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Lavdim KRASNIQI

Director of the Kosovo Judicial Institute

Dear readers of the magazine "Justicia"

Some months before the Kosovo Judicial Institute started the implementation of the Program for Preparation of future judges and prosecutors of Kosovo. During the period of training in this program, candidates for judges and prosecutors, in addition to attending the training, they also assumed other professional obligations. One among them is the publication of the legal magazine named "Justicia".

The magazine expresses the coherence and their ambition as future judges and prosecutors and implements their concrete initiatives.

Magazine contains various research works of candidates who attended training in the Initial Legal Education Program in Kosovo Judicial Institute.

When the idea emerged for publication, the purpose of this magazine has been for the candidates of the Initial Legal Education Program to express their legal opinions, to promote research primarily in cases challenging the judicial system, to give opinions and interpretations for various institutes of the law, but always with thought that these works would be of informative character. But

looking at the approach and work of the candidates it is clear that these works other than informative character for all lawyers in Kosovo have solid values for our legal culture.

Feature of this magazine is that topics are selected and edited by candidates themselves.

We hope that the ideas, interpretations and opinions presented in this review will be useful for you in your daily work.

Since this is the first number of the magazine which will now be annual, comments and suggestions are welcomed.

Mr.sc.Afrim SHALA

COMPETENCES OF THE PRE-TRIAL JUDGE PURSUANT TO THE CRIMINAL PROCEDURE CODE OF KOSOVO[1]

Court as a basic subject of criminal proceedings realizes the trial function deciding in individual and collegial manner. In collegial manner the court decides in panels (large body panel, small panel and juvenile panel) as well as judicial college (college of three or five judges), whereas in individual manner the pre-trial judge takes the decision, judge who conducts the confirmation of the indictment hearing, the court president, the presiding judge, the individual judge when deciding on punishing order, the individual judge when adjudicating criminal matters in the summary procedure and the juvenile judge[2].

Pre-trial judge is one of the professional judges of municipal and district courts in Kosovo.

The term "pre-trial judge" is a new term which is foreseen for the first time with the Code of Criminal Procedure of Kosovo.

1 The Criminal Procedure Code of Kosovo, was promulgated with the UNMIK Regulation 2003/26 dated 06.07.2003 and entered into force on 06.04.2004 (hereinafter CPCK). The CPCK was amended and supplemented with the Law 03/L-003, dated 03.11.2008, on amendment and supplementation of the Provisional Criminal Procedure Code of Kosovo. As this essay covers the competences of the pre trial judge pursuant to CPCK, in all instances where only the article (and/or paragraph) is named without specifying the law, we deal with the provision of the CPCK.

2 Dr. Ejup Sahiti, Criminal Procedure Law, Prishtina 2005, pages 60 - 61.

Based on the provisions of CPCK, primarily pre-trial judge has the authority to act only in the preliminary procedure. Preliminary procedure is the first stage of criminal proceedings, which in itself includes investigations, the indictment and the indictment confirmation hearing. However, as we shall see below, in some cases pre-trial judge has the authority to act even if criminal proceedings have not formally begun (investigation), especially when it comes to limiting freedom of movement of the person. Some actions that are undertaken in the preliminary procedure by the pre-trial judge, under the provisions of the CPCK, are undertaken by the presiding judge or the panel during the main trial.

Determination of competence of the pre-trial judge is a difficult issue, because the CPCK does not list these powers in a single legal provision, but they can be determined by analyzing a large number of legal provisions. In general pre-trial judge has the authority to decide on actions and measures in the preliminary procedure which limit the rights and fundamental freedoms (Article 9 parag.3).

Basic feature of the preliminary procedure is that pre-trial judge does not take any action ex officio, but always with the proposal of the parties and other participants, even when deciding on restrictions placed on freedom and other rights of the person[3].

First, pre-trial judge has powers that until the indictment to decide on measures to ensure the presence of the defendant, to prevent the re-commission of the criminal act and ensure the successful development of criminal procedure (Article 268 parag.4). Under Article 268 of the CPCK parag.1 measures that can be used to ensure the presence of the defendant, to prevent the re-commission of the criminal act and for the successful implementation of the procedure are: summons, order for arrest, promise of the defendant not to leave his or her place of current residence, prohibition on approaching a specific place or person, attendance at the police station, bail, house detention and detention on remand. Before the indictment pre-trial judge

3 Xhevdet Elshani, Mejdi Dehari, Criminal Procedure Code of Kosova, Part III - IV, Kosovo Judicial Instiutute, Prishtina, September 2008, Presantation X-XI, page 1.

also decides on extension of the prohibition of approach to a specific place or person (Article 272), measure of attendance at the police station (Article 273) and the measure of detention on remand, if the conditions provided for by law are fulfilled.

When it comes to limiting freedom of person, pre-trial judge is competent to decide on the appeal of the arrested person filed against the decision on arrest (Article 212 parag.6). Appeal does not suspend execution of the decision. Pre-trial judge decides on appeal within twenty four hours from the moment of arrest (212 parag.6).

However, undoubtedly one of the most important powers of pre-trial judge is ordering, continuation (extension) and the termination of detention on remand.

Under Article 282 of the CPCK parag.1, detention is ordered by the pre-trial judge of the competent court pursuant to the written request of the public prosecutor, after holding the hearing. After the arrested person is brought to the pre-trial judge, he immediately notifies the arrested person of these rights: the right to be informed in a language that he understands for the reasons of the arrest, to remain silent and not respond to any question, other than providing information about his identity, to ensure free translation if he or she does not understand or speak the language of the procedure, use the assistance of appointed defense counsel and if he or she cannot afford to pay for legal assistance, to notify or require the police to notify a family member or other person of his choice about the arrest and have control and medical treatment including psychiatric treatment.

After this pre-trial judge conducts the hearing regarding the detention, in which the prosecutor must present reasons that support the request for ordering of detention, while the defendant and his counsel may respond by presenting their arguments (Article 282 parag.5).

Pre-trial judge, after holding the hearing has the following options:

a) to approve the request of the prosecutor and order the detention against the defendant,

b) to refuse the request of the prosecutor and to order any other alternative measure to detention or
c) reject the request of public prosecutor and release the defendant.

Detention is ordered by a decision of the pre-trial judge, against which the appeal is allowed within 24 hours.

Detention ordered by pre-trial judge, may be extended by a panel of three judges. But the pre-trial judge may continue detention against the defendant if the public prosecutor has submitted a proposal. Thus, under provision of Article 285 of the CPCK parag.4, detention ordered by a panel of three judges, can be extended by pre-trial judge no more than a month, within the deadlines set out in section 284 of this Code, after the hearing on detention[4].

Upon the public prosecutor's consent, pre-trial judge may at any time to terminate the detention of defendant during the investigation (Article 286 parag.1). Reasons for which pre-trial judge may terminate detention against the defendant are set out in Article 286 parag.3 and 4 of the CPCK. When pre-trial judge and public prosecutor cannot reach agreement on the termination of detention, pre-trial judge requests that the panel of three judges decide on this (Article 286 parag.1).

The detainee or his counsel may at any time to appeal to the pre-trial judge to rule on the legality of detention (Article 286 parag.2).

Pre-trial judge may conduct the hearing if at first sight with the appeal is determined that the reasons for detention under Article 281 of this Code since the last decision of the court for detention cease to exist because of changing circumstances or discovery of facts new or detention for any other reason is illegal.

Pre-trial judge will order the immediate release of detainee when:

4 The extension of the detention before the indictment, is regulated by article 284 par.2 and par. 3 of the CPCK

- reasons for detention under Article 281 of CPCK cease to exist, detention ordered by the court has expired,
- period of detention designated by the court exceeds the term provided in Article 284,
- paragraph 2 of CPCK or in exceptional circumstances, the deadline stipulated in Article 284, paragraph 3 of CPCK or,
- detention for any other reason is illegal.

While the defendant is in custody, pre-trial judge may permit the detainee to be visited by relatives, upon his request by the doctor, or other persons (Article 294 parag.1). The detainee may correspond or have other contacts with people outside of the detention center with the knowledge and under the supervision of pre-trial judge. When pre-trial judge refuses to visit detainees or prohibits communication with people outside of the detention center, the detainee may request from the panel of three judges to be given such permission (Article 294 parag.5).

Pre-trial judge may impose disciplinary punishment of restriction of visits or correspondence to the detainee who has disciplinary violations (Article 295 parag.1). Against this decision an appeal may be submitted to the panel of three judges within 24 hours.

Although the public prosecutor is responsible for investigating criminal offenses under the provisions of the CPCK, pre-trial judge has quite important powers in this regard.

Thus, the judge must be notified of initiation of the investigation (221 parag.1), expanding of the investigation (Article 222 parag.2), suspension of the investigation (Article 223 parag.4) and termination of the investigation (Article 224 paragraph. 2). In addition, pre-trial judge has the authority to authorize the extension of the investigation, as well as order and perform certain investigative actions.

In this way pre-trial judge has powers to allow extension of the investigation, if such thing was requested by the public prosecutor. Under Article 225 of the CPCK parag.1, if the investigation does not end within a period of six months, the public prosecutor

shall submit a written request to pre-trial judge, together with the reasons for extending the investigation. Pre-trial judge, after receiving the request of public prosecutor to allow the continuation of the investigation, shall inform the defendant and the injured party about the request of public prosecutor to continue the investigation, in which case they have the right within 3 days to submit a written statement regarding the continuation of the investigation. Pre-trial judge may authorize a continuation of the investigation up to six months if justified by the complexity of the case. For offenses for which the punishment provided for is at least five years imprisonment, pre-trial judge may authorize a further continuation of investigation up to six months (Article 225 parag.2).

Until a decision is taken on continuation of the investigation, the public prosecutor may take investigative actions that are requiring urgent attention. Pre-trial judge is immediately notified of such investigative actions (Article 225 parag.6).

CPCK foresees in the preliminary proceedings, that the judge of this procedure, at the request of public prosecutor (in urgent cases the judicial police) can order the control of a house, the other premises and property of a person when there is grounded suspicion that such person has committed a crime prosecuted ex officio and there is a possibility that control would likely result in arrest of the person or the discovery and seizure of evidence relevant to criminal proceedings (Article 240 parag.1). In addition, pre-trial judge may order the personal control of a specific person when there is a real possibility that this control will result in the discovery of traces or seizure of evidence of a criminal act (Article 240 parag.3). The content of the order is defined in Article 240 of the CPCK parag.5.

Exceptionally, in urgent circumstances, when the written order for control cannot be obtained on time and if there is real danger of delay, which could result in the loss of evidence or danger to life or human health, judicial police may begin control based on verbal permission from pre-trial judge (Article 245 parag.3).

Another important power of pre-trial judge is the site inspection and reconstruction[5] of the crime scene. Thus, under section 254 parag.1, pre-trial judge may order site inspection and reconstruction of the crime scene to review evidence collected or to clarify facts relevant to criminal proceedings (Article 254 parag.1).

Expertise in the preliminary procedure under Article 176 parag.2, is ordered by the pre-trial judge at the request of public prosecutor, the defense or ex officio. Pre-trial judge orders the expertise when for certification or assessment of any important fact opinion from a specialist who possesses the necessary professional knowledge is needed (Article 175). Parag.2 of Article 237 of the CPCK provides that autopsy, physical control, except in cases from articles 192, paragraphs 2 to 4 and 205 of this Code, psychiatric control, and genetic and molecular control of DNA analysis, can be ordered only by pre-trial judge, unless when witness or the injured party agrees that these actions can taken by the police or public prosecutor.

Under certain conditions the pre-trial judge may take testimony from a witness or to seek expert opinion, if such a thing is requested by the public prosecutor or the defendant. This possibility of pre-trial judge is foreseen in Article 238 of the CPCK which is denominated "extraordinary investigative opportunity." According to this legal provision, exclusively, public prosecutor or the defendant may require pre-trial judge to take testimony from a witness or seek expert opinion in order to preserve the evidence when there is only one possibility for obtaining the relevant evidence or where there is potential risk that evidence could not be obtained during trial. Appeal may be submitted to the panel of the three judges against refusal of pre-trial judge for taking such testimony. At the hearing to obtain such testimony that is directed by the pre-trial judge the defendant, his defense counsel and public prosecutor must be present.

5 Reconstruction is done by re-creating the facts or situations under which circumstances the event was developed, based on gathered evidence. During the reconstruction of the events care must be taken not to violate the law and order, offend public morals or endanger the life or health of people.

If a witness or an expert fails to appear or refuses to appear without good reason, upon the public prosecutor's request, pre-trial judge may fine them, but also can order the detention of the witness (Article 237 parag.2).

The covert and technical measures of surveillance and investigation can be ordered from pre-trial judge if the conditions foreseen by law are fulfilled (Art. 256). In addition to the pre-trial judge, the public prosecutor can give orders to some covert and technical measures of surveillance and investigation (Article 258 parag.1). But the assignment of most covert and technical measures of surveillance and investigation, according to the provisions of the CPCK is the competence of pre-trial judge.

Under Article 258 of the CPCK parag.2, pre-trial judge, at the request of public prosecutor, may order any measure of the following: secret photographing or video surveillance in private places, secret monitoring of conversations in private places, control of the postal delivery, telecommunications surveillance, tapping computer communications network, controlled sending of postal delivery, use of tracking devices or the placement of surveillance, simulated purchase of some items, simulation of a work of revealing corruption or the financial data.

In urgent cases, when reception of the order of pre-trial judge under paragraph 2 of Article 258 of the CPCK would jeopardize the investigation or the safety of life and safety of the injured party, witness, informer or their family members, the public prosecutor may provide temporary order for one of the measures envisaged in paragraph 2 of this article. Such a temporary order loses power unless confirmed in writing by pre-trial judge within twenty-four hours from issuance. Upon confirmation of the provisional order, pre-trial judge ex officio in writing determines the legality of the order.

Upon written request of public prosecutor, private plaintiffs, the subsidiary prosecutor, defense counsel, the injured party or witness, pre-trial judge may give protective measure or an order for anonymity[6]

6 Anonymity is lack of information on the identity or residence of the injured party or witness, identity or residence of the family member of the injured party or the witness or identity of any person that has connection to the injured party or the witness (article 168 para.4 of the CPCK).

when there is serious risk for the injured party, witness or their family members (Article 169 parag.1). Upon receipt of the request, the judge may order protective measures appropriate to the injured party or witness, and if he deems necessary before a decision on the request is made, conducts a closed hearing to hear additional information from the prosecutor, defendant, defense counsel, the injured party or witnesses. Measures which may be ordered by the pre-trial judge are:

- Omitting or expunging names, addresses, place of work, pro fession or any other data or information that could be used to identify the injured party or witness,
- Non-disclosure of any records identifying the injured party or witness
- Efforts to conceal the features or physical description of the injured party or witness giving testimony, including testifying behind an opaque shield or through image or voice-altering devices, contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television, or videotaped examination prior to the court hearing with the defence counsel present,
- Assignment of a pseudonym,
- Closed sessions to the public, in accordance with Article 336 of the present Code,
- Orders to the defence counsel not to disclose the identity of the injured party or witness or not to disclose any materials or information that may lead to disclosure of identity,
- Temporary removal of the defendant from the courtroom if a witness refuses to give testimony in the presence of the defendant or if circumstances indicate to the court that the witness will not speak the truth in the presence of the defendant, or
- Any combination of the above methods to prevent disclosure of the identity of the injured party or witness.

Pre-trial judge may allow the protective measures be changed, canceled or authorize the granting of a protected material to another judge to use in other proceedings (Article 170 parag.4). If protective

measures under Article 170 of CPCK are not enough to ensure the protection of witness or the injured, pre-trial judge may give an order for anonymity (parag.1 article 171 and article 172 parag.1). Before ordering the anonymity, the pre-trial judge conducts the hearing behind closed doors, during which the injured party or witness and other persons necessary are questioned. In this session only the public prosecutor, court staff and defense counsel may be present (Article 172 parag.2).

The public prosecutor may make a written application to a court for an order declaring a person to be a co-operative witness (Article 299 parag.1)[7] Upon receipt of the request, pre-trial judge sets hearing in which the public prosecutor and defense counsel of a cooperative witness can be present to assess witness credibility and to ensure collaborative compliance with the Article 298 of the CPCK. Afterwards the pre-trial judge orders to declare a person as a co-operative witness if it considers that the conditions provided for in Article 298 of CPCK are met.

Based on Article 116 parag.1 and 2 of the CPCK, pre-trial judge, upon the proposal of the authorized persons can take a decision on appointment of interim measures to secure the property claim as a result of performing a criminal act under the provisions applicable in the execution procedure.

In some cases determined by CPCK, pre-trial judge decides regarding the appeal filed against decisions or actions of a public prosecutor. Thus i.e under article 143 of CPCK parag.3, where the public prosecutor refuses for the defense counsel to see, photograph or photocopy case file, then the defense counsel may require from the pre-trial judge to allow viewing or photocopying of case file. Also the injured party or his legal representative or authorized person may submit an appeal to the pre-trial judge, to decide on allowing the

7 "Co-operative witness" means a suspect or a defendant with respect to whom the indictment has not yet been read at the main trial and who is expected to give evidence in court which is: likely to prevent further criminal offences by another person; likely to lead to the finding of truth in criminal proceedings, voluntarily made with full agreement to testify truthfully in court; determined by the court to be truthful and complete; or such that it might lead to a successful prosecution of other perpetrators of a criminal offence

viewing, photographing or photocopying of the case file. The decision of pre-trial judge is final (Article 143 parag.3).

In the end, pre-trial judge, on public prosecutor's proposal, may issue a wanted notice when the defendant against whom proceedings have been initiated for a criminal offence prosecuted ex officio and punishable by imprisonment of at least two years is in flight and when an order for his or her arrest or a ruling on the determination of his or her detention on remand has been issued (Article 544 parag.1 and 2).

Pre-trial judge has some other powers provided by CPCK, to be undertaken in the prliminary procedure.

Most of the powers, pre-trial judge exercises by issuing a decision. But in some cases, pre-trial judge exercises his legal powers, by issuing order for search (Article 240), order (Art. 116, 170, 176, 237, etc..) permission (Article 294), wanted notice (Article 544), oral permission (Article 245 parag.3), etc.

Mr.sc.Albert ZOGAJ

COMPARATIVE ASPECTS OF DEFINITION OWNERSHIP

The right of ownership represents one of the most important legal institutions of civil law in general, respectively the most important legal institution of the law on property in particular.[8] Institute of the right of ownership is a central institute of social-economic system, of a legal syste[9]. This definition of legal science, explicitly shows the great importance that the right of ownership in the civil justice system to almost any country.

The right of ownership is a old legal institute and as such the concise definition of its can be found in Roman law, in the context of that period. Despite the fact that Roman lawyers have not given the right definition of real right, classical jurists had basic idea that the property should be defined as full power over things or as *plena in re potestas*[10]. The term "proprietas" or property that means it belongs to someone, is born relatively late, but efforts to determine the meaning of property are of early age. In determining that the Roman lawyers do, the content of property rights constitute the use, enjoyment and availability[11]. By analyzing the contents of the property taken as plena in re potestas, it was seen that the owners on the

8 Abdullah Aliu, The Real Property Rights (Pronesia), Prishtina, 2004, page 47.
9 Ejup Statovci, Protection of ownership - comparative studies, Prishtina, 1979, page 65.
10 Arta Mandro, Roman Right, Emal 2007, page 108.
11 Ib idem, page 241.

basis of property law have primarily three groups of authorizations: jus utendi, jus fruendi et jus abutendi[12].

These three groups of authorizations that owners had on the basis of property rights meant: jus utendi - the right of possession and use of their item, jus fruendi - the right to collect natural fruits, but also their civilian item and jus abutendi - the right of disposal or alienation of the item or the right that constituted a real right for other persons.

Analysis of these rights means the owner had supreme power over the item.

The right of ownership represents a social relationship related to the item. The holder of such legal -social relationship, has the full right to use, enjoy, to harvest and dispose of its item.[13]

The modern legal science, but also most countries have defined (specified) in their laws the right of ownership. The right of ownership is right on item that contains in itself more extensive powers on the occasion of use and availability of an item.[14] The right of ownership is the right on item that gives full authorization to the owner for any private legal powers, which is allowed under legal order and guaranteed by the state.[15]

For the importance of property as a legal institute, the same approach dominates the literature of the time. Ownership between real rights is the right that includes more authorizations that subject can exercise on the item authorizations which are potentially unlimited.[16] As for the content, the ownership is a broad right of the owner over an item.[17]

Despite formulations that may be found in legal science concerning the right of ownership, in its content we necessarily find the three powers that relate to the use, exploitation and availability of an item.

12 Ivo Puhan, Roman Right, Prishtine, 1989, page 239.
13 Ejup Statovci, as above, page 66.
14 Andrija Gams, Basis of the real property rights, Prishtina, 1978, page 122.
15 Abdullah Aliu, as above, page 47.
16 Francesco Galgano, Private Law 1, Hyrje, Pronesia, Tirana, 2003, page 132.
17 Vedrish Martin & Karic Petar, Civil Law, Zagreb, 1998, page 76.

These three powers are associated with title - owner, who has factual and legal power over the item.

As noted above most of their countries with their positive laws have provisions on the property right, as well as in our country the matter is regulated by law. In Kosovo, the Law on the Basic Property Relations, dated 1980, is still in force, which regulates basic legal and property relations. But since this law belongs to the period of socialist self-governing system, where legal and property relations are regulated in the spirit of that system, the Kosovo Assembly in 2004 adopted the Law on the Real Property in Kosovo Nr.2004/31,[18] that regulates legal and property relations concerning private property. Since it is expected for the Law on the Real Property in Kosovo to enter into force, in which case the Law on Basic Property Relations, will be repealed, we see that as a reasonable reference point to have the two laws because it also serves to the comparative aspect of the issue.

The Law on the Basic Property Relations, states: "the owner has the right to keep his item, to use and dispose pursuant to the limits of law". [19]

With the Law on Real Property in Kosovo, ownership is defined: "Ownership is a full right on an item. The owner may dispose the item by his will, specifically to own and use, and to exclude other persons from any influence, if not opposed by law or the rights of a third party.[20]

The legal definition of ownership generally corresponds to the definitions of the laws of modern countries especially countries belonging to the continental system, which are somewhat influenced by the civil codes of France, Germany, Italy, Switzerland etc.

Content of ownership, in terms of legal regulation and the sense of authority that is recognized to the owner, according to the Law on the Real Property Rights in Kosovo, is interfering with the content of

18 Law on Real Property in Kosovo, 2003/31, (the law is not in force as it was not signed by the SRSG).
19 Law on Basic Property Relations, Official Gazzette of the SFRY, no. 6/80, article 3
20 Law on Real Property in Kosovo, (no.2004/31) article 17 item 1, (still not in force).

some civil codes and positive laws, therefore as a comparative point definitions of some civil codes are presented.

French Civil Code (Article 544): "Ownership is the right of enjoyment and access to items in the most absolute way possible, in order not to become what is not prohibited by laws or other provisions.[21]

Swiss Civil Code, provides: "Who is the owner of an item may dispose of items according to his desire, inside the legal limits.[22]

German Civil Code provides, (paragraph 903): the owner of any item may, if it is not contrary to law and the rights of others, to behave as he wishes and exclude others from any action on the item".[23]

The countries of the region, neighboring Kosovo, as countries that have left the socialist system of governance and accepted the democratic system with their post-communist laws accepted the spirit and principles of the civil codes of France, Germany, Italy, etc.

Republic of Albania in the Civil Code stipulates: "Ownership is the right to enjoy and freely dispose of items within the limits set by law".[24]

It is important to note that the Kingdom of Albania, in 1929, had issued the civil code, which among other things gives the definition of ownership: "the ownership is the right to use the items without any limitation, aside of those determined by the law or regulation".[25]

It can easily be concluded that Albania had quite early started the construction of a genuine legal civil system, but the period of dictatorship had ruined the entire existing system.

In addition, Macedonia, in the Law on ownership and real property rights, stipulates: "the owner has the right to keep the item itself, to

21 French Civil Code
22 Swiss Civil Code
23 German Civil Code
24 Civil Code of the Republic of Albania (1994, amended in 1999 and 2001), article 149
25 Civil Code of the Kingdom of Albania, (1929), article 794, Toena, Tirana, 1998.

fully utilize and dispose of it according to his desire, if it is not contrary to law or with any rights of another person ". [26]

By studying the definition of property under legal definitions provided in various countries, more specifically in above mentioned countries, it is seen that the formulation can be different, but the content is approximately the same.

In addition to the contents of the definition of property is similar between positive laws, this content is similar with the formulation that Roman lawyers have given for the property right, except that now the question arises in very different economic and social circumstances.

26 The Law on Ownersip and other real property rights, official gazette of Republic of Macedonia, (18/2001).

Arsim HAMZAJ

UNIVERSAL DECLARATION OF HUMAN RIGHTS, ITS ROLE IN PROTECTION OF HUMAN RIGHTS AND HUMANITARIAN INTERVENTION

Adoption of the Universal Declaration on Human Rights by the General Assembly of the United Nations, represents a very significant achievement in many aspects. For the first time in an international organization a joint declaration on human rights was agreed, which claimed to be legally binding all of its sides. The statement was prepared for a very short time compared with other texts of human rights. The atrocities of World War II, with its intensive and not seen before repression and brutality, secured direct "moral" basis for drafting and approval of the General Declaration of Human Rights, while its realization was made possible by committed and able personalities, which were involved in this process and the circumstances of that time. Representatives of some countries such as China, former USSR, USA and former Yugoslavia, were the most vocal supporters of the document for human rights in the form of statement, which formally would not be obligatory. Despite this, delegates from India, Australia and Great Britain were strong supporters of the legally binding convention. The representatives of Chile, Egypt, France and Uruguay had intermediary position. They wanted the combined form of the declaration and the convention. They shared the opinion that the Convention was more preferable that statement, because the second it is not formally binding.

Despite the states that protected the Declaration, because they clearly did not want too strong provisions (because they feared interference in domestic matters), France's position was pragmatic. Her delegation opposed the Convention being not binding, but considered that the statement was more favorable for the time, because the declaration will be written immediately as the first stage where she would wake up very quickly public opinion and would serve as a guide for future policy of the states. This strategy "Statement first, then the Convention" won in practice.

As the Declaration of (Universal) for Human Rights was adopted in resolution form, not in the form of international treaty, since the first day there have been differences over whether the provisions of the Declaration are mandatory or not. A group of authors, relying on the text of the Declaration, which is advertised as "general ideal" denied the legal value, because that statement does not impose legal obligations nor contains legal means to ensure its implementation. Authors of other provisions of the Declaration regarded as informal legal source, which would take legal value when Pacts on Human Rights enter into force. However, none of these authors has not disputed its high moral value.

Since the Universal Declaration of Human Rights was adopted in the form of Resolution, not international treaty, it has played a contributing role and has been influential in the development of human rights in both domestic and international plan. This can be seen from the fact that the most important documents on the field of human rights that were adopted later, have been inspired and are based on the purposes and principles of the General Declaration of Human Rights. These include: International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child, the Convention against Discrimination in Education, European Convention for the Protection of Human Rights and Freedoms , etc..

Declaration on human rights is also guaranteed by the Constitution of the Republic of Kosovo.

The difference between the General Declaration (Universal) Human Rights and other international documents on human rights.

General Statement (Universal) Human Rights differs from other international documents on human rights, because it has been adopted and proclaimed in the form of resolution of the General Assembly of the United Nations, not in the form of treaty or a treaty by which countries receive international obligations.

Universal Declaration of Human Rights differs from the International Covenant on Civil and Political Rights and International Covenant on Economic Rights, Social and Cultural Rights, because the statement includes all civil and political rights, economic and social and cultural rights, where for the first time proved that these socio - political categories were closely related, while pacts contain only civil and political rights, namely the economic social and cultural rights. This then (Universal Declaration of Human Rights) has been one of the first international documents on human rights, which has been the basis for issuing the documents of many other subsequent international human rights.

Humanitarian intervention

Humanitarian intervention can be found in the works of ancient philosophers. Humanitarian intervention is allowed any time if intends to prevent atrocities or stop a state crimes against an entire population, or when a country lacks a minimum of moral order.

Humanitarian intervention has the function of punishment of the state or nation that is prone to cause damage to others, which gives the right of all others to join to punish and prevent further damages. Humanitarian intervention is considered as the interest of human society. From this it appears that every time a systematic and massive violations of human rights and minority rights, can qualify as a threat to peace, either because the risk of internationalization of internal conflict, either because the negative consequences that

cross the border (massive influx of refugees), the Security Council can under Chapter VII of the Charter of the United Nations, to authorize measures that include the use of armed force.

In modern time, major challenge for the UN and all other states, represents the persistence of grave violations of human rights in different parts of the world (in the form of genocide, hunger, torture, etc.). Therefore the focus of global efforts should be focused on combating such practices and bringing criminals to justice. From this perspective, the establishment of an international court - as was decided by the Plenipotentiary Conference to establish the International Court, organized by the United Nations in Rome (June - July 1998) is fundamentally important. Such is the willingness of the Security Council of the United Nations and other political bodies to take measures, if necessary through the use of military force, to combat serious violations. Developments in the former Yugoslavia since 1993 demonstrated what can happen if the international community's response is too late and not effective.

The UN Charter prohibits the use of force in resolving disputes and invites parties to resolve them peacefully. However if a dispute is such that could jeopardize the peace and undermine security in the world, then the Security Council may order other measures including interventions with military force, which deem necessary to maintain or to restore peace and security. This was clearly manifested in the case of Kosovo in 1999. But, unfortunately this was not the case with Rwanda (1994-1995) with only three months have gone over 500,000 to one million members the Tutsi tribe, or the Republic of Bosnia and Herzegovina (1992-1995), which killed over 200,000 people, and are expelled more than 2.5 million others, just because they were a nationality, a tribe, race, religion or other language. From this follows that the practice goes in favor of the right of intervention for humanitarian reasons.

As we said earlier, humanitarian intervention is considered interest since the early human society, so even before the adoption of the UN Charter. So the big powers such as France, Great Britain, Russia, etc.., have intervened in the war for the liberation of Greece from Ottoman

occupation in 1927 which also considered as one of the first cases of humanitarian intervention.

Many authors support the right of humanitarian intervention, where some believe that intervention should be even faster if you wish to prevent massive violations of human rights such as apartheid, genocide, starvation, etc.. But unlike the authors of the aforementioned groups, others think that armed intervention for humanitarian purposes is prohibited and not legitimate because it is not authorized by the UN Charter. This is because based on the right of "humanitarian intervention" very strong states have misused this right to occupy other countries. But despite this, the UN Charter, in Chapter VII, allows the use of armed force, if there is no other way to resolve a dispute which threatens peace and security of a region or the of the world in general.

Burim ÇERKINI

ATTEMPT AS A PHASE OF COMMISSION OF CRIMINAL OFFENCE

Introduction

Criminal Law, as branche of positive law of a state and as part of a system of legal science, is a system of legal norms that determines which human actions are considered criminal acts and what types of criminal sanctions will be imposed their perpetrators. It deals with understanding the offense and its image, with the constituent elements of this figure, which are the main factors that serve as the basis to put a person before the criminal responsibility.[27]

The fight against the criminal phenomenon is also undertaken by other branches of law, as criminology, penology, etc.. The specialty of the criminal law is that it defines the general conditions under which specific action can be considered a criminal offense, the sanctions provided for their authors, and special circumstances (mitigating and aggravating) that should be taken into account by the court, in the process of determining of each case.

While determining the offense, as socially dangerous action, envisaged by law, this branch of positive law of each state is the basis for

27 Dr. Ismet Salihu, Criminal Law, general part, Prishtina 2003, page 25.

an effective fight against crime. This branch aims to establish accountability of those who commit criminal acts, who meet the conditions outlined above and thus provides legitimacy in the criminal process.

The criminal law as legal science and branch of positive law is divided into two parts, in the general and special part. This division is also as a consequence of the fact that all modern states' criminal codes are divided in the general and special part. The Criminal Code of Kosovo[28] is divided into two parts:

General part of composed of general provisions that refer to criminal acts, criminal responsibility and criminal sanctions.

The special part, which has for object the study of concrete figures of criminal offences provided for in specific provisions of the special part, especially their elements, as well as mitigating and aggravating circumstances under which the offenses are committed by specific persons.

One of the achievements in which it is shown that criminal law shows respect for protection of human rights and fundamental freedoms of the individual protected by the Constitution, the European Convention on Human Rights and other national and international acts, is the contribution that it provides in determining the stages of commission of a criminal act or preliminary stages of conducting a criminal offense. The main phase and perhaps most important of them, which we will describe below is the "attempt".

To commit a criminal offence, the person goes through a process of a prior criminal activity, starting from the birth of thought to commit a criminal act, occurrence of this opinion in outside world, undertaking preparatory acts, attempts to commit the offence, and finally, achieving the desired criminal results.

Attempt is direct action aimed at commission of the offence, but this is not done for reasons that do not depend on the willingness of the

28 Criminal Code of Kosovo, entered into force on 06.04.2004 (hereinafter CCK).

person. In fact, when the criminal act has been attempted, it means that the desired effects have not been achieved, for reasons independent of the will of the subject who has taken action. But this does not mean the non responsibility of the entity has attempted to perform a specific offense.

Historical Overview of the institute of attempt

In the history of criminal law, institute of attempt is at the same time seen with the institute a criminal offence. If you look at the history of criminal law, we will see that the preliminary stages of criminal activity, or phases before committing the criminal act, are punished in different ways in different stages of history.

In the ancient period person was punished not only for the offense committed fully, but also for previous criminal activity.

The ancient law condemned the preparation and attempt. This law condemned the opinions expressed in the outside world even though they were not associated with any concrete action.

The medieval Criminal Law, in general, condemned the same the criminal acts that had been completed, as well as the attempt and preparation. It condemned the emergence of thought in the outside world and go further than the ancient law. Under this law, the person was punished even when suspected that in his mind he had a view that was contrary to the interests of class in power, especially if it was contrary to the religious beliefs. It was enough for someone to be suspected that he or she does not agree with the official interpretation of religious dogma to finish burned on a pile of wood.

After the French revolution, various ideologues fought against arbitrariness of the medieval criminal justice.

They established the principle "nullum crimen sine lege", under which it cannot be considered a criminal offense an action which is not prescribed as such by the law itself. As a great achievement of this period is the principle that the opinion expressed in the outside world

cannot be considered a criminal offense and person cannot be punished only for voicing of that opinion.

The criminal law of this period revealed that the preparation stages of the criminal act in most cases were not punishable.

According to this, the punishment should be applied, as a rule, only when the person had attempted to carry out an act which was considered a criminal offense under the law.

In Albanian areas, from the beginning of the XV century, in countries occupied by the Ottoman Empire the Sharia law was in force, which was based on the Qur'an. Feature of this time was non specification of the punishments, which may be pronounced by the conviction of Kadi (judge) accordingly, to protect the interests of the ruling class he represented.

In Albanian areas this Law was applied in cities and in areas which were occupied by Turks, and in mountainous areas, which were not subjected to foreign administration continued to operate the Albanian criminal customary law.

In the history of customary law, customs are conceived as unwritten rules, forwarded in tradition from one generation to another.

Sources of the Albanian customary law known so far are: Kanun of Skanderbeg, Kanun of Leke Dukagjini, Kanun of Mountains and Kanun of Laberia.

All these Kanuns, without exception, envisioned a series of norms on criminal character, but the most important amongst them was the Kanun of Leke Dukagjini.

According to kanun, criminal acts can be carried out as active actions or omissions. For some offenses consequence was required, such as death of the victim in the murder, whereas other offenses may remain in the attempt. [29]

29 Dr. Ismet Elezi, Historical development of the criminal legislation in Albania, Tirana 1998, page 22.

Regarding the development stages of a criminal offense, Kanun speaks for preparation, but for this stage criminal liability is not foreseen. The attempt was foreseen as the first stage of commission of the criminal offense followed by the committed offence (completed).

Several types of attempt were distinguished:

- when a person shot another person with a rifle and the bullet went close, he had to reward half of the blood,
- when a person was shooting towards the opponent, but the rifle did not fire, because the bullet was not appropriate, the perpetrator was guilty equally as the crime would have been committed,
- who shot the corpse was responsible for two bloods (vendetta): attempted murder and insult to the dead. [30]

In our time there has been an even greater increase of the principle "nullum crimen nulla poena sine lege" and a further development of the stages of commission of a criminal act and punishment of these phases.

According to the theory of criminal law, from the moment when the individual incepts the idea for commission of the offense and until the commission of a criminal act, respectively, until the punishable consequence occurs (in the case of material offenses), there are several stages, the distinction and definition of which is of great importance. In literature usually we recognize four stages which, in most cases are expressed in the course of a criminal act.

These phases are: [31]

The decision to commit the offense,
Preparatory actions that are undertaken with the purpose of committing a criminal act;
Initiation of commission of the criminal act that may remain in the attempt;
Committing a criminal act (delictum consummatum).

30 Kanun of Leke Dukagjini, compiled by Shtjefen Gjeqovi.
31 Dr. Ismet Salihu, as above, page 337.

Although, as mentioned, criminal activity goes through some other moments, internal, dealing with the will of the author of a criminal offense (birth and manifestation of thought) for criminal law in general, present phases are of interest, starting by taking the decision to commit the offense. Of practical importance and interest, in terms of criminal liability in some cases, are: the preparatory phase and for all criminal acts committed with intent, the attempt.

Understanding the attempt

Attempt as the definition given in Article 20 of the CCK. According to the article, " Whoever intentionally takes an immediate action toward the commission of an offence and the action is not completed or the elements of the intended offence are not fulfilled has attempted to commit a criminal offence".

In criminal law theory regarding the causes that justify the punishment of attempt, exist or are submitted three theories:

objective theory,
subjective theory
objective-subjective theory.

Under the objective theory, attempt presents the endangering of the goods that are protected by criminal law. Therefore, the endangering of the material goods is the essence of the attempt, the danger which justifies punishment. The intensity of the danger of attempt depends on the type of the attempted offense.

Under the subjective theory, attempt is based on the person's willingness to conduct a criminal offense that is manifested in the outside world. According to this theory a person should be convicted of attempted criminal act as he or she has manifested the criminal will.

Objective-subjective theory is union of these two theories. Under this theory, the attempt is punished because it has endangered the material goods and because in that case the willingness to commit criminal offense was manifested.

In criminal legal aspect, in order to consider that the attempt occurred, three conditions must be met: [32]

a) to undertake the action of commission of a criminal act,
b) that action to be taken intentionally and
c) act is not completed, respectively the consequence is not caused.

If these three conditions are met we can say that attempt of the criminal act was committed. However, since as one of the conditions for the attempt is that the consequence of the criminal offence has not occurred, in the theory of law dilemmas arise which are the causes that justify the punishment of the attempt.

a. The first condition for the existence of the attempt was undertaking direct actions for committing a criminal act.

We cannot have attempt of the commission of a criminal act, when conditions are not yet established that the author of crime can act directly on the object. Prior to that time we are still in another phase, the preparatory actions for committing a criminal act of the subject. But at the moment when he acts directly on a social good, which is protected by criminal law and fails to realize its goal, ie. completion of the act for reasons that do not depend on his will, in that case we deal with the attempt.

b. The second condition in terms of criminal law is that attempt is considered to have been committed only when direct actions of a criminal act are committed intentionally.

So it is required that the person is set to perform the act, and aware of all the features of concrete criminal act and has the will to do it.

The existence of intent within the attempts presupposes that the person forecasts the consequences of a criminal act and wants for them to occur and tries to commit the offence, take direct actions to realize what he had envisioned.

32 Dr. Ismet Salihu, as above, page 342.

It cannot be considered for the attempt to exist if the person has not decided to commit the act, even though it has taken some actions, i.e when the person takes the knife out of the holster and points it to another person, but has not yet decided to attack him.

As it was mentioned above, the attempted action can be directed towards the implementation of the act only when the subject has estimated the impact coming and when it is desired arrival of this result. For these reasons, with the theory is accepted in our criminal law that attempt, as the preliminary stage of commission of a criminal act, is performed always with direct intent.

The question is whether we can commit an attempt with eventual intent (indirect)?

In connection with this we had different opinions.

Some authors admit the possibility of committing attempt with eventual intent, but say that in practice it is difficult to prove that the person has intentionally attempted to reach an eventual certain, socially dangerous result. In their opinion attempts can be performed with direct and indirect intent. Here is an example: we will have committed an act of attempted murder, intentionally indirectly in those cases, when the subject firing a firearm against the person whom he wants to murder, when he is very close to a friend of his. In this case when the subject shoots against the person whom he wants to murder, he acts with direct intent, but at the same time, he can predict that the bullet could affect the other person, standing next to him. Although he does not wish the murder of this person, these authors expressed the opinion that by shooting against a person, he consciously allows the murder of the other person. For these reasons, these authors continue, if the other person is not murdered, in such cases are we deal with the attempted murder with indirect (eventual) intent.

Other authors whose opinions coincide with the positions of our criminal law, state that attempt may not be performed with eventual intent. It is virtually impossible to prove that the person who mur-

dered or attempted to murder a person, whose murder he wanted, who was standing close to another person, intentionally tried to murder the other person as well. In the attempt, the action should be directed directly to the realization of a criminal offense only when that person has provided through action that will achieve a certain socially dangerous result, a result that the person desired.

As for whether we have attempt out of negligence, in criminal law and in prevailing opinions of many authors there can be no criminal offense if the person acts in negligence in both its forms.

c. The third condition that must be considered for the existence of the attempt, is not to cause the consequence of the criminal act which the person has wanted to achieve with the action taken. Otherwise if the consequence occurred than the issue is not about the initiation of criminal offence, respectively attempt, but for the completed criminal offense.

In practice there are cases where the criminal act is not completed, but the actions of the person who has taken have caused consequences which meets all the elements of another criminal act. Then, in this case in order to considered which criminal offense has been committed the subjective element is taken as basis, the intent of that person, which was the offence he wanted to commit, i.e., Person A fires the gun in direction of person B, with intent to deprive him from life and hits him in the leg, where he causes serious bodily injury. In this case, even though all elements of the criminal act of serious bodily injury caused by firearms were met, here we have to do with the offense of attempted murder, because the goal or intent of person A was to deprive from life the person B.

Offenses for which attempt is not possible

In the theory of criminal law and judicial practice it is considered that for some criminal offences the attempt is not possible.[33] In general we recognize two groups of criminal offences where the attempt is not possible.

33 Dr. Ismet Salihu, as above, page 348.

The first group constitute those offenses which are considered to be committed if preparatory actions were undertaken. Such acts are war crimes against humanity, genocide etc.., while the second group comprises of those offences which in theory are known as formal criminal acts, to which due to the nature of these offences the attempt is not possible i.e., it is not possible to attempt the criminal offense of libel, participation in brawl, insult, some offences of traffic and which are caused by negligence, etc..

A dilemma that is present in the theory of criminal law and judicial practice, and where we have very divided opinions is the punishment of the attempt for offenses to committed by omission.

According to some authors due to the specific nature of these offences it is not possible to attempt offenses that are committed by omission and that are known as direct criminal offences with omission, i.e., failure to give medical assistance.

The punishment of the attempt under the Criminal Code of Kosovo

In Article 20 of the CCK parag.2, the punishment for the attempt is defined. Under this paragraph, attempted commission of a criminal offense punishable by at least three years in prison is punished, whereas for other related criminal offences attempt is punishable only if the law expressly provides for this.

By this provision of the CCK it results that in our criminal law the attempts is not punishable for all criminal offenses. The person will be punished for attempt only when it comes to more serious offenses. So according to this the weight of the offense or the intensity of risk is determined by the type and extent of punishment foreseen, which means that for the punishment of a person attempting to commit the offense higher degree of danger is required.

Although our penal code condemns in principle only attempt of criminal offences punishable by at least three years in prison, the last sentence of paragraph 2 of Article 20, which says about other crimi-

nal offences where the attempt is punishable only if the law expressly provides that, provides the possibility of punishment for attempted offenses for which punishment is foreseen less than three years (i.e., theft, Article 252 of the CCK).

Regarding the expression "at least" CCK does not give proper clarity of this expression. In some countries this has the minimum sentence meaning (to the criminal offence of murder, article 146 of the CCK), while in some other cases does not have the meaning of minimum sentence but the sentence that can be imposed.

At the time of entry into force of this code there were dilemmas between drafters of the code and judicial practice in Kosovo in terms of this expression.

Drafters of the law protected the opinion that this expression means the minimum sentence.[34]

Judicial practice has defended the second opinion. Position of the Supreme Court is that attempt is punishable for criminal offences where a sentence of more than three years imprisonment may be imposed.

This approach is taken starting from the fact that the CCK, which entered into force in 2004, has reduced the degree of risk of the offenses for which attempt is punishable, in comparison with the Kosovo Criminal Law of 1977.

If we then apply the first opinion the Kosovo Judicial practice would have very big problems. It would have many offenses that by nature are serious, for which the attempt of the commission would not be punished, (i.e., criminal offence of rape article 193, parag.1 CCK)

Criminal Code of Kosovo, in article 20 paragraph 3, has foreseen that the person who attempts to commit a criminal offence, so when offence remains attempted, is punishable by more leniently than the person who has completed - committed the offense.

34 Dr. Ismet Salihu, as above, page 344.

This mitigation is in accordance with Article 65 paragraph 2 of the CCK, which means that the sentence imposed for attempt should not be higher than three quarters of the maximum sentence prescribed for that offense.

The difference between attempt and preparatory actions, as phases of the criminal offence

Distinction between the attempt of the criminal offence and preparatory actions, is that during the attempt commission of an intended criminal offense has started, while with preparatory actions only preconditions to commit a criminal offence are created.

But these two phases of committing a criminal offence have also similarities between them:

- Both are phases or actions pertaining to the preliminary stages of a criminal offense,
- Both these stages lack consequences, physical violation of any protected goods by criminal law.

As said, unlike the preparatory actions, attempt is a more advanced stage. A person during this phase of preliminary criminal activity exceeds the creation of conditions and means to commit a future offense, socially dangerous, in the realization of that offence. He takes actions to perform full offence, intended to fulfill it to the end.

So, for a criminal offense to remain in attempt, not only sufficient conditions and preparations are needed, but also the start the direct action to perform that offence. At the attempt, the purpose of the perpetrator is the commission of the criminal offence, for this reason he undertakes direct action to realize its goal.

There are opinions from different authors that the same action of a person, or the same action in some cases may be preparatory actions and in some cases attempt, i.e., "Breaking the door in the apartment should qualify as a preparatory action, if verified, that person A wanted to deprive from life the person B, who lived in that apartment, and

has to be named as attempt if the breaking of the door is made in order to commit the offense of theft".

From this you can conclude that in order to determine if we deal with preparatory actions or attempted criminal offence, we should evaluate with great care not only external features or actions or omissions committed by the person, but also what the person wanted to achieve with those acts, therefore, the subjective side of the figure of the criminal should be viewed as well.

Types of attempt

As attempt is considered committed when the action has been completed, as well as in the case when this action only started (but always provided that the consequences of a criminal offence are not to be caused), the criminal law recognizes some divisions of the attempt: full attempt and flawed attempt; inappropriate attempt and qualified attempt.

Full attempt is considered in cases where a person has taken action of the commission of a criminal offense and has completed the action, but has not caused consequences, such as when person A fires the weapon in order to deprive of life the person B, but does not hit him.

Flawed attempt is when a person begins the action of the commission of a criminal offence but did not end the action, i.e., person A aims the weapon in order to deprive of life a person B, but the weapon misfires.

CCK does not recognize such a division between full and flawed attempt. In Article 20, the CCK gives the exact definition of attempt. However, the theory of criminal law recognizes the separation in full and flawed attempt.

The difference between full and flawed attempt is of greater importance connected with the issue of voluntary abandonment of commission of criminal offence.

CCK recognizes inappropriate attempt. In article 21 of the Code it is stated that "the court may relieve a person who attempts to commit a criminal offence with inappropriate means ore against an inappropriate object." But this code does not recognize the difference between absolute and relative inappropriate attempt, which division exists in the theory of criminal law.

The qualified attempt exists when with the action of attempt to commit a criminal offence, in fact another criminal offence was committed, i.e., action has all the elements of another criminal act, which is provided for in the Criminal Code. So the intent of a person was to perform a criminal offence which has been attempted, but his actions have all the elements of another criminal offence, i.e., person A shots person B with intent to deprive him of life, but shoots him in the lower parts of legs which causes serious bodily injury. In this event although there are all elements of the offense of serious bodily injury, the intent of the person was to deprive the person B of his life and this action is qualified as attempted murder.

Conclusions

Understanding of the attempt as the phase of the commission of the criminal offense, presents a great interest in theoretical terms and especially in the practical terms.

The criminal law recognizes as the phase of the criminal act: the inception of thought, its manifestation, preparatory actions and attempt. [35]

The inception of thought, even with the Kosovo Criminal Code is not punishable, but this does not mean that it does not exist as a phase.

The manifestation of thought is generally not punishable, except when the person at the time of occurrence of thought has consumed the offense.

35 Dr. Ismet Salihu, as above, page 202.

In connection with the preparatory actions, criminal codes, in their general part, provide the meaning of the preparatory actions and criminal liability for the person who prepares to commit an act.

Dominant view in the criminal codes is that preparatory actions for certain types of offenses are punishable.

The CCK punishes preparatory actions for certain types of offenses. Usually these are serious criminal acts and with international character.

Attempt as a phase of commission of the criminal offence, treated in the paper presented above, exist when there is direct action for committing a criminal offence, only to offenses where the form of guilt is intent and the offense was not completed, respectively the consequences have not occurred.

We do not deal with attempt of the criminal offence, at offenses that were committed by omission.

Fatmir BEHRAMI

THE RIGHT OF OWNERSHIP

The basic object of this paper will be description of property, namely the notion, acquiring and protection of property. The topic, therefore, in short points will provide knowledge about the following issues.

1. The notion of ownership

In Kosovo, there are a lot of obstacles, due to lack of clear definition of property, which for years has been administered by laws of a legal system which even the international factor had difficulties in understanding. Term ownership, as the institute of civil law has a wider significance, not only in view of the items, but also in the right as the object of legal and constitutional regulation, as the right of ownership is regulated in the constitution.[36]

Ownership is absolute right with subjective character, which enjoys protection with the criminal law, administrative law and civil law provisions, as well as the guaranteed highest state act, the Constitution.

36 The Constitution of the Republic of Albania, Tirana, 1998, article 41, para.1

The right of ownership is fundamental human right, included and guaranteed in the Universal Declaration of Human Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, each legal system recognizes the right of ownership, on the basis of consolidation of the right "to enjoy and dispose of items in full and exclusive manner"[37] Another issue is that property from Roman law in itself contains not only right on one item, but also the right to use, exploit and dispose of an item to the limits of law (jus utendi, jus fruendi and jus abutendi). Under jus utendi, owners have the right to own and use their item, according to jus fruendi, owners have the right to collect natural and civil fruits of items, while the jus abutendi, they could destroy the item definitely or legally, by alienating the property or by a constituting a real right for interest of other persons.[38]

The right of ownership is the real right that contains wide powers on the occasion of the use and access of an item.[39]

2. Acquisition of right of ownership

Ownership is acquired through two specific ways with civil codes and other ways determined by special law: the acquisition by origin and derivative acquisition of ownership.

Derivative acquisition of property refers to gaining ownership from a previous owner to the new holder. Under applicable law, ownership cannot be delivered, because it does not represents a physical thing, but it contains powers of property of a person who has the right to keep his item, to use and dispose within the limits set by law. [40]

With the acquisition by origin, the ownership is acquired free and without obligation, which means that it is independent from the right of any previous owner. In this way, ownership is acquired under

37 The Civil Code of the Republic of Albania, Tirana, 1998, article 832.
38 Ivo Puhan, The Roman Law, Prishtina, 1989, page 222.
39 Abdullah Aliu, The real property right (Ownership), Prishtina, 2006, page 76.
40 The Law on Basic Property relations, article 3.

the law, with creation of new item, with the union, with mixing, with construction on a foreign land, the division of fruit, with statute of limitation, with the acquisition of property by non-owner, with occupation and certain other cases provided for by the law.[41]

3. Protection of ownership right

Protection of ownership rights is one of the most important rights, for protection of the right of property, for which, except the owner, the justice system should take care of.[42] The Constitution of the Republic of Kosovo, in regard to protection of property states: "The right property is guaranteed and no one will be arbitrarily deprived of ownership".[43] This right, as will be discussed in more detail below, is also guaranteed with international law.

If someone happens to violate or undermine the right of ownership, the owner has the lawsuit as the available remedy for protection. Main indictments for the protection of property are: the revindication lawsuit (actio reivindicatio), the negating lawsuit (actio negatoria) and publician lawsuit (actio publiciana).[44]

As known, in the development of civil procedure and its dynamics, the parties bear more responsibility (nemo procedat sine actore) than in the development and dynamics of criminal procedure, because the criminal procedure develops more ex officio. As these principles are applied into practice, the reality in Kosovo is such of an insufficient condition for the protection of property, is in alarming state and reflects the insufficient function of the legal system and irresponsibility of the administrative bodies at the local and central level.

One of the problems of inability for the protection of property rights, is presented in the fact that the cadastral offices often lack the documentation from the earlier period of time, but especially the documentation that was destroyed or lost, but there are also cases of pre-

41 Abdullah Aliu, as above, page 111.
42 Abdullah Aliu, as above, page 127.
43 Constitution of Republic of Kosovo, article 46, para.1.
44 The Law on Basic Legal Relations, article 37 - 42.

vious government - Serbs who have worked with these administrative bodies on the occasion of the departure from Kosovo in 1999 have taken with them many cadastre books. As a result of this is problems are caused in identifying the property rights of individuals and for this issue in most cases it is required from citizens to protect this right through the courts.

The large number of forged documents that circulate in Kosovo due to lack of relevant documentation have caused considerable confusion on the property. To protect property rights from this phenomenon the Criminal Code of Kosovo has set some kind of criminal offences for the protection of property rights which has provided for the protection of private property owners, as well as social property which issued a specific regulation regarding this property.

The lawmaker has defined by the Criminal Code of Kosovo these types of offenses that protect the right of individual ownership, such as:

- Criminal offence of illegal occupation of immovable property, Article 259 paragraph 1, which stipulates that anyone who illegally invades property of another person or a part of it is punishable by fine or imprisonment up to one year, as well the offense of illegal occupation of property, by article 259 A, which defends social property, which is issued only as special regulation for the protection of social property.

- Also the criminal offence of legalization of false content is foreseen, which is widely used on the confirmation of contracts of sale of immovable property. The elements of this offense are set forth in Article 334, paragraph 1 and 2 of the Criminal Code of Kosovo, stating that whoever misleads the competent body in order to prove a false issue intended to serve as property in a legal matter in a public document, in a register or book, is punishable by imprisonment up to 3 months to 5 years. According to paragraph 2, anyone who uses the document, such registers or books knowing that they are false, shall be punished with imprisonment from paragraph 1 of this article.

As can be seen, there are many difficulties in connection with adequate protection and the right of property that often has to do with lack of accountability and responsibility of authorities to municipal bodies, besides the inefficient judiciary and the protection of property rights to individuals - citizens.

Isa SHALA

PROPOSAL FOR EXECUTION AND ALLOWING OF THE ENFORCEMENT

Introduction

Executive procedure is initiated upon the proposal of the creditor as well as ex officio, when the law provides for such action, in conformity with the provisions of Article 3 of the Law on Executive Procedure.[45]

As with this procedure in a strict way they legal rights of the debtor are attacked (objects and rights are taken), claims must be proved in order to avoid the possibility of doubt of its existence, which means it has to be reliable.

Executive document is the document that contains legal act confirming the existence of request, its maturity and legitimacy of the parties in the execution procedure, where pursuant to this document the duty of the court is to set and enforce execution as per proposal of the creditor.

The content of proposal for execution

45 Law on Executive Procedure of the Republic of Kosovo, no. 03/L-008, hereinafter LEP.

On the formal side the LEP provides no particular form for any proposal for execution. Articles 39 and 40 of the LEP regulate the issue of what should the proposal for execution contain.

The proposal must contain the request for execution in which the executive document will be shown, or reliable document under which the execution is requested, the requester of the execution and the debtor, the credit required to be fulfilled, the means by which to carry out the execution, the object of execution if it is known, as well as other data that are necessary to implement the execution.

- Executive document is the document in which execution is based, i.e., final judicial decisions, executable, reliable documents, etc. According to article 37.1 of this law if the proposal for execution submitted to the court that has not decided in the first instance to the claim, together with the proposal the execution document is presented in which the certificate for execution is attached.

Novelty in the law is the in the notary document for execution where this document does not need to be equipped with certification for execution because it is determined by provisions of law on notary.

- The requester of the execution and the debtor, so it is mandatory to determine in the proposal for execution.
- Credit to be fulfilled under this law which is entitled to realize the amount of money or any award, action, omission or tolerance (example: for the debts in cash the nature of the obligation and the amount that will be paid to the debtor should be known).
- The means by which the execution should be performed, i.e., for immovable items the execution transfer or sale in specific items is to be carried out to fulfill the creditor's claims. This is not obligatory to movable items (Article 41 LEP),
- And other data that are necessary to implement the execution.

If with the proposal for execution the request is made for the determination of the debtor's property, the outcome of such determination of the court shall notify the proposer of the execution and pro-

vide sufficient time to the presenter to regulate the proposal, respectively, to amend or supplement the proposal.

According to article 40 of the LEP, the proposal for execution on the basis of reliable document other than the executive request pursuant to paragraph. 1 of Article 39 of this law, shall contain the request for the court to compel the execution debtor that within 7 days, and in disputes where there bills of exchange and cheques exist within 3 days from the date of the submission of the decision, to fulfill the obligation together with specified expenses, this issue is foreseen in the new law on executive procedure.

As a novelty in the new law on executive procedure the determination of the debtor's property is foreseen, where under Article 42 it is provided that the proposer of execution in his proposal based on the execution document may ask the court before the decision to request from the debtor and other entities in the proposal providing the data on debtor's property. Procedure how the court should act on this issue is regulated by Article 42 paragraph 1 to 7.

Review of the proposal for execution

The Court after receiving the proposal for execution must examine and verify and after that take a decision by eliminating the phenomenon of allowing incomplete and inaccurate proposals.

Taking into account high number of cases in this procedure and the low number of judges and executive officials, this process initially appears somewhat complicated because the executive officer during should base the review on a variety of questions some of which do not are obliged by law, but represent the shortcomings of proposals as well as Articles 23, 24, 25, 26, 27, 28, 29, 30, 37 and 38 of LEP.

Before allowing the execution of special importance should be paid to the basic competence having in mind these questions:

- Is the presented document suitable for execution?
- Does the case fall under the jurisdiction of this court or the Economic Court?

- If items are mentioned, are these things under the power of jurisdiction of that court?

If after reviewing these questions, we come to the conclusion that we are dealing with incompetency of the court, then the execution should be rejected and the creditor must be instructed to submit the case to the competent court.

After allowing the execution court may be notified with the objection of the debtor on incompetency. After determining the incompetence the court must take a decision on incompetence, where the procedure of execution is completed in that court and as decision becomes final the matter is forwarded to the competent court.

From the list of other questions we distinguish:

- Is the document that serves as the basis for enforcement attached?
- Is the court fee paid?

The Court while considering the proposal should clearly determine which proposal is invalid and which one is valid. After this, the court finds which of the valid proposals is complete and which one is not complete.

The proposal is invalid:

- If the debtor is not specified,
- If the document under which the execution is required document is not enforceable,
- In cases when within certain legal requirements the request must be submitted (this applies to the return of workers in the workplace, or requests for counter execution, etc..)
- Document based on which proposal is submitted does not contain any liability,
- The person who submits the proposal is not a creditor or authorized person.

The proposal is incomplete:

- If the document under which the execution is required is not attached to the proposal (Article 37 parag.1 the LEP),
- If information about the exact address of creditor or debtor is not mentioned, etc..

A proper review of the proposal before execution is allowed will save time in terms of timely completion of the procedure.

It is being repeated in judicial practice but in a lesser extent, the phenomenon of allowing the execution where the document submitted as the basis for enforcement does not contain any obligation for the debtor or proposal is submitted to the court which does not have jurisdiction over the case, but is less burdened with cases and therefore the case is submitted to that court. This practice of allowing erroneous execution should be stopped.

It should not be allowed in judicial practice, that the execution proposal regarding the lump sum of judicial expenses and fines to be sent to the office of the execution of the same court, just to be registered as a case and to be immediately pronounced as incompetent in that case and just to complete a report concerning the finished cases, but should be directly sent to the competent court for execution.

If the proposal is not valid the court shall reject the execution.

While, in cases where the proposal is not complete the court will require additional information by the creditor or other administrative bodies.

In cases where the proposal presented is not complete the court then issues a conclusion to require additional information from the creditor, based on the provisions of Article 22 of the LEP concerning Article 99 paragraph 2 and article 102 paragraph 1 of the Law on Execution Procedure.[46]

46 Law on Executive Procedure of the Republic of Kosovo, no. 03/L-008, hereinafter LEP.

If submissions are not returned within a specified time to the court, or they are returned turns, but without being corrected or completed they are considered withdrawn and submissions will be rejected, based on article 102.3 of the LEP.

In practice there are different positions regarding the application of the provision of Article 102 of the LEP. A position is that the court should request from the competent authorities the provision of addresses based on Article 117 of LEP.

A brief analysis of the above mentioned articles which the court take as basis for allowing the execution.

According to article 23 of the LEP the court determines execution solely on the basis of executive title or reliable document, if not otherwise provided by law.

Executive titles are:

- execution decision of the court and execution court settlement;
- execution decision given in administrative procedure and administrative settlement, if it has to do with monetary obligation and if by the law is not foreseen something else;
- notary execution document, that is added as executive title in the new law on execution procedure;
- other document which by the law is called execution document (i.e., reconciliation achieved in the mediation procedure if approved by the court or certified by the competent authority - new law for the mediation procedure Article 14.4).

Pursuant to Article 25 of LEP execution decision of the court is considered to be: the verdict, decision, and the ruling given in judicial proceedings or arbitration, whereas court settlement is the deal reached before the court and arbitration.

Decision of the administrative body is considered the decision and the conclusion given in the administrative procedure, from the

administrative service or legal person in charge of public authority, and the settlement is considered administrative deal reached in administrative proceedings before the administrative body or service.

Executive document must contain certain obligation of the debtor, if any decision of a court or administrative body does not contain the obligation of the debtor that has to do with any award or omission that cannot be executive document.

Confirmation judgments (declarative) and decisions which only proves the existence of any legal relationship, are not executive documents (i.e., verdict on dissolution of marriage or verdict that declares execution as not allowed).

Given decision or deal reached in administrative procedure, not only should contain monetary obligations, but for their execution powers are not given to any other body (i.e., in administrative procedure on several issues regarding the payment of some types of taxes the competence is for the same administrative authorities under the regulations and administrative instructions to perform the procedure of execution through bank accounts).

The highest number of documents under which the execution is assigned stems from civil procedure, while less from non contested procedure. The decisions taken in criminal proceedings as executive documents are considered to be the judgments imposing fines, confiscation of property, decisions on procedure costs and compensation claims.

Enforceability of the decision and validity are different notions, which in practice often get mixed. Concerning the enforceability the law regulates this with articles 26 and 27, where it is said that a court decision is executable if it has become final and if the deadline for voluntary fulfillment has expired (i.e., if the judgment is saying "the defendant is obliged for the fulfillment of the contract of loan to pay plaintiff the sum of 500 euros, within 15 days of receipt of the verdict" the deadline for voluntary completion is 15 days, while the verdict is executable after the deadline of 15 days).

The enforceability clause is put in the original document or the certified copy after the deadline for voluntary fulfillment.

The clause is put by the court, namely body which has decided in the first degree.

The enforceable document is executable on the first day after the deadline for voluntary fulfillment.

If we refer to the judicial practice the enforcement proposal presented before the expiry of the deadline for voluntary fulfilling should not be refused, but should be expected to wait for the deadline for voluntarily fulfillment.

If the court wrongly decided on the execution even though the document has not been enforceable in cases where the document was not submitted properly to the debtor, then the court namely body has decided in the first instance, upon the proposal of the debtor within 7 days, from the date on which it is submitted for execution, will render a decision to annul the enforceability clause (Article 37.4 of the LEP).

Pursuant to article 30 paragraph 2 of the LEP, reliable document are:

- Bills,
- Bills of exchange and cheque, with return receipt and, if necessary for the establishment of the credit,
- A public document,
- Extract from business registers for payments of utilities, water, electricity and waste,
- Private document verified under the law.

The court based proposals on reliable documents, mainly made on the basis of bills, whereas for the other documents quite rarely.

The most frequent creditors based on these proposals are: KEK, PTK, public utilities companies, while debtors are natural and legal persons.

Value of debt that requires execution varies from very low values to those more higher. In conformity with legal provisions the court is obliged to take action on all subjects, regardless whether the value of the case is 5 euros, that creates heavy burden for the court and in many cases because of the time constraints the cases with higher amount remain without execution.

Suitability of the execution document

An executive document to be legally valid and suitable for execution must meet the following conditions:

- To have recorded the first and last name of creditor and debtor, respectively company name and address (in judicial practice there are cases where the court does not note the surname of debtor),
- Obligation of the debtor under the object, type, volume and timing of his fulfillment in order to eliminate ambiguities as to what obligation of the debtor is.

Pursuant to article 28.1 of LEP executive document is suitable for execution if it shows the creditor and the debtor, object, type, volume and time of fulfillment of the obligation.

The determination of the deadline is not a necessary condition for the suitability of the execution document because if such a time frame is not defined in the executive document, the deadline is set by the decision of execution (Article 28.2 of the LEP).

Based on this court determines the proposed execution provided that the debtor within that time frame does not voluntarily fulfill the obligation.

Limits of execution

Under Article 49 of LEP, execution is carried out within the limits set in the decision for execution.

Creditor may seek enforcement of an amount provided for in the document for execution, may require less, but not more than in the document submitted for execution.

Allowing execution decision

Based on a formal review of the proposal for execution, if the conclusion is reached that the legal criteria are met the court renders a decision to allow execution.

Article 44 of LEP, stipulates that the decision on execution should show the execution document, respectively, and the debtor, the obligation that needs to be fulfilled, the means and the object of execution and other data necessary to implement the execution, while paragraph 2 of this article regulates the issue of calculation of interest.

New Law on Execution Procedure in particular has set the decision based on reliable document, where in this case the court obliges the debtor that within 7 days, and in disputes relating to bills of exchange and cheque within 3 days of date of submission of the decision to fulfill the obligation together with specified procedural expenses.

With the decision allowing the execution the execution and the manner of implementation of execution is set, depending on the means and the subject of execution.

The decision on execution is the same as the obligation of the debtor specified in the document that is submitted for execution, while other expenses are calculated during the entire execution process.

Article 46 of LEP, provides the contents of the decision on execution, which in parag.1 cites that decision should not necessarily contain the reasoning, so it can be issued by placing the square stamp on the proposal for execution.

Execution decision must contain instructions for legal remedy available for the parties.

Decision with which the proposal for execution is wholly or partly refused or rejected, must necessarily contain the reasoning.

Although not decisively provided by the law whether a decision on execution contains the reasoning, after additional information or improvements, such decision must necessarily have a reasoning because in this case the proposal should be amended or supplemented so that it is impossible for it only to be stamped.

Mr.sc.Isuf SADIKU

THE RIGHT TO A FAIR TRIAL, PUBLIC, WITHIN A REASONABLE TIME, BY AN INDEPENDENT AND IMPARTIAL COURT IN LIGHT OF ARTICLE 6 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND LEGISLATION IN THE REPUBLIC OF KOSOVO

Convention for the Protection of Human Rights and Fundamental Freedoms, Constitution of the Republic of Kosovo and Kosovo legislation have set high standards for respect of the reasonable time within which a case should processed in court.

Thus the European Convention for the Protection of Human Rights and Fundamental Freedoms[47] in Article 6 has provided that "in the determination of his rights and obligations of civil or of any criminal charge against him, everyone is entitled to a fair judicial process and public hearing within a reasonable time by an independent and impartial court, established by law ". Furthermore, in Article 13, it has provided that "any person whose rights and freedoms set forth in this Convention are violated, shall have an effective legal tool before a national authority, despite the fact that violations committed persons acting in official capacity".

47 Known as the European Convention on Human Rights "ECHR", promulgated in Rome on 4th of November 1950, whereas it entered into force on 3rd of September 1953.

Highest legal acts of the Republic of Kosovo, which regulates this matter are:

Kosovo Constitution[48]

Article 3 Equality before the law

Exercise of public authority in the Republic of Kosovo shall be based on principles of equality before the law of all individuals and with full respect for internationally recognized human rights and fundamental freedoms, as well as protection of the rights of and participation by all Communities and their members.

Article 53 Interpretation of Provisions for Human Rights

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the decisions the European Court of Human Rights.

Article 54 Judicial Protection of Rights

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

Article 22 Direct Implementation Agreements and the International Instruments

Human rights and fundamental freedoms guaranteed by the following international
agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and
other acts of public institutions
[...]
European Convention for the Protection of Human Rights and

48 The constitution of the Republic of Kosovo, entered into force on 15th of June 2008.

Fundamental Freedoms and its Protocols;

...

Besides the Constitution, other laws of the Republic of Kosovo provide reasonable duration to conduct judicial procedure, such as:

Criminal Procedure Code of Kosovo [49]

Article 5

1. *Any person suspected or charged with a criminal offence shall be entitled to fair criminal proceedings conducted within a reasonable time.*
2. *The court shall be bound to carry out proceedings without delay and to prevent any abuse of the rights of the participants in proceedings.*
3. *Any deprivation of liberty and in particular detention on remand in criminal proceedings shall be reduced to the shortest time possible.*

Law on Contested Procedure[50]

Article 10

The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law.

Article 475

In contentious procedures in work environment, especially is setting the deadlines and court sessions, the court will always have in mind that these cases need to be solved as soon as possible.

49 The Provisional Criminal Procedure Code of Kosovo was promulgated on 6th of July 2003, with the UNMIK Regulation 2003/26 and entered into force on 6th of April 2004, whereas with the Law no. 03/L-003 dated 6th of November promulgated with Presidential Decree DL-058-2008 dated 27 November 2008 by the President of the Republic of Kosovo, Dr. Fatmir Sejdiu for the amendment and supplement of the Provisional Criminal Procedure Code of Kosovo, the article 1 in the whole text of the law the term Provisional Criminal Procedure Code of Kosovo was substituted with Criminal Procedure Code of Kosovo.

50 Law no.03/L-054 30 July 2008, promulgated with decree no. DL - 047 - 2008, dated 07 August 2008 by the President of the Republic of Kosovo, Dr. Fatmir Sejdiu.

Article 479

In contentious procedures because of possession refusal, especially is setting the deadlines and court sessions, the court will always have in mind that these cases need to be solved as soon as possible, but each case will be looked into its nature and circumstances.

Law on executive procedure[51]

Article 5 Urgency and order of action

5.1 In the executive procedure, the court has a duty to act with urgency.
5.2 The court has a duty to receive cases for procedure according to the order the proposals for execution arrives, unless if the nature of the credit or special circumstances requires for the court to act differently.

Analysis of situations that may refer to a reasonable duration of judicial procedures in the administration of justice system in Kosovo

Reasonable duration is a quite important element in the course of the judicial process and the outcome of a case whether criminal or civil. Therefore judges as well as prosecutors should pay special attention to the reasonable time during which a judicial procedure begins and ends. The importance and weight of reasonable time, being provided for in the above mentioned laws, has been further strengthened with the entry into force of the Constitution of the Republic of Kosovo, which has provided for an effective remedy in Article 54, implementation of the European Convention on the Rights Human in Article 22, as well as case law of the Strasbourg Court, in Article 53.

Element of the reasonable time of judicial proceedings, except that enjoys legal protection of civil and criminal legislation in the Republic of Kosovo, it is also protected with the Constitution of the Republic of Kosovo and the European Convention on Human Rights

51 Law no.03/L-008 2 June 2008, promulgated with decree no. DL - 042 - 2008, dated 24.06.2008 by the President of the Republic of Kosovo, Dr. Fatmir Sejdiu.

and the case law of the European Court of Human Rights in Strasbourg. But it is important to note that there is no strict deadline to determine how long is the reasonable duration to a process in a court case, as that depends on the circumstances of each case.

European Court of Human Rights has stated many times that significant delays in the administration of justice related to parties that do not have effective means constitutes a threat to the rule of law within the domestic legal order. For violation of Article 6 of European Convention on Human Rights there are many decisions issued by the European Court of Human Rights.[52]

Excessive delays can occur in criminal proceedings and in civil ones, but these delays are prevalent in civil proceedings. There is a saying that strengthens and gives a sense element in the timely completion of a judicial procedure, which means "Justice delayed is justice denied". Also, excessive delays in judicial procedure also adversely affect the confidence or opinion of citizens on objectivity and impartiality of the judicial system.

In some cases dealing with the definition of civil law, the duration of the procedure is considered the time of the commencement or initiation of court proceedings, see cases (Sienkiewitz against Poland, judgment September 30 2003; Molodovan and others against Romania verdict dated 12 July 2005) until the time when the case is finally decided or the court decision is executed, as guaranteed by Article 6 of the Convention, because otherwise it would be illusive if a state's legal system will allow a judicial decision that is final and binding to remain without effect to the detriment of parties in the process because the Strasbourg European Court several times in a row had decided that the execution of a judicial decision is an integral part of the judicial process, see cases (Vocaturo against Italy, verdict dated May 24, 1991; Immobbiliare Saffi against Italy, verdict of July 28, 1999; Hornsby against Greece judgment 5 February 1997).[53]

52 See the official website of the European Court of Human Rights in Strasbourg www.echr.coe.int/echr/; Newsletters on the jurisprudence of the European Court of Human Rights in Strasbourg, published in the website www.ceoalb.org.

53 For more details see www.echr.coe.int/echr/.

Reasonable duration of a judicial procedure should be evaluated under the particular circumstances of the case and taking into account the criteria established in judicial practice and precedent law of the European Court of Strasbourg, here as circumstances that could justify the time during a judicial proceeding may include: complexity of the case, the behavior of the parties and authorities involved, and what is in the interest of the complainant. So, exceptionally, when conduct of the parties contributes to the delay of the judicial proceedings or when the case is complex we cannot refer to the aforementioned legislation for violations.

In regards to the reasoning about the lack of human resources, backlog of cases, lack of adequate space, according to practice or precedent court cases to the European Court of Strasbourg this is not justified. Therefore it is upon the state public institutions and judicial institutions in Kosovo that other than to conclude that we have the rule of law in Kosovo increased attention should be given to the reasonable duration to develop and complete a judicial proceeding because otherwise it is likely that the state of Kosovo, after the membership in the Council of Europe is achieved, will be sued before the European Court of Strasbourg among other for the "reasonable time".

Therefore, from what was stated above, we reemphasize the fact that the element of"reasonable time" in a judicial procedure is foreseen in the law and is legally mandatory under the legal instruments of our country but also under the European Convention on Human Rights.

Nehat IDRIZI

CRIMINAL OFFENCE OF TRAFFICKING IN PERSONS

Introduction

Trafficking in human beings is present primarily after the destruction of the former Soviet Union, former socialist countries and the wars in former Yugoslav territories. Trafficking in human beings is a negative phenomenon which many countries face and continues to be a major concern for them. People are trafficked in different ways. Most of them become victims of trafficking by promise of a good job, luxurious life, high salary and other benefits and only later they learn that they are victims of trafficking. Women and girls are recruited primarily to deal with prostitution and other forced labor.

Trafficking in people, brings huge earnings to persons dealing with trafficking.

Crimes that trafficked persons experience include sometimes horrific acts such as rape, torture, violations and violations of human rights and can sometimes affect national and international security when this is done by transnational criminal organization.

Often some of the trafficked persons are afraid to report to the state bodies the hardship which they are experiencing as a victim of trafficking.

Trafficking in persons is a major problem, from the aspect of geographical extent and also by the number of trafficked people. To illustrate this i present some reports of international organizations.

According to a general report of 2005 of the International Labor Organization on forced labor, it appears that every year in 2.45 million people worldwide are trafficked for forced labor.

Children's Fund of the United Nations (UNICEF) estimates that nearly 1.2 million children are trafficked every year.

United Nations Office for Drug and Crime (UNODC), based on databases for trafficking trends reports that people are trafficked from 127 countries to be exploited in 137 countries around the world.

In Kosovo, according to an analysis of cases of trafficking in persons, made by the Legal System Monitoring Section of the OSCE, in the beginning of 2006, in Kosovo courts there were 41 pending cases of trafficking in persons.

Understanding the offense of trafficking in persons

In the group of offenses against international law, the trafficking in persons is included in article 139 of the Criminal Code of Kosovo. In the early twentieth century trafficking in persons is foreseen as a criminal offence with several international conventions that prohibited and punished trafficking in persons, among them most important are: the Convention on the prohibition of trade with white slaves of the year 1910, the Convention for the prohibition of trade of women and children of the 1921, Convention for the prohibition of trade of adult women of 1933 and the Convention on punishment and prevention of trade with persons and their exploitation for prostitution purposes. "[54]

Trafficking in persons offenses is provided for in article 139 of the Criminal Code of Kosovo. Under paragraph 8, item 1 of this Article,

54 Dr. Ismet Salihu, Criminal Law, special part, Prishtina, 2006, page 96.

the word "trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation ". [55]

It is considered that this criminal offence is committed by the person who knows that particular person is a victim of trafficking, and despite this uses the person for sexual purposes paragraph 5.

Grave forms of the offense of trafficking in persons are considered these cases: if criminal offence is carried out against a person under the age of 18, paragraph 2, if the specific person organizes group of people, with the purpose of carrying human trafficking paragraph 3, if criminal offence is carried out by the official person in the exercise of his duty. As a grave form of this offense is not foreseen the case when human trafficking is conducted in such manner, which endangers the life or safety of persons who are trafficked because often, trafficking is done by means or circumstances such as in winter time, night, impassable mountains, with closed truck, through water, etc.. which seriously endangers the life of victims of trafficking. Also as a grave form of this offence must be foreseen the case when during the trafficking the death of one or more persons has occurred. For these forms of trafficking in persons more severe penalties should be foreseen". [56]

These forms of criminal offense of trafficking in persons can be carried out by any person other than the form foreseen in paragraph 7 which can be carried out only by an official person.

This offense can be carried out only intentionally, except for the case foreseen in paragraph 4 of this article, which can be performed even by negligence which consists in enabling, respectively facilitating the commission of trafficking in persons.

54 Ib idem.
56 Ib idem.

Elements of the offense of trafficking in persons

By definition it appears that elements of the offense of trafficking in persons are: recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other forms of coercion, kidnapping, counterfeiting, fraud, or abuse of power or position or to a sensitive position or by giving or receiving of payments or benefits to achieve the consent of the person having control over another person for the purpose of exploitation.

From the definition of article 139 of the CCK we see that the criminal act of trafficking in persons contains three groups of elements:

1. The first group contains the recruitment, transportation, transfer, or receipt of persons, harboring,
2. The second group contains, means of threat or use of force or other forms of coercion, kidnapping, counterfeiting, fraud or misuse of power or of a sensitive position or by giving a receipt of payments or benefits to achieve consent of the person having control over another person and
3. The third group contains the purpose of exploitation. Exploitation is defined as "exploitation of prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or similar acts to slavery, slavery or removal of organs."

The use of forced labor can be in construction, agriculture, domestic work, charity, prostitution and other forms of sexual exploitation.

These three elements differ between them and can be seen as the element of action that includes, recruitment, transportation, transfer, harboring or receipt of persons, the element of tools which includes the threat or use of force or other forms of coercion, kidnapping, counterfeiting , fraud or misuse of power or of a sensitive position or by giving a receipt of payments or benefits to achieve the consent of the person having control over another person and mental or psychological element, meaning the purpose of exploitation of the trafficked person. The first two elements require particularly the existence of action, while the third element requires the existence of the intention of the perpetrators.

1) Element of action

The first element or element of action can be completed through one of five consecutive actions, respectively: (i) recruitment, (ii) transport, (iii) transfer, (iv) receipt or (v) harboring.

i. Recruitment - means the employment of the person. There is no requirement that the recruiter to have intended to pay that person. Recruitment can occur abroad as well as in the village or hometown of the victim.
ii. Transportation - means the person's physical movement from one location to another. This does not necessarily require crossing the borders: a person can also trafficked within Kosovo.
iii. Transfer - means giving control over a person, to another person, who then accepts the victim of trafficking. While cash payments may be evidence that trafficking occurred, it is not necessary element of the offense of trafficking.
iv. Receipt - is taking control of the victim, usually by a person who has previously recruited or transferred to the victim.
v. Harboring - means providing a room or other space for the person, but without admitting the person as a victim as on the contrary this would constitute receipt.

2) Element of tools

The second element of the offense of trafficking is the so-called element of the tool. This provision applies only to adult victims of trafficking.

Particularly in article 139 of the CCK, it is required that the perpetrator has committed acts of recruitment, transportation, transfer, accommodation or receipt of persons in relation to the victim by means of threat or use of force or other forms of coercion, kidnapping, counterfeiting, fraud or abuse of power or of a sensitive position or by giving a receipt of payments or benefits to achieve the consent of the person having control over another person. Therefore, only the transfer, receipt, harboring, recruitment or transportation of a person does not in itself constitutes the offense of trafficking if it is

not supplemented by the element of tool, so to be used, threat, force, coercion, etc..

3) Mental or psychological element

The third element of the criminal offense of trafficking is the mental condition or the subjective element, the intentional use of the victim. As is clearly envisaged under article 139 of the CCK, the exploitation includes but is not limited to prostitution, other sexual services, forced labor, enslavement, or extraction of organs.

The purpose of the exploitation is the mental element in other words the means of action and the perpetrator must have intended use of the victim. Therefore, it is not necessary that the perpetrator of the act in fact has exploited the victim.

Consequently, if the actions and means committed by the perpetrator, such as "transfer with use of force, acceptance by fraud, etc.. are made for the purpose other than exploitation of the victim i.e., the purpose of earning money from victims, the criminal offense of trafficking is not committed. However, even if the subjective element of the offense of trafficking is not met the suspect can be prosecuted for other crimes, i.e., facilitation of prostitution, trafficking in immigrants, etc."[57]

For the question of child trafficking Kosovo Criminal Code, defines a lower level of evidence for trafficking of children than for trafficking of adults. Article 139 parag.8 / 4 CCK makes clear that the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation, should be considered "trafficking in human beings" even if it does not include any means of using force, coercion, threat, etc..

Thus, when juveniles are recruited, transported, transferred, accommodated or accepted, it is not necessary to prove that the child is deceived, threatened, etc.. "While it is logically impossible to have offence of trafficking in adult persons as defined by article 139 of the

57 Legal analysis of the trafficking in persons in Kosovo, OSCE, October 2007, page 7.

CCK where one or more means are not used, so the threat, liability, etc.. While it is not necessary to fulfill the tool element in cases where victims of trafficking are children. Therefore, only simple recruitment, transportation, transfer, harbor or receipt of a child with aim of exploitation, always fulfills all elements of the criminal offense of trafficking ".[58]

Therefore a crucial element of the offense of trafficking in persons is the purpose of exploitation of the person.

Regarding the consent of the victim, it should be noted that we cannot have the consent of the victim if there is use of intimidation, force, including the obligation, kidnapping, fraud, counterfeiting, misuse of power or position, abuse of a position of sensitive, giving or receiving of payments or benefits to achieve the consent of the victim of trafficking for the purpose of exploitation.

- Example from practice shows the criminal offence of trafficking in persons.

Besa is 17 years old from the city of Pristina, one day while walking she was stopped by a friend named Arsim for a talk and during the talks he convinces Besa to go to a bar to have a coffee, but as soon as Besa enters the car Arsim rapidly drives away towards Montenegro. When they reach Ulcinj, Arsim enters into a bar and invites his friend Agim, to come to Hotel Shpati "to see Besa and to bring the money.

When Agim comes to Hotel Shpati "and when he sees Besa he says to Arsim that she does not meet the conditions for "that job "and refuses to give money.

After this Arsim decides to return to Pristina, and when they arrive in Pristina, hedrives toward the hotel "Lumi", to meet a friend with the name Naim and over the telephone he says to Naim that he will bring Besa to work as a prostitute in the hotel "Lumi" in Prishtina, for which he receives a message from Naim that the job is done and that Besa will start to work at the hotel.

58 Ib idem.

On reaching the hotel "Lumi" Besa begins to work as a prostitute and serves several customers within a few days, but one of the clients finds out that Besa was forced into prostitution and that she was threatened that if it refuses to work or if tells someone about that they will cause harm her only brother.

In this case, all elements of the offense of trafficking in persons are met, the element of action, tool and purpose.

Qerim ADEMAJ

PROVISIONAL ARREST AND POLICE DETENTION

Measure of provisional arrest and police detention is provided by Articles 210 to 219 of the Criminal Procedure Code of Kosovo.[1]

According to the provision of Article 210, this measure can be implemented by the police, as well as any other private person, if a person is caught in flagrancy in the course of a criminal offense, which is persecuted ex officio or that person is persecuted for any criminal offense committed earlier.

But in terms of arrest by private persons, in legal terms of procedural legislation of law in Bosnia and in Croatia has been removed, where the same states this right have turned into the right "of each person or citizen to prevent leaving of the person caught in flagrancy of performing the criminal act". Justifications are logical because the citizen has neither the means nor the ability to arrest the person or the possibility of applying absolute violence. Theory of criminal procedure law considers that the perpetrator of a criminal act may be advised or encouraged not to leave the scene, while the actions of violent arrest by private person of the criminal perpetrator made suspicious.[2]

1 Criminal Procedure Code of Kosovo, is promulgated by UNMIK Regulation No. 2003/26, dated 06 July 2003 and it entered into force on 6 April 2008 (hereinafter CPCK). CPCK has been amended by the Law No. 03/L-003, dated 6 November 2008.
2 Xhevdet Elshani and Mejdi Dehari, Criminal Procedure Code of Kosovo, section III-IV, presentation III, page 3 - Kosovo Judicial Institute, Prishtinë.

This question comes in expression occurred because in practice were some cases where the perpetrator is caught in flagrancy and when the perpetrator hasn't stopped when instructed by the owner, the criminal perpetrator was caused serious bodily injuries, even in cases where the perpetrator has been a minor person.

If one looks at the constitution of the Republic of Kosovo, except in CPCK, it may not be interpreted that private individuals may arrest the perpetrators caught in flagrancy, since from these provisions unequivocally appears that arrest can only be performed by legally authorized namely the police, because the provision of Section 210 of the CPCK risks to establish anarchy in the opinion, even to be abused by citizens.[3]

The arrest represents the actual removal of citizen's freedom in the manner prescribed by law by state authorized bodies (police), for which the police does not obtain a written decision. This measure lasts as long as necessary to bring the arrested person to court or police station and competent public prosecutor should be immediately notified on the reasons for the arrest and for taking further measures and actions regarding the justification of detention.

According to the provision of Article 211 of CPCK, police can deprive a person of liberty if:

- There is a grounded suspicion that the person has committed a criminal offense,
- There are reasons for detention set out in Article 281 paragraph 2 point i, ii, iii and sub-paragraph 3 of CPCK, such as confirmation of the identity of the perpetrator, hiding, the risk of his escape, disposal, storage, change, falsification of evidence of a criminal offense, obstruction of criminal procedure while affecting defective witnesses, associates, weight of the criminal act, his personal characteristics, his previous behavior, environment and conditions in which he/she lives and any other personal circumstance that indicates the risk that that person may repeat the offense or commit the offense

3 Constitution of the Republic of Kosovo entered into force on 15 June 2008

- The police shall be obliged to bring him or her without delay to a pre-trial judge to rule on detention on remand.

Looking at the provision of Article 211 of the CPCK we may conclude that it is quite unclear and is in full contradiction with the provision of Article 212 paragraph 5 of the CPCK, under which as soon as possible after the arrest, but not later than six (6) hours from the time of arrest, prosecutor or police officer authorized person arrested shall issue a decision on detention, where the same provision is also inconsistent with Article 282 paragraph 1 of CPCK, under which detention shall be sentenced by pre-trial judge of the competent court and based on the written request of public prosecutor after the hearing.

From this we may conclude that the arrest and detention of a person shall be done with the authorization of the public prosecutor and the detention measure may not be applied by pre-trial judge without the request of public prosecutor. Provision of Section 211 of CPCK, regarding pre-trial judge to decide on detention without the request of the public prosecutor, practically we may say that is completely unenforceable.

The provision of Article 212 of the CPCK, in urgent circumstances the police may arrest and detain the person when:

- There is a grounded suspicion that he or she has committed a criminal offence which is prosecuted ex officio,
- There are reasons for detention set out in Article 281 paragraph 1 sub-paragraph 2, points (i) and (iii) of the CPCK, such as confirmation of the identity of the perpetrator, hiding, risk of escape, weight the criminal act, his personal characteristics, his previous behavior, environment and conditions where he/she lives and any other personal circumstance, which show the risk that that person may repeat the offense or conduct the offense he/she threatened to perform, or there are reasons to suspect that the arrested person may destroy traces of the criminal act, foreseen by Article 281 paragraph 1 sub-paragraph 2 point (ii) of this Code, when the

police due to urgent and reasonable circumstances may not obtain the authorization by the public prosecutor, can detain and arrest the person, but shall immediately inform the public prosecutor about the arrest and the reasons for the arrest.

Arrested person, immediately on the occasion of his arrest shall be informed of his rights as set forth by section 214[4] as following:

- To be informed about the reasons for the arrest, in a language that he or she understands,
- To remain silent and not to answer any questions, except to give information about his or her identity,
- To be given the free assistance of an interpreter, if he or she cannot understand or speak the language of the police,
- To receive the assistance of defense counsel and to have defense counsel provided if he or she cannot afford to pay for legal assistance,
- To notify or require the police to notify a family member or another appropriate person of his or her choice about the arrest, and
- To receive a medical examination and medical treatment, including psychiatric treatment.

If the arrested person is a foreign national, he or she has the right to notify or to have notified and to communicate orally or in writing with the liaison office or the diplomatic mission of the State of which he or she is a national or with the representative of a competent international organization, if he or she is a refugee or is otherwise under the protection of an international organization.

According to Article 212, Paragraph 5 of the CPCK, as soon as possible after the arrest and no later than six hours from the time of the arrest, the public prosecutor or an authorized senior police officer shall issue to the arrested person a written decision on detention which shall include;

4 When making reference to the provisions of the criminal procedure, it shall be borne in mind that we refer to the provisions of the Criminal Procedure Code of Kosovo.

- the first and last name of the arrested person,
- the place, date, and exact time of the arrest,
- the criminal offence of which he or she is suspected,
- the legal basis for the arrest, and
- an instruction on the right of appeal.

The arrested person shall have the right to appeal a decision under paragraph 5 of the present article to the pre-trial judge. The police and the public prosecutor have a duty to ensure that the appeal is delivered to the pre-trial judge. The appeal shall not stay execution of the decision. The pre-trial judge shall decide on the appeal within forty-eight hours of the arrest. (Article 212, paragraph 6 of the CPCK).

A person arrested under the decision of the public prosecutor or senior officer police authorized may remain in police detention not exceeding 48 hours (Article 212 paragraph. CPCK 4). Before the deadline of 48 hours, he detained person should be sent to pre-trial judge, who according to Article 29 paragraph 2 of the Constitution of the Republic of Kosovo shall decide on his detention or release not later than 48 hours from the moment when the detained person is brought before the court.

Detention through the decision of the public prosecutor or senior authorized police officer may not exceed 48 hour, because if this deadline passes, the police are obliged to release the detained person, unless the pre-trial judge has ordered detention.

If the suspect or the defendant does not engage a defense counsel under section 69 of the CPCK paragraph 6 on his or her own, his or her legal representative, spouse, extramarital partner, blood relation in a direct line, adoptive parent, adopted child, brother, sister or foster parent may engage defense counsel for him or her, but not against his or her will.

It is a legal requirement (Article 213 paragraph 1 of CPCK) that the arrested person has the right to immediate assistance of counsel which he engages according to his choice, but even this condition has exception because section 213 paragraph 5 to CPCK, provided If the

arrested person is suspected of terrorism or organized crime and there are grounds to believe that the defense counsel chosen by the arrested person is involved in the commission of the criminal offence or will obstruct the conduct of the investigation, the pretrial judge may, upon the application of the public prosecutor, order that alternative defense counsel be appointed to represent the arrested person for a maximum period of seventy-two hours from the time of arrest.

The right to the assistance of a defense counsel may be waived, except in cases of mandatory defense (Article 73 of the present Code), if such waiver is made explicitly and in an informed and voluntary manner. A waiver must be in writing and signed by the suspect or the defendant and the witnessing competent authority conducting the proceedings, or made orally on video- or audio-tape, which is determined to be authentic by the court.

Waiving the right to counsel must be voluntary by the arrested person, it must be in writing and shall be signed by the detainee and the body that implements the procedure, either the prosecutor or police, and also may be done verbally through the audio recording, whose authenticity can be verified by the court (Article 69 paragraph 3 of CPCK).

If a suspect or defendant who has made a waiver subsequently reasserts the right to the assistance of defense counsel, he or she may immediately exercise the right (Article 69 paragraph 5 of CPCK).

Persons under the age of 18[5], may waive the right to the assistance of defense counsel with the consent of a parent, guardian or a representative of the Center for Social Work, except that in cases of domestic violence involving the parent or guardian, such parent or guardian may not consent to the waiver of such right. Persons who display signs of mental disorder or disability may not waive their right to the assistance of defense counsel (Article 69 paragraph 4 of CPCK).

Also persons, who have mental disorders or express signs of mental disability, can not relinquish the right to engage defense.

5 The term "minor" means a person who is between the ages of fourteen and eighteen years, Article 2 par. 2 of the Juvenile Justice Code, promulgated by UNMIK Regulation 2004/8, dated 20 April 2004

Judicial practice in Kosovo has shown that the most frequent violations of criminal procedure are committed in the phase of investigative procedure, where frequently police and prosecutors, upon interrogation of suspects do not read their rights envisaged by Articles 229 - 236, which also includes the right to engage his defense according to his choice, or to engage defense ex officio if the detainee cannot afford one, since statements of suspects taken by the police and prosecutor without respecting the above provisions, constitute unacceptable proof to the court.

When arrested person shows signs of mental disorder or mental disability, police are obliged to notify immediately after the arrest the person designated by the arrested person and the center of social work on the arrest and place of detention where the arrested person is held, and on any eventual of place of detention.

Although the announcement to family members and other competent authorities to arrest suspected persons is a legal requirement, this rule has an exception regarding the registration deadline, because according to Article 215 of the CPCK paragraph 4, Notification of a family member or another appropriate person is a legal requirement nevertheless there is an exception from the rule because according to article 215 of CPCK, paragraph 4, the notification may be delayed for up to twenty-four hours where the public prosecutor determines that the delay is required by the exceptional needs of the investigation of the case. There shall be no delay if the arrested person is under 18 years of age or displays signs of mental disorder or disability.

An arrested person has the right, upon request, to be examined by a doctor or dentist of his or her own choice as promptly as possible after his or her arrest and at any time during detention. If such doctor or dentist is not available, a doctor or dentist shall be designated by the police.

Also at the request of his or his family members, the arrested person has the right to medical treatment, psychiatric whenever necessary. The police may also appoint a doctor to conduct a medical examination or to provide medical treatment at any time in the case of phys-

ical injury or other apparent medical necessity (Article 216 of the CPCK paragraph 3). In case the arrested person refuses to undergo a medical examination or to accept medical treatment, the doctor shall render a final decision on the necessity of such examination or treatment, after due consideration of the rights of the arrested person.

If an arrested person displays signs of mental illness, the police may immediately order an examination by a psychiatrist. Results of each control or medical treatment, duly recorded and such records are available to the arrested person and his defense counsel.

Article 217 of CPCK, provides that the person arrested must be separated from convicted or detained persons, Persons of different sex shall not be detained in the same room and A person detained for more than twelve hours shall be provided with three meals daily. In any period of twenty-four hours, an arrested person shall have the right to at least eight hours of uninterrupted rest, during which he or she shall not be examined and shall not be disturbed by the police in connection with the investigation.

In addition to the rights set out in Article 214 of the CPCK, which must be read to the arrested person, which were mentioned above, Article 231 of CPCK paragraph 2 foresees that the detainee must also notified on these rights:

- The criminal offence with which he or she has been charged,,
- That his statement can be used as evidence before the court, and
- That has the right to require obtaining evidence for his defense.

The examination shall be conducted with full respect for the dignity of the defendant; The defendant shall be asked questions in a clear, distinct and precise manner. It is prohibited to ask the defendants leading question, to keep him standing, to deny food, water and necessary medical treatment. During interrogation of the detained or arrested person, short breaks shall be done in approximately two hour intervals, but the rest may be postponed when, due to reasonable cause, there is reason to believe that the delay would:

- Cause risk for injury to persons or loss or serious damage to property,
- Unnecessary delay of detention or completion of interrogation, and
- Prejudice the outcome of investigations,

Interrogation of detainees should offer him the opportunity to challenge the reasons for suspicion against him and bring out the facts and evidence that go in his favor. Arrested person in interrogated verbally, but interrogation he/she is allowed to take notes (articles 216, 218, 233 and 234 of CPCK).

In any questioning or examination it is prohibited to (Article 155 of CPCK):

- Impair the defendant's freedom to form his or her own opinion and to express what he or she wants by ill-treatment, induced fatigue, physical interference, administration of drugs, torture, coercion or hypnosis.
- Promised to any benefit that is not prescribed by law,
- Threaten the defendant with measures not permitted under the law, or
- Impair the defendant's memory or his or her ability to understand.

Under Article 219 of the CPCK, The police shall keep a single written record of all actions undertaken with respect to an arrested person, including:

- The personal data of the arrested person,
- The reasons for the arrest,
- The criminal offence of which he or she is suspected,
- The authorization or notification of the public prosecutor,
- The place, date, and exact time of the arrest,
- The circumstances of the arrest,
- Any decision of the public prosecutor or an authorized senior police officer regarding detention,
- The place of detention,

- The identity of the police officers and the public prosecutor concerned,
- Oral and written notification to the arrested person of his or her rights, as provided for in Article 212 paragraph 3 of the present Code.
- Information about the exercise of the rights, as provided for in Articles 214 of the present Code, especially the right to defense counsel and to notification of family members or other appropriate persons,
- Visible injuries or other signs which suggest the need for medical help,
- The conduct of a medical examination or the provision of medical treatment, and
- Information about the provisional security search of the person and a description of objects taken from the person at the time of the arrest or during detention.

The police shall keep a written record of any examination of the arrested person, including the time of beginning and concluding the examination and the identity of the police officer who conducted the examination and any other persons present. If the defense counsel was not present, this shall be duly noted. This record shall be signed by the relevant police office and countersigned by the person arrested.

Nëse personi i arrestuar refuzon nënshkrimin e procesverbalit, autoritetet policore shënojnë refuzimin e tillë dhe ja bashkëngjisin shpjegimin ose komentet eventuale me shkrim ose me gojë të personit të arrestuar.If the arrested person refuses to sign the written records, the police authorities shall record such refusal and any explanation and append any comments offered by the arrested person orally or in writing.

The written records under paragraphs 1 and 2 of the present article shall be made available to the arrested person and his or her defense counsel on their request and in a language that the arrested person understands. These records shall be preserved by the police for a period of ten years from the time of the official end of the criminal proceedings or the person's release from detention, whichever is later.

Sabri HALILI

KOSOVO JUDICIARY, REFLECTIONS FROM THE PAST AND JUDICIAL ETHOS

The situation in Kosovo justice for a long time was associated with anachronistic elements from the past, political and ideological elements, but also with the lack of ethics, stratified among others with the mentality of uniform system. In not too distant past, justice was calculated and done while implementing political decisions and orders, fabricated in governing cabinets - political. There were professionals in the judiciary, who were devoted to implementing these daily policies of the cabinets. However, the last judicial system also has its benefits, especially in terms of institutional care to judges and prosecutors. By this approach, judicial and prosecutorial professionals never felt unsafe or inferior in their work, in any segment of society, they were motivated and encouraged in many ways. Nevertheless, to most of the citizens of Kosovo, last judicial system has left many wounds.

This is what was said above, presents approximately the of Kosovo justice until the last war in Kosovo.

When "justice begins" in Kosovo

What the justice situation in Kosovo was after the war and how the current situation in independent Kosovo is reflected? What the justice is facing after ten years from the installation of a new spirit, in trend with democratic societies, with strong presence of democratic countries of European and the world?

The situation of justice after the war was in emergency stage. In this situation it was in difficult situation, but with consistently improving trend, although never reached a satisfactory level.

Currently, this situation of justice may be described in few words; heavy, with internal tensions, with increasing distrust... at the first sight as road to perdition and very disturbing. The reasons are numerous, but the primary reason is that society, two powers in Kosovo (international and local), in transition-emergency phase, but even today, do not pay sincere and professional attention to this important social segment. Even today differentiated access to justice was provided, depending on the region or national origin. This is illustrated with an ugly example, but it was reality in Kosovo for some time.

Times ago, a daily newspaper, published a triumphing title, "justice begins..."? It was news to start re-functioning of the court in Mitrovica north. After ten years of liberation and after ten years of governance, local and international governance of Kosovo, it is pity! For each person, let alone the professionals, this title would seem absurd and disturbing!

Reasons for dysfunction of justice in that part of Kosovo, some say they are the discontent of Serbs with the status of Kosovo. This is also sui generic nonsense, in a state that aims to build a democratic order and rule of law!

If now the Kosovo status is the reason for rejection of justice in the north, what were the reasons for dysfunctional justice in the past, when Kosovo was not independent? The past 9 years in that part of

Kosovo, under UNMIK management, namely the international democratic societies, crimes against citizens occurred, crimes against public order and security, even serious attacks against KFOR forces. The EU is "very concerned on the largest smuggling in Europe. However, it is not known if until today any group or individual was sentenced as responsible of these crimes.

The answer is simple, for those who want to see the problem with real dioptre. Certain political segments and organized criminal groups, of this part of Kosovo, in cooperation with groups outside this area, do not want to have justice.

This state of justice and differentiated approach, depending on nationality and region, is known to Albanians only in the previous governance of Kosovo. Even then, laws and courts were held wherever and whenever, just for Albanians. This is probably the main reason why certain criminal groups obstruct justice and prevent the extension of law and order throughout Kosovo. They want grounds with complete anarchy, with laws and courts that they make, or are brought to them from certain circles.

In the opinion of many local professionals, this situation in Kosovo justice has been similar, since early nineties, than continued in the period of UNMIK, but no one wants to think that this will continue in the EULEX "mentoring" period.

How to achieve the goal of justice

It was clear to everyone that the transition phase will be a hard process, followed by numerous difficulties. But no one thought it would last so long. Even if someone thought that this would take this long, there was hope that with time, along with human professional changes, positive changes shall be made in general infrastructure, in improving working conditions, safety and livelihood of judges and prosecutors. However, this has not happened, and yet no light is seen for rapid improvement. Those who are competent to make these changes are not investing enough for a sound future of justice. Consequently, announced reforms will not succeed without the cre-

ation of all conditions, at least beginning of creating conditions that will pull this sector out of currently serious situation. Only a green light in this direction will encourage and motivate judges and prosecutors. This will be a hope for the public; something that will change in law and provide a motive for judges and prosecutors that should work and give their best, for their profession, which is as difficult as it is important, for each community and each legal state. Success in this segment will be measurable by raising awareness, social and political and state-forming, respectively institutional, as the most important and the only segment for combating organized crime, corruption and other ugly phenomena, which present a society as unorganized and as degenerate.

This will be done only with appropriate laws, when judges and prosecutors and their professional work is treated as deserved, same as in all democratic societies and in states with rule of law. This will be achieved with the creation of conditions in infrastructure, especially technical, adequate equipment to hold court sessions unaffected and unhindered. Currently, court hearings are held even in presence of third persons, who enter and leave whenever they want, and in offices where even criminal trials are held.

To change this situation, adequate facilities should be built, which coincide with a genuine judiciary. Currently, judicial facilities are obsolete, even their architecture is completely with images and motifs of monist system. And if we consider the general conditions, the above corruptive phenomena that dominate especially justice in Kosovo, a red signal should be already lit before relevant state institutions. However, still they don't show any sincere concern and thus the judiciary and justice in general remains at the mercy of those who want a fairly dependent, subservient to narrow interests.

Constitution of Republic of Kosovo, Chapter VII, Article 102, determines the judiciary as unique, independent, fair, apolitical ... However, due to the conditions and circumstances in which judges and prosecutors currently operate, these constitutional provisions are not respected in appropriate level, especially by some state institutions, that affect the work of justice, with various excuses, even

unprofessional and banal, as it is the lack of adequate legal infrastructure. In fact, nonsense delays of issuing the law on organization of courts and prosecution offices make judiciary indirectly dependent from other state powers.

Such reasons may not sustain, even for ordinary citizens of these areas, because elect people don't do anything but to propose and pass laws, and just for this they are very well paid. And when Parliament adopts a law, the public considers that it will be implemented, that all risks and consequences are planned, including financial risks, and not recognize such justifications for the lack of financial resources....

Perception is different from different perspectives

It is clear that in Kosovo there are two points of view and aspects of perception of the judiciary of Kosovo. One side is totally burdened by daily politics, which for years was imposed by different circles of political parties. The second perception is related to loss of trust in the judiciary, for numerous reasons, elaborated above, especially because of reflections from a bitter past.
The first aspect is related with the general perception of Belgrade's policy, with everything in an independent Kosovo. Political calculations of Belgrade are done here to prevent general developments, especially in the field of rule of law, as a political alibi for the inability of Kosovo to manage security and the rule of law.

The second aspect concerns the loss of trust, due to continuity of a system through which this nation has not realized any right in the past, a justice system that in every action and every decision has produced discriminatory elements and violated basic human rights. Of course, public expectations for changes have been enormous. However, changes have gone very slowly, even in some cases, on first sight, it seems that nothing has changed from the previous system.

To change these perceptions, enough words are not enough, but we must move in two directions: determined to establish rule of law in all parts of Kosovo and to every citizen alike, and on the one hand

creating trust to public on independent, effective and impartial work. Each judge and prosecutor should use law and Constitution of Kosovo as the only advisor, radically changing the mentality of approach and action against parties, office, profession, and especially in relation to the law.

Sadly, our society still has access to such broad public which can not reflect clearly dividing border between the executive and legislature by the judiciary, perhaps just because of direct or indirect influence of external factors, to this social segment.

Ethics, help or hindrance for judges and prosecutors, in a society without proper care to justice

It is imperative that each judge and prosecutor behaves and acts in law in effect, but also based on the Judicial and prosecution Code of Conduct. Under this code, these professionals in their work must always act creating the public trust, reflecting dignity, integrity and independence. The judge and prosecutor should reflect high standards of personal and professional conduct, respect and implement the law, avoid any behavior or situation that would bring into question their integrity and impartiality and independence, to respect human rights at any time, in conformity with international standards, for all parties to proceeding. These are some general principles of ethics of judges and prosecutors, that in practice the Kosovo judiciary often lacks.

Besides controlled behaviors, at any place and at any time, judges and prosecutors have legal and ethical obligation to protect the rights and freedoms of all persons during judicial process, especially the defendants, who may not be prejudiced as guilty, while his guilt is not proven, with a final judicial decision, after a legitimate judicial process. Even in these cases, judges and prosecutors should not allow to be influenced by external factors, such as family, society, senior government officials, threats, pressure or other form. They must avoid any conflict of interest, legal issues, in which they judge or should judge.

Until now, the relation of judges and prosecutors with these external influential factors, has been a small distance, not to say that the line was inexistent. This has happened because of their status, i.e. working conditions, but the way of employing judges, but also their mentality.

According to judicial and prosecutorial ethics, the judge and prosecutor, unlike the other professionals can not deal with any activity that are contradictory and "are incompatible with faith in judges and prosecutors, or their impartiality or independence, or their commitment to deal carefully and within a reasonable time with matters brought before him." According to this definition, judges and prosecutors can speak in a symposium dealing with their profession, to keep a lecture about their profession, to participate in any activities involving the legal system, ie in any agency government that is dedicated to improving the legal system, deal with sport, art and other charitable non-profit activities.

Judges and prosecutors may not involve in political activities and hold any political post. They cannot participate in any organization that supports any kind of discrimination, or get involved financial and business matters that could affect their impartiality, i.e. should not engage in economic relationships with lawyers or persons that may appear before the court, in which they serve.

Judges, prosecutors and their families are limited to acceptance of gifts, favors or privileges and promises of material assistance from any person who directly or indirectly has an interest in a case tried by the judge.

All other professions may engage in secondary jobs, while judges and prosecutors are restricted and prohibited to undertake any other activity outside the profession and primary professional duty.

Due to these obstacles, many, society must think that they can live a dignified, fair and without material-financial pressures. The state should also provide sufficient security against the influence and

threats to life and work of judges and prosecutors, as well as their families.

If you do not achieve financial, optimal and ethical security, code of ethics cannot be seen as a contribution, nor as stimulus for the work of judges and prosecutors.

Mr.sc.Shaban SHALA

DETERMINATION OF THE VALUE OF THE OBJECT OF DISPUTE

Dispute represents disagreement between parties, namely the claimant and the defendant concerning any civil legal matter. Civil legal disputes may have basis in civil legal relations of the nature of property, mandatory, inheritance or family. Value of the object of dispute is important because based on that the case competency is determined, the right of submitting revision and tax amounts for charges (under the new law), whereas under the old law except these three cases, depending on the value of the dispute, the composition of the court is determine (individual judge or court).

As known, the parties in civil proceedings are claimant and the defendant. Claimant is the person (natural or legal) who claims that a subjective right has been violated that it recognizes as the objective right, while the defendant is the person (natural or legal) against who the subjective claims is directed.

The dispute procedure is initiated through a civil lawsuit which is filed by the claimant in a court of competent jurisdiction. In order to act on it, the file must be compiled in compliance with legal provisions.[1]

1 Article 253 par.1 of the Law on Contested Procedure No. 03/L-006, dated 30 June 2008 is promulgated by the Decree No. DL-045-2008, dated 29 July 2008, issued by the President of the Republic of Kosovo. The Law entered into force 15 days after publication in the Official Gazette.

Looking from this aspect, the lawsuit presents a formal legal act, since the law defines its constituent elements.

The formal elements if the lawsuit includes the value of the object of dispute,[2] which also must be determined by the claimant in the lawsuit filed in court. The fact is incontestable that every lawsuit must have the value of dispute, but the question is raised if the "claimant is free in determining the value". If legal provisions are carefully read and analyzed that regulate legal issues, it derives that the freedom of claimant is limited, so upon determining the value he is subject to legal restrictions which means that the claimant can only act within the legal space permitted. In this regard, and depending on what is the object of dispute, the claimant's freedom is completely or partially restricted.

Below we will analyze the legal provisions regulating the legal and civil issues starting with the essence of the provision:

1) Value represents the value object to dispute the main application.

This legal provision represents the first restriction to claimants that consists in the fact that the value of the disputed facility is the one from main request.[3] This means that if the claimant has requested to approve the claim in the value of 1.000 € (thousand euros) as main request and besides the main request he has submitted and accessory request for payment of interest on the amount of 3% annually and procedural costs in the amount of 200 €. Request of claimants in the amount of € 1000 will be presented as disputed facility, which means that the disputed value does not include accessory requests their amounts (interest, procedural costs, fines and contracted, etc).[4]

From this stems the fact that when we deal with requests in the amount of money, the main demand in the money represents the value of the disputed facility.

2 Ibid. Article 253, par. 1, item (d).
3 Ibid. Article 30, par. 1.
4 Ibid, Article 30, par.2.

Claim of the claimant presented money can be expressed in various forms, such as future profits that are repeated and for this form the legislator has determined how to determine the value of the disputed facility. So if we have to do with future profits that are repeated, the value of the disputed facility is calculated according to the total amount of profits but not more than the total of profits for the period longer than five years.[5] For example, if we have to do with the claim to receive the income support as monthly amount of 100 € value, the disputed facility would represent the sum of these claims that yearly would be € 1200. So in total these amounts can be collected up to a maximum of 5 years.

Claimant with a lawsuit against the defendant can only submit a claim, or two or more claims. If we are dealing with a claim, situation is clear as the main claim value represents the value of the disputed facility, but how to determine the value of disputed facility when there are more claims against the defendant. Even on this issue the legislator has clearly defined the rule under which, if the claim against the defendant includes several claims that have a same factual and legal basis, the value of the disputed facility is set by summing the values of all claims.[6] For example, when the defendant is a security company and claim is related to several claims for material and moral compensation which are based on the same factual and legal basis (traffic accident), then the total claim of an lawsuit against the defendants will present value of the disputed facility.

On contrary if the demands in the claim are with several bases or against several defendants, the value of the disputed facility is determined according to the amount of each individual claim.[7] For example, when three physical persons are defendants and claim against the persona is € 1000, € 2000 against person B, € 3000 against person C , then the value of the object of dispute against persons A, B and C will be determined separately according to the amounts than the requirements specified earlier.

5 Ibid, Article 31.
6 Ibid, Article 32, par. 1.
7 Ibid, Article 32, par. 2.

The object of dispute in the proceedings may be daily pay, lease, use residence or working space, and legislator took care of these disputes too. If the dispute is related to a daily-pay or lease or use of residence or working space, the value of the dispute is calculated based on the annual amount of the daily-pay or lease, except when the daily-pay or lease relation is for a shorter contracted period.[8] For example, if we have a contractual relation to rent for a term of two years in amounts of 200 € monthly, value of disputed facility would represent the sum of € 2400 if the claimant files the claim after one year from the date of arriving of the claim of rent since this amount represents the amount of debt a year on behalf of the rental.

2) When the claimant claim is not expressed directly in money

Claimant claim is not always expressed in money which is confirmed by judicial practice, but the claimant may request on the claim filed to the Court that instead of fulfilling the claim, he agrees to pay the amount specified in the money. In other cases where the claim is not monetary related, the decisive amount shall be the amount that was set by the claimant in his or her claim,[9] It would seem so practical example if the claimant has requested the defendant to submit his vehicle type Golf 2 with registration table 211 - KS-211, but instead accepts the amount of € 2000.00 to be paid in cash, and this amount represents the value of the disputed facility.

3) When claimant's claim is not related to money, but requirements of different nature

It is not excluded the possibility that the claimant shall seek legal protection from the Court concerning the granting of security for any claim or to establish the right of mortgage. In these cases the value of the disputed facility will be determined by the amount of demand that should be secured.[10]

8 Ibid, Article 33, par. 1.
9 Ibid, Article 35, par. 1.
10 Ibid, Article 34, par. 1

4) When claim of the claimant is directly or indirectly not expressed in monetary value

There are types of disputes where claim of the claimant is not expressed in money. The question is raised on how to determine the value of the disputed facility. Even these types of disputes must have a certain value which must also be set by the claimant.[11] Nevertheless, does claimant have the absolute freedom to determine the value of the dispute in these types of disputes? If you carefully read and analyze legal provisions regulating this issue, claimant's freedom is limited and it should depend largely on the court and defendant who could have an active role. Thus if the claimant has not emphasized the value of the disputed facility of presented too high or too low value, then the court ex officio or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter but before the start of the principal proceeding, promptly and appropriately determine or verify accurately the value claimed by the claimant. In such a case, the decision of the court is not subject to appeal.[12] This means that in determining the value of dispute facility in this way, namely when the claimant does not specify the value of the dispute, defines a very high or very low value, the court must act ex officio, on the contrary the provisions of procedure would be violated. How will this process take place in procedural terms, firstly there is no disputed value presented by the claimant, and if the claimant submits it to the court that the court will under regular legal procedure, but if the claimant submits too high or too low value ex officio court must act requiring the claimant to it to increase or lower it. If the claimant does not obey, the court will take decision to determine the value of the disputed facility against which no appeal is allowed. Regarding these issues the defendant may also present turndown. But the court actions that would be ex officio or according to objections of the party, are limited in time, so they can be taken at the latest by the preparatory session, or until review session but prior to the beginning of review. In these cases, and under these circumstances if the court does not act ex officio or according to

11 Ibid, Article 35, par. 2.
12 Ibid, Article 36.

timely filed objections, defendant violates procedural provisions. If the defendant prepares the objection after the deadlines noted previously, the court is not obliged to act and therefore there cannot be such a violation regarding the value of the disputed facility.

In the context of this legal analysis, it would be very useful and reasonable to verify the fact whether courts of Kosovo implement these legal provisions which refer to setting the value of the disputed facility. We may be certain, but we are very skeptical regarding their implementation. However to reach to a correct conclusion regarding this issue, it will be good to do a practical research which hopefully will be undertaken in meantime.

Mr.sc.Shaban SHALA

NEW LAW ON ADMINISTRATIVE PROCEDURE, RELATION WITH THE PREVIOUS LAW AND CHALLENGES OF ITS IMPLEMENTATION

The Law on Administrative Procedure 02/L-28, was approved by the Assembly of Kosovo on 22 July 2005 and was promulgated by the Special Representative of the Secretary General[1] (hereinafter: SRSG) through UNMIK Regulation. Given the transitional provision under this law, specifically Article 143 which stipulates that the law enters into force 6 months after the date of promulgation by the SRSG, it results that the Law is into force since 06 November 2006. But the question is if before entering into force of this law, whether Kosovo had a law which regulated the administrative procedure. Knowing the fact that Kosovo has been a constituent unit of the former Yugoslav Federation and procedural issues have been regulated in a unique way for the whole territory of the federation, since the federation had exclusive authority for such issues, it results that before the entry into force of this law in Kosovo and during the period of autonomy, the Law on General Administrative Procedure was in force.[2]

For the purpose of comparing the new law on administrative procedure with the applicable law, we will briefly present their content by

1 UNMIK Regulation No. 2006/33, dated 05 May 2006.
2 UNMIK Regulation No. 1999/24 on Applicable Law in Kosovo.

placing emphasis on issues which are not regulated at all or are regulated differently.

Initially it should be noted that the two laws contain principles, but the number of principles in the new law is much smaller in relation to the applicable law, despite the fact that in the new law there are certain principles which are completely new e.g, the principle of balancing public interests with the private one, the principle of proportionality, etc.

The new law in relation to the applicable law does not contain any provision regarding the parties and their representation, but only refers to the fact that in regard to the representation, the rules of civil law apply.

It should be noted also that the two laws regulate the issue of the use of legal remedies, and while the new law provides for the use of request for reconsideration and appeal as regular legal remedies, the applicable law has defined clearly the complaint as the only regular legal remedy.

The new law in relation to the applicable law does not contain at all provisions on procedural expenses and the use of extraordinary legal remedies which under the law applicable are allowed, but they are also enumerated.

Also there is a difference regarding the execution of decisions, with the new law referring to the execution only as an issue, while the applicable law has regulated in detail the procedure and forms of execution.

When looked in its entirety, the new law on administrative procedure contains in total 143 articles, which means that in relation to the applicable law is less because it contains a total of 301 articles. The number of legal provisions in a law does not represent a guarantee that a law is comprehensive and qualitative, but in cases such as this one it tells that it might be incomplete when compared in numbers and having in mind that here we have to do with systemic issues

such as the uniform arrangement of implementing the administrative procedure.

In the following we will briefly elaborate the issues which we presented as different and which deserve clarification.

As for the principles which provide the basis for regulating the activity of the parties and the body that conducts administrative procedure there is a pronounced change in terms of their numbers and innovation. We would emphasize as an advantage of the new law the fact of existence of new principles such as: the principle of balancing public and private interests which implies that public and private persons are equal before the public administration body, the principle of proportionality where during the conduct of public administration procedure, the public administration body must use means that are proportionate to the realization of the goal. While as shortcomings of this law we would emphasize the lack of some very important principles such as: the principle of hearing of the parties, the principle of free evaluation of evidence, etc.

Regarding the parties and their representation, the new law contains a single provision: *"Capacity to start an administrative proceeding or to participate in it, as well as the rules governing the representation are set out in accordance with the provisions of civil rights on eligibility of natural and legal persons."*[3] We consider that this situation represents a deficiency be it from the fact the situation is only regulated partially or due to the fact that legal-administrative issues differ significantly from legal-civil issues and therefore seen by this aspect the position of parties and other participants in the proceedings are different. In this regard, it should be noted that the applicable law has widely and in detail regulated duties and responsibilities of the parties and the body which conducts the procedure, which fact we consider represents an advantage of this law.

Although the two laws foresee the institute of appeal, they do regulate this institute differently, so while the new law recognizes the

3 Article 35 par.2 of the Law on Administrative Procedure, No. 02/L-28.

institution of administrative appeal which includes the request for reconsideration and appeal, the applicable law has determined the complaint as the sole regular legal remedy against which the second instance decides. This way of regulation under the new law may be an advantage since the decided issues can be expeditiously reviewed by the body which has decided, but also can be a deficiency since the body to decide on appeal is the same that decided in first instance (for the reconsideration requests) which could be possibly manifested by a rigid position of administrative bodies. How will this develop remains to be seen, and this will be proved through the legal practice.

A defect of the new law is the fact that it does not contain a special chapter on procedural expenses as it is the case with any systemic procedural law, but it does not contain a single provision which regulates the issue. As known, in conduct of any legal proceedings in general, administrative procedures in this regard is not an exception where the body which conducts proceedings and the parties undertake certain actions in order to resolve the issue based on merits, so procedural expenses arise which are determined in principle when deciding on administrative issues based on merits and which obliges the party who lost the claim or who caused them. In one way or another integral part of any administrative procedures are the procedural expenses, and therefore non-regulation of legal expenses makes this law with serious deficiencies and respectively not functional. On the other hand, the applicable law has a special chapter which has regulated in detail the procedural issue. Also, regarding attack against the decision which in administrative procedure has taken the plenipotentiary form the new law does not recognize at all the institute of the use of extraordinary legal remedies, while the applicable law not only recognizes this institute, but has clearly defined their number and type and has determined the conditions and circumstances under which they can be submitted.

Also in regard to the execution of the decision which has taken the plenipotentiary form in administrative procedure there is a contrast, and while the new law on administrative procedure regulates the execution of decisions only partially without providing any answer

on ways of execution which may be administrative and non-administrative (monetary), the issue is regulated in detail by the applicable law under which the administrative issues which have the administrative character are executed by the body that decided in the first instance, while administrative issues related to monetary obligations are executed by the competent court.

In the issues we presented above we have presented the issues that are important and present serious challenges to its implementation. In order to be more convincing and argumentative we will present the example of two countries: the Republic of Croatia and Bosnia and Herzegovina on how these states acted during the transition period in regard to the Law on General Administrative Procedure of the former Yugoslav Federation.

As known, these two states have been two of the six constituent units of the former Yugoslav Federation. In these units of the former federal territory, now independent countries, unique systemic procedural laws were applied (federalist), so in this direction it was also applied the former Law on General Administrative Procedure. But after the independence process and consolidation of independent states the two countries have almost completely incorporated integral text of the former common law with some cleaning in terms of self-government and federalist elements. After these interventions in the form of cleaning, they have adopted them as special laws which are today in force.[4] This should not be looked at or understood as nostalgia for the past or to be associated with something else irrational, but eventually be seen as a good and pragmatic legal solution. Not only because the former Yugoslavia has been a common state and all units took part in legislative process, including Kosovo, which means that in political terms if there is certain legitimacy if we may say so, but simply for of pure legal and practical reasons. What makes such a decision a good decision and what may have been the motives that prompted both countries to acquire a former common law, it is quite sure that there were no political motive behind this having in mind the fact what all these countries suffered in this for-

4 See: The Law on General Administrative Procedure of the Republic of Croatia and Bosnia and Herzegovina.

mer common creature, but be strongly believe that pure legal and practical issues were behind. Perhaps the Republic of Kosovo should have also followed such a path having in mind pure legal and practical reasons with some of them presented below:

The fact that we have to do with a substantive and qualitative systemic law;

Its implementation for a period of time in Kosovo yielded a rich practice;

Implementation of this law by state authorities has influenced on the one hand to create a minimum standardization at least in its implementation and recognition from citizens on the other;

Taking into consideration what was previously mentioned, the implementation of this law would present a serious challenge to the administrative bodies in Kosovo on the one hand and the realization of the rights of citizens on the other side, since the first contact citizens have with the state is with administrative bodies. This challenge becomes even more challenging taking into account that in this law has a legal terminology which to an extent is in contradiction with standardized procedural terminology used in Kosovo.

However it remains to be seen how this law will be reflected in practice, but it will probably cause headache (dilemma) for its implementers and probably will produce consequences for citizens.

Valon TOTAJ

(PRE) MARITAL CONTRACTS

First, the object of the law of marriage (as subsidiaries of family law) consists of relations of personal nature. These are relationships which are regulated by imperative legal norms, such as conditions for marriage, the causes of invalidity of marriage, rights and duties of the marital couple, the reasons for dismissal or the divorce, etc.. No doubt that personal marital relationships are primary. But the subject of matrimonial law are the property relations that flow from marriage. Property relations are derived from personal relationships thus considered as secondary. And these relations are regulated by law and are in function of realizing better personal relationships.

In connection with the legal nature of marriage, there are two theories: first, that marriage is a civil contract and second, that marriage is a legal institution. Under the first theory, marriage is a civil contract specific character. This concept has its roots in Roman law, as has been enshrined in legislation of the church (Codex iuris kanonici) and is sanctioned in this days in sharia law. The second theory, called the marriage a legal institution. Accordingly, the marriage creates legal status of husband and wife, thus creating a family.

The totality of legal norms which regulate relations with the couple's marital property is called marital property regime. The results

of various historical legal research and legal-comparative research show that in different periods of social development have existed different regimes of marital property. This regime has largely been dictated by the position which the woman had in society. However, looking in general, there are three types of matrimonial property regime: the common property regime, of the particular property and mixed property regime. On the basis of legal solutions that are envisaged in some countries of the region (Albania, Macedonia, Croatia, Serbia, Montenegro, Vojvodina, etc..) solution of which has provided some specifics of the Family Law of Kosovo (2004), the regime of joint marital property regime is not legally binding, because now wedded couple is enabled that based on their desire and needs to regulate the relations of their property, simply by concluding a contract. Historically, the way of regulating property relations of wedded couple has evolved from the transfer of property by women to husband's property, then the division of women's property to which husband was governing, to the common property of spouses.

Upon entry into force of the Family Law of Kosovo (nr.2004/32), the possibility was created that the couple, with undertaking of legal work (link agreement - contract) to regulate property relations of marriage in accordance with the way that it is convenient for their needs and interests. This means the current property as well as future property which they can earn or expect to win. Among the many agreements, which the couple can enter into such as the donation contract, the contract on trading, etc.., no doubt that the pre marital contract that regulates property relations of marriage, represents one of the most important contracts. General legal basis for the conclusion of this contract stems from Article 276 of the Family Law of Kosovo (FLK), under which "members of the family can mutually regulate marital relations with contract". Under this law, spouses respectively the couple, can adjust their relations with marital property agreement - contract, through which they "form" a property regime based on their will. With this contract they (spouses) can evade the whole regime of joint property ownership, may extend it to all their wealth in the current or future, etc.. However, the with the pre marital con-

tract the spouses cannot adjust their actions (effects) of personal property of marriage, through which the interests of spouses party which is economically weaker than the other party is protected (i.e., removal of the right to support will not generate any legal effect).

Pre marital contract is effective if it is entered into in free will and by persons with full action capacity. This contract is the solemn form, shall be entered in writing and must be certified by the judge, who is obliged before confirmation, the read the contract and warn that with the signing of this contract the regime of joint marital property is excluded. In this way it ensures that the couple is aware of the content, understands the effects and consequences of signing this contract. In legal systems in which there is the institution of the notary, the contracts are certified before notary. The pre marital contract is considered agreed before marriage, but it does not begin to produce legal effects before marriage. Pre marital contract that as its object has the real estate is registered in public books (records) on property rights.

Property disputes between (former) spouses sharing the common property are complex and highly sensitive. Therefore, the connection of this contract pretty much simplifies the work of the court but also the possible judicial parties, because what should be proven in judicial proceedings, is already regulated by contract. In these cases we fully apply the provisions of the contract on the division of joint property. Therefore, this regulates better and more comprehensively the relations on property of spouses, and spouses legal protection in judicial proceedings is made faster and more efficient. In one word, that (wealth) that spouses have owned before marriage, what they have independently acquired during marriage, or who have received donated or they have inherited, do not need to share through court proceedings, because all these are regulated by contract.

Pre marital contract is optional and if the spouses, respectively the couple do not enter into the institution (through the connection of

this contract), in their reports the legal regime of property of spouses is applied.

Practical aspect of the Pre marital contract

Spouses (future) who decide to enter into Pre marital contract must take into account the following circumstances:

- Marital contract may be entered before and during marriage;
- With this current contract is regulated property of the spouses or property which they can earn in the future;
- Marriage contract must be in written form;
- Marriage contract should contain all the contracting parties with notes on their identification (names, addresses, etc.);
- In order to produce legal effects, this contract must be certified by a competent court (municipal);
- Procedure for confirmation of this contract is initiated in a way that office for the receipt of a competent court docu - ments submitted proposal for the certification of the content of marriage contract, which is attached to the copy of the text of the contract;
- Referent in the admission office accepts the proposal, enters it in the relevant protocol, after which this course takes a special number;
- At the invitation of the court, the parties spouses must appear before the court, in which case the judge concerned, as did the identification of parties, in the presence of a witness staged reading of the contract by notifying the parties (contractual) spouses that with the signing of this contract they excluded the common property regime of spouses;
- During this procedure the judge cares about is the fact that a signed contract with the free will of spouses;
- For all procedural actions taken by the judge who drafted the minutes is attached a copy of the contract, while the original contract also noted the number of protocol, which the certification procedure of this contract before the court ends;

- Contracts for marriage which has its own object and immovable property, registered in the books (records) on the rights in real estate.

Instead of conclusion

Pre marital contract is a contract by which spouses, future spouses, respectively, independently determine the marital property regime. With entering into this contract spouses independently and with the agreement regulate their relationship in regard to marital property. Binding of this contract, in no way expresses (nor should) distrust of spouses to each other but through it is intended to eliminate the disputes about what that "what is of whom".

The question is that whether this contract prevents a divorce and whether the appearance of such contract has reduced the number of divorces?

Binding of this contract does not preclude divorce nor could result in reducing the number of divorce. According to Milena Milanovic "marriage, as one of the most important institutions of society, is being destroyed more and more. I do not know what will save him would not even know this for a long time. The fact is incontestable that the feminist movement has positively influenced the realization of the rights of women, but maybe just maybe, this movement has influenced the increase in the number of divorce, because now the woman has become more aware, more economically independent and less willing to compromise ... "ends this lawyer known that his whole career has been dealing with marital problems.

How ironically, it must be said that the pre marital contract, in some way facilitates divorce. However, in disputes of this nature, should not be denied the introduction of a factor that will facilitate and accelerate the judicial process of divorce.


Valon TOTAJ & Arsim HAMZAJ

DIVORCE IN KOSOVO

After the 1999 war, Kosovo is faced with problems of different nature. This period is characterized by of major changes of the psychological and socio - economic nature, which were and remain serious challenge for citizens of the Republic of Kosovo. Problems and disorders of different social nature, which among them are disturbed family relations, which in some cases also follow the collapse of marriage, respectively divorce.

According to UNMIK Regulation nr.1999/24, Special Representative of the Secretary General of the United Nations in Kosovo, in the field of family relationships, until the 16 February 2006 has been in force Law on Marriage and Family Relations of Kosovo (LMFRK) of 1984. After this date entered into force the new law - the Family Law of Kosovo. It is considered as the fundamental law (basic source). There are some laws that are considered as additional sources of family law, which, inter alia, regulate some family relationships such as: Law Birth Books (Nr.2004/46, 2004), Law on Heritage of Kosovo (2004) , Law on Contested Procedure (2008), Code of Criminal Procedure of Kosovo (2004), Law on Administrative Procedure (2006), Law on executive procedure (2008), Regulation on protection against domestic violence (2003/12), etc.. As sources of family law are also various international acts such as the United Nations Charter (1945),

Universal Declaration of Human Rights (1948), International Covenant United Nations Economic Rights, Social and Cultural Rights (1966), United Nations Declaration on Suprimimin of Discrimination against Women (1967), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention on consent to marriage, minimum age for marriage and registration link marriage (1962), Convention on the Citizenship of Married Women (1957), Convention for the Protection of motherhood (1952), Convention on the Rights of the Child (1989), etc..

Family Law of Kosovo, which entered into force on 16.2.2006, regulates marriage and family relations and provides a legal act which almost fully codified in Family Law. The law in question is divided into 8 (eight) parts and contains in itself a total of 355 articles.

The freedom to marry is usually accompanied on the freedom of its dissolution. According to the laws in force in the Republic of Kosovo, to resolve the marriage, the District Courts are competent. Currently, in Kosovo function 5 (five) district courts: Pristina, Prizren, Peja, Mitrovica and Gnjilane.

Marriage is dissolved (ends) with: the death of one spouse, declaration of one spouse as missing, with divorce and annulment. Not all state legal systems allow divorce (as valid marriage settlement). So we recognize: legal systems that prohibit divorce, legal systems which allow divorce, legal systems which consider divorce as a sanction, legal systems where the divorce is considered legal remedy and combined systems.

The divorce of marriage means dissolution of valid marriage, with judgment of a competent court in legal proceedings and, for reasons provided by law. Normally the marriage that is invalid is not resolved but it is canceled. Causes of divorce are due to the circumstances which may be required dissolution of marriage, and which arise after marriage. Causes may be general or specific, absolute and relative reasons, reasons for which the right to sue is obtained after the deadline and those for which this right is not connected with the term, the hidden causes or open causes, and the reasons for the marriage set-

tlement to which the right of submission of the lawsuit is lost after the deadline and the reasons for which the right of submission of the indictment did not lose after the deadline.

- *General causes of divorce,* are circumstances formulated in a general way, in the framework of which may be included all or a large part of the specific reasons (disagreement characters, permanent differences, etc.). Special causes of divorce must be defined in precise and be named (breach of loyalty spouses, serious abuse, leaving intentioned and unreasonable, etc.).

- *Absolute causes of divorce,* are those which in itself seize evidence, circumstances or other situations as provided by law, whose presence is due to the issuance of verdict for divorce of marriage (breach of loyalty, criminal acts against a spouse, etc.). Relative causes of divorce, exist only when set of facts, circumstances or other situations may affect the establish ment of such relations between spouses parties, which have relations to the community due to the collapse of marriage, which also will miss the goal main marriage (non compatibility of characters, different approach, etc.).

- *Causes for which the right to sue after the deadline is gained,* are those reasons because of which the suit (or proposal) cannot be submitted before the deadline is set to pass. This lawsuit for divorce may not submitted by neither spouse during preg nancy and until their child reaches one year. The reasons for which the right to sue is not connected with the term, are numerous in practice. In these cases the right for filing the lawsuit arises with the introduction of the cause. In this group of causes include: breach of loyalty spouses, criminal acts against the spouse, leaving with no reason intentioned, etc..

- *Open causes of divorce,* are those which are presented in a "natural" and as such cannot put a burden on either party spouses (Inconsistency of characters, different approach, etc..). Hidden causes are those causes which are presented as a result of the behavior of spouses parties, and which are contrary to law (abuse, etc..).

- Causes for resolution of marriage to which the right of submission of the lawsuit is lost

After the expiration of the term, are those reasons for which the law is foreseen that loses the right to initiate the procedure is that it is not made within a specified period, during which (term) side has understood the fact concerned. These are causes relative and their foundation is guilty as subjective element (adultery, leaving intentioned, etc.). Causes for resolution of marriage rights for which the submission is never lost, exist in all other cases when the right of submission of the indictment is not about time. These are objective reasons to nature (maltreatment, consequent neglect, etc.).

In addition to lawsuits, spouses may seek resolution of marriage with the agreement. Depending on whether the spouses have children or not, marriage can be resolved (divorced) in two ways: solution of marriage with spouses joint proposal and divorce by agreement of the spouses. The first case relates to settlement of marriage between spouses who have children, while the second with spouses who do not have a child. We want to stress that in the second case, in addition to agreement on divorce, spouses are obliged to attach to this agreement in writing proposal for the care, education and nutrition of children, which not necessarily obligates the court. Also with this agreement the organization of personal contacts of both spouses with their children in the future is regulated.

The right to divorce is only for spouses and not for their heirs. Eventually, only the heirs may continue the procedure already existing but not to initiate it. Also, to quell an actual community or a extra marital community does not require official legal action.

Divorce procedure is a separate and specific procedure, so as such it includes in itself some principles that characterize it as. These principles are: the principle of special protection to certain categories of persons in the proceedings, the principle of exclusion of the public, the principle of restricting access to the object of dispute, etc.. The procedure is developed in two phases: phase attempt for reconciliation of spouses and the judicial review stage. Otherwise in marital

disputes a judgment cannot be issued due to non presence or based on acceptance. For the marital disputes, the bases of appeal are the same as in civil proceedings. Exception are the divorce cases of joint proposal by spouses on divorce and the divorce by agreement of the spouses, where the verdict which resolved only marriage could be appealed because of: substantial violations of provisions of civil procedure and because the proposal is given in mistake of fact or under the influence of coercion, or deception. If marriage is resolved or canceled the final verdict, the decision to divorce, respectively for annulment of marriage, cannot be appealed with extraordinary legal remedies.

Based on the project "Monitoring of the district courts and social welfare centers, in divorce cases" carried out by associations of lawyers "Norma", it appears that the number of divorces in the Republic of Kosovo is growing almost permanently. Data includes the period of 2000-2004 years. So while in 2001, there were 15327 marriages, 1363 of them have ended with divorce (including those related to earlier), in 2003 out of 15985marriages, 2261 divorces were recorded (including previous marriages).

In 2003, the joint proposal of the spouses for divorce (the marriage proposal to resolve by agreement the spouses) were initiated in 1385 cases, or 65.30% of cases, lawsuits have been initiated in 736 cases or 34.70% of cases. Of these 344 cases, or 46.74% of the cases were initiated by the wife, while 392 cases, or 53.26% of the cases were initiated by the husband. Also this year, from 2121 subjects committed to divorce, in 1363 cases, or 64.26% of cases spouses had children, and in 758 cases, or 35.74% of cases the spouses had no children.

In 2003 of 1363 cases of divorce, where spouses have had children, in 682 cases, or 50.03% of cases children are entrusted to mother, and in 681 subjects, or 49.97% of cases children were entrusted to the father. In this year, 55% of divorced spouses were from rural areas, while 45% urban. Age of the youngest spouse was 18 years old while of the oldest was 84 years.

Violeta HUSAJ-RUGOVA

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WITH PARTICULAR EMPHASIS ON ARTICLE 5

Background

European Convention on Human Rights and Fundamental Freedoms is an international treaty, aiming respect for human rights and fundamental freedoms. It was adopted in Rome on 4 November 1950, becoming the cornerstone of the Council of Europe. Its basic text amended and supplemented by 13 protocols was successively adopted in the period from 1952 until 1994.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) determines the human rights and fundamental freedoms of people in Europe as well as control mechanisms for their protection.

European Countries, Council of Europe member states and signatories of the Convention for Protection of Human Rights and Fundamental Freedoms and Protocols to the Convention are obliged to enable enjoyment of human and fundamental freedoms for all those who are under their jurisdiction. These countries are also obliged to enable their citizens, other groups and individuals, as well

as foreigners staying in their territory to have unhindered access to European Court of Human Rights in Strasbourg, if they consider that their freedoms and rights are abused by public authorities of the state concerned.

The Convention has 59 Articles and 13 Protocols. Protocols 1, 4, 6, 7 and 12 are additional protocols (they have increased guaranteed rights), while other protocols are amendments.

The Convention is composed of 3 parts in total. The first part provides for the rights and freedoms, the second half provides for the provisions concerning the European Court of Human Rights, while the third part includes various provisions of supplementary character.

Guaranteed rights

The Article one (1) provides that Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the. The obligation applies to all persons within the jurisdiction of the state, regardless of citizenship. The first part of the Convention defines 12 rights:

- The right to life (Article 2),
- Prohibition of torture and inhuman treatment (Article 3),
- Prohibition of slavery and forced labour (Article 4),
- Right to liberty and security (Article 5),
- The right to a fair trial and within a reasonable time (Article 6),
- Protection from the retroactive effect in criminal law (Article 7),
- The right to respect private and family life, home and correspondence (Article 8),
- Freedom of thought, conscience and religion (Article 9),
- Freedom of expression (Article 10),
- Free of assembly and association (Article 11),
- The right to marriage and family placement (Article 12) and
- The right to effective means if someone's right has been violated (Article 13).

State cannot restrict rights and fundamental freedoms, more than provided in the European Convention, but may provide in domestic

legislation effective guarantee for the rights and fundamental freedoms.

The Convention also provides some other rights that are set out in its additional protocols, respectively in protocol 1, 4, 6, 7 and 12. As we said above protocols that provide and add additional protocols are called Additional Protocols.

Protocol number 1 increases the three other rights:

- The right to property (Article 1),
- The right of parents to provide education for their children, in conformity with their religious and philosophical beliefs (Article 2) and
- The right to free elections (Article 3

Protocol number 4 adds four other rights:

- Protection from prison because of debts (Article 1),
- Freedom of movement and choice of residence (Article 2),
- Protection from exile and the right to enter the country where that person has citizenship (Article 3) and
- Prohibition of collective expulsion of aliens (Article 4).

Protocol number 6 also adds another right:

- Prohibition of the death penalty during the peacetime (Article 1).

Protocol number 7 also adds five other rights:

- The right of a foreigner not to leave the country without judicial process (Section 1),
- The right to appeal for criminal cases (Article 2),
- The right to compensation for non-legal proceedings (Article 3),
- Immunity from persecution of the same offense twice (Article 4) and
- Equality of rights and responsibilities of spouses in terms of private law character between them and their relation with their children (Article).

Protocol number 12 adds another right:

- General Prohibition of discrimination (Article 1).

In addition to submitting to a catalogue of rights and freedoms, the Convention establishes a mechanism for implementation of obligations undertaken by contracting states. This responsibility was entrusted, only to the European Court of Human Rights (established in 1959) and the Committee of Ministers of the Council of Europe, consisting of Ministers of Foreign Affairs of member States or their representatives.

Article 5 of ECHR Right to Freedom and Personal Safety

Article 5 of the ECHR is a fundamental element for the protection of human rights of an individual. Personal freedom is basic condition for the enjoyment of other rights, such as law and respect for private and family life, freedom of movement, etc.. Therefore, judges of the Member States in the exercise of their functions should bear in mind that any deprivation of liberty must be placed in certain circumstances, be justified in an objective and not last more than is necessary.

This article deals with the protection of physical liberty, especially the protection of liberty by arrest or detention. This section also guaranteed the right to be informed immediately upon arrest, the right to appear before court as soon as possible, and right in the procedure prescribed by law.

Article 5, paragraph 1 provides that everyone has the right to freedom and personal security, and can be deprived of those rights only in following cases:

> *"When legally imprisoned after a conviction rendered by a competent court";*
>
> *"When legally arrested or imprisoned for failing to observe the order given by a court in accordance with the law or to ensure the fulfillment of an obligation provided for by law"*

"When arrested and detained to be brought before the competent judicial authority, when there is credible reason to suspect that he has committed a criminal act or when there are reasonable reasons to believe that it is necessary to prevent conduct a criminal offense or to leave after its commission "

"When a minor lawfully detained for the purpose of supervised education, or his legal prohibition, in order to put before the competent legal authority"

"When individuals legally prohibited to prevent the spread of infectious diseases of mentally ill persons, alcoholics, drug addicts or stray,

"When a person lawfully arrested or detained, in order to prevent its unauthorized entry into that country, or a person against whom is being conducted a deportation or extradition proceedings". .

Article 5 par. 1 of the Convention provides for the presumption that everyone initially has the right to liberty and personal security and nobody can be deprived of those rights, save in the following cases and in accordance with a procedure prescribed by law, and then determines in cases when you can deny or limit freedom to a person; which means that this section has 6 exceptions (allowing the removal of freedom under certain conditions). Points a, b, c have to do with the arrest on civil and criminal matters, point d is related to detention of minors, the point e detention in non-contested procedure, while point f has to do with detention of foreign nationals.

In this paragraph it is provided that deprivation of liberty of one person can be done in case of commission of criminal offense and in order to prevent the person to carry out any other criminal offence. To arrest or detain a person is necessary for him to have committed a criminal offense contemplated by the legislation of the country where offence is performed. Besides this condition, there should also be a requirement for a reasonable doubt for committing a criminal act.

The existence of reasonable suspicion that the person arrested has committed a criminal offense is a necessary condition (sine qua non) in order for detention of the person to be in accordance with law.

With reasonable suspicion in terms of Article 5 par. 1 point c we must understand that deprivation or restriction of personal liberty of a person will be done in case there are strong grounds for that. Strasbourg Court has emphasized that suspicion is considered reasonable, if based on facts and information that create the conviction that there is an objective connection between the suspected and criminal act for which a person is charged. So there must be sufficient evidence to establish the belief that the person committed the offense alleged and deprivation of liberty of person should not be based on feelings, instincts or prejudices that respective judge deciding the issue may have.

Article 5, paragraphs 2 and 3 provide that:

2. Any person arrested must be informed within the shortest and in a language he understands, for reasons of his arrest in connection with any allegation made against him.

3. Any person arrested or detained in circumstances set forth in paragraph 1 / c of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial functions and has the right to be tried within a reasonable to release the above trial. The release may be conditioned by guarantees to appear before the court.

In this case, the Convention provides an assurance, that any person whose freedom has been taken away must be presented before a judge or other authority authorized by law. The function of the competent legal authority is to determine whether measures of detention should be continued and if so, for how long. It is also necessary that overall length of deprivation of liberty before trial of a criminal offense is not exceeded.

Term "within a short period" used by Article 5 para. 3 is an important standard of respect for personal freedom of individuals. The

Convention does not specifically provide for a maximum period to bring the detainee before a judicial authority but said the term within a short period. European Court of Human Rights has indicated in several cases, what should be the deadline to send the person before a judicial authority. Also the effect of the decision of judicial authority under Article 5 par. 3 is to ensure the appearance of the person alleged in court and detention measures in prison is only imposed when judges create the belief that other measures are inadequate.

The court in its jurisprudence has emphasized that there are these reasons to be considered by the judicial authority to determine the extent of detention which are: the risk of leaving, the risk of interference in the justice process and the need to prevent further consequences of a criminal offense.

Finally, the judge must be independent and impartial in the case of deciding on the legality but also on the necessity of holding in custody. He must have proper authority to do so and its decisions must be binding and contain sufficient reasons to justify the factual and legal holding in custody.

Article 5, paragraph 4 provides:

Habeas Corpus

4. "Every person whose liberty was taken away with arrest or imprisonment, has the right to appeal the court order the latter to decide, within a short period, the legality of his detention and order release, if the detention is unlawful ".

With this provision the detained person is given an opportunity to challenge the legality of detention. The detainee, can present the complaint to determine the legality of detention at any stage of proceedings, and at any time when he thinks he is detained without basis.

But with paragraph 5 of Article 5 of the Convention the right person to seek compensation for any case where he claims to have violated

any right guaranteed is set. This compensation is determined by the European Court for Human Rights, which is different from case to case. First such court determines that a violation has occurred, then the state which has breached the sentence determines an amount of money, which that State is obliged to pay to the injured party as compensation, the obligation to which member states undertake the occasion of signing the Convention and accession to the Council of Europe.

In case of contempt of decisions of the European Court of Human Rights by a member state there cannot be any sanction other than the possibility of exclusion of that country by the Council of Europe.

From what was said above, the Convention (ECHR) provides a *"Pan European Constitution" which obliges member states of the Council of Europe for their legislation to comply with the Convention, and in case of discrepancy, the Convention may find application directly relevant to the state of that law until the harmonization with the Convention. All this is done in order to achieve maximum and effectively respect the rights and fundamental* freedoms that belong to every human being regardless of race, nation, religion, language. Therefore, member states of the Council of Europe also signatories of the Convention, can guarantee to its citizens more rights and freedoms than those foreseen in the convention, but the restrictions of the rights and fundamental freedoms cannot exceed the limits foreseen by the Convention.