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Dear readers,

It is with great pleasure? that I address you through this legal journal, the publication of which has now become a tradition of every generation for judges and prosecutors, occupying an important place in the array of legal literature and publications of KJI.

This journal contains the papers of judges and prosecutors candidates who are attending the KJI Initial Training. The journal covers various topics treating different legal institutes, aspects of local and international legislation as well as issues of legal practice.

The purpose of this legal journal, in addition to building the skills of candidates in the area of research and legal drafting, is to provide professional support to young jurists, judges, prosecutors and other legal practitioners in Kosovo and beyond.

The journal Justicia is printed by every generation of the candidates of the Initial Training Programme and this is the fifth (5) edition. The topics for the journal are selected and edited by the candidates themselves.

The reading of the sixteen papers of the journal indicates that the candidates have studied and analysed legal issues with special focus on changes to legislation and legal institutions that require further attention of the legal science in Kosovo.

We hope that the topics elaborated by this edition of "Justicia" journal will provide useful information and will serve all legal professionals and other readers in order to have an opportunity to learn different perspectives.

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Director of the Kosovo Judicial Institute

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LEGAL POSITION OF THE PRE-TRIAL JUDGE IN RELATION TO OTHER SUBJECTS DURING THE PRELIMINARY INVESTIGATION

ABSTRACT

We have recently witnessed rapid changes to the criminal procedure legislation in almost all countries of the Western Europe towards promoting individual rights and expediting criminal procedure, changes which also engulfed Southeast Europe and Kosovo. A shared feature of these changes is adoption of the Provisional Criminal Code and Kosovo Criminal Procedure Code, for this first time in 2004 by the Parliament of Kosovo, in order to ensure a more functional judiciary relative to CPL of the previous system.

The implementation of the KCPC brought about a new outlook on the role of the justice, police and prosecution bodies with a shift from inquisitorial to accusatory system, as the former was rendered useless and non-functional. Under the accusatory system, currently in effect, the competences over investigations, which had previously been the prerogative of the investigative judge, have now been moved to the state prosecutor, an action similarly adopted in almost all Balkans countries.

Among many novelties contained in the KCPC is also the determination of the special position and the role of the pre-trial judge. Under KCPC, which entered into effect on 01 January 2013, the position of the pre-trial judge has been promoted considerably.

Key words: **pre-trial judge, role, authorizations, competences, other subjects, etc.**

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Introduction

The key tenet of the preliminary procedure is that the pre-trial judge does not undertake any action by virtue of official position, with a minor exception, but always at the reasonable request of parties and other participants to proceedings, under the situations and conditions provided for in the Kosovo Criminal Procedure Code in effect since 01 January 2013, when deciding on the matters related to restriction of person's rights and freedoms. In this sense, the Criminal Procedure Code seems to strive to uphold the principle of the equality of parties also in the preliminary procedure, where the role of the state prosecutor is dominant. Although actions, decisions and orders are taken at the proposal of the parties rather than by virtue of official position, these actions of the pre-trial judge have an important role, as they affect the rights and freedoms of an individual, i.e. restriction of these rights, while the investigative action of prosecution and police is thereby granted legitimacy. If such actions were to be undertaken without due notice, i.e. orders from pre-trial judge, they would constitute inadmissible evidence during the trial, provided for in more detail under Article 257, paragraph 2 of the KCPC[1].

The role and activities of the pre-trial judge are placed in motion through adequate decisions, orders only at the request of parties and other participants in the preliminary procedure. This paper will therefore seek to reflect on the role and competences of the pre-trial judge in the following order:

1. Decisions, orders at the request of the state prosecutor - police,
2. At the request of the defendant and his attorney, and
3. Decisions, orders at the proposal of the injured party, his legal and authorized representative.

1. Decisions, orders at the proposal of state prosecutor - police

1.1. Commencement, continuation, expansion and termination of investigations

Upon deciding to commence investigations[2] on the case placed before him for review following analysis of the criminal denouncement and finding that the content constitutes reasonable doubt of existence of crime commission and in order to shed light on the criminal act, the Prosecutor performs informal and formal action by reaching a written decision to commence investigations, a copy of which is immediately submitted to the pre-trial judge in view of Article 104, paragraph 1 of the KCPC[3]. This action of the prosecutor also holds practical importance as it represents the starting point of the duration of an investigation against a person, for a period no longer than 6

[1]Paragraph 2 states that the evidence obtained in violation of criminal procedure is inadmissible for cases when this Code or other legal provisions specifically state that.

[2].Article 102 paragraph 1 of the KCPC, p. 45.

[3] Article 104 par.1 states that the investigation commences with the decision of the state prosecutor. Such decision shall specify the person who is subject of investigations, the time of commencement, description of the crime and its elements, legal designation of the criminal acts, circumstances and facts justifying the reasonable doubt on the crime, any provisions authorizing covert and technical surveillance or investigations measures as well as evidence collected.

(six) months upon such date, with the longer durations requiring separate authorization of the pre-trial judge.

1.2. Duties of the State Prosecutor towards the Pre-trial judge

The State Prosecutor is also required to inform the pre-trial judge related to expansion of investigations in conformity with Article 157, paragraph 3 of the KCPC as well as on suspension of investigation in line with Article 157 paragraph 4 of the KCPC.

In cases when the investigations fail to conclude within a two years' period after the date of commencement, the prosecutor shall submit a written request to the pre-trial judge requesting continuation of investigation, along with justification (Article 159, paragraph 2 of the KCPC).

1.3. Request of State Prosecutor – an obligation to respond for the Pre-trial judge?

The pre-trial judge may authorize a continuation of investigation for an additional 6 months, when properly justified under the request of prosecutor by complexity of the issue. For criminal acts carrying a sentence of at least 5 years of imprisonment, the pre-trial judge, upon new request, may authorize an extension of up to 6 months. If, during this period, the investigations have not been completed owing to the complexity of the matter, only the Kosovo Supreme Court may, exceptionally, authorize an extension of additional 6 months.

Upon receipt of request for extension of investigations, the pre-trial judge shall notify both the defendant and the injured party as to the request of state prosecutor for extension. The defendant and the injured party may submit their statements regarding the extension in the course of 3 days upon notification. The decision of the pre-trial judge on the extension is appealable by both parties and the injured party.

During the period pending a decision on extension of investigations too, the state prosecutor shall, in the absence of a formal decision, notify the pre-trial judge in case he or she needs to undertake urgent action to acquire evidence.

1.4. Collecting evidence and expertise

Taking into account that evidence is a product of a criminal procedure, the evidence was formerly deemed admissible as those were acquired through the order of a judge or prosecutor and, as such, could be included in the indictment and be admitted by the judge at the confirmation hearing. This process was formal and may have not served the best interests of the rights of the parties or of the justice, as incomplete evidence may have been admitted or, important evidence not ordered to be collected may have been lost.

Under the current Code, in effect since 01 January 2013, the role and importance of evidence is more elaborated, especially during the early stage, which is related to initial action. For example, under the Article 70 the police may acquire evidence during the initial steps without the supervision of the prosecutor; however, the person engaged in collecting evidence on behalf of police should be properly trained and capable of explaining the undertaken action to prosecutor and subsequently to the judge. This makes the evidence acquired without an order from prosecutor or a judge admissible under article 150 7 and 8. This also indicates a shift in the role of participants to proceedings in the last decade.

Under the provisions of the previous KCPC, specifically the article 176, the expertise was ordered by the court at the request of state prosecutor, the attorney of the defendant or of the injured party, without wishing to exclude occasions of requirements by virtue of official position. Under article 139, paragraph 1, the court shall order inspection of the body and the autopsy every time, while article 187 states that the expertise shall be directed by the pre-trial judge. In contrast, the current applicable KCPC, under article 137, specifies that the state prosecutor may issue decisions to assign an expert by also taking into account parties' proposals, to ensure that the latter have no disagreements and that they may put forward individual proposals. This selection may be challenged by the defendant or the injured party[4], requiring the judge to reach a decision on the challenge in the course of ten days. Under the article 141, the defendant may ask the state prosecutor to assign an expert or may pay for an expert himself. In case of dissenting opinions between two experts, the judge or the state prosecutor may ask the opinion of a third expert.

The court shall also order toxicology analysis for any suspicious substance found within a body[5]. However, under article 144, paragraph 2, the physical examinations involving bodily invasion such as taking blood samples during the physical examination may only be taken with a court order or with the voluntarily consent of the person. The article 144, paragraph 9 of KCPC, reads that "duress for physical examination and similar control may only applied under a separate court order". It is interesting to note, though, that Article 76 of the KCPC, paragraph 5 states that in the cases when police conducts an alcohol test and needs to obtain urine or breathe samples, those shall not be taken under duress without a court order.

Under provisions of article 148, paragraph 2 of the KCPC, the autopsy, the physical examination, with the exception of cases specified under article 145, paragraph 2 to 4 and 76 of the Code, the psychiatric, molecular, genetic and DNA examinations may only be ordered by the pre-trial judge except in cases when a witness or an injured party agrees to these actions being undertaken by police or prosecutor. Under this provision, it is clear that these actions and orders are under the authority of the pre-trial judge, however, exceptionally with the consent of the injured party and

[4] Article 137 par. 2.1 of KCPC, p. 61, states that the defendant, attorney, victim or victim's attorney may challenge the selection based on qualification or potential conflict of interest by submitting a challenge with the preliminary procedure judge. The preliminary procedure judge takes a decision on assignment of the expert within (10) days upon assignment by the prosecutor.

[5] Article 143 paragraph 2 of the KCPC.

the witness, these measures may be undertaken by police or public prosecutor and shall be deemed legal.

In cases when a witness or an expert fails or rejects to make an appearance before the state prosecutor without any legal grounds, at the proposal of the prosecutor, the pre-trial judge may cite a 250 EUR fine for the default[6], provided that the summons has been serviced in conformity with the law. It is also worth noting that in cases when a witness has made an appearance when summoned, upon being made aware of the consequences of rejecting to testify without legal grounds irrespective of the fine, but persists in the refusal, he or she may be imprisoned for the duration of such refusal but no longer than one month or until such time when his or her testimony is rendered moot. Also, other measures related to assignment of experts to perform expertize of various areas shall only be ordered by the pre-trial judge, depending on the nature of the criminal act for which the investigation is ongoing.

1.5. Court warrant for search of premises shall have legal basis

At the request of the state prosecutor, the pre-trial judge may order a search of a house, other large premises or a property of a person when there is a reasonable doubt that the person has committed a crime, prosecuted by virtue of official position, and when there is a likelihood that the search will result with the arrest of the person or discovery and confiscation of important evidence for the criminal proceedings. By the same token, he may also order personal search upon an individual when there is a realistic opportunity that the search may result in discovery of traces or confiscation of persons related to a crime. The order shall be carried out by the court police. This issue has been regulated under the article 105, paragraphs 1, 2, 3 and 5 of the KCPC. This search is not the same with the temporary safety search carried by police without the court order, in conformity with the provisions of the new applicable code.

Exceptions to the article 110 of the KCPC may occur in urgent circumstances when a written search order may not be obtained in time and in case of a reasonable risk that the delay may result in loss of evidence or danger to the life and health of people, in which case the court police may commence the search based on the verbal order of the pre-trial judge. In cases when the police carries out searches without a written court order, under the circumstances prescribed by article 110, paragraph 1 and 5 of the KCPC, it shall submit a report to state prosecutor and the pre-trial judge in the course of 12 hours[7].

In principle and legally, no search order shall be issued by the pre-trial judge, irrespective of a request from prosecutor and police to that effect solely on the basis of a reasonable doubt that the person to be subject to search has committed a crime, unless a decision has been reached to

[6] See article 135 par.1 and 2 KCPC

[7].Article 110 par.6 KCPC states that when police carries out a search without a written court warrant, it shall submit a report to the prosecutor and the competent judge in the course of 12 hours, if a judge has been assigned on the matter in order to obtain retroactive court approval in conformity with the constitutional provisions.

commence investigations against such person based on a reasonable doubt of a crime commission. This indicates that there should not be instances of this kind in the daily practice, without wishing to elaborate on the existence or otherwise of these cases occurring in the regions to a larger or smaller extent, not for the lack of professionalism but rather on the account of tremendous daily workload of prosecutors and judges as a result of an excessive number of cases brought before them and due to absence of sufficient staff. Moreover, they are often required to delegate these requests to support staff to look into them on behalf of judges and prosecutors and consequently, in the absence of adequate control, judges and prosecutors sometimes sign off without looking at the substance of the request or order, which at a later stage, due to such violations, are declared inadmissible by the court either *ex officio* or at a motion from a defendant or his/her attorney[8], because they were not obtained in conformity with the legal provisions, thus risking losing the case for which charges have been raised in spite of the reality of the crime commission. In other words, no search order shall be issued in the absence of the legal basis described above, with the exception of the cases described and prescribed under articles 110 and 11 of the KCPC, unless a decision on commencement of investigation against one or more persons has been taken on the basis of existence of reasonable doubt.

1.6. Covert technical measures of surveillance and investigation

The pre-trial judge may issue a series of orders, at the proposal of the prosecutor and the parties, under chapter XXIX covert technical measures of surveillance and investigation.

Under article 91, paragraph 1 and 2 of the KCPC, the pre-trial judge, at the request of state prosecutor, may order any measure set out under the Code. The warrant involving covert technical measures requires an evaluation of concrete conditions and circumstances on case-by-case basis.

In urgent cases, where waiting the warrant of pre-trial judge under paragraph 2 article 91 would jeopardize the integrity of investigation or the life and safety of the injured party, a witness, an informer or their family members, the state prosecutor may issue an interim order for one of the 10 cited measures. Such interim order shall be revoked unless confirmed in writing by the pre-trial judge in the course of 24 hours upon issuance.

Under article 96, paragraph 6 and 9 of the KCPC, the state prosecutor shall inform in writing, sent via a certified mail, any person involved by the order of the fact that he or she are subject to covert measures and that he or she are entitled to appeal with the Surveillance and Investigation Review Panel, through the chairperson of the competent authority in the area of judicial issues in the course of 6 months and that he or she are allowed access to collected material in case the reasonable doubt of crime commission has ceased to exist or the state prosecutor has failed to file an indictment in the course of one year upon termination of order (article 96 paragraph 1).

[8]. Article 249 par.1 items 1.1, 1.2,1.3 of the KCPC, pp. 113-114

In specific cases, at the request of prosecutor, the pre-trial judge may order to deny access to a person subject to surveillance order to items and materials acquired during the covert investigation if such an access would jeopardize the integrity of investigations or the life and safety of an injured party, witness, informer or their family members or decide to delay the notice by no longer than a year, if the obligation to do so before the expiry of such period would jeopardize the integrity of investigations, the safety of life of an injured party, witness, informer or their family members.

However, by virtue of paragraph 3 of the article 96, the pre-trial judge, at the request of state prosecutor, may order the informer or the authorized official of the court police who carried out measures under this chapter, to redact or avoid names, addresses, work places, occupations or any other information in the material that may lead to identification of such persons. Such order may be issued before the person, who is subject of the order, is notified.

Subjects that are part of the preliminary procedure are required to strictly comply with the procedures involving measures under this chapter, as any action in contradiction would render the evidence inadmissible in the course of proceedings, in view of article 97, paragraph 1.

1.7. The security measure of defendant's presence, prevention of recurrence and safety of criminal proceedings

The role and activity of the pre-trial judge is also prominent under chapter X, involving issuance of measures to ensure the presence of defendant to proceedings in view of article 173, paragraph 4 in relation to article 175 paragraph 4 of the KPPC. The pre-trial judge issues orders upon proposal and depending on the rationale of the proposal, he or she may cite one of the following measures:

- Arrest warrant (article 175)
- Promise of the defendant that he or she will not leave the place of residence (article 176),
- Restraining order (article 177),
- Report to police station (article 178),
- Escrow (article 179),
- House arrest (article 183 of the KCPC)
- Diversion (article 184) and
- Order detention (article 187)

Each of the measures above shall be cited at a specific time or under specific situation, such as those involving non-cooperative perpetrators, starting from failure to appear before the prosecuting authority. The kinds of orders issued by the pre-trial judge shall depend on the case and on the rationale of state prosecutor's request, under article 188, paragraph 1 of the KCPC. This means that notwithstanding the rationale and the need to ensure the presence of the defendant to proceedings, the application of a measure cited by the pre-trial judge is, nonetheless, conditional. Each of the measures is cited at the prosecutor's request, when the case is already before the

prosecutor for investigation, and if the prior legal remedies have been exhausted by the prosecutor and provided that the legal requirements prescribed for each of the measures have been met, then the pre-trial judge, in accordance with the circumstances reasoned in the request, may cite one of the necessary measures to ensure the presence of the defendant.

The request for a measure does not necessarily imply its gratification, if alternatives to the measure are deemed sufficient to meet the needs of the prosecuting authority (prosecutor).

1.7.1. Detention, citation, extension, termination and enforcement of detention

As this is one of the gravest measures of restriction of person's rights and freedoms it will be elaborated in more detail.

In conformity with article 188, the detention is cited by the pre-trial judge at the written request of the state prosecutor, following a pre-trial hearing.

The hearing on detention requires the presence of the state prosecutor and the defendant's attorney. Even in the cases when a defendant has not hired an attorney, an attorney shall be appointed *ex officio* as it involves mandatory defence under article 188 paragraph 4 of the KCPC. At the hearing, the state prosecutor shall present arguments about detention, also verbally, while the defendant or his attorney may respond by stating their arguments, in view of article 188, paragraph 5 of the KCPC[9].

Parties are entitled to appeal against the decision citing a detention in the course of 24 hours upon servicing of the decision. The Appellate Court Review Panel shall decide on the appeal in the course of 48 hours upon submission.

When the pre-trial judge rejects the request of state prosecutor for citing a detention, he or she may order any other measure under chapter X – measures to ensure the presence of the defendant.

Under provisions of article 190, the detention may last for a maximum duration of one month from the day of arrest under the first decision of the pre-trial judge. Thereafter, he or she may be held in detention only under a court decision for extension of detention[10].

Once the indictment is submitted, the detention may last for a maximum of one year, i.e. if involving crimes carrying a prison sentence of 5 years the detention shall last for 4 months, while for crimes carrying a prison sentence of more than 5 years, the detention shall last for 8 months. In specific cases, the detention may be extended for 4 months for crimes carrying prison sentence of less than 5 years, or 12 months when the procedure involves a crime punishable by at least 5

[9].Article188 establishes the procedure for detention order, specifically, paragraph 5 states: at the hearing on detention on remand, the state prosecutor shall state the reasons for his or her application for detention on remand. The defendant and his or her defense counsel may respond with their arguments. The pre-trial judge shall rule on scuh motions, as per article 188, paragraph 6, see KCPC p. 86.

[10].Article 191 par.1 of KCPC,

years of imprisonment, in extraordinary circumstances when failure to submit an indictment within the deadline prescribed by paragraph 2 of the article 190 is related to complexity of the case or with other factors not attributed to state prosecutor. If the indictment is not submitted before the expiry of said deadlines, the detainee shall be released.

In relation to article 191 of the KCPC, which regulates the detention extension, before an indictment is filed, any extension shall be granted only at the proposal of state prosecutor, duly justifying the reasons for citing and extending the detention and that all reasonable action has been undertaken to exclude implementation of the investigation.

Under article 191 par. 3, the detention cited by the pre-trial judge may be extended by the pre-trial judge, individual judge or the presiding judge, all dependant on the stage of the criminal proceedings. Unlike the applicable code, the earlier code of 2004, in effect until 31 December 2012, under articles 284 and 185, paragraph 3, provided for an initial detention extension of one month by the pre-trial judge and subsequent extensions not exceeding two months by the three-judge trial panel within the deadlines prescribed under article 284, upon submission of relevant interlocutory applications by the defendant and his attorney. The detentions cited by the three-judge trial panel could be extended by the pre-trial judge for a period no longer than one month, within the deadlines provided for under article 284 of the Code following the hearing. This indicates that a detention, once cited by the pre-trial judge, may be extended by the trial panel and subsequently by the pre-trial judge for a duration of one month following the hearing, thereby allowing for alternating maximum extension, as set out under article 284 of the Code. An injured party and victim's defender may ask the state prosecutor, formally and informally, to intervene with the request for extension of detention. The defendant and the defence attorney shall be notified of the proposal no later than three (3) days before the expiry of the detention cited under the last decision[11].

1.7.2. Termination of detention based on court's supervision

Based on article 197 of the KCPC, detention may be terminated by the pre-trial judge with the consent of prosecutor. In case of dissenting opinions, the trial panel shall decide in the course of 48 hours upon receipt of judge's request.

The statement above, that the pre-trial judge only acts at the request of parties to proceedings with few exceptions leads to repeated views involving provisions of article 192, i.e. decision on legality of detention by virtue of official position and that, before taking a decision on termination of detention, the pre-trial judge shall notify the state prosecutor three days in advance, who, in turn, may appeal the decision of the pre-trial judge for termination of detention with the review panel made of three judges. The review panel shall issue a decision in the course of 48 hours.

[11] . Article 191 par.2 of the KCPC

Provisions of the Criminal Procedure Code, specifically articles 192, paragraphs 2 and 4 set out a new procedure for termination of detention and review of legality of citing and extending detention or procedure *habeas corpus.* The detainee or his or her attorney may, at any time, appeal the pre-trial judge to decide on the legality of detention.

The pre-trial judge may conduct a hearing session in conformity with article 188, paragraph 3, 4, 5 and 6, if, at first glance, the appeal proves that:

Reasons for detention under article 187 of this Code since the first court order for detention have ceased to exist, the circumstances have changed, new facts have been brought to light, or the detention, for other reasons, has been rendered illegal.

The pre-trial judge may, at the hearing, order the immediate release of the detainee, if he or she finds that:

- The reasons for detention under article 187 of this Code have ceased to exist,
- The detention period ordered by the court has expired (the prosecutor failed to submit a request for extension of detention),
- The detention period determined by the court exceeded the terms prescribed under article 190 (8, 12 months), or
- Detention is illegal on other grounds[12].

1.7.3. Enforcement of detention in a Correctional Facility

The pre-trial judge shall decide, in agreement with the director of the facility, that a detainee is assigned to activities in the penitentiary institution commensurate with his physical and mental abilities (article 199, par. 2 of the KCPC).

With the permission of the pre-trial judge and under his or her supervision, or under supervision of a person assigned by him or her, the detainee may receive visits of close relatives, doctors or other persons (article 200 par.2 of the KCPC).

With the knowledge of the pre-trial judge, representatives of a liaison office or of a Diplomatic Mission may visit their citizen without the supervision of a judge, just as representatives of international organizations may visit the detainees who enjoy refugee status (article 200 par. 2).

The detainees may correspond or maintain contacts with persons outside of the facility, with the knowledge and under the supervision of the pre-trial judge. Upon consultation with the state prosecutor, he or she may terminate such communication on legal grounds (article 200 paragraph 4).

[12]. See article 189 par.1,2,3 and 4 of the KCPC

Under article 201, the pre-trial judge may cite a disciplinary sanction of prohibition or restriction of visits and correspondence of the detainee who has committed a disciplinary violation (article 201 paragraphs 1 and 2 of the KCPC).

1.8. Protection of injured party, witness and cooperating witness

The state prosecutor, defendant, defendant's attorney, cooperating witness or a witness may, at any stage, submit a written request to competent judge for protection order or anonymity.

Under provisions of articles 220 and 222 of the KCPC, an accessory to crime may be declared a cooperating witness at the proposal of the state prosecutor.

Also, under articles 220 par.1 and 226 of the KCPC, a pre-trial judge may declare an injured party or a witness as a protected witness, at their request or at the request of state prosecutor.

For both these cases the order shall be issued by the pre-trial judge following a closed hearing.

2. At the proposal of the defendant and his attorney

Under the provisions of Article 125 of the KCPC, a defendant may submit an appeal to the pre-trial judge to decide on the legality of the requirement to appear before the prosecutor. This provision has stirred some controversy since the draft stages of Code review. In truth, the article 125 failed to thoroughly regulate this competence of the pre-trial judge.

However, the provisions of the criminal procedure shall be interpreted in favour of the defendant and take into account that the defendant is notified of the criminal proceeding against him when he receives the summons to appear before the state prosecutor. As the provisions of the Code of Criminal Procedure are based on the European Convention on Human Rights, the opinions of the European Court of Human Rights also state that "a criminal indictment shall be any notice of the state authority that a person is charged of a crime commission". This issue remains contentious as this provision has some gaps, especially as it relates to possible decisions of the pre-trial judge. To date, however, no such complaint has been recorded.

Under the provisions of Article 213, par. 3 of the KCPC, the defendant's attorney shall be allowed inspection, copy or pictures of any interlocutory applications, books, pictures or other items available to state prosecutor, i.e. materials that serve for preparation of defence as evidence acquired from the defendant or were previously under his property, as the case may be. The state prosecutor may deny access, however, the defendant may ask the pre-trial judge to allow inspection, copying or photocopying. Also, under article 214, par. 1, even if such a request is denied by the court and the prosecutor assigned under paragraph 2 of the article 214, the defendant and his attorney shall be entitled to appeal with the pre-trial judge. The ruling of the pre-trial judge shall be final and binding.

2.1. The decisions of the pre-trial judge are final and binding

The state prosecutor shall issue a decision on detaining a person arrested by police no later than 6 hours upon arrest, an authority also extended to the court police officer under the Code of 2004. Under the KCP, both the defendant and his attorney are entitled to appeal with the pre-trial judge in the course of 24 hours.

The pre-trial judge shall decide on the appeal within 48 hours of the arrest. Also, the defendant may ask the state prosecutor to obtain any concrete evidence[13]. If the state prosecutor rejects the request for obtaining evidence, the defendant may appeal such decision with the pre-trial judge. The Code of Criminal Procedure also fails to provide a thorough solution to this issue in that it fails to specify the possible decision and its character in the procedure.

3. Decisions, orders at the proposal of the injured party, his legal or authorized representative

The injured party under the current legal proceeding has seen an enhancement of its rights and more adequate treatment to the extent that, in some crimes, such as those involving bodily integrity and sexual violence, they are afforded equal rights to regular parties to proceedings (article 219 paragraph 1, item 7 in relation to article 374 par. 2 of the KCPC.

Also, during the preliminary criminal procedure (investigations) the injured party may ask the state prosecutor to obtain any evidence both within the country and abroad[14], who shall then decide on the relevance of the evidence and its bearing on the further proceedings and, on the basis of such determination, shall either approve or reject the request with reference to article 217, paragraphs 1,2,3,4.

At the proposal of the injured party and in view of article 218 par. 2 of the KCPC, the pre-trial judge shall decide on the safety of any property-legal claim.

The injured party or his legal or authorized representative are entitled to inspect, copy or take pictures of the interlocutory applications and material evidence available with the state prosecutor, if his interest is deemed legitimate. In case the prosecutor rejects this request of the injured party, the injured party may appeal with the pre-trial judge.

The ruling of the pre-trial judge shall be final and binding, however, in case of denied access to evidence, the trial panel may decide further.

Also, as with the defendant, provisions of article 216 of the KCPC allow the injured party to request acquisition of any evidence by the state prosecutor. In case the prosecutor rejects the request, the injured party may appeal the decision with the pre-trial judge.

[13] See article 216 par.1 of the KCPC
[14] Article 219 par.1,2,3,4,5,6,7 of the KCPC

4. Special investigative opportunity

Article 149 of the Criminal Procedure Code allow for a special investigative opportunity whereby a state prosecutor or a defendant may ask the pre-trial judge to obtain the testimony from a witness or seek an expert opinion, for the purpose of preserving evidence in case of a unique opportunity to collect important evidence or in case of a potential risk that the evidence may not be subsequently available during the trial.

In cases when the pre-trial judge rejects the proposal submitted by the authorized parties under KCPC, an automatic entitlement to appeal before the three-judge trial panel shall be generated. In cases when the judge undertakes these investigative actions, he shall hold a hearing with the view of obtaining evidence from the witness and the expert in the presence of the defendant, defence attorney and the state prosecutor, while the injured party or his representative shall be informed of the hearing and are entitled to participate.

5. Conclusion

In view of the discussion above, the pre-trial judge has an important role among other subjects in proceedings. The role and position of the pre-trial judge, the prescribed competences and legal authorities are indicative of an advanced role for control of legality of police and prosecutorial action during the pre-trial investigations. The current utilization and application of measures have become commonplace, especially in situation when criminal denouncements are made in Kosovo prosecutions against NN persons involving a crime which has actually been committed. I believe that, in these situations, the rationale does exist.

We are also witness of everyday practices, as covert measures are introduced in Kosovo for the first time in 2004. This was also the time of introduction of a new designation for the institution of the pre-trial judge, which in itself encompasses the position, the role, authorizations and competences for this stage of procedures, as an entity that balances the legality of parties' requests, now recognized under the Criminal Procedure Code. Before that, Kosovo lacked both legal framework and technical capacity; inability to employ these measures contributed to a considerable number of unresolved cases in Kosovo, left pending to this date. The Criminal Procedure Code asks much more responsibility of the parties and of the judge himself, as safeguards of parties' rights provided for under the Law. In other words, the role of the judge changed significantly, as it has now been assigned a much more proactive role in investigating and adjudicating the actions and less so during the procedure, with a commensurate enhancement of rights of other parties to proceedings. The role of the pre-trial judge as part of the activities provided for by the KCPC during the pre-trial stage, actions undertaken at the request of parties to procedure, should be corroborated requests for citing measures with the mere fact that all judges in criminal proceedings, irrespective of their legal authorizations, should observe and implement those in practice as recognized under the law, as in so doing, they will have proven their

professionalism, independence, impartiality and integrity as law enforcers and institutions respecting the human rights and freedoms in conformity with the Conventions we are required to observe, along with other internal acts we apply every day for cases brought before us.

6. Recommendations:

- It is recommended that applicants are spared of needless applications to the extent possible, in cases when a criminal investigation may be carried out without recourse to covert technical surveillance measure.
- It is recommended that pre-trial judges may also be equally vigilant upon receipt of such requests, analyse the conditions of each such request thoroughly to ensure existence of legal conditions to accommodate the request of the requesting authority (police or prosecutor), and decide further on the rationale of the approval, as in practice no request for such measure should be submitted and subsequently approved by the pre-trial judge, unless a decision on commencing investigation against any such person is reached, as has become the daily practice in some courts.
- Distinguish situations involving a suspect and a defendant, with the mere fact the with a suspect, there is situation which may entail a criminal denouncement only, perhaps even unsubstantiated by reasonable doubt. Amidst the inability to collect other evidence, we may resort to covert measures only as a last resort, although lacking a decision for commencement of investigations, because there is only a person suspected of committing a crime.
- For both the prosecutor and the pre-trial judge: the state prosecutor should not submit a request for search warrant of premises or houses of an x or y person with the pre-trial judge, unless there is a substantiated suspicion that a crime has been or will be committed, unless the person whose premises or home will be searched has a status of a defendant against whom a decision for commencement of investigations has been reached. The last two sentences should constitute grounds for pre-trial judge to reject any proposal in contradiction.
- The judges should first analyse any requests personally and may then delegate them to support staff, as in view of excessive workload, a similar practice seems to be lacking.
- Prosecutors and judges should strive to pursue professionalism and genuine legality in submitting requests to each other rather than relegate those to the level of mere formality always presupposing approval.

Due to inability to list all recommendations, it is hoped that in view of the significance of these six recommendations the officials carrying state authorities, the prosecutors and judges may consider them properly when implementing them in practice, in addition to many others, which we could not list separately.

Bibliography

- Kosovo Criminal Procedure Code, no.04/L-123
- Kosovo Criminal Procedure Code, no.04/L-082
- Provisional Criminal Procedure Code of Kosovo, UNMIK/RREG/2003/26
- Regulation no.2002/6 on covert technical measures of surveillance and investigation
- Dr. Ejup Sahiti and Dr.Rexhep Murati, Law on Criminal Procedure, Prishtinë 2013
- Prof. Dr. Enver Hasani / Prof.Dr.Ivan Cukalovic, Commentary of the Constitution of the Republic of Kosovo, First Edition.
- Brief Guide on the Convention of Human Rights, Donna Gomien, Third Edition
- European Convention of Human Rights

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REHABILITATION AND DISCLOSURE OF INORMATION FROM CRIMINAL RECORDS

ABSTRACT

With this paper I intend to emphasize the role of the institute of rehabilitation, its place in the criminal code, beneficiaries and the manner of restitution through a comparative overview to the criminal codes of the region. The key topic of this paper will be: what exactly is the rehabilitation, its opportunities, the amnesty provided by the legal provisions of the country for persons who have justified it by their conduct after the punishment of imprisonment has been served and the expiration of the period prescribed by law, manner of restitution of right denied to them because of their conflict with the law. With this paper I intend to somehow call on the state to appoint a competent public entity in the field of judicial affairs that would deal *ex-officio* with legal rehabilitation which in a sense would relieve the courts from unnecessary work and would manage to restore to a large extent confidence of citizens to justice authorities.

Key words: Rehabilitation, competent public entity in the field of judicial affairs, court, legal rehabilitation, expungment from the records of the convicted, application.

Introduction

Institute of rehabilitation of convicted persons falls within in the line of the institution that criminal justice science has not paid attention it deserves, notwithstanding that the approval or denial of the request of the convicted person affects the rights of all those who at any given period of time have been involved in capacity of defendants in any judicial matter that was concluded with criminal sanction. Also, by failing to recognize these right ex officio, certain rights are restricted when it comes to finding employment or exercising of any particular activity. There is no doubt that this institute deals with important dimensions of criminal law and sometimes also misunderstood by the relevant factors of justice. Therefore one can say that from the scientific and functional point of view this institute is marginalized and its importance only addressed from practical standpoint.

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This institute is dealt with only in descriptive terms without any claim to his of legal and functional sense.

The purpose of this paper is to have a look into the effect of this institute despite the difficulties that follow it, as well as its development in terms of prevention it achieved, because at the request of the convicted person it provides an opportunity to compare the past and positive or negative impact of punishment as well as the overall achievement of legislators goals through a rendered sentence as a sufficient measure to prevent crimes and for resocialisation of convicts.

Purpose of the paper

This paper shall analyze the institute of judicial and legal rehabilitation under the Criminal Code of the Republic of Kosovo, the legal provisions set forth for this institute as well as disclosure of criminal record that somehow affect the person's a right on privacy stipulated by the International Convention on the Human Rights and Freedoms directly applied to the Criminal Code of the Republic of Kosovo. Also the ways of benefiting from this right, reasoning, while the attention will be focused on the examination of the request of a convicted person. The analysis is concerned with the legal nature of judicial rehabilitation as a penal institution which should be treated as a right of a convicted person or just an opportunity provided by the positive legislation in Kosovo. In view of the authority that decides on rehabilitation in the first instance, to the repetition of the request to materialize this right. [i]

In addition, it will deal with advantages of legal systems in the region, ways to regulate this institute, and a fair treatment of the person convicted by the court.

Despite that the legislation does not cease the right for application upon rejection of the request, method of application in order to materialize his/her right and the loss of that right due to an early presentation before the legal prescribed period of time in period of two years, it gives the impression among convicted persons of an arbitrary decision, distrust from this part of the population that has already suffered from "penalties" and "rewards" by non-avoiding the execution of sentence.

1. Notion and the types of rehabilitation

Each country regardless of what kind of government or judicial set up it has, apart from protection of its sovereignty must have foreseen also the protection of its citizens as a general task. In exchange for protection and security provided by the state, the public is required to comply with envisaged legal rules, framework of which includes refraining from criminal actions, behaviours and actions that would constitute a criminal offence, at the same time by envisaging criminal sanctions.

Constitution of the Republic of Kosovo provides the respect of human rights and freedoms to all of its citizens within its territory, citizens' temporary abroad due to a business, temporary residence and to all of those who due to different reasons are within its territory.[15] This authority is based on principles of equality before the law to all individuals and full observation of basic human rights and freedoms[16], but as we underlined above the failure to observe those human rights and freedoms envisaged in the constitution and other relevant laws is an exception from the rules that need to be sanctioned.

Criminal sanctions are expressly provided in law and no one can be found guilty for any offense which at the time of its commission was not envisaged as a criminal offense, at the same time prohibiting the retroactive application of law unless the latter is more favourable for the defendant-accused.

Almost the entire purpose of criminal sanctions is about general prevention-refraining potential perpetrators from unlawful actions. While the main purpose of their re-socialisation and rehabilitation is to return them back to society to contribute with good behaviour and in compliance with positive law. Endless labelling of this number of people and their permanent deprivation of constitutional rights does not serve the purpose of criminal sanction.

As we pointed out, the legislators' goal is not only the liability of offenders for wrongdoing and their punishment, but general prevention means achieving the legally required goal - rehabilitation and socialization whereby the institute of legal rehabilitation can be systemized. This because it would not be fair for an individual, who in a certain period of life intentionally or negligently violated the law, to suffer his entire life the consequences of his criminal offence, (excluding serious offenses and those of punished internationally), therefore institute of legal rehabilitation is kind of satisfaction in order to say what the legislator has provided for the former convict who through his/her conduct upon serving sentence justifies it.

In a broad sense this means the restitution the convicted person, upon meeting the conditions stipulated by law, except those rights that may be limited by special laws[17]. According to this definition, a convicted person is restored with some rights that were lawfully restricted to him/her due to commission of a specific criminal offence, i.e. *"Institute of rehabilitation is in fact a kind of obsession over nullified punishment*"[18].

[15]''.... exercises its authority based on the respect for human rights and freedoms of its citizens and all other individuals within its borders".
Constitution of the Republic of Kosovo, Article 2.
[16] Constitution of the Republic of Kosovo, Article 3, paragraph 2.
[17]Elezi,I.,Kaqupi,S.,Haxhia,M.,Commentary of the Criminal Code of the Republic of Albania ,Tirana,2009,page 293-294
[18]Salihu,I. Criminal Law, General part .Prishtinë 2005, pg.552

1.1. Types of rehabilitation pursuant to CCRK

Legal Rehabilitation and disclosure of information from criminal records is envisaged in Articles 102 through 105 of the Criminal Code of the Republic of Kosovo, where in details is claimed this institute is regulated.

Legal Rehabilitation and disclosure of information from criminal records is envisaged in Articles 102 through 105 of the Criminal Code of the Republic of Kosovo, where supposedly this institute is regulated up to details.

According to the CCRK the legal position of the convicted persons after a punishment of imprisonment has been served, subject to pardon or prescribed by statutory limitation, a convicted person shall exercise and acquire all the rights waivered due to the punishment for their criminal offence, namely : " a punishment of imprisonment has been served, subject to pardon or prescribed by statutory limitation, a convicted person who has made restitution..."[19], also pursuant to the rendered sentence stipulating the time of restrictions. This legal provision[20] provides us with understanding that convicted person shall be a subject of restitution only after serving his sentence, being that a court reprimand, fine, suspended sentence or punishment with imprisonment, acquitted of the criminal offences the latter was prosecuted because under different circumstances it got pardoned, offered amnesty or a subject to prescribed by statutory limitation, and that the same one cannot be prosecuted for that criminal offence or to have the sentence executed: "*Rehabilitation expresses the views of the society that commences from the concept that convicted people can be corrected and cannot remain forever under the status of a convicted, therefore they enjoy the same rights as other citizens"*[21]

According to CCRK there are two types of rehabilitation foreseen for the convicted persons:

Legal Rehabilitation[22]
Judicial Rehabilitation[23]

[19]Criminal Code of the Republic of Kosovo(hereinafter in this paper referred as CCRK),Article 102, paragraph.1
[20]"After a punishment of imprisonment has been served, subject to pardon or prescribed by statutory limitation, a convicted person who has made restitution shall exercise and acquire all the rights provided for in the Constitution and law unless otherwise provided in this Code. This Article shall also apply to a convicted person released on conditional release, Article 102 par.1 and 2 of the CCRK
[21]Elezi,I.,Kaqupi,S.,Haxhia,M.,Commentary of the Criminal Code of the Republic of Albania ,Tirana,2009,page-294
[22]Article 103 of CCRK
[23] Article 10 of CCRK

1.1.1. Legal Rehabilitation

" *By legal rehabilitation, a punishment shall be expunged from the record of a first time convicted person ...*"[24], after expiration of prescribed period of times envisaged by the law if the convicted person has not committed new criminal offence during that period of time.
According to this legal provision convicted person benefits from this right in a way that criminal conviction is expunged from his/her criminal record and that person is no longer considered convict[25] whereby his rights are restored, provided that the legal prescribed period of time as envisaged pursuant to the penalty imposed, which means that competent public entity in the field of judicial affairs shall *ex-officio* render a decision to expunge the sentence from criminal records[26].

Not all convicted persons can benefit from Institute of Rehabilitation; therefore the Criminal Code provides limitation on benefits from this right. The first limitation refers to persons sentenced to fifteen years imprisonment[27], persons sentenced to life imprisonment, at the time of the duration of accessory punishment and measure of mandatory treatment [28].

Based on this competent public entity in the field of judicial affairs related to sentences rendered out of this scope shall *ex officio* issue a Ruling[29] to expunge the sentence from the criminal records of convicted persons, one year after the judgment becomes final, in the case of a judicial admonition[30], meaning that a person is rendered with a final judgment of judicial admonition, the same shall be expunged from the record and will not be considered convicted if one year period has passed and during this period he/she committed no criminal offense.

The convicted person, who was found guilty and was sentenced with suspended sentence, will be expunged from the records of convicted one year after the verification period. The period of expungement is one (1) year from the day a punishment is served, prescribed by statutory limitation or terminated by a pardon or a change in the law, in the case of a punishment of semi-liberty.

In cases where the perpetrators of a criminal offence have been sentenced to imprisonment up to one year, a fine or punishment, accessory punishments shall be expunged from the records of convicts if three years from have passed since the date sentence was served, has settled obligation related to the payment of a fine,[31] or the period of restriction of any of the rights imposed by an accessory punishment. Similarly shall be acted when the convicted person is sentenced to a fine and due to various reasons has failed to pay the fine, therefore it got replaced by a prison sentence. In such cases the punishment can be expunged from the record when it exceeds the period

[24]Article 103 of CCRK
[25]Salihu,I. Criminal Law, General part .Prishtinë 2005, pg. 554
[26]Article 520 par.1 of the Criminal Procedure Code (hereinafter in this text CPCRK)
[27]Salihu,I.,.Criminal Law, specific part ,Prishtinë 2005, page.554
[28] Article 103, par.3 and 4
[29]Article 520 of the CPCRK
[30]Neni 103 par.2 pika 2.1 i KPRK-së
[31]When a convicted person is sentenced with a fine and in order not to cause damage to the household, he/she required to enable him/her the payment in instalments, the sentence will be expunged from the records of convicted three years after the convicted person has paid last instalment of a fine.

prescribed by law for expungment from the day when he/she has served a prison sentence. When convicted person is sentenced one to three years imprisonment, the period of legal rehabilitation and waverings of the restriction of rights as a consequence of the sentence, is reached five years from the date of the sentence, eight years from the date of serving sentence for the sentences rendered from three to five years in imprisonment, ten years when was sentenced to imprisonment from five to ten years, fifteen years from the date of the sentence of ten to fifteen years imprisonment.[32] Thus, we can note from the legal provisions that the time period when is possible to be expunged from records depends on the length of the sentence that coincides with the endangerment of the society and the criminal offence.

Legal Rehabilitation does not preclude the execution of accessory punishment. Namely in addition to the principal penalty a convicted person is also imposed through restrictive measure for a specific period of time, in such cases rehabilitation does not stop the execution of punishment. This penalty will be expunged after verification period is over pursuant to the duration of the punishment. In cases where the same person was imposed more sanctions, penalties may be expunged in the same time only and it if the conditions to expunge each of them are met. By acknowledging rehabilitation, the rights of the third parties, on which the sentence was grounded, shall not be denied or restricted.[33]

It is noteworthy to underline that the law has envisaged criminal liability of legal persons, initiation and cessation of legal consequences for the latter by stipulating the legal deadline related to the restitution of those rights restricted as a consequence of criminal offences that "*may be foreseen not longer than five (5) years, starting from the day when the judgment becomes final"*[34].
In order to restore within the prescribed periods of time the restricted rights of legal persons that were imposed as consequence of criminal offences, the procedure is set in motion at the request of the legal person, the court shall consider the conduct of the punished legal person, whether the compensation of the damage caused was implemented and the material benefit from the criminal offence was returned as well as other circumstances that are related to the reasonability of the cessation of legal consequences of the punishment.[35]

1.1.2. The competent public entity on legal rehabilitation in Kosovo

First of all this depends on who keeps the records on convictions. It is a very common question in Kosovo, but is the one that has not been answered in any paper so far. It means that no one has seriously dealt with this circumstance up to date. The difficulty is created from the very expression used in the Article 520, paragraph 1 of the CPCRK which reads: *"…the competent public entity in*

[32]Article 103 par. 2 item 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, and 2.7 of the CCRK
[33] Commentary of the Provisional Criminal Code of Kosovo, Prishtina, 2012.page .190
[34] Article 16 paragraph.2 on the liability of legal persons for criminal offences
[35]Article16 par.2 and 4 of the Law on the Liability of Legal Persons for Criminal Offences.

the field of judicial affairs …" shall render a ruling expunging the conviction ex officio after exceeding deadline set forth in the law under specific circumstances. The Article 421 of the CPCRK confirms that that it is not the judicial body that deals *ex-officio* with expungement of convictions but it is the administrative authority due to the following provision *"Procedure for expungement of conviction when the administrative body fails to act* ". Moreover, the text of the Article 520 paragraph 1 in Serbian Language speaks about public entity in judiciary matters, same as the text in English. Nevertheless all citizens of Kosovo know that the certificate for no conviction is acquired at the police who although keep recordings of convictions in Kosovo, so far have never issued any decision *ex-officio*; hence the citizens have always been forced to address the court for such document.

The conviction that it is not the judicial entity that acts *ex-officio* is strengthened by the legislation and the case law of other countries. For example the Criminal Procedure Law of the German Federal Republic, determines Common Register of the Prosecution actions, which is managed by the Federal Directorate of Judiciary.[36] The Croatian Legislation which is harmonized with European Union Legislation clearer in this regard because in addition to the Criminal Procedure Law has also promulgated a specific law: the Law on the Legal Consequences adjudications, record on convictions and rehabilitation. The Article 3 of this law stipulates that the record on convictions shall be kept keep and administered by the Ministry competent for the judiciary, while Article 7 notes that the final judgments shall be sent to them by courts, prison records on served sentences, the special services for execution of the community service work and also the courts regarding the date of payment of the fine[37]

There is no doubt that the legislator (CPCRK) has thought about the administrative body that would deal with judiciary matters which in form of expression includes the Ministry of Justice in Kosovo. Nevertheless it did not complete, conclude the legislation in order to compel the Courts to send final judgments to this ministry, prisons to inform about the execution of sentences, conditional releases, the probation service of Kosovo about the conclusion of the conditional releases and the work for community services, in order to keep general records about convictions and to be able to *ex-officio* expunge the sentences. Citizens should not be forced in this manner to face unnecessary procedures in front of the courts.

It should be emphasized that this issue is strictly regulated in the countries of the region, Montenegro, Serbia, Bosnia and Herzegovina etc. Therefore, the task of Kosovo Legislature remains to clarify this issue with legal norm so that citizens would have easy access to the freedoms and rights guaranteed by the Constitution, because difficulties in acquiring of those data is an obstacle to their employment or reaching their other rights**.**

[36]Law on Criminal procedure of the German Federal, Article 492/1, Edition in Bosnian, Sarajevo 2011, page 186.
[37] Law on Legal Consequences, records on convictions and rehabilitation, NN 143/12,7 December 2012.Zagreb.

1.2. Judicial Rehabilitation

The judicial rehabilitation is a complementation of the legal rehabilitation[38] and is set in motion upon the request of the convicted person which is dealt also through a Ruling same as with the legal rehabilitation with a distinction that on this request it is the court that decides and not the competent public entity in the field of judicial affairs.

Judicial rehabilitation suffices if the half of the foreseen legal deadline for expungment of the convicted person has passed as set forth in the Article 103, paragraph 2 and the person convicted during this period of time has not committed a new criminal offense[39], Characteristic of judicial rehabilitation is that the court is not obliged to decide *ex-officio* to expunge the convicted person from the record of convicted when exceeding the half of the legal limit for expungement as it was envisaged for legal rehabilitation. In this procedure the request of the convict is indispensable.

Such request is indispensable also when the convicted person meets the legal terms to be expunged from the records, and a competent public entity in the field of judicial affair[40] has not taken any decision because the procedure to recognize this right can be initiated with the court only based on the application filed by the convicted person, his/her defence counsel or by an authorized representative.

Under this provision the court renders a ruling expunging the records of the convicted on the panel session upon the application of the convicted that has finished half of the legal deadline stipulated by Article 103 of CCRK. The Court is not obliged to grant the request of the defendant, but waiving of these restrictions is an alternative that can be recognized, which means the jurisdiction of the court after evaluating the nature of the offense and other circumstances that are important for adequacy of expunging the conviction from the record, to decide whether to approve or reject such a request made by a convicted person.

The legal provisions of the Article 103, paragraph 1 and 2 of the CCRK also apply to the judicial rehabilitation.

The Law on the liability of legal persons for criminal offences regulates the cessation of legal consequences dealing with restitution of the rights restricted as result of a criminal action, which is set in motion upon the application by the legal person to which the court decides "after three (3) years have passed from the date conviction or prescribed by the statutory limitations....[41]", "that application is not necessary to be approved by the court but it is an alternative that provides the

[38]Elezi,I.,Kaqupi,S.,Haxhia,M., Commentary of the Criminal Code of the Republic of Albania Tirana,2009,page.295
[39]Article 104 of the CCRK
[40]The competent public entity for judicial related matters, it is not explicitly defined by the code of criminal procedure, such a thing really should be the responsibility of the police which deals with the identification of criminal suspects and should be clearly regulated. In the post-war period the competent public entity for judicial related matters never rendered any Ruling to expunge from the criminal records persons convicted ex-officio, which not only does violate the right of convicted persons but also burdens the court with unnecessary tasks , a task that someone else would have done it ex-officio before the due date.
[41] Article 16 par. 3 of the Law on the liability of legal persons for criminal offences

law as a legal person in his request has justified his conduct, has fulfilled the obligations set by criminal sanction, have compensated and returned benefit from the criminal proceeds.

2. Content and disclosure of information from criminal record

The criminal record of a person contains personal information for the perpetrator, the data on the sentence, judicial admonition, measure of mandatory treatment or release the offender from punishment imposed, changes to the data on convictions that were entered in the criminal record, data on sentences served and on expungement of erroneous convictions.[42]. The criminal record is confidential and can be accessed only the authority that keeps it and the same may be communicated or made known only to the court, prosecution and police authorities in charge for the enforcement of criminal sanctions, the competent authorities participating in the procedure of pardoning or expunge of evidence and only for sentences that are not expunged. This information can be disclosed to police, prosecutors and judges when against the person who is expunged from the record there are ongoing criminal proceedings, but the convicted person at his request may be given these data if he needs them, except in certain cases provided by law[43].

Viewed from this provision it appears that authorities to be notified of a criminal record of a person convicted are only the police, prosecutors and courts. Consequently, other bodies should not be informed except by reasoned application may be disclosed to public bodies if accessory punishments or measures of mandatory treatment are still in force at the time of application.

Practice in our country seems to show the opposite in relation to disclosure of information from criminal record. For example when a person applies for a job, visa or something similar he/she is required to present a document that is not under investigation and as not prosecuted for any offense[44]. I consider that in these cases the principle of presumption of innocence is directly violated because if against the same person there is an ongoing criminal proceeding and he is denied request by violating the principle that "no one can be considered guilty until his guilt is not found guilty by the final judgment". In many cases, in order for authorities not to be accused for violations of the rights of citizens who had any interest in recognition of any of their rights, for business travel, family reunion, or similar position but the same were required to sign the document that would allow those authorities the right to require proof of criminal record from the police, prosecution and courts. In a way, interested citizens have fallen before a necessary choice because if one does not sign one will automatically be eliminated from the competition, even though the security of the state or it citizens was not put in question by an application such as provided by law.

[42]Article 105 of CCRK
[43]Article 105 par.1,2,3,4,5 of the CCRK.
[44]Such is the extent of those cases that in order to apply for a passport a proof from the criminal offences court was required, even for obtaining a driving license such evidence was required for a period of more than ten years, and apart from material damage caused citizens it also interfered with their guaranteed rights.

Whereas, when it comes to criminal records of legal persons it should be noted that legal persons can be held liable according to the law on liability of legal persons for criminal offenses, and the provisions of the Criminal Code of Kosovo and Criminal Procedure Code of Kosovo shall apply mutatis mutandis unless otherwise provided by law[45], if the conditions for liability of legal person under this Law are met[46] and same criminal sanctions that may be imposed against him/her are sentences, suspended sentences, security measures, whereas sentences that may be imposed are in fines and termination of the legal person[47]. Moreover, criminal records are kept also against legal persons that were imposed any of criminal sanctions provided by law on liability of legal persons for criminal offences, this record is kept with the first instance court under which jurisdiction the seat of the legal person falls, it's the representative or a branch of a foreign legal person[48], containing all the data for legal persons and for the offense committed, as well as potential criminal sanctions that have been imposed, the data on the person liable for commission of criminal offence for which the legal person got convicted of, data on the execution of the sentence or annulment of record on wrongful sentence.[49]

The data regarding criminal records of legal persons may be disclosed only at the request of governmental authorities with reasonable interest and based on the law and whether the sanction or security measures will last indefinitely. These data can be disclosed to courts, prosecution and police in connection with criminal proceedings conducted against the person who had previously been convicted; to competent authorities in charge of the execution of criminal sanctions; and, to competent authorities involved in the procedure of granting pardon or expunging of sentences.

3. Legislation and practice on decision related to the application for expungement from records of convicted persons in Kosovo and in the laws of the region

3.1. Rehabilitation, legislation and practice in Kosovo

Institute of rehabilitation is set forth in CCRK provided in Article 102 and 103 which provides that rehabilitation can be instituted by the law, specifically under this provision "upon the legal rehabilitation, a punishment shall be expunged from the record of a first time convicted person as provided in paragraph 2 of this Article and such person shall not be considered convicted. This legal provision is quite confusing and in judicial practice has caused quite a dilemma when a person convicted should have been acknowledged that right and how many times a person is entitled on that right.

According to the first version, this right may be acknowledged to the convicted person only once and it by a public competent entity on judicial related matters given the time period, the opportunity

[45]Law no. 04/l-030 on liability of legal persons for criminal offences, Prishtina 2011
[46]Article 3 par .2 of the Law no. 04/l-030 on liability of legal persons for criminal offences. 31 August 2011
[47]Article 8 par.1 of the Law on liability of legal persons for criminal offences
[48]Article 15 of LLLPCO
[49] Interpretation of the criminal records of legal persons has been conducted based on the legal provisions of the Law on liability of legal persons for criminal offences Article 15 par.1,2,3,4,5,6

of undertaking research to justify expunging from the evidence. When a second time convicted person is found in such situation the public competent entity on judicial related matters shall not be bound to *ex officio* recognize this right, convicted person because did not justify it, he again violated the law, therefore I consider that in cases as such the court has the opportunity to undertake certain actions for approving or rejecting the request of the convicted person.

According to the second version : " *by legal rehabilitation conviction is expunged from the record of the convicted person for the first time* .." means that convicted person can be only once expunged from the criminal record for what I think it is a direct infringement towards these same persons as if they have committed a criminal offense does not mean that they are devoid of human dignity because it is not fair and humane that the convicted is only once provided with opportunity to file the request to be expunged from the record.

In these cases, the dilemma arises as how to act with those convicted who at the time of the commission of offense or criminal offenses were young and during the transition phase from juvenile[50] to adulthood many young people are inclined to deviate from rules of normal behaviour. These young people often times come into conflict with the law after committing various criminal acts and over time many young people, especially when they are provided with special care from family and friends; they manage to integrate and return to regular life and contribute as useful people.

How to act and art the same time not to contravene the legal provisions and guaranteed human rights and freedoms-by providing a fair and due trial.[51]Should the ex-convicts suffer a lifetime consequences for their mistakes in their youth, especially when they see clearly that they are integrated into society, have a stable family, have completed high school and want a good job, however in their rerecord still appears they have been convicted and oftentimes in practice this brings trouble in establishing working relationship!!. Although the legal consequences of conviction cease upon punishment of imprisonment has been served, subject to pardon or prescribed by statutory limitation, a convicted person who has made restitution [52](if not otherwise provided by law) can be equipped with a clean certificate about their criminal past, and the same is requested from police records.

In these cases police requests court ruling on expungment in order to have them expunged from their records as well. Hence the convicted persons face problems because if they had more than one conviction then only one of the convictions will be expunged and the request for the other will be rejected.

[50] In this case we are not talking for juveniles but for those young who have gone through this phase which is inclined to deviation in behaviour.
[51] Failure of judicial bodies to provide a fair trial and in a reasonable time constitutes violation of Article 6 of the European Convention on Human Rights, moreover failure to provide opportunity in observing rights acknowledged by law at the time of the commission of a criminal offence constitutes infringement of this principle.
[52]Article 102, par 1 and 2 of the CCRK.

It is exactly here where the violation of the principle of a fair trial and due process stipulated by the European Convention on Human Rights is put into question because as mentioned above the public competent entity for legal related matters is required to deal with it ex-officio. In practice this does not happen, whether by the negligence of the administration to take care on notifying the public competent entity for legal related matters, or failure to maintain in order the records when the legal deadline for expungment expires, or no exact definition of to whom must these data be submitted to and their obligation to report. With this institute is not dealt *ex-officio* at all and with or without awareness the rights of the convicted are infringed, and there are cases where when an application sets in motion the procedure it is noted that the sentence should have already been expunged for one offense, which would not contravene any current legal provision, because as such it would not be shown at all and the dilemma would not have been raised on how to act about the offence which now has reached the time for rehabilitation.

When speaking about making restitution for legal persons as a result of their offenses, it is stipulated in details as to whom this law applies [53], who cannot be held liable as s legal person (but only person in charge of legal person entity)[54] and whom legal persons can call upon, without setting limitations on how many time a request may be filed and because it is not envisaged how many times can be filed, this implies a presumption in favour who may file an application whenever the need be pursuant to the prescribed periods of times provided in this law. Moreover, this law explicitly provides that the court is authorized body for the cessation of legal consequences as a result of execution of sentence upon application from a legal person.

3.2. The Ruling on expungment from records of convicted persons

As underlined above when dealing with judicial rehabilitation the public competent entity dealing with legal related matters[55] renders a ruling to expunge from the records after it made necessary queries and if against that person there is no ongoing criminal procedure for a new offence before the deadline envisaged for expungment has expired.

If this is not done ex officio by the public competent entity for legal related matters, the convicted person may seek confirmation for expunging of the sentence within 30 day, and a ruling to be rendered for expunging of punishment from the records in accordance with the law.. In case that even after this nothing is undertaken than the convicted person may request from the first instance court, which adjudicated his case, to render a ruling to expunge it from record. That means that after the failure of the public body in charge of making decision ex officio and failure to reply in

[53] The Law on liability of legal persons for criminal offences applies to local legal persons as well as for foreign legal persons who committed criminal offence within territory of the Republic of Kosovo, to foreign legal persons liable for commission of criminal offence abroad but in the detriment of the Republic of, its citizens or legal person abroad (vendor) who is liable for commission of criminal offences abroad. Article 4, paragraph 1 items 1.1, 1.2, 1.3 and 1.4 of the Law on liability of legal persons for criminal offences.

[54] Article 3 and 4 of the Law on liability of legal persons for criminal offences.

[55] We consider that the competent public entity on judicial related matters in this case is the Ministry of Justice, because the Kosovo Probation Service as a competent entity for execution of decisions is obliged to inform ministry of justice for each executed sentence and keeps records on them.

relation with the ruling within 30 days upon filing of the application by the defendant, the public competent entity loses the right to reject the request of the person convicted but is obliged to determine the expungement ex officio. Only in case these options and prescribed legal timelines are exhausted while this body has not taken any decision, then the convicted person is entitled to address the issues with court.

4. Competence and criteria for deciding on the request of the convicted person to be expunged from records pursuant to the CCRK

When dealing with judicial rehabilitation and also legal rehabilitation, competent public entity in the field of judicial affairs did not render a ruling to decide on the request of the defendant, the procedure on deciding in the court to expunge it from record of convicted persons is set in motion by request of a convicted person [56] who addressed the court which adjudicated the matter in the first instance to recognize this right, by presenting evidence and presenting the evidence on justification of the request, even in case it contains shortcomings, the court is obliged to request them *ex-officio* from the authorities in charge to keep the records: the police, prosecution, courts and competent authority for execution of criminal sanctions. Upon receiving the request, the judge assigned to the case (Judge Rapporteur), first verifies the legally set deadline, whether the application submitted is in compliance with criteria provided under Article 104 in conjunction with Article 103 paragraph 2 of CCRK, and whether it is filed by an authorized person.

Mandatory criteria for deciding on the request of the convicted person are:

- To be filed by a person authorized by law;

- To have spent half the time of the limit envisaged for legal rehabilitation;

- The convicted person to have not committed another criminal offense within the legal prescribed period of time for rehabilitation;

- To have reasoned granting of request with his conduct after the court admonition, fine, probation or imprisonment and

- To have spent no less than two years from the time when his/her request was rejected to be expunged from the evidence of the convicted persons

Request is formal and it should contain the essential elements of any submissions that may be filed to the court: name and the address of the courthouse, judgment-judgments requested to be expunged, evidence from the correctional facility on the sentence or early release, evidence on payment of the fine if a fine was imposed, evidence of payment of procedural costs incurred in criminal proceedings initiated against him and the evidence for compensation of the injured party if such obligations are rendered with the judgment.

[56]Article 523 par.1 of the CPCRK

If the set criteria are met, notwithstanding if the applicant has submitted all necessary documents, the judge confirms the allegations presented in the application, and collects evidence that will serve in rendering a Ruling.[57]

The request submitted by an unauthorized person shall be dismissed as impermissible while the convicted person does not lose the right to file a request.[58]

The panel of judges of the first instance court that has rendered judgment shall decide on the request of the convicted person upon reasoned proposal by the judge and conducting of necessary inquiries. If the convicted person meets these criteria then the court takes a decision to grant the request of the convicted person and orders the authority where he/she is recorded for the offense requested to be expunged, in order to expunge it from the records of convicted persons.

In cases where the convicted person does not meet the criteria stipulated by the law and his conduct did not justify expungment, then it shall be rejected by a Ruling, and the convict may repeat the same request only after the expiration of two years from the date of the ruling to reject his/her request became final[59] in which he/she is entitled to an appeal with the Court of Appeals.[60]

4.1. Competence and criteria for deciding on the request to be expunged from criminal records pursuant to the laws of the region

Almost all countries that claim to have democratic system of government inevitable have the rehabilitation institute as a human right claiming to be acknowledged to the re-socialised convicts. Through this institute the convicted persons upon serving their sentence are enabled to be expunged from criminal records in order to acquire the same rights as people without sentences, envisaging also the procedure and the competence for expungement.

The CCRK, as we underlined above, recognizes the right of legal and judicial rehabilitation by also envisaging the criteria and competence on decision.

The Criminal Code of Croatia has envisaged the rehabilitation institute under the Article 85, recognizing the legal and judicial manner of rehabilitation. Under this law, legal rehabilitation is completed by a competent authority [61] (Ministry of Interior) as soon as it reaches the prescribed time limit and it does not pose any problem, because criminal records are kept electronically and the convicted person will benefit from this right as soon as they have reached legal prescribed time

[57] The police is required to provide information whether the petitioner is suspected for any criminal offence that he/she is recorded in this body, the obtained information from the police to be confirmed also within the state prosecution from whom it requests opinion in relation to render a ruling upon the application (although it is not related to the opinion), thou according to the law (Article 524 par.4) can request a report on conduct of the convicted person also from the institution where the person served his/her sentence however such practice is almost never practiced.

[58] In such cases the convicted person is nod bond to two years prescribed period of time as when the application of the convict is rejected as ungrounded.

[59]Article 523 par.6 i of the CPCRK

[60] The Court of Appeals enjoys the right to confirm the Ruling rendered by Basic Court, to amend it or to send it back for reconsideration.

[61]Bačič,F.,Pavlovic,Š. Commentary of Criminal Code ,Zagreb, 2004,page 402

limit upon necessary research, while the judicial rehabilitation is carried on by the court at the request of the convicted person.

Even under the Criminal Law of Montenegro on rehabilitation procedure is clearly regulated and the convicted person has no problem to benefit from this right because the same is carried on automatically as soon as the prescribed period of time is met as well as upon necessary queries and researchers have needed on behaviour on the conduct of the convicted person, it is the court that decides whether the convicted person through his conduct has justified expungement from the record.

According to the Italian Criminal Code, the decision for rehabilitation lays with the court which imposed the sentence but the procedure set in motion at the request of the convicted person who when filing the application must submit to the court evidence about his place of residence, that has served sentence or paid the fine, has covered procedural expenditures of the proceedings against him/her, has compensated the victim, or evidence that he/she did not claim compensation, it will be desirable to provide the reasoning for filed application. The Court has few months to decide on the request, schedules a meeting with the applicant in where the assistance of a legal counsel hired by him/her or appointed by the court is needed, ,and in that meeting the decision on approval or rejection of the application is announced. If the court decides in favour for rehabilitation of the applicant, he/she will be expunged from the telematic court archives, which can be waived if the citizen within seven years commits another offense punishable by at least two years in prison.[62]

According to the CLY the expunging from the records of persons convicted in one year imprisonment or higher sentences was an exclusive competence of the court[63] that decided upon the application of the convicted person on which the judge rapporteur carried necessary inquiries for conduct of the convicted person and the justification to expunge him/her form the record.[64] The panel of the court decided on expunging from the record.

The Criminal Code of Kosovo foresaw the legal and judicial rehabilitation that could be carried out administratively or judicially.[65] The administrative expunging from criminal records is *ex-officio* conducted by internal affairs body, whereas the court decides for judicial rehabilitation upon application of the convicted person.

The Provisional Criminal Code of Kosovo has placed the rehabilitation under Article 86 paragraph 2 that recognized legal and judicial rehabilitation by anticipating time period upon which the punishment would be ex-officio expunged from records of convicted persons and to the request of

[62]Av. mascia salvatore., Criminal rehabilitation-how to sanitize criminal records. Published on 20 December 2010 in www.shqiptariiitalise.com
[63]Article 93 par.5 of the Criminal Law of Yugoslavia,1977
[64] Criminal Procedure Law of the SFRY, article 513, 1986
[65] Guidelines on preparation of bar examination. Kosovo Institute on Euro-Atlantic Integrations. Prishtinë 2001, page.173-174

the convicted person under some limitations referring the sentences beyond 15 years or long term imprisonment[66].

5. Comparative Overview of the institute of rehabilitation with the laws of the region

Rehabilitation Institute is relatively new, first time it appeared in France after the triumph of the French Revolution, [67] a date when it became an integral part of almost all criminal codes of all democratic states, serving to the socialization of persons convicted.

According to the criminal law of the SFRY, rehabilitation and expungement from of *ex lege* record was provided for prisoners rendered judicial admonition, released from sentence, suspended sentence, sentenced with a fine, and for him /her who within one year's time after the judgment became final have not committed other offenses [68] . For convicted persons sentenced to imprisonment up to one year imprisonment and juvenile prison, the sentence is expunged from the record when five years have elapsed from the sentence being served, the prescribed statutory limitation or pardoned and have not committed any other criminal offense. It is noteworthy to mention that pursuant to this law (Art. 93 paragraph 7) if, within the period specified for the expungement from records, the convict is imposed additional prison sentence of over three years, neither previous conviction nor the latter one shall be expunged, whereas in relation to some other sentences of the same persons they will be expunged simultaneously in case for each of them certain criteria stipulated in the law[69].

Provisional Criminal Code of Kosovo's provides the rehabilitation institute under Article 86 according to which after a punishment of imprisonment has been served, subjected to pardon or amnesty or prescribed by statutory limitation, a convicted person shall exercise and acquire all the rights provided for by law and other provisions before the commission of the offense and shall be considered as not sentenced if he/she meets the criteria stipulated by the law and by his conduct justifies expungement.[70]

The Albanian Criminal Code places rehabilitation institute under Article 69, a provision that provides that "The sentencing of the following is considered null and void the sentencing of":

> a) those who are convicted with imprisonment sentences less than six months or with any other more lenient sentence, who have not committed any other criminal act for two years since the [last] day of their served sentence.

[66]Ibid., fq.145-146
[67]Salihi,I.,Criminal Law, general part, Prishtinë 2005, page.552
[68]Article 93 of the Criminal Law of the Yugoslavia, par.1,2,3,4, of 1977
[69]Article 93 par. 7 and 8 of SFRY, 1977
[70] Provisional Criminal Code of Kosovo, Article 86, Prishtinë 2004

b) those who are convicted of imprisonment sentences ranging from six months up to five years and who have not committed other criminal act for five years since the [last] day of their served sentence

c) those who are convicted of imprisonment sentences ranging from five to ten years and who have not committed any other criminal act for seven years since the [last] day of their served sentence.

d) those who are convicted of imprisonment sentences ranging from ten to twenty-five years and who have not committed any other criminal act for ten years since the [last] day of their served sentence[71].

Criminal Code of Republic of Albanian also provides legal and judicial rehabilitation. Judicial Rehabilitation is rendered through a court Ruling after the court finds plausible evidence that the person during the term of probation is improving, whereas regarding the legal rehabilitation, for a person to be to be considered null and void of any sentencing it suffices if the legally prescribed period has exceeded, without having any particular need for a specific court decision.[72]

According to the Italian Criminal Law any convicted person may request the right to rehabilitation himself or through defence counsel if conditions stipulated by law which proved to be more favourable than in CCRK in relation to more lenient sentences , because according to the Italian Criminal Law one may request to be expunged from the records if three years have passed since the final judgment which is not appealable, and for those who are convicted of serious offenses or been convicted several times for various criminal offenses the request may be submitted only after the lapse of 8 or 10 years as specified by law, must have not committed criminal acts, have compensated the injured party and paid the costs of criminal proceedings initiated against him and should not be subjected to security measures.[73]

6. Conclusions

Rehabilitation Institute is considered a humane option granted to persons who are convicted after committing an offense and during the prescribed vetting period have not committed any criminal offense. This is a second chance that the legislator provided for convicted persons in order to contribute primarily in self-improvement and thus to contribute to the family, surrounding and to society. By analyzing this institute it was aimed to clarify some dilemmas that arose in practice and to provide suggestions regarding decision without violating the rights of prisoners and aiming the purpose of punishment, without pretending that all subjects and points have been tackled. Recommendations lie mainly in accurate interpretation of this provision and application of more favourable law.

[71]Article 69 of the Criminal Code of Albania
[72]Elezi,I.,Kaqupi,S.,Haxhia,M., Commentary of the Criminal Code of the Republic of Albania ,Tiranë,2009,page.29
[73]Av. mascia Salvatore. Criminal rehabilitation-how to sanitize criminal records. Published on 20 December 2010 in www.shqiptariiitalise.com

1. Regarding the accurate and equal implementation within entire territory of Kosovo I believe that Supreme Court should take a principle stance on this.

2. If legal provisions of Article 103 read that a person convicted may be expunged from the records one time only, then it would be more humane to act pursuant to the provision foreseen in CPCRK because its provisions are more favourable to the convicted persons because it does not envisage the word: the first time for offenses that were committed while the same law has been in force.

3. It is a matter of exigency to define who is the public competent entity for judicial related matters that would *ex-officio* deal with the rehabilitation, since apart from recognition of the right of convicted persons, at the same time the courts would be relieved from taking decisions in recognition of the said right which would significantly contribute in bringing back the trust in public authorities.

4. Regarding the disclosure of information from the criminal record of convicted, I think an intervention is needed in this regard so upon the expungment from records obtaining of information for expunged convictions would be more limited and with this the rehabilitation institute would lose its effect and the re-socialized persons again would be a subject of prejudices.

Bibliography

- Bačič,Franjo.,Pavlovic,Šime., Commentary of Criminal Code ,Zagreb, 2004
- Guidelines on preparation of bar examination. Kosovo Institute on Euro-Atlantic Integrations. Prishtinë 2001, page.173-174
- Elezi,I.,Kaqupi,S.,Haxhia,M., Commentary of the Criminal Code of the Republic of Albania ,Tirana,2009
- Provisional Criminal Code of Kosovo, Prishtinë 2004
- Criminal Code of Montenegroe, no.70/04,13/04
- Criminal Code of Croatia, Zagreb 2004
- Criminal Code of Albania. Tirana, 1995.
- Criminal Code of Bosnia and Herzegovina
- Criminal code of the Republic of Kosovo, 2013
- Criminal procedure Code of the Republic of Kosovo,2013
- Commentary of the Provisional Criminal Code of Kosovo, Prishtine , 2012
- Constitution of the Republic of Kosovo
- European Convention on Human Rights and Freedoms
- Criminal procedure Code of the German Federal Republic, edition in Bosnian language ,Sarajevo 2011
- Law no. 04/l-030 on Liability of Legal Persons for Criminal Offences. 31 August 2011
- Criminal Law of Yugoslavia,.1977

- Criminal procedure Law of the SFRY, 1986
- Av. Mascia Salvatore., Criminal rehabilitation-how to sanitize criminal records. Published on 20 December 2010 in www.shqiptariiitalise.com
- Salihi,I., Criminal Law, general part, Prishtinë 2005
- Law on legal consequences of sentences, criminal records and rehabilitation, NN 143/12, 7 December 2012. Zagreb

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USUFRUCT

ABSTRACT

This paper explains the institute of usufruct as a real right, which significantly restricts the rights of the owner of the usufruct object. In addition to this, the content of usufruct will also be discussed, more specifically the fundamental rights and obligations of the usufructuary. Moreover, this paper will also discuss the creation of the usufruct, its protection and ending. A particular overview will be devoted to the legal position of aforementioned entities and the restriction in using the object of usufruct. The rights and obligations of the usufructuary and its owner are regulated in detail by the Law on Property and Other Real Rights in Kosovo, and are analyzed in comparative level, by drawing comparisons with other legal systems of different countries.

This paper proves that the absolute nature of the property right is however subject to restrictions while there is a legal relationship or agreement of usufruct, of which the owner of the property is liable to collect, so as to allow the usfructuary to peacefully exercise its right who ultimately is also liable to adhere to the manner of use as determined by the law and in particular, while special care shall be given to preserving the substance of the property and its economic destination.

Key words: personal servitude, usufruct, the owner of the asset, usufructuary, using the asset, fruits, rights and obligations, limited real right.

Introduction

According to the legislation in Kosovo, the usufruct, as one of the most important personal servitude, is regulated with the provisions of Law on Property and Other Real Rights (Article 218 -251).[74]

[74] Official Gazette of the Republic of Kosovo nr.57/04, 2009.

The usufruct, is a time limited use of an asset and its collection, without damaging the substance of the asset and its economic destination. As a real right of the broader use of someone else's asset, the usufruct represents the most important personal servitude.

As any other subjective right, the usufruct consists of the rights and obligations for the subjects or entities that enter into a legal agreement in order to establish it. The content of the usufruct is part of absolute subjective rights group and as such, it applies *erga omnes*, i.e to all third persons including the holder of good at service. However, unlike third persons, whose actions are negative, relative relations of the subjective rights are established between the holder of the right and the usufructuary. Since into the relationship between the holder of good at service and the usufructuary, the usufruct has dual action effect, the usufruct contains elements of the subjective rights with the absolute and relative nature.[75] With regard to the content the usufruct is similar to the obligations (for example: rent), while with regard to its application, the usufruct is a real right. An object of the usufruct can be assets or rights.

A usufruct can be established under a contact or a judicial decision. [76]

Under the contract, the usufruct can be established in a manner that the holder of the right of serving, retains the right of property over the asset while it transfers the right of usufruct to the usufructuary, or, retains the right of usufruct while it transfers the right of property.

Under a judicial decision, the usufruct can be established when all the legal facts set forth by the law are made relevant. This can be best illustrated by the fact that if we refer the Law on Inheritance in Kosovo, article 63.2, which provides: "If the usufruct… has been contracted to the assignor and his spouse together, in case of death of any of them, the usufruct… the entire usufruct belongs to the other party until his death, unless it results otherwise from the agreement, or from the circumstances" so it can be inferred that in order to exercise the right of usufruct, the legal facts have been proven.

According to the article 223 of Civil Code of Albania, the usufruct can be established also with adverse possession. Also the Albanian Civil Code in article 236 has foreseen the joint-usufruct, according to which a usufruct could exist in favor of more than one person. When the right belonging to one of them ceases to exist, it transfers in proportions to the usufructuary that are left.

An immovable or a movable asset can be encumbered in a way that the person (user) in whose benefit the asset was encumbered has the right to use and reap all the benefits of the item, without impairing the substance.[77]

The usufructuary cannot use the essence of the asset nor legally nor factually.[78] Furthermore, it cannot use legally the essence of the asset since the usufruct is a personal servitude and is bound

[75] D.Stojanovic-O.Antic, uvod u gradjansko pravo, Beograd, 2004, 204
[76] Law on Property and Other Real Rights of the Republic of Kosovo, article 220.
[77] Law on Property and Other Real Rights of the Republic in Kosovo, article 218.
[78] Gams,Andrea , The Basics of the Real Rights Belgrade, 1966,page.151

to the subjectivity of the usufruct holder while factually the usufructuary must keep the essence of the asset by not changing is composition nor its economic destination. [79]

1. The legal position of usufructuary

1.1. The rights of usufructuary

The usufructuary has the right to use the asset pertaining to another person, by respecting is economic destination and by preserving its substance, while the owner of the asset has to endure such use. The Law on Property and Other Real Rights stipulates: "Movable and immovable property can be encumbered in such way that a person for whose benefit the encumbrance is made is entitled to use and encumber the property (usufruct) provided the substance of the property remains unimpaired"[80]

Furthermore, the Law on Property and Other Real Rights article 224 stipulates the following: The usufructuary is entitled to possession of the movable property encumbered by the usufruct. Thus, as it can be understood from this legal provision, one of the most fundamental rights of the usufructuary is the right to possess the asset encumbered with usufruct. Also, while referring to the legal wording of the provision found in article 218 of Law on Property and Other Real Rights, it is clear that the usufructuary has the right to use and collect all the benefits of the asset.

1.1.1 The right to take the asset into possession

The usufructuary is authorized to possess the asset.[81] In principle, the usufructuary has lawful possession, independent an exclusive. Whereas the possibility to contract a possession of intermediate and joint possession exist only when with this kind of possession the purpose of right of use and fruit collect is achieved. [82]

The right to poses and asset means that the usufructuary is immediately establishing a relations with the asset, with the purpose to use, administrate, and benefit its fruits, without having the need for an action from the owner or anybody else who is already unvested from its rights of use. This represents an essential quality of the usufruct.

The owner is obliged to handle the asset to the usufructuary and if he does not do this voluntarily then the usufructuary has the right to sue the owner in order to obtain the asset.[83] In case the usufructuary and the owner in their agreement have not foreseen the obligation to handle or deliver

[79] Aliu, A, cited book, page. 168
[80] Law on Property and Other Real Rights of the Republic in Kosovo, article 218.
[81] German Civile Code, article 1036
[82] Kovacevic, Nemanja, The content of the usufruct right in the Serbian law "Glasnik Prava" Kragujevc, 2013 fq. 121.
[83] Law on Property and Other Real Rights, article 232.

the asset in good conditions, then the usufructuary shall not have the right to refuse accept the asset because of non-conformity. If the usufructuary misuses its right, then the court can deprive him from the right to administer the asset. The word itself usufruct, entails two essential elements: Usus – the right to use the asset and Fructus the right to collect its benefits. These two elements give meaning to the usufruct, known with this name. Almost all legal regulations with contemporary civil law establish the usufruct right based in these two essential elements, on which stand the rights of usufructuary, for example the CCF, the CCA etc.[84] It is essential to preserve the substance of the asset that is object of the usufruct, regardless of the volume of authorization that the holder of the right of usufruct has in using the asset belonging to someone else. This is very easy to be understood based on the definitions provided for the usufruct. This increases the need for he asset to be non-exhaustive.

1.1.2 The right to use the asset

The right of use exercised from the usufructuary is a general right, which is undefined and the law makes a negative definition, thus obliging the usufructuary in preserving the substance of the asset. [85]

The usufructuary has the authorization to use the asset but does not have the right to change its economic destination without the prior consent of the owner. The right of use means the right to collect its fruits or benefits. The usufructuary has the right to gather the fruits (either natural or civil) that the asset produces during the time of usufruct. The usufructuary has the right to use the asset into usufruct which means that the usufructuary has the right to use the usufruct same as the owner. The usufructuary has the right to use the servitudes[86] that are related to the property upon which has the right of usufruct and to exercise other real rights that can be exercised by the owner as well, except cases when restrictions are stipulated according to the contract for establishing the usufruct, or according to the law. The usufructuary has the right to use the real servitude in the immovable asset in which it has established a usufruct, regardless of the fact of that real servitude was constituted before or after the established of the usufruct.[87] In a way the usufructuary is obliged to use the real servitudes, in order to preserve the right to use them, so to avoid and statute of limitation for this right which comes as a result of not exercising the right.[88] The usufructuary cannot establish new real servitude in the asset which is encumbered with the right of usufruct, but he can allow the third person to use the asset that is object of the usufruct, according to the legal relations of obligations. [89]

[84] CCF Article 5977, CCA Article 849, al.1
[85] CCA, article 237.
[86] CCA, article 245.
[87] Stankovic, Obren & Orlic, Miodrag, Stvarno pravo, deveto izdanje, Beograd, 1996, fq.221.
[88] Stankovic, Obren & Orlic, Miodrag, vepra e cituar,, fq.221.
[89] Right there

With regard to the right of using the asset that is object of the usufruct, many authors consider that the usufructuary has the right to reach that level of being the owner of the asset. But, regardless of all, it is essential in this case that the asset is used as per its economic destination by preserving its substance. At the end, preserving the substance of the asset is a precondition in establishing the usufruct. The foundation of usufruct itself is bound to collecting the fruits or benefits from an asset that is somebody else's property and it is essential to the legal relationship of the usufruct. The usufructuary has the right to gather the fruits or benefits, either natural or civil. He has the right to use these fruits without any disturbance. He has the right to sell them. The usufructary has the right to transfer the right of collecting the fruits or benefits to another person. The usufructuary has the right to request an inventarization with the purpose of assessing the condition of the asset. If the inventarization of the asset has not been performed in the beginning, it is considered that the asset has been in an average condition. [90] Whereas according to the KCS, the expenditures of inventarization are carried out by both parties, regardless of who requested the inventarization. [91] Whereas the KCGJ stipulates that the expenditures with regard to inventarization can be carried out by the party that has request it in the first place. [92]

1.1.3 The right to transfer the usufruct

In case the usufructuary is a natural person, then he cannot transfer the usufruct. An asset encumbered with the usufruct can be transferred to another person to exercise the right of usufruct. [93] Namely the usufructuary who is a natural person can transfer to another person only the right of exercising the usufruct but not the right upon the usufruct. When a third person exercises the rights deriving from the usufruct which lasts within the time limit set for the use of the usufruct, by the death of first usufructuary the rights deriving from the usurufuct ceases to exist.

Whereas with regard to transferring the right of using the usufruct to another person, the Civil Code of Albania as foreseen a different situation from our law on property and other real rights.

According to CCA: "The usufructuary can transfer to another this right for a certain period or for all time it is on, except when in the establishment act it is differently foreseen. The transfer must be writtenly announced to owner, otherwise the former usufructuary and the person who has acquired such a right are solidary responsible to the owner."

When we are dealing with the transfer right of the usufruct, and when the usufructuary is a legal entity the Law on Property and Other Real Rights of Kosovo has foreseen this solution:

"If a usufruct is held by a legal person or a partnership with legal personality, the usufruct is transferred if the assets of the legal person or the partnership are assigned to another person by

[90] Statovci,E. The Servitude Right, 2009, page.294 cited as KC PA par.513.
[91] CCS, Article 763
[92] CCG, Article 1034
[93] Law on Property and Other Real Rights of Kosovo, Article 219

way of universal succession. If a business or part of a business operated by a legal person is transferred to another person, a usufruct may be transferred to the acquirer if the usufruct is considered beneficial for the purposes of operating the business or a part thereof."

The CCA foresees the possibility to transfer the right of the usufruct for a limited period of time, or for the whole time while the usufruct is set to exist, unless it has been regulated otherwise with the establishing act.

Transferring the right of usufruct to another person should be announced to the owner, otherwise the usufructuary and the person who gained the right of usufruct shall be jointly responsible to the owner. [94]

According to the CCA the usufructuary has the right to transfer the right of the usufruct to another person or to alienate it at the extent allowed for the alienation. He also has the right to rent the asset and the right to use the servitude and other real rights. [95]

Fruits or benefits are assets that are periodically produced by the main asset. Whereas the German law divides the fruits into assets fruits and fruits deriving from the right, thus in a direct and indirect way. [96] The usufructuary of a corporal asset has the authorization to collect the natural fruits and the civil fruits as well, and all other benefits deriving from the right of use of that asset. [97]

The usufructuary has the right to possess the asset encumbered with the usufruct. [98]

The usufructuary has the right to collect the natural fruits provided by the good at service, without reducing its substance and without interfering with the legal provision and common practice. Civil fruits, that the assets provides based on a legal act, belong to the usufructuary during the whole time that the usufruct actually exists. Civil fruits that are created after the usufruct ceased to exist belong to the owner of the asset. Natural fruits are considered to be all those fruits that are produced by the land, or as an outcome of a man's work and also animal products.

Natural fruits are also considered to be sand, rock, gravel, etc. If the usufructuary and the owner of the asset have not drafted a record in form of document with regard to the condition or conformity of the good at service, then it is considered that the usufructuary has received the good at service in an average condition of use, with at the qualities for a regular use by the usufructuary. The usufructuary covers the expenses for regular maintenance of the good at service.

The usufructuary or the owner may request that the instrument (security) and the renewal certificate be deposited at a depository institution with the stipulation that delivery may be requested only by the usufructuary and the owner jointly. [99]Thus according to this the authorization

[94] CCA, article 240
[95] CCA, article 240-241
[96] CCG, article 962
[97] CCG, article 1030
[98] Law on Property and Other Real Rights of Kosovo , article 224
[99] Law on Property and Other Real Rights of Kosovo, article 246. Par.2

to return the instrument (security) or the renewal certificate pertains to usufructuary and to the owner of the asset that is the object of usufruct, and only upon the condition of them acting jointly. The owner of the asset may denounce the usufruct. The denouncement may be made when the usufructuary fails to provide the required safety from the owner and when there is a serious threat jeopardizing his rights, especially when dealing with the right to maintain the asset or require it back. If the denouncement of the usufruct is valid, the usufructuary retain his right for proper compensation for the non-collected benefits.

CCA stipulates: The usufructuary receives the assets in the conditions they are before the usufruct. Assets of the usufruct are received in delivery by inventory done with a notarial act or with the verification by notary, in the presence of owner, after he was announced in an appropriate term. It is the right of parties that in inventory must be noted all details which are related to the definition and condition of thing taken in usufruct.

The inventory can be done by a private act also, when two parties are in agreement and are present during its performance. The expenses for the performance of inventory are on the charge of usufructuary, except when it is differently foreseen in the establishment act.[100]

When dealing with the usufruct in an enterprise, then the usufruct shall be registered in the tregister of the rights of immovable property. The usufructuary has the right to use and take action with all the properties of the enterprise and to become a beneficiary of all the rights that the enterprise has towards third persons, unless the usufruct provider and the usufructuary have agreed otherwise.

The Law of Kosovo on Expropriation stipulates the following:

"If, as a result of an expropriation, a personal servitude, construction right, right of preemption, usufruct or right of use on or to the expropriated property is terminated, the Final Decision shall require the Expropriating Authority to pay reasonable compensation, as determined by the Office of Property Valuation, to the Persons who have been damaged by the loss of such servitude or right. Unless an applicable and lawfully awarded contract provides otherwise, the Expropriating Authority may order the Applicant or anticipated Beneficiary – if any – to pay such compensation."[101] Even when we are dealing with property expropriation executed for the benefit of public interest, the lawmaker has foreseen the possibility of compensation for the holder of the right of the personal servitude – the usufruct.

2. The obligations of usufructuary

The usufructuary must provide for the maintenance of the property in order for its substance to remain unimpaired.[102] The usufructuary is obliged to preserve the substance of the asset, but he

[100] CCA, Article 247
[101] Law of Kosovo on Expropriation, article 18
[102] Law on Property and Other Real Rights of Kosovo article 18

cannot be held responsible for the diminished value which comes as result of its regular use. [103]The usufructuary is not obligated to carry out extraordinary repairs and renovations, but must permit the owner to undertake such repairs or renovations. [104]The usufructuary is obligated to carry out repairs and renovations only to the extent that these are part of the normal maintenance of the property.[105] Whereas the owner is responsible to cover the expenses which come as a result of asset amortization, force majeure or coincidence.[106] While in the Croatian legal system there is no obligation foreseen for the usufructuary to provide the owner with relevant safety measures with regard to the substance of the asset.[107] In contrary to this, the CCG stipulates that the usufructuary is not obliged to insure the owner as specified above.[108] Even the CCA foresees the obligation of the usufructuary to insure with regard to fulfilling its obligations deriving from the usufruct. [109] In addition, the usufructuary has the obligation to notify the owner immediately after damage or deterioration has be caused to the asset or if there is a necessity for extraordinarily reparation of the asset due to an unforeseeable danger. Notice shall be made in the same way with regard even for the claims of a third person on the usufruct.[110] CCG in the meanwhile foresees the obligation of the usufructuary to notify the owner of the asset that has been damages or deteriorated, for any extraordinary repair or possible renovation of the asset or for any preventive measures to protect the asset from unforeseeable danger. The usufructuary must notify the owner without any unreasonable delay. In the same way the usufrutycary notifies the owner about the claims of a third person toward the asset. [111]

For the duration of the usufruct, the usufructuary is obligated to pay all ordinary public charges due for the asset, such as taxes and fees. The usufructuary is further obligated to pay private charges that were levied on the property as of the date the usufruct was created, in particular interest on a mortgage and land charges.[112]

If after the termination of the usufruct, the asset is not in the same condition as the one in which the usufructuary received it, he is accountable to the owner for the diminished value, regardless of the cause; however, he is not held accountable for the diminished value because of age or regular wear and tear that could not be avoided or remedied by full performance of the duties referred to. [113]

[103] Stankovic, Obren & Orlic, Miodrag, cited book,page .221.
[104] Law on Property and Other Real Rights of Kosovo article 226, par.3
[105] Law on Property and Other Real Rights of Kosovo article 226, par. 2
[106] Stankovic, Obren & Orlic, Miodrag, cited book, page.221.
[107] Zakon o vlasnistvo i drugim stvarnim pravima Republike Hrvatske, NN91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114.01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, neni 209 par.1.
[108] CCG, article 505.
[109] CCA, article 252.
[110] Law on Property and Other Real Rights of Kosovo article 228
[111] CCG article 1042, Stankovic, Obren & Orlic, Miodrag, cited book,, page.221-222.
[112] Law on Property and Other Real Rights of Kosovo, article 229.
[113] The law of Croatia on Property and Other Real Rights, Article 210,

The usufructuary is obliged to pay for the value of the lost or damaged asset even though if this was not because of his fault. The Law on Property and Other Real Rights of Kosovo obliged the usufructuary to maintain the asset, as follows: "The usufructuary must provide for the maintenance of the property in order for its substance to remain unimpaired."[114]

The usufructuary must provide maintenance of the property by taking all the measures in order for to preserve it from being destroyed. The usufructuary is obligated to carry out repairs and renovations only to the extent that these are part of the normal maintenance of the property. The usufructuary is not obligated to carry out extraordinary repairs and renovations, but must permit the owner to undertake such repairs or renovations.[115]

If the property is destroyed or damaged or if an extraordinary repair or renovation or a precautionary measure for protection of the property against unforeseen hazards becomes necessary, the usufructuary must notify the owner without undue delay.[116]

The rights of the usufructuary are not equal with the rights of the owner, since as it is specified above the usufructuary is obliged to preserve the substance of the asset. Whereas, respecting the asset economic destination, is not an obligation of usufructuary towards the owner, but a restriction in using the usufruct. Thus, this means that the usufructuary has the right to use the asset only in a manner stipulated without impairing its substance or altering its economic destination. If he fails to respect this, he violates the property right, and it does not fail to fulfill its obligation related to the usufruct. At this point, we are not dealing only with violation of the authorizations that have been primarily specified, but at the same time we are dealing with misuse of usufruct. Therefore, such actions of usufructuary which fail to respect the economic destination of the asset cannot be deemed to be legal toward third parties either. [117]

When there is a demand to preserve the economic destination of an asset, then it should be specified clearly the notion of economic destination. This is because an asset can be suitable for many functions. Thus a building can be serve for residence, office, store, and this due to the fact that many factors determine it economic destination of such asset. This factors or circumstances could be: the environment where the asset is located, the social position of the owner, or other circumstances present at the moment when the economic destination of the asset is being determined. However it is important to point out that it must be taken into consideration the economic destination of the asset at the moment when the usufruct was established.

At the time the usufruct end, the usufructuary must return the enterprise and all its assets to the owner. In addition, if the value of all current assets returned to the owner is lower that their value

[114] Law on Property and Other Real Rights of Kosovo , article 226
[115] Right there,
[116] Law on Property and Other Real Rights of Kosovo, article 228
[117] Law on Property and Other Real Rights of Kosovo, article 228

at the time of the creation of the usufruct, the usufructuary must compensate the owner accordingly.[118]

3. Legal position of the owner

3.1 The rights of the owner

The property right is a subjective right of the absolute nature. Therefore this gives right to the owner to use its asset accordingly to his will, but upon the condition that he must not violate the usufruct rights. The owner has the right to freely use the asset that is usufruct object, to alter it without any restrictions, to give it away, to bequeath it, to establish a real servitude and to use it to the extent that it does not violet the rights of the usufructuary. While in the immovable property the owner can establish the usufruct.

In addition the owner has the right to require from to court to set a preliminary injunction in relation to the usufruct, as per the conditions set forth in order to avoid any other option from the usufructuary in fulfilling its insurance obligations. In case the court refuses such request, the right of the owner to require forceful enforcement from the court is presumed. [119]

A found treasury belongs to the owner, not to the usufructuary. In case the usufructuary uses the asset in an unauthorized manner, the owner may issue a warning to the usufructuary. If the usufructuary continues the unauthorized use notwithstanding that a warning was issued, the owner may seek an injunction against the usufructuary prohibiting the unauthorized use. [120]

If a claim for a particular asset falls due which arose before the usufruct in the owner's assets was created, the owner may require the usufructuary to return the asset that is necessary to satisfy the creditor's claim.

3.1 Obligations of the owner

In additions to the rights, the owner has also obligations to meet, thus he is obliged to make it possible to the usufructuary to exercise his right. Handover or deliver the asset to the usufructuary, while the asset must be in good condition. The owner is obliged to cover extraordinary expenses (repair the roof and other similar and conditional damages) and other extraordinary hauls related to the asset. Extraordinary hauls are considered to be: expenses related to the demarcation between neighbor owners, another expenses on reparation in building wall or maintaining yards. [121]The owner has the right to sue the usufructuary in order to protect his right.

[118] Law on Property and Other Real Rights of Kosovo, article 251
[119] Law on Property and Other Real Rights of Montenegro, article 239.
[120] Law on Property and Other Real Rights of Kosovo, article 231, par. 2
[121] Statovci ,E. The Servitude Right, 2009, page.295

4. Protecting the right of the usufruct

If the right of the usufructuary is violated, then the usufructuary has the same rights as the owner does. Depending on the damage, the holder of the right of the usufruct can submit:

1) Claim against the obstruction of possession
2) Claim to verify or confirm the existence of a servitude
3) Actio conferssoria (confessing claim)[122]

The principal claim through which the usufructuary protects its right is the confessing claim (action confessoria), and in addition he has the right to submit a claim for possession.

The confessing claim the claimant can testify:

a. The existence of his right
b. The respondents obstruction act [123]

In the Roman law the servitudes as a real right are protected with *action in rem,* whereas in the Justinian era the claim to protect the servitude was known as action conferssoria. Primarily this belonged to the holder of the right of the usufruct, against the owner of the good at service, and latter actio confessoria was allowed also to be submitted against third parties that obstructed the usufructuary in exercising its right of the servitude. Actio confessoria is same as vindication servitutis, through which the claimant pretends he is entitled the usufruct. The claimant must verify that he is entitled the right of the usufruct, and he also must verify the action of the respondent by which he obstructs the right of using the usufruct,[124] whereas in this case the respondent will be forced to accept the right of the usufructuary upon the servitude (usufruct) and to make possible to the claimant to exercise without any obstruction its right of usufruct, and the compensation for the damage caused, including the termination of any further obstruction.

Actio conferssoria is similar to actio negatoria. With action negatoria the owner is protected against any other third party who is obstructing him, since he embraced the right of the servitude. Actio confesoria is submitted by the holder of the right of the usufruct against the owner of the asset and against third parties in order ensure the recognition of his right upon the usufruct.[125] Actio conferssoria has been made available also to the deputy holder of the right of the servitude, and this is the person who is competent to testify the legal basis and other true ways of gaining the right of the servitude before a competent court. In case the right of the servitude is damaged with a null decision in the land registration books, the holder of the right has at his disposal ‘’erasure claim’’. [126]In this case the usufructuary is an active legitimate, the right of who has been violated, while all the others, even the owner of the right, who obstruct the usufructuary to exercise his right

[122] Gavela,N. Stvarno Pravo Zagreb 2008, page.100
[123] Right there,
[124] Right there,
[125] Klarič,Vedriš , Stvarno pravo,Zagreb 2008, fq.25
[126] Klarič,Vedriš , Stvarno pravo,Zagreb 2008, fq.25

upon the usufruct are passive legitimates.[127] With the confessing claim the return of the asset is required, which has been taken by the claimant (restiutio in integrum) or in addition to that what could also be required is the termination of further obstruction in exercising the right of the usufruct. The statute of limitation for this claim is twenty years, starting from for the moment the holder of the right when the holder of the right was denied the right to or obstructed in possessing such right.[128] Comparative law foresees that the usufructuary could raise any real right claim, against the owner or against third parties. According to the CCG the usufruct is protected in the same way as it is protected the property right[129], such as: petition claim which corresponds with the rei vindiacatio claim and action negatoria and other real rights claim. The same solution has been incorporated in the Law of Property and Other Real Rights of Kosovo: "The usufructuary is entitled to the same rights as the owner against any third party interference with the usufruct''.[130]

The French law meanwhile the usufruct right is protected with the confessing claim o the usufruct and with the possessing claim.[131]

In terms of forcefully exercising of the right and the competence of the court: the Law on Enforcement Procedure, stipulates the following: To decide about the proposal for execution for the usufruct, or any other similar property right of debtor and for application of application of this execution, of territorial jurisdiction is the court in territory of which is situated the residence of execution debtor, and if execution does not have residence in Kosovo, competent is the court in territory of which is his place of stay. When the debtor is a legal entity, of territorial jurisdiction is the court in territory of which is situated the headquarters of the legal entity, and in the debtor has no headquarters in Kosovo, competent is the court where in territory of which the legal entity is situated. [132]

5. End of the usufruct

The usufruct as a legal relation, is established, altered and ended upon the fulfillment of certain legal circumstances which the law recognizes. The usufruct is ended when the time set forth for its existence has passed, but before the usufructuarys death. If by the time of death of the usufructuary the usufruct contracted period has not ended yet, or it has not been contracted at all, the right of the usufruct at that point is ended as a personal servitude upon the usufructuarys death while the owner will retain back is right to the asset, who until then was unvested from the property rights. The ending of the usufruct as a legal relation happens upon its fulfillment and by waiving the right upon the usufruct.

[127] Statovci,E.E Drejta e Servituteve Prishtine 2009 ,fq 300
[128] Gavela,N. Stvarno Pravo Zagreb 2008 , fq.100
[129] CCG, Article 1056
[130] Law on Property and Other Real Rights, article 232
[131] Satovci, E. E Dreja e Servituteve, Prishtine 2009, fq 301 cituar Planiol-Ripert 665,Yiannopoulos 226.
[132] Law on Enforcement Procedure in Kosovo, article 175

The usufruct can be ended upon the contract reached by the owner of the asset and the usufructuary (this agreement could be with or without compensation) and also with the usufructuary denouncement.[133] The validity of the denouncement is considered as one sided legal act, and the consent of the owner of this asset which is usufruct object is not required, however the usufructuary creditors could require the annulment of the denouncement which has been exercised against their interests. The interest of the usufructuary to waive its right from the usufruct, comes as a result of non-profitability of the asset which at one point becomes a burden for him.[134] Legal facts that are recognized by the law e which lead to the termination of the usufruct are different. The Law on Property and Other Real Rights of Kosovo stipulates the following, with regard to the ending of the usufruct:

a. with the death of the usufructuary, if the usufructuary is natural person.

b. in the case that the usufructuary is a legal entity with its termination.[135]

c. a usufruct in immovable property terminates when the usufructuary gives the owner a notice of termination and the termination is registered into the immovable property rights register.

d. a usufruct in movable property terminates when the usufructuary declares to the owner that the usufruct is abandoned.[136]

The CCA foresees the following ways of ending the usufruct right:

- by the death of usufructuary or ceasation of usufructuary legal entity;
- by the unification of qualities of owner and usufructuary in a sole person ;
- by the complete destruction or the loss of thing given in usufruct;
- by non-usage of usufruct continuously for twenty years

The death of the usufructuary is the most natural way to end the usufruct. This way of ending the usufruct is common for all the legal systems. [137] The right of the usufruct is a subject right belonging to one specific person. It lasts until the usufructuary is dead, and by his death the right of the usufruct ends.

Some civil codes[138] do not allow for the usufruct right to be transferred to the usufructuarys successors after his death. While, in terms of ending the right of the usufruct when the legal entities have the capacity of the usufructuary, it ends upon the termination of the legal entity. [139]

[133] CCF, Article 621, 622, CCG article 1064, CCS a.l2, article 748
[134] Stankovič,O.& Orlič,M. Stvarno Pravo,naučna Knjiga ,Beograd,1981,fq.341
[135] Law on Property and Other Real Rights of Kosovo, article 235.
[136] Law on Property and Other Real Rights of Kosovo, article 236.
[137] Law on Property and Other Real Rights of Kosovo, CCA 235, article 225 par.1, CCG article 1061, CCF article 617, Croatian Law on Property and Other Real Rights article 201.
[138] CCG article 1061, CCF article 617
[139] Law on Property and Other Real Rights of Kosovo, article a235, par.2, CCA article 255, CCG article 1061

In other civil codes the usufruct right has a timeline of thirty years,[140] from the day he usufruct right commenced.

Another way of ending the usufruct right is expiration of the contracted time. In principle the usufruct end with the death of the usufructuary however parties have the opportunity to set the duration of the usufruct themselves.

The usufruct can also end by not exercising this right from the usufructuary. If the usufructuary does not exercise this right for a considerable time period (does no live in the house of apartment upon which he has the right of the usufruct), the owner has the right to require through a judicial decision to be verified that the right of the usufruct has been terminated. The usufruct can end also by destruction of the asset. The usufruct ends under the conditions stipulated by the law.

6. Conclusion

The elaboration we made for the usufruct as a legal institute pertaining to the real rights, it was clear that the usufruct represents one of the most important personal servitude. As the most relevant personal servitude, the usufruct is a complex institute of the real rights law, since its legal nature is quite complicated, which entails the substantial rights of the owner of the asset and for this reason the lawmaker has paid special attention by regulating it in a detailed manner through specifying the rights and obligations of the usufructuary and the owner of the asset.

In the comparative law the institute of the usufruct represents one of the most relevant personal servitudes, and it pays particular attention its legal regulation. This has been also a characteristic of our legal system, for the mere fact that in the considerable amount the rights of the owner of the asset that is object of the usufruct have been affected.

From what has been established in this paper, the usufruct could be created only in the manners specified by the law, while preserving its substance and not altering its economic destination of the usufruct object, where basic preconditions establishing this institution and respecting them is indispensable.

In addition, it was established that throughout the duration of the usufruct, the usufructuary besides having rights, has the obligation to preserve the usufruct asset with responsibility and to notify the owner when there is danger threatening the usufruct object, and at the same time require from the owner to undertake all necessary interventions.

Since after the end of the conflict in our country there has been load of transactions with immovable property, the court should be careful when rendering decision on the merits of property cases, by taking particular care in not violating other real rights pertaining to their holder, including those of the usufructuary.

[140] CCF, article 619

Bibliography

- Aliu, Abdulla, E drejta Sendore, Prishtinë, 2005.
- D.Stojanovic-O.Antic, uvod u gradjansko pravo, Beograd, 2004
- Gams,Andrea ,Bazat e së Drejtës Reale,Beograd 1966.
- Gavela,Nikola, Stvarno Pravo Zagreb 2008.
- Klarič,Vedriš, Stvarno pravo,Zagreb 2008.
- Statovci, Ejup, E Drejta e Servituteve Prishtine 2009-ribotim.
- Stanković, Obren .& Orlić,Milorad Stvarno Pravo,naučna Knjiga ,Beograd,1981.
- Stanković, Obren .& Orlić,Milorad Stvarno Pravo,deveto izdanje, Beograd,1996.
- Civil Code of the Republic of Albania 1994
- German Civil Code 1900
- French Civil Code 1804
- Civil Code of Louisiana 1996
- Law on Property and Other Real Rights (Official Gazette of Kosovo nr. 57/04,2009)
- Law on Expropriation of Immovable Property (Official Gazette of Kosovo nr. 03/L-139)
- Law on Property and Other Real Rights of Montenegro
- Law on Property and Other Real Rights of Croatia
- Law on Enforcement Procedure 2013.

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DIVERSITY MEASSURES ON JUVENILES

ABSTRACT

The reason for elaborating "Diversity Measures on Juveniles" is that juveniles as a category are very sensitive due to their mental and physical development. The disturbing fact that a considerable number of criminal offences are juveniles, is what lead to choose this topic for elaboration. Thus, finding more adequate measures to impose to this category represents an interest of study in the field of criminal law. This paper, beside the introduction part is divided in two parts which include the conclusions and bibliography.

In the first part of this paper we have mainly elaborated the background of the diversity measures commencing from its establishment. Whereas in the second part of this paper we have elaborated implementation forms of the diversity measures according to our criminal system and juvenile treatment when diversity measures are imposed (enforcement of diversity measures. The final part of this paper contain main findings on Diversity Measures on Juveniles. While by the end of this paper the bibliography used for the purpose of preparing this paper is provided.

Key words: Diversity measures, implementation forms of diversity measures, diversity measures according to our system, juvenile treatment.

Introduction

Often in every country, the category of younger age known as juveniles are the one committing criminal offences. Young people are current and future of every society, therefore due to the specification characterizing this category it is necessary to find alternative forms of measures to be imposed thus technically it would not be named as criminal sanctions, but as diversity measures.

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The necessity of finding this measures arose as a result of social wide effort, that this category of offenders to be excluded from the criminal jurisprudence in order to protect themselves from any possible negative impact of these measures.

Also, given that the age of juvenile's offenders constitutes the stage of development where the juvenile is in the period of rapid development mentally and physically. Exactly for this reason, the society with its mechanisms wants to come to help juvenile offenders in order for him to forgo actions and behaviors that are against the law and for them to be oriented in an appropriate direction for his mental and physical development. For this reason, the diversity measures have been provided and they are free for the criminal element.

Diversity measures represent all modern criminal-procedural systems, while the legal basis derives from the legal provisions and international conventions that refer to human rights and freedoms.

1. Historical development of diversity measures

The idea of finding the most appropriate measure on the category of juvenile's committing criminal offences is very old. First ideas can be encountered at Dyrkem and Weber on new measures of social reaction towards juveniles with the premise of removing the dose of repression.

Permanent processing of the diversity measures in the contemporary times were made by the Norwegian Nils Cristy. His concepts and ideas represented the initiative for alternative dispute resolution. According to him, the dispute between the victim and the juvenile offender can be resolved through equalizing the compensation claims for the damage caused by the juvenile offender. According to the mentioned author, '' the position of state is of a third person, who in an informal procedure intervenes in resolving the dispute between the victim and the juvenile offender".

In the wake of Nil Cristy ideas, many programs were developed in order to avoid juvenile delinquency in orienting the use of guarantees in preliminary criminal procedure, to a better behavior of juvenile offender upon his release from the social or medical institutions and in advising the juvenile's offender and the victim.

Every system represents this model, including the continental law system and the common law system, as a new and progressive approach oriented in two segments: the reduction of crime as phenomenon as a preventive and reintegration of juvenile offenders in the society. Wider implementation of the diversity measures can be found in USA and in Belgium, especially after 1967 under an operational program for prevention of juvenile delinquency.

2. Implementation forms for diversity measures

Diversity measures can be interpreted in to main forms: simple diversity and diversity with intervention.

Simple diversity applies for juvenile offenders committing lighter criminal offences. This form of diversity is applied in our country as well. According to this principle, state prosecutors are given the opportunity that based on their free will, to decide whether it will initiate the request for diversity measures or any other measures. Diversity with intervention means undertaking one of the educational measures upon the proposal of the state prosecutor or upon the proposal of the judge toward the juvenile offender.

The implementation of diversity measures on juvenile offenders is mainly recommended for cases when they first committed a criminal offence or when they first committed a criminal offence with low rick to the society. These measures represent the sudden reaction of the society towards the juvenile offender by obliging him in fulfilling certain conditions but without court intervention. Thus, these measures make it possible to the juvenile offender to reintegrate where he live and to take responsibility with the purpose of awareness and regretting his illegal action.[141]

3. Diversity measures on juveniles according to our criminal system

Like in any society, our country also as foreseen specific measures for the juvenile category which can be applied and in the legal science are known as diversity measures.

Diversity measures were first regulated with the Criminal Law on juveniles which entered into force with the regulation nr. 2004/8 of April 20th, 2004. The law has been replaced and now the diversity measures are regulated with the Juvenile Justice Code which entered into force on July 8th, 2010. The basic principles are foreseen in the preliminary provisions according to which the dignity, freedom of speech, legal help, avoiding the possibility of labeling juveniles must be preserved.

According to new solutions in this regard, the Juvenile Justice Code in chapter IV has foreseen the purpose, conditions for imposition and types of diversity measures.

According to the content of this Code, in its article 16, the purpose of diversity measures is to prevent, whenever possible, the commencement of proceedings against a minor offender, to promote the positive rehabilitation and re-integration of the minor into his or her community and thereby prevent recidivist behavior.

Article 17 of this Code specifies the conditions under which the diversity measures can be imposed: acceptance of responsibility by the minor for the criminal offence; expressed readiness

[141] Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).

by the minor to make peace with the injured party; and consent by the minor, or by the parent, adoptive parent or guardian on behalf of the minor, to perform the diversity measure imposed.

Article 18 of this Code specified which measures can be imposed to the juvenile offender. According to this, these measures are:

- Mediation between the minor and the injured party, including an apology by the minor to the injured party;
- Mediation between the minor and his or her family;
- Compensation for damage to the injured party, through mutual agreement between the victim, the minor and his or her legal representative, in accordance with the minor's financial situation;
- Regular school attendance;
- Acceptance of employment or training for a profession appropriate to his or her abilities and skills;
- Performance of unpaid community service work, in accordance with the ability of the minor offender to perform such work; this measure may be imposed with the approval of the minor offender for a term ten (10) up sixty (60) hours
- Education in traffic regulations and psychological counseling.[142]

Based on the nature, condition of imposition for this measures, we can easily say that our country has embraced a modern system, human and comprehensive and more advance of the diversity measures that can be imposed on the juvenile offender.

4. Juvenile treatment when imposing diversity measures

When imposing diversity measures, a bridge of connection between police, prosecutor, juvenile offender, his parent, the damaged party, court and probation service is automatically created.

In this case, the activity with the purpose of implementing the diversity measure is coordinated. In his case, the competent prosecutor invites the juvenile his parent or guardian and his defender.

When imposing the diversity measures the public prosecutor, juvenile judge or panel of judges send the decision and all other motions of the case to the Probation Service to enforce the diversity measures in territory where the juvenile offender has his place of stay.

The supervision of the enforcement of the diversity measures is performed by institutional who imposed that measure. If eventually, the juvenile offender does not fulfill the obligation that derives from diversity measures, the Probation Service will verify the facts and reasons for such failure. To fill the report in conformity with the legal provisions for juvenile, the Probation Service

[142] Kosovo Juvenile Justice Code 2010 , Article 16, 17, 18

inform the competent public prosecutor and the court that has imposed such diversity measure. [143] If we suppose that the juvenile has fulfilled the obligations deriving from the diversity measures then it could be concluded that the measures has been appropriate and the purpose for this imposing these measures has been achieved.

5. Conclusion

Taking into consideration that we all are witnesses of increasing number of criminal offences, where the criminal offender is a juvenile, in this aspect immediate measures and actions should be taken in order to prevent this phenomenon from happening any longer in our society. Education of new generation is very vague and this is very concerning for our country. Implementing non-criminal measures would be very important and convenient on juvenile offenders, since the possibility of labeling juveniles would be avoided.

Therefore, implementing diversity measures which have a non-criminal character would be the most favorable and adequate method for the juveniles that for the first time confront the law. These measures would have an impact in increasing the juvenile awareness to not repeat the same illegal behaviors in the future. Through these measures, the society reacts towards this criminal phenomenon and makes it possible to apply measures that have erased the repressive element and the purpose of criminal sanction. By applying diversity measures the reintegration is made possible for the juvenile in the environment where he lives by regretting his illegal action.

Bibliography

- Juvenile Justice Code of Kosovo
- Criminal Code of Kosovo
- Criminal Procedure Code
- Authorized lectures held at the Kosovo Judicial Institute.

[143] Kosovo Juvenile Justice Code 2010, Article 8


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PLEA BARGAINING

Introduction

Coronation of the Republic of Kosova, as a sovereign and independent state has been finalized by entry into force of the Constitution on June 15, 2008. By aiming to bring into line and harmonize our legislation with that of the European Union and international right, and by guaranteeing human rights and freedoms, the constitution, as the highest legal and political state act, in Articles 18,19,20,21 and 22[144] has incorporated international instruments and agreements as directly applicable by holding priority to law provisions and state acts.

After entry into force of the constitution, the justice system has subsequently suffered reforming changes, especially in the area of penal legislation, such as: amendment and supplementation of the Penal Code and of the Code on Penal Procedure, and the Law on Execution of Penal Sanctions which entered into force on January 1st, 2013. As such, a legal ground in the area of penal justice has been built. The new penal legislation has foreseen many new institutions, new incriminations, altering and harshening punishment policy, and other novelties.

Within the Code of Penal Procedure, for the first time in Kosova, an establishment of a Plea Bargaining Institution [145] has been foreseen. Since these legal institutions have been inaugurated for the first time, and with the purpose of promoting and applying them in practice, an independent scientific study of this institution is necessary and welcoming. In order to achieve the right scientific results, we have approached this study by inter-disciplinary methodology. For this purpose, we have used different scientific methods such as historical, sociological, normative-legal, comparative and analytical method. We hope this paper to be a modest contribution in advancing knowledge and application in practice of this institute's work.

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[144]Constitution of the Republic of Kosova, Article 18- 22.
[145]Penal Procedure Code, Article 233 par.1.

By aiming clear and comprehensive treatment, we will handle the subject of this study by starting with the notion, continuing with subject, background, legal procedure and a conclusion about the relevance of this institute.

1. Notion, Subject and Background of the Plea Bargaining

In order to ease the work in the system of penal justice, which is a sensitive and highly serious area, the Republic of Kosova has specified by law, and started to apply the institute of Plea Bargaining. An agreement written between the person indicted until the completion of the main hearing and the State Prosecutor which means guilt is inclined for the penal act, under certain conditions by which the state prosecutor withdraws from some counts in the indictment, determines limitations of easing the sentence or withdraws completely form the sentence if the accused accepts to become the cooperating witness.
In this case, such plea has influence over persons as a preventive measure in committing a criminal act or in proving they have committed criminal acts, and this presents the crucial subject of the Plea Bargaining. As such, the Plea Bargaining is a legal institution of penal procedure that includes issues of procedural, material and penal right. To put it differently, the Plea Bargaining provides possibility to the accused to benefit alleviations in the aspect of deciding on the type and duration of the legal sanction in exchange of pleading guilty.

In Anglo-Saxon and Euro continental countries, the institute of Plea Bargaining has begun its application in late 20th Century. Most of these countries have established a solid practice of application of this institute, while its effect has been welcomed. This institute, although in a different format, has been recognized by the Roman Right, while, in substance most of it was of a legal right civil character, but also customary right of many nations. As such, it has been recognized by our customary law summarized in the cannon of Lekë Dukagjini and other local cannons. Subsequently, when every perpetrator of a forbidden act pleads guilty, he/she would be treated and sentenced with less punishment.

In Kosova, with revisions and supplementations made in the Penal Code and Penal Procedure Code in 2008 (hereinafter: PC, respectively PPC) the Plea Bargaining has been inaugurated as a new institute. The PPC that entered into force on January 1st, 2013, talks about this institution in Article 233.

2. Motive and Interest of Parties in Reaching an Agreement

Reasons by which parties are driven to bond an agreement pleading guilty and eventually complete that agreement are numerous. The prosecutor, the accused and the defense may have interest in

reaching such agreement. The prosecutor has the "justice interest" while the accused his personal interest, but in compliance with the justice interest of the concrete penal case.
The prosecutor is interested to finish the case as soon as possible, which results to less expenses by avoiding conduction of a regular procedure, less human recourses that have to be engaged in a case (official persons, experts and barriers of jurisprudence functions; and material costs), and will also provide qualitative proof against other perpetrators of criminal acts that otherwise would be difficult for the prosecutor to access. Moreover, the result of this agreement would enable to indict and punish other perpetrators, which is very important in forms of organized crime.

The accused has also interest to reach a Plea Bargaining, so he can receive a lighter punishment compared to one from a regular trial, avoid costs that result from the trial, avoid being a subject of a long public hearing, and pleading guilty would express his actual remorse for the act committed. Last purpose of negotiating the Plea Bargaining is bonding the agreement and deciding on its terms and conditions of admitting guilt by a written contract compiled and signed by the state prosecutor, the accused and his defense.

3. Inclusion of the Plea Bargaining into the Penal Right

Entry of the institute of Plea Bargaining into the penal-legal system of Kosova according to above mentioned laws has also been reflected in PC, since a penal-legal ground had to be gained for lessening the penal sanction when bonding the agreement [146].

Provisions of PC in Articles 75, paragraph 1.3 on the punishment reduction state: "when the perpetrator has plead guilty by terms from Article 233, paragraph 20 of the PC, and the written agreement of pleading guilty contains a paragraph that predicts reduction of punishment, the court will decide on a lighter punishment. In such a case, the court shall take into consideration the opinion of the prosecutor, of the accused and the damaged party and shall be guided, but not obligated, to the limitations under Article 76 of the PC". Therefore, the limits of decreasing punishment will not be valid according to Article 76 of the PC.

4. Agreement of Pleading Guilty in the Aspect of Penal Procedure Right

According to Article 233, paragraph 1, of PPC, at any time, before filing the indictment, the state prosecutor and the defense can negotiate terms of agreement for pleading guilty based on which, the defendant and state prosecutor agree with the charges included in the indictment and the defendant agrees to plead guilty in exchange for:

[146]Penal Procedure, Book published in 2013, Prof.dr. EjupSahiti, p.329.

1. State prosecutor's consent to recommend to the court a lighter punishment, but not under the minimum predicted by law or the minimum foreseen in paragraph 7 of this Article, or;
2. Other considerations in the interest of justice, such as release from foreseen punishment by Article 234 of this Code (to release from punishment a cooperating witness who has committed a penal act, but cooperation with him has resulted in successful penal prosecution of other perpetrators of criminal acts, or when prevention of committing other penal acts has been achieved).

In order to reach a Plea Bargaining with the prosecutor, the defendant's defense lawyer, or the defendant, if not represented, requests for a preliminary meeting with the state prosecutor in order to begin negotiations for the Plea Bargaining, and during all these negotiations, the accused has to be represented by his defense in compliance with paragraph 1, of this Article. After receiving the request for preliminary meeting, the state prosecutor will inform the main prosecutor of his office, who will authorize such a meeting. Agreements of pleading guilty have to be written and approved from the relevant office's main prosecutor before being delivered formally to the accused. While, the court cannot participate in negotiations of pleading guilty, but according to need, can decide on reasonable deadlines of completion of agreement which cannot be longer that three months, so the resolution of the penal case will not be delayed.

5. Content and Effects of the Plea Bargaining

The whole procedure of pleading guilty is aimed at defendant's admittance of guilt and for the case to gain legal power by its recognition from the court. PPC, in the part that refers to the guilty plea, has foreseen a solution by which reaching of a Plea Bargaining is exclusively parties' issue, respectively of the public prosecutor's in one hand and of the accused and his defense on the other. This solution brings into life the principle of respecting the autonomy of parties. In this aspect, the court doesn't play an active role when it comes to reaching the agreement for pleading guilty, but it can set a reasonable deadline for reaching the agreement. This deadline can take up to three months at the most. We consider that this solution has been predicted in order to maintain court's authority and not delay penal procedure without reason. Consequently, the issue of the content of the agreement for pleading guilty and its effect has been regulated by Article 233 of the PPC. [147]

The Plea Bargaining has to be drafted in writing, being it is a formal document and mandatory for the parties. As such, the agreement should contain all terms of the agreement and has to be signed by the main prosecutor of the relevant prosecutor' office, the accused and his defense and is obligatory for all signing parties.

[147]Penal Procedure Code, Article 233 par.12. count 1-4*Penal Procedure, Book published in 2013, Prof.dr. EjupSahiti, fq.226.*Internet through google "agreement on admitting guilt" clicked on;20.06.2014

The Plea Bargaining should include at least:

1. Counts of indictment admitted by the accused;
2. Whether the accused accepts to cooperate;
3. Rights that are waved;
4. Responsibilities of the accused for damage compensation of the damaged party and confiscation of all material goods in compliance with Articles 489,499 of the Code.

The written agreement can also include a provision by which parties agree on the limitations of the damage that will be proposed by the public prosecutor, if the accused cooperates substantially, while, if the court announces a punishment that damages one party, the right to appeal will be granted to the party. According to this solution, the reached agreement on pleading guilty has to be drafted in writing and contain all terms to which parties have agreed upon. In addition, such agreement, in order to be valid, has to be signed by the main prosecutor of the relevant prosecutor's office and by the accused and his defense. As such, this reached agreement is obligatory to parties. Therefore, the parties cannot accept only certain parts of the reached agreement; it obliges parties to accept it as a whole. This is the principle aspect of the content of the agreement. This means that the agreement of pleading guilty can be focused on the content of only the data that are considered necessary.

In these cases the agreement can include, at least, counts of the indictment for which the accused admits guilt, the fact that the accused accepts to cooperate, rights that the accused waves (e.g. right to appeal) and the fact that specifies responsibility of the accused for compensating damage to the damaged party and confiscation of all material goods gained by the penal act. In compliance with this paragraph, the agreement can also include a point where parties agree to limitations of the punishment that will be proposed to the court. This applies to situations when the accused is willing to cooperate with the court. A part of this point can also be the recognition of right to the damaged party, that the damaged party can appeal the decision taken about the part related to deciding on punishment.

By the rules, the court doesn't take part in negotiating the guilty plea, but can set reasonable deadlines for reaching the agreement. The reached agreement is delivered to the court which then has two acting options.

The court can:

1. Approve the reached Plea Bargaining, or
2. Refuse it.

Consequently, the agreement has to be presented in the court in an open public hearing. This presentation enables parties and especially the court to know in public the agreement reached which will be in the function of bringing alive of the *basic principle, publicity and transparency* in the penal procedure. The court has to hear the accused before accepting the agreement in order to be persuaded:

1. That the accused has understood the nature and consequences of pleading guilty;
2. That pleading guilty by the accused was done in free will, and
3. That the guilt is based on facts, proofs and other documents.

The court will refuse the agreement if it evaluates that any of these circumstances have not been met. If the court accepts the agreement, it will put it in the case file and as such it produces legal consequences. If the court refuses to accept the Plea Bargaining, the trial continues in accordance with procedures predicted by PPC.

The agreement is invalid (null) if it violates public moral and order, if it is reached in conflict with legal rules or if influenced by threat, violence, compulsion or other similar circumstances. Situations that in general result in invalid legal works, apply also in cases of Plea Bargainings.

6. Parties in the Procedure and Their Position

The Accused

According to law provisions, the accused can make this agreement only by his free will. From this point of view, there is equality concerning initiative and discussion. The court is not entitled to interfere during the agreement of pleading guilty, which ensures the principle of presumption of innocence until proven guilty.

The accused under such procedure should have a defense representative (paragraph 3 of Article 233 of PPC) therefore it is supplemented by a new paragraph of Article 57, count 1.5 of the PPC when concerned with obligatory defense in the penal procedure.

The accused is entitled to take initiative related to preliminary meeting with the State Prosecutor to determine basis of the Plea Bargaining and earns limited immunity for his testimony. If the agreement results unsuccessful, or is not accepted by the court, testimonies will not be taken as evidence. The accused has also the right to appeal against the decision announced by the court if this criteria has not been met, which has to do with the fact that the court, when announcing the punishment for the act, has given a harsher or lighter punishment from that specified in the agreement.

The Damaged Party

When reaching the Plea Bargaining, the prosecutor is obliged to inform the damaged party, while it will take part in the session for reviewing the agreement in the court and will declare, if it is a closed hearing, prior to the session of announcing punishment. Meaning, he will be notified that the agreement and its terms have been accepted or refused.

Although the prosecutor is legally obliged to inform the damaged party about negotiations of the Plea Bargaining and court's obligation to inform about the session for agreement review, and the damaged party's declaration concerning the agreement, this doesn't represent a condition for agreement's approval by the court.

The public prosecutor is obliged to inform the damaged party about the agreement and its final form, and when a legal-property request exists that derives from the penal act of accusation; the agreement has to necessarily refer to the request of the damaged party. When reviewing the Plea Bargaining, the court has to listen to the opinions of the prosecutor, the defense and the damaged party. If the agreement for cooperation and for pleading guilty by the accused is closed, the court will allow the damaged party to give a statement after the completion of cooperation of the accused, prior to announcing the punishment.
The damaged party will be declaring concerning legal-property request in the court, before the court approves the Plea Bargaining and the responsibility of the accused for damage compensation to the damaged party, as well as confiscation of all material goods in compliance with Articles **489 – 499** of this Code."

When the court reviews the Plea Bargaining, it has to hear opinions of parties and of the accused, and if the hearing is closed for public (because it has to declare the accused as the cooperating witness) the damaged will be enabled a testimony at the end of the cooperation with the accused, but prior to announcement of the punishment to the accused.

7. Decisions of the Court from Reviewing the Agreement

The reached agreement is sent to the court, which has two acting options. Consequently it can:

a. Approve the reached Plea Bargaining, or
b. Refuse it.

The agreement should be presented in the court in an open public session. This presentation will enable parties and especially the court to get familiar with the agreement and if it is in accordance with enabling the *direct principle, publicity and transparency* in the penal procedure.

Prior to deciding about the acceptance of agreement, the court has to hear the accused, so it can be convinced:

1. That the accused has understood the nature and consequences of pleading guilty;
2. That pleading guilty by the accused was done in free will, and
3. That the guilt is based on facts, proofs and other documents.

The court will refuse the agreement if it evaluates that any of these circumstances have not been met. If the court accepts the agreement, it will put in the case file and as such it produces legal consequences. If the court refuses to accept the Plea Bargaining, the trial continues in accordance with procedures predicted by PPC.

The agreement is invalid (null) if it violates public moral and order, if it is reached in conflict with legal order, if influenced by threat, violence, compulsion or other similar circumstances. Situations that in general make legal work invalid, apply also in cases of Plea Bargainings.

8. Deciding on the Punishment and its Measurement in Cases of Negotiation

By the agreement, the length and type of punishment can be specified as predicted by provisions of the PC. Firstly, legal provisions related to the specific and general legal maximum and minimum. In certain cases, such as "substantial cooperation", can be negotiated under the legal specific and general minimum for deciding on the punishment. In cases of substantial cooperation, but also of cooperation in general, when deciding on the punishment in negotiations, these circumstances are considered:

4. Relevance of admitting the penal act;
5. Circumstances that the penal act could not be proved by other means or ways.
6. Pleading guilty will have an impact on preventing the crime, its detection and proving of other penal acts.
7. If in the concrete case, special mitigating circumstances exist.

According to the agreement, these options for setting up the punishment are possible:

a. The state prosecutor can propose the punishment and the other measure or just the punishment.
b. The main punishment together with the additional punishment.
c. Punishment on probation, court warning, etc.

The state prosecutor doesn't hold the right to decide on the punishment (iuspuniendi), therefore has to stick to the set rules on the penal material, when it comes to measuring the punishment, rules of reducing the punishment, when negotiating the agreement. Although the written act is

named a Plea Bargaining and has the guilt as its main element, the agreement on punishment is of the same importance. These agreements cannot stand alone, since both derive from the free will of the accused and the public prosecutor's and is based on legal provisions, otherwise the act of agreement without these two elements cannot stand.

9. Backing up of Negotiators from the Agreement

The parties, prosecutor or the accused can refuse the Plea Bargaining that they have bonded, before it appears in the court. (parag.11)[148]. In such a case, a regular proceeding continues same as in cases when negotiations have failed or the Plea Bargaining is not accepted by the court. The testimonies given by the accused, pleading guilty for certain points of the indictment or for the indictment in total, in cases when the agreement was not accepted by the court, or parties have backed up from the agreement before its appearance in the court, will present unacceptable proof in the penal procedure in which the negotiations were performed and in any other procedure.

10. Ensuring Execution of the Agreement

The guarantee that the Plea Bargaining will be applied by both parties, are evident from the point of view of procedural provisions that regulate this issue. Firstly, the Plea Bargaining is legally valid only after being approved by the court. Parties, at any time, can refuse/cancel the agreement, prior to court's approval. Although the court doesn't participate in negotiations of pleading guilty, it can postpone the session up to three months by a notice to parties involved in the procedure (Paragraph 10).

After the court approves the agreement, it can forbid the accused to back up from pleading guilty or the prosecutor to cancel the agreement, except in cases when they manage to convince the court that any of the terms of paragraph 18, was not met, which means the burden of proof falls upon the party that requests solution of the agreement (parag.22). After approval of the agreement, the court can set a date when parties will give their statements concerning the punishment. But, the court, in order to realize the obligation of the Plea Bargaining and the accused to serve as a cooperating witness, will postpone the session on punishment for a time which is not specified in the law. This provision will surely be taken as insurance for other obligations of the accused for the agreement to be realized.

But, the question arises, after execution of obligations of parties according to the agreement and its approval by the court, especially in cases when the quality of the cooperating witness has been used, "substantial cooperation" in another penal case, while the court announces a different

[148]Penal Procedure Code, Article 233 par.11

punishment from that approved by the court, will only the right of parties to appeal about the punishment should be called insurance of agreement execution.

11. Legal Means in Agreement Procedures

Against court's decision of discarding the Plea Bargaining, appeal is not allowed, since we are dealing with a procedural decision taken in the procedure court transcript where parties don't have the right to appeal. Provisions that regulate the Plea Bargaining, do not foresee filing of an appeal if the court discards the agreement. In the contrary, it will be continued with a court hearing in a regular procedure.

12. Appeal against the Decision Based on the Agreement

An inevitable question arises; if court accepted the agreement and a judgment was taken based on it, in what direction or ground can an appeal be filed as a regular legal instrument? Thus, if the court considers that terms for accepting the agreement are met, it will approve it and conclude it by a decision in the transcript while scheduling the hearing for announcing the punishment and other measures predicted by the agreement. After completion of the hearing, a judgment is reached with a factual description of the act and legal qualification of the indictment. Having in mind these circumstances, it can be concluded that the appeal in the aspect of punishment predicted by the agreement is not allowed and a legal restriction exists. For which the accused is instructed. If the accused appeals on this ground, the same will be discharged as prohibited.

If the Plea Bargaining has chosen as a solution receiving of pecuniary benefit, announcement of judgment by means of public information, decision on legal property request and procedural costs, and the court approves this request on these grounds, it cannot either file an appeal.

Likewise, in these situations, an appeal cannot be filed based on wrong and incomplete confirmation of the factual state, because the accused has pleaded guilty without doubts and has intentionally given up from a regular trial. While, without a trial and proof administration in a procedure as its crucial stage, there is no confirmation of a factual state, neither the judgment can be appealed on this ground.

Appeals on other grounds are not explicitly forbidden, although the right to appeal is guaranteed with Human Right Convention. It is possible to file an appeal based on essential violations of provisions of penal procedure and violation of the penal law, although this appeal ground can hardly influence in changing the decision of the court on the existence of penal act and penal responsibility. Without carrying out the penal procedure, in principle, there is no essential violation of penal procedure provisions, although it is not impossible, based on this, e.g. irregular panel of

judges, or announcement of punishment. (the judge who didn't participate in the main hearing was excluded from the trial, or the judges who was supposed to be excluded have participated, the hearing was held in the absence of the person whose presence was obligatory, the right to defense was violated, the court has failed in regards to existence of permission for prosecution from the competent body, etc). Same situation appears in the cases of penal law violations. A situation where the act committed by the accused is questioned for being a penal act, whether circumstances that exclude penal responsibility exist, whether the prescription has been achieved, whether the principle of 'bis in idem' was violated, material law was wrongfully applied, the authorization by the court was exceeded concerning the decision on punishment, security measure, taking of material benefit, whether the provisions of calculating detention have been applied?

From the point of view of the public prosecutor's right, independently the appeal is not explicitly forbidden based on decision of punishment, if the prosecutor has compiled the guilty pleas agreement which was approved by the court, the appeal would be dropped as unacceptable.

13. Conclusion

Viewed from the historical and developing aspect, this institution, in legal systems were applied so far, has resulted successful in regards to prosecution of perpetrators of penal acts, especially those related to organized crime. Criminal acts of co-execution are evident in penal acts of corruption, money laundry, etc. both in prosecution and in conviction, since the manner for case resolution has been made easier and strong and acceptable proof have been gathered in the penal procedure.

We consider that, after fair application of these provisions from justice bodies, the success in finding the perpetrators of penal acts will surely not be missing and in trying and preventing penal acts and their perpetrators. With the solutions provided by law, which can be supplemented further (can be applied this way also), the interest of justice would be realized, which is greater than any case, even when a person's punishment is reduced or removed completely, if his contribution results in finding out and putting under penal responsibility perpetrators, especially in organized crime, corruption, money laundry and human trafficking.

In relation with the defendant, *the Plea Bargaining* enables him to gain important procedural ease, favorable treatment and even lighter punishment in nature. Since the Plea Bargaining is applied in the penal procedure, in considerable measure spares the courts from e great deal of work. At the same time, the accused not only gains favors in this aspect, but the institution also improves in a great measure his position as a defendant in the penal procedure.

Whilst concerning the application of this important institution, according to data we possess the institute of Plea Bargaining in our country has been applied slightly, except for some individual cases. It remains for the future to promote this new institution more, and encourage justice bodies in our state to apply it at any case if the terms predicted by law are met.

Bibliography

- Constitution of the Republic of Kosova
- Penal Code of Kosova
- Penal procedure Code of Kosova
- Penal Procedure Right, Ejup SAHITI
- Different literature from internet and Google.

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Fatime Hasani – Ruhani* **Qefsere Berisha***

EUROPEAN CONVENTION ON FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

- DISCRIMINATION WITH SPECIAL EMPHASIS ON DISCRIMINATION AGAINST WOMEN-

ABSTRACT

This paper intends to present the discrimination, types of discrimination and in particular the discrimination against women. Despite the fact that we live in the XXI century and the fact that human society has made great progress and has advanced immensely (walking in great steps ahead), unfortunately we cannot say that discrimination in these modern times it's a past thing. Unfortunately, discrimination, especially discrimination against women (female) is present, in some places more and others less, somewhere in some forms and other vital aspects depending on the region or country where they live or operate. Through a particular case, we tried to touch the subject in its essence, to reflect the sufferings of a female gender person, who has experienced all of the sufferings and discrimination for the only fact of being a female. In addition, we have touched upon local aspects of discrimination, the legal basis, in which there is positivism and good movements. Discrimination is the current theme at any given time, in every society, state, or even community. The main criterion of this progress is the position and the role of women in a society as its advancement is largely dependent on her role, education, and the reconciliation of her role in it. Thus, we analyzed this issue in terms of the European Convention on Human Rights and the European Court of Human Rights.

Keywords: discrimination, equality, gender, gender equality, etc.

INTRODUCTION

1. Discrimination in general

It is often easier to become outraged by injustice half a world away than by oppression and discrimination half a block from home. Try to think of a person whom you know and who

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* Qefsere Berisha, candidate judge

throughout his/her life has not been subject to any form of discrimination. You will see that you will not be able to find any.

In the broadest sense, human rights are considered as rights that pertain to every individual. As a consequence of being a human, regardless of legal acts, affirming the existence of human rights, we say that every human being by the fact that he or she is such then is entitled to something. Appreciating the unique value of every human being from the international community leads not only towards those efforts to eliminate destructive elements from the individual but also to create conditions which will enable to him or her to develop and prosper. The fundamental rights and freedoms are immanent rights that exist irrespective of the will of an individual or group of people. They neither earned nor donated through any action. They may be unrecognized or even not respected but nevertheless they pertain to an individual. The fundamental rights and freedoms are not bound to duly adopt legal norms, but the adoption of appropriate norms aims to protect human rights and define the ways of their realization.

The legal norms of human rights do not define the rights and fundamental freedoms, they only guarantee them. Designated actions or their waiver pertain to a human and it is primarily based on the particularity of being a human being. This particularity is also the base in determination of the dignity of every human being. Every human being itself is regarded as a purpose, thus no one should be regarded merely as means even if such means would tend to be very useful to the society or the person her/himself.

Equality is another important element of the human rights concept, all human beings are born free and equal in dignity and rights.

The principle that all human beings have equal rights and should be treated equally is the base of the human rights understanding that stems from every humans equal dignity. However, this natural right of equality, either in the past or at present, was never offered to human beings fully.

Discrimination, since the beginning of the humankind in one form or another it has been a problem. Discrimination occurred everywhere, towards authoritative persons and minorities, against Blacks, Jews, against the Aborigines of Australia, Roma and various African tribes, migrant workers, refugees and asylum seekers. Discrimination occurs against children, women who treated as less valuable human beings, people infected with HIV-AIDS, against those with mental and psychical disabilities, discrimination against workers, gender discrimination in employment, discrimination against women in cases of unemployment assistance, and many more cases of discrimination.

Discrimination appears in multiple forms that it can be assumed that everyone in certain form and quantity has been affected by discrimination. Discrimination is an inhuman, humiliating and degrading act that is present since the creation of humanity. In overall, discrimination is considered any form of distinction, exclusion, restriction or certain reference for the purpose of denial or refusal of equal rights and protection, hence it constitutes an impact in the principle of equality

and corruption of human dignity. Depending on the matter in question there exists discrimination based on race, belief, nation, color, gender, religion, sexual orientation and so forth.

2. Discrimination of women

Gender based discrimination is common, despite of the progress made in this regard, in many countries there are systems which among others deny women the right to representation of matrimonial property - spouses, the right of inheritance on equal terms with men and the right to work and travel without the husband's permission. Women are also subjected to violence and abuse practices which continue with the same momentum in many countries and with this they usually suffer twofold discrimination as to race or their origin and because they are women. In Asia (as well as in many other countries of the world) most parents prefer to have boys rather than girls. According to the 2011 UN report, the population in this part of the world had about 134 million fewer women because of abortion, infanticide and negligence.

Education. Worldwide, women and girls make up two-thirds of people with less than four grades of school.

Sexual harassment. Over 2.6 billion women live in countries where rape by the husband still not considered a crime.

Health. In the countries in development, about every second minute a woman dies from complications during pregnancy or childbirth because they do not receive proper medical care.

Property rights. Although women cultivate more than half of the products around the world, in many countries they have no legal rights to own a property or inherit land.

The woman is born free and enjoys equal rights with men in every aspect. Therefore, discrimination against women shall mean any distinction, exclusion or restriction based on sex which has the effect or purpose to compromise or destroy the recognition of women's position, regardless of her position in marriage based on equality of men and women, fundamental human rights and freedoms in the political, economic, social, cultural, civil or any other field.

Large portions of the world's population are routinely subject to torture, starvation, terrorism, humiliation, mutilation and even murder, merely because they are females.

Miriam's case

Miriam is 36 years old and the mother of six children. She grew up in a village away from urban centers. She stopped schooling after her second grade. Her parents were poor, and the school was four (4) kilometers away from the village. Her father believed that educating a girl was waste of time and efforts as women's destiny is marriage and not working for survival.

When she was 12, Miriam was circumcised according to local custom. At 16, she was married to a man who was around 50 years of age. Her father received a substantial amount of money as dowry. The very next year, she gave birth to a baby boy. The baby was stillborn. The health center was 10 kilometers away, and anyway, did not attend deliveries. Miriam believed that the baby was born dead because of the repeated beatings she had received from her husband all through her pregnancy. Nevertheless, her family and many others from the village blamed her for the miscarriage. Miriam's husband considered it his right to have sex with her, and regularly forced himself on her. Miriam did not want to get pregnant again and again, but had little choice in the matter. She visited healers and received various potions of herbs and kept these charms that were unsuccessful. She had no time to go to the health clinic, and when she went sometimes because her children were sick, she was hesitant to broach the subject of contraception with the nurses. The nurse, although she appeared to understand Miriam's local language she still preferred to talk in the predominantly language in use in the capital among the educated class of persons. She intimidated Miriam. Her life with her husband was a long saga of violence, poverty and famine. Miriam struggled to keep body and soul together through her several pregnancies and raising her children. She had to farm her small plot of land to feed the children, because her husband never gave her enough money. She approached to her parents and to a missionary for several times for help. Everyone told her to her to listen to her husband and reminding her obligations for the husband and family.

One day her husband accused Miriam of 'carrying on' with a man in the village. He had seen Miriam laughing and chatting with the man, he claimed. When she answered back, he hit her repeatedly calling her a whore and promising that he is going to avenge on her this humiliation. Miriam was badly injured; she thought she had a rib fracture. For weeks she could not move out of the house. But she did not have any money to hire transport to go to the health center. No one at the village helped her although there were some that thought her husband had overreacted. The woman is her husband's business. Unable to go to the market to trade or cultivate her garden, she and her children starved almost.

Miriam knew there would be violence in the future, she was terrified for her and her children's life. She dreamt of death and knew she had to leave. As soon as she started walking she took her two youngest children and left the village. She now lives in a strange village, a refugee in her own country, living in fear of being found by her husband and brought back home...

Wonder how many more women on the word share the same or a similar destiny such as Miriam.

Women mostly suffer from poverty; they receive less health care, education and food than men. Gender based discrimination flourished despite of the trends of equality of human rights and human rights instrument. Discrimination against women is defined as any distinction, exclusion or limitation based on gender that aims to amend or annul the recognition, enjoyment by women regardless of marital status, based on equality between husband and wife, fundamental human rights and freedom in political, economic, social, cultural, civil or any other field.

Despite the changes that have followed the development of women today, not only in Kosovo, but also in the world, yet there is a gap between capacity, needs and the resources available to them for education, employment, involvement in decision making. The low level of representation of women in decision making is a matter affected by many factors, sociocultural, economic, structural, social, etc.

The first country in the world which he has allowed women the right to vote was New Zealand in 1893. Today, after nearly 100 years after gaining the right to vote and the right to choose, women in Kosovo have a level of low representation in decision-making level.

Gender equality is not a women's issue as it is characterized, but is a matter of equality between groups of men and women and equal opportunities between them in all walks of life ranging from the directing the family to the government of a state. It is an integration process aimed at the development of society, the level of fundamental human rights and freedoms in social level, at the level of civil and political rights given equal opportunity to exercise the right to elect and be elected.

3. Inclusion of discrimination in domestic legislation and beyond as well as some insights in this regard

All persons are equal before the law and entitled to equal protection without discrimination. In this respect, the law shall prohibit any discrimination and guarantee effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, or any other condition.

The Constitution of the Republic of Kosovo as the first constitutional act of Kosovo as an independent and sovereign state, it contains the principles and general rules that guarantee all fundamental rights and freedoms- Chapter II of the CRK. The purpose of the constitutional guarantee of fundamental rights and freedoms is the protection of human dignity, freedom and equality. In addition to these rights guaranteed by the constitution, there is also the law in force and application, the Law on Gender Equality (No. 2004/3).

However, despite the fact that these rights are guaranteed by the constitution, gender differences in the workplace can be used as an indicator of gender equality, because women are not treated fairly in the labor market and face indirect barriers such as stereotypes and gender based discrimination. Women still face discrimination in both forms of horizontal and vertical segregation as majority of them continue to be employed in the sectors where women traditionally work, such as health and education. An important measure to improve the situation of women is the existence of good quality jobs for women in managerial or senior management levels. A study done in Harvard, has shown that women's professional yields are better than those of male colleagues, because the only banks that were not in credit crisis were those that had women in leadership, explained the financial specialist Heather McGregor in the bank / City / London,

namely that women are more rational with money, less emotional and are more inclined to savings. In the terminology of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 11 of the Convention specifies that states shall take all appropriate measures to eliminate discrimination against women in the field of employment.

While in our country, despite of specifications and regulations in regard to legal equality in the field of employment, yet again the women's right employed in the private sector are not respected although that is regulated by the Law on Labor No. 03/L-2112 – Maternity Leave from Article 49. Women employed in the private sector do not enjoy this entitlement as this legal provision does not apply to private employers as mothers instantly after giving birth must report to their workplace or otherwise be dismissed. Private sector employees reported a high percentage of gender based discrimination at the workplace in 30.7% compared to 16.7 % in the public sector. From numerous surveys it is perceived that maternity leave conditions the carrier development and also during pregnancy the quality of work lowers.

The percentage of women employed across the years, from 2009 up to date did not show any increase, thus carrier advancement for women after maternity leave are slim, considering that only 27% of all employees in Kosovo are women, the gender proportion in employment is in danger to expand. Therefore, maternity leave in a modest duration will increase the possibility of women to take part in the labor market significantly where there is paid leave. For instance, the German maternity leave reform, called ELTERNGEL, which replaced 67% of incomes up fourteen (14) months after childbirth has revealed a significant increase in the probability of employed mothers at the end of this period. Thus, maternity leave is the essence of a process that impacts and determines women's will to return and carry out the work successfully.

4. European Convention on Human Rights

The European Convention on Human Rights (ECHR) it is an international treaty based on which the member states of the Council of Europe pledge to ensure fundamental rights not only to their citizens but to any other individual under their jurisdiction.

Guarantees and prohibitions- The convention protects in particular the following:

1. Right to life
2. Right to a fair trial
3. Right to respect for private and family life
4. Freedom of thought, conscience and religion, and
5. Property right.

The convention prohibits:

1. Torture and inhumane or humiliation treatment,

2. Slavery and forced labor,
3. Unlawful and arbitrary detention, and
4. Discrimination in enjoyment of the rights and freedoms stipulated in the Convention.

The convention was signed in Rome on 4 November 1950 and became effective in 1953.

5. Few words about the European Court of Human Rights

The European Court of Human Rights is an international court established in 1959. This court takes decisions on individual or interstate application that allege violations of civil and political rights set out in the European Convention on Human Rights.

The court is seated in Strasbourg - France from where it monitors the respecting of human rights of 800 million Europeans in the 47 member states of the Council of Europe that have ratified the convention.

The number of judges is equal to the number of member states. At the beginning of the establishment of this court there were only 7 countries, and today it is comprised in total of 47 countries, and it serves as the key instrument for the protection of human rights. Judges are elected for a term of 6 years, they may be reelected, but the mandates of half of the judges elected at the first election shall expire at the end of three years. In every case there participates also a local judge to facilitate the understanding of domestic legislation. Every appointed judge serves in his/her personal capacity.

The requirements that must be met to address an issue to the Strasbourg Court are:

- Violation of a right protected by the ECHR and its protocols.
- Applicant (s) is (are) the victim of the violation.
- Complaint to be made within the time limit of less than six months after exhaustion of domestic remedies.

If the case is considered admissible, the chamber of 7 judges decides on the merits of the case. Their judgment, if the case is considered particularly important or present any innovation to existing jurisdiction, is final, where the grand chamber of 17 (seventeen) judge considers the application.

The judgments are binding and may also provide compensation for damages. Enforcement of judgments is the task of the Committee of Ministers, which supervises the enforcement of court judgments. But the main problem of this court is the large number of complaints, which has grown more recent years resulting in overloading of the system.

6. Conclusion

Discrimination is one of most important areas and the most dynamic in jurisprudence because unlike many other treaties on Human Rights, the Convention does not prohibit discrimination in the exercise - the enjoyment of other rights guaranteed by the treaty in question but it renders the freedom from discrimination as a human right in itself. This is one reason why the procedure under the Optional Protocol has remained attractive to persons within the jurisdiction of the European Convention of Human Rights, according to which the infringement for non-discrimination can be ascertained only when the discrimination is carried out in connection with the enjoyment of any of right protected by this Convention.

Bibliography

- WHO- Training curriculum gender rights in reproductive health
- European Convention on Human Rights- Cases, Materials and commentary- Prof. Alaistar Mowbray (Professor of Public Law, University of Nottingham), Article 14 Prohibition of Discrimination, page 815.
- CEDAW- Convention on Elimination of all Forms of Discrimination against Women, Article 11.
- www.un.org/women
- www.healthorganization.com
- www.etc-graz.at
- Key Cases from the Committee of Human Rights compiled by Raija Hanski and Martin Scheinin
- Constitution of the Republic of Kosovo
- Anti-Discrimination Law No.2004 / 3
- Labor law no. 03 / L-212


Mustaf Tahiri* **Ilir Bytyqi***

COVERT AND TECHNICAL

MEASURE OF INVESTIGATION AND SURVEILLANCE

ABASTRACT

A brief short introduction on the procedural law institute of covert and technical measures of investigation and surveillance, which envisages the execution of these measures before or after authorization of criminal investigations, regardless if the suspect is known or not. Herewith we have mentioned also the types of covert measures of investigation and surveillance, the changes in the Criminal Procedure Code of Kosovo and manners for use and regulation of covert and technical measures of investigation, the contents of the application and procedures for issuance of the covert measures, the rights of persons against whom are applied the covert and technical measures of surveillance and investigation, the admissibility of evidence obtained by the order for covert technical measures of surveillance and investigation, the Review Panel for investigation and surveillance as well as other bodies which help in implementing these measures.

Keywords: covert and technical measures investigation and surveillance, investigation, State Prosecutor, pre-trial judge, prosecutor's application for covert and technical measures of investigation and surveillance, Order of the judge for covert and technical measure of investigation and surveillance.

Introduction

Chapter IX of the Criminal Procedure Code of Kosovo provides the covert and technical measure of investigation and surveillance. Viewed from the procedural rules aspect, the covert and technical measures of investigation and surveillance are relatively new. The reason for drafting of these provisions same as provisions concerning protection of injured parties, the witnesses and

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cooperative witnesses, stands on need of society to increase the procedural effectiveness in the fight of serious crimes, organized crimes and corruption.[149]

Taking into account the need for prevention and fight of crime in Kosovo in order for improvement and effectiveness of criminal investigations these measures started to be applied through the UNMIK Regulation 2002/6, dated 18 March 2002. Further with the Provisional Criminal Procedure Code of Kosovo, UNMIK Regulation No. 2003/26, dated 6 July 2003, and recently also with the Criminal Procedure Code of Kosovo No. 04/L- 123, which entered into force on 1 January 2013.

1. Types of covert and technical measures of surveillance and investigation

According to the Criminal Procedure Code of Kosovo, Law no. 04/L-123, the following covert and technical measure of surveillance and investigation are provided:

1. Covert photographic or video surveillance in public places;
2. Covert monitoring of conversations in public places;
3. Undercover investigation,
4. Metering of telephone calls,
5. Covert photographic or video surveillance in private places;
6. Covert monitoring of conversations in private places;
7. Search of postal items;
8. Interception of telecommunications including text and other electronic messages,
9. Interception of communications by a computer network;
10. Controlled delivery of postal items;
11. Use of tracking or positioning devices;
12. A simulated purchase of an item;
13. A simulation of a corruption offence, or
14. Disclosure of financial data.

The human rights and freedoms as constitutional categories, in particular the right to privacy of persons, are intruded and affected through implementation of covert and technical measures of surveillance and investigation. Therefore, with the Criminal Procedure Code of Kosovo under Chapter IX are provided the conditions, methods and manners for use, ordering and implementation of these measures. Any violation of these procedural provisions constitutes and infringement of individual, private and personal rights stipulated in the Constitution of the Republic of Kosovo, conventions and other international instruments.

The Constitution of Republic of Kosovo, Article 36, [Right to Privacy], stipulates:

[149] Dr.Ejup Sahiti dhe Dr.Rexhep Murati, E Drejta e Procedurës Penale, Prishtinë 2013, faqe 211

"Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication. Whereas paragraph 2 provides: *"Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law…"*

The right to privacy in itself includes some other rights, in view of which the Universal Declaration of Human Rights (Article 12) and the International Covenant on Civil and Political Rights (Article 17), stipulate: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence…".[150]

In addition, also the Criminal Code of Kosovo through Chapter XVII for the criminal offences against human rights and freedoms has envisaged as a special criminal offence *"Violating orders for covert or technical measures of surveillance or investigation, Article 206 of the CCK".* The criminalization of this criminal offence was stipulated in order not to abuse the covert and technical measures of surveillance and investigation, thus the object of protection of this criminal offence are the conditions and implementation of these measures.

In addition, Article 88, paragraph 1 of the Criminal Procedure Code of Kosovo, provides that covert and technical measures of surveillance and investigation may be ordered against a particular person or place if:

Item 1.1. There is a grounded suspicion that a place is being used for, or such person has committed a criminal offence which is prosecuted ex officio or, (in cases in which attempt is punishable), has attempted to commit a criminal offence which is prosecuted ex officio; and

Item 1.2. The information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

According to the Criminal Procedure Code of Kosovo, the covert and technical measures may be ordered against the suspects for criminal offences that are punishable up to five (5) years of imprisonment or more or against the suspects who are suspected for commission of one or more criminal offences provided under Article 90, paragraph 1, item 1.2 of this Code.

All evidence obtained by the State Prosecutor, prior or in the course formal implementation of investigations through implementation of covert measures that are lawfully ordered according to Article 888 of the Criminal Procedure Code of Kosovo, are admissible evidence during the main

[150] Prof.Dr. Enver Hasani / Prof.Dr.Ivan Cukalovic, Komentar Kushtetuta e Republikës së Kosovës, Botimi 1.

trial, regardless if the evidence is or is not included in the indictment for the criminal offences listed under Article 90 of the CPCK.

According to Article 91, paragraph 2, is stipulated that the jurisdiction for issuance of covert and technical measures of investigation and surveillance rests with the Pre-trial judge, who upon the Application of the State Prosecutor may order implementation of these measure. Exceptionally, paragraph 1 of this Article, provides that the State Prosecutor in exigent circumstances may order any of the covert and technical measures of investigation and surveillance. In addition, in criminal proceedings that are investigated under Chapter XXIV (organized crime) or Chapter XXXIV (official corruption and criminal offences against official duty) of the of the Criminal Code or money laundering offences in necessary cases, if the delay that would result from a pre-trial judge issuing an order would jeopardize the security of investigations or the life and safety of an injured party, witness, informant or their family members. Such provisional order ceases to have effect if it is not confirmed in writing by a pre-trial judge within three (3) days of issuance. This is a novelty in the new Criminal Procedure Code of Kosovo compared to the previous PCPCK, where according to Article 258, paragraph 1, item 1, 2, 3, 4 of the Provisional Criminal Procedure Code of Kosovo, the public prosecutor may issue an order for each of the following measures: 1) Covert photographic or video surveillance in public places; 2) Covert monitoring of conversations in public places; 3) An undercover investigation: or 4) Metering of telephone calls.

Whereas, the pre-trial judge may issue an order for each of the following measures on the basis of an application by a public prosecutor: 1) Covert photographic or video surveillance in private places; 2) Covert monitoring of conversations in private places; 3) Search of postal items; 4) Interception of telecommunications; 5) Interception of communications by a computer network; 6) Controlled delivery of postal items; 7) Use of tracking or positioning devices; 8) A simulated purchase of an item; 9) A simulation of a corruption offence; or 10) Disclosure of financial data.[151]

2. The person who may be subject of implementation of covert and technical measures of surveillance and investigation

I. *Covert photographic or video surveillance, covert monitoring of conversations in public places, metering of telephone calls or disclosure of financial* data may be ordered against a particular person or place if:

a) There is a grounded suspicion that a place is being used for, or such person has committed a criminal offence which is prosecuted ex officio or, in cases in which attempt is punishable, has attempted to commit a criminal offence which is prosecuted ex officio; and,

[151] Article 258 of the Provisional Criminal Procedure Code of Kosovo *UNMIK/RREG/2003/26*

b) The information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

II. *Metering of telephone calls or disclosure of financial data* may be ordered if there is a grounded suspicion that:

a) such person receives or transmits communications originating from or intended for the suspect or participates in financial transactions of the suspect; or

b) The suspect uses such person's telephone.

III. *Covert monitoring of conversations in private places, search of postal items, interception of telecommunications, interception of communications by a computer network, controlled delivery of postal items, the use of tracking or positioning devices, a simulated purchase of an item, a simulation of a corruption offence or an undercover investigation* may be ordered against a particular person, place or item if:

a) There is a grounded suspicion that a place or item is being used for, or such person has committed or, in cases in which attempt is punishable, has attempted to commit a criminal offence listed in Article 90 of the CPC.

b) The information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

IV. The search of postal items, the interception of telecommunications or the interception of communications by a computer network may be ordered against a person other than the suspect, if there is a grounded suspicion that:

a) Such person receives or transmits communications originating from or intended for the suspect; or,
b) The suspect is using such person's telephone or point of access to a computer system.

3. The content of the Application and the Procedure for issuance of the order for Covert and Technical Measures of Investigation and Surveillance

An application from the State Prosecutor for issuance one of the covert measures shall be made in writing and shall include the following information:

a) The identity of the duly authorized police officer, officer of the body authorized to enforce criminal law or the state prosecutor making the application;
b) The formal designation and the legal grounds of the measure,
c) Reasons and facts that support the application and fulfill the criteria in Article 88 of the Criminal Procedure Code of Kosovo; and
d) Information about any previous application known to the applicant involving the same person and the action undertaken by the authorizing judicial officer on such application.

An order from the Pre-trial judge for implementation of covert and technical measures of surveillance and investigation contains the following:

a) The name and address of the subject or subjects of the order, if known the number of affected data subjects and the scene of the event;
b) The official designation of the measure and its exact legal bases;
c) In particular the current findings and the sound probability[152];
d) The measure and its exact starting and closing time, if applicable; and
e) The person authorized to implement the measure and the officer responsible for supervising such implementation.

The order issued by the Pre-trial judge for any of the measures shall not exceed sixty (60) days from the date of the issuance and the duly authorized police officers shall provide the judge with the report on implementation of the order at fifteen (15) day intervals from the date of the issuance of the order.

The order for interception of telecommunications, interception of communications by a computer network, metering of telephone calls, and search of postal items, controlled delivery of postal items or disclosure of financial data shall include as an annex a separate written instruction to persons other than duly authorized police officers whose assistance may be necessary for the implementation of the order. Such written instruction shall be addressed to the director or the official in charge of the telecommunications system, computer network, postal service, bank or other financial institution and shall specify only the information, which is required for assistance in the implementation of the order.

The order for covert measures cannot be extended unless the preconditions for ordering a measure as set forth in Article 88 of the CPC, continue to apply and there is a reasonable explanation of the failure to obtain some or all of the information sought under the earlier order. The order for covert photographic or video-surveillance in public places, covert monitoring of conversations, search of postal items, interception of communications by a computer network, controlled delivery of postal

[152] According to Article 19, paragraph 1, sub paragraph 1.11, the definition “Sound Probability” means -the basis for an order to search or otherwise justify a government intrusion into a person's privacy. Possession of admissible evidence which would satisfy an objective observer that a criminal offence has occurred is occurring or there is a substantial likelihood that one will occur and the person concerned is substantially likely to have committed the offence.

items, use of tracking or positioning devices, an undercover investigation, metering of telephone-calls or disclosure of financial data may be extended for a maximum period of sixty (60) days, which may be renewed up to a total period of three hundred sixty (360) days from the date of the issuance of the order.

The order for covert photographic or video-surveillance in private places or interception of telecommunications may be extended for a maximum of sixty (60) additional days, which may be renewed for a further maximum period of sixty (60) additional days.

The order for a simulated purchase of an item or a simulation of a corruption offence shall only authorize a single purchase of an item or a single simulation of a corruption offence, namely if implementation of this measure fails or becomes unsuccessful then a new order shall be issued as set forth in Article 88 of the CPCK and there is a reasonable explanation for that failure.

4. Suspension of the implementation of the order and the materials obtained through the covert and technical measure of surveillance and investigation

The authorizing judicial officer may terminate the order at any time if he or she determines that the preconditions for ordering a measure, as set forth in Article 88 of the CPC, cease to apply, for instance the information for which the measure is issued can now be obtained with another measure. The extension of an order for a measure ordered by a pre-trial judge may only be ordered on the motion of a state prosecutor.

On the completion of the implementation of the order of the Pre-trial judge, the duly authorized police officers shall send the collected materials, documentary records, tapes and other items relating to the order and its implementation to the state prosecutor.

Materials may be closed and held in secret if the state prosecutor considers that making them public would corrupt subsequent investigations or create a risk to the victim, witnesses, investigators or other persons. Also, the Pre-trial judge through the Application of the State Prosecutor may deny the access in the collected materials through covert measures also to the person against who is applied the measure. Postal items, which do not contain information that will assist in the investigation of a criminal offence, shall immediately be forwarded to the recipient.

5. The rights of persons against whom are implemented covert and technical measure of surveillance and investigation

With the provisions of Article 96 of the Criminal Procedure Code of Kosovo is provided that the persons who are subject of implementation of the measure of covert and technical measure of

surveillance and investigation as set forth from Article 86 to 100 of the present code shall be notified. This means that besides of the targeted persons shall also be informed the other persons significantly affected thereby; This comes in question in implementation of Article 87, sub paragraph 1.1 and 1.7 of the CPCK, covert photographic or video surveillance or use of location tracking devices. In addition, in cases of Article 87, sub paragraph 1.2 of the CPCK if there was covert monitoring of conversation in public places besides of the target persons shall also be informed the others that are significantly affected by this, namely persons who owned or lived in the private premises under surveillance at the time the measure was effected;

In the case of Article 87 subparagraph 1.3 of the CPC, the sender and the addressee of the postal item shall be notified, whereas in the case of Article 87 subparagraph 1.10, the person targeted, persons significantly affected thereby; Notification shall be dispensed with where overriding interests of an affected person that merit protection constitute an obstacle thereto.

Notification shall take place as soon as it can be effected without endangering the purpose of the investigation, the life, physical integrity and personal liberty of another, or significant assets. Were notification is deferred pursuant to the first sentence, the reasons shall be documented on the file. The notification shall take place 12 months after completion of the measure and any deferral of notification shall be subject to the approval of the court, which shall decide upon the duration of any further deferrals. If certain measures are implemented within the given time limit, the time limit shall start running after expiry of the last measure which shall be six (6) months.

Court decisions shall be taken by the court competent to order the measure. In all other cases the court situated where the competent state prosecution office is located shall be competent. Even after completion of the measure and for up to two weeks following their notification, the persons named affected by the measure may apply to the competent court a review of the lawfulness of the measure, as well as of the manner and means of its implementation. An immediate complaint against the decision shall be admissible. Where public charges have been preferred and the accused has been notified, the court seized of the matter shall decide upon the application in its concluding decision. All personal data acquired by means of the measure which is no longer necessary for the purposes of criminal prosecution or a possible court review of the measure shall be deleted without delay. The state prosecutor shall promptly inform in writing by registered mail each subject of an order pursuant to paragraph 4 of this Article that he or she has been the subject of that order and has a right to file a suit to the competent court within six (6) months of being informed.

6. Admissibility of Evidence Obtained through Orders for Covert and Technical Measures of Surveillance and Investigation

Evidence obtained by the covert and technical measures of surveillance and investigation shall be inadmissible if the order for the measure and its implementation are unlawful. After the filing of

the indictment, the single trial judge or presiding trial judge shall consider challenges by the defendant to the admissibility of the collected materials, if the challenge is filed prior to the second hearing. The decision on a challenge under this paragraph may be appealed.

At any time prior to the final judgment, the single trial judge or presiding trial judge may review the admissibility of materials collected under Article 88 of CPC ex officio for violations of the defendant's constitutional rights if there is an indication that the materials were collected unlawfully. When the ruling that an order or its implementation is unlawful is final, the single trial judge or presiding trial judge assigned to the proceedings shall remove all collected materials from the record and submit such materials through the President of the Basic Court to a Surveillance and Investigation Review Panel for a decision on compensation.

If a person considers that he or she has been the subject of a measure under the Chapter for covert and technical measures of surveillance and investigation, which is unlawful, or an order for a measure under this Chapter, which is unlawful, he or she may submit a complaint to President of the Basic Court who shall, if a violation of the law is alleged, appoint a Surveillance and Investigation Review Panel for adjudication.

The Surveillance and Investigation Review Panel shall:

- adjudicate on a complaint submitted under Article 98, paragraph 5 of the CPCK in respect of a measure or an order for a measure under this Chapter and decide on compensation where appropriate; or
- Decide on compensation for the subject or subjects of an order under this Chapter if a judge has made a final ruling under Article 97 paragraph 3 of the CPCK that the order or its implementation is unlawful.

The Surveillance and Investigation Review Panel shall be composed of three judges who shall be assigned by the President of the Basic Court to adjudicate on an individual complaint or to decide on compensation following an individual ruling under Article 97 paragraph 3. None of the three members of the Surveillance and Investigation Review Panel shall be professionally connected with the subject of the complaint or the collected materials, which are the subject of the ruling under Article 97 paragraph 3 of the CPCK. Authorized police officers and state prosecutors shall provide the Surveillance and Investigation Review Panel with such documents as the Surveillance and Investigation Review Panel shall require to perform its functions and shall, on request, provide oral testimony to the Surveillance and Investigation Review Panel. When a ruling of a judge that an order is unlawful is final, it is binding on the Panel.

If on adjudicating on a complaint the Surveillance and Investigation Review Panel finds that a measure is unlawful or an order for such measure is unlawful, it may decide to:

1. Terminate the order, if it is still in force;

2. Order the destruction of the collected materials; and/or
3. Award compensation to the subject or subjects of the order.

7. Assistance of other Authorities to Implement Measures

The provisions of the Criminal Procedure Code stipulate that the police may, where appropriate, seek the assistance of other authorities responsible for maintaining law, such as the assistance of custom officers and other similar services.

Bibliography:

- Sahiti, Ejup and Murati, Rexhep, E Drejta e Procedurës Penale, Prishtinë 2013/ Criminal Procedure Law 2013
- Hasani, Enver dhe Cukalovic, Ivan, Komentar: Kushtetuta e Republikës së Kosovës, Botimi 1. Prishtinë, 2014/ Commentary of the Constitution of the Republic of Kosovo, first edition, Prishtina 2014
- Udhëzues i shkurtër i Konventës për të drejtat e njeriut, Donna Gomien, edicioni i 3-të./ Brief guideline of the Human Rights convention, Donna Gomein, 3rd edition
- Aktet juridike / Legal acts
- Konventa Evropiane për të Drejtat e Njeriut 1966./ European Convention on Human Rights and Freedom
- Kodi i Procedurës Penale të Kosovës nr.04/L-123, Gazeta zyrtare nr./ Criminal Procedure Code of Kosovo No. 04/L-123
- Kodi i Përkohshëm i Procedurës Penale të Kosovës UNMIK/RREG/2003/26 / Provisional Criminal Procedure Code of Kosovo UNMIK/REG/2003/26
- Rregullorja nr.2002/6 mbi masat e fshehta teknike të vëzhgimit dhe hetimit/ Regulation no. 2002/6 on Covert and Technical Measures of Surveillance and Investigation
- Kodi Penal i Republikës së Kosovës nr.04/L-082, Gazeta zyrtare nr. e Repubikës së Kosovës, / Criminal Code of Republic of Kosovo, no. 04/L-082, Official Gazette of Republic of Kosovo,
- Udhëzues i shkurtër i Konventës për të drejtat e njeriut, Donna Gomien, edicioni i 3-të, vendi dhe viti I botimit /Brief guideline of the Human Rights convention, Donna Gomein, 3rd edition, place and year of publication

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INJUNCTIVE MEASURES

ABSTRACT

In this paper, I have tried to elaborate on injunctive measures, as a civil litigation instrument through which the Court provides legal protection to interested parties, should the case require exigent actions.

In the present paper, the reader can find an introduction, which strives to give an idea of and explain the reason for regulating this matter as well situations in which the Court may seek judicial protection via such instrument of civil procedural law.

Further on, the meaning of the injunctive measures, the legal requirements that the court may set and the procedure to be followed therein were outlined.

The final section of the present paper highlights some issues that are deemed essential for such an instrument of the civil procedural law, whose provisions constitute a novelty in the Law on Contested Procedure.

Introduction

The right to own property is guaranteed.[153] Each physical or legal person has the right to enjoy his property peacefully. Nobody should be deprived of his/her property, save when that is done in public interest and in compliance with the requirements provided by law and with the general principles of the international law.[154] 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

[*] Ilir Berisha, candidate for judge.

[153] The Constitution of the Republic of Kosova, published in the Official Gazette dated 9 April 2008, which entered into force on 15 June 2008, Article 46 (protection of property).

[154] European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, adopted on 4 November 1950, and Protocol No. 1, adopted on 20 March 1952 in Paris, Article 1, which, pursuant to Article 22 of the Constitution, are directly applicable in the Republic of Kosova and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

effective legal remedy if found that such right has been violated.[155] Ownership is the comprehensive right over a thing. The owner of a thing may, unless it is not contrary to the law or the rights of third parties, deal with the thing in any manner he sees fit, in particular possess and use it, dispose of it and exclude others from any interference.[156]

We have started the introduction to the present paper by quoting some property protection rules of our legal system, so as to give the reader an idea of the reason for setting such legal norms, because, more than often, the right to property as a constitutional category is infringed upon by various subjects of law.

Accordingly, to protect property rights, the lawmaker has issued different provisions, which explain the path that the interested parties should follow to obtain the necessary legal protection, by adopting the Law No. 03/L-006 on Contested Procedure (hereinafter LCP).[157]

With the exception of the general provisions on the conduct of an ordinary contested procedure, the Law contains a separate chapter from Article 296 to Article 318, which regulates the injunctive measures when interested parties seek urgent judicial protection (summary procedure).

1. Understanding injunction

The Court provides subjects of law legal protection also when there is a danger that the enforcement of the civil legal sanction will not yield the desired result. In other words, it is provided when the subjective civil right is not likely to be pursued despite application of force by the competent body. In such cases, legal protection lies in issuing an injunction as provided in the provisions of LCP. When the legal requirements are met, the said injunction may be issued not only in the course of contested procedure, but also before its introduction. Yet, though we are dealing with the provision of legal protection, it should be noted that the measure is of a temporary nature. It only lasts until the court, in the contested procedure, takes a decision rejecting the request for legal protection as ungrounded or until the creditor realizes his credit against the debtor.[158]

Realization of private subjective rights usually takes a relatively long time. This owing to the fact that, for a civil subjective right to be realized, a regular procedure establishing the private subjective right should be conducted as a principle. And it is only following such procedure that

[155] The Constitution of the Republic of Kosova, published in the Official Gazette dated 9 April 2008, which entered into force on 15 June 2008, Article 54 (judicial protection of rights).
[156] Law nr.03/L-154 on Property and other Real Rights, published in the Official Gazette on 4 July 2009, Article 18 (property).
[157] Official Gazette of the Republic of Kosova No. 38 dated September 20, 2008, Pristina, Law No. 03 / L-006 on Contested Procedure, promulgated by Decree no. DL-045-2008 dated 29.07.2008 by the President of the Republic of Kosova, Dr. Fatmir Sejdiu, and amended by the Law No. 04/L-118 on Amending and Supplementing the Law No.03/L-006 on Contested Procedure dated September 13, 2012.

[158] Dr. Brestovci, Faik, E drejta procedurale civile I, Prishtinë 2004, fq.13 [Civil Procedural Law I, Pristina 2004, p.13].

the procedure for the factual realization of the private subjective right (enforcement procedure) can be conducted. Hence, a long time will lapse pending factual realization of the private subjective right, as a unresponsive party that does not have the will to keep his promise voluntarily may use different methods to impede, avoid or deprive the claimant/creditor from pursuing his subjective right. That is why various rules enabling the claimant/creditor to secure his/her claim have been stipulated.[159]

Upon the application of the claimant, the court will allow injunction when there are reasons to suspect that the execution of the decision on the rights of the claimant will become impossible or difficult. Such an application is allowed in different stages of contested procedure, namely the request for injunction may be filed before the very claim is filed, during the contested procedure, in the course of appellate proceedings and after the judgment has become final. The competent court decides on the request for injunction, depending on the phase of procedure in which such a request is filed.

Article 296.1 and 2 of the LCP clearly stipulates the jurisdiction of the court to decide on the proposal for injunction. Accordingly, only the courts of first and second instances have jurisdiction, as opposed to the court of third instance i.e. the court adjudicating upon extraordinary remedies, for paragraph 2 of Article 296 of the LCP clearly provides that "after the decision over the claim charge is an absolute decree one it is decided by the competent court for deciding over the charge claim of the first instance" [sic!].

2. Legal grounds for imposing the injunction

In order to decide on injunction, the provisions of LCP require that two requirements are met cumulatively and that:

- when the claimant renders the existence of his claim or subjective right plausible and
- when there is a danger that, should injunction not be issued, the adversary party will render the realization of the claim impossible or difficult to a considerable extent.[160]

Hence, the court may render a ruling on an injunctive measure:

- if the party that proposes the injunction renders the claim plausible by corroborating his/her request or subjective right with relevant pieces of evidence.

[159] Dr. Morina, Iset, Komentar i Ligjit për Procedurën Kontesitimore, Botimi i parë, Prishtinë 2012, fq.541 [Commentary on the Law on Contested Procedure, 1st Edition, Pristina, 2012, f.541].
[160] Article 297, par.1 of the LPK.

(*lat.* ***fomus boni iuris*** *– likelihood of success on the merit of the case – presumption of sufficient legal grounds).*[161]

- If there is a danger that the pursuance of the claim will be rendered impossible or difficult without the issuance of the injunctive measure.
  (lat. ***periculum in mora*** *– danger of inevitable damage of the right).*[162]

However, there is a debate at present between scientists and practitioners of civil procedure regarding the notion that was used in the first legal requirements, which reads: "if the claimant of the injunction renders the existence of his claim or subjective right plausible".[163] They have their pros and cons as to whether a court decision on injunction does or does not prejudge a decision on the principal matter.

Professor Iset Morina believes that: "In this moment, it is still unknown and cannot be prejudged who is the creditor or the debtor, pending the announcement of court decision on the merits of the case. This is the principle of justice".[164]

Ways to render the pursuance of the claim impossible or difficult or to deprive somebody of pursuance thereof vary and involve, in particular, alienation and hiding of own property or encumbering thereof as well as other ways that would change the current status of affairs or that would adversely affect the rights of the claimant that has filed a request for injunction.

The court may issue an injunction provided that applicant does, within the timeline set by the court, make a security deposit for the measure and the type thereof that the court has determined for the damage that may be inflicted upon the adversary party by the issuance and execution of the injunction. Otherwise, should the applicant fail to make the provided security deposit within the stipulated timeframe, the court may reject the application. However, if the applicant does not have money, he may be exempted from the duty of making a security deposit, like the local government communities were.[165] Such security deposit shall be reimbursed within 7 days of the expiry of the injunction.

By way of such provision, the lawmaker aims to make sure that the court also provides protection to the adversary party, because, as it is known, it may happen that his/her status may deteriorate

[161] http://en.wikipedia.org/wiki/Periculum_in_mora, *fumus boni iuris* is a Latin phrase, used in European courts, meaning "likelihood of success on the merit of the case" (literal meaning: "smoke of a good right"). The existence of this assumption should be examined by the court which will decide according to the results of the fait accompli.

[162] http://en.wikipedia.org/wiki/Periculum_in_mora, *periculum in mora*, Latin for "danger in delay", is one of two conditions which must be asserted in actions aimed at obtaining a protective order or injunction to be granted the relief sought (the other condition being fumus boni iuris). The second condition is the c.d. Prima facie case. The burden of proof of danger in delay falls to the person who requests the injunction or order, demonstrating the existence of both requirements, pericolum notice, and the risk of suffering serious and irreparable damage.

[163] Article 296, paragraph 1, item a) of the LCP.

[164] Dr. Morina, Iset, Komentar i Ligjit për Procedurën Kontesitimore, Botimi i parë, Prishtinë 2012, fq.543 [Commentary on the Law on Contested Procedure, 1st Edition, Pristina 2012, p. 543].

[165] Article 297 of the LCP.

or he/she may face potential limitations or even suffer eventual damages, and, should the claim be found ungrounded by a final decision, he or she will be entitled to reparation from the security deposit.

In addition, we consider that the legal requirement for the applicant to make a security deposit so that the adversary part does not suffer damages and that, in case he or she does, he or is compensated from the security deposit, makes the application of the first even more credible to the court, because neither party can know the truth about the subject of dispute and no one can feel the danger from the adversary party with regard to the subject of dispute better than the applicant. Therefore, his/her readiness to offer (make) a security deposit indicates, at the same time, the credibility of his/her claim and his or her resolve to seek judicial protection for the subject of his/her claim.

With regard to the way the security deposit is made, the provision refers to the Law on Enforcement Procedure. According to the law, in cases for which a security deposit is provided, the security deposit is made in cash. The court may allow a security deposit in the form of a bank deposit, securities and valuable items the market value of which can be established easily and which can be quickly converted into cash.

3. Types of injunction

Law on Contested Procedure regulates, but does not limit itself to three main forms of injunction, which was not the case with the Law on Contentious Procedure of 1976 (old law). The following presents three main forms of injunction as well as their types, which cover the disputes arising from civil legal relations quite well.

a) Injunction in cash[166]

The court may impose the following measures for injunction in cash:

- prohibition of adverse party from alienating, hiding, encumbering or possessing a certain property up to the value of the claim;
- protection of property from the adversary party, applicant or a third person;
- prohibition of accommodation of request or delivery of the item to the debtor or adversary party;
- establishment of the right to mortgage over an immovable property up to the value of the claim.

[166] Article 299 of the LCP.

The court issues an injunction, which is sent to the adversary party or to the debtor of the adversary party and, in certain cases, to the public registry, if it relates to such a measure, which is considered enforced as of the moment when the ruling is served. ***b) Injunction in items***[167]

To secure the claim towards a certain item or a part thereof, the court may impose the following measures:

- prohibition of adverse party from alienating, concealing, encumbering or possessing a property against which the claim was filed;
- protection of property from the adversary party, applicant, a third person or its deposition in the court;
- prohibition of the adversary party from carrying out actions likely to damage a part of property;
- authorizing the applicant to carry out certain activities on the given object.

Injunction measures should cover the claim that is secured through such injunction measures in its entirety.

c) Injunction of other rights[168]

The following measures may be imposed to secure other rights or protect the current state of affairs:

- prohibition of adversary party from performing certain activities without an order for performance of such activities;
- authorizing the applicant to undertake certain activities;
- leaving a certain property of the adversary party under the protection and care of a third person;
- other measures required to secure the claim.

Upon the imposition of the prohibition and until injunction becomes effective, registration with public registries or any other change is not possible, otherwise that will be subject to liability as per rules of civil law. On the other hand, any action taken while the decision is in force has no legal effect.

The court may allow the claim be secured with some of the various types of injunction measures, for a certain value or item, but not exceeding the value of the claim.

[167] Article 300 of the LCP.
[168] Article 301 of the LCP.

4. Application for injunction

The procedure of imposing injunctive measures starts with lodging a written (submission) or oral (in the course of proceedings i.e. court session) application. The written application or verbal application made during the court session should contain all elements stipulated in the e provisions of Article 304 al.3 of the LCP.[169]

However, owing to the fact that application for injunction may be filed at any stage of proceedings, it can also be made orally during the court session, but by always giving plausible reasoning of underlying grounds. In addition, the application should state the proposed injunctive measure and the means and subject thereof clearly.

The court imposes the injunction measure mainly after the adversary party has made a statement thereon, save cases when this is not possible, namely when the applicant renders the claim that the injunctive measure is grounded and exigent and that any postponement would fail to serve its intention plausible. The adversary party has the right to file a reply in writing about the issuance of the injunctive measure within 7 days.

5. Urgent injunction

The court may, upon application, issue an injunction without having received the statement of the adversary party. The adversary party is entitled to challenge the injunction within 3 days of its receipt, file a reply and challenge its grounds. On the other hand, the court, having received the reply, has to schedule the session within 3 days, summon the parties, hear their allegations and render a ruling on the injunctive measure approving or rejecting the application for injunction.[170]

Indeed, the court, in issuing the injunction, determines the type of injunctive measure, the means by which it will be enforced and the subject thereof, by, of course, abiding by the rules of enforcement procedure.

Hence, the foregoing indicates that the court sends the injunction to the competent enforcement court in order to execute it and register it in the Immovable Property Rights Register.

If injunction is issued before the claim is filed, the ruling imposing the injunction measure also sets a timeline which may not be shorter than 30 days and within which the applicant may file a claim and provide the court with evidence indicating that he/she has acted as per its recommendations.[171]

Injunction remains in force pending another decision on its revocation and at least for 30 days after the requirements for compulsory enforcement are met. If the claim is rejected, the injunction

[169] Sylejmani, Shukri, Procedura Kontestimore, Pjesa e dytë, Ligjërata të autorizuara nga Instituti Gjyqësor i Kosovës, Prishtinë 2014 [Contested Procedure, Part II, Lectures authorized by Kosova Judicial Council, Pristina 2014].
[170] Article 306 of the LCP.
[171] Article 308 of the LCP.

remains in force until the judgment becomes final. On the other hand, the court usually expunges the injunction from public registries.[172]

6. Legal remedies

A complaint against injunction may be filed within 7 days of its receipt. The adversary party may file a reply to the complaint within 3 days of its receipt. On the other hand, the court of second instance must, within 15 days, decide on the complaint filed against the injunction. Compliant against injunction does not stay the execution thereof.[173]

Pursuant to the provision of Article 312 and in agreement with the adversary party, the right to mortgage over a given item may be established instead of issuing an injunction.

7. Costs

Costs incurred in the course of injunction proceedings shall be borne by the applicant beforehand. However, should the applicant fail to pay for the costs within the timeline set in the injunction, the court shall terminate the proceedings and annul the actions taken. The court shall render such a decision even when the circumstances on account of which the injunction was issued have ceased to exist or changed and rendered the further existence thereof unnecessary. As to the adversary party, the court shall terminate the proceedings and annul the actions performed even when:

- the adversary party deposits the required sum for the claim that is secured by interest rate and expenses,
- renders the realization or the injunction plausible,
- it is confirmed, by a final decision, that the application was not filed or had been rejected.

8. Damages

According to the general rules of property rights, both applicant and adversary party are entitled to damages inflicted by the failure to observe the injunction and if it is established that the approval of [application for] injunction was ungrounded or unjustified. Claims for damages are status barred within 1 year from the day of the expiry of injunction.

Injunctions are implemented by the court that would be competent to execute the final judgment.

[172] Article 309 of the LCP.
[173] Article 310 of the LCP.

9. Conclusion

- Injunction as an instrument in the version provided by the Law on Contested Procedure is undoubtedly a novelty among many others that the Law has brought, as opposed to the old Law on Contested Procedure of 1977 (SFRY Official Gazette No. 4/77), which has not regulated such an instrument of civil procedure. However, this field was regulated by the provisions of the Enforcement Procedure Act of 1978 (SFRY Official Gazette No. 20/78).
- In addition to general provisions on the conduct of an ordinary contested procedure, the Law on Contested Procedure has a separate chapter regulating injunction when parties involved seek urgent judicial protection (summary procedure).
- The court issues the injunction when two requirements are met cumulatively: when the applicant renders the existence of the claim or his/her subjective right plausible and when there is a danger that, should injunction not be issued, the adversary party will make the realization of the claim impossible or difficult to a considerable extent.
- The injunction issued by the court cannot and may not prejudge the outcome of the principal matter, as, even if the court issues an injunction favoring the claimant, he/she may lose the case.
- There is a substantial difference between interim measure and injunction, because the court may render a ruling on interim measure upon claimant's application without having received the statement of the adversary party. The adversary party may challenge the ruling on interim measure and grounds thereof within 3 days of its receipt. On the other hand, the court, having received the reply, must schedule the session, summon the parties, hear the allegations of both parties and render a ruling approving or rejecting the application for injunction within 3 days.
- In order to give leeway to the court, depending on the circumstances of a given case, the lawmaker has provided several injunctive measures so as to serve the final purpose – injunction's efficiency and efficacy.

Bibliography

- Constitution of the Republic of Kosovo, April 9, 2008;
- European Convention for the Protection of Human Rights and Fundamental Freedoms; Nov. 4, 1950, Protocol no. 1, March 20, 1952;
- Law no. 03-L-154 on Property and Other Real Rights;
- Law No. 03-L-006on Contested Procedure;
- Law No. 04/L-118 on Amending and Supplementing the Law No.03/L-006 on Contested Procedure;
- Dr. Brestovci, Faik. . E Drejta Procedurale Civile I [Civil Procedural Law I], Pristina 2004;
- Dr. Morina, Iset. Komentar i Ligjit për Procedurën Kontestimore, botimi i I, Prishtinë 2012 [Commentary on Law on Civil Procedure, 1st Edition, Pristina 2012]

Fatos Ajvazi[*]

GROUNDS FOR SETTLEMENT OF MARRIAGE BY ANNULMENT

ABSTRACT

The present paper explains grounds for settling marriage by annulment, focusing on grounds for absolute annulment of marriage and grounds for relative annulment of marriage. In the beginning, the present paper addresses grounds of absolute annulment of marriage, focusing on: sex differences (where also the question of change of sex by individuals has been elaborated on); mental diseases and incapability of performing legal acts; sex as a ground for absolute annulment (two charts, indicating blood line levels, in terms of both direct and indirect lines have been presented in this section). The question of minority, under 16 years of age, as a ground for absolute annulment; failure to follow the marriage procedure; failure to respect jurisdiction as well as swaying from the aim of the marriage, where examples of swaying from the aim of the marriage are given; grounds for relative annulment of marriage, such as absence of will to marry, violence, threat and deception; minority age, from 16 to 18 years, as well as mental illness and incapability of performing legal acts, were explained later on, including a description of cases when that represents a ground for relative annulment.

Keywords: marriage, blood line, settlement, annulment, absolute grounds, relative grounds, sex, court.

INTRODUCTION

The question of marriage in violation of legal provisions is a very problematic issue and has grave consequences for both family and society. Because of such marriages – which are concluded despite existence of obstacles thereto – we have a large number of annulled marriages. Fortunately, Kosova has a good century long tradition of sustainable marriages that has been inherited over generations. Such tradition has helped Kosova have sound marriages and a sound society. This tradition has started to diminish after the last war in Kosova. We are witnesses of a large number

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of marriages that are ending up with divorces and marriage annulments alike. Even a bigger problem is the fact that, when couples with children end up their marriage by absolute or relative annulment, it is the children that suffer the most from such marriages that have been entered into in violation of legal provisions.

Kosova has on 16 February 2006 adopted a law regulating family and marriage relations in detail. This is another strong groundwork to help prevent such marriages that run counter to the law from happening. The present paper aims at studying the reasons that lead to the annulment of such marriages and at giving new opinions and ideas for the timely prevention of such marriages by the competent state bodies.

In addition to the introduction, the present paper contains the reasons for settling the marriage by annulment, a conclusion as well as a list of consulted sources.

The INTRODUCTION presents the question of marriages that run counter to the legal provisions and their annulment. It outlines the reason why the settlement of marriage by annulment is the subject of the study, grounds for settling a marriage by annulment, including absolute annulment of marriage, than reasons that make an absolute marriage void as well as relative annulment of marriage and reasons that make a relative marriage void. It also presents the methodology of work that was used for the present paper.

Reasons for researching the settlement of marriage by annulment: Reasons for researching the settlement of marriage by annulment stem from the fact that this matter has not been dealt with much in the legal literature and there is no special review on this topic, at least not in Kosova. Another reason is that marriage may only be annulled on grounds that have been provided by law expressly. A marriage concluded in violation of legal provisions undermines general social interests, and the public prosecutor, spouses and any interested party has the right to file a claim.

Work methodology: Before I embarked on the present scientific research, I first gathered the legal literature, which is diverse and dedicated generally to the annulment of marriage and grounds thereof.

1. Settlement of marriage by annulment

Marriage has a very important role in the creation of family. Marriage is the foundation for the creation of the family, family is the foundation for the creation of the society, and society is the foundation for the creation of the state. Hence, state is the institution providing for the creation of marriage and setting the requirements that need to be met to conclude a marriage by legal norms, in order for the marriage to be valid, so as not to produce negative consequences for the society. Or else, if a marriage is concluded by failing to adhere to legal norms, which are set by the state, it will be considered as void.

A marriage that is concluded without meeting the legal requirements for its validity is declared void.[174] In addition to the sanction of legal and family nature of the annulment of marriage, the law has also provided criminal sanctions.[175] This means that persons who have concluded the marriage (the couple) and (official) persons that have allowed the marriage bond in violation of requirements provided by law shall be held criminally liable for their actions, besides legal and family consequences.

Marriage annulment is a legal manner of settling a void marriage and sees the marriage as not made at all.[176] These means that the couple, after the marriage is annulled, will not be considered as divorced, but as persons who have never married, and the marriage will be considered as inexistent and the spouses will be considered as never married (singles)[177].

Up to the moment when it is annulled, the marriage produces the same legal effects as a valid marriage, as regards both (marital) children and spouses (needs such as marriage settlement arise).[178] These will be elaborated on separately when we will deal with the legal effects of the marriage annulment.

Reasons that make a marriage void have been provided by law (*nulla nullitas sine lege)* expressly. In legal theory, marriage obstacles are considered as reasons to annul a marriage. Marriage obstacles should have existed before the marriage was made or, at least, at the time of its conclusion.[179]

Among grounds for marriage annulment, the theory of family law recognizes to types: [grounds for] absolute annulment of marriage and [grounds for] relative annulment of marriage.

2. Grounds for absolute annulment of marriage

Absolute annulment of marriage exists when grounds for absolute annulment of marriage exist."[180] FLK does not provide grounds for absolute annulment of marriage expressly. However, depending on whether grounds for absolute annulment of marriage are evitable or not, we can find that causes that produce absolute annulment marriage are grounds than can be avoided (mended). If legal requirements for protection of general social interests are not met, the legal family sanction will apply, and the marriage will be proclaimed absolutely void.[181] Thereby, we can infer that a

[174] Hamdi Podvorica: "*E drejta familjare*" *[Family Law]*, Pristina, 2006, p.114.
[175] Idem, p.114.
[176] Abdulla Aliu & Haxhi Gashi: *"E drejta familjare*" *[Family Law],* Pristina, 2007, p. 150.
[177] http://family-law.lawyers.com/divorce/Can-This-Marriage-be-Annulled.html.
[178] Hamdi Podvorica: "*E drejta familjare*", Prishtinë, 2006, f.114 *[Family Law*, Pristina, 2006, p.114].
[179] Idem, p.114.
[180] Abdulla Aliu & Haxhi Gashi: "*E drejta familjare*" *[Family Law],* Pristina, 2007, p.151.
[181] Hamdi Podvorica: "*E drejta familjare*", *[Family Law],* Pristina, 2006, p.114.

marriage that fails to meet inevitable legal requirements and undermines the overall social interests is unlawful and should be annulled.

Grounds for absolute annulment are obstacles provided by law, but there may be other facts.[182] FLK stipulates the grounds for annulment of marriage in the provisions of articles 62 through 67, but, as we mentioned before, it does not specify specific grounds for absolute or relative annulment of marriage. Grounds for absolute annulment of marriage include:

a. existing marriage;
b. failure to distinguish between sexes;
c. mental diseases and incapability of performing legal acts;
d. relation (by blood, by marriage, by adoption);
e. minority age;
f. absence of will to marry;
g. swaying from the aim of marriage;
h. failure to respect the jurisdiction of the competent authority; and
i. failure to follow the marriage procedure.

2.1. Existing marriage as a ground for absolute annulment of marriage

Every marriage entered into at the time of the existence of another valid marriage will be considered as void. This has been expressly stipulated in Article 62, paragraph 1 of the FLK, which reads: "marriage entered into at the time of the existing of a previous marriage of one of the spouses is void". Paragraph 2 of the same Article provides that marriage newly bonded at the time of the existence of the previous marriage of one of the spouses shall not be annulled, if the previous marriage was dissolved in the meantime [sic!].

The civil registry clerk has the duty to check if the would-be spouses have entered into another marriage.[183] He/she does this based on the birth certificate, which should not be older than 6 (six) months.[184]

There are several cases when the new marriage is not annulled. First, if during the session on annulment of a new marriage, the spouse who has been in a marriage relation claims that the previous marriage was void, the court should first consider the claim.[185] Another example is that when the first marriage has ceased by the death of the previous spouse or if the latter was pronounced dead, the second marriage, though entered into before the end of the first one, is

[182] Idem, p.114.
[183] Idem, p.82.
[184] Idem. p.82.
[185] Valentina Zaqe: "Marrëdhënjet familjare sipas legjislacionit shqipëtar", Tiranë, 1999, f.72 [Family Relations under Albanian Legislation, Tirana, 1999, p.72]

considered lawful.[186] However, even if the spouse that was pronounced dead returns or is confirmed alive, the marriage with the second spouse will be valid.[187]

As to Islam law (sharia), there is an exception in this regard. Islam law allows marriage with more women, up to four women at the same time[188], which implies four marriages at the same time.

Many wars were waged and many Muslim men have fallen in those wars and many widows were left behind. In order to provide for the livelihood of the women by means of lawful marriage, the Islam law has allowed marriage with several women (up to four).[189] Our positive law and the positive law of the western states recognize monogamy and acknowledge it as principle of family law.

Following the settlement or annulment of the first marriage, as provided by law, our legislation does not envisage the expiry of the term of the post-marital wait as a precondition to being granted the right to enter into new marriage, for the purpose of avoiding disputes concerning the confirmation of fatherhood.[190] Such timeline is provided by the Civil Code of France, Article 228, par.1, according to which the wife must wait 300 days after the settlement of the first marriage to enter into second marriage.[191] The waiting period of 300 stems from the fact that a child may be born during that time, and the parenthood of the child should not be disputed. Thus the period of 300 days, this is considered the longest period of pregnancy. The Civil Code of France, though it was adopted in 1804 and was only slightly amended, remains in force at present and we can say that it is one of the most perfect codes of all times. A large number of states that have their own civil codes have taken the Civil Code of France as a model. They include Netherlands (1837), Italy (1866), Egypt (1875), Spain (1889), etc.[192]

2.2. Failure to distinguish between sexes as a ground for absolute annulment of marriage

"Marriage is a legally registered union of two persons of different sexes, through which they freely decide to live together with the goal of creating a family", Article 14, par. 1 of the FLK.

Failure to respect sex distinction between the spouses at the time of the marriage bond produces absolute nullity, if the marriage was not concluded between persons of opposite sex.[193]

[186] Valentina Zaqe: "Marrëdhënjet familjare sipas legjislacionit shqipëtar" [Family Relations under Albanian Legislation] Tirana, 1999, p.73.
[187] Idem, p. 73.
[188] Resul Rexhepi: "*E drejta martesore islame*", Pristina, 1996. f .47.
[189] Idem, p. 48.
[190] Hamdi Podvorica: "*E drejta familjare*" *[Family Law]*, Pristina, 2006, p.82.
[191] Idem, p. 82.
[192] Andrija Gams:"Hyrje në të drejtën civile" [Introduction to Civil Law], Pristina, 1986, p. 31.
[193] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorised Lectures], Pristina, 1994, p. 78.

When such a requirement for a valid marriage bond exists, we have a void marriage, so such an action should produce no legal effect in the field of family law.[194] The marriage will only be valid if the civil status indicates that the spouses that want to marry are of the opposite sex.[195] That is also provided by the European Convention of Human Rights, in its Article 12, which reads: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

Dissatisfaction among and protests by homosexuals have spread recently, as they are requesting the legalization of marriages between homosexuals. Tendencies to allow marriages of same sex have made several western countries allow some models of cohabitation between persons of the same sex, in the form of a civil union, e.g. in Vermont.[196] However, it should be noted that: "The natural aim of the marriage was, is and will be birth and proper growth of children and sexual intercourse.[197]

2.2.1. Change of sex as a new social phenomenon

Sometimes human desire is so powerful that pushes the desire to the extreme and even to the change of sex. The phenomenon of the change of sex has appeared as a result of big achievements in medicine, which enables people to change their sex by surgery.[198]

Transsexualism is a phenomenon that leads a person of a given sex to a sexual desire to change the sex, which corresponds to an intimate and authentic feeling of belonging to the other sex".[199] According to the French doctrine, such marriages should not be allowed, due to the absence of genetically opposite sexes, as a necessary condition and presupposition for a valid marriage bond.[200] That is because, by surgery, one can only imitate the other sexual organ, for, in reality, in biological terms, it remains the same sexual genetic organ that it was before.[201] Before it allows the marriage bond between interested persons, the competent authority for marriage bonds should check in the civil registry records if the persons interested to marry are of opposite sexes and, if it is conformed that they are of opposite sexes and if all other legal requirements are met, it may allow the marriage bond, otherwise it should reject the marriage of the persons involved. However,

[194] Hamdi Podvorica: "*E drejta familjare*" *[Family Law]*, Pristina, 2006, p.115.
[195] Valentina Zaqe: "Mardhënjet familjare sipas legjislacionit shqipëtar", [Family Relations under Albanian Legislation] Tirana, 1999, p.53.
[196] Abdulla Aliu & Haxhi Gashi: "E drejta familjare", [Family Law], Pristina, 2007, p.153.
[197] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p.73.
[198] Idem, p.74.
[199] Valentina Zaqe: "Marrëdhënjet familjare sipas legjislacionit shqipëtar" [Family Relations under Albanian Legislation], Tirana, 1999, p.53.
[200] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p.74.
[201] Idem, p.74.

if sex is changed after the marriage, this may be a ground for annulling the marriage, because heterosexuality is a precondition to a valid marriage.[202]

2.3. Mental illness and incapability of performing legal acts as grounds for absolute annulment of marriage

Absolute annulment of marriage due to mental illness and incapability of performing legal acts exists when a person who has entered into marriage was unable to judge because of a serious mental illness or for another reason.[203] This is provided by Article 64, par. 1 of the FLK as a ground for annulling the marriage, if the spouses were incapable of performing legal actions on the occasion of marriage due to some diagnosed mental illness or for another reason. The same is expressly stipulated in the Family Code of Albania [FCA] i.e. in its Article 12, which reads: "A person who suffers from a mental illness or lacks the mental capacity to understand the nature of marriage cannot enter into matrimony".

The person who has lost the capability of performing legal actions because of a serious mental illness may not enter into marriage. In addition, a marriage is also void if the person was in such condition that he/she unable to understand the significance of his/her actions at the moment of marriage.[204] Taking into account the fact that marriage is an act of [free] will between two spouses and that such will has been missing to such an extent that he/she could not understand the purpose of the marriage, his/her later recovery cannot rule such a ground for annulment or deprive that person of his/her right to file a claim for annulling the marriage in which he/she has entered when he/she was mentally unable to judge.[205]

For the purpose of protecting public health and eugenics, contemporary legislations prohibit marriages between persons affected by serious diseases (such as venereal diseases or physical or psychological disorders).[206] On the other hand, there are legislations, such as the French legislation, which, for the purpose of informing the spouses about their health, require medical examination before marriage, whereby they are issued a medical certificate, which is presented to the civil registry clerk and which is called premarital [test] certificate.[207] This is a good practice, because it prevents entering into marriage with a person who suffers from a mental or mental disorder.

[202] Hamdi Podvorica: "E drejta familjare", [Family Law], Pristina, 2006, p.74.
[203] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p. 76.
[204] Franqesko Gallgano, p. 919.
[205] Valentina Zaqe: "Marrëdhënjet familjare sipas legjislacionit shqipëtar" [Family Relations under Albanian Legislation], Tirana, 1999, p.75.
[206] Idem, p.54.
[207] Valentina Zaqe: "Marrëdhënjet familjare sipas legjislacionit shqipëtar" [Family Relations under Albanian Legislation], Tirana, 1999, p. 55.

Inability to judge due to a serious mental illness or another illness is a ground for marriage annulment only if such illness has existed at the moment of the marriage. Otherwise, the later recovery of the spouse makes that a ground for relative rather than absolute annulment of marriage.[208] In order to consider a person incapable of performing legal actions, there should be a preliminary court decision by which he/she is deprived of capability of performing legal actions. However, even if a court decision depriving him/her of capability of performing legal actions was rendered, the FLK provides an exception in Article 20, par. 2, which says that a court may exceptionally allow such a person to wed upon request, after the opinion of the parent, the custodian or the Guardianship Authority is obtained.

2.3.1. Existence of mental illness as a ground for annulment of marriage

There are several reasons for annulling marriage on grounds of mental illness that have a big impact on the society:

First, the expression of free will in relevant legal fashion does not exist, because persons with mental disabilities are not aware and cannot understand the significance of their actions.[209] Such actions can only be understood by persons who are fully capable of performing legal actions and who are ready to fulfill all the obligations deriving from the marriage bond.

Secondly, based on performed analyses, 16 percent of children suffering from schizophrenia have inherited the disease from their parents.[210] In cases of other mental illnesses, the illness inheritance rate amounts to 60 or 80 percent.[211] This is truly a high rate, which entails consequences to our society. For this very reason, legislations envisage restriction of marriage between people who suffer from such serious mental illnesses. This is also stipulated in Article 64, par. 1 of the FLK.

It is very logical not to allow persons with serious mental illnesses or mental disabilities to enter into marriage, because such persons are not capable of providing for their own needs, let alone performing conjugal obligations that derive from a marriage bond.

2.3.2. Main characteristics of mental diseases as a ground for annulment of marriage

There are some diseases that heavily affect the normal life a person and prevent him/her from being efficient in his normal life, such as epilepsy, schizophrenia, drug addiction, chronic alcoholism, etc. In order to consider the mental illness a reason for annulling the marriage, first it

[208] Idem, p.75.
[209] Hamdi Podvorica: "E drejta familjare", [Family Law], Pristina, 2006, p.83.
[210] Idem, p.83.
[211] Idem, p.83.

should be established if the mental illness or the mental disability exists at the moment of the entry into marriage i.e. when the free will is declared before the civil registry clerk.[212]

If the illness has evolved after the entry into marriage (during the marriage life), this may be a reason for a divorce, rather than an annulment of marriage.[213] That owing to the fact that, at the time of the entry into marriage, the persons interested to enter into marriage were mentally capable of expressing their will to enter into marriage, and, if one of the spouses becomes mentally ill after the entry into marriage, this does not grant the other spouse the right to annul the marriage, but he/she may only claim settlement of marriage by divorce, if the disease has affected the marital relation.

In addition, it should be noted that mental diseases or disabilities constitute a ground for absolute annulment only if the effect of the mental disease or disability continues at the time when the claim is filed.[214] If the disease has ceased to exist during the marriage, than it constitutes a ground for relative annulment of marriage.

It should be noted that mental disease or disability or incapability of performing legal acts constitute a ground for absolute, but interim, annulment of marriage, if the disease is curable.[215]

3. Blood relation as a ground for absolute annulment of marriage

Blood relation is a ground for annulling the marriage when the marriage is entered into between persons related to each other in a line provided by law, such as relation by blood, relation by marriage and relation by adoption.[216]

Islam law also provides milk kinship as an obstacle for marriage, even at the same scale with the blood relation. A verse in Quran reads: "(…..forbidden to you are…) your foster mothers…your foster sisters…."[217] The Canon Law has also recognizes the spiritual relation (godfatherhood) as a blood relation.[218]

The Family Law of Kosova provides relation by blood, relation by marriage and relation by adoption as types of relation. However, the vast majority of world legislations provide these types of relations too. We will dwell on the following three types of relations that serve as grounds for marriage annulment: relation by blood, relation by marriage and relation by adoption.

[212] Hamdi Podvorica: "E drejta familjare", [Family Law], Pristina, 2006, p. 83.
[213] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p.76.
[214] Santhipi Begeja: "E drejta familjare e RPS të Shqipërisë" [Family Law of PSR of Albania], Tirana, 1984, p.127.
[215] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p.84.
[216] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p. 76.
[217] Resul Rexhepi: "E drejta martesore islame" [Islam Family Law], Pristina, 1996, p. 38.
[218] Hamdi Podvorica: "E drejta familjare", [Family Law], Pristina, 2006, p. 50.

3.1. Relation by blood

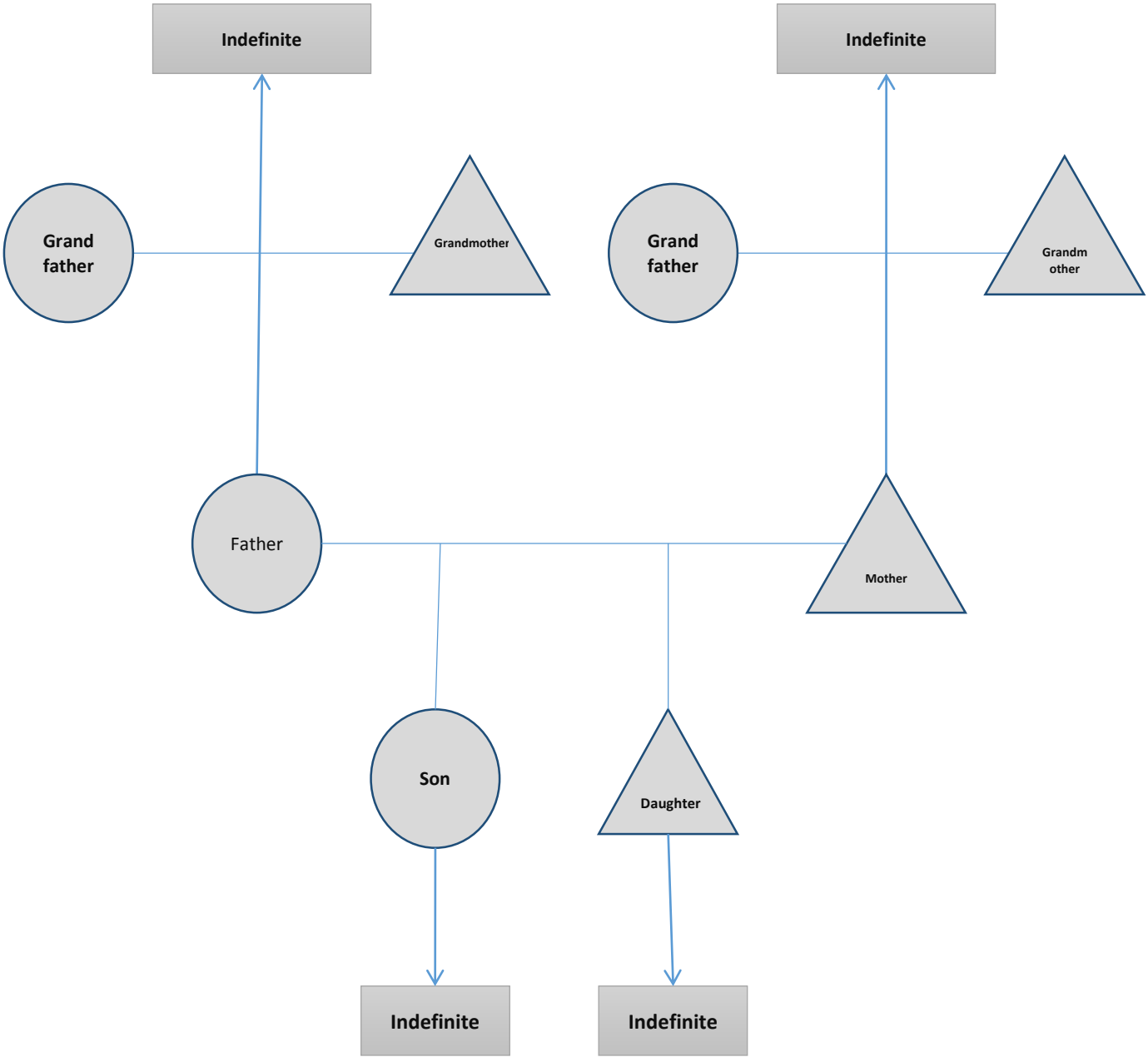
Relation by blood in an indefinite direct line and relation by blood in indirect line up to the fourth level serve as a ground for marriage annulment.[219] This is also provided by the FLK i.e. its Article 21, which reads: "Persons related by blood in a direct blood line (consanguinity) or indirect blood line (kin), such as a brother and a sister from the same father and mother, father's and mother's sister and brother, uncle (mother's brother) and niece, aunt (father's sister) and nephew, children of mother's and father's sisters and brothers from the same mother and father (nephews and nieces), as well as sisters' and brothers' children of the same mother and father, shall not enter into wedlock" [Sic!]. This indicates that FLK does not distinguish between siblings from the same father and mother and those who only have one mutual parent, be he/she the father or the mother.

Blood line, with the exception of the provisions of the FLK, is also provided in other positive laws, such as FCA, LFM, etc. As far as relation by blood in direct line is concerned, there is a difference between the FCA and the FLK, for the first allows marriage in relation by blood in indirect line even at the fourth level on reasonable grounds, namely its Article 10 provides: "The court, for sufficient reasons, can allow the marriage of first cousins". The Albanian lawmaker must have considered "pregnancy of the girl or birth of a child resulting from intimate intercourses between them" as important grounds.[220]

It was not by chance that relation by blood in an indefinite direct line and relation by blood in indirect line up to the fourth level were stipulated as obstacles for the marriage. It was scientifically confirmed that birth of a child in a relation by blood in a direct indefinite line may have serious consequences, because children with physical or mental deformities may be born. In order to make it clearer for the reader, we will present both relation by blood in direct line and relation by blood in indirect line in a tabulated form.

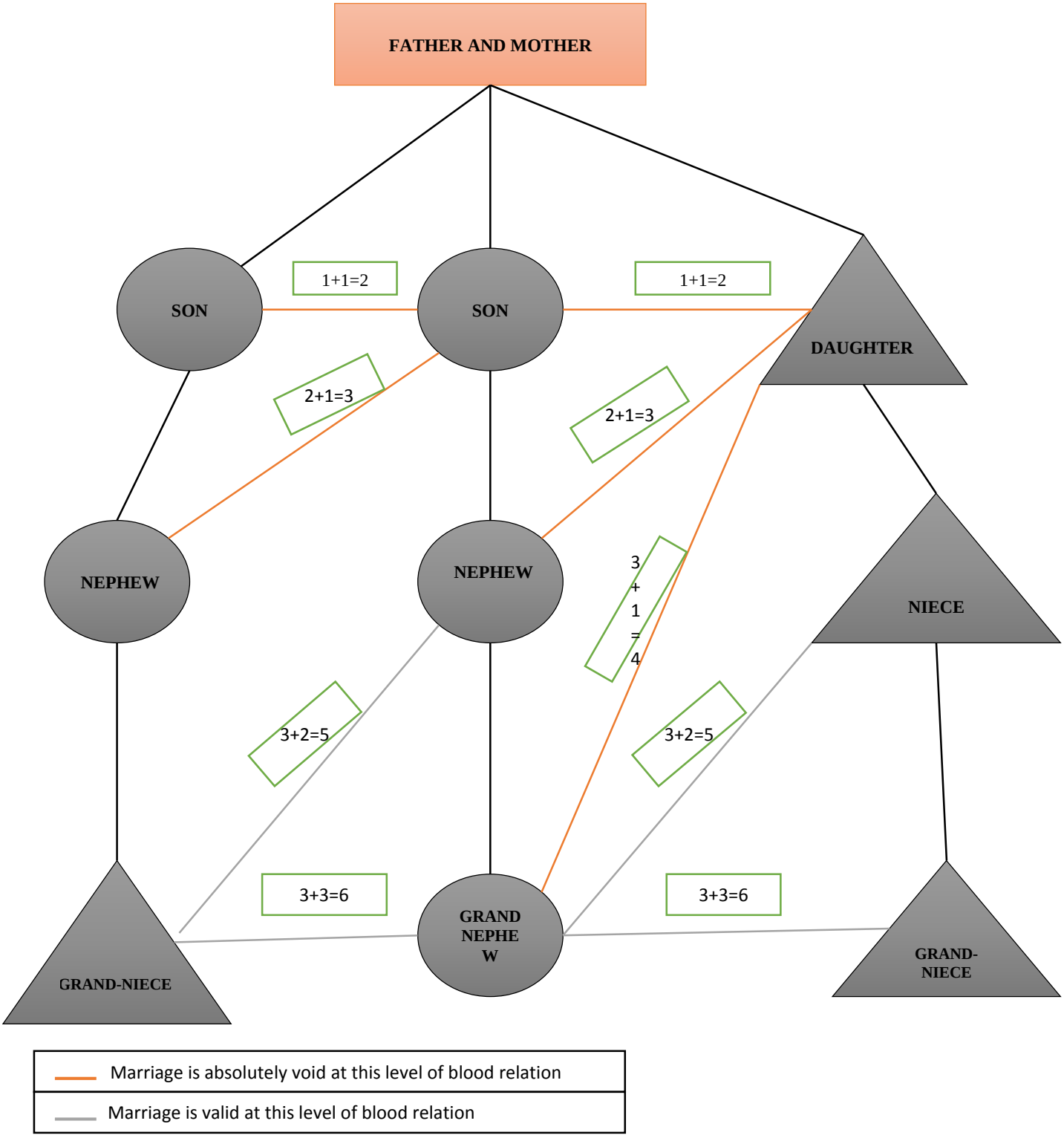
[219] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p. 77.
[220] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p. 84.

Marriage obstacles in direct line:



This indicates that entry into marriage cannot be allowed at any level

Marriage obstacles in indirect line:



Dashes in red indicate the levels at which marriage is not allowed, and dashes in green indicate the levels at which marriage is allowed.

3.2. Relation by marriage

Relation by marriage is established by marriage and represents the relation of one of the spouses with the relatives related by blood to the other spouse.[221] However, relation by marriage, once established, cannot cease even if the marriage from which it was created has ceased.[222] Relation by marriage is an obstacle for the marriage up to the first level. The FLK makes an exception here, allowing the entry into marriage even in relation by marriage, as, in its Article 23, par. 2, it provides that "the competent court may, on reasonable grounds, allow people related by marriage to entry into marriage, upon obtaining the decision of the Guardianship Authority".

The FCA does not provide a legal possibility for entry into marriage in relations by marriage, even if the marriage has ceased by annulment or in another legal way (Article 11 of the FCA). This indicates that the FCA has stayed true to the social moral fostered over centuries, though permission of such a relation would not have any biological consequences.

In legal terms, relation by marriage represents a relation created by marriage between a spouse and the blood related relatives of the other spouse, and is a marriage obstacle up to the first level. Existence of marriage relations, in relations by marriage, such as between the father-in-law and daughter-in-law, son-in-law and mother-in-law, stepfather and stepdaughter (the daughter that the wife has had in another marriage), stepmother and stepson (son that the husband has had in the earlier marriage), render the marriage absolutely void.

3.3. Relation by adoption

Adoption is created as a result of a civil (artificial, non-biological) relation between the adopter and his relatives and the adoptee and his descendants. This legal relation produces the same legal effects as the blood relation. Everything that applies to the relation by blood, applies to the relation by adoption too. In legal theory, we have to types of adoption: complete adoption and incomplete adoption. FLK only recognizes complete adoption, as opposed to the previous Law No. 10/84 of SAP of Kosova dated 23 March 1984, which recognized incomplete adoption. Article 22, par. 2 of the FLK provides: "Kin established by adoption is a ban to wedlock same as consanguinity [sic!]".

Complete adoption as an obstacle to marriage is of a permanent nature, inevitable and a ground for absolute annulment of marriage.[223] Unlike complete adoption, incomplete adoption produces relative annulment, but may be a temporary or evitable obstacle to the marriage, because it can be terminated, and both adopter and adoptee can enter into marriage with the permission of the

[221] Abdulla Aliu & Haxhi Gashi:" E drejta familjare" [Family Law], Pristina, 2007, p.107.
[222] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p.85.
[223] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p. 87.

competent authority.[224] Yet, one should not forget that relation by adoption should be terminated before the entry into marriage is allowed.

4. Minority as a ground for absolute annulment of marriage

Marriage of couples under 16 years of age makes the marriage absolutely void. Marriage between people under 16 years of age is absolutely void and is not considered a marriage at all.

People capable of performing legal actions are capable of entering into marriage. Article 15, par. 2 and Article 16 par. 2 of the FLK stipulates the 16 years of age minimum for entering into marriage. Minors under 18 years of age and above 16 years of age may enter into marriage by court decision. People who want to marry at this age should file a request with the court. This is provided by Article 114 of the LNCP, which reads: "In the procedure for the grant of permission for marriage bond, the court decides on the proposal for the grant of permission for marriage bond between the appointed persons when according to the law is foreseen that the marriage between them can be bonded only with the permission of the court [Sic!]. Once it is confirmed that they are mentally and physically capable to understand the significance of marriage, the court allows the persons who have filed the request to enter into marriage". However, it is surprising that the FCA does not provide such a minimum, as its Article 7, par. 2 provides that "the court in the location where the marriage is to be concluded may, for sufficient reasons, allow marriage prior to this age" [sic!]. This because minors are not able to understand the meaning of the expression of the free will due to their young age and mental and physical immaturity or to understand the consequences that endue the failure to perform their rights and obligations in marriage.[225] According to the Albanian customary law, boys would assume the capability to act from the moment when they would take up the arms, at the age of 15, and, from that moment on, they would be considered men and would do the jobs that the other men in the family, who had the capability to act, would do.[226]

5. Failure to follow the marriage procedure

The failure to follow the marriage procedure is a ground for absolute annulment of marriage, if actions that confirm the entry into marriage are not performed.[227] According to 27, par.1, of the FLK, wedlock is solemnly entered into in specifically designated premises. Also, Article 28. par. 3 of the FLK requires that spouses, two adult witnesses and the registrar are present on the occasion of marriage. Absence of one or both spouses is a ground for absolute annulment of marriage, owing to the fact nobody can express better the free will to marry than the very persons who enter into marriage. In addition, the FLK requires a civil form of entry into marriage for the marriage to be

[224] Idem, p.87.
[225] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p.87.
[226] Aleks Luarasi: "Marrëdhënjet familjare" [Family Relations], Tirana, 2001, p.59.
[227] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p. 79.

valid. Article 36 of the FLK provides that persons marrying according to religious rules shall not perform the wedding, unless the spouses testify the legal marriage bond through a certificate, issued by the marriage registrar. Otherwise, the marriage entered into according to religious rules before the civil marriage is inexistent.

6. Failure to respect the jurisdiction of the competent authority as a ground for marriage annulment

Failure to respect the jurisdiction of the authority with which the marriage is entered into is a ground for absolute annulment of marriage, if marriage is not entered into before the competent marriage authority provided by law.[228] Thus, if marriage is entered into before an authority that is not competent for marriages, the marriage is absolutely void. Article 28, par. 1 of the FLK also provides the entry into marriage before a competent authority and states that the marriage should be entered into before the registrar.

7. Swaying from the purpose of marriage as a ground for its absolute annulment

Swaying from the purpose of marriage renders the marriage absolutely void if the couple has not entered into marriage for the purpose of living together, but, rather, for another purpose. Article 66, par. 1 of the FLK considers marriages not entered into for the purpose of coexistence as void. Paragraph 2 of the same article reads: "Marriage is void when the spouses through marriage were in fact not interested to establish co-existence but want to hide some other legal action or primarily want to achieve another goal (i.e. legal succession, family pension, evasion from criminal liability or abuse of any other rights)". We are witnessing what is happening with some of our nationals, who are citizens of foreign countries now, and some of whom are entering into simulated marriages with foreign citizens i.e. citizens of the country in which they are staying for the purpose of being granted the permission to stay. Only in 2007, 500 marriages were annulled under the suspicion of being false in the Canton of Zurich.[229] As a result, a large number of divorces are happening in the Republic of Kosova now, which I conditionally call "simulated divorces", because, in fact, they are still living together, but they are doing this for the purpose of getting the papers (the permission to stay) in another state.

Research conducted in the courts has shown that 90 % of the cases were annulled because of swaying from the purpose of marriage.

Article 66, par. 3 of the FLK provides an exception to the rule of Article 66, par. 1 of the same law. The exception is made when the couple later decides to lead a joint life in marriage (to live together).

[228] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p.79.
[229] Koha Ditore, 22 January 2009, No. 4168.

This implies the fact that marriage is entered into so that the couple leads a life with each other,[230] rather than to achieve an aim that encroaches upon institution of marriage.

8. Grounds for relative annulment of marriage

Relative annulment of marriage exists when there are marriage obstacles, provided by law expressly, that only produce annulment of marriage by private claim.[231] Relative annulment of marriage cannot be requested by any person, but only by couples that have an interest in filing such a request.[232] However, it should be noted that the spouse who has filed a request for relative annulment of marriage may waive the request if he/she wants the marriage life to continue.[233] Relative annulment of marriage takes place when reasons that produce annulment are evitable, and, in the course of proceedings, the court may not annul the marriage, but, rather, confirm its conclusion. The FLK does not specify the grounds for relative annulment of marriage, save grounds that produce general annulment of marriage. Due to the consequences that some of the grounds for annulment of marriage produce, the following grounds for relative annulment of marriage can be distinguished:

a. relation by marriage,
b. minority and
c. mental diseases and incapability of performing legal acts.

8.1. Relation by marriage as a ground for relative annulment of marriage

Relation by marriage is a marriage obstacle at the first level. Relation by marriage is a ground for absolute annulment of marriage. However, there are legislations that allow marriages within this relation as well, such as marriage between daughter-in-law and father-in-law, son-in-law and mother-in-law, but it may serve as a ground for relative annulment of marriage. Persons related by marriage may be allowed to enter into marriage within this relation as well on grounds provided by law. Article 23, par. 2 of the FLK provides that: "on reasonable grounds, the competent court may allow marriage between persons related by marriage after having obtained the decision of the Guardianship Authority."

[230] Abdulla Aliu & Haxhi Gashi: "*E drejta familjare*" *[Family Law]*, Pristina, 2007, p. 154.
[231] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p.79.
[232] Santhipi Begeja: "E drejta familjare e RPS të Shqipërisë" [Family Law of the PSR of Albania],Tirana, 1984, p.129.
[233] Idem, p.129.

8.2. Minority as a ground for relative annulment of marriage

Minority as a ground for relative annulment of marriage exists if the person who has entered the marriage is under 18 years of age, but not younger than 16 years of age, or else absolute annulment of marriage ensues.

In annulling the marriage, the court may, on reasonable grounds, reject the claim for annulment and leave such marriage in force.[234] This owing to the fact that the court may confirm the marriage if the person of that age, from 16 to18 years of age, though incapable of performing legal actions, is physically and mentally mature and if, based on an analysis of his condition, confirms that he is capable of performing his conjugal duties. This indicates that minority from 16 to 18 years of age is evitable and a ground for relative annulment of marriage.

8.3. Mental diseases and incapability of performing legal acts as grounds for relative annulment of marriage

In some cases, mental illness and incapability of performing legal acts, with the exception of absolute annulment of marriage, also produce relative annulment of marriage. For instance, if one of the spouses was incapable of performing legal actions because of a mental illness that was not established at the moment of marriage, and, during the life in marriage, he/she recovers, the marriage may be annulled and only the spouse that has suffered from the mental illness or was incapable of performing legal actions for other reasons will be entitled to file a claim (FLK, Article 67, paragraph 2). This means that we are dealing with a relative annulment of marriage, because this only involves one evitable act. The same article and paragraph provides: "The claim may be filed within one year from the date [when] the aforementioned reasons ceased to exist". If the other spouse does not claim annulment of marriage, the marriage is not annulled and remains valid.

It is not even reasonable to annul such marriage, owing to the fact that a person has suffered from an illness that has constituted an obstacle to the marriage, but has recovered from the illness and is now able to exercise all the rights and obligations deriving from marriage and conjugal life.

8.4. Absence of will to enter into marriage as a ground for relative annulment of marriage

For a marriage to be valid, Article 31, par. 2 of the FLK requires the couple to express their free will to enter into marriage. If marriage is entered into without the declaration of the free will or without the individual consent of the couple to marry each other, the marriage is void.[235]

Declaration of will to enter into marriage before the competent authority should not only rely on couple's own will, but such will should be expressed accurately and clearly and reflect a complete

[234] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p. 81.
[235] Hamdi Podvorica: "E drejta familjare", [Family Law], Pristina, 2006, p. 115.

consistency and unity between them.[236] According to Article 18 of the FLK, marriage will be void if the couple has married under coercion, threat, deception or absence of couple's will to marry. However, it should be noted that these grounds should have existed at the moment of marriage, because, if there will be e.g. physical violence after the marriage (during the conjugal life), then we will have domestic violence, which may emerge as a ground for divorce rather than annulment. In the light of all the foregoing, we may conclude that there is absence of will if marriage is entered into under influence of violence, threat or deception.

8.5. Violence or threat as grounds for relative annulment of marriage

Violence as a ground for relative annulment of marriage implies the fact that the marriage was entered into by means of violence that one of the spouses has exerted upon the other or by means of violence that a third person has exerted upon the couple. For example: One of the spouses beats or otherwise abuses physically the other spouse to persuade him/her into marrying. Violence exerted for entering into a marriage against one's own, real will can be psychological and physical.[237]

Psychological violence is manifested in threats, because threat is a psychological, rather than a physical violence.[238] This owing to the fact that if we have exertion of direct physical violence, than we have violence in the true meaning of the word rather than a threat. Violence differs from threat, because, in case of threat, harm emerges as a possibility, and in case of violence, harm is inflicted[239] for the purpose of entering into marriage. Threat is involved, for instance, when the spouse or another person threats the other spouse that he/she is going to kill him/her or a member of his/her family if he/she does not marry. Threat can be so serious that the threatened person may not be able to avoid marriage, much as he/she may not want it, because of the manifestation of big fear.[240] Threat should be possible, which implies the potential harm to the one who is being threatened, e.g. he/she may receive threats that he/she will be killed if he/she doesn't marry, but one cannot consider it a threat if he/she is threatened that his/her parents who have died long ago will be killed. Threat should be unlawful, namely the one who threats should be violating the law[241], which entails his/her criminal liability. Marriage entered into under the influence of such circumstances produces relative annulment of marriage, because there is absence of will on the occasion of marriage.

If the will to enter into marriage was achieved under the influence of fear caused by threat, we cannot say that the marriage has been concluded upon couple's free will, and such marriage can be

[236] Valentina Zaqe: "Marrëdhënjet familjare sipas legjislacionit shqipëtar" [Family Relations under Albanian Legislation], Tirana, 1999, p.72.
[237] Hamdi Podvorica: "E drejta familjare", [Family Law], Pristina, 2006, p.77.
[238] Valentina Zaqe: "Marrëdhënjet familjare sipas legjislacionit shqipëtar" [Family Relations under Albanian Legislation], Tirana, 1999, p.78.
[239] Andrija Gams: "Hyrje në të drejtën civile" [Introduction to Civil Law], Pristina, 1986, p. 310, .e.d.c.
[240] Hamdi Podvorica: "E drejta familjare", [Family Law], Pristina, 2006, p.78.
[241] Abdulla Aliu & Haxhi Gashi: "*E drejta familjare*" *[Family Law]*, Pristina, 2007, p. 102.

declared void.[242] Besides, Article 63 of the FLK says that marriage shall be annulled if the spouse has provided consent under fear, violence or serious threat [sic!].

8.6. Deception as a ground for relative annulment of marriage

Deception exists when a spouse has had a wrong idea about the circumstances, facts and basic qualities of the other spouse at the moment of marriage, whose existence makes coexistence impossible.[243] These facts are so intense that, had the spouse been aware of them, he/she wouldn't have married or expressed his/her free will before the competent authority.[244] Deception is an erroneous reflection of an objective reality, so, in cases of deception, there is a discrepancy between the true free will and the legal action, otherwise, had such facts been known, the legal action wouldn't have happened.[245] Reference to legal action implies entering into marriage.

A distinction should be made between deception and misleading, because while in cases of misleading one of the spouses is misled without the intention of either of them, in cases of deception we deal with concealment of facts and circumstances by one of them. We distinguish between three types of deception:

a. deception about physical person;
b. deception about civil person and
c. deception about basic qualities.

8.6.1. Deception about the physical person

Deception about the physical person is when one of the would-be spouses has thought that he/she was marrying a certain person, and has married another.[246] Example: If one the spouses thinks that he is marrying person A, and has married person B, though this is unimaginable. However, such cases might exist, especially in countries that apply marriage through a representative of one of the spouses (a proxy, or, in other cases, when one of the engaged is abroad, and the other in the homeland, and marriage is entered into by proxy, without the presence of one of them). [247]

Such marriages, without the presence of one of the spouses, have taken place especially in Kosova during the eighties and nineties, when a large number of young Kosovars have migrated abroad for economic and political reasons. Such marriages have also happened after the last war in Kosova,

[242] Santhipi Begeja: "E drejta familjare e RPS të Shqipërisë" [Family Law of the PSR of Albania], Tirana, 1984, p.130.
[243] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p.79.
[244] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p. 79.
[245] Ruzhdi Berisha:"Doracaku për përgatitjen e provimit të jurisprudencës" [Handbook for the Preparation for the Law Exam], Pristina, 2004, p. 499.
[246] Idem, p. 499.
[247] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p. 80.

while the LFMR [Law on Family and Marital Relations] of 1984 was in force, and until the FLK dated 06.09.2004 was adopted.

Possibility of marriage due to deception about the physical person in the Republic of Kosova is zero, because Article 28, par.3, of the FLK provides participation of both spouses for the marriage to take place.

8.6.2. Deception about the civil person

Deception about the civil person exists when one of the spouses has married a certain person, but in fact he/she is not the person he/she thinks he/she is, because that person has presented false data about the name, the surname, the date of birth, the place of residence or the citizenship.[248] This deception entails false presentation i.e. concealment of true identity or basic qualities.[249] Example: if a person falsely presents his/her age or place of residence by means of a false ID card e.g. when the person introduces himself/herself as 24 years old by documents, when he is 30 years old in reality, than we are dealing with a deception about the civil person.

8.6.3. Deception about person's basic qualities

Deception about person's basic qualities exists if one of the spouses is deceived about some qualities of the other person, which, had they been known on the occasion of marriage, they would have certainly affected him/her and he/she would have not entered into marriage.[250] These are qualities which the other spouse has not revealed or has hidden and which the other spouse could not have noticed in a simple conversation, because they cannot be noticed from the outside due to their nature, but are intrinsic to a human being, such as: inability to reproduce (sterility), amorality, immoral occupation (prostitution), drug addiction, etc.

Deception about the qualities of the person should be serious, so that the deceived spouse was not and could not have been aware of such qualities of his spouse up to the moment of marriage.[251]

As to FLK, it does not expressly stipulate who has the right to file a claim on grounds of basic qualities, while the LFMR, Article 36, par. 3, and FCA, in its Article 44, par. 2, expressly grant the right to file a claim to the deceived spouse only. The claim must be filed within 1 (one) year from the day of becoming aware about the deception. If this legal timeline is not used, the right to claim annulment of marriage is lost.

[248] Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994, p. 81.
[249] Ruzhdi Berisha:"Doracaku për përgatitjen e provimit të jurisprudencës" [Handbook for the Preparation for the Law Exam], Pristina, 2004, p. 499.
[250] Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006, p. 80.
[251] Abdulla Aliu & Haxhi Gashi: "*E drejta familjare*" *[Family Law]*, Pristina, 2007, p. 100.

9. Conclusion

After the development, research and elaboration on the subject, I have come to the following conclusions:

First, divorce has to do with the settlement of a valid marriage, and, after the divorce, the couple appears as divorced in the civil registry. On the other hand, annulment is the resolution of an invalid marriage, which is not considered as marriage bond i.e. the spouses are considered as singles rather than divorced after the annulment of the marriage.

Second, a topic that has been widely debated in Kosova after the adoption of the Constitution is its Article 24, paragraph 2, which reads: "No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status". This truly indicates that the Constitution does not prevent people of the same sex to have a personal relation, but it does not legitimize their marriage, as the rumor had it. To confirm this, we may refer to Article 37, paragraphs 1 and 2, which stipulate that everyone enjoys the right to marry and the right to have a family as provided by law. In this case, the Family Law of Kosova is the law that regulates family and marriage affairs and does not allow marriage between persons of the same sex, which is a ground for absolute annulment of marriage.

Final message: "Marry the one you want to marry, but not the one the law forbids you from marrying!"

Bibliography

- Hamdi Podvorica: "E drejta familjare" [Family Law], Pristina, 2006.
- Gani Oruqi: "E drejta familjare-ligjërata të autorizuara" [Family Law, Authorized Lectures], Pristina, 1994.
- Abdulla Aliu & Haxhi Gashi: "E drejta familjare" [Family Law], Pristina, 2007.
- Valentina Zaqe: "Marrëdhëniet familjare sipas legjislacionit shqiptar" [Family Relations under Albanian Legislation], Tirana, 1999.
- Santhipi Begeja: "E drejta familjare e RPS të Shqipërisë" [Family Law of the PSR of Albania], University Book Publishing House, Tirana, 1984.
- Aleks Luarasi: "Marrëdhëniet familjare" [Family Relations], Tirana, 2001.
- Resul Rexhepi: "E drejta martesore islame" [Islam Family Law], Pristina, 1996.
- Ruzhdi Berisha: "Doracaku për përgatitjen e provimit të jurisprudencës" [Handbook for the Preparation for the Law Exam], Pristina, 2004.
- Muhammed Sharif:"Femra nën mbrojtjen e islamit" [Woman under the Protection of Islam], Pristina, 2004, f. 87.
- Francesko Gallgano: "E drejta private" [Private Law], Luarasi Publishing House, Tirana, 1999.
- Andrija Gams: "Hyrje në të drejtën civile" [Introduction to Civil Law], Pristina, 1986.

- Kosova Law on Family Relations, 16 February 2006.
- Family Code of Albania, Law No. 90/62 dated 08.05.2003.
- The Constitution of the Republic of Kosova, 15.06.2008.
- KOHA DITORE, 22 January, 2009 No. 4168.
- http://family-law.lawyers.com/divorce/Can-This-Marriage-be-Annulled.html
- Law on Marriage and Family Relations, Official Gazette of SAP of Kosova No.10/84, dated 28 March 1984 (abrogated).
- Family Law, Official Gazette of Republic of Macedonia No.80 / 92, supplemented and amended by Law 38/04.
- Kosova Law No. 03 / L-007 on Out Contentious Procedure dated 13.12.2008.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INITIAL HEARING ACCORDING TO CRIMINAL PROCEDURE

ABSTRACT

The reason in discussing the Initial Hearing according to the Criminal Procedure lies in the fact that various courts in Kosovo used different approaches when applying this institution regarding review of indictment when the Criminal Procedure Code entered into force on 1 January 2013. Thus, application of provisions foreseen by the Criminal Procedure Code regarding holding of an Initial Hearing represents a topic of study in the criminal procedure field. This work, apart from its introduction contains discussion on filing of the indictment in front of a court, scheduling of the initial hearing, instructions that shall be given to a defendant on his rights during the initial hearing, review of a guilty plea agreement by the court, the guilty plea by the defendant, sentencing during an initial hearing once the defendant has pleaded guilty. It also contains objections against evidence listed in the indictment, defendant's request to dismiss indictment, filing of the amended indictment by the State Prosecutor, dismissal of the indictment and Conclusion. The list of references consulted in preparing this work is provided at the end.

Keywords:

Initial hearing, defendant, guilty plea agreement, objection to evidence in indictment, dismissal of indictment.

Introduction

The Criminal Procedure Code of the Republic of Kosovo has paid particular consideration to the Initial Hearing. This hearing makes the criminal procedure more effective, since immediately after filing of the indictment during the Initial Hearing, in cases when a defendant pleads guilty, the trial

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may be concluded during the same session by announcement of a punishment imposed by the single trial judge or presiding judge.

Knowing that the Initial Hearing is held immediately after filing of the indictment, the Criminal Procedure Code has accurately and in detail foreseen how is the Initial Hearing supposed to be held, the guilty plea by the defendant, objections to evidence, the request to dismiss the indictment, dismissal of the indictment, amendment of the indictment by the State Prosecutor and other details to be dealt with in this work.

In order to see how this matter is regulated by the Criminal Procedure Code, we shall look into it in more detail, starting from filing of the indictment up until scheduling of the Second Hearing, also in respect of any change, supplementation or any suggestion, which would be beneficial for further improvement of the Initial Hearing.

1. The Initial Hearing

The State Prosecutor, once investigations have ended, or when he/she considers that information in his/her possession about the criminal offence and its perpetrator represent a well-grounded suspicion that the defendant has committed the criminal offence, files the indictment. This indictment is filed in front of the competent court in as many copies as there are defendants and their defense counsels, plus one (1) copy for the court. Filing of the indictment represents the end of the involvement for the Pre-Trial Judge in the proceedings.

Once the indictment is filed, the Court immediately assigns a judge or a trial panel with its presiding judge.

If the indictment is filed in front of General Department, the Initial hearing is held by the single judge including the second hearing and the main trial. Whereas, if the indictment is filed in front of Department for Serious Crimes of Basic Court, the initial hearing is held by the presiding judge including the second hearing. The main trial is held by the trial panel composed of the presiding judge and two professional judges.

The single judge or presiding judge decides ex-officio whether it has jurisdiction over the matter within the indictment and if he/she finds that he/she has jurisdiction to decide over the matter within the indictment, then he/she immediately shall schedule the initial hearing to be held within 30 days of the indictment being filed. If the defendant is being held in detention on remand, the initial hearing shall be held at the first opportunity, but not to exceed 15 days from the indictment being filed.

The initial hearing is regulated by article 245 of the Criminal Procedure Code.

The single judge or presiding judge shall notify the state prosecutor, defendant/s and defense counsels of the time and place of the initial hearing. As a rule, hearings are held in the courthouse.

Where, in particular cases, the courthouse is unsuitable due to the lack of space or other justified reasons, president of the court may order that the main trial be held in another building. This issue is regulated by article 286 of the CPC, which determines the venue where the main trial may be held and which is also applicable in the case of the initial hearing and the second hearing.

The State Prosecutor, the defendant/s and their defense counsels shall be present at the initial hearing. Regardless of the fact that article 245 para.1 does not expressively foresee presence of the injured party; we consider that it is not a legal obstacle for the injured party to be present at the initial hearing[252]. This is due to the fact that, in cases when it is foreseen that the defendant may plead guilty at the initial hearing according to the CPC in article 248 para. 2, it is also foreseen that the single judge or presiding judge may also invite the opinion of the injured party in evaluating the guilty plea.

During the initial hearing, the single judge or presiding judge provides a copy of the indictment for the defendant/s, if they have not already received this copy of the indictment and also decides on all proposals to extend or implement measures to ensure the presence of the defendant. Also, he/she ensures that the State Prosecutor fulfilled obligations in relation to disclosure of evidence arising from article 244 of the CPC. Article 244 of the CPC stipulates what materials are provided to defendant upon filing of the indictment, where, no later than at the filing of the indictment the state prosecutor shall provide the counsel or lead counsel the following materials or their copies, which are in his/her possession, control or custody, if these materials have not already been given to the defense counsel during the investigation:

a. records of statements or confessions, signed or unsigned, by the defendant,
b. names of witnesses whom the state prosecutor intends to call to testify and any prior statements made by those witnesses,
c. information identifying any persons whom the state prosecutor knows to have admissible and exculpatory evidence or information about the case and any records of statements, signed or unsigned, by such persons about the case,
d. results of physical or mental examinations, scientific tests or experiments made in connection with the case,
e. criminal reports and police reports and
f. a summary of, or reference to, material evidence obtained in the investigation.

So, this material and all witness statements are made available to the defendant in a language that he/she understands.

[252] The Criminal Procedure Law - Prof.Dr.Ejup Sahiti and Prof.Dr.Rexhep Murati, page 339

2. Instructing the defendant about his/her rights during the initial hearing

At the beginning of the initial hearing the single trial judge or the presiding judge shall instruct the defendant of his/her rights:

a. the right not to plead his/her case or to answer any questions,
b. if he/she pleads his/her case, not to incriminate himself/herself or a close relative, nor to confess guilt,
c. to defend himself/herself in person or through legal assistance by a defense counsel of his/her own choice, and
d. to object to the indictment and admissibility of evidence presented in the indictment.

Once the defendant is instructed of his/her rights the single trial judge or the presiding judge shall then satisfy himself/herself that the right of the defendant to defense counsel has been respected and that the state prosecutor has fulfilled the obligation relating to the disclosure of evidence under article 244 of the CPC.

The state prosecutor shall then read the indictment to the defendant.

Once the single trial judge or the presiding judge is satisfied that the defendant understands the indictment, he/she affords an opportunity for the defendant to plead guilty or not guilty. If the defendant has not understood the indictment, the single trial judge or the presiding judge shall call on the state prosecutor to explain it in a way the defendant may understand without difficulty. If the defendant does not want to make any statement regarding his/her guilt, he/she shall be considered to have pleaded not guilty[253].

In cases when the defendant does not plead guilty during the initial hearing the single trial judge or the presiding judge shall inform the defendant and defense counsel that prior to the second hearing, they must:

a. file any objections to evidence listed in the indictment;
b. file any requests to dismiss the indictment as legally prohibited; and
c. file any requests to dismiss the indictment for failing to describe a criminal offence under the law.

It is worth mentioning that no witnesses or expert witnesses shall be examined or other evidence presented during the initial hearing, unless a witness is required for the decision to extend or implement measures to ensure the presence of the defendant under article 245 para. 3 of the CPC.

During the initial hearing, the single trial judge or presiding judge shall schedule a second hearing no less than thirty (30) days after the initial hearing and no more than forty (40) days after the initial

[253] Article 245 para. 6 of the CPC.

hearing. In the alternative, the single trial judge or presiding judge may only require the filing of motions by a date set no more than thirty (30) days after the initial hearing[254].

In relation to the issue of whether it is necessary to proceed to the second hearing in cases when it has already been decided on objections during the initial hearing or in cases when there is no decision pending on any motion, the Supreme Court of Kosovo has issued a Circular in relation to a consideration of indictment GJ.A 5/2014, dated 03.01.2014, where it provided an explanation regarding proceeding to the second hearing by saying the following: the second hearing is not always necessary, the second hearing may not be proceeded to at all, if the judge has decided on filed objections at the first hearing and if there are no pending decisions to be made on any motion, there is no need to proceed to the second hearing, but it shall be proceeded to the main trial (article 245 para.5 of the CPC), it shall be proceeded to the second hearing only if the court has not yet decided upon all objections of the parties filed during the initial hearing[255].

3. Evaluation of the guilty plea during the initial hearing

The state prosecutor may file a guilty plea agreement together with the indictment to the court. This case is present in article 247 of the CPC. If the plea agreement under article 233 of the CPC has been filed with the indictment, the single trial judge or the presiding judge shall evaluate the plea agreement and renders the following decisions:

a. accepts the agreement
b. rejects the agreement, or
c. schedules a separate hearing in accordance with the procedures on guilty pleas under article 248 and procedures on negotiated pleas of guilty under article 233 of the CPC.

In cases when the defendant pleads not guilty, the court may not sentence the defendant unless the defendant changes the plea to guilty or the court convicts the defendant after the main trial, regardless of the plea agreement.

The single trial judge or presiding judge may hold hearings in connection with the check of the indictment under chapter XV with measures of secrecy upon the request of the state prosecutor under Chapter XIII of the CPC[256], this chapter dealing with protection of injured parties and witnesses (article 247 para.3 of the CPC).

A plea agreement under article 233 of this Code or a guilty plea agreement under article 248 of the CPC may be considered by the court at any time prior to conclusion of the main trial[257].

[254] Article 245 para. 5 of the CPC.
[255] The Supreme Court of Kosovo, Circular on reviewing of indictment Gj.A 5/2014, dated 03.01.2014, page 2
[256] The Criminal Procedure Law - Prof.Dr.Ejup Sahiti dhe Prof.Dr.Rexhep Murati, page 341
[257] Article 247 para. 4 of the CPC

4. Guilty plea by the defendant during the initial hearing

Once the indictment has been read to the defendant and once he is instructed of his rights under article 246 para.1 of the CPC, the defendant is afforded an opportunity to plead guilty during the initial hearing.

In cases when the defendant pleads guilty on each count of the indictment under articles 246 or 247 of the CPC, the single trial judge or presiding judge shall determine whether conditions foreseen under article 248 para.1 of the CPC have been met, so, whether:

a. the defendant understands the nature and consequences of the guilty plea;
b. the guilty plea is voluntarily made by the defendant after sufficient consultation with defense counsel, if the defendant has a defense counsel;
c. the guilty plea is supported by the facts of the case that are contained in the indictment, materials presented by the state prosecutor to supplement the indictment and accepted by the defendant; and any other evidence, such as the testimony of witnesses, presented by the state prosecutor or the defendant, and
d. the indictment does not contain any obvious legal errors or factual misstatements.

In this case, the judge is the protector of the defendant's rights, so, he/she ensures that all of the above conditions have been met.

It is worth mentioning that the authors of the "Criminal Procedure Law", have replaced in their textbook formulation of paragraph 1.4 of article 248 of the CPC, which in this work is present under d) where it says: indictment does not contain any obvious legal errors or factual misstatements, by formulating provision from paragraph 1.4 of article 248 with: d) none of the circumstances foreseen by article 253 para. 1 of the CPC to dismiss the indictment exist, with the reasoning that provision of para. 1.4 of article 248 of the CPC is too general and even unclear and, as such, it may cause dilemma during practical judicial work, emphasising that the proposal for the legal formulation in question, with formulation under d), was rightly presented and argued by judge Xhevdet Elshani of the Basic Court in Prizren, at the Meeting of Judges and the State Prosecutor, lawyers and others, held some time ago as part of review-meetings for easier and unobstructed implementation of CPC provisions in practice[258].

In considering the guilty plea of the defendant, the single trial judge or presiding judge may invite the views of the state prosecutor, the defense counsel and the injured party.

If the single trial judge or presiding judge is not satisfied that the matters provided for in para.1 of article 248 of the CPC are established, he/she shall render a ruling to reject the guilty plea and proceed with the initial hearing as if the guilty plea has not been made.

[258] The Criminal Procedure Law - Prof.Dr.Ejup Sahiti dhe Prof.Dr.Rexhep Murati, fusnota 322, Faqe.341

Regardless of the fact that the defendant does not plead guilty during the initial hearing he/she may choose to change the plea to guilty at any time and in this case, for any defendant wishing to plead guilty under article 248 of the CPC, the single trial judge or presiding judge shall conduct, mutatis mutandis, a hearing under article 248 of the CPC.

5. Sentencing during the initial hearing after a guilty plea by defendant

In cases when the defendant pleads guilty during the initial hearing and when the single trial judge or presiding judge is satisfied that the matters provided for in para. 1 of article 248 of the CPC are established, he/she shall render a ruling to accept the guilty plea made by the defendant and shall proceed with sentencing, schedule a hearing to determine a matter relevant for sentencing or shall suspend sentencing pending the completion of the cooperation by the defendant with the state prosecutor. This possibility is foreseen under article 248 para.4 of the CPC make the procedure more effective and more practical.

Once the Criminal Procedure Code entered into force on 01.01.2013 application of para.4 of article 248 of the CPC caused confusion because it was understood and interpreted in different ways and, in particular, whether it is necessary to proceed with closing speeches in order to go ahead with sentencing or not in cases when the defendant pleads guilty during the initial hearing; and also whether it is necessary to establish a trial panel in cases when a 3 judges panel decides.

The Supreme Court of Kosovo has issued the legal opinion, GjA.nr.207/2013, dated 19.03.2013, on this issue, which states the following: If the defendant has pleaded guilty during the initial hearing in front of the single trial judge or presiding judge and the single trial judge or presiding judge, respectively, evaluates that the guilty plea was made in accordance with the law, i.e. all legal preconditions required by the law for the guilty plea have been met, in such a situation, the single trial judge or presiding judge, respectively, may proceed with sentencing, without proceeding to the main trial and, also, without complementing the trial panel at all even in cases when the law, for such offences, foresees that the trial panel is composed of three (3) professional judges[259].

6. Objections to evidence in the indictment

Prior to the second indictment, the defendant may file objections to the evidence listed in the indictment. In cases when the defendant has a defense counsel engaged, he/she may also object to the evidence. The defense counsel is a vital protector of the defendant's rights.

According to article 249 of the CPC the defendant may file objections based on the following grounds:

[259] The Supreme Court of Kosovo, Legal Opinion Gj.A no.207/13, dated 19.03.2013, page 1

a. the evidence was not lawfully obtained by the police, state prosecutor or other government entity;
b. the evidence violates the rules in chapter XVI of the present Code; or
c. there is an articulable ground for the court to find the evidence intrinsically unreliable.

The state prosecutor shall be given an opportunity to respond the filed objection verbally or in writing, also, this response to the objection he/she may present during the second hearing, verbally or in writing. Also, there is a possibility for the single trial judge or presiding judge to provide the state prosecutor with a period of one (1) week to file a written response to an objection (article 251 para. 3 of the CPC).

For all evidence where an objection has been filed, the single trial judge or presiding judge shall issue a written decision with reasoning that permits or excludes the evidence. In cases when the court renders a decision by which it declares certain evidence as inadmissible, such evidence is separated from the case file and kept separated from other records and evidence. It is worth mentioning that evidence declared as inadmissible may not be examined or used in the criminal proceedings, except in an appeal against the ruling on admissibility.

For the purposes of efficiency in criminal proceedings all evidence where no objection has been filed according to the CPC shall be admissible at the main trial, unless the court ex-officio determines that admission of the evidence would violate rights guaranteed to the defendant under the Constitution of the Republic of Kosovo[260].

Either party may appeal a decision on admissibility of evidence in front of the Court of Appeals of Kosovo, through the Court which rendered the decision, within five (5) days of the receipt of the written decision.

7. Request by the defendant to dismiss the indictment

Article 250 of the CPC foresees the possibility that the defendant may file a request to dismiss the indictment based on four basic reasons, namely because:

a. the act charged is not a criminal offence,
b. circumstances exist which exclude criminal liability,
c. the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution, or
d. there is no sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.

[260] The Criminal Procedure Law - Prof.Dr.Ejup Sahiti and Prof.Dr.Rexhep Murati, page 343

Same as in the case of objection to evidence, also in case of a request to dismiss the indictment the state prosecutor shall be given an opportunity to respond to the request verbally or in writing, also, this response to the request he/she may present during the second hearing, verbally or in writing. Also, there is a possibility for the single trial judge or presiding judge to provide the state prosecutor with a period of one (1) week to file a written response to a request (para. 3 of article 251 of the CPC). Apart from this, in this case, in lieu of a response to a request filed to dismiss the indictment the state prosecutor may file an amended indictment.

For a request to dismiss the indictment filed by the defendant, the single trial judge or presiding judge shall render a justified written ruling by which it rejects the request or it dismisses the indictment.

8. Filing of an amended indictment by the state prosecutor

If the defendant files a request to dismiss the indictment before the second hearing, the state prosecutor, in lieu of a response to this request, may file an amended indictment in accordance with article 241 of the CPC within one (1) week of the second hearing.

If an amended indictment is filed against one defendant or multiple defendants, the single trial judge or presiding judge shall schedule an initial hearing under article 245 of the CPC as though the indictment was new.

Also, the defendant may file any new objections about evidence under Article 249 of the CPC or requests to dismiss the indictment under Article 250 of the present Code, but only as to those parts of the indictment that have been amended. If the defendant does not renew his/her previous objections, or he/she presents previous requests, the single trial judge or presiding judge shall conclude that those objections or requests are not relevant to the amended indictment and shall not consider them further.
Also, the state prosecutor may only amend the indictment once, unless he/she has obtained new information that requires the indictment to be amended.

9. Dismissal of indictment

For every request to dismiss the indictment filed by the defendant under article 250 of the CPC the single trial judge or presiding trial judge shall render a ruling to dismiss the indictment and to terminate the criminal proceedings if he/she determines that:

a. the act charged is not a criminal offence,
b. circumstances exist which exclude criminal liability,
c. the period of statutory limitation has expired, an amnesty or pardon covers the act, or other circumstances exist which bar prosecution; or

d. there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.

In rendering a ruling on dismissal of the indictment and termination of the proceedings, the single trial judge or presiding judge shall not be bound by the legal designation of the criminal offence as set forth by the state prosecutor in the indictment.

Either party may appeal a ruling on the request to dismiss the indictment in front of the Court of Appeals of Kosovo, through the Court which rendered the ruling, within five (5) days of the receipt of the written ruling.

It should be said that apart from the single trial judge and presiding judge, the state prosecutor may also dismiss the indictment when he/she, on the response to the request to dismiss the indictment filed by the defendant under article 250 of the CPC, finds that the request to dismiss the indictment is grounded and renders a ruling to dismiss the indictment and terminate the proceedings.

10. Conclusion

- Implementation of the Initial Hearing, by judges who are given this responsibility as well as precise application of provisions of the Criminal Procedure Code, represents assistance for parties to the proceedings and the court that at the end renders a decision supported on elaborated facts and evidence.

- A merited decision, always supported by evidence and proof, protects all parties, but, it also increases reputation of the Judiciary and promotes justice.

- It is very important that the Initial Hearing is scheduled and held within the foreseen legal deadline, and that is concluded as it merits, in accordance with the Criminal Procedure Code.

- Aiding circumstance in this case such as the guilty plea agreement, defendant's guilty plea, in this phase makes criminal proceedings very effective and practical, so, contribution of the parties to the proceedings has its importance in relation to a just conclusion which is accepted by everyone, therefore, effectiveness of criminal proceedings perhaps needs further improving, to harmonise it with the most advanced international acts and always having in mind that human rights need to be respected.

Bibliography

- Criminal Procedure Code No.04/L-123
- Instruction on Criminal Procedure Code of Kosovo 2013
- Law on Criminal Procedure - Prof. Dr.Ejup Sahiti and Dr.Rexhep Murati
- Circular of the Supreme Court of Kosovo GJ.A 5/2014, of 03.01.2014
- Circular of the Supreme Court of Kosovo GJ.A194/2014, of 08.05.2014

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CODE OF JUDICIAL ETHICS AS A NECESSARY FACTOR IN IMPROVING PUBLIC'S FAITH IN JUSTICE SYSTEM

ABSTRACT

This work aims to present the role of the judicial code of ethics as an important factor in improving public's faith in the judicial system. Judges, while performing their functions, shall always act towards protection of dignity, responsibility, independence and impartiality of judicial bodies. They hold the right and obligation to solve matters put in front of them impartially, relying on facts and in accordance with the law, without being subjected to any influence, pressure, threat or inappropriate direct or indirect interference. Court proceedings shall be conducted free of any interference. Justice, apart from being delivered, shall also be seen as being delivered. Protection of each judge's effective independence is linked to the appropriate form of his responsibility, essential for this, in my opinion, is ethics. It does not suffice for a judge to say that whatever is legal is also ethical. Often, rules of ethics call for higher standards than the law itself. Ethics represents higher standards, which judges in particular shall endeavour to protect.

Introduction

1. Judicial code of ethics as a necessity in the judicial system

Judges are important state officials whose authority are spread in all areas of social life, and who through the process of resolving contests occurring between people and applying the law, define citizens' rights and obligations, they decide on important matters in the public and private sector, and also decide in relation to actions of other state officials. Therefore, such large power on judges requires them to have high standards of conduct, inside as well as outside of courts.

In order to determine these standards of conduct, the idea has already been accepted that it is necessary for a framework on rules of judicial ethics to be issued, which shall ensure that judges

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and the public are aware about principles that lead the judges in their personal and professional life.

Issuance of rules on judicial ethics was not always welcome in various countries, and this is mainly due to the connection with the conflict that these rules present opposite the principle of the independence of the judiciary. It is widely known that the independence of the judiciary is considered to be the necessary standard for any democratic society, and in this context, the argument that if rules on conduct of judges are issued than their independence is being restricted was often used. There is this conviction that determination of judicial standards of conduct and investigation of responsibility in cases when they are violated interferes with the independence of the judiciary. On the other hand, in order for citizens to have faith in the judiciary, judges should be able to provide credibility, which is achieved by respecting ethical rules and principles.

Nevertheless, in majority of countries, these two elements, independence of the judiciary and responsibility of judges, are seen as complementary to one another and have the same aim, namely, promotion of independent judiciary and improvement of public's faith in capacity of judges.

Not only faith of the public, but, also the success of the courts largely depends on implementation of the code of ethics. If judges do execute their ethical function, not bypassing the professional one, the public shall have faith and respect for the judicial institutions and they shall act in accordance with their decisions.

This trust cannot be maintained and strengthened if judges do not act according to this code and if they do not respect the highest standards of the ethical code. Also, if the state does not ensure that the judiciary has available all the necessary means and resources to enable them to execute their duties efficiently and within reasonable time.

At the time when ethical rules presented as necessary, together with the professional qualification, there was a dilemma about who is supposed to issue these rules considering that this framework of judicial rules directly influences the independence of the judiciary.

Considering that the issue of the independence of the judiciary must be regulated by this very branch of the state power and no intervention by legislative or executive powers shall be allowed, than the issue of the code of ethics, which is essential in determining independence of the judiciary and goes inside the area where this independence is influenced, must be regulated by the judicial power itself. Based on the abovementioned fact, the judiciary must take a proactive role in issuing codes and rules of ethics, and it shall not wait for any interventions by the legislative and executive powers. It is precisely the process of issuance of this code that influences in its execution, so, this process shall necessarily reflect discussions and opinions of judges and these principles are issued with their approval.

2. Background on appearance of the judicial code of ethics

Ethics is an essential element in the role of judges. Knowledge and execution of rules of ethics is essential in guarantying the rule of law, democracy and good governance in every society.

While all countries accept that ethical and moral rules are necessary, not only to ensure public's faith, but also to instruct judges hoe to conduct themselves in various situations, not all countries have regulated this matter in a same way, some of them by judicial codes, and the large majority of them have only issued ethical rules in order to ensure a better judiciary.

The Judicial Code of Ethics, as a compilation of ethical rules, appeared for the first time in the USA, in 1924, by the American Bar Association, who made the issue of ethics a central problem. Since then, these efforts in the USA did not stop and such rules have been rewritten and changed many times and lastly, in 2010, the latest code was issued. Nowadays, all over the world there are judicial code of ethics issued, which are seen as a guarantee for the judicial integrity. Initiatives to issue these codes came at various times, starting from various international meetings, by judges themselves, and courts and also by lawyers. In 1998, the European Charter on the Statute of Judges was issued. In 1999, a similar code was issued in India, and then in following years in South Africa, Australia etc.

Also, in Kosovo, on 25 April 2006, the Judicial Code of Ethics was issued by the Kosovo Judicial Council, which presents a set of moral standards and norms that assists judges in supplying themselves with the most essential abilities, the ability to adjudicate and decide honourably and objectively, without being influenced by external factors and free of any form of pressure.

Judges are also obliged to act in accordance with this Code of Ethics and disrespecting it brings about disciplinary accountability.

3. Content of the Judicial Code of Ethics

The Judicial Code of Ethics aims to determine standards on conduct of judges through principles that serve as instruments to keep judges on tracks of independence, impartiality, professionalism and transparency. Essential principles are the principle of independence, impartiality, integrity, respect for rights of the parties to proceedings etc. During exercise of their duties judges shall respect ethical principles of professional conduct. These principles do not include only obligations that may be sanctioned by disciplinary measures, but also provide instructions for judges how shall they conduct themselves during exercise of their profession.

4. The principle of independence

The independence of the judiciary is a precondition for the rule of law and an essential guarantee for a fair trial. Independence of the judiciary shall be legal, functional and financial. It shall be guaranteed and protected by the other branches of the state power, by parties that seek justice, by other judges and society as a whole through national rules of the highest level. The state and each judge are responsible for promotion and protection of the independence of the judiciary.[261] The independence of the judiciary is guaranteed in particular by the manner of recruiting, nomination until the retirement age, promotion in duty, impossibility of dismissal, training, judicial immunity, discipline, compensation and financing of the judiciary.

The independence of the judiciary is not a privilege of an individual judge. It is a responsibility of each judge that enables him to adjudicate a contest honourably and impartially based on the law and evidence, without any pressure or fear of interference from outside. The essence of the independence of the judiciary principle is full freedom for the judge to review and decide on matters in front of court and no external party including the legislative powers, government, other individuals or judges shall interfere or try to interfere in the way a judge conducts and decides on a matter. So, a judge exercises the judiciary function independently based on evaluation of facts and conscientious understanding of the law, free of any external influence, incitement, pressure, threat or direct or indirect interference from any angle and for any reason. A judge shall encourage and protect execution of judicial duties and protect institutional independence of the judiciary. He shall promote high standards of conduct in order to improve the public's faith in the judicial system, which is an essential precondition in protecting the independence of the judiciary.

5. The principle of impartiality

Impartiality is essential in correct execution of the judicial function. This is valid not only for a decision but also for the process through which this decision was rendered. In order to better understand the impartiality principle, it should be noted that the independence is a necessary precondition of impartiality. A judge may be independent but not impartial, but a judge who is not independent can never be impartial.

Impartiality is an essential quality required from a judge and it is an essential attribute of the judiciary, it must exist also as factual matter but also as a matter of a reasonable perception. If it is thought that a judge did not act impartially, then this perception creates a feeling of injustice that harms the faith in judiciary system. This perception may rise due to several reasons such as conflict of interest, conduct of a judge while performing his duties or even due to acts or activities of a judge outside a court.

[261] Magna Karta for Judges, 17-19 November 2010, Strasbourg

The European Court of Justice clarified that there are two aspects of the impartiality principle[262]. Firstly, a judge must be objectively impartial i.e. he shall not have any prejudice or be personally biased. Personal impartiality shall be presumed, except for cases when there are reasons to believe otherwise. Secondly, a judge shall also be impartial from an objective point of view, so, he shall provide sufficient guarantees to exclude any legitimate doubt in this sense, including his appearance and his personal conduct. If a judge appears partial than this harms the public's faith in the judicial system. Therefore, a judge shall exclude himself from all activities which may give an impression that a judge's decision may be influenced by external factors. The very term 'partial' is defined as an inclination, tendency, or predisposition towards one or the other party for a certain result. Partiality is a mental state, stance or point of view which influences judge in exercising his function impartially. Partiality may manifest verbally or physically through usage of names, offences, nicknames, body language and face expressions. A judge shall ensure that his conduct, within the court as well as outside it, conserves and improves the faith of the public, legal professionals and parties in his impartiality and namely by avoiding communication ex parte, by "checking" his conduct and words also outside a court and by showing care when necessary about any conflict of interest.

6. Integrity

Integrity is an essential element in exercising functions of a judge, it is an attribute of honour and justice. Integrity components are honour and judicial moral. A judge shall always, and not only during execution of the official duty, act honourably and be virtuous in conduct and character. Integrity as a concept cannot be graded, it is an absolute value. In judiciary, integrity is more than a virtue, it is a necessity, because the faith of the public in justice institutions does not depend only on judges' professionalism but also on their moral integrity. It is their duty not only to decide on matters with honour and impartially but also to exercise their duties in such a way that this does not give rise to any suspicions to the contrary. Therefore, their professional ability is only one side of the medal, the other side, of same importance, is to ensure public's faith in their impartiality. Thus, on top of being a "good judge', it is expected that a judge also shows that he is also a "good citizen", because his conduct and image have an influence on a judicial system as a whole. All of this is achieved through high standards in private and public life, conduct in a court and strict following of the law.

Integrity is an internal characteristic which means that a person acts in accordance with specific principles and values, which one does not compromise – at work or in ones' private life. It means conduct of duties honourably, faithfully, correctly and with diligence. In fact, integrity is manifested in completion of judicial acts objectively, equally, fulfilling law conditions, all of this towards legality of the act.

[262] Gregory vs United Kingdom, European Court of Human Rights, (1997)

7. Conclusion

Justice is the backbone of every democratic society. The rule of law and acceptance of its values and principles means having faith in justice. In order for citizens' faith in the system to exist, professionals in the justice system shall be able to provide for trust. They shall show irreproachable conduct and excellent professional demeanour because public's perception regarding work of the judiciary directly affects the faith on judiciary system and it is the public that delivers the final judgment on ethical performance of the judiciary. Therefore, each judge shall conduct himself and act in accordance with the law and ethical rules set by the Judicial Code of Ethics.

Finally, it should be emphasised that the judicial ethics is a joint concern of judges and the jurists' community and, furthermore, it is not considered as a privilege for judges, but as a right of citizens to be convinced that the courts are the most legitimate and the most credible institution that treats their issues. The judicial ethics is an associate of the rule of law, good governance and democracy that establishes public's credibility for constitutional guarantees of their rights and impartial and fair judgment of their contests.

Yet, despite the advantages that code of ethics offer, they are not, and they should not be regarded to as, replacements for judges' individual ethics, since the judicial system cannot rely on judges who only show respect for rules determined by a code but do not possess any individual ethical values themselves. Because judges are also human beings with advantages and weaknesses as everybody else. They should always be objective in exercising their duties, but they cannot escape from their personal formation, which they gained during their experience.

Bibliography

- Universal Declaration on Human Rights,1948, UN
- UN Basic Principles on Judicial Independence, 1985, UN
- European Standards on Independence of Judicial System, Venice Commission, 2010
- Recommendation of Council of Europe 94/12 on independence, efficiency and role of judges, 1994,
- Magna Carta of Judges, 2010,
- Bangalore Principles, Commentary, 2007, KB,
- Code of Ethics and Professional Conduct, April 2006,
- Judicial Ethics, Jetish Maloku, 2013

Naime Ahmeti*

A DEFENDANT – RIGHTS OF THE DEFENDANT IN CRIMINAL PROCEEDINGS

ABSTRACT

Rights of the defendant in criminal proceedings are guaranteed by the Constitution and the Criminal Procedure Code of Kosovo, as well as by International Conventions, which organs executing the criminal proceedings are obliged to respect as such. In this work, these rights shall be looked at in detail, the legal status of the defendant in criminal proceedings, during different stages of the proceedings. Particular attention shall be given to the rights of the defendant during all stages of the proceedings, as well as legal remedies available to the defendant for effective defense of his rights.

Keywords: defendant, criminal proceedings, legal remedies, defense counsel, prosecutor, court, police.

Introduction

Criminal proceedings consists of entities, the Court, the Prosecution, the defendant as well as other entities during different stages of the criminal proceedings such as injured party, expert, witness etc.

The criminal proceedings start against the defendant as the subject when a grounded suspicion exists that he committed a criminal offence. The person that commits a criminal offence is the subject of the criminal offence, and at the same time an active subject of the criminal proceedings.

Whereas, a suspect is the person who might have committed the criminal offence or that hold information about the criminal offence. The criminal proceedings against this person have not started formally, but, he also has some rights during the pre-trial phase or during other stages of the proceedings. The suspect may not be questioned without being explained the reasons of his detention and also without engaging a defense counsel for him, since this consists an inadmissible evidence, which at a later stage may be proclaimed as such, except in cases when we deal with

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waiving of the right for mandatory defense-but in this case also a defense counsel is assigned in the capacity of an adviser.

In cases when the grounded suspicion exists that a person committed a criminal offence, and when there are sufficient evidence to this against him, execution of the criminal proceedings start and implementation of procedural legal norms which are linked to the rights and obligations of the defendant but also of the organs that start these proceedings. So, the organs that conduct the criminal proceedings, namely the Court, Prosecution, Police, shall identify the defendant and if possible also identify him as the person suspected of committing the criminal offence, and in order to initiate the investigative procedure his identity and address should be verified. All of this since the criminal proceedings may not be conducted against two persons if actions were undertaken by only one of them. It is not an obstacle for investigations to start against a person, against whom the criminal proceedings are being conducted, as person NN if the criminal offence exists, actions were undertaken and the consequences are known, but whose identity or residence is not known.

A suspect can be a person of any age. So, a suspect can also be a child, whereas the defendant gains this capacity from 18 years of age, regardless of whether he has abilities to act or not, and if he is a minor because according to the law the criminal proceedings may be conducted even against a minor above 14 years of age. The defendant, at the same time is also an active person in the criminal proceedings since he shall personally be present during the criminal proceedings. This active role of the defendant is particularly evident when his duty is to respect restrictions of his rights.

Position of the defendant is regulated and promoted during the last decades by the international positive law and the defendant is a subject equal to the other subject in the criminal proceedings. Main international acts that guarantee standards for a fair trial are:

- International Covenant on Civil and Political Rights (ICCPR) article 14 item 1, which stipulates that “all persons shall be equal before justice organs”.
- UN Declaration on Human Rights of 1948, which we come across in article 11 para. 1 of the Declaration with the formulation “everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.
- European Convention on Human Rights, article 6 para. 1, the right to regular proceedings, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

These principles are implemented in the Constitution of the Republic of Kosovo and they are elevated to standard principles in the Criminal Code of the Republic of Kosovo, Criminal Procedure Code of the Republic of Kosovo, Juvenile Justice Code.

CPC in its general provisions has foreseen as main principles:

The freedoms and rights of the defendant may be restricted before a final judgment has been rendered only under the conditions defined by the present Code[263].

A criminal sanction may be imposed on a person who has committed a criminal offence only by a competent, independent and impartial court in proceedings initiated and conducted in accordance with the present Code[264].

Presumption of innocence of the defendant and dubio pro reo, any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court[265].

Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant (in dubio pro reo)[266].

Principle ne bis in idem, no one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, if criminal proceedings against him or her were terminated by a final decision of a court[267].

A final decision of a court may be reversed through extraordinary legal remedies only in favour of the convicted person, except when otherwise provided by the present Code[268].

A fair trial, impartial and within reasonable time, "any person suspected or charged with commission of a criminal offence has the right to an impartial criminal proceedings implemented within a reasonable time[269].

The principle of an independent court shall be independent and decide in accordance with law[270].

The principle of equality of arms, the defendant and the state prosecutor have an equal status in criminal proceedings[271].

Legality of deprivation of liberty and decision rendered speedily "any person depraved of liberty by arrest or detention, shall be entitled under the procedures provided by the present Code to take proceedings by which the lawfulness of his arrest or detention shall be decided by a court speedily and his release ordered if the detention is not lawful[272].

[263] CPC art. 1 para. 3
[264] CPC art. 2
[265] CPC art. 3 para.1
[266] CPC art. 3 para.2
[267] CPC art. 4 para.1
[268] CPC art. 4 para.2
[269] CPC art. 5 para. 1,2,3,4
[270] CPC art. 8 para. 1,2
[271] CPC art. 9 para. 1
[272] CPC art. 12 para. 1,2

The principle of public hearing, a court trial is public, except in cases when this is foreseen by legal provisions and it may be restricted[273].

The principle of a criminal sanction ”a criminal sanction may be imposed on a person who has committed a criminal offence only by a competent, independent and impartial court in proceedings initiated and conducted in accordance with the present Code”[274].

According to the Criminal Procedure Code, the following expressions are determined: a suspect – a person who is suspected by the police and prosecutor that has committed a criminal offence, but against whom no investigations have been initiated, a defendant – a person against whom criminal proceedings are being conducted, accused – a person against whom an indictment has been filed and a court trial is scheduled, convicted person – a person who is found guilty of a criminal offence by a final judgment.

Rights of the defendant

The right to be presumed innocent

This right of the defendant is defended during all stages of the criminal proceedings until his guilt is decided upon by way of a final judgment. Based on this obligation, the defendant is free of obligation to prove his innocence, he is not obliged to present evidence and to defend himself that he is innocent, he may not incriminate himself, but this right does not defend him from execution of criminal proceedings against him and from limits to his rights. In promoting this principle the defendant:

- Is not obliged to plead his case
- Is not obliged to confess guilt
- Has the right to defend himself
- Is obliged to be present in the proceedings
- Is not an obstacle to confess guilt

The defendant is not obliged to prove his innocence, but, the presumption is not an obstacle for him to confess guilt, this principle is often violated and prejudiced by the police, prosecution, court, media etc.

The right to evidence and decisive facts

This right of the defendant consists on the obligation of the prosecution, court and other organs that execute the criminal proceedings to establish facts that go to the detriment as well as in favour

[273]CPC art. 293 para.1
[274] CPC art. 2

of the defendant, and on which the final decision depends. If a fact, which goes to the detriment of the defendant, is not fully established it shall be interpreted in favour of the defendant even though it is not fully established but it must be a decisive fact.

The right of the defendant according to the principle ne bis idem

It enables that no one is prosecuted or convicted for a criminal offence for which he was acquitted or if the charge was dismissed by a final judgment of a court. It must be said that when applying this principle the subjective and objective identity of the indictment shall exist by a judgment i.e. that the concluded proceedings acts against a determined person whereas the objective identity means that there must be a full match of the elements of the criminal proceedings for which the criminal proceedings were completed with elements of a criminal offence for which another proceedings cannot be executed.

The right to be informed about the reasons of detention or charges

It means the right of the defendant not to incriminate himself, the right to remain silent, not to incriminate himself or any of his relatives, prohibition to impose guilt or any statement through torture, force, threat, promise etc.

The right to be informed of his rights

It is the right of the defendant to, immediately after he is deprived of liberty, be informed of reasons for his arrest in a language that he understands, the right to a defense counsel of his choice, the right to inform a member of family of his arrest and all of this shall be recorded in writing.

The right to remain silent

This right of the defendant consists on not giving a statement, not to give answers to questions posed, not to incriminate him or confess guilt. Organs that conduct the criminal proceedings are obliged to identify the person whereas according to this legal obligation the defendant must identify himself stating the information. This information must be accurate but according to this obligation under no circumstances he must be forced to state this information accurately, but this is no hindrance to conduct criminal proceedings since this does not mean that he, during a later stage in the criminal proceedings, remains silent since this is not in his best interest. There is an exemption to this right if the defendant is announced a cooperative witness.

The right to a defense counsel

It means the right to have a defense counsel during the whole of the proceedings, before each questioning and during the questioning the defendant is instructed of this right. Mandatory defense is present when defendants are minors for domestic violence when a defendant shows signs of mental disorders. The right to a defense counsel never expires, this right includes a defense even when the defendant waives this right. The defendant has a right to a defense counsel at a public expense in case the criminal proceedings are conducted for a criminal offence punishable with imprisonment of 8 years or more, in cases when appointment of a defense counsel is dictated by interests of justice and in cases when the defendant cannot meet expenses for a defense, also, the defendant has the right to have three defense counsels at the most. Whereas the defense counsels shall be given ample time to prepare their defense.

The right of access to evidence

The defendant and the defense counsel may at any time have access to the case files prior to the official investigations, after initiation of investigations by the prosecutor, after conclusion of investigations and after indictment is filed.

The right to propose evidence

The defendant has the right to propose evidence and proof in his favour whereas the defense counsel is obliged to challenge evidence presented by the prosecutor and the injured party and to propose evidence that go in favour of the defendant.

The rights of the defendant once the indictment is filed

After filing of indictment the defendant has the right to:

Receive a copy of the indictment; that the judge ensures that the defendant has a defense counsel and to understand the charges against him included in the indictment, as well as to give him the opportunity to plead guilty or not guilty. To be notified by the judge of his right to submit a request to dismiss the indictment or to challenge evidence within 30 days or prior to the second hearing. To be notified of his right to propose witnesses and evidence which go in his favour.

The rights of the defendant during the main trial

The defendant has the right to a timely notification about the main trial. Presence of the defendant in proceedings is ensured through a summons, the deadline is eight days before the main trial. The

summons is handed over in person and he is notified of his right to a defense counsel as well as of the consequences of not appearing since the court holds the right to compel him. This is due to the reason that no court session can be held without the defendant being present, if he is regularly summoned and he did not respond to the court summons. The obligation for order during the main trial and the only possibility that the law has foreseen for a main trial session to be held without defendant's presence, is his removal from the main trial session due to failure in keeping the order during the main trial session.

The right of the defendant in front of a court of a second instance

The defendant has the right to participate in a session decided upon an appeal of the second instance but there is no obligation for this. It derives from this that he is obliged to inform the court about change of address whereas the session may be held even without his presence.

The right to ordinary and extraordinary legal remedies

The ordinary legal remedies that the defendant may exercise are the appeal against the judgment and the appeal against the ruling, whereas the extraordinary legal remedies are:

1. A Request for reopening of criminal proceedings, in cases when evidence are presented for which he was not aware of or was unable to present during the main trial and which would have led to a different judgment being rendered.
2. Extraordinary mitigation of punishment, in cases when after the final has become judgment final, new circumstances occur which did not exist when the judgment was rendered or, although they existed, were unknown to the court at that time, and such circumstance obviously would have led to a less severe punishment.
3. A Request for protection of legality is an effective remedy against a final decision or against judicial proceedings which preceded the rendering of that decision, which may be filed on the grounds of a violation of the criminal law and violations of the provisions of the criminal procedure.

Waiver of rights

Is done in voluntary manner by the defendant after he is informed of his rights.
It must be in writing and after he is informed of his rights.
He is informed about the consequences of waiving his rights during the later stages of the criminal proceedings.

The defendant as a passive subject of the criminal proceedings

Obligation to respond to the summonses implementing the criminal proceedings.

Obligation to respect limitations of his rights.

Conclusion

The status and the role of the defendant during the criminal proceedings has changed pursuant to the time when Codes were issued, beginning with the Provisional Criminal Code of Kosovo and then the current Criminal Procedure Code. So, with the new Criminal Code, in force since 01.01.2013, the right of the defendant are more emphasised and more advanced in each stage of the criminal proceedings. Hence, in the very pre-trial stage, at the time when the criminal proceedings are not implemented yet and all the way up to the later stages, when investigations and other measures start being applied against him until the criminal proceedings end, but also, in accordance with the ordinary legal remedies and during other stages subject to extraordinary legal remedies.

Bibliography

- European Convention on Human Rights
- Constitution of the Republic of Kosovo
- Criminal Code of the Republic of Kosovo
- Criminal Procedure Law
- Authorised lectures held in Kosovo Judicial Institute.

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CRIMINAL PROCEDURE AGAINST JUVENILES

ABSTRACT

In this work we discussed the notion and meaning of the term juvenile in a criminal procedure, characteristics of the criminal procedure against juveniles such as urgency in completing procedural actions, the principle of the best interest for the juveniles and other principles. Next, the provisional arrest, police detention and detention on remand applied against the juveniles, when can they be applied and how these measure can be applied. Particular attention is provided to the composition of the trial panel; stages of the criminal procedure against juveniles, preparatory procedure, role and competences of the prosecutor during the preparatory procedure, procedural actions undertaken by the prosecutor as well as measures that may be imposed by the prosecutor. Also, the diversion measures were discussed and their types; the stage of the main trial when evidence is administered and decision is taken on the criminal matter decision is rendered on imposing an educational measure or a sentence for juveniles as well as the procedure according to legal remedies and the mediation procedure.

Keywords: juvenile, criminal offence, criminal procedure, prosecutor, judge, educational measure, sentence for juveniles.

Introduction

Dealing with juveniles in separate criminal proceedings has started only recently and consequently it has started being applied alongside scientific advancements, first of all referring to advancements in pedagogy, psychology, sociology, penology etc.

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First tendencies to sever proceedings for juveniles from standard criminal proceedings date from the end of the XIXth century and beginning of the XXth century.

During this period a large number of measure was being applied, which were mainly focused on the level of less severe punishment.[275]

Next, the issue started being investigated in more detail regarding not only more adequate measures and sanctions for juveniles but also to displace the procedure as a whole foreseeing a completely separate procedure for juveniles.

Republic of Kosovo, in connection with regulation of criminal proceedings against juveniles, has approved the Juvenile Justice Code (JJC), which regulates measures, sanctions, procedures as well as execution of measures and criminal sanctions against juveniles.

The other legal infrastructure which deals with issues regarding measures, procedure etc. For juveniles such as Criminal Code of Kosovo, Criminal Procedure Code and the Law on Execution of Criminal Sanctions may apply under the condition that they do not clash with the JJC provisions.

Characteristics of the criminal procedure against juveniles

The Juvenile Justice Code makes the difference between terms child, which includes persons under the age of 18 years. A minor is a person between the age of 14 and 18 years, which is also the boundary of the criminal liability, which means that criminally liable are children from this age, but not those under 14 years of age.

Further, a young minor is a person between the age of 14 and 16 years, which means that against this category adequate measure may be imposed, but not sanctions.

A minor adult is a person between the age of 16 (sixteen) and 18 (eighteen) years, an important category because against them, apart from measures, sanctions may be imposed, too.

Also, the laws in force include the category of young adults, which means persons between the age of 18 (eighteen) and 21 (twenty-one) years. In principle, court proceedings may not be conducted against an adult who has reached the age of 21 years for a criminal offence committed as a juvenile under the age of 16 years, but, proceedings may be conducted against him for a criminal offence committed as juvenile under the age of 16 years if this criminal offence is punishable by more than 5 years of imprisonment. Meanwhile, in court proceedings conducted against an adult for a criminal offence committed as a juvenile who has reached the age of 16 years, the court may impose either a measure or a sanction, considering also the time lapsed since commission of the criminal offence.

[275] Criminal Procedure Law, Rexhep Murati & Ejup Sahiti

Persons who have reached the age of 18 years are considered adults. In criminal proceedings implemented against a young adult who has not reached the age of 21 years for a criminal offence committed as a young adult, the court may impose a measure or sanction for juveniles if he assesses that the aim that would be achieved by imprisonment would also be achieved by a measure or sanction for juveniles, but, also by taking the opinion of an expert regarding the psychological development of the young adult and his best interests, the measure or the sanction may last until this person reached the age of 23 years.

The procedure against juveniles, as mentioned above, has several characteristics which make it different from the criminal procedure against adults. Some of the most important specifics are:

- Urgency of the procedure, since institutions dealing with implementation of the procedure against juveniles shall act within the shortest timeframe possible. In this respect, the Juvenile Justice Code, has foreseen shorter deadlines in comparison to those applicable against other adult perpetrators.
- A juvenile may not be tried in absentia and he shall be accompanied by his parent during all stages of the criminal proceedings;
- Defense during proceedings against a juvenile is mandatory starting from the first questioning, in cases when the procedure is conducted for a criminal offence for which a sentence up to 3 years of imprisonment is foreseen or from the time when a ruling on initiation of preparatory procedure is received for a criminal offence for which a more lenient punishment is foreseen, if a judge for juveniles considers that a juvenile needs a defense counsel or adequate defense;
- If a juvenile, or his legal representative and other persons legally obliged to defend a juvenile, do not engage a defense counsel, one is appointed ex officio the organ in front of which criminal proceedings are being conducted;
- Statutory limitation for execution of punishments by imprisonment for juveniles is shorter.
- The best interest of a child is the main principle, which characterises the procedure against juveniles, and which is Constitutional category determined by article 50, para. 4 of the Constitution of the Republic of Kosovo.

Considering the above, actions undertaken by the state organs conducting criminal proceedings against a juvenile as a suspect shall bear in mind that the best interests of the child shall be prevailing considerations.[276]

[276] Convention on the Rights of a the Child, article 40
Juvenile Justice Code, art. 10

Provisional arrest, police detention and detention on remand

The procedure against a juvenile, regarding these measures in particular, shall be conducted with urgency and there deadlines foreseen which are different from those applied with adults. These are foreseen by the JJC, which is in harmony also with international instruments which deal with the rights of the child, first of all the Convention of the Right of the Child.
These measures may be ordered against a juvenile only as a last measure and for a shortest time possible.

A juvenile may be detained or arrested provisionally for no longer than 24 hours and after this he should be released in absence of a legal decision for detention on remand.

Detention on remand as a measure against a juvenile may be ordered in accordance with provisions of the CPC and only if other alternative measures would not be sufficient in securing his presence and prevention of recidivism and also ensuring successful conduction of the criminal proceedings.

A judge reviews other alternative measures, such as placing a child in a shelter, transfer to another family etc. and in the ruling imposing detention on remand reasons should be provided as to insufficiency of the alternative measures.

Detention on remand as a measure against a juvenile may be imposed by a Juveniles Judge for a maximum period of 30 days and this may be extended by a Juvenile Panel for a further 60 days.

Juvenile Panel shall, within 30 days, review the ruling on imposing detention on remand in a session where present shall be the juvenile, prosecutor and the defense counsel.

Detention on remand against a juvenile under no circumstances can be longer than 12 months and he should be held in an educational-correctional institution, if the Juvenile Judge considers this to be in the best interest of the juvenile.

While the juvenile is held under detention on remand, adequate social, educational, psychological, medical assistance is provided to him as needed.

Composition of the Juvenile Panel

A Juvenile Panel in the court of the first and second instance, except for panels of the Supreme Court Panels, shall be composed of a Juvenile Judge and two lay judges. The Juvenile Judge shall always be the presiding judge of the panel.
A Juvenile Panel in the Supreme Court of Kosovo shall be composed of three judges, including at least one juvenile judge. When a Juvenile Panel of the Supreme Court adjudicates at a main trial, it shall be composed of two juvenile judges and three lay judges[277].

[277] Composition of the Juvenile Panel according to the JJC

Stages of the criminal proceedings against juveniles

Criminal proceedings against juveniles are regulated by the Juvenile Justice Code. Essential principles that shall be respected during conduction of the criminal proceedings against juveniles deal with the welfare of a juvenile due to young age and psychological development and in order for the criminal proceedings against him not to have a negative impact or to have the least of consequences on his personality.
Therefore, humane treatment of a juvenile during all stages of the criminal proceedings is the main requirement for those executing, and others participating in, the criminal proceedings against juveniles.

This principle shall prevail also in cases when diversion and educational measures are applied, whereas deprivation of liberty is the last resort, by limiting it to the shortest time possible.

If an imprisonment sentence is imposed on a juvenile, than education, psychological assistance and other support is ensured for a juvenile depending on his needs in order for a juvenile to rehabilitate.

A juvenile shall be provided with a defense counsel when in front of any organs conducting the criminal proceedings.

During the criminal proceedings, a juvenile shall be given the opportunity to express himself freely, this obliges the organ conducting the criminal proceedings to inform a juvenile of his rights guaranteed by law and proceedings shall not continue until it is ensured that a juvenile has understood these rights.

When deprived of his liberty a juvenile shall be kept separate from adults if it is judged that this serves his best interests.

The juvenile's right to privacy and not to be exposed to public during proceedings is a right which shall be applied by all organs and other persons participating in proceedings against a juvenile.

Preparatory procedure

Role and competences of a prosecutor

The state Prosecutor, in cases when he receives information, proposal by an injured party, or a criminal report that a juvenile has committed a criminal offence or a juvenile is a victim of a criminal offence, acts speedily and without delays by applying provisions of the JJC and provisions of the CPCRK as appropriate.

The State Prosecutor's competences in criminal proceedings against juveniles, same as in proceedings against adults, is finding and prosecuting perpetrators of criminal offences which are prosecuted ex officio or based on a proposal.

If grounded suspicion exists that a criminal offence has been committed by a perpetrator under 14 years of age, criminal proceedings are not initiated, and if they have been initiated due to unawareness of the juvenile's age, proceedings are immediately terminated upon realisation of his age and the Guardianship Authority and Correctional Services shall be notified of the case by the prosecutor. Then, the Guardianship Authority undertakes further actions, in accordance with the Law on Social and Family Services for treating perpetrators of criminal offences under the age of 14 years, based on its programmes.

The State Prosecutor starting from the principle of the best interests for a juvenile, the principle that reaction shall be proportionate to the circumstances of the criminal offence perpetrator and the principle of reasonability, based on article 56 of the JJC, may initiate the preparatory proceedings even if the grounded suspicion exists that a juvenile has committed the criminal offence punishable with imprisonment of less than three (3) years or a fine. In this case, the prosecutor thinks that it would not be appropriate to conduct criminal proceedings against a juvenile because of the nature of the criminal offence, circumstances under which this offence was committed, absence of severe damage or consequences for an injured party, considering the past conduct of a juvenile as well as his personal characteristics. Also, in cases when against a juvenile a sentence or measure is being executed, prosecutor may decide not to initiate preparatory proceedings for a criminal offence committed by a juvenile, if considering the gravity of this criminal offence, as well as the sentence or measure being executed, conduction of a procedure or imposition of a sentence or measure for this criminal offence would not serve any objective.

In order to confirm circumstances for a decision not to start preparatory proceedings against a juvenile, prosecutor may request from the Probation Services to conduct social inquiry, and if necessary, to invite the parent, adoptive parent or guardian of a juvenile, as well as other persons and institutions and the injured party. Even in this case, when he decides not to initiate the preparatory proceedings, he notifies the guardianship organ.

If the prosecutor does not undertake any of abovementioned actions based on article 57 of the JJC he renders a decision to initiate the preparatory procedure. The ruling determines that juvenile against whom the procedure is being conducted, description of the criminal offence which defines the elements of the criminal offence, legal qualification of the criminal offence, circumstances and facts which justify the grounded suspicion, collected evidence and information on any punishment or measure imposed in the past against the juvenile. A stamped copy of a ruling on initiation of the preparatory procedure is sent to the juvenile judge without delay, and the Centre for Social Work and the Probation Service is notified in accordance with article 8 of the JJC in order to prepare the social inquiry. During the preparatory procedure the prosecutor takes care of all the rights of the juvenile that he enjoys according to the JJC and the CPC. If a juvenile is under arrest, the prosecutor without delays files a request to impose the detention on remand measure if there are grounds for this in front of the juvenile judge, respecting the 24h deadline, otherwise, if this deadline passes and no ruling is rendered to impose detention on remand by the juvenile judge, a juvenile is immediately released. It should be noted here that the provisional arrest, police

detention and detention on remand are measures which shall be used as a last resort and only in necessary cases, when other measures to secure presence of a juvenile in a procedure are not sufficient.

During conduct of the preparatory procedure the prosecutor may suspend the investigation procedure against a juvenile and to impose a diversion measure for the criminal offence for which a fine is foreseen or an imprisonment up to three (3) years or for a criminal offence for a criminal offence committed due to negligence, for which a sentence of up to five (5) years of imprisonment is foreseen, except those which end with death as a consequence. Other conditions which require imposition of this measure are confession of guilt by a juvenile, willingness of a juvenile to reconcile with the injured party, consent by a juvenile or parent, adoptive parent or guardian on behalf of a juvenile to impose the diversity measure. If the imposed measure is not executed, the prosecutor is notified about non-completion of diversity measure obligations by a juvenile and he may decide to re-initiate prosecution of the case.

Diversity measures that may be imposed against a juvenile perpetrator are:

- Reconciliation between the juvenile and the injured party, including an apology by the juvenile to the injured party;
- Mediation between the juvenile and his or her family;
- Compensation for damage to the injured party, through mutual agreement between the injured party, the juvenile and his legal representative, in accordance with the juvenile's financial situation;
- Regular school attendance;
- Acceptance of employment or training for a profession appropriate to his or her abilities and skills;
- Performance of unpaid community service work, in accordance with the ability of the minor offender to perform such work; this measure may be imposed with the approval of the minor offender for a term ten (10) up sixty (60) hours.
- Education in traffic regulations; and
- Psychological counselling.

Also, during the preparatory procedure, the prosecutor may suspend the procedure, and may propose to parties, i.e. the juvenile and the injured party a mediation procedure, if he evaluates that this is better considering the nature of the criminal offence and the circumstances under which it was committed, the personality of the juvenile, reduction of the damage to the injured party and rehabilitation of the juvenile. Parties shall be explained the mediation principles and rules as well as legal effects which are achieved through mediation. Parties must give their consent to go to the mediation procedure. The mediation procedure shall not be longer than ninety (90) days from the day the ruling on mediation is rendered. The prosecutor is notified about the result officially and if the mediation procedure is not successful than the prosecutor continues with the procedure at the point it was suspended.

During the preparatory procedure the prosecutor may terminate the procedure at any time if based on collected evidence he finds that (article 60 of the JJC):

- There is no reasonable suspicion that the minor has committed the indicated criminal offence;
- The period of statutory limitation for criminal prosecution has expired;
- The criminal offence is covered by pardon;
- The conditions set forth in Article 56, paragraph 1 of the present Code; or
- There are other circumstances that preclude prosecution.

The prosecutor immediately informs the juvenile judge termination of the procedure, as well as the juvenile except in cases when actions in preparatory procedure were undertaken.

The preparatory procedure shall conclude within six (6) months, if it does not conclude within this timeframe the prosecutor files a request in front of a juvenile judge to continue with the preparatory procedure and the procedure may be continued in accordance with provisions of the Criminal Procedure Code of Kosovo.

The prosecutor, after conclusion of the preparatory procedure informs the defense counsel of the juvenile about his intention to conclude the procedure within fifteen (15) days, where the defense counsel has the right to file a request to obtain a new fact or evidence.

Once the preparatory procedure is concluded the prosecutor may submit a proposal in front of a juvenile panel to impose an educational measure or a sentence against the juvenile.

The proposal shall contain personal data of the juvenile, description of the criminal offence, legal qualification of the criminal offence, evidence, possible inquiry, the proposal to impose the educational measure or sentence as well as reasons why the diversity measures were not imposed.

Main trial

This stage of the criminal proceedings represents the main part in which a solution to a criminal matter is provided or where evidence is presented and at the end the criminal matter is clarified.

Once receiving a proposal from the prosecutor the juvenile judge may dismiss the proposal or transfer the case to another competent court if he finds that this is necessary.

If none of the possibilities abovementioned meets the legal conditions to be used than the juvenile judge, within 8 days of having received the proposal, schedules the main trial.

The juvenile judge may at any time during the conduct of the criminal proceedings suspend the court proceedings and impose relevant diversity measure if the juvenile confesses criminal liability, shows willingness for reconciliation with the injured party and at the end, if the juvenile or the parent, adoptive parent or guardian consent to this.

Apart from persons foreseen also by the CPC, to the main trial summonsed are the parent, adoptive parent or the guardian and representative of the Probation Service. Their absence is not an obstacle to hold a main trial session.

Provisions of the CPC on amendment and extension of the accusatory act apply also in the case of amendment or extension of the proposal even though in the procedure against juveniles the trial panel is authorised by law to render a decision based on facts and evidence presented during the session by showing that the situation regarding the proposal has change based on them.

The main trial for juveniles is always held with no public present, although the trial panel may make exceptions allowing presence of some persons who are professionals in dealing with issues of welfare, education and delinquent behaviour of juveniles.

The trial panel may order exclusion of participants in a main trial, except the prosecutor, defense counsel, representative of the guardianship authority and representative of the Probation Service. Tis may occur under extraordinary circumstances and when it is believed that this at juvenile's best interest.

The trial panel is not bound by the proposal of the prosecutor in rendering a decision regarding imposing a measure or sentence. By way of a ruling the trial panel terminates the court proceedings if we deal with reasons from the CPC (the prosecutor withdraws from prosecution, actions for which the juvenile is charged do not constitute a criminal offence, the injured party withdraws from the proposal etc.).

Educational measures are imposed by the trial panel by way of a ruling, where in its enacting clause it is stated only the order for the educational measure and other potential measure or sentence, where the juvenile is not found guilty for the criminal offence from the prosecutor's proposal.

The reasoning of the ruling contains description of the criminal offence as well as the circumstances which influenced imposing of the educational measure.

The sentence against the juvenile is imposed by the trial panel byway of a ruling which is rendered in accordance with provisions of the CPC, which includes also the measures or sentencing such as measures of mandatory treatment etc.

The ruling or the judgment for juveniles is drafted in writing within 8 days of its announcement, whereas this deadline may be extended to maximum of 15 days with the authorisation of the president of the court.

The juvenile may be ordered by the court to pay the costs of proceedings and to satisfy property claims only if it has imposed a punishment on the juvenile. If educational measures have been imposed upon the juvenile, the costs of the proceedings shall be paid from the state budget and the injured party shall be referred to civil litigation to realise property claims.

Regardless of the above, the juvenile may be ordered by the court to pay the costs of proceedings and to satisfy property claims if the same does realise financial income or owns property.

The procedure according to legal remedies

Decisions rendered by the first instance court may be appealed within eight days from the day of the receipt of the ruling or judgment. Grounds to file an appeal are the same as in the procedure for adults.

Circle of persons who may file an appeal on behalf of the juvenile is relatively wide and includes the defense counsel, prosecutor, spouse, parent, adoptive parent, a relation by blood in a direct line to any degree, brother, sister – the latter may file an appeal even against the will of the juvenile. A specific feature in this case is that the juvenile may not waive his right of appeal.

An appeal against a ruling imposing an educational measure served in an institution suspends the execution of the measure, although the court may decide to execute the measure notwithstanding an appeal if it determines that this is in the best interest of the juvenile, after hearing the opinion of the parent, adoptive parent or guardian.

The court of second instance may modify the appealed decision by imposing a more severe measure only if so requested in the appeal by the public prosecutor.

The court of second instance may impose a sentence upon a juvenile if this was not done by the court of first instance only if a hearing is held, this also applies for educational measures.

The procedure according to other remedies such as request for protection of legality, reopening of proceedings is conducted according to provisions of the CPC, which are implemented as appropriate, whereas a request for extraordinary mitigation of punishment is applied only under the condition that a sentence was imposed upon a juvenile by way of a judgment.

Mediation procedure

Mediation as an institution is foreseen by the JJC and it is a non-court procedure which is conducted in accordance with JJC provisions and the law on mediation.

There are several conditions in order for the mediation procedure to be applied, whereas the main condition is existence of reconciliation between the juvenile, as the perpetrator, and the injured party.

Lawmaker did not clearly determine the criminal offences where the mediation may be applied but it provided an orientation for circumstances which shall be considered when mediation may be utilised such as nature of the criminal offence, circumstance under which the criminal offence

was committed, the juvenile's background, the possibility of reconciliation between the juvenile and the injured party, the possibility of his rehabilitation and reintegration in the society.

In cases when there is an agreement by the parties to apply the mediation procedure this is noted in the minutes by the prosecutor or judge, depending on what stage the procedure is, he renders a ruling which appoints the mediator from a list of mediators in accordance with the Law on Mediation.

The prosecutor or judge shall beforehand notify the parties regarding mediation principles and rules, the process as well as legal effects of possible agreements achieved through this process.

The mediator appointed by a ruling shall contact the juvenile and the injured party in order to start with the mediation procedure, which shall not be longer than ninety days starting from the day of the announcement of the ruling on appointment of the mediator. The prosecutor or the juvenile judge shall be informed about the mediation results.

Mediation procedure for juveniles is free of charge for the parties and they are paid from relevant budgets, depending on which organ initiated the mediation.

The mediation procedure is over when:

- The mediation has been successfully finished;
- The deadline of ninety days has expired;
- The mediator considers that continuation of the procedure is not possible or not reasonable;
- The juvenile or the injured party declare that they want to terminate the procedure.

Based on this it is understood that the mediation may be terminated upon a will of one of the sides if they request so.
The criminal procedure shall continue if the mediation is not successful from the moment of its abolishment, whereas in case it was successful the procedure is terminated by way of a ruling and parties notified accordingly.

Also, if parties achieved an agreement for compensation of damages, this is submitted to the organ that initiated the mediation and if the same is approved that it becomes a document based on which execution may be carried out according to the law.

Also, during the pre-trial procedure the prosecutor may suspend the procedure and propose the mediation procedure to the parties, i.e. to the juvenile and the injured party, if he estimates that it is more appropriate taking into consideration the nature of the criminal act, the circumstances under which the criminal act was committed, the personality of the juvenile, the possibility of deducting damage of the injured party and rehabilitation of the juvenile.

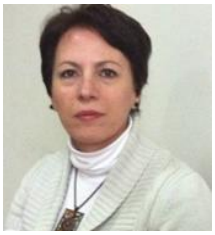
Parties shall be explained the mediation principles and rules as well as legal effects achieved through mediation. Parties shall give their consent in undergoing the mediation procedure. The mediation

procedure shall not be longer than ninety (90) days from the day the ruling on mediation is rendered. The prosecutor is notified of the result officially and if the mediation procedure is unsuccessful the prosecutor continues with the procedure from the moment of its abolishment.

Bibliography

- Juvenile Justice Code
- Criminal Code of the Republic of Kosovo
- Criminal Procedure Code
- European Concvention on Human Rights
- Convention on Rights of the Child
- Universal Declaration of Human Rights
- Criminal Procedure Law, Rexhep Murati
- Constitution of the Republic of Kosovo





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EXCLUSION OF CRIMINAL LIABILITY

ABSTRACT

The reason of discussing the exclusion of criminal liability lies in the fact that in some cases, situations and circumstances, perpetrator of the act happens to commit a criminal offence sanctioned by law, and is acquitted of the criminal liability, is he acted under conditions foreseen by the law.

These situations include cases when the perpetrator has acted in necessary defense to protect himself or another person from a real and unprovoked attack or if acted in extreme necessity or under the influence of violence or threat caused without his fault.

This work, apart from the introduction part, in its first part deals with acts of exclusion of criminal liability and situations in which perpetrator finds himself during commission of the criminal offence; the final part of this work deals with reasons for exclusion of criminal liability according to the CCRK for these criminal offences. At the end of this work there is the conclusion where we provide our findings on exclusion of criminal liability and at the very end there is the literature consulted during this work.

Keywords:

Exclusion of criminal liability, reasons for exclusion of criminal liability, degree of danger, defense.

1. Introduction

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Exclusion of criminal liability for these criminal offences was foreseen also by previous laws of the Republic of Kosovo,

because the perpetrator is obliged to defend himself or another person from a danger posed from another person and which is a serious risk and directed directly at him or another person. This danger, apart from people, may come from animals, natural phenomena such as floods, earthquakes, fire, various explosions etc, without being provoked by the perpetrator of the criminal offence.

Criminal liability is a general element of every criminal offence. Every socially dangerous act is not considered to be a criminal offence. In order for a dangerous act to be considered a criminal offence it is necessary for it to be manifested with a high degree of risk and to be defined as a criminal offence by law.

Reasons to exclude criminal liability according to the general part of the Criminal Code of the Republic of Kosovo are foreseen by two norms through which criminal liability is excluded if certain conditions are met, and these are the necessary defense (article 12) and extreme necessity (article 13).

Reasons or circumstances that exclude criminal liability, according to the general part of the CCRK, are violence and threat (article 14), acts of minor significance (article 11) and superior orders (article 16).

2. Objectives

After reading this work, readers shall be able to:

- Understand the concept of exclusion of criminal liability,
- Define criminal liability,
- Differentiate between criminal liability and danger and
- Describe reasons which exclude the criminal liability.

3. Criminal liability

Criminal liability is a general element of every criminal offence. It represents the legal basis for defining the criminal offence and according to its nature is a feature of every offence, therefore, it is a feature of criminal offences as well.

Not every socially dangerous act is considered to be a criminal offence. In order for a dangerous act to be considered a criminal offence it is necessary for this act to be manifested with a high degree of danger and to be defined as a criminal offence by law.

4. Danger (degree of danger)

Danger to society of a criminal offence may be of different intensities. Some criminal offences are less dangerous and some of them more. Degree of danger posed to the society is determined considering:

- Manner of commission of criminal offence,
- Means by which legal goods were endangered or damaged,
- Time of commission of criminal offence,
- Location of commission of criminal offence,
- Motive for commission of criminal offence,
- His conduct in the past,
- Recidivism is present or not.

Based on degree of danger to society the gravity of criminal offence is determined, when the degree of danger is high the criminal offence is considered as more serious and vice versa, when the degree of danger is low the criminal offence is considered to be lighter.

5. Reasons to exclude criminal liability according to the general part of the Criminal Code

Reasons to exclude criminal liability are numerous and we shall mention only few:

- Necessary defense
- Extreme necessity,
- Violence,
- Threat,
- Act of minor significance,
- Superior orders etc.

6. Necessary defense

Article 12 para. 1 of the CCRK expressively stipulates that an act committed in necessary defense is not a criminal offence.

According to article 12 para. 2 of the CCRK, necessary defense is the defense necessary to avert an unlawful, real and imminent attack against himself or another person and the nature of defense is proportionate to the degree of danger posed by the attack.

The necessary defense exists e.g. when a person A attacks by knife the person B, but person B defending his life deprives person A of his life.

From this example it results that in the described situation all characteristics of the criminal offence of murder have been met, however, the murder was committed in necessary defense, it is

considered that the criminal offence does not exist, since the attacked person has the right to avert the unlawful attack.

The attack and defense must exist in order for the necessary defense to exist.

7. Attack

An attack is any action of a person directed towards damaging or endangering legal goods.

Usually an attack is committed by way of an action, but exceptionally it may be committed by omission (e.g. an emergency room doctor refuses to provide medical help to a person at risk for his life). In such cases, any person may force a doctor to carry out his duty.

Attacker must be a human being – In order for the necessary defense to exist, the attack must be undertaken by a human being.

The attack may be directed towards any goods. So, the attack may be directed towards legal goods belonging to a natural person, legal person, security or territorial integrity of Kosovo etc. However, in everyday life mostly it is the human life that is attacked, bodily integrity and property.

The attack must be unlawful – The attack is unlawful when the attacker has no legal authorisations for his activity, when his activities violate legal system of a state.

The attack must be imminent – The attack is imminent when it is expected to start at any time, when it has started and while it continues, in other words until it is over.

When the attack is expected to start – It is considered that the attack may be expected at any moment in cases when it may start there and then, immediately e.g. during a quarrel between two persons, one of them loads a handgun or pulls a knife from its holster.

When the attacked has started- The situation is clearer in cases when the attack has already started e.g. person A is running with a knife after person B and as soon as he comes close to him, he pulls a handgun and deprives him of his life, the attack here has already started, so, it is not expected to start.

The attack must be genuine- In order to consider that the necessary defense exists the attack must be genuine, to really exist.

8. Defense

Defense is any human action which damages or endangers any attacker's goods. Necessary defense exists also from the definition of this institution, necessary defense exists even in cases when the attack is averted by the third person.

The defense must be directed at the attacker- In order to consider that the necessary defense exists, action of the defense must be directed against the attacker, against the legal goods of the attacker which is necessary to avert the attack (e.g. against body, life, property etc.).

The defense is mandatory necessity to avert the attack- In order to consider a defense as necessary it must be mandatory necessary for a person to avert the attack from himself or from another person.

The defense must be proportionate to the intensity of the attack- In order for the necessary defense to be needed, it should exist in proportion between intensity of the attack and defense (in proportion with means used by the attacker, physical force of the attacker, means in possession of the attacker).

9. Exceeding the necessary defense

Exceeding necessary defense is present when defense is not proportionate with the attack, or when the defense is undertaken after the attack was averted or over.

In all cases when the attacked person exceeds the limits of necessary defense, all damage caused to the attacker are considered a criminal offence and such a person is criminally liable as for any other criminal offence.[278]

10. Extreme necessity

Article 13 para. 2 of the CCRK – Extreme necessity is a secondary circumstance which excludes criminal liability. According to the legal definition, the extreme necessity exists when an action is committed to avert an imminent and unprovoked danger from himself or another person which could have not otherwise been averted, provided that the harm created to avert the danger does not exceed the harm threatened

E.g. person A in order to save the life of a child, enters forcibly in house of person B, which is engulfed in fire, another example is when person A in order to save the life of a drowning child takes someone else's boat.

Danger and averted danger must be present in order for this institution to exist.

[278] Pursuant to the Criminal Code of the Repubic of Kosovo, General part, article 12

11. Danger

Existence of a danger is a precondition for the extreme necessity to exist. Danger is usually defined as a situation in which based on existing objective circumstances it is reasonable to presume that at any moment, there and then, legal goods of a natural or legal person may be harmed.

Danger may come even from forces of nature or natural phenomena such as**:**

- Flooding

- Earthquakes

- Severe freezes

- Landslides or avalanches

- Attacks by animals or wild animals etc.

The danger may be provoked or caused- It cannot be considered that a person acted in extreme necessity if by his fault, intentionally or out of negligence, he caused the danger, e.g. the person himself caused fire and finding himself in danger, in order to save himself, he harms another person.

Danger may be posed to any goods – In principle danger may be posed to any legal goods protected by legal system, however, in practice, danger is mostly directed to human life, body, health, freedom and property.

Danger must be genuine – Danger is considered as genuine when it exists, it is objective, if a person erroneously thinks that danger exists than we are dealing with the so called putative extreme necessity.

12. Averting danger

Averting danger is an action undertaken in order to save legal goods which are under threat.

Averting danger must be imminent, current with existence of danger

It is considered that this condition is met in cases when action by which danger is averted is undertaken during the time that danger is present, or when it is expected, threat exists, that danger shall start at any moment.

Certain proportion must exist between the threatened harm and the harm caused

The extreme necessity exists when the harm caused is the same as, or smaller, than the threatened harm e.g. in order to save the life of a person property of another person is harmed.

13. Exceeding limits of extreme necessity

Exceeding limits of extreme necessity may also occur, same as in the case of necessary defense:

- When the harm caused is larger than the threatened harm
- When danger could have been averted by causing less harm to the legal goods of another person and
- When harm to the legal goods of another person was caused after the danger was over.

The act committed in exceeding the limits of extreme necessity is considered a criminal offence and if this exceeding of limits was intentional, the perpetrator shall be held liable for intent and if it was committed out of negligence than he shall be liable for negligence.

14. Obligation to expose to danger

There are few categories of people who because of their duties, profession or social position in a society, may not call upon the extreme necessity, but, they are obliged to expose themselves to the danger (article 13 para. 4 of the CCRK).[279]

15. Violence and threat – article 14 of the CCRK

15.1. Violence, the notion and types of violence

Violence is the use of force against another person in order to force him to undertake or fail to undertake ë an action by which features of a criminal offence are realised.

Violence may be physical or mechanical, whereas as force, violence is also considered to be use of hypnosis or other intoxicating means, in order to put another person, against his will, in an unconscious state or to render him unable to resist.

15.1.1 Violence may be absolute and compulsive

Violence is absolute in cases when a person against whom violence is used was completely depraved of any opportunity to take a decision to act or not to act, or if this person was prevented to execute his decision.

[279] According to the Criminal Code of the Republic of Kosovo, General part, article 13

E.g. person A ties up a railway staff and he cannot give a signal for a train to stop and as a result a train collision is caused with a lot of casualties and material damage.

Compulsive violence is expressed in cases when a person against whom violence is used is not absolutely depraved of the opportunity to decide, but the violence applied exerts such pressure that forces him to undertake or not undertake a certain action.

15.1.2. Threat

Threat is a declaration which makes another person know that something bad is bound to happen to him, if he does not act the way the person making the threat wishes. Threat is usually done verbally. However, it may be done in writing, or by concludent actions.

15.1.3. Criminal importance of violence and threat

In the case of absolute violence there is no criminal offence, since it does not have the essential element "Voluntary action of a person".

According to this, the person, who under the influence of the violence, undertakes an action which includes all features of a criminal offence defined by law, shall not be held criminally liable, since it shall be considered that he was only the means to commit the criminal offence. Whereas, when we deal with the compulsive violence and the threat, they shall be assessed within the necessary defense and the extreme necessity.[280]

16. Acts of minor significance

It may occur that a person commits an action, which might have all the characteristics of a criminal offence defined by the criminal law, but, because the offence involves insignificant danger to the society it is not considered a criminal offence, e.g. a person a steals a simple fork in a restaurant. Actions of person A includes all elements of the criminal offence of theft, however, since the degree of danger of this offence is insignificant, it is not considered a criminal offence.

Two conditions shall be cumulatively met in order for an act of minor significance to exist:

- The act shall be of minor significance and
- There are no harmful consequences at all, it was insignificant.

[280] According to the Criminal Code of the Republic of Kosovo, General part, article 14

Whether an act is of minor significance depend on a lot of circumstances. An orientation as to how significant a criminal offence is provided perhaps by the stance of the lawmaker manifested in the sentencing foreseen for the criminal offence.

Apart from the gravity of the offence there are other conditions that must be fulfilled in order for an act to be considered of a minor significance, and mainly they are related to:

- Means by which the criminal offence was committed,
- Circumstances under which the criminal offence was committed,
- Psychological reports on the perpetrator of the criminal offence (form of guilt, intent and motive) etc.

It is not necessary for all of these conditions to be fulfilled in each case, it is possible for only one condition to exist and the act to be treated as an act of minor significance.

The second condition, in order for a criminal offence to be considered as insignificant danger to the society it is required that a prohibited consequence is not caused, or that it is insignificant e.g. in case of the criminal offence of attempt to take somebody else's car, person A enters the car of person B and wants to go somewhere but he is prevented in doing so (he did not cause any consequences at all). [281]

17. Superior order

Persons who based on the hierarchy are in subordinate positions, are obliged to execute orders of their superiors. However, it may occur that by executing these orders a criminal offence is committed.

Pursuant to the Criminal Code of Kosovo, even when a subordinate commits a criminal offence based on an order by superior he shall be considered as criminally liable and sentenced. However, in three paragraphs of this article certain cases are foreseen when a subordinate, although committed a criminal offence, shall not be criminally liable or sentenced if:

1 The person was under legal obligation to obey such an order
2 The person did not know that the order was unlawful and
3 The order was not manifestly unlawful.

18. Self-harm

Self-harm exists in cases when a person harms legal goods, personal goods e.g. causes bodily injuries to himself or destroys his own property. Personal legal goods are e.g. life, bodily integrity, honour, authority, freedom of movement, individual property etc.

[281] Pursuant to the Criminal Code of the Republic of Kosovo, General part, article 11

In criminal law self harm does not represent a criminal offence under the condition that it does not pose a danger to the society.

A person who injures himself in order to avoid military service shall be held criminally liable, in this case it shall be considered that such a person has committed a criminal offence of avoiding military service by rendering himself disabled.

19. Conclusion

Based on the topic we conclude that:

Every socially dangerous act is not considered to be a criminal offence. For a dangerous act to be considered a criminal offence, it is necessary for this to manifest a high degree of danger and be defined a criminal offence by law.

Even though the abovementioned criminal offences are foreseen by the CCRK as criminal offences, perpetrators of the offences shall be acquitted of the criminal liability or be punished by a reduced punishment if it is proven that they have acted in necessary defense, extreme necessity, under the influence of violence or threat to avert the danger posed to them directly or to another person, danger which was imminent and unlawful.

Whenever it is confirmed that a person, at the moment of commission of the criminal offence was influenced by the perpetrator due to these reasons or abovementioned situations, he shall be acquitted of the criminal liability, or a reduced punishment shall be imposed against him.

Bibliography

- Criminal Code of the Republic of Kosovo
- Authorised lectures held in Judicial Institute of Kosovo

Drilon Haraçia*

STATUTORY LIMITATION ON CRIMINAL PROSECUTION AND THE EXECUTION OF CRIMINAL SANCTION

ABSTRACT

Considering the importance of the criminal prosecution and criminal sanctions as some of the stages of criminal proceedings where the state, once the foreseen legal deadline has passed, loses the right to prosecute perpetrators of criminal offences and to execute criminal sanctions, this, in the criminal law is called the statutory limitation. In this work we shall discuss the statutory limitation on criminal prosecution as well as execution of criminal sanctions. Next, when does the statutory limitation of criminal prosecution commences to run, interruption and stay of the statutory limitation on criminal prosecution, absolute and relative statutory limitation on criminal prosecution, criminal offences that are not subject to statutory limitation, deadlines of statutory limitation on criminal prosecution. Also, there is a ruling on how does a statutory limitation on criminal prosecution expire. These apply also in the case of statutory limitations on criminal sanctions. Considering all the above, after reading this work the reader shall be familiar with the importance of the statutory limitation and shall be able, in practice, to apply this institution of the criminal law.

Introduction

Kosovo is day by day, as a young state, regulating the judicial system by giving a lot of importance to the legal state. However, there are still problems with statutory limitation on criminal prosecution and criminal sanctions in which case citizens lose faith in the judicial system due to inefficiency. This occurs as a consequence of Kosovar judges facing a large backlog of cases and deadlines, which is a time interval that does not stop. Also, it should be noted that the Kosovo Police must establish a Task Force for execution of court orders because their non-execution is concerning. Therefore, the institution of the statutory limitation on criminal procedure is of large importance and through this work we shall get more familiar with the statutory limitation and steps that need to be undertaken in order to avoid its expiry.

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1. Statutory limitation on criminal prosecution

Statutory limitation on criminal prosecution consists on the fact that because a deadline foreseen by the law has elapsed the criminal prosecution may not be initiated and the person cannot be imposed a punishment for the criminal offence he has committed. Therefore, statutory limitation is a legal institution where the state loses the right to apply criminal prosecution due to the statutory limitation. The criminal law recognises two types of the statutory limitation: statutory limitation on criminal prosecution and on the execution of punishments.

2. Commencement of statutory limitation on criminal prosecution

The period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. It was decided that the day when the criminal offence was committed is the time when the statutory limitation commences. A lot of criminal codes in the world accept the theory of action and not that of a consequence. In cases of continued criminal offences and collective criminal offences the period of statutory limitation commences with the last action undertaken e.g. in a case of a criminal offence of unlawful occupation of immovable property from article 332, the statutory limitation of the criminal offence of falsification of documents commences on the day the document is used, in case of criminal offences of status the statutory limitation commences on the moment the consequence occurred, for offences in co-participation it is the moment of undertaking the action of the main offence and not the moment when the very act of co-participation was undertaken, in cases of guaranteed omissive offences with intent commencement of the statutory limitation matches with non-compliance with guaranteed obligations. [282]

Pursuant to the Criminal Code of Kosovo period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. If a consequence that constitutes an element of a criminal offence occurs later, the statutory limitation commences to run from that time, article 107 para. 1 of the CCRK. If a criminal offence is committed against a person under the age of eighteen, the limitation period shall commence to run on the day the victim reaches the age of eighteen years, article 107 para. 2 of the CCRK.[283]

3. Tolling of statutory limitation on criminal prosecution

Tolling of statutory limitation is present when due to some circumstances foreseen by the law the criminal prosecution may not be initiated or if it has been initiated it may not continue according to the law. While those circumstances which obstruct initiation or continuation of the criminal

[282] Criminal Law, Prof.Dr. Vllado Kambovski, Skopje, 2006, pg. 1068
[283] Criminal Code of the Republic of Kosovo, No.04/L-082, fq. 46

prosecution are present, the statutory limitation does not run. This stay of the statutory limitation because of the effect of certain circumstances is called tolling of the statutory limitation. When the obstacles causing the tolling of the statutory limitation cease to exist, the statutory limitation continues to run. Subsequently, the period of the statutory limitation shall be extended for the time period of continuation of the tolling.

The criminal law recognises two types of obstacles, which may cause tolling of the statutory limitation: factual obstacles and legal obstacles.

Factual obstacles are circumstances and real situations which render it impossible initiation or continuation of the criminal prosecution, such as perpetrator of the criminal offence fleeing, address of the perpetrator is not known, occupation of a territory by an enemy, earthquake, flooding, fire and other similar circumstances which make work of the court impossible.

Legal obstacles exist in cases when a circumstance or a situation of a legal nature is present because of which criminal prosecution may not be initiated or continued, such cases are immunity of an MP, psychiatric illness of the defendant during the criminal procedure etc. In cases when the criminal offence was committed in co-perpetration, tolling of the statutory limitation may occur only against a co-perpetrator who is subject of the abovementioned circumstances or situations, whereas against the others it continues to run.[284]

4. Interruption of the statutory limitation

Interruption of the statutory limitation in our criminal code is foreseen in two cases where the statutory limitation is interrupted by every act undertaken by the competent state organ for the purpose of criminal prosecution of the perpetrators of the criminal offence, and the second case is when the perpetrator prior to expiry of the period of the statutory limitation commits another criminal offence of equal or greater gravity than the previous criminal offence.[1]

Statutory limitation is interrupted by any procedural act undertaken because of prosecution of the perpetrator of the criminal offence. The procedural act shall be undertaken against concrete persons in the capacity of the perpetrator for a concrete criminal offence; acts against unknown perpetrator or a concrete person are excluded e.g. the real perpetrator is summonsed for an informative talk at the police station, but without a reason for the talk to be concretely for the criminal offence. The act of interruption of the statutory limitation, different from the tolling, consists on the fact that for each interruption (each procedural act, or new criminal offence) the statutory limitation commences to run, so the period of the statutory limitation prior to the interruption occurring is not calculated in the statutory limitation.[2]

[286] Criminal Law, Prof.Dr. Ismet Salihu, Prishtina, 2010, pg. 561-562
[287] Criminal Law, Prof.Dr. Ismet Salihu, Prishtina, 2010, pg. 568-569
[288] Criminal Law, Prof.Dr. Vllado Kambovski, Skopje, 2006, pg. 1069

Based on the Criminal Code of the Republic of Kosovo, the statutory limitation period is interrupted by any act undertaken for the purposes of criminal prosecution of the criminal offence committed (article 107 para.5). The period of the statutory limitation is also interrupted if the perpetrator prior to expiry of the period of the statutory limitation commits another criminal offence of equal or greater gravity than the previous criminal offence (article 107 para.6), a new period of statutory limitation will commence after each interruption.

5. Absolute statutory limitation on criminal prosecution

Tolling and interruption of the statutory limitation may mean that it never actually practically expires. Due to this reason, the Criminal Code has foreseen absolute statutory limitation on criminal prosecution, which arises when twice the period of the statutory limitation required by the law has elapsed (article 107 para.8), so, e.g. if a relative statutory limitation of 2 years has been foreseen for a certain criminal offence, the absolute statutory limitation would be 4 years, or if a foreseen statutory limitation is 3 years, than the absolute statutory limitation is 6 years.[1]

6. Criminal offences not subject to statutory limitation

International crimes are not subjected to statutory limitation, criminal prosecution and execution of punishment are not subject to statutory limitation for the following criminal offences: genocide, crimes against humanity and war crimes foreseen by the CCRK, and relevant criminal offences foreseen by international conventions such as the United Nations Convention on Non-Applicability of Statutory Limitations for War Crimes and Crimes Against Humanity of 1968 as well as the European Convention of 1974.[2]

Pursuant to the Criminal Code of the Republic of Kosovo non-applicability of statutory limitation for criminal offences against international law and aggravated murder article 111 para.1 and 2, no statutory limitation shall be applicable for criminal offences of genocide, war crimes, crimes against humanity or for other criminal offences to which the statutory limitation cannot be applied under the international law, including the criminal offence of murder.

7. Periods of the statutory limitation according to the CCRK, article 106

The criminal prosecution may not be initiated after the following periods have elapsed:

- Thirty (30) years from the commission of a criminal offence punishable by lifelong imprisonment, article 106 para.1 item 1.1 of the CCRK:
- Ttwenty (20) years from the commission of a criminal offense punishable by imprisonment of more than ten (10) years, article 106 para.1 item 1.2 of the CCRK:
- Ten (10) years from the commission of a criminal offense punishable by

[289] Bar Exam Handbook, Prishtina 2009, pg. 223
[290] Criminal Law. Prof.Dr. Vllado Kambovski, Skopje, 2006, pg. 1070

imprisonment of more than five (5) years, article 106 para.1 item 1.3 of the CCRK:
- Five (5) years from the commission of a criminal offense punishable by imprisonment of more than three (3) years, article 106 para.1 item 1.4 of the CCRK:
- Three (3) years from the commission of a criminal offense punishable by
- imprisonment of more than one (1) year, article 106 para.1 item 1.5 of the CCRK; and
- Two (2) years from the commission of a criminal offense punishable by imprisonment up to one (1) year, article 106 para.1 item 1.6 of the CCRK.[3]

A sample of a Ruling on statutory limitation of the criminal prosecution:

BASIC COURT IN GJAKOVA, through its single judge X.X. and legal secretary I.I. in the criminal matter against the defendant N.N. from Gjakova because of the criminal offence of Falsification of a document from article 398 para.1 of the CCRK, according to Indictment of the Basic Prosecution Office in Gjakovë PP.nr.10/2009, dated 10.01.2019, deciding ex officio, based on article 107 para. 8 of the CCRK, and article 363 para.1 item 13 of the CPCRK, on 12.05.2014 rendered the following:

RULING

THE CHARGE IS REJECTED AND CRIMINAL PROCEEDINGS TERMINATED against defendant N.N from Gjakova because of the criminal offence of falsification of a document from article 398 para.1 of the CCRK.

- **Because of the absolute statutory limitation of criminal prosecution from article 107 para. 8 of the CCRK.**
-

  Based on article 69 of the CCRK, **the security measure is imposed – seizure of the falsified diploma**, which is the object of the criminal offence.

Reasoning

The Basic Prosecution Office in Gjakovë filed the indictment PP.no.10/2009, dated 10.01.2009, in front of this Court, against the defendant N.N. from Gjakova because of the criminal offence of Falsifying documents from article 398 para.1 of the CCRK.

After reviewing the indictment PP.no.10/2009, dated 10.01.2009, the Court arrived at the conclusion that the criminal prosecution against the defendant N.N. from Gjakova because of the criminal offence of Falsifying documents under article 398 para.1 of the CCRK is subject to absolute statutory limitation.

The criminal offence of Falsifying documents under article 398 para.1 of the CCRK, is sanctioned by fine and punishment by imprisonment of up to three (3) years.

[291] Criminal Code of the Republic of Kosovo, Nr.04/L-082, pg. 46

It is suspected that the defendant undertook actions of the criminal offence that he is charged with on 17.09.2007 when he presented this document to the public body.

The Court, by analysing actions undertaken by the defendant on 17.09.2007 and up until rendering of this Ruling, dated 12.05.2014, 6 (six) years have elapsed, came to a conclusion that the period of absolute statutory limitation on criminal prosecution against the defendant N.N. from Gjakova because of the criminal offence of Falsifying documents under article 398 para.1 of the CCRK, has expired.

Pursuant to article 107 para. 8 of the CCRK, the criminal prosecution shall be prohibited in every case when twice the period of statutory limitation has elapsed (absolute prohibition on criminal prosecution).

Decision on security measure – seizure of the falsified diploma is rendered based on article 69 of the CCRK, which is the subject of the criminal offence.

The Court, pursuant to article 107 para. 8 of the CCRK and article 363 para. 1 item 13 of the CCRK, and reasons mentioned above decided as in the enacting clause of this Ruling.

RENDERED AT THE BASIC COURT IN GJAKOVA,

P. no.23/2009, dated 12.05.2014.

Judge

X.X.

LEGAL REMEDY: Appeal may be filed against this Ruling within days from the day it was received, in front of the Court of Appeal in Prishtina, through this Court.

8. Statutory limitation on criminal sanctions

Statutory limitation on criminal sanctions consists on the fact that because of the foreseen legal deadline elapsing execution of the criminal sanction may not be undertaken and the person cannot be taken to serve the sentence or pay a fine for a criminal offence committed. Therefore, the statutory limitation is a legal institution where the state loses the right to execute a criminal sanction after a legal deadline for it has elapsed.

9. Commencement of periods of statutory limitation on the execution of punishments

The statutory limitation on execution of punishments consists on the fact that, once a period foreseen by the law elapses, the imposed punishment cannot be executed. This situation may occur if execution of the punishment has not commenced or if the execution is interrupted.

The period of the statutory limitation on execution of the punishment commences to run from the day the judgment become final, whereas if the alternative decision was revoked, than from the day the decision on revoking became final.

The statutory limitation of the execution is present for main punishments as well as for alternative and accessory punishments. However, the statutory limitation on accessory punishments is not present at the same time with main punishments or alternative punishments.

The statutory limitation on execution of punishments commences to run on the moment the judgment imposing the punishment becomes final. An exception to this rule is when the convicted person flees. In cases when the conditional punishment is revoked, the statutory limitation period commences to run on the day the convicted person fled. [285]

10. Tolling and interruption on execution of the punishments

The period of statutory limitation does not run for any time during which the execution of the punishment may not be initiated by law. Stay of the statutory limitation period may occur only by legal obstacles and not by factual ones on execution of the punishments and other sanctions and measures. Once the legal obstacles are removed the statutory limitation period continues to run from the moment of interruption, which means that the time period of occurrence of the legal obstacles is included in the period of the statutory limitation.

The period of statutory limitation is interrupted by every act undertaken by a competent authority for the purpose of executing the punishment. By an act undertaken for the purpose of executing the punishment we mean actions foreseen by the Law on Execution of Criminal Sanctions, which ensures voluntary or forced execution of the punishment such as summons or order to serve the punishment by imprisonment or order of compelling or domestic or international wanted notice. A new period of statutory limitation will commence after each interruption, this means that the time prior to action which interrupted the period of statutory limitation is not calculated in the statutory limitation period.

The execution of a punishment shall be prohibited in every case when twice the period of statutory limitation required by law has elapsed.

Circumstances due to which a punishment shall not be executed may be of legal or factual nature. Such circumstances which warrant interruption of the statutory limitation period are e.g. prolongation of execution of the punishment based on the Law on execution of criminal sanctions, also, it is possible when the convicted person is ill, or a member of his close family dies and also when prosecution organs cannot find the convicted person.[286]

[285] Criminal Law, Prof.Dr. Ismet Salihu, Prishtina, 2010, pg. 563-564
[286] Criminal Law, Prof.Dr. Vllado Kambovski, Skopje, 2006, pg.1072-1073
[1] Criminal Law, Prof.Dr. Ismet Salihu, Prishtina, 2010, pg. 565-566

11. Absolute statutory limitation on the execution of criminal sanctions

Tolling and interruption of periods of statutory limitation on the execution of punishments produce the same effect as in the case of tolling and interruption of periods of statutory limitation on criminal prosecution. Absolute statutory limitation on the execution of punishments occurs in every case when twice the period of statutory limitation required by law has elapsed, regardless of the fact that tolling and interruption were present and regardless of the time period they continued for. In case the absolute statutory limitation period expires, the imposed sanction may not be executed. Statutory limitations on the execution of accessory punishments and measures of mandatory treatment are types of criminal sanctions, therefore, the institution of the statutory limitations is applicable in relation to them, too.

12. Statutory limitation on the execution of accessory punishments and measures of mandatory treatments

Accessory punishments same as main punishments are types of criminal sanctions, therefore the statutory limitations are applicable in relation to them, too. The institution of the statutory limitation is applicable also in cases of measures of mandatory treatment. General reasons which lead to expiry of periods of statutory limitations on accessory punishments and measures of mandatory treatments are the same as in cases of limitations on execution of main punishments. Also, under the same conditions, provisions on tolling and interruption of periods of statutory limitations on execution of accessory punishments and measures of mandatory treatments are applicable as in the case of the absolute statutory limitation. However, due to specificities of accessory punishments and measures of mandatory treatments and their objective, periods of statutory limitations could not be the same as those of statutory limitations on the execution of main punishments.

13. Criminal offences which are not subject to statutory limitation

International crimes and execution of the punishment is not subject to the statutory limitation. So, no statutory limitation shall apply to the offences of genocide, war crimes, crimes against humanity, or other criminal offences to which the statutory limitation cannot be applied under the international law.

14. Statutory limitation on the execution of punishments pursuant to CCRK article 108

The imposed punishment cannot be executed after the following periods have elapsed:

- Thirty (30) years from a sentence of life long imprisonment, article 108 para.1 item 1.1 of the CCRK;

[2] Criminal Law, Prof.Dr. Ismet Salihu, Prishtina, 2010, pg. 566

- Twenty (20) years from a sentence of imprisonment of more than ten (10) years, article 108 para.1 item 1.2 of the CCRK;
- Ten (10) years from a sentence of imprisonment of more than five (5) years, article 108 para.1 item 1.3 of the CCRK;
- Five (5) years from a sentence of imprisonment of more than three (3) years, article 108 para.1 item 1.4 of the CCRK;
- Three (3) years from a sentence of imprisonment of more than one (1) year, article 108 para.1 item 1.5 of the CCRK, and
- Two (2) years from a sentence of imprisonment up to one (1) year, article 108 para.1 item 1.6 of the CCRK.

15. Statutory limitation on the execution of accessory punishments and of measures ofmandatory treatment pursuant to the Criminal Code of the Republic of Kosovo

- The execution of other accessory punishments shall be prohibited after five (5) years from the day when the judgment imposing this punishment becomes final, article 109 para.1 of the CCRK;

- The execution of a measure of mandatory treatment shall be prohibited after three (3) years from the day when the judgment imposing this measure becomes final, article 109 para. 2 of the CCRK;

- The statutory limitations on the execution of accessory punishments and the execution of a measure of mandatory treatment shall be tolled when the person fails to comply with court orders pertaining to the accessory punishments and measure of mandatory treatment, article 108 para.3 of the CCRK.

A sample of a Ruling on expiry of the period of statutory limitation of the criminal sanction:

BASIC COURT IN GJAKOVA, with the President of the Court D.D, regarding execution of the criminal sanction against the convicted person X.X. from Gjakova because of the criminal offence of Aggravated Theft under article 327 para.1 item 1.1 of the CCRK, ex officio, on **12.05.2014**, rendered the following:

RULING

Execution of the punishment against the convicted person X.X. from Gjakova, according to matter ED.no.20/2009 of the Basic Court in Gjakova, is PROHIBITED, because of absolute statutory limitation, so, every action in relation to the execution of the punishment is interrupted.

Appeal does not stay execution of this Ruling.

Reasoning

The Basic Court in Gjakova, ex-officio, conducted the criminal proceedings ED.no.20/09 from 20.01.2009, against the convicted person X.X., with residence in Gjakova, regarding serving the sentence, sentenced pursuant to Judgment P.no.50/08, dated 25.07.2008, rendered at the Basic Court in Gjakova, was sentenced by an imprisonment sentence of 1 (one) year, with the Judgment becoming final on 15.08.2008.

The Basic Court in Gjakova, summonsed the convicted person to serve the sentence on 20.09.2008 and the convicted person did not appear in Court voluntary in order to go and serve the sentence, therefore, this Court issued an Order to forcibly send the convicted person to serve the sentence, ED.no.20/2009, dated 01.10.2009, and on 02.03.2010 we have issued a Wanted Notice ED.no.20/09, which was never executed by the Kosovo Police-police Station in Gjakova, as it results from the case files.

The convicted person, according to the abovementioned Judgment, was sentenced with an imprisonment sentence of 1 (one) year.

Based on Judgment P.no.50/08, dated 25.07.2008, which became final on 15.08.2008 and it is subject to execution from the day it was rendered, and since then until the day this Ruling is rendered 4 years have elapsed, pursuant to article 106 para.1 item 1.6 in conjunction with article 107, 108 and 110 para. 1, 2 and 6 of the CCRK, the Court considers that the period of statutory limitation on the execution of the criminal sanction has expired, since over 4 (four) years have elapsed without the imprisonment sentence of 1 (one) year being executed.

Due to the reasons abovementioned it was decided as in the enacting clause of this Ruling.

RENDERED AT THE BASIC COURT IN GJAKOVA,

ED.n.20 /2009, dated 12.05.2014.

President of the Court-judge,

D. D

LEGAL REMEDY: An appeal may be filed against this Ruling within 3 days, starting from the day this Ruling is received, to the Court of Appeals in Prishtina, through this Court.

16. Conclusion

At the end I would like to state that all of what was said here about the statutory limitation on criminal sanctions and the execution of punishments - we as a young state did not pay a lot of attention to this institution since a lot of matters are subject to statutory limitations in Courts' shelves, and this is a consequence of a lot of cases that Judges have to deal with, as well as lack of professional staff at the Kosovo Police for execution of orders, as western countries have for example. This is the reason the statutory limitation commences to run. But, starting from the fact that this kind of a topic is a very wide field, it is obvious that there is lot to be said, however, the most important parts of it are included in this work.

Bibliography

- Criminal Law. Prof.Dr. Vllado Kambovski, Skopje-2006, Publishing house PH "Furkan ISM" 2nd Macedonian Brigade lok.22, 1000 Skopje-Macedonia
- Criminal Law. Prof. Dr. Ismet Salihu, Prishtina- 2010, 4th Edition, University "Fama" - Pristina
- Bar Exam Manual, Prishtina -2009 Implemented by UNDP- Kosovo and supported by the Government of Japan.
- Criminal Code of the Republic of Kosovo no.04/L-082




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CRIMINAL OFFENCES OF CORRUPTION

1. Introduction

Kosovo came out of the war with destroyed institutions. This means that corruption and criminality in Kosovo, same as in any other society, started to spread enormously, which mad general social functioning difficult. After the war Kosovo did not have legal infrastructure, institutions or proper state functioning, despite the fact that instalment of UNMIK administration made efforts to consolidate functioning of the social life, with all the evident difficulties.

The topic which we chose to discuss is "Criminal offences of corruption". In this work we have tried to treat this topic critically and as comprehensibly as possible.

At the beginning we shall talk about the meaning and the notion of the criminal offence of corruption.

Next, in this scientific research work we shall present also the characteristics of criminal offences of corruption, official corruption and criminal offences official corruption.

2. Meaning and the notion of the criminal offence of corruption

The criminal offence of corruption shall mean every violation of duty of official persons or responsible persons in legal entities and every activity of initiators or beneficiaries of such behaviour, committed in response to a directly or indirectly promised, offered, given, demanded, accepted or expected reward for oneself or some other person[287].

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[287] Law against Corruption No.2004/34, dated 22 April 2005

Corruption – any abuse of power or any other behaviour of official person, responsible person or other person for the purpose of achieving or obtain of an advantage for himself or for illegal profit for his/her self or any other person[288].

3. Characteristics of criminal offences of corruption are:

1. Violation of legal and ethical norms by official person.
2. Purpose of obtaining personal benefit.
3. Profit for oneself or any other person and
4. Cause of damage to an individual or society.

Senior Public Officials[289] in the Republic of Kosovo are:

President of the Republic of Kosovo, members of Presidential Cabinet, Secretary as well as Directors of Professional Departments in the Office of the President of the Republic of Kosovo; Members of Parliament, all persons selected or nominated by Assembly, Presidency, Chairperson of the Assembly as well as Cabinet of the Chairperson of the Assembly of the Republic of Kosovo; Prime Minister, Deputy Prime Minister, Ministers, Deputy Ministers, Political Advisors, Heads of Cabinets as well as all persons nominated by them; Permanent Secretaries of the Government, Managers of Agencies, which are established by law or any other act, Director, Deputy Director as well as Regional Directors of Kosovo Tax Administration, General Director and Directors of Customs Departments;

Auditors of General Audit Office as well as all internal institutional auditors;

Members of Boards of Public Enterprises, members of Regulatory Boards, of Commissions or other Agencies established by Law or any other act; Members of the Board, Director and Deputy Director of Central Banking Authority; Municipal Mayors and Deputy Mayors, Presidents,

Deputy Presidents, Advisers of Municipal Assemblies as well as all Directors of Municipal Directorates;

Members of Kosovo Judicial Council and of Kosovo Prosecutorial Council, Director of Judicial Council Secretariat, Director of Prosecutorial Council Secretariat, Judicial Auditor, Disciplinary Prosecutor; Judges and Prosecutors, Judges of Constitutional Court and Secretary of the Constitutional Court;

Directors of all departments, Heads of Public Finances and Procurement throughout all public institutions; Ambassadors, Consuls, Deputy Consuls, Secretaries of Embassies or Consulates of the Republic of Kosovo;

[288] Law on Anti-Corruption Agency No. 03/L-159, dated 29 December 2009, promulgated by decree No. DL-006-2010, on 19.01.2010.
[289] Law on Declaration, Origin and Control of Property and Gifts of Senior Public Officials No.04/L-050, dated 31 August 2011, promulgated by decree No.DL-028-2011, dated 31.08.2011.

Rector, Vice-Rectors of Public University, Deans and Vice-Deans as well as Secretary of Public University and of Academic Units; General Director, Deputy Directors and Regional Directors of Kosovo Police, Head of Kosovo Police Inspectorate; Commander, Deputy Commander of the Kosovo Security Force; Director, Deputy Director and General Inspector of Kosovo Intelligence Agency; Ombudsperson as well as his/her Deputies;

Chief Inspectors of central and local level.

Foreign public official or foreign official person [290] means:

- any person holding a legislative, executive, administrative or judicial office of a foreign State, whether appointed or elected;
- any arbitrator exercising functions under the national law on arbitration of a foreign State;
- any person exercising a public function for a foreign State, including for a public agency or public enterprise;
- any official, employee or representative of a public international organization and their bodies;
- any member of international parliamentary assembly; and
- any judge, prosecutor or official of international court or tribunal which exercises its jurisdiction over the Republic of Kosovo.

4. Official corruption and criminal offences against official duty

By criminal offences against official duty foreseen by the Criminal Code of the Republic of Kosovo the normal, regular and legal execution of the official duty by persons, to whom various public and state authorisations were trusted, is protected. Authorised persons shall exercise their official duty based on the law and in the interest of efficient administration and protection of the rights of citizens.

Perpetrators of these criminal offences most often are official persons and responsible persons[291]. However, perpetrator of these criminal offences in certain cases may be any person, such as cases of criminal offence of Unauthorised Use of Property (article 427), Giving Bribes (article 430) and Disclosing Official Secrets (article 433 of the CCRK).

A joint characteristic of these criminal offences is that these offences are committed with intent. This due to the fact that official persons or responsible persons by committing these offences, consciously and willingly act unlawfully. An exception is made in the case of the criminal offence

[290] Criminal Code of the Republic of Kosovo No.04/L-82, dated 20 April 2012, entered into force on 01 January 2013, promulgated in the Official Gazette of the Republic of Kosovo based on article 80 paragraph 4 of Republic of Kosovo.
[291] Article 120 paragraph 1 of the Criminal Code of the Republic of Kosovo No.04/L-82, dated 20 April 2012 entered into force on 01 January 2013, promulgated in the Official Gazette of the Republic of Kosovo based on article 80 paragraph 4 of the Republic of Kosovo.

of Disclosing Official Secrets for which criminal liability is foreseen even if it is committed in negligence[292].

Official person[293], who by taking advantage of his office or official authority, exceeds the limits of his or her authorizations or does not execute his or her official duties with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violates the rights of another person, shall be punished by imprisonment of six (6) months to five (5) years, article 422 of the CCRK.

Corruption, as a negative phenomenon, obstructs development of the country, the rule of law, strengthening of democracy, causes loss of citizen's faith in justice and state institutions, incites citizens in committing criminal offences of corruption, increases the gap between persons with high leading positions who through corruption manage to get rich overnight, affects economic development since foreign investors do not invest in countries with high level of corruption due to insecurity.

Perpetrators of these criminal offences are first of all official and responsible persons who exercise a certain function in state bodies, in public services, other public institutions and entities, which make decisions on citizen's right and duties. They are representatives of the highest state levels, they are persons that hold high posts with authority, holders of high state and economic functions with certain authorisations, persons in responsible positions, in commercial-business and economic and customs positions, in trade of goods – trade agents, brigadiers etc. usually, perpetrators of these criminal offences are official persons.

The manner of commission of these criminal offences of corruption is by acting and only with the intent.

Criminal offences against the official duty could be criminal offences that may be committed only by official persons and criminal offences that may be committed also by persons without the capacity of official or responsible persons.

The category of criminal offences that may be committed only by official persons includes the following criminal offences:

- Abusing official position or authority
- Misusing official information
- Misappropriation in office
- Conflict of interest
- Disclosing Official Secrets
- Fraud in Office

[292] Ismet Salihu, Criminal Law (specific part), Prishtina, 2014 pg. 652.

[293] A person elected or appointed to a State body; an authorised person in a state body, business organisation or other legal person, who by law or by other provision issued in accordance with the law, exercises public authority; a person who exercises specific official duties based on authorisation provided for by law, article 120 of the CCRK.

- Accepting Bribes
- Issuing unlawful judicial decisions
- Falsifying official document
- Unlawful collection and disbursement
- Unlawful appropriation of property during a search or execution of a court decision
- Failure to report or falsely reporting property, revenue/income, gifts, other material benefits or financial obligations.

The categories of criminal offences that may be committed also by persons who are not official or responsible persons include the following criminal offences:

- Unauthorised Use of Property
- Giving Bribes,
- Trading in Influence and
- Giving Bribes to Foreign Public Official

One of the joint, essential, elements of criminal offences that may be committed also by a person not in a capacity of the official or responsible person, is the one where its perpetrator, in majority of cases, may only be the official person. However, the official persons, as the main subject of these offences, do not himself define their character in placing them in the group of criminal offences against the official duty. It was already mentioned that the essence of the criminal offences against the official duty is violation of duties and functioning of services, which implicates a wide concept of such offences, in which are included, except offences dealing with exercise of the official duty, also offences linked with their commission. It is about specific criminal offences which are not exclusively official criminal offences, but they, apart from official persons, may be committed by other persons in office or who generally work in state organs or in public services; their perpetrator may also be any (through trading in influence, giving bribes etc.).

Perpetrators of criminal offences of corruption usually are not from the ranks of classic crime world, but they are representatives of the highest levels of a state, they are people in high posts and authority, holders of high state economic functions with certain authorisations, people in responsible positions related to business and commercial world, in economy and customs services; in trading with goods – trading agents.

These criminal offences may be consumed only during exercise of the official duty and outside of this these criminal offences do not exist. Usually, perpetrators of these criminal offences most often are officials that exercise a certain function within state organs, public services, public and other institutions, which take decisions on citizen's and legal persons' rights and duties such as: granting certain permits or consents, granting of certificates, rulings, diplomas, various tax and customs obligations and other financial obligations to the state etc.

5. Criminal offences of corruption pursuant to the Criminal Code of the Republic of Kosovo

5.1 Abusing official position or authority

This criminal offence is committed by an act or omission. The offence is committed by an act when an official person undertakes acts that are within his authorities, but he uses these authorities to with the intent to acquire any benefit for himself or another person or to cause damage to another person. Another manner of commissioning of these criminal offences is also exceeding of authorities committed by an official person with the intent to acquire any benefit for himself or another person or to cause damage to another person. This criminal offence is committed by omission when official person in order to acquire benefit for himself or another person or to cause damage to another person does not perform his official duty, he does not undertake the act which according to the law he should have undertaken.

This criminal offence is committed only by direct intent.

5.2 Misusing official information

This criminal offence is committed when an official person with the intent to acquire benefit for him or another person misuses official information which he learned during execution of his official duty.

This criminal offence is committed only by direct intent.

5.3 Conflict of interest

This criminal offence is consumed in cases when there is a conflict between the public official duty and private interest of an official, when during execution of his function an official or a person close to him has a financial interest or non-financial personal, direct or indirect, that affects, or may affect the appropriate manner of execution of the public function, where he may be in situations of possible violation of principles, limitations or prohibitions and obligations, in accordance with the law.

5.4 Misappropriation in office

This criminal offence is committed when an official person with the intent to acquire unlawful benefit for him or another person during execution of his official duty misappropriates property which was entrusted to him because of his position. Perpetrator of this criminal offence is an official person to whom, because of his official position, monies or other means of value were entrusted.

This criminal offence is committed only by direct intent.

5.5 Fraud in office

This criminal offence is committed when an official person or responsible person during execution of the official duty and in relation to execution of the official duty, with the intent to acquire unlawful benefit for himself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement.

5.6 Unauthorised use of property

This criminal offence is committed when a person, to whom, because of his duty or workplace, money, securities or other movable property has been entrusted, whereas he uses the same for himself or confers such property without authorisation on another person.

This criminal offence is committed only by direct intent.

5.7 Accepting bribes

This criminal offence is committed when an official person acquires benefit for himself or another person by executing an official duty which according to the law he must execute, or not to execute a duty which according to the law he must not execute.

5.8 Giving bribes

This criminal offence is not committed by an official person but by any person who gives a gift to an official person in order for the official person, within his legal authorisations, to execute his official duty which he is obliged to execute or not to execute his official duty which he is prohibited from executing, or when a person gives or promises to give to an official person or responsible person a gift or another benefit in order for him, within his legal authorisations, to execute an official act which is prohibited or not to execute an act which he is obliged to execute.

5.9 Giving bribes to foreign public official

The manner in which this criminal offence is committed is similar to the manner the criminal offence of Giving bribes is committed, with the difference that in this case the bribe is given to a foreign public official, who because of the immunity cannot be criminally prosecuted.

5.10 Trading in influence

Tis criminal offence may be committed by any person, who unlawfully promises, offers or requests, accept a gift in order to influence another official person in undertaking a lawful or unlawful act or to refrain from acting.

5.11 Issuing unlawful judicial decisions

The criminal offence may be committed by an act or omission. The criminal offence is committed by an act when a decision, ruling, order or other unlawful act is rendered or by undertaking other actions in violation of the law (e.g. consciously entering non-existing in the minutes of a main trial, which have essentially influenced in non- rendering of a legal decision). Meanwhile, the criminal offence is committed by an omission in cases when an obligation of a judge to undertake certain actions existed (e.g. a judge intentionally did not enter relevant facts in the minutes, on which existence or non-existence of responsibility depends by rendering an unlawful act).

The intent of the judge to acquire unlawful property gain must be present in order for this criminal offence to exist.

5.12 Disclosing official secrets

this criminal offence exists when an official person or responsible person, without authorisation, communicates, sends, or in some other way makes available to another person information which constitutes an official secret or obtains such information with the intent to convey it to another unauthorised person, or when the perpetrator intends to publish or use such information outside the territory of Kosovo.

A characteristic of this criminal offence is that it may be committed by negligence and it may be committed by a person who has previously been an official person and had an obligation to guard the official secret.

5.13 Falsifying official document

This criminal offence exists when an official person, in an official document, official register or file, enters false information or fails to enter essential information or with his signature or official stamp certifies a document, official register or file which contains false data or enables the compilation of such document, register or file with false content.

There are three modalities of falsifying documents:

1. Entering false data or failing to enter important data;
2. Certifying a false document, register or file and
3. Enabling compilation of a false document, register or file with false content.

The first form of the criminal offence consists on compilation of a document, register or official file with a false content. The criminal offence is committed with entering of false information on the mentioned document or non-entering of important information. ***The second form*** of the criminal offence consists on *certifying* a document, register or official file with a false content, by placing a signature or stamp. Certification must be done by an official or responsible person, whereas in relation to existence of the offence it is not important which person compiled the false

content. ***The third form*** consists on ***enabling*** compilation of a document, register or file with a false content.

This form of the criminal offence is consumed when an official person, by his signature, or official stamp enables another person to obtain a document or register with a false content, but in this case it is required that the official person is aware that the other person shall enter false information on a such document or register. This criminal offence also exists when an official person or responsible person uses a false document, official register or file as if it were true in his business activity or who destroys, hides, damages or in any other way renders unusable the official or business document, official register or file.

Perpetrator of all forms of the criminal offence may only be an official person or responsible person.
Criminal offence may be committed only with the intent.

5.14 Unlawful collection and disbursement, the criminal offence is committed by an official person or responsible person who collects from another something that such a person is not bound to pay or collects more than such a person is bound to pay or who, in a payment or delivery pays or delivers less than what is required. So, it is about an official duty.

According to manner of the commission, the offence may present in two forms:

1. Unlawful collection and
2. Unlawful disbursement.

In the first case, an official person or responsible person collects something from another that such a person is not bound to pay or collects more than such a person owed, even though he is aware that the obligation to pay does not exist or that it does not exist as the requested sum. Therefore, the criminal offence would not be committed if an official person collects more by mistake. In the second case, an official person or responsible person, in a payment or delivery pays or delivers less than what is required.

Perpetrator of the criminal offence may be only official person or responsible person, whose scope of work includes collecting and disbursement.

The criminal offence is committed with intent.

5.15 Unlawful appropriation of property during a search or execution of a court decision

This criminal offence is committed by an official person who during a search of premises or a person or during the execution of a court decision takes movable property with the intent of obtaining an unlawful material benefit for himself or another person.

In order for the criminal offence to exist it is necessary that the property is taken during execution of mentioned legal actions by the official person.

The criminal offence may be committed only with ***direct intent***, which also includes the intent to unlawfully obtain material benefit.
Perpetrator of the criminal offence may only be an official person.

5.16. Failure to report or falsely reporting property, revenue/income, gifts, other material benefits or financial obligations, article 437

This criminal offence may be committed by any official person who although obligated to file a declaration of property pursuant to the Law on Declaration, Origin and Control of Property and Gifts of Senior Public Officials, fails to do so. This criminal offence may be committed by an omission to act in cases when property is not declared within the legal deadline, and by an act when property is falsely declared.

Within the CCRK there are another four criminal offences considered to be criminal offences with a corruptive element, and this is based on the instruction of the Chief Prosecutor, and they are:

- Facilitating the escape of persons deprived of liberty defined by article 406 of the CCRK.
- Escape of persons deprived of liberty article 405 para. 2 of the CCRK.
- Unjustified giving of gifts under article 316 of the CCRK and
- Entering into harmful contracts under article 291 para. 2 of the CCRK.

In order to prevent and fight corruption the Assembly of the Republic of Kosovo issued the Law on Anti-Corruption Agency, with competences below[294] .

- Initiates and undertakes the detection and preliminary investigation procedure of corruption, and forward criminal charges for the suspected cases of corruption in competent public prosecutor's office, if for the same case the criminal procedure has not been undertaken;
- Cooperates with local and international institutions that have as a mission fighting and preventing corruption;
- In cooperation with the Commission, Government, other Institutions and nongovernment organizations prepares Strategy against the Corruption and action plan;
- Monitors and supervises the implementation of the Strategy against Corruption and action plan;
- Supervises and prevents cases of conflict of interest and undertakes the measures as foreseen by a special Law;
- Supervises and the property of senior public officials and other persons, as required by specific Law;

[294] Article 5 para. 1 of the Law on Anti-Corruption Agency, Law No.03/L – 159, dated 29 December 2009, promulgated by decree No. DL-006-2010, dated 19 January 2010.

- Supervises the acceptance of gifts relating to the performance of official duty and undertakes measures foreseen by Law;
- Cooperates with public authorities responsible for drafting, implementation and harmonization of legislation for combating and preventing corruption;
- It is represented in international meetings that have to do with combating and preventing the corruption and takes part in the process of negotiations to conclude bilateral and multilateral agreements or the adoption of international legal instruments against corruption;
- cooperates with the competent institutions of the Republic of Kosovo for the implementation of obligations arising from international acts against the corruption and offers recommendations for their completion;
- Participates and offer advice on drafting the code of ethics in the public and private sectors;
- Provides opinions regarding the conflict of interest and supervision of gifts related to the performance of official duty;
- Offers clarification regarding the manner of declaration of wealth and other issues from the scope of the Agency;
- Collects, analyses and publishes statistical data or other data regarding the state of corruption in Kosovo;
- Cooperates with state institutions and civil society for raising public awareness about corruption;
- Reports to the Assembly once a year and to the Commission every six (6) months for the work of the Agency. The Commission may request more frequent reports from the Agency;
- Prepares and proposes the annual budget of the Agency.

The President of the Republic of Kosovo, on 15 February 2012, within her efforts to fight corruption, established the National Anti-Corruption Council.

The aim of this council is coordination of the work and activities of institutions and agencies within their competencies and scope of work in preventing and fighting corruption. Also, with an objective to fight the organised crime and corruption, the Kosovo Prosecutorial Council drafted the Strategic Plan[295], for Inter-Institutional Cooperation in the Fight against Organised Crime and Corruption 2013-2015, approved on 16 November 2012.

The Kosovo Prosecutorial Council, within its competencies and responsibilities coming from the Constitution and the Law on Kosovo Prosecutorial Council, through this strategy demonstrates its will and dedication in fighting the organised crime and corruption. While drafting this strategy the Kosovo Prosecutorial Council based itself on recommendations of the Presidency of the European Union Council, dated 8 June 2011, no.9225/4/11 REV 4. Also, the Kosovo Prosecutorial Council, while drafting this strategy, consulted, accepted, comments and recommendations from these institutions: Kosovo Police, Customs, Anti-Corruption Agency and other Agencies and institutions implementing the law in Kosovo. The aim of this Strategic Plan is improvement of the cooperation

[295] Strategic Plan for Inter-Institutional Cooperation in the Fight against Organised Crime and Corruption 2013-2015, approved on 16 November 2012.

between the prosecutorial system of Kosovo and other institutions included in the fight against the organised crime and corruption.

The Kosovo Prosecutorial Council, through this strategy, aims to achieve the following objectives:

- improved detection, investigation and successful prosecution of organised crime with special attention to trafficking in narcotics, weapons and human beings;
- improved detection, investigation and successful prosecution of corruption offences,
- improved detection, investigation and successful prosecution of money laundering offences,
- improved the identification of material benefits of criminal offences and increase confiscation of material benefits of criminal offences,
- increased prevention of organised crime, corruption and money laundering,
- improved the quality of information and statistical data about the detection, investigation and prosecution of organised crime, money laundering and corruption offences,
- increased public awareness through improving the quality of information provided to the public and media and improve cooperation with the public and media.

The Kosovo Prosecutorial Council shall appoint expert prosecutors after consultations and agreement with the Chief Prosecutor and Head of the SPRK.

The Kosovo Prosecutorial Council shall establish a database on specific criminal offences of organised crime and corruption.

According to this Strategic Plan, the Kosovo Prosecutorial Council and the Chief Prosecutor, shall cooperate and coordinate with other agencies and institutions implementing the law in Kosovo, in particular with the Kosovo Police and the Anti-Corruption Agency, in joint reporting on achievements of the fight against the organised crime and corruption.

6. Monitoring and evaluation of the strategy implementation

The aim of the monitoring and evaluation of implementation of the strategy is to follow and continually ensure execution of the objectives since the Strategic Plan is a continuous process.

A monitoring report may be submitted to The Kosovo Prosecutorial Council every six months or based on requests even more often in order to enable verification of the progress of the strategy and the action plan.

The report shall be drafted by the Performance Evaluation Unit of the Kosovo Prosecutorial Council together with expert prosecutors and the SPRK. Evaluation of the strategy implementation is done once a year by the working group of evaluators composed of representatives of institutions and agencies included in the plan, relevant expert prosecutors and the Head of the SPRK.

The Evaluation Report shall be secured and presented to the Kosovo Prosecutorial Council.

7. Conclusion

There is a lot to be said in relation to the criminal offences of corruption. However, we have tried to draft this scientific-research work reasonably and draw a conclusion for the criminal offences of corruption and corruption in general. If we compare what has been done in Kosovo about fighting criminal offences of corruption, it can be seen that a lot has to be done.

Even despite the sufficient legal basis that exists and the coordination of various institutions of Kosovo in fighting corruption, corruption is still widespread and fighting of these offenses remains a big challenge.

Corruption as a negative phenomenon obstructs development of the country, the rule of law, strengthening of democracy, causes citizens to lose faith in in justice and state organs, makes people commit criminal offences of corruption, increases the gap between people in high positions, who got rich overnight, and others, affects economic development since foreign investors do not invest in countries with high levels of corruption due to insecurity.

At the same time, the corruption phenomenon was a subject of frequent criticism by international observers of the Kosovo judicial system. Achieving higher standards in this direction must be the main objective of those implementing the law and the judicial system in general.

Bibliography

- Ismet Salihu, Criminal Law (special part), Prishtina, 2014.
- Suppression of Corruption Law, No.2004/34, of 22 April 2005
- Law on Anti-Corruption Agency, No. 03/L-159, of 29 December 2009, promulgated by decree No. DL-006-2010, on 19.01.2010.
- Law on Declaration, Origin and Control of Property and Gifts of Senior Public Officials, No.04/L-050, of 31 August 2011, promulgated by decree No.DL-028-2011, of 31.08.2011.
- Strategic Plan for Inter-Institutional Cooperation in the Fight against Organised Crime and Corruption 2013-2015, approved on 16 November 2012.