Opinio Juris

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Introduction

Dear readers,

It is with pleasure to address to you through this legal magazine, publication of which in this format started for the first time, hoping to hold a valuable place in the legal literature and in the JIK publications.

The magazine "Opinio Juris" is published for the first time this year, giving the opportunity for publication to the judges, prosecutors, university proffessors and other judicial experts in Kosovo. The topics of the magazine are selected by the Editorial Board of the JIK, which is comprised by the eminent professionals from the legal, prosecution and the judiciary system in the country.

This magazine contains works by different authors such as judges, prosecutors, university professors, lawyers, etc. that through their works deal with various legal issues related to judicial snd legal practice in national and international level .

The purpose of this magazine is to provide professional support to judges, proseutors and other legal experts in Kosovo and beyond.

By reading the works in this journal, it is noted that the authors have addressed legal issues which were the subject of changes in legislation and mostly new legal institutes that deserve further attention from the legal science in Kosovo.

We hope that the topics covered by this number of magazine "Opinio Juris" will serve as an opportunity to recognize different perspectives, both positive and will provide assistance to the work of the legal community and other readers that are serving the justice system in Kosovo.

Mr.Sc. Lavdim Krasniqi
Director of the Judicial Institute of Kosovo

Mr. Sc .Afrim Shala*

CRIMINAL ACTS AGAINST THE RIGHTS TO VOTE

ABSTRACT

Criminal offenses against the rights to vote are given in a separate chapter of a special section of the Criminal Code of the Republic of Kosovo[1]. Offenses against the rights to vote in Kosovo, recently have been paid particular attention by domestic and international institutions, due to the fact that a series of criminal proceedings against persons alleged to have committed offenses of this nature have been launched. Because of their nature, acts against the rights to vote are committed by political motives and are connected to the elections in the Republic of Kosovo.

Key words: the right to vote; elections; the voting process; the action of commission; consequences of the offense; perpetrator

1. General overviews

Offenses against the voting rights are provided in Chapter XVIII of the KPRK. This chapter is a new Chapter in KPRK and besides that it is a new Chapter, there are also some new criminal offenses which were not foreseen as such in previous criminal legislation. Some of the offenses in this Chapter, the former Criminal Code of Kosovo (CCK) [2] have been provided under the Chapter of offenses against freedom and human rights.

Because of their consequences and danger, crimes against voting rights according to article 22 of the Criminal Procedure Code (CPC) [3], are considered serious crimes and the Department of Serious Crimes of the Basic Court is competent for their judgment at first instance.

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[1]Criminal Code of Republic of Kosovo (Hereinafter CCRK), No.04/L-82, of the date 20.04.2012, entered into force 01.01.2013.

[2] Criminal Code of Kosovo, UNMIC Regulation no. 2003/25, of the date 06.07.2003.

[3] Code on Criminal Procedure, No.04/L-123, of the date 13.12.2012, entered into force on 01.01.2013.

Most criminal acts of this chapter are of Blunkett character, because in order to exist these offenses should be performing actions contrary to the relevant electoral laws.

Some of the offenses in this Chapter are also severe or qualifying forms, which are considered done if the basic format of these crimes are committed with the use of force or serious threat, or such offenses are committed by the member of the electoral commission or any other person in the exercise of official duties in relation with the vote.
Any person can be a perpetrator of criminal acts against the voting rights. However, some criminal acts of this chapter may be performed only by persons who possess certain qualities, such as offense misuse of official duties during the elections, under Article 214 of CCRK can only be performed by an official person. [4]

All offences from this Chapter can be performed deliberately and with certain political motives.

2. Violation of the right to candidate[5]

The right to vote includes active right and passive right to vote. The active right to vote is the right of citizens who have reached the age of adult to vote in the elections held in the Republic of Kosovo, and the passive right to vote is the right of citizens to stand for election to certain positions. The right to vote is guaranteed by Article 45 of the Constitution of the Republic of Kosovo, as well as by provisions of the Law on Local Elections of the Republic of Kosovo[6] and the Law on General Elections of the Republic of Kosovo[7], which has been amended by Law on Amending and Supplementing the Law on General Elections in Republic of Kosovo. [8] Based on these legal provisions, the use of the right to vote is

[4] Such criminal acts, that may be committed only by persons that possess certain qualities (for example. an official), in the criminal law are called *"delicta propria"*. Shala, Afrim, *Introduction to the criminal law,* Second edition, Gjilan, 2013, pg 45.
[5] Article 210, CCRK.
[6] Law no.03/L-072 For Local Elections in Republic of Kosovo, of the date 05.06.2008 (Hereinafter LLERK).
[7] Law no..03/L-073 For General Elections in Republic of Kosovo, of the date 05.06.2008 (Hereinafter LGERK).
[8] Law no.03/L-56 For Amending and Supplementing the Law no. 03/L-073 For General Elections in Republic of Kosovo, of the date 29.10.2010.

guaranteed by the provisions of the criminal legislation of the Republic of Kosovo, respectively KPRK provisions. [9]
Violation of the right to run is a new violation provided in KPRK and this criminal act violates the passive vote.

According to paragraph 1 of Article 210 of KPRK, the basic form of this criminal act is performed by whoever unlawfully prevents or hinders a person from running in elections.

Action of committing this violation consists in undertaking such illegal action by which a person is prevented or obstructed of cadidating in elections.

Object of protection of this criminal act is the right to run in elections.

The consequence of this offense is preventing or obstructing a person from running in elections, or the inability of a person to run in the elections.

Punishment by a fine or imprisonment up to one year is provided for this form of criminal act.

A severe form of this offense is provided in the paragraph 2 of Article 210 of KPRK. According to this legal provision, severe form of this offense exists when the basic form of this offense from paragraph 1 of this article is committed with the use of force[10] or serious threat, which provides punishment with imprisonment of six months to three years.

Any person can be a perpetrator of this offense.

3. Threat to the candidate[11]

Another new criminal offense provided in this chapter is the threat of KPRK candidate. According to paragraph 1 of Article 211 of KPRK, the

[9] Shala, Afrim, *Particular part of the criminal law with judicial practice, Gnjilane*, 2010, pg.128.
[10] According to article 120 paragraph 15 of CCRK, as strength among others is also implementation of hypnosis or other intoxicating substances for the purpose of bringing the person against his will in a state of unconsciousness or to disable for rezistence.
[11] Article 211 of CCRK.

basic form of this criminal act is performed by whoever unlawfully compels any candidate to pull his candidacy.

Actionof performing this type of offense consists in taking such an illegal action by the perpetrator who obliges any candidate to withdraw his candidacy. For this form of criminal act punishment by a fine or imprisonment up to one year is provided.

Another form of this offense is provided in paragraph 2 of this article, which is considered to occur when someone unlawfully prevents or obstructs any candidate from exercising any activity during the electoral campaign.

Object of protection of this form of offense is the exercise of free and unimpeded election activity, of any candidate during the election campaign.

An action by which this form of offence is performed is prevention or inhibition of any candidate to perform any activities during the election campaign. [12]

Punishment by a fine or imprisonment up to one year is provided for this form of criminal act.

While, severe form of this offense is provided in the paragraph 3 of this article, which is considered to be carried out in cases where forms of this offense from paragraph 1 or 2 of this Article are carried out with the use of force or serious threat. So, this severe form of offense is considered to have been committed if the perpetrator unlawfully, by force or by serious threat compels a candidate to withdraw his candidacy, or the use of force or serious threat illegally prevents or obstructs any candidate from exercising any activity during the electoral campaign.

Punishment by a fine or imprisonment from six months up to three years is provided for this form of criminal act.

Any person can be a perpetrator of this offence

[12] Salihu Ismet, Zhitija Hilmi & Hasani Fejzullah, *Criminal Code of Republic of Kosovo, Commentary*, Edition I, Prishtina, 2014, pg. 574.

4. Prevention of exercising the right to vote[13]

The basic form of criminal act prevention of exercising the right to vote, in accordance with paragraph 1 of Article 212 of KPRK, is performed by whoever is entrusted to exercise tasks related to elections, unlawfully and with intent to obstruct another person from exercising his right to vote, does not register such person in the voter registration list or removes such person from the voter registration list.

Actions of performing this form of criminal act are set alternately and consist of not registering a person in the voter registration list or removal of such person from the voter registration list, by the perpetrator unlawfully.
Punishment by imprisonment from one up to three years is provided for this form of criminal act.

This form of the offense can be committed only deliberately, which in itself includes the goal of preventing another person from exercising his right to vote.
A perpetrator of this type of offense can only be a person who is entrusted with certain tasks during the elections.

Another form of the offense is provided in the paragraph 2 of this article, which is considered to have been committed when the perpetrator during the vote or referendum, unlawfully prevents, impedes or affects free decision of voters or in any other way prevents another person in exercising his right to vote.

Punishment by imprisonment up to one year is provided for this form of the criminal act

This form of offense can be committed only deliberately and any person can be a perpetrator.

While severe form of this offense, referred to in paragraph 3 of this article, exists in cases when the offense under paragraphs 1 or 2 of this article is committed by a perpetrator who uses force or serious threat.

Punishment by imprisonment from one to five years is provided for this form of criminal act.

[13] Article 212, CCRK.

Based on these provisions, Article 213 of KPRK also envisages as a criminal violation the free determination of voting. According to this legal provision, this offense is carried out by whoever uses force or serious threat, or by abuse of economic dependence and professional influence of the voter, compels the voter in the Republic of Kosovo to vote in a particular manner or not to vote in the elections.

Carrying out actions of this criminal act consist in influencing the will of the voter or his obligation to vote in the specified manner or not to vote in elections.

Instruments of performing this offense are the use of force, serious threat, the abuse of economic or professional dependence. The offense is considered to have been committed when the person to whom it is subject to violence, serious threat, the abuse of economic or professional dependence, under the influence of these instruments voted in the specified manner or did not vote at all.

Perpetrator of this offense may be any person and this offense can be committed only deliberately.

Punishment with imprisonment from one to five years is provided for this form of criminal act.

6. Abuse of official duty during elections[14]

According to Article 214 of KPRK, this offense is carried out by any official person who is entrusted with tasks related to elections, who abuses his position, duty or authority by ordering, advising or committing any illegal act in order to change or impact the voter registration list or voting of any person, or in any other way acts in order to change, influence or impede any person from exercising his right to vote, not to vote, to cast an invalid vote or to vote in favour or against a specific person or proposal.

Punishment by a fine or imprisonment of two to five years is provided for this criminal act.

Any official who is entrusted with tasks related to elections in the Republic of Kosovo can be a perpetrator of this offence.

[14] Artcile 214, CCRK.

This offense can be committed only deliberately, which in itself includes the above mentioned purpose.

7. Giving or receiving bribes in relation with voting[15]

According to paragraph 1 of Article 215 of KPRK, the criminal offense of providing or receiving bribes in relation to voting, is committed by whoever promises, offers or gives any benefit or unmerited gift to any person, with intent to influence that person to vote, not to vote, to vote in favour or against a specific person or proposal or to cast an invalid vote in an election or referendum.
Actions performing this form of offense are promising, offering or giving any benefit or undeserved gift to any person.
This form is considered a criminal act, at the time of issuance of the promise, offering or giving any benefit or undeserved gift to any person.
This form of offense can only be carried out deliberately and with the intention of influencing another person to vote, not to vote, to vote in favor or against a specific person or proposal or to cast an invalid vote election or referendum.
Punishment with imprisonment from one to five years is provided for this criminal act.
Another form of this offense is provided in paragraph 2 of Article 215 of KPRK. This legal provision envisages that the second form of this criminal act is performed by anyone who seeks or accepts any benefit or undeserved gift for himself or for another person, or accepts the offer or promises such benefit or gift, to vote or not to vote, to vote in favor or against a specific person or proposal or to cast an invalid vote in an election or referendum.
Actions of performing this form of offense consist in seeking or receiving any benefit or undeserved self gift or gifts for any other person or accept the offer or promises such benefit or gift.
This form of offense is considered as committed at the moment of request or receipt of a benefit or undeserved self gift or gift for another person.
This form of offense can only be carried out deliberately and with the intention to vote or not to vote, to vote in favor or against a specific person or proposal or to cast an invalid vote in an election or referendum.
Punishment with imprisonment of one to five years is provided for this criminal act.

[15] Article 215, CCRK.

Special form of this offense is provided in paragraph 3 of Article 215 of KPRK. This form of offence is performed by a person who serves as an intermediary and violates paragraph 1 or 2 of this article.

Punishment with imprisonment of one to five years is provided for this criminal act.

Severe form of this offense can be committed only by a member of the Election Commission or by any other person while in the official duty, in relation with voting and other forms of this offense can be performed by any person.

8. Abuse of the right to vote[16]

According to the legislation in force, the citizen of the Republic of Kosovo has the right to vote only once during the elections. Also, the citizen has the right to vote only on his behalf and to use only one voting list. Thus, disregard of these rules is considered an offence according to article 216 of KPRK and is entitled "Abuse of the right to vote". According to this provision, the offence is committed by whoever performs one or more of the following acts:

1. Votes or attempts to vote on behalf of another person;
2. Votes or attempts to vote although he voted once, or
3. Uses more than one voting list.

Carrying out actions of this offencee are determined alternatively and consist of cases when the perpetrator votes on behalf of another person or attempts to vote on behalf of another person; votes although he voted once (votes for the second time) or attempts to vote although he voted once earlier, or uses more than one voting lists.

Any person can be perpetrator of this basic offence.

Punishment with imprisonment from six months to three years is provided for this form of offence.

The severe form of this offence is provided in the paragraph 2 of article 216 të KPRK, which is considered that occurs in cases when a member of

[16] Article 216, CCRK.

the Election Commission enables another person to perform or attempts to perform criminal act from paragraph 1 of this article.

Actions of performing this form of offense consist in enabling the user by the Electoral Commission member to conduct basic form of criminal act by another person.

Perpetrator of this offence can only be a member of the Election Commission.

Punishment with imprisonment from three to five years is provided for this severe crminal act.

9. Obstruction of the voting proces[17]

The basic form of offence obstruction of the voting process, according to paragraph 1 of article 217 of KPRK, is committed by whoever illegally obstructs or interrupts the voting process..

Actions of performing this form of offence consist in undetaking ilegall actions by which the voting process is obstructed or interrupted.

Punishment with imprisonment from one to two years is provided for this form of criminal act.

Severe form of this criminal act is provided in paragraph 2 of this article, which is considered as committed in cases when the perpetrator by the use of force or serious threat, obstructs the voting process, disturbs the public order in the polling station, which provides punishment with imprisonment from one to three years.

Any person can be perpetrator of this offence.

10. Violation of secrecy of voting[18]

The secrecy of voting is guaranteed under paragraph 2 of article 45 of the Constitution of Republic of Kosovo. While, based on this legal provision,

[17] Article 217, CCRK.
[18] Article218, CCRK.

the violation of the secrecy of voting in KPRK, is envisaged as a criminal offense. Thus, under paragraph 1 of Article 218 of KPRK, this offense is carried out by whoever violates the secrecy of the ballot during elections or during referendum.

Actions of performing this offence consist in violation of secrecy of voting in elections or in referendum.

Punishment with imprisonment up to six months is provided in paragraph 1 of this article.

Severe form of this offence is provided in paragraph 2 of this article, which is considered to be carried out in cases when a person uses force, serious threat or in other illegal form requests from another person to tell him for whom he voted.

Instruments of this type of offence are the use of force, serious threat or other illegal form. For this severe form of offence punishment with imprisonment up to one year is provided.

In paragraph 3 of this article, a more severe form of this offence is provided, which is considered to exist in case the offence from paragraph 1 or 2 of this article is carried out by member of the Election Commissio or another person who abuses the duty, position or authorisation during elections or voting.

Punishment with imprisonment from one to five years is provided for this severe form of offence.

Any person can be perpetrator of this offence, except the most severe form provided in paragraph 3 of this article, which may be carried out by members of Election Commission or another person in abuse of his duty, position or authorisation during elections and voting.

11. Falsification of voting results[19]

According to paragraph 1 of article 219 of KPRK, the basic form of offence falsification of voting results is committed by a person who adds, removes or deletes votes or signatures, inaccurately records votes or

[19] Article 219, CCRK.

election results in the election documentation or publishes vote or election or voting results in election documentation or publishes vote or results of elections or voting that does not respond to real voting, or in another form falsifies the vote or election results.

As it can be seen, actions of this criminal act are determined alternatively and this form of criminal act is considered as carried out in case any of the abovementioned act is performed. For this form of criminal act punishment with imprisonment from one up to three years is provided.

Severe form of this criminal act is envisaged in paragraph 2 of this article, which is considered that exists in cases when the criminal act from paragraph 1 of this article is carried out by member of Election Commission or another person who abuses the duty, position or his authorisations regarding elections.

Punishment with imprisonment from three to five years is provided for this severe form of criminal act.

Basic form of this criminal act may be carried by any person, while the severe form of this criminal act can be carried out by members of Election Commission or another person who abuses his duty, position or his authorisations regarding elections.

12. Destruction of voting documents[20]

Basic form of this criminal act, according to paragraph 1 of article 220 of KPRK, is carried out by any person who destructs, hides, damages or takes a ballot or any other item or document related to elections or referendum.

Carrying out actions of this criminal act are set alternately and consist of destruction, concealing, damaging or taking ballots or any other object or document related to the election or referendum. For this form of this criminal act punishment with imprisonment of one to three years is provided, and perpetrator of this type of criminal act can be any person.

Severe form of this criminal act is envisaged in paragraph 2 of article 220 of KRPK. This severe form of this criminal act is considered carried out

[20] Article 220, CCRK.

in cases when the criminal act from paragraph 1 of this article is carried out by member of Election Commission or another person who abuses the duty, position, or his authorisations regarding the elections.

Punishment with imprisonment from three to five years is provided for this criminal act and perpetrator of this form of criminal act can be member of election commission or any other person who abuses his duty, position or authorisations regarding elections.

13. Conclusion

Chapter XVII where criminal acts against the voting rights is considered one of the most important chapters in the special part of KPRK. A considerable number of these criminal acts of this chapter, are considered as new criminal acts, because they have not been envisaged in the previous criminal legislation.

Criminal acts against voting rights are carried out by political motives, because they are related to elections held in the Republic of Kosovo. These criminal acts can be carried out during local elections (including here local elections for municipal mayors), as well as during general elections..

As noted earlier, these criminal acts are defined as serious crimes and for their judgment at first instance is competent Severe Crimes Department of basic courts, while in the second instance is the competent department of the Severe Crimes Appeal Court in Pristina.

Recently, these criminal acts have been paid special attention from local and international institutions, for the fact that a considerable number of criminal proceedings have been initiated against persons alleged to have committed criminal acts of this nature in recent elections in the Republic of Kosovo.

Perpetrator of these criminal acts in principle can be any person, but some forms of these offenses can be carryied out only by members of the Election Commission or other persons in abuse ofduties, or their authority positions in the elections or voting.

Regarding the time of committing these criminal acts may be carried out before and during the elections (during the voting and counting).

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www.kqz-ks.org (Central Election Commission)

Mr.sc. Agim Maliqi*

A BRIEF COMMENTARY OF INITIAL AND SECOND HEARING UNDER PROVISIONS OF CRIMINAL PROCEDURE CODE

ABSTRACT

This paper comments provisions which regulate initial and second hearing according to the Criminal Procedure Code (Code no.04/L-123)[1], which entered into force on 1 January, 2013.

Commenting on these provisions is important for the fact that very often it is possible to avoid a fair trial, namely, the possibility of conclusion of a phase of the proceedings is increased (pronouncing of sentence) during this phase, or even the possibility of rejection of the indictment that also concludes concrete issue. These provisions enable the parties in the proceedings (state prosecutor, the defendant and the victim) to be active and that the court still gives the ability to have its pro-active role in controlling the indictment.

Commenting of legal provisions is done for every article starting from initial revision, to continue with the plea and the plea agreement, rejecting evidence and demand for laying the indictment.

Also, legal provisions are commented quite extensively, specifying the conditions and cases of rejection of the indictment, the second hearing, reviews to determine the validity of the proposals to complete the submission of materials by the defense.

The paper also contains conclusion and literature which was used for realization of this paper.

Key words: KPP, initial hearing, second hearing, admission of guilt, rejection of evidence

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[1] Hereinafter we will refer with terminology Code or CPC.

1. Initial hearing[2]

1. During the initial hearing, the state prosecutor, the defendant or defendants and lawyers should be present.

It is important to emphasize that during the initial hearing it is envisaged to have present the state prosecutor, defendants and lawyers, which is natural and meets minimal standards for initial hearing.
Presence of the state prosecutor[3] is inevitable and is conditioned by the fact that without his presence the initial revision can not be developed, since, besides the fact that he is a party in the proceeding[4] he also has competences to present the indictment during all phases of criminal proceeding before the courts.

Also, during the initial hearing it is necessary to have the presence of the defendant, and that any person can win the quality of the defendant in criminal proceedings, who possesses the ability to act, ie the person who has certain age and who is accountable[5] as the Code[6] does not allow development of an initial hearing or court review in the absence of the defendant "in absentia". Non judgment in the absence of the defendant even though it is not written explicitly[7], but based on the concept that the Code is built, it ruled out the possibility of trial in absentia, based on the active role it has given to the defendant in the proceeding[8]. However it should be noted that the trial in absentia is an old concept and now with some minor exceptions has been abandoned by the majority of European criminal law and moreover it is in contradiction with the principles of KEDLNJ[9] which is directly[10] applicable in our legislation.

However, the presence of the defence is not necessary unles the cases of compulsory defence[11] or defence cases with public expenses, when the

[2] Article245, KPPK
[3] Competences of state prosecutor are defined in article 7 of the law of State Prosecutor and article 49 of CPC
[4] Article19 par.1.15 of CPC
[5] Hajdari, Azem, *Criminal procedure* – Commentary, Prishtina, 2010, page155
[6] Hajdari, Azem, *Criminal procedure* – Commentary, Prishtina, 2010, page 155
[7] Code of Criminal Procedure of Bosnia and Herzegovina prohibits specific provision trial in absence..
[8] Article 232, CPCK
[9] Article 6 point 1 and 3 point, KEDNj
[10] Article 22, Constitution of Republic of Kosovo
[11] Article57, CPCK

defence is compulsory[12] and is provided based on request of the accused under certain conditions. The Code has not envisaged the way how the presence of the sides that take part in the initial hearing would be provided, however it should be understood that provisions of the call for judicial review should be implemented.

An important issue that must be analyzed is the fact that the initial evaluation has not envisaged the presence of the injured. This is interesting especially considering the fact that the role of the injured is significantly strengthened by this Code, the injured person has the role of the party[13], moreover, in case this provision is to be analyzed in systemic terms, it is contradictory to Article 248 paragraph 2 of the Code which states that "in assessing the plea of the defendant, judge of court or the presiding judge may seek the opinion of the state prosecutor, defense counsel and the injured[14]" and this necessarily presents a logical question how can the opinion of the injured be taken without being present.

Therefore, in order to overcome this situation, it is necessary that the agrieved person is necessarily invited at the initial hearing, specifically due to the fact that accused person pleads guilyt, the injured party should be given the opportunity to make statement about the type and amount of property-legal request.
While the second possibility would be to complete the initial hearing and appoint another session for determination of any fact relevant to the sentence[15]. And in this session the damaged party would have possibility to present his proposal for a property claim, since the property claim would present relevant fact for the punishment, to determine the type and length of punishment.

However, in case pronounciation of the sentence is done in this phase, than the damaged person should necessarily be present since his opportunity to present judicial property claims during the criminal proceeding ends here, unless the damaged person has filed statement og damage.[16]

[12] Artcile 58, CPCK
[13] Artcile19 par.1.15 and article 62 par.1 item.1.3, CPCK
[14] Article248, par.2, CPCK
[15] Article 248, par.4, CPCK.
[16] Article 218, CPCK.

2. During the initial hearing, the single court judge or the presiding judge gives copy of indictment to the defendant or defendants, in case they have not accepted these copies of indictment before.

This paragraph is of technical character and it is not prefereable to happen this way due to the reasons that: it would be necessary that the indictment is filed before the initial session due to the fact that acceptance of indictment presents an important precondition for the defendant to declare his guilt or innocence. So, it would be unrealistic to expect from the detendant to declare about his guilt immediately after he accepted the indictment, as it is envisaged at the initial hearing, therefore it would be very important that together with the initial hearing to enclose the indictment as it is envisaged in the judicial review, not later than eight (8) days[17] that would kreate adequate preconditions of the initial hearing.

3. During initial hearing, the single court judge or the preseding judge decides about all proposals in order to continue or implement measures for security of presence of the defendant.

This presents an interesting fact and is in line with the principal that security measures of presence of the defender are necessary to be treated in all phases of the procedure, since the basis and conditions of the measures may change after filing the indictment. The rationale for revision of these measures is important for two reasons:

- first of all it is important due to the fact that at the initial hearing the sides are present and they can present their views for these measures and
- secondly, by completing the investigation phase, the phase of filing the indictment starts and this can change basis and conditions for continuation or implementation of measures for insurance of presence of the defendant.

Certainly, it is important to emphasize the fact that the Code has not envisaged segregation of security measures of the presence of defendant before and after presentation of the indictment, respectively in case a measure is determined before filing the indictment it remains in power even after its filing until this measure expires. In one word the concept has been abandoned that every determined or continued mesaure during investigation procedure, to be reviewed obligatory after filing the

[17] Article 287 par.3, CPCK.

indictment and where it is decided to continue or withdrow the measure (as it was done with former KPPK), but now the Code has determined that as for the measures for continuation or implementation of security of the presence of defendant to decide at the first hearing, in accordance with the proposal of the sides in proceeding, but it is important the fact that the obligation to question the arrested persons- detained persons, derives from the known principle Habeas Corpus, according to which the arrested – detained person must be heard by the judge and this is an overall known rule by legislation of the states and is implemented by the International Criminal Court.[18]

But it should be clear that with regards to measures to ensure the presence of the defendant it can be decided even before the initial hearing, in two cases: in the first case when such measure expires after filing the indictment and prior to the initial hearing and the second case is when the charges[19] filed by the state prosecutor, the proposal for ordering detention is presented (where the defendant is at liberty) or it is proposed that a defendant who is in custody should be released from detention and in such cases the initial hearing should not be waited to decide for such a measure.

4. During the initial hearing the single judge or the presiding judge of the panel ensures that the state prosecutor has fulfilled obligations relating to the disclosure of evidence from article 244 of the Code.

This presents a duty to the court to ensure that the state prosecutor has fulfilled oblibgations for disclosre of evidence from article 244 not later than the filing of an indictment that could be submitted even before, respectively during investigation.

Even the provision of article 244 is not clear and while its subject describes "materials that are given to the defendant by filing an indictment", [20] and the provision referes to the defender of the accused person (exclude paragraph 2 of this article) however this may cause uncertainty to whom should the investigation materials be subimtted,to the defendant or the defender but it shold be read in a way that it is obligatory for the investigation materials to be submitted to the defender and this means the obligation is fulfilled.

[18] Islami Halim, Hoxha Artan & Panda Ilir, *Criminal Procedure*, Tirana, 2012, pg. 352.
[19] Article 241, par.2, CPCK.
[20] Article 244, par.1, CPCK.

Also, uncertainty that may cause confusion are also the expressions used while its title uses the expression "materials that are given to the defendant"which means that they should be given to the defendant, while in the description of provision "No later than filing the indictment, the state prosecutor provides to the defender or the main defender the below materials or their copy, that are in possession or in its protection, in case these materials are not given to the defender during investigation",[21] thereof these materials are provided to the defender, which means that the materials are put in his disposal and at this point the obligation of the state prosecutor ends up here, and defense can take them if deemed becessary.

A logical question arises from this, such as what would happen in case the defendant is not given evidence, while the defender has not been provided evidence according to article 244 of CCP. This situation is not regulated by any relevant provision, but than of course te court should oblige the state prosecutor to submit them within the timeframe specified by the court (court deadline) and this deadline should be reasonable, considering the complexity of the case and the amount of materials to be submitted and it would be reasonable to interrupt the session in order to continue the review after their provision, higlighting that this has not been envisaged by special provisions but provisions of court review should be applied accordingly.

5. During the initial hearing, the single judge or the presiding judge of the panel schedules the second hearing no earlier than (30) days after the initial hearing and no later than fourty (40) days after the initial hearing. On the contrary, the single judge or the presiding judge of the pannel may require only the presentation of proposals until the scheduled date, wich can not be later than thirty (30) days from the initial hearing.

There are two possibilities in this provision, the first in cases when the initial hearing does not come to confession, than the second hearing is schedulred within the specified time. The second option is to require presentation of proposals which means that proposals should be provided by both sides the prosecutor and the defender or the defendant no later than 30 days from the initial hearing and this avoids the second hearing. So, strict timeframes are set between these reviews, aiming at having a more efficient procedure.

[21] Article 244, par.1, CPCK.

It should be clarified that these options exclude each other and despite of the fact there are two options in disposal, it is difficult to determine which option would be better and more efficient, but according to the court practice until now, it is noted that majority of courts applied the first option, respectively have determined and hold the second hearing to decide regarding objections and proposed requests.[22]

Nevertheless, I consider tha the timeframe no earlier than 30 days for scheduling the second hearing is too long and in case this timeframe was shorter, it would serve in the function of the efficiency of the procedure.

6. The single court judge or the presiding judge of the panel informs the defendant and the defender that before the second hearing, they should:
6.1. present their objections for evidence mentioned in the indictment;
6.2. present requests for rejection of indictment in case it is legally prohibited; and
6.3. present requests for rejection of of indictment due to non description of the criminal act in accordance with the law.

This is important for the fact that after the second hearing these objections and requests should be in disposal of the state prosecutor, in order to resond to these claims either in written form when there is no second hearing, or these claims are answered orally during the second hearing. But it should be clear that the objection may be claimed for evidence in the indictment and later to present evidence by the defender or the defendant that are reviewed during the second hearing.

7. No witness or expert is examined and no evidence are presented during the initial hearing, unless the witness is required to make decision on continuation or implementaion of measures to ensure presence of the defendant under paragraph 3. of this article.

As stated above, during the initial hearing no evidence are presented, respectively no witnesses or experts are heard, but exclusively this may be done in case it is needed for continuation or implementation of the presence of the defendant and this presents the possibility that throgh this hearing to continue, respectively reject security measures of the presence of defendant, although it is not specified, I think it would be justifiable only for the most serious security presence, respectively through detention

[22] Sahiti, Ejup & Murati, Rexhep, *The Law on Criminal Procedure*, Prishtina, 2013, pg. 346.

measure respectively implementation of this measure according to article 194-203 of this Code.

2. Acceptance of guilt[23]

1. At the beginning of the initial hearing, a single judge or the presiding judge of the panel shall instruct the defendant about his right to avoid being declared about his case or to answer any questions and if he declares about the case, that he is not obliged to incriminate himself or a relative, or to confess guilt; to defend himself or through legal assistance of the attorney of his choice; to oppose the indictment and admissibility of evidence presented in the indictment.

It is inexplicable for what reason this provison does not envisage why the defendant is not initially taken his personal data,[24] since it is very important during the initial hearing, for two reasons:

- firstly, because personal data are important and are not only technical or ceremonial issue, or only to verify his identity, but are fundamental issues since through these data the court creates an overview related to the personality and character of the defendant, his economic and social state, education degree, which are important information for decision on the case;
- while, the other importance of full security defendent's personal data is in cases when the defender may accept the guilt during this hearing and the personal data are important for individualization of the sentence, respectively for determination of the type and length of sentence.

In the case of guidance for the rights given to the defender, it is important that the judgemakes shure the defendant understands them, since these guidances should be given in a simple way, without exagerated terms of judicial nature and in general they should match the level of the accused person regarding the education level, the age and other charcteristics. Importance of these guidelines is also for the fact that through these guidelines the defendant is being informed that he takes active part in the initial hearing and si not there only formally.

It is very important to emphasize specifically that the defendant is guided in relation with the right to have defender, but in case it deals with

[23] Article 246, CPCK
[24] Article 321, par.1, CPCK.

criminal act where obligatory protection is envisaged, the court when notes that the defendant has no defender before the initial hearing, is obliged to provide the defender and provide necessary materials since it present a precondition for a successful session.

2. The single judge or the presiding judge of the panel than evaluates whether the right of defendant to counsel is respected and if the state prosecutor has fulfilled obligations relating to the disclosure of evidence from article 244 of this Code.

This provision has defined two obligations of the single court judge or the presiding judge, and the first obligation is to apprise the defendant's right to counsel, and in cases when the defendant has no defense or while for various reasons he remained without defense, the court appoints defense to the defendant, in cases where defense is required[25]. In cases where defense is not required, the defense is appointed by public expense at the request of the defendant[26], and it is important that if the court is aware that the defendant has no defense, it would be preferable that counsel is appointed in advance, ie before the initial hearing, and moreover the investigation materials should be provided to the defense. It is similar when obligations under Article 244 of the CPC are not fulfilled.

Both situations need caution, otherwise if these preconditions are not fulfilled that there is possibility to interrupt the initial hearing and continue the initial hearing after the preconditions are met, in accordance with the provision.

3.Than the state prosecutor reads the indictment to the defendant.

Reading the indictment presents an important moment of the initial hearing due to the fact that it is the moment when the people present (the public and other persons) for the first time undersand the claims of the state prosecutor. Reading of the indictment in fact presents the start of the initial hearing since the above mentioned part is referred to the guidelines of the parties.

4. After the single judge or the presiding judge of the panel is convinced that the defendant understands the indictment, he ofers to the defendant the possibility to plead guilty or not guilty. If the defendant did not

[25] Article 57, CPCK.
[26] Article 58, CPCK.

understand the indictment, the single judge or the presiding judge of the panel calls the state prosecutor to explain the indictment to the defendant so that he may understand without difficulty. If the defendant does not want to make any statement regarding his guilt, it is considered that he is not guilty.

It is important to treat the momentum when the defendant shall declare on his guilt but prior to that, it is important that he has right understanding on the indctment made upon him. This usually presents different difficulties. First, the indictment may be incomprehensable for the defendant and he may have difficulties understanding it because it uses legal terminology, so an opportunity should be provided to the state prosecutor who has an active role during the initial hearing,[27] to xplain to the defendant the content of indctment. This should be implemented in a way that the explanation fits the age of defendant, the education, overall knowledge of the defendant, specifically the focus should be at explaining legal institutions, such as negligence, intent, mistake of law, the violation factual, performing together, abetting, aiding, etc.

It should also be clarified in a fair, clear and simple way the elements of the offense as often there are created more uncertainties for the defendant. But the importance of this should be related to the fact that often the defendant may declare formally that he understands the indictment, but it happens often to be an incorrect statement for different reasons: either due to the fact that if they dont understand the indictmentl, they would feelthemselves badly, and sometimes it is combined with the fact that this statement appears before the declaration of guilt and that could affect the fact that the plea would be punished more leniently, therefore I consider that the legislator rightly asks the judge single judge or the presiding judge to be careful when explaining the charges and often he should ask the state prosecutor to do a simple explanation without excessive legal terms until he is convinced that the defendant understands and he is clear what is he accused for.

Misunderstanding the indictment fully results in the fact that the misunderstanding presents reasons that protection might be wrong, however, it should be clear that non clarification of of the indictment,

[27] Çollaku Hashim: *The Role of State Prosecutor in the Criminal Procedure*, Prishtina, 2013, pg. 134.

respectively its misunderstanding presents basis for essential violation of provisions of criminal procedure.[28]
While in case the defendant is not pleading guilty, the procedure continues as if the defendant has plead not guilty.

3. Agreements on accepting the guilt during the initial hearing[29]

1. If the agreement on accepting the guilt, from article 233 of this Code appears together with the indictment, the single judge or the presiding judge of the panel considers the agreement on accepting the guilt and accepts it, rejects it or determines special hearing in accordance with procedures from article 248 and article 233 of this Code.

This paragraph deals with agreement on accepting the guilt which is possible to appear together with the indictment and the court in this case considers the agreement on accepting the guilt and has three possibilities: to accept, to reject the agreement or to appoint special hearing with regards to the agreement on guilt. It should be emphasizes that the institute of agreement for accepting the guilt is a relatively new institute in our legislation, and its application started in 2004 and managed to develope rapidly and has great impact in increasing efficiency and selection of a great number of criminal issues, and that this institute originates from USA, but now it is being implemented in many countries in the region, respectively this institute is known in CPC of Bosnia and Herzegovina, CPC Of Croatia and CPC of Serbia.[30] It should be emphasized that the Procedural Code of Albania doesnt envisage such an institute but in its provisions it has determined a similar institute called "summary procedure", which has some similarities with the institute of agreement for accepting the guilt, since the initiative derives from the defendant and in case the court acepts the summary procedure reduces the fine or imprisonment by one third.[31]

2. If the defendant pleads not guilty, the court can not punish the defendant, unless the defendant changes his declaration and accepts the guilt, or if the court proclaims the defendant guilty after the court hearing, regardless of the agreement on acceptance of guilt.

[28] Article384 par.2, CPCK.
[29] Article247, CPCK.
[30] Çollaku, Hashim, *The role of State Prosecutor in the Criminal Procedure*, Prishtina, 2013, pg. 134.
[31] Islami Halim & Hoxha Artan & Panda Ilir, *Criminal Procedure*, Tirana, 2012, pg. 547.

There is possibility that even after reaching an agreement on the guilt, the defendant may declare not guilty at the initial hearing and after this the court can not punish the defendant, but there is possility that the defendant can admit guilt even later, but logically after the court hearing can proclaim the defendant guilty.

3. Reviews from this chapter may be held under secret measures after the request of state prosecutor from Chapter XIII of this Code.

Admittion of guilt is regulated by Chapter XIII of this Code, since it presents something specific for all phases when the agreement of guilt is regulated, while it is characteristic that the reviews may be held under secret measures until the agreement is reached.

4. Agreement on admittion of guilt from article 233 of this Code or acceptance of guilt from article 248 of this Code may be reviewed by the court any time before the end of the trial.

Agreement for acceptance of guilt between the parties as well as admittion of guilt may be reviewed any time before the end of the trial.
Although this provision is included at the initial hearing, nevertheless it has much wider character and includes the phase from the initial hearing until before the judicial review, that in fact the provision does not limit the possibility for the defendant to admit guilt until before the end of the judicial review, but it is up to the court to review this admittion. In the judicial practice, often cases of accepting the guilt appear in the cases of changing the indictment, while the change is done when the state prosecutor during the review finds that the reviewed evidence show that actual situation presented in the indictment is changed,[32] but it should be emphasized that the change of indictment often results with change of the legal qualification of the criminal act, therefore it is necessary that after this change the defendant to declare about the guilt once more.

4. Admittion of guilt during the initial hearing, article 248

1. When the defendant admits guilt for all the items of indictment according to article 246 or 247 of this Code, the single judge or the presiding judge of the panel determines that:

[32] Sahiti, Ejup & Murati, Rexhep, *The Law on Criminal Procedure*, Prishtina, 2013, pg. 367.

1.1. defendant understands the nature and consequences of the guilt;

1.2. admittion is done deliberately by the defendant after sufficient consultations wth the defender, in case the defendant has a defender;

1.3. admittion of guilt relates to facts of the case that is consisted in the indictment, in the presented materials by the state prosecutor for fulfilment of the indictment accepted by the defendant and any other evidene, such as testimony of witnesses presented by the prosecutor or the defendant; and

1.4. indictment contains no clear legal violation or faactual mistakes.

The most important phase after the initial hearing is the moment after admittion of guilt by the defendant and this is important for several reasons, first of all due to the fact that the conditions envisaged should be fulfiled in cummulative way and only in this case the admittion of guilt can be accepted and not in cases when the admittion is partial, with dilemas or unclear.

Evaluation of admitting the guilt is quite complex and multidimensional and not easy at all to determine whether criteria are met or not, since some criteria are measurable but some are of objective nature and it is more difficult to be determined.

The most interesting is the fact that admittion of guilt should be done in a way that the defendant should understand the nature and consequence of admittion of guilt and this is very complex, due to the fact that the defendant should understand the indictment that stands on it, than because by admittion of the guilt we would have avoidance from the regular judicial process, respectively the process would be much shorter than usually, because he is deprived of providing evidence or rejection of evidence presented by the state prosecutor and that after this he will immediately be pronounced his punishment for his action, he would be obliged to fulfill property- judicial request of the damaged party (in case there are damaged parties and there are proposals of authorised persons for property-judicial request), that the property gained as result of criminal act may be confiscated (if there proposal for confiscation), while as consequence of admittion of guilt presents the fact that the judgment can not be attacked due to the wrong or non final verification of the actual state respectively losts one base for appeal of judgment.

Admittion of guilt should be done voluntairly, fully and with no dilema, further more the defendant should be aware for this admittion and the admittion should not be done by force, threat, obligation, ignorance, than

if it a known fact that the defendant suffers from a temporary or permanent mental disease and preferrably on most cases the defender should be part of it and must appreciate the fact that there was enough time for consultations, so all these elements are very important, otherwise acceptance of guilt would be incomplete.

Another important fact is that admittion of guilt should be supported by concrete evidence although in fact formally in this phase no evidence are reviewed, however the single judge or the presiding judge of the panel, is obliged to review and evaluate quantity and quality of evidence in the subject acts and it necessarily obliges the court to make it clear if there is criminal responsibility of the defendant, than whether there are elements of criminal act described in the accusation and many other elements, that must be considered due to the fact that evidence must be valued for the fact if the evidence are accepted since, as it is known the judgement can not be based on unaccepted evidence,[33] and mus consider evidence for determination of guilt,[34] respectively lack of evidence for a decision on guilt.

2. During evaluation of admittion of the guilt by the defendant, the single court judge or the presiding judge of the panel may ask for opinion of the state prosecutor, the defender and the damaged person.

It is important, though not obligatory to request the opinon, since the parties from their view will present arguments, which sometimes might be contradictory. Undoubtedly it would be preferable to ask for opinion of the parties since the court would have a clear picture of the evend, than it is left to the court's evaluation, to be connected to evidence it has in disposal.

Getting the opinion is of importance for the fact the court may receive important informaion to decide about acceptance or nonacceptance of guilt or no, which in this contect and based on the other fact, no final word is foreseen, than the parties to the proceeding may present their views for this as well and enable the court to have a more clear picture about the circumstances of committing criminal act, personality of defendant and many other important circumstances to individualise the sentence, respectively to determine the type and the level of sentence,

[33] Article 257, par.3, KPPK.
[34] Article 262, KPPK.

respectively concrete sentence which is provided by the court to the author of criminal act.[35]

3. When the single judge or the presiding judge is not convinced that the facts from section 1 of this article, he brings decision by which he refuses admition of guilt and proceeds with the initial hearing, as the admitions of guilt was not done.

But despite these hits of evidence under paragraph 1, however, the court has no other option at this stage other than the fact that if it finds that the facts set out in Article 248 paragraph 1 of the CPC are not proven or finds any deficiency of evidence, to reject admittion of guilt in order to pave the way for the secondhearing or judicial hearing. Although not mentioned specifically, it is clear that the decision is recorded in the minutes of the initial review.

4. When the single judge or the presiding judge of the panel is convinced that the facts from section 1 of this article are verified, he brings decision by which he accepts admittion of guilt by the defendant and continues with pronouncing the sentence, scheduilng session for verification of relevant facts for the sentence or suspends sentence until completion of cooperation within the defendant and state prosecutor.
Same as in the previous paragraph, in this case the decision on admittion of guilt is found in the minutes of initial hearing, also no specific provision is envisaged for the content of minutes of initial hearing, while minutes should be compiled in written form and record the corse of the main core.[36]

No doubt that the part which mostly caused debate by entering into force of this Code is the moment when the single judge or the presiding judge of the panel accepts admittion of guilt and than we might have three different situations.

The first is that it can bee proceeded with pronounciaiton of sentence and it presents a reduction of judicial procedure but here are presented dilemmas especially when handled by department for serious crimes and this has caused confusion that after admittion of guilt, the presiding judge of the pannel shall pronounce sentence or the judge panel to be completed. However, provisions that regulate court competences should

[35] Muçi, Shefqet, *Criminal Law, Overal part*, Tirana, 2007, pg. 265.
[36] Hajdari, Azem, *Criminal procedure* – Commentary, Prishtina, 2010, pg. 597.

be analised in details, specifically "In criminal procedure within the Deparment of Serious Crimes of the Basic Court, the decision is brought by three (3) professional judge, one of which chairs the judge panel" [37] and if analysed carefully it is understood that the decision is brought exclusively only by the judge panel, which means that this is supposed to hapen in every phase of the proceeding, respectively even after the initial hearing, since the provision does not specify in which phase it may happen. Therefore, it allows possibility to happen in any phase, but in every case when the decision is brought based on this sentence, it should be taken after the judicial panel is completed, notwithstanding the initial hearing. This conclusion is made by analysing systematically the provision which belongs to decisions before the judicial hearing, because "After the indictment by the state prosecutor in the Basic Court, single judge or the presiding judge of the panel holds initial hearing and the second hearing, decides on requests to exclude evidence and makes a decision on the request for assignment of detention or other measures to ensure the presence of the defendant",[38] that provides competences to the presiding judge for decision making for all these situations except for bringing the judgement.

However, I consider that it would be natural and normal that pronounciation of the sentence is provided by the judicial panel, based on the fact that hypothetically we would come to a situation that the head of presiding judge pronounces the most serious sentence envisaged by the Criminal Code of Republic of Kosovo, respectively the centence of life imprisonment.

However, we aknowledge the fact that by applying these provisions, there were lot of uncertainties and confusion among the courts regarding sentencing in the department of serious crimes of basic courts and in some of them the sentencing was provided by the presiding judge of the panel, while in some others by suplementing the judge panel only for sentencing, because this provision was interpreted differently in since the beginning and caused confusion in the judicial practice. [39]
But this dilemma is overcome by the opinion of the Suppreme Court of Kosovo[40] which has determined that the penallty should be imposed by the presiding judge as it comes to the specific situation during the initial hearing.

[37] Article 25, par.3, CPCK .
[38] Article 26, par.1, CPCK.
[39] Sahiti, Ejup & Murati, Rexhep, *Law on Criminal Procedure, Prishtina*, 2013, pg 342.
[40] Legal Opinion of Suppreme Court of Kosovo, GJA. no. 207/13 of the date 19.03.2013.

Another situation, respectively the second situation appears in cases when after admittion of guilt exists another relevant fact which would be more interesting and necessary for sentencing and in these cases although not decisively defined it would be necessary to close the initial hearing and schedule another session only for verification of the fact in question. It is not clear what would be the term of appointment and retention of this session, but obviously it depends on the circumstances to be established, and especially which facts it comes to the doubt that this is a discretion of the presiding judge. Also relevant facts may be of different nature, such as insurance of data from the evidence of convicted persons, any significant personal circumstances or family issues of defendant, if it were necessary to verify the fact whether or not the victim respectively the damaged person has been compensated, such could be confirmation of the fact when the defendant has limited mental capacity. But in all cases, that might be of different natyre should exclusively be linked to verification of a fact or circumstances regarding sentencing of the type of punishment and it sometimes brings to postponing of the initial hearing and than scheduling a special session exclusively for sentencing..

While the third situation appears in cases of cooperation between the defendant and state prosecutor and this may cause suspension of sentence until this cooperation is completed, which might appear in situations when the agreement of admittion of guilt is being negotiated and in cases when we deal with cooperating witness. While in cases of suspension, the court schedules judicial term, aiming at not prolonging too much and certainly these terms should be determined in relation with the complexity of the case, but in case this cooperation is prolonged, than the court would be able to pronounce the sentence since the decision on admittion of guilt is done already.

With regards to this provision it is necessary to analyse two more situations that appear quite often in practice, after raising the accusation, which is important due to the accusation principal nemo iudex sine actore[41]:

- the first sutuation when the accusation is raised towards the defendant for various criminal acts and in these situations logically we also have declaration of the defendant for each action separately and in some items of the accusation admittion of guilt is

[41] Sahiti, Ejup, *The Law on Criminal Procedure*, Prishtina, 1986, pg 173.

done according to criteria of article 248 par.1 of this Code, while for some the criteria may not be met.

In these situations it should precisely be determined for what actions the guilt has been admitted and for what actions the guilt is rejected, for what actions the criteria are met and for what actions the criteria are not met. Nevertheless, it is important in these cases to continue with second hearing or judicial hearing only for accusations when the guilt is not adimtted or the criteria has not been met, while for cases when the guilt is not met, the sentence is pronounced at the end of judicial hearing.

- the second situation exists in cases when the accusation is raised towards some defendants and in these cases exists the possibility that one or some defendants declare not guilty. In these cases the procedure should be separated[42] and the defendants who admit the guilt continue with sentencing while the other defendants shall continue with the second hearing or eventually with the judicial hearing.

Separation of procedure is justified specifically in these situations:

- the first situation when we deal with complicated cases, which would take much time and the defendant who admit the guilt would be obliged to be present during the judicial procedure although his presence is not necessary,
- the second situation is in cases when defendants are in custody and it would be completely unnecessary to be kept in custody.

Another strong argument in favor of separation procedure is the provision envisaged in the judicial hearing " Single judge or presiding judge of the panel postpones sentencing for defendants who admit the guilt at the beginning of judicial hearing until the end of judicial hearing",[43] which in fact enables the defendant to admit the guilt, not to be present during the flow of judicial hearing until imposition of sentencing.
However the court must be careful in assessing the admittion of guilt due to the fact that sometimes the defendants may have secret agreement among themselves for admittion of guilt for different reasons and based

[42] Article 36, par.1 of the CCP allows possibility of specifying criminal procedure, for important reasons or for reasons of efficiency
until the ending of court hearing, that enables the specification to be done during the initial hearing.
[43] Article 326, par.5, CPCK.

on this reason we can not say it might be a uniform solution separation of procedure but separation of procedure should be done on a case by case basis.

Obviously the judicial practice in such cases is not uniform because there are times when the procedure is separated but there are also cases when the procedure is not separated, however, I consider that the opportunity would be to separate the proceedings for the reasons set out above.

5. A defendant who pleads not guilty during the initial hearing may change his statement and plead guilty at any time. For any defendant who wants to plead guilty in this paragraph, the single judge or the presiding judge of the panel applies appropriste hearing from this article.

Even after completion of the initial hearing the possibility of pleading guilty is not exhausted or there is a possibility that the defendant pleads guilty at any time after the initial hearing, although it is not specified in what form will be able to make this statement, however it can be done through a written appeal, therefore it can determine the development of an initial examination that can actually take place conditionally rather than an initial hearing.

5. Rejection of evidence[44]

1. Before the second hearing, the defendant may file objections to certain evidence in the indictment, based on these reasons:

1.1. the evidence are not taken lawfully by the police, state prosecutor or other state body;
1.2. evidence are in contrary with regulations from Chapter XVI of this Code; or
1.3. there is articulated base that the court values the evidence as deeply unsupportable

It should be noted that among the initial hearing and the second hearing there is a middle phase in which a series of very important procedural actions are conducted by the parties in the proceedings, which initiatives arise from the defendant through an objection to the evidence presented by the state prosecutor in the indictment and this is the stage when the

[44] Article249, CPCK

defendant through this institute of claims opposition presents his evidence regarding the proposed evidence by the state prosecutor.

Undoubtedly, opposing of evidence is important due to the fact that there is a possibility that in this stage of the proceedings the court should record and also declare inadmissible certain evidence and this would be a decontamination of the case from the inadmissible evidence, since the court decision can not rely in such evidence.[45] Objections can be submitted only on certain evidence and in cases when they are received in illegal ways by bodies that conduct investigations and it is important that these bodies should be prudent in their actions and that exceeding the authority can lead to the fact that the evidence are received in illegal way.
Regarding the evidence that are in opposition with Chapter XVI of the Code, in esence presents differently the institute of unaccepted evidence, further more this chapter describes which evidence are unaccepted.

As far as the third basis is concerned, where the request for opposition of evidence can be presented when there is articulated basis, in order for the court to value the evidence as deeply unsupportable.[46]
2. State prosecutor is given possibility to respond to opposition orally and in written.

It is common that the claims of the defendant be given an opportunity to state prosecutor to respond to these claims. This can be accomplished in two ways; orally that is common during the second hearing, and the second way is a written response which may occur between the initial hearing and the second hearing. It is natural that the court in cases when the defendant files a written objection to the submission of the other party or send it to the state prosecutor, responsible and deadlines are shown in the provision of Article 251 paragraph 3 of this Code.

Another issue that needs to be addressed is what would happen if no answers are presented by the state prosecutor within the term of 7 days, then the court after expiry of this deadline must decide without the response of the state prosecutor to not remain hostage to the answers and to not postpone the issue. But primarily because of the many reasons it would be more preferable that the state prosecutor's response was mandatory because the concept as it is currently constructed rate this presents an opportunity and not an obligation of the state prosecutor.

[45] Sahiti, Ejup & Murati, Rexhep, Law on Criminal Procedure, Prishtinë, 2013, pg. 249.
[46] Article 19 par.1.29, CPCK.

3.For all evidence for which the objection has been filed, the single judge or the presiding judge of the panel brings the written decision justified for issuance or exclusion of evidence.

This provision determines that for all evidence it should be decided to allow or exclude the evidence. This actually represents an interruption of procedure until a decision is taken for allowance or exclusion of evidence. Therefore, there is possibility to allow or exclude some evidence or to allow or exclude all evidence.

4. Inadmissible evidence are separated from the case and are closed. Such evidence are kept separated from court documents and other evidence. Inadmissible evidence can not be reviewed or used in criminal procedure, unless in the case of complaint against the decision on admittion.

This paragraph describes actions undertaken when found that there are inadmissible evidence in the case. This is a common standard that evidence are separated from other documents, to be closed and are not allowed to be used until a decision is taken about them. So, this presents a common standard based on the fact that the evidence proclaimed as inadmissible are considered as they don't exist, although there is no definition regarding the inadmissible evidence. These eveidence are taken against legal provisions, this is considered invalid or inadmissible evidence.[47]

5. All evidence against which no objection is filed, are admissible in the judicial hearing, unless the court based on the official duty determines that the admissibility of certain evidence would prejudice teh defendants rights guaranteed by the Constitution of the Republic of Kosovo.

The above provision comes into consideration in the cases when the parties do not dispute the evidence, in that case the authority is given to the court to exclude the evidence in cases when admittion of determined evidence affects defendant's rights guaranteed by the Consitution of Republic of Kosovo. This represents a very broad concept and rightly entrusted the legitimacy of the court as authority that is likely to exclude the evidence as inadmissible in evidence can not support decision of guilt or not guilty.

[47] Çollaku, Hashim, *The role of State Prosecution in Crminial Procedure*, Prishtina, 2013, pg. 92.

6. Either party may appeal against the decision from paragraph 3 of this article. The complaint must be maid within five (5) days of receipt of the written decision.

Complaints may be submitted by each party and the complaint is submitted to the court of appeal.

6. Request to dismiss the accusation[48]

1. Before the second hearing, the defendant may file a request to dismiss the accusation, based on these reasons:

1.1. the offence charged is not a criminal offence;
1.2. there are circumstances which exclude criminal responsibility;
1.3. the timeframe of criminal act has passed, criminal act is involved in forgiveness or there are other circumstances that inhibit prosecution; or
1.4. no sufficient evidences to support a well based doubt that the defendant committed criminal act for which he is accused on indictment.

The second option of the defendant before the second hearing is to file request for dimissal of accusation and this request may be filed for the grounds set and these situations are identic with bases for excemtion from accusation.

2. The state prosecutor should be provided possibility to respond to the request orally or in written form.

Same as in the above article, the state prosecutor is given possibility to respond orally during the second hearing or in written before the second hearing.

3. The single judge or president of presiding judge makes a written decision by which he refuses the request or rejects the accusation.

After the response by the state prosecutor or even without response within the determined timeframe according to article 251 par.3 of this Code, the court has two possibilities to refuse the request for rejection of accusation

[48] Article 250, CPCK

in case he evaluates that there are bases from paragraph 1 of this Code. It is important to emphasize that in this case the court decision (upon refusal of request for rejection of accusation), presents a filter of court control of the accusation and based on theory aspect after completion of procedures about accusation control, the accusation becomes final.[49]

4. Each party may file request against the accusation from paragraph 3 of this article the Complaint must be filed five (5) days from the day of written decision.

The complaint can be filed by each party and the complaint is submitted to the appeal court, according to the defined term.

7. Responses[50]

1. The state prosecutor is given possibility to respond on the objection from article 249 or in the request from article 250 of this Code.

It is natural that upon objection and request of defender or defendant the state prosecutor is enabled to submit responses so that the court could consider arguments of the parties during decision making.

2. Response from paragraph 1. of this article may be done orally during second hearing or in written.

Responses may be submitted in written through the complaint so that the court could consider it during decision making, while there is also possibility that arguments that are submitted orally during the second hearing, respectively in the report of the second hearing. I consider that certainly it is more preferable to have written communication since the state prosecutor would have more time in disposal.

3. The single judge or presiding judge of the panel provides available time of one (1) week to the state prosecutor, to submit written response from article 249 or request from article 250 of this Code.

[49] Sahiti, Ejup & Murati, Rexhep, *Law on Criminal Procedure*, *Prishtinë*, 2013, pg. 347.
[50] Article 251, CPCK.

Legislator rightly ruled legal term for the state prosecutor's response but still the court after the expiry of the deadline immediately is created possibility to decide on the application or objection.

4. Instead of response to request from article 250, the state prosecutor can submit changed indictment from article 252 of this Code.

In this paragraph there is possibility that the state prosecutor instead of response to the claims of the defendant to have opportunity of repairing the accusation respectively change it, which presents innovation compared to previous Code and it also creats much confusion and dilema. Basic issue which needs treatment is the fact what is understood by the changed accusation and whether this change in the accusation means substantional change or only in the aspect of technical mistakes. Is it possible that this change includes subjective and objective aspects, whether it can be changed not only in the aspect of technical mistakes but also substantial, specifically referring to article 252 par.3 of CPCK, which is envisaged as separate basis of objections and requests exclusively for this change of accusation.

8. Amended indictment[51]

1. In case the submitted request from the

If the request submitted by the defendant for rejection of accusation from article 250 of this Code may be regulated by changing the accusation, the state prosecutor presents changed accusation in accordance with article 250 of this Code may be regulated by changing the accusation, the state prosecutor submits changed accusation in accordance with article 241 of this Code within one (1) week from the second hearing.
Responding to the claims of the defendant for rejection of indictment the state prosecutor has possibility to amend the indictment and the amended indictment should be presented within a week of the second hearing. So, the change can be made after the second hearing, also this difference is not clear in what consists, in content or just changes of the aspect of technical mistakes. But referred to in paragraph 3, it is clear that it is about substantial character changes.

[51] Article 252, CPCK.

2. If the amended indictment is filed against a defendant or multiple defendants, the single judge court or the presiding judge determines the initial hearingunder Article 245 of the Code as the indictment was new.

This provision is extremely unclear and it is not clear whether the defendant is about the same as in the initial submittion of the indictment or may be submitted against the other defendants. It may also be either one but it is possible that the amended indictment be submitted to other defendants due to the fact that this indictment was treated as new indictment. It is important to note that through the amended indictment we have a recycling or a return to the stage of filing of the indictment.

3. The defendant may submit new objections from article 249 or the request from article 250 of this Code, but only for the amended parts of accusation.

Objections and requests may be submitted only for the ammended parts of accusation not for the parts that have no possibility of their submittion.

4.The defendat may submit previous objections again, from article 249 or requests from article 250 of this Code. In case the defendant doesn't submit objections or previous requests again, the single judge or the presiding jude of the panel decides that those objections or requests are not relevant for the ammended accusation and does not review them further.

So, as dit was escribed above, now we have an opportunity to re-submission of applications and objections submitted before, but then a single judge or presiding judge of the panel decides on complaints and objections, respectively decides that they are not relevant to the amended indictment and no further reviews therefore estimates that the initial objections are eliminated with the amended indictment.

5. State prosecutor may amend the indictment once, unless provided with new data that necessitate the amendment of the indictment.

There is only one possibility of amending the indictment except in cases when the data are provided wich make it necessary to amend the accusation, so that this provision is quite complex since it allows that ammendment of accusation is done several times in cases when new data are provided which make the ammendment of accusation necessary as provided by the legislator, which is quite unclear and this confusion is

even bigger based on the fact how would the data be provided, when bsince by filing the accusation ceases any activity of the state prosecutor, respectively the investigation phase is completed for that criminal act.

9. Rejection of accusation[52]

1. For every request for rejection of accusation from article 250 of this Code, the single judge or presiding judge of the panel makes decision for rejection of accusation and cease of criminal procedure when he evaluates that:

1.1. the act by which he is accused doesn't present criminal act;
1.2. there are circumstances which exclude criminal responsibility;
1.3. the timeframe of offense has passed, the offense is involved in amnesty or forgiveness, or there are other circumstance that obstruct prosecution; or
1.4. there are no sufficient evidence to support a well based doubt that the defendant has committed criminal act for which he is accused in the accusation.

This provision regulates rejection of accusation which is connected to article 250 and is certainly important the fact that rejection of accusation and cease of procedure may be done according to request of the parties. So, according to this provision it is determined that the accusation and cease of criminal procedure is done only after the request of parties that excludes the possibility of the court to act according to official duty. Here we certainly should clarify and distinguish the situation when the court rejects the appeal, after it is returned to the submitter for correction and amending, as consequence of inaction.[53] Certainly, distinction among these situations is substantional due to the fact that rejection of appeal the procedure is not terminated and is not considered as judging issue "ne bis in idem", while provision of this paragraph rejects the accusation and terminates the procedure, and in these cases when the decision becomes final, the procedure towards the defendant can not continue for that criminal act. So, it is related to the subjective and objective identity of the accusation.[54]

[52] Article253, CPCK.
[53] Article442of CPK, as submission defines the accusation as well
[54] Article4, CCPK

With regards to bases for rejection, these are determined explicitly and are similar with bases determined at the acquittal judgement.

2. Upon making decision from this article, the single judge or presiding judge of the panel is not obliged by legal qualification of the criminal act, as set by state prosecutor in the accusation.

The Court is not bound to the legal qualification under the state prosecutor claims, however it is related to description of the facts related to the indictment.

3. In response to the request from Article 250, the state prosecutor can reject an indictment if the application of Article 250 of this Code is based.

This paragraph provides opportunity to the state prosecutor in the case of the response to allegations of the defendant to reject the accusation in cases where it considers that the request is based.
This provision is quite interesting for two reasons, first it seems illogical for the state prosecutor to reject the accusation which was previously raised by him and secondly how would cast an indictment which is already submitted to the court.

10. Second hearing and scheduling judicial hearing[55]

1. The state prosecutor, the defendant and defenders participate at the second hearing, unless the single judge or presiding judge of the panel requested only submittion of proposals until the date of second hearing.

Second hearing presents another very important phase in the procedure where the court develops very important activity and is not limited to one session. But more sessions can be scheduled, however it should emphasize the fact that the second hearing also likely not to be held at all, such as when the indictment is rejected and the case is closed at this stage, or the proposal for rejection of accusation is refused and in this case the judicial hearing is held. But peculiarity is the fact that it is not possible to conclude the procedure during the second hearing.

It is important to note that even at second hearing there are set deadlines relating to the initial hearing. The state prosecutor, the defendant or the

[55] Article 254,CCPK.

defendants and the defense participate in this hearing, and only submission of proposals until the date of second review is required. to So if the proposals are ssubmitted then the second hearing is not held at all.

2. During the second hearing, the single judge or presiding judge of the panel makes sure that the defender has fulfilled all the obligation relating to disclosure of evidence from article 256 of this Code.

While the initial review examined the state prosecutor's obligations to the defendant and his defender, now at the second hearing the court is focused on obligation of disclosure of evidence by the defense, which is interesting to note here that there is no mention of defendant and that this could be interpreted by the fact that this obligation is attributable to defense as a professional and not the defendant, or that occurs after the legislator apparently did not foresee the situation where the defendant will defend himself without defense.

3. During the second hearing, the single court or the presiding judge of panel reviews objections from article 249 or requests from article 250 of this Code. He may ask from the state prosecutor to respond orally during the hearing or in written, in accordance with articles 249-253 of this Code.

If requests or objections have not been reviewed previously, they are reviewed at the second hearing and requests from the state prosecutor to respond to these claims. If there exists readiness to economize the procedure it can be done orally at the report, but can not be submitted in orall form, therefore the opportunity is provided to submit them in written through appeals.

4. During the second review, the single judge or the presiding judge of the panel schedules hearing sessions in accordance with article 225 of this Code, if such sessions are needed.

This paragraph precedes Article 255 of this Code and has been left the possibility that a single judge or the presiding judge of the panel have the opportunity to review the validity of the proposals to schedule and maintain more sessions. This should be understood as special sessions and during the second hearing. It is clear that these should not be intended as a continuation of the second hearing but special sessions and moreover there is no limit on how much can be the number of these sessions. However these are left to the discretion of the single judge or presiding

judge of the panel and, if necessary, but these should be related to the complexity of the subject matter.

5. During the second hearing, the trial judge or the presiding judge appoints judicial hearing unless he has not taken a decision on the objections made by Article 249 or the requirements of section 250 of this Code.

In this paragraph it is enabled that during the second hearing to schedule judicial hearing and in practical terms it is especially important to more complex subjects nature and in this case the flow of the trial can be planned. But there is no possibility that judicial hearing be set until deciding on requests and complaints submitted, respectively it is procedural obstacle, further more more decisions should be final.

6. If the single judge or presiding judge of the panel still has not decided on objections from article 249 or requests from article 250 of this Code, he makes written decision justified for all unresolved proposals after the second hearing. He schedules the judicial hearing by written order, which is issued at the same time with the decision or written decisions for abovementioned proposals.

After holding the second hearing, it should be decided for all proposals and at the same time decide regarding proposals and schedules judicial hearing which presents a good possibility for the present parties not to be invited one more time through regular calls, creates difficulties of different natures.

7. No witness or expert is examined and no evidences are submitted during the second hearing.

Until the initial examination and specifically permitted except in the case of deciding regarding the continuation or implementation of measures to ensure the presence of the defendant to hear witnesses, the second hearing does not foresee such a possibility. However, this presents an interesting situation that deserves a brief treatment at least for two reasons, such as:

- First the court is always obliged at all stages to review these measures to ensure presence of the defendant especially the most serious detention measure and it would be reasonable for these measures to decide at any stage that means even this stage;

- secondly given the fact that participants in the second hearing are the state prosecutor, the defendant and his defender, it would be expected to presentdemands for continuation or implementation of measures and from this reason it would be useful to hear arguments of the parties.

However, it is unclear why the legislator did not allow the hearing of parties and presentation of evidence as provided in the initial hearing, and only in regard to ensuring the presence of the defendant in particular to review the most serious measure or detention.

11. Reviews for determining the validity of of proposals[56]

1. In case the single judge or the presiding judge estimates that it is necessary to hold a hearing for verification of objections of the defendat from article 249 or requests from article 250 of this Code, he determines and implements this hearing as soon as possible to be able and not later than three (3) weeks from the day of the second hearing.

It is interesing to consider the paragraph in question, for several reasons: first, it is clear that it is necessary to hold several hearings, because it is described that these hearings are dealing with determination of validity of proposals. These hearings are held only it is not decided for these proposals during the second hearing, otherwise there wouldn't be needed to hold a hearing for this during the second hearing. However, it seems that the legislator had in mind the situation when after the second hearing and despite the fact that the court has in disposal requests and objections but even the responses related to that, however there might exist objections that decide about them, therefore for this reason envisaged the anticipated review, and has envisaged time limitations until when this hearing can be implemented, from the second hearing.

2. The single judge or the presiding judge of the panel, issues a written decision, justified as soon as possible after the hearing to hold according to this article and not later than three (3) weeks from the day of holding the hearing from this article.

[56] Article 255

The maximum timeframe of issuance of the decision determined is 3 weeks from the say of holding the hearing, but more essential is the fact that the decision should be in the written form and justified.

12. Presentation of the defense material[57]

1. During the second hearing, the defence presents to the state prosecutor:

1.1. notice of intent to present an alibi, stating the place or places where the defendant claims to have been at the time of the offense and the names of witnesses and any other evidence that supports the alibi;

1.2. notice of intention to present grounds for excluding criminal responsibility, specifying the names of witnesses and any other evidence that supports such ground; and
1.3. the announcement of the names of witnesses whom the defense intends to call to testify.

As emphasized earlier, during the second hearing the court makes shure to fulfill the obligation of protecting the defendant towards the state prosecutor in line with items 1.1, 1.2 and 1.3 set out explicitly.

It is important that the defender presents these notifications due to the fact that the state prosecutor needs to prepare for presentation of issues at the court hearing, further more appearance of witnesses in this phase is of importance because if not presented at this phase, it needs to be justified why these materials are not presented at this phase.

2. At any time before the judicial hearing, the defender may amend in written the information given according to paragraph1 of this article to the state prosecutor.

This paragraph allows information to be amended until before the judicial hearing, but the information however need to be presented before the judicial hearing.

3. If the defender doesn't perform the obligation from paragraph 1 and 2 of this article, while the court doesn't find justifiable reasons for this

[57] Article 256, CPCK

thing, the court may pronounce fine up to twohundred fifty (250) EUR towards the defender and informs the Bar Association for this.

This paragraph allows that in case of non-fulfillment of obligation to discipline the defender by pronouncing a fine and submitting a notification to the Bar Association, and rigthly the legislator has envisaged these measures as professional and a person who can be a cause of necessary, which damage efficiency of the procedure.

13. Conclusion

At the conclusion of this paper it is important to note that initial hearing, actions between the initial and the second hearing and the second hearing represent one of the most important stages of the criminal proceedings, which begins with the filing of the indictment by the state prosecutor and can be completed after the initial hearing in the case of rejecting of the indictment or can end the sentencing judgment in the case of the guilty plea or the successful negotiation of the plea agreement.

Initial hearing presents an important phase of criminal proceeding, where the recording of evidence is provided, unaccepted evidences are defected and eliminated, but there are also provisions of technical nature, such as submittion of accusation, which I consider is excessive and unnecessary, since the accusation should previously be submitted together with the invitation, in order to prepare for the initial hearing.

Ensures that the right of the defendant to have a defender is respected and and that the state prosecutor has fulfilled the obligation to discover evidences and all these present a guarantee and preparation for the main phase, respectively for the judicial hearing.

During the initial hearing it is decided about security measures of the presence of defendant, which is important since the parties may submit their views on the continuation or implementation of these measures directly during the hearing and therefore exceptionally hearing of witnesses and experts is allowed.

During the initial hearing, the parties have possiblity to present their objections on certain evidences, which is a judicial filtering of controlling the actions of bodies that have developed investigative procedure and in

case of recording such evidences, the court can avoid that evidence from the case, declaring them as uinadmissible evidence.

Also, during the initial hearing it is possible to complete a criminal act through rejection of accusation which can be done exclusively by request of the parties in the procedure, respectively between the accused person and the state prosecutor, but it is not foreseen to provide rejection according to the official duty, and by this I estimate that a possiblity should exist that the court could act ex officio, to have possibility to reject the accusation without request of parties, in order not to proceed with other phases in the procedure.

Of same importance is the fact that parties in the procedyre in this phase have very active role, either through the requirement for objection of the accusation or objection of proves and in the basis of requirement as one party, then there is possiblity of responsibility in written form before second hearing, or orally during the second hearing, which notes that these timeframes are long (one week for response), therefore I consider that these timeframes could be shorter, three or five days for purpose of efficiency of the procedure. While a good solution is the fact that a possiblity has been envisaged for court decision without response from the other party, after the timeframe for response, also the fact that there exists the possibility of the state prosecutor to change his accusation within the timeframe of one week is new, which according to my opinion is unnecessary and unreasonable.

A single judge or the presiding judge of the panel chairs the initial hearing, by guiding the denfendat about his rights and in case of admittion of guilt or plead not guilty, or reaching an agreement for admittion of guilt if legal conditions are met, they are competent to pronounce sentence although this provision has been applied in practice. However, at the department of serious crimes it causes lots of debates and dilema, whether sentencing can be done by the presiding judge of the panel, therefore I estimate that in the cases that are being reviewed by the department of serious crimes it would be an opportunity that after admititon of guilt to amend the judicial body with two more judges for pronounciation of sentencing.

Second hearing is peculiar because during this hearing it is not possible to end up the criminal procedure and may not be held at all, if for the parties in the procedure is decided through decisions of the single court or presiding judge of the panel, after the initial hearing.

During the second hearing the court ensures that the defender has fulfilled all obligation of presenting evidences, since the same provision is requested by the state prosecutor before the initial hearing and this is aiming to review evidences among parties in the procedure.

The special thing of this phase is the fact that besides the initial hearing and the second hearing, it has been envisaged that special hearings may be organized in order to determine validity of proposals of the parties and in this situation we deal with review of proposals according to the adversarial principle in presence of parties, where it is noted that maximum of taking decisions are too long (not more than three weeks), and it would be better for this term to be shorter, respectively maximum one week, in order to continue with the main phase, respectively judicial hearing.

I am fully aware that short commentary of these provisions may be deficient and with possible defects, but I welcome suggestions and comments from readers of this paper.

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ACCEPTANCE OF CRIMINAL LIABILITY OF LEGAL PERSONS IN THE "CIVIL LAW"- AN OVERVIEW OF LEGISLATION IN KOSOVO

ABSTRACT

Nowadays, the role and impact of legal persons in the soci-economic life is very large and in the continuous increase, in the state and international level. This certainly brings legal persons in situations to realize with their actions (inactions) and harmful facts for the society, including criminal acts. This reality impacted legal persons to be subject of treatment in terms of criminal law.

In this paper we will do a theoretical survey of criminal proceeding for legal persons, respectively, acceptance of european countries of principle "*societas delinquere e potest*". This theoretical treatment aims to elaborate some essential arguments of the doctrine for accepting this insitution, as bases for interpretation of legal provisions from this field. With particular emphases some of the key aspects of Kosovo's legislation on liability of legal persons for the offence will be treated.

Key words: criminal responsibility, legal person, a natural person, Compliance program.

1. Introduction

Increase of impact of legal persons in socio-economic life in the global level and increase of their criminality, has impacted that legal persons are subject of treatmen in terms of criminal law.[1]

In criminal law, regulation of responsibility of legal persons is becoming one of the most interesting topics, or as the world doctrine considers it as *"strategic research site"*.[2]

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[1] Puka, A.: A theoretical observation on the liability of legal entities for criminal offences - an European perspective, *Riv. Archivio Penale, 2015/2*, fq.1

Legal persons now cover a great part of industrial, commercial and sociological sectors, therefore their discipline in the frame of criminal law is considered as necessary to have a safe society with sustainable economy.[3] In this reality, criminal responsibility of legal persons, nows is a concept which is raised in the whole world, including european countries.

Despite the denial for a long time, in recent years in most jurisdictions of the European countries (following a long tradition of applying penal measures against legal persons in the framework of Common Law system) has accepted the possibility of applying for the criminal responsibility for legal person besides natural person, passing in this way from the principle "societas delinqueri non potest" in principle "societas delinqueri of potest".

In this paper we will provide a theoretical survey of criminal responsibility for legal persons, respectively switching of european countries in principle "*societas delinquere e potest*". This theoretical treatment aims to elaborate some essential arguments of the doctrine for acceptance of this institution, as basis for interpretation of legal provisions from this field. Also, some of main aspects of Kosovo legislation for responsibility of legal persons for criminal acts will be considered.

2. Acceptance of criminal responsibility for legal persons in the countries of "Civil Law" system

The doctrine of criminal law in european countries did not recognise for a long time the possibility for the legal persons to be criminally liable for actions performed by his members or by his representatives, based on the principle that criminal responsibility is individual and not collective (*societas delinquere non potest*). Consequently, legislations of these states were created on these bases and criminal responsibility has been limited only for natural persons.[4]

[2] Rodriguez, L.Z.: Corporate Criminal Liability: Responsibility of legal persons for offenses in the European context, *ISISC, Siracusa, 2008,* fq.315 and continual.
[3] Mahajan, K.: Corporate Criminal Liability: Why Corporations are preferred and not the employees?, *Company Law Journal, Vol. 4, 2008*, fq.1
[4] Puka, A.: *Ibidem*, fq.2.

Furthermore, the notion of guilt is considered only as concept of personal nature that implies the existence of criminal responsibility depending on psychological factors, which can be tested only at natural persons. According to this conception for criminal responsibility a psychological relation is requested with purpose of impeachment, as "personal" responsiblity that derives exclusively from subjective consciousness.[5]

Principle *societas delinquere non potest* has its origine in the context of church, in fact by a dogma of Pope Inocenti IV, which had the purpose of abbey for corporations or civil entities for the sins performed by members of these corporations. This dogma was preserved even in the context of development of criminal law, acting until the twentieth century. [6] This concept under the system "*Civil Law*" is based on the theory of German jurist and historian Friedrich Carl Von Savigny: that only natural person may possess rights, while legal persons for development of his activity needs representatives, therefore he can not be perpetrator of criminal act, being simply a legal fiction.[7] This attitude has represented traditional approach according to theory of fiction or romanistic.

Theory of fiction is now replaced with theory of reality (technical). This theory, which is known as organic theory, supports the idea that while legal persons are important participants in the socio-economic life, this should have repercutions in the criminal law as well. Therefore, this discipline being faced with phenomenon of collective crime can not be supported infictions and to remain in the sphere of individual criminal responsibility.[8] Theory of reality justifies criminal responsibility of legal persons with criminal measures against all entities that cause serious consequences for the society, and on the other side, until the legal person has the capacity to act, bear civil and administrative responsibility for actions of his representatives, than accoeding to a logical interpretation, it should keep criminal responsibility for criminal acts committed on his behalf and benefit.

[5] De Maglie, C.:,Societas Delinquere Potest? The Italian Solution. Ed.by Pieth,M. & Ivory, R. – Corporate Criminal Liability, *Ius Gentium: Comparative Perspectives on Law and Justice 9, Basel, 2011,* fq.256

[6] Shih Zapatero, A. L. : Die strafrechtliche Verantwortlichkeit der juristischen Personen in Spanien. In: *Schulz et al. (eds) Festschrift fu¨r Imme Roxin. Muller, Heidelberg, 2012*, fq. 711.

[7] Shih Savigny, C.v.F.: Sistema del diritto romano attuale, *Volume II, Bologna,* 1900.

[8] Kambovski, V.:Legal-criminal framework of prevention of organized crime, *Organized crime – legal aspects, Tetovo, 2009*, pg.40-41.

Then starting from a definition of the meaning of legal norms themselves and to the general principle that if the rules or violating legal norms stipulated by the penal provisions, the legal consequences for its offender is a criminal sentence[9], should also apply in cases where the offender is a legal person. In this way also it creates a foundation for the passage of traditional concepts that only natural persons can bear criminal responsibility.[10]

Unlike natural person, who is required to respect values of society protected by legal and criminal norms within his mental capacity, awareness of their importance and behaviour contrary to these rules presents basis of his conviction, it can not be applied by legal persons, for which (*corporate culture*) to provide an environment for application of the action legally, respecting legal goods of the society. Furthermore, for determination of guilt or innocence of the legal person for actions committed by his representative, requires existence of an organizational model and control (*compliance program*[11]) in order to prevent criminal actions. On the contrary, lack of such a model presents basis of doubt for legal persons.

There can be no question of a person intentionally or nengligently or psychological report with criminal action, as defined at natural persons, and we can not have a psychological conception of guilt for legal person. This problem can be overcome in terms of doctrine through a normative conception of guilt, by adjusting its criteria with the nature of legal persons and their functioning. Subjective aspect of criminal responsibility of legal persons, it is based on evaluation of existence or no of a programe (measures) for prevention of criminal acts that might be performed on their behalf and benefit. Application or nonapplication of a programe or measures for prevention of cirminal actions, is an indicator of orentation (vill) of legal person in regard with respect of values of society protected by laws.

[9] More on this topic see Ramacci, F.: Corso di diritto penale, Torino, 2005, pg.30 and continual.
[10] Puka, A.: *Ibidem.*
[11] "*Compliance program*" means domestic programs (measures) applyed by a legal person for the purpose of compliance with applicable laws and other regulations, as well as a control body for the formulation and effective implementation of these programs. To avoid a legal person guilty of criminal acts, this program must include clear measures to prevent such acts that could potentially be carried out by its representatives.

Thus "*mens rea*" that once was thought to represent the overwhelming problem for the application of a scheme of criminal liability for legal persons is now exceeded by basing the actions of agents[12] who have delegated powers by the governing bodies of the legal person, and their actions will be identified with the legal entity itself. This principal is now accepted in the world doctrine, identifying personal responsibility with actons of its agents, known as principle of identification.[13] The conception of guilt of legal persons can be said is result of what Professor Ramacci names orientation of world doctrine in finding most favourable aspects for formulation of idelogical principle *'nullum crimen, nulla poena sine culpa*" because there are various scientific concepts relatingf to the notion of guilt,[14] and as a result of a countinuous dynamics to match the principles and rules of criminal law with the needs of social reality.

As it is known, beginnings of normative concetion appeared in the XX century, with penetration of "neocantism" and with return of values and ethic criteria in formulation of criminal- legal institutions, recognizing the ethical notion of guilt as reproach[15] for actions or omissions in violation of criminal and legal norms in force.

In this way, through transition from traditional conception of guilt to normative concetion, it becomes possible warning of any subject if it does not fit in social values accepted by the society. In this line of thoughts, guilt is not about psychic (personal) and the individual criminal act, but a sign that is made to all subjects, and to legal persons as careless in respecting the law.[16] As such, normative conception of guilt is considered as "*key*" of affirmation of criminal responsiblity for legal person, that as criteria of guilt is taken the prove whether the action committed on his behalf is consequence of interest of the legal person to benefit (directly or indirectly) from such an ation is consequence of negligence of legal person to take necessary measures for prevention of damage, respectively criminal act. Criminal responsibility of legal persons is determined on that basis, in majority of european countries that have accepted this institution.

[12] Mohojan, K.: *Ibidem*.
[13] Molan, M., Lanser, D.; Bloy, D.: Principles of Criminal Law, 4th ed. London, 2000, pg.138 and continuation.
[14] Ramacci, F.: Corso di diritto penale, cit., fq.107.
[15] Kambovski, V.: Criminal law- general part, *Skopje 2004,* pg.248 and continuation.
[16] Bozheku, E., Elezi, I.: Criminal responsibility of legal persons, *Tirana, 2012,* pg.44.

2.1 Hesitations about accepting criminal responsibility for legal persons in european system- trends of presetving legal traditions

Despite broad acceptance of criminal responsibility for legal persons in all legal systems in the world, still we can not say that the principle "*societas delinquere non potest*" is fully eliminated in the field of criminal law, in particular in the european system which has been constantly followed by doubts in this aspect.

From different approaches in doctrine and evaluation of judiciary in european countries in relation to hesitations to accept criminal responsibility for legal persons in the frame of their legislations, mainly two obstacles or justifications are noticed. First, traditional approach of theoreticians of criminal law is connected to principle "*societas delinquere non potest*", while as second obstacle, it s considered that legislative reforms that need to be performed in many fields (environment, business, etc.) which are impaced by acceptance of responsibility of legal persons in the frame of criminal legislation.[17]

These aspects have led some countries to find specific normative solutions, aiming at preserving constitutional principles and their legal tradition. As typical representatives of these countries that hesitated to accept criminal responsibility for legal persons there are solutions determined by German and Italian legislator.

In the system *Civil Law* (unlike *Common Law*) there has been a continuous objection to accept criminal responsibility even against legal persons, based on the tradition of preserving the principle of criminal personal responsibility, causing delays in accepting pure criminal conceptions for legal persons[18] in european countries as well. On the other side, current legal framework of EU that requires regulation of responsibility of legal persons for criminal acts, does not necessarily determine criminal responsibility. This impacted countries like Germany and Italy to use this opportunity within the legal framework of EU. to avoid a determination of legal responsibility that would be applied directly towards legal persons.

[17] Puka, A.: *Ibidem.*

[18] Manduchi, C.: The introduction of corporate "criminal" liability in Italy, *Riv.Diritto&Diritti, 2010, www.diritto.it/docs/30795*

In this regard, the italian legislator did one of the biggest movements with legal system by the Law nr. 231 from the date.08.06.2001, where he does a solution of the type *sui generis*, by determining administrative responsibility for legal persons that are responsible for criminal actions committted on their interest or their advantage. This careful solution of italian legislator is done in order to avoid violations of article 27, *parag.*1 of the italian Constitution, which determines principle of guilt and personal criminal responsibility. Aspect *sui generis* of the mentioned law is seen in the fact that despite avoidance of the notion "*criminal responsibility*" and limitation of sanctions of criminal nature, as way of preserving harmonization of legal acts, the procedure which is developed towards a legal person is typical criminal and is based on provisions of the Code of italina criminal procedur and is under competences of criminal court.[19]

The trend of accepting criminal responsiblity in european countries was not followed by Germany, because dogmatic problems in the existing system are considered unresolved for acceptance of such responsibility.[20] Even German legislator provides even more restrictive solution, determining only administrative responsibility for legal persons, for criminal actions committed by subjects they represent. Respecting in this way article 19 of the German criminal code which determines that "*only natural persons can committ criminal actions*". In the german system, development of legal procedure towards legal persons is under competences of administrative court.

It is natural that countries which were impacted by german and italian judicial system, hesitated for a long time to admit criminal responsibility for judicial persons, for example.: Hungary[21] and other states. But until now, almost all european countries have determined criminal responsibility within their legislations for legal persons, for criminal acts cimmitted on their behalf or their benefit (Netherland, France, Belgium, Finland, Norway, Switzerland Denmark, etc).

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[19] For this reason the solution provided by italian legislator is considered as a model "*parapenal*" or "*semi criminall*" for responsibility of legal persons for criminal actions.

[20] Bohlander, M.: Principles of German Criminal Law, *Studies in International & Comparative Criminal Law, Oxford, 2009,* pg. 23 and continual Bö se, M.: Corporate Criminal Liability in Germany – Corporate Criminal Liability. Ed.Rodha, I. & Pieth, M., *Basel 2011,* pg.227-228.; Weigent, Th.: Societas delinquere non potest? – A German Perspective, *Oxford University Press, 2008, ICJ 65 (927).*

[21] Santha, F.: Criminal responsibility of legal persons in Hungary – theory an (a lack of) practice, pg. 198 and continual. *(http://www.upm.ro/proiecte/EEE/Conferences/papers/S1A38.pdf) {02.03.2014}.*

In the last decade, an orientation of determination of criminal responsibilities of legal persons has been noted even in the Balkans, that in the provisions of criminal codes (Macedonia, Bosnja and Herzegoviva) or by specific laws (Albania, Kosovo, Croatia, Montenegro and Serbia) determined conditions of legal person's responsibilities, procedural aspects and sanctions that might be applied towards them. In the Balkan countries one of current problems noted is practical implementation of laws from this field.

3. Criminal responsibibility of legal persons according to Kosovo legislation

As in many other countries, the Republic of Kosovo as well acceded in principle "*societas delinquere potest*" by norming criminal responsibility of legal persons. Conception of criminal responsibility in Kosovo as well is result of necessity to create legal basis for an efficient fight against crime of legal persons, and on the other hand a responsibility towards requirements of international mechanisms for regulation of this field.

Criminal responsibility of legal persons as a concept in Kosovo has been accepted for the first time in the Criminal Code of 2003,[22] where in article 106 in principle was determined that "*Criminal acts for which legal person can be criminally responsible, criminal responsibility of legal person, criminal sanctions that can be implemented towards legal persons and specific provisions which regulate criminal procedure applicable toawrds legal persons, are provided specifically according to the law*".

On the level of formal recognition, criminal responsibility of legal persons is determined according to Criminal Code of 2012[23], which also contains some provisions on responsibility of legal persons, but it does not fully regulate this institute to apply it in practice as well.

Full regulation of this institute in Kosovo has been provided by approval of the law 04/L-030 for responsibility of legal persons for criminal acts

[22] This Code proclaimed by UNIM Regulation no.2003/25, entered into force on 6 April of 2004.

[23] Code on Criminal Procedure of Republic of Kosovo, entered into force, on 1 january 2013. *Official Gazzette of Republic of Serbia* /No.19/13 July 2012.

(hereinafter law 04/L-030),[24] applying in this way even principle provisions of Criminal Code, that envisafe regulation of this institute.
With entry into force of law 04/L-030 the Law on economic crimes has been abolished (1986)[25], which up to this time has regulated the field of responsibility of legal persons.

Law 04/L-030 regulates responsibility of legal persons for criminal acts, determines criminal sancctions that can be pronounced, and contains specific provisions of criminal procedures
that can be applied (article 1). Further, we will try to present some essential aspects of criminal responsibility for legal persons in Kosovo, in particular affirmations of the law 04/L-030 and main problems that we consider will present challange for legal system in Kosovo on the occation of judgement of legal persons.

The law defines that "***responsible persons***" is: "*physical person which in the framework of legal person has the trust to perform specific duties, or an authorisation to act on behalf of legal person as well as there is high reliability that it is authorised to act on behalf of legal person*" (article 2, *parag*.1, *point*.1.1). that provides possibility to the court to apply criminal responsibility against legal person only when it is proved that besides authorisation, there is reliability that the responsible person presented "*interests*" of legal person, expressed his will, and not only because he was an emoloyee of legal person.

While criminal responsibility of legal person derives of criminal act of natural person, then one of conditions to conceptualize this responsibility is identification of natural persons that can act on behalf of legal persons, and in which conditions criminal act committed by them can be basis of responsibility for legal person as well.

[24] Law 04/L-030 for responsiblity of legal persons for criminal acts was approved on.31.08.2011 and entered into force on .01.01.2013. The author of this papre was member of Commission of Ministry of Justice fr development of the first draft of this law. Considering that in the further procedure in the commission of Kosovo Parliament, there was more a focus to a debate on the needs of amending EU standards in this field and in this way they are not included many proopsals of experts for development of a functional law. This caused approval of a law with shortcomings and some unclear provisions, that we consider would challange the system of criminal justice in Kosovo. On the other hand, this also has critics on criminal legislations of the Baklan countries. that many laws in these countries have been approved aiming at fulfilling some critera in regard to EU , without taking into consideration the functonal aspect of theirs and circumstances where should they apply.
[25] "Official Gazzette "former Yugoslavia, nr. 10/86.

Depending on the model followed by legislations of various countries, basis of responsibility of legal person in relation to action of natural persons, is determined in many ways, such as: explicit definition of persons that are in the structure of legal person, that can committ criminal acts on his behalf; by identification of responsibility of legal person only by actions of high bodies and based on an inadequate ssytem of organization and lack of measures for prevention of criminal acts (*Compliance programe*);[26] or by not specifying subjects that according to hierarchy position in general that legal responsibility of legal person derives from criminal act of natural person (responsible) regardless of position in the structure of legal person, but which has authorisation to act on his behalf and with committed action provided benefits to legal person. This model is applied in Kosovo as well.[27]

Therefore, legal responsibility of legal person, may appear only by criminal acts that are committed by natural persons that have specific qualities[28] and it can be proved that they have acted on behalf of legal person,[29] in every concrete case of criminal proceeding against legal person. It is up to prosecution to prove this relation between natural and legal person, based on formal positioning that legal person had to repersent legal person based on the firmal positioning that natural person had based on the employemnt act (contract or agreement on employment) or other acts of providing legal authorisations to represent legal person. Than, the second aspect consists on proving whether criminal act was also the willingness (intention) of the legal person, or at least the legal person did not undertake measures for prevention of such an action (subjective aspect of criminal responsibility of legal person).

[26] Pieth, M. & Ivory, R., Emergence and Convergence: Corporate Criminal Liability Principles in Overview – Corporate Criminal Liability, *Ius Gentium: Comparative Perspectives on Law and Justice 9, Basel, 2011*, pg.22 and continual.

[27] This model was followed by legislator in Kosovo, where in article 5, *parag.*1 of the law 04/L-030, that determines basis of criminal responsibility for legal persons, does not specify hierarchy of natural that might committ criminal action on behalf of legal person. In this capacity are subjects that are responsible
who can act on behalf of legal person and with criminal act bring benefit to the last one, or cause damages on his behalf.

[28] For determination of natural persons that can committ criminal act on behalf of legal person, according to Kosovo legislation, should refer to article 2 of the Law 04/L-030 on definition of the notion "*responsible person*".

[29] See Bozheku, E., Elezi, I.: *cit*., pg.22 and continual.

With regards to definition of the notion of legal person, the law contains only a general definition, that legal person is only domestic or foreign legal subject , who according to the legislation in power is considered as legal person (Article 2, *parag*.1, *item*.1.2). The same definition is in the Criminal Code of (2012), in general provisions on criminal responsibility of legal persons (article 40 and 120).
From this, it appears that kosovar legislator avoided final definition of the notion "*legal person*" in terms of applying his responsiblity for criminal acts, leaving it as a duty for the doctrine and judicial practice that through interpretation of Kosovo legislation in general, to determine which are subjects of the right that are considered legal persons. A more complete definition with regards to Kosovo legislation is in the Law Nr.02/L-123 for Trade Associations which says: *"Legal person" is general expression that means a society, including trading society, that has a particular legal identity and are separated from him and its joint-stock."*[30] With the aim of identification of legal persons towards which criminal responsibility may apply, is of particular importance the distinction between legal public private persons. This is due to the fact that criminal sanctions can not apply toward all legal persons for actions committed on their behalf and benefit, such as: Legal persons with public interest. Such distinction the law 04/L-030 provides in article 4, *parag*.3. which provides that: "*Republic of Kosovo, state administration bodies and local self governments and foreign state organizations that act in the Republic of Kosovo can not be responsible for criminal acts, but responsible person holds criminal responsiblity".* This definition first expresses orientation of the law 04/L-030 its main aim is discipline of private legal persons.

In regard with criminal acts for whih legal person may be criminally responsible, kosovar legislator decided for less limited solution, providing possibility to the legal person to be responsible for criminal acts from the particular part of Criminal Code of Kosovo and for other acts, whenever the conditions are met for responsibility of legal person (article 3, *parag*.2), accepting therefore the model "*all-crimes approach",* such is

[30] Law nr.02/L-123 for trade societies, as legal person capacitates: societies with limited liabilities and Joint Stock company, while individual companies, collective societies and commanditary societies, don't have the status of legal person. In general, there is no final definition of the notion for legal person, characterizing it as a society of people or fund with specific aim (i.e. fondation), that according to the law has legal personality. He differs from other societies of people by possessing legal personality and may appear in front of courts as prosecutor and respondent ("*Parteifähigkeit*" – capacity to be party in the court). (http://www.eurofound.europa.eu/emire/GERMANY/LEGALPERSON-DE.htm, *(15.12.2014)).*

the case with legislation of Netherland[31], Croatia[32],etc. We think that such a broader soultion, limitating only in the condition that criminal act matches the nature of legal person and fulfill conditions for criminal responsibility is practically more right than listing criminal acts for which legal person may be held responsible (*list-based approach),* such is the case with italian,[33]spanish,[34]estonia,[35] legislator, etc. which explicitly define criminal acts for which legal person may be responsible. Advantage of the first model is argumented through the fact that main criteria for legal responsibility is prove whether the legal person benefited from the criminal act, which is perfomed on his behalf and whether he is guilty (always have in mind normative conception of guilt).

Territorial validity of the law 04/L-030 is defined in article 4 , which envisages that this law is applied toward legal persons (domestic and legal) that are responsible for criminal acts committed in the territory of Republic of Kosovo, affirming in this way the principle of territorially. Also, this law is applied toward foreign legal person which is responsible for criminal act committed outside the state in damage of Republic of Kosovo, its resident or domestic legal person (real protection principle) and towards domestic legal person (domestic) which is responsible for criminal act committed outside the territory (Principle of active personality)

Kosovar legislator provides exclusion of criminal responsibility for legal person which is committed during realization of autorizations that are entrusted to him according to the law (article 4, *parag*.4).

[31] See Dutch Penal Code *(Wetboek van Strafrecht) (DPC), 1976,* article 51.

[32] See Act on the Responsibility of Legal Persons for the Criminal Offences, *Croatia, Official Gazette no. 151/2003,* neni 2.

[33] After approval of the law 231/2011 on administrative responsibility of legal persons for criminal actions the italian legislator by reforms of 2002, 2003, 2005, 2006 and 2007 included by specific laws some new forms of criminal acts for which legal person may be responsible, such as: terrorism and slavery, market abuse, keeping stolen things and money laundering , etc. See De Maglie, C.: Societas Delinquere Potest? The Italian Solution, Ed.by Pieth,M. & Ivory, R. – Corporate Criminal Liability, *Ius Gentium: Comparative Perspectives on Law and Justice 9, Basel,* 2011, fq.260 dhe vazhdim.

[34] For deeper information on criminal responsibility of legal persons in spanish system, in particular see De La Questa, J.L.: Criminal Responsibility of Legal Persons in Spanish Law, *International Review of Penal Law, AIDP/IAPL, 84,1/2, 2013,* fq.143-179.

[35] Ginter, J.: Criminal Liability of Legal Persons in Estonia, *Juridica International, XVI/2009,* pg.151.

3.1 Basis and the limit of criminal responsibility for legal persons according to the law 04/L-030

Basis and limit of criminal responsibility for legal persons in Kosovo is determined in article 5 of the law 04/L-030, which provides fundamental provisions towards this discipline, but it is even the most controversal and problematic of the law in questions.
Criminal responsibility of legal person derives from criminal act committed by the person in question, on his behalf and benefit. In this way, article 5, *parag.*1 defines that: "*Legal person is responsible for criminal act of the person responsible, that acting on behalf of the legal person within authorisations committed criminal act in order for the legal person to realise some benefit or has caused damage. Responsibility of legal person exist even when action of legal person was against with the business policy or orders of legal person."*

Definition that criminal act should be committed unless "*on behalf*" but also " *within authorisations",* is a right formulation of the legislator which means that for a criminal act against legal person it is not sufficitent that criminal act is committed by responsible person only by representing legal person (*on behalf*) but should have acted within given authorisation by the legal person itself. While the other part "*…in order for that the legal person realises benefit …*" can present problem during interpretation in practice, because it envisages a specific will of the responsible person, which is difficult to prove in practice. At this point courts in Kosovo should be careful in interpretation of this part of the provision in question, because the aim of a responsible person does not always match with the aim o legal person (even he can not have identification).[36] Therefore the court should regardles of the will of responsible person, to prove whether legal person wanted or allowed such an act through his behavior and the policy it implemented.

As it is known in the criminal law, principle of criminal responsibility presents one of its basic principles, which means that every individual responds only for consequences, respectively facts (that according to the law are defined asn criminal acts) that he personally caused by his action

[36] More on subjective aspect of responsibility of legal person in relation with interest or will of natural person, and arguments of guilt of legal persons should match with interests of natural person, see Lattanzi, G.: Reati e reponsabilità degli enti, *Milano, 2005*.

or inaction (objective action)[37] and are result of will or his carelessness (subjective aspect)[38]. According to this principle, a person can not be responsible for the criminal act committed by another person, but only for the act that he committed personally and by his fault.

Based on the postulates of this principle, some of teoreticians insisted that criminal responsibility of legal person is not possible, because it would mean that the last one is blamed for a criminal act committed by another person (natural person).[39] This principle as an obstacle for acceptance of criminal responsibility of legal persons was treated even earlier, when we spoke about hesitations of some countries to accept this responsibility, such is the case with Italy where the legislator avoided the notion of criminal responsibility to respect article 27 of Italian Constitution where principle of criminal responsibility is stimulated,[40] which in the doctrine plan is overcome through normative conception of criminal responsibility of legal person, and this should comprise the basis of any interpretation from judicial practice.

We should bear in mind that definition of guilt of legal persons, besides law provisions that define this institute, it is based also on principles and regulations provided in the criminal code and the code on criminal proceeding, as much as they can match the nature of legal person. In this spirit the law of Kosovo 04/L-030 for responsibility of legal persons for criminal acts, in article 3 *parag.*1 provides that: " *Unless otherwise provided by the law, provisions of Criminal Code of Kosovo and Code on Criminal Proceeding apply toward legal persons"*. Therefore, a more coherent interpretation of provisions is required within positive criminal legislation in general, through a deeper study to clarify criteria that present basis of criminal responsibility for legal person. Otherwise, from practical aspect, it can be problem to justify court decisions against legal

[37] According to objective aspect, criminal action is personal when there is cause connection between action or ommition and consequences, on the contrary the person can not be criminally responsible. CCP in article 20 determines that: *"Personi nuk është penalisht përgjegjës kur midis veprimit ose mosveprimit të tij dhe pasojës mungon lidhja shkakore".*

[38] According to subjective aspect, criminal action is personal of the individe when he is mentally capable (or has limited mental ability but exists a level of ability) and the action is committed with guilt (will or carelessness). So, from this aspect personal principle is identified with the conception of criminal responsibility.

[39] More on tjis principle in relation ot criminal responsibility of legal person see: Bozheku, E., Elezi,I.: cit. pg 40 and continual.

[40] For deeper knowledge of this princile in the positive italian law see Ramacci, F. cit. pg. 107 and continual.

persons as responsible for criminal acts committed on their behalf and benefit.

In this regard, in order to consider a legal person as guilty, it is necessary that the committed criminal act on his behalf or benefit, to be proved by objective and subjective side.
While, as basic conditions for criminal responsibility of legal person are that criminal act should have been committed "*on his behalf*" and "*on his benefit*", in his plan to prove guilt of the legal person, main duty of the courti is right interpretation of these two conditions (objective aspect of criminal responsibility of legal person). First, in order for the criminal act to be committed "*on behalf"* of the legal person it is not sufficient only to prove that in concrete case acted on his behalf and had authorisation for such an action. On the contrary, legal person can not be proclaimed guilty. Second aspect, should be proved if the legal person had benefit respectively exclusive interest from such acts. Benefit of legal person may be direct and indirect.[41] Besides other criteria, these two conditions should be proved in cummulative way to create criminal responsibility of legal person. Another basis of guilt of the legal person according to law 04/L-030 is also cause of damage.[42] Legal person may be proclaimed guilty in case it is proved that damage is result of an interest of legal person or he did not respect necessary standards during implementation of the action.

For example, a construction company may be proclaimed guilty if the damage came as consequence of non-taking protection measures, and justification of criminal responsibility based on this interest benefited by not spending in buying equipment for security at work. Also, such a

[41] Direct benefit of legal person of committing criminal act may be in cases when management bodies of legal person favor committing of criminal acts fby natural persons, with the aim to end up in illegal way. ie..: stiumate corruption of representatives to benefit from public tenders, etc. While an indirect benefit the legal person may have in cases when they dont apply adequate measures for prevention of criminal acts in order to preserve thhis budget, etc. for example a construciton company doesnt invest in security measures in order not to spend too much and as a consequence it causes damages, or a company for production of food does not invest in technological equipment in accordance with the standards and by this endangers lives and health of the population, etc.

[42] Committing actions (cause of damage) as consequence of negligence of a person may be pollution of environment or cause of damage by another construction company that has bought all the equipment in accordance with standards for prevention of pollution or other consequences at work but are not put in function or are not maintained and this negligence causes dangerous consequences. Therefore, cause of damage shal be result of an interest of the legal person or his negligence to act in accordance with legal obligations.

company may be proclaimed guilty in case it did not apply protection measures in line with standards required for security during implementation of its activity, and as consequence damage has been caused.

So, in both these cases the caused damage is in relation to behavior og legal person and is identified with his interest and responsibility for facts he could envisage. Therefore applicaiton of criminal responsibility is in line with the spirit of law 04/L-030 (*ratio legis*) and principle of guilt that a subject is responsible for facts it could envisage. On the other hand, in case such relation of legal person can not be proved by the caused damage can not have criminal responsibility. For example, can not have criminal responsibility a construction company in case it manages to prove that it took protection measures in accordance with required standards, but the damage caused during performance of the action or in relation with it is consequence of "*vis major*".

In this regard, cause of damage as bases of criminal responsiblity makes sense only if proved that it is in relation with an interest or negligence of legal person in relation to his legal obligations.

Therefore, in order to prove criminal acti by subjective aspect, the guilt of legal person should be based on the way of its internal organization, existence and imlementation of a model for prevention of criminal acts or no, or another act in this regard.

In practic,e criminal acts performed on behalf and on benefit of legal person in many cases are direct consequence of a weak organization of legal person to avoid such actions.[43] On this basis the guilt of legal persons is justified and his punishment if proved that determined criminal act is consequence of weak organization of legal person to avoid it,[44] while the legal person can not prove the opposit in the criminal procedure.

In this way throug normative conception the guilt of legal person is justified as will and carelessness. The will exists when the act expresses the will of legal person (for example: corruption acts stimulated by legal persons itself), while the act is considered that it is committed by negligence in cases when it came out as consequence of a weak and

[43] See. Manna, A.: La responsabilità administrativa delle persone-il punto vista del penalista, *Cassazione penale 2003*, pg.1101.
[44] Manduchi, C.: *cit.*, fq.2

unnecessary organizaton of legal person to avoid such an act (*culpa in vigilando*)[45] and this should be basis of blaming legal persons even according to provisions of law 04/L-030.

Independence of criminal responsibility of legal person in Kosovo (in terms of a criminal responsibility in paralelle[46] in relation to natural person) is provided in article 5, parag.2, where it is envisaged that legal person is responsible for criminal act in case the responsible person who committed criminal act is not sentenced for that act.[47]

But, in deep contradiction with previous definition is the other provision (*parag*.3) where it is provided that criminal responsibility of legal person is based on the guilt of responsible person. Also, the law defines that subjective elements of criminal act that exist only with responsible person will be valued in regard to legal person (*parag*.4).

This definition of the legislator in Kosovo, creates uncertainties and are in opposition with the main principle of criminal responsibility of legal person, because his guilt is udnerstood and affirmed only by normative aspet (which is also considered "key" of accepting criminal responsibility for legal person), and can not be conditioned with willingness or carelessness of natural person, according to psychological criteria of guilt (traditional conception).[48] This contradictory solution of the law 04/L-030, complicates prove of guilt of the legal person, specifically in cases when responsible person is not sentenced, because by his guilt the legislator has also connected criminal responsiblity of the legal person. On the other side, this brings the legal person in an unfavorable situation in front of the court in other cases, when the natural person needs to be sentenced, that according to given solution means automatic blaming of the legal person for simple reason that criminal act is committed on his

[45] See Bozheku, E.: Criteria for criminal responsibility of legal persons under subjective profile, *Avokatia*, 2012, pg 37 and continual.
[46] Kambovski, V.: Criminal law, *(General part)*, Skopje, 2010;
[47] In practice there might be situations when for different reasons the responsible person can not be punished for criminal act committed on behalf and on benefit of person, for example when after committing criminal act, loses the ability to be responsible, escapes, dies,etc. In such situations criminal responsibility of the legal person can not be excluded, therefore definition of the legislator in this case is correct.
[48] For a deeper analyses on this aspect, see also: Bozheku, E., Elezi, I. cit. fq. 296 dhe vazhdim, Bozheku, E.: Guilt – some theoretical, methodological, functional and practical aspects of the second element of criminal act, E Drejta/Law, Prishtinë, n.2/2010; Ramacci,F.: Corso di diritto penale, II ed., Torino, 2011; etc.

behalf, regardless of attitute or relation of legal person with sucha an act, disabling them to prove innosence.[49]

From provisions of the law 04/L-030, appears that his main problem is clear definition of the basis of criminal responsibility for legal person. In this regard, lack of defined clear and formal criteria is seen as fundamental problem, through provision of an organizational model and effective control (*compliance program*) for legal person, as main criteria of prove of guilt or innosence of the legal person. This would be in accordance with the aim of sentence of legal persons for criminal acts.

Existence of an organizational culture (which in the anglo sacon system is known by terminology "*corporate culture*") as system of values, way of organization and control, based on which legal person needs to exercise the aktivity, in an ongoing basis was topic of discussion in the world doctrine in relation to application of criminal responsibility.[50] Possibility of implementation of a "*corporate culture"* at legal persons is understood as avoidance of presure that heads of the legal can perform towards lower level employees, so that they realise unlowful actions to bring benefit to legal person.[51] But in this regard we should always be careful because general regulations of organization (*corporate culture*[52]) tha a legal person may have, can not be replacement of a "*model of organization and effective control"* (*Compliance programe*) which is dedicated exclusively for prevention of criminal acts.

[49] Puka, A.: Considerazioni sulla responasabilità degli enti in Kosovo, *Riv. Collona Roma, Sapienza, 2015*, pg.137.
[50] *Ibidem.*
[51] Henning, P.J.: Corporate criminal liability and the potential for rehabilitation, *Wayne State University Law School, Legal Studies Paper Series no.09-21, 2009,* pg.15
[52] A "*corporate culture*" at legal persons in terms of prevention of criminal acts can function and be basis for avoidance of guilt, only if the legal person has a model of organization and effective control (*compliance program*) dedicated for this purpose, that in an explicit way defines measures that undertakes continualy to prevent jhis employees to committ criminal acts, and also to have a control body on effectiveness of these measures. Such a model should be applicable and to be proved as sufficient for prevention of criminal acts so that legal person could prove his innosence at the court or at least to have mitigation of sentence. In case of
criminal proceeding, from the legal person who claims innocence is requested to prove that he took adequate measures that criminal act should not happen anymore, and that it has been committed by the guilt of responsible person by not applying decisions and regulations of the legal person. It can not be sufficient basis for avoidance of generalized criminal responsibility "*corporate culture*, which by specific acts defines general regulations for behavior of his employees.

In this regard, lack of legal criteria for proving innocence by legal persons, that would oblige him to approve a "*compliance program*" for this purpose (in accordance with the law), is also main shortcoming of the law 04L-030 and laws approved in many countries for responsobility of criminal responsibility for criminal acts, with excerption of some countries, for example Italia, where the law[53] explicitely defines that the legal person would not respond for the criminal act if he can prove in front of the court his innocence based on the law criteria. ër

In general laws on responsiblity of legal persoms for criminal acts, envisage the possibility for the law to provide mitigation of damages when it is proved that the legal person had a "*compliance program*" at the time of committment of criminal act,[54] or based on reporting of violation or acceptance of guilt[55], as indicato that it has *"willingness"* that in the future not to act in contrary to the norms in force, and to avoid unlawful actions of the subjects they represent. In the Italian system as well, existence and efficiency of a model of organization and supervision body enables avoidance of responsiblity for criminal acts or at least a reduction of sanctions.[56]

Similar to the italian mode, the legislator in Kosovo in the case of amending the law must provide formal criteria upon wich the legal person can prove that he is innocent for the crimnial act which was committed on his behalf and his benefit, if he manages to prove that he undertook all measures that such criminal act doesn't happen and in any way did not contribute (in active and passive way) for such an action to be committed.[57] As an integral part of a "*compliance program*" of legal person in Kosovo should be: a) Model (Programme) of organization,

[53] Italian law 231/2001 on administrative responsiblity of legal peprsons for criminal acts. For a deeper cnowledge of the italian model see Fiorella, A. & Lancelloti, G.: La responsabilià dell'impresa per i fatti da reato, *Torino, 2004*; Vinciguerra, S. & Gastaldo, C.M. & Rossi, A.: La responsabilià dell ente per il reato commesso in suo interesse, *Padova, 2004.;* Manduchi, C.: The introduction of corporate "criminal" liability in Italy, *Diritto&Diritti (http://www.diritto.it) 2010*; Lattanzi, G: Reati e responsabilità degli enti, *Milano, 2005.;*etc.

[54] Pieth, M.,Ivory, R.: cit. fq.44.

[55] Nanda, V. P.: Corporate Criminal Liability in the United States: Is a New Approach Warranted?, *Ius Gentium*, cit. pg.71.

[56] Manduchi, C.: *cit.*., fq. 3

[57] Based on criteria of an internal control for legal persons, their obligation to have an ethics and to approve a "*compliance program*", specific importance within international documentation has also Manual of the Organization for Economic Cooperation and Development (OECD) with topic: "*Good Practice Guidance on Internal Controls, Ethics and Compliance".*

where at least it should define clearly the way of functioning of the legal person, way of taking decisions and measures applied for prevention of criminal acts and b) Supervision body (of control), *which need to exercise continuous control over the subject of legal person that needs to implement the model and make sure this model is changed and amended in an ongoing basis, to be more efficient in prevention of criminal acts.*

We think that current legislation in Kosovo, in cases when legal person manages to prove that he undertook measures for prevention of criminal act, tha has a code or internal regulation for this purpose, the effect should be possiblity of exception of guilt or mitigataion of damage, or even the effect of pronouncing lighter security measures towards legal person. This would also be a way that would minimize the risk of an unfair interpretation of current provisions of article 5 of the law 04/L-030.

3.2 Other penalties and criminal sanctions against the legal person under the law 04/L-030

Besides the problem of guilt conception for legal persons, theoreticians that adhered in the theory of fiction (based in the principle "*societas delinquere non potest*") as an obstacle for implementation of responsibility toward legal entities considered the impossibility or difficulty of applying criminal sanctions toward them.

One of basic arguments of these theoreticians against criminal responsibility for legal person, is based on impossibility to apply imprisonment sanction (as typical criminal sanction) and some other measures of criminal nature, and has in general been considered difficult to match criminal measures for legal persons.[58] Such an attitude is held even today in the countries that did not accept the institute of criminal responsibility for legal persons, and that is mainly based in controlled economy from the state.[59]

[58] Wagner, M.: Corporate Criminal Liability – National and International Responses, *International Society for the Reform of Criminal Law 13th International Conference Commercial and Financial Fraud: A Comparative Perspective Malta, 8-12 July 1999, pg.2*

[59] See Cheng Yang, V.: Developments in Criminal Law and Criminal Justice: Corporate Crime-State-Owned Enterprises in China, *Crim.L.F.14,* pg.1 *and continual.* While criminal responsibility of legal persons is impsed by empowering of corporations in the capitalist systems, it is natural that in the countries with controlled economy this institute has not been appliled. We consider that this was also one of factors why places of former

But, today by regulation of responsibility of legal persons for criminal acts by majority of world legislations, does not appear as a problem the system of criminal sanctions toward them, even criminal sanctions are justified as subsidiar in regard to civil sanctions[60] that are not sufficient for prevention of criminality of legal persons.

Depending on the model of conception of responsibility of legal persons for which various states decided, we can do a separation of the system of sanctions against legal persons in:

- *Sanctions of administrative nature* (for example. Germany, which did not adhere in the model of determining criminal responsibility for legal persons, as majority of european countries did, that accepted the model of states in the system "*Common law*"[61]);
- *Semi criminal sanctions or administrative- criminal* (Italia);
- *Criminal sanctions* (states that accepted criminal responsibility of legal persons).

As sanctions that can be pronounced toward legal person in Kosovo according to the law 04/L-030 are: penalties, conditional sentence and security measures. Sentences provided are fine and termination of legal entity (article8).

The fine is the most applicable penalty toward legal persons and most convenient to impact prevention of delinquency of legal persons[62] which is envisaged as replacement of the sentence with imprisonment applied toward natural persons for specific criminal acts and is equivalented with it. As an illustration, for example in article 9, (*parag.*2, *point*.2.1) of the law 04/L-030 defines that: "*for criminal acts that provide sentence of imprisonment from fifteen (15) up to three (3) years, the Law can*

socialist block (Albania, countries of former- Yugoslavia, etc) hesitated for a long time to accept criminal responsibility of legal persons.

[60] Neumann Vu, S.: Corporate Criminal Liability: Patchwork verdicts and the problem of locating a guilty agent, *Columbia Law Review (104 Colim.L.Rew.459) 2004,* pg.11

[61] For a deeper study compared to administrative sanctions that are applied in the german legal system for legal persons and criminal sanctions in the american system, see Diskant, E.B.: Comparative Corporate Criminal Liability:Exploring the Uniquely American Doctrine Through Comparative Procedure, *The Yale Law Journal, 2008,* pg. 128-172.

[62] Jefferson, M.: Corporate Criminal Liability: The problem of sanctions, *Journal of Criminal Law (JCL65(235)),* 2001, pg. 2 and continual.

pronounce fine, from one thousand (1.000) up to five thousand (5.000) Euro. Such a model of equivalenting fine sentence for legal person is present in other states, for example in Croatia, where for imprisonment sentence of 15 years envisaged for natural person, for the same act the legal person can be sentenced by fine from 2800 up to 685.000 euro (approximately because the fine sentence in the croatian law is defined in local currency).[63]

In the law 04/L-030 the fine sentence is defined in article 9, where *parag.*1 provides that: *"For criminal acts of legal persons, the fine sentence can not be lower than (1.000) Euro and larger than one thousand (100.000) Euro."* Bearing in mind that according to its nature, the fine sentence is more favorable and is more often executed towards legal person, we consider that the large limit of this penallty in Kosovo (100.000 euro) is very low for legal persons. Further more, this provision did not take into consideration provision of the Criminal Code of Kosovo, which for criminal acts of natural person, committed in relation to terrorizm, human traficking, provides that fine sentence can be up to five thousand (500.000) euro (article 46 ofi CCK). On the other hand, analyses of legislation of other countries (Albania, Macedonia, etc.) it is noticed that the maximum of the fine sentence is around 500.000 euro. Further more when taking to consideration the nature of criminal acts committed by legal persons (mainly economic) appears that this definition of the fine sentence in Kosovo is not well thought of by the legislation, except it shows an absence of harmonization by definition of the Criminal Code.
Change of this provision was in the middle of some proposals during the phase of approval of the law 04/L-030.

According to Article 10, on the occasion of measuring the fine, the court should take into consideration circumstances such as the consequences that have arisen or could arise; the circumstances in which the crime was committed; economic strength and the size of the legal entity; legal person's behavior after committing the crime, etc.

As in most jurisdictions in the world, Kosovo law envisages termination of the legal person (Article 11). The imposition of this sentence is limited to cases where a legal person is established with the purpose of committing criminal acts or activities mainly used for committing offenses (parag.1.). This doctrine sentence that compares to the death

[63] Kučić, V., Crnković, A.: Criminal Liability of Companies in Croatia, *Lex Mundi, 2008*, pg.1-2.

penalty is applied to natural persons, presents severe penalty within the system of penalties for legal persons. As such, this sentence may be necessary in cases of serious offenses, such as those relating to terrorism, various forms of organized crime, and in all cases where a fine and other measures are considered insufficient to prevent crime of the concrete legal entity.

The law 04/L-030 article 12 defines a suspended sentence. With the suspended sentence the court may determine the legal person a punishment of up to fifty thousand (50,000) euro, but that the punishment not be executed if convicted legal person for the time determined by the court, which can not be less than one and no more than two (2) years (validation), does not commit any new criminal offense that has elements of the offense in terms of section 5 of the law in question.

Article 13 foresees the following types of security measures: *prohibition of committing certain activities and tasks; confiscation of assets; confiscation of material benefit and publication of the judgement.*

Chapter IV of the law 04/L-030 defines procedures that should be implemented during the trial of legal persons.

The Law provides that for the criminal act of the legal person and the legal person is raised and applyes uniform procedure and a judgement is issued (article 18, *parag*.1). While in the following paragraph independence of the legal person is expressed in relation to the responsible peerson in the procedural aspect, which states that for legal reasons, and other reasons criminal procedure can not be raised or applied against the person responsible. (*parag*.2). Following, in articles 19-30 of the law 04/L-030other procdural aspects are regulated, such as: territorial competences, representation of legal person accused. Submittion of decisions and notes to the legal persons, development of legal proceedings, the content of the judgement, etc.

A particular definition of the law 04/L-030 is also provision of precautions that the court may pronounce toward legal person in case specific circumstances justify the fear that the legal person acused would repead the criminal act, or would end up the attempted criminal act, or would end up the criminal act he threatens with. Such measures provided are: *prohibition of certain activities and tasks; prohibition of business with state and local; and the prohibition of acquisition of licenses, authorizations, concessions and subsidie* (article 31).

4. Conclusion

Criminal responsiblity has been normed in majority of state legislations, but continues to be one of the most discussable topics within judicial systems, with an attempt of harmonization with principles of the criminal law.

After a long tradition in the "Common law" system, in the last decades criminal responsiblity of legal persons has been accepted in the countries that are part of "Civil law", as well (except Germany which applies administrative responsibility, and Italy which is defined as a model of sei-criminal measures), as a responsibility toward the need to protect from crimes of legal persons. Justification of applying criminal responsiblity toward the legal person, stands in the strong impact itself and position that legal (natural) persons have in the society.

Challange of the states that accepted criminal responsibility for legal persons, remains to define most accurate law criteria for application of this responsibility. Such a need remains actual for Kosovo legislator as well, that on the occation of amending the law 04/L-030, to regulate those aspects that present problem for justified implementation of criminal resoponsiblity for legal persons.

One of basic aspects that requires clarification from theoretical and practical point of view remains the concetion of guilt of the legal persons. For an accurate definition of this problem, solution is normative conception of guilt of the legal person, unlike psychological conception or psychological-normative guilt of legal person. It is up to the prosecution and the court to prove the responsiblity of legal persons in paralel with responsibility of natural person, as an autonomous responsibility, although it derives from criminal acts committed by natural person (responsibility). This means that the guilt og legal person is based on his behavior, business policy he implemented with the aim of prevention of criminal acts.

Aiming at creating more clear judicial basis on responsibility of legal persons in Kosovo, it is necessary to define the duty of legal persons according to the law, to approve models of organization and efficient control (compliance program) and this should be basis of proving their guilt or innocenc.

However, even with the current legislation, exists a legal framework that enables follow up and trial of legal persons. for criminal acts that may be committed on his behalf or benefit. Some of aspects that might be unclear in the law for criminal responsibility of legal persons, can be overcome by an interpretation of the legislation in force, first of all based on provisions of the Criminal Code and Code of Criminal Procedure of Kosovo.

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LEGAL INTEREST IN CIVIL PROCEDURE

ABSTRACT

In everyday life the rights defined by substantive law can often be affected by the subjects of law. In practice, the parties whose rights were violated, have a legal interest to seek judicial protection.

The article "Legal interest in civil procedure", explains primarily the notion of "legal interest", with a particular look into the civil procedure. It will continue then with the elaboration of a legal interest in low-value disputes, legal interest connections versus types of indictments and third interveners in civil proceedings.

And, at the end will have the conclusion of the article wherein will be presented a summary of whole paper, and opinions around the dilemmas and raised issues as a result of the paper.

Key words: legal interest, judicial protection, the right, indictment, law, intervener, protection.

1. Legal interest in civil procedure

Legal interest means a personal gain of a procedural entity to ask for judicial protection for its subjective right. Legal interest for indictments and claims should be understood as a special interest of the plaintiff to protect its subjective right which is violated or at risk to be violated in the future. Pursuant to Article 2 paragraph 4 of the Law for Civil Procedure of the Republic of Kosovo, each party in civil proceedings should have legal interest for the indictment, as a legal remedy, and for other procedural actions carried out during the procedure, so as it is seen the LCP has paid a special importance to the legal interest, ranking it in the first articles of the law, as one of the first premises to consider before starting civil proceedings. Legal interest, as procedural-legal notion, is closely related to the subjects of

law and remedies (indictment). In order to fill better the meaning of the term legal interest we refer also to Article 254.2 of LCP.[141]

In practice, subjective rights may be violated by the subjects of the law itself. Consequently, there is a need for judicial protection of these rights (ultimate racio), or a genuine legal interest appears for judicial protection of those rights.
Since in principle, the legal system of our country does not allow self-judgement as a form of protection of subjective law (except in some certain cases), then judicial protection should be requested in order to protect the violated rights, or the rights threatened to be violated in future, if the court doesn't issue a judgment in favour of plaintiff.
Judicial protection by the courts should be provided only in cases in which without its intervention, the subject of law cannot perform legal protection interest which is recognized by law[142] . It derives from this that in the formal law, the legal interest or interest for legal protection as a procedural-legal notion is different from the substantive law, since in the formal law legal interest represents special interest of the legal subject to ask judicial protection of its right, whereas within the substantive law the legal interest is considered to be protected by law. So in formal law, legal interest represents the initial premise for the initiation of civil proceedings, while in the substantive law legal interest is protected by law, such interest may also be economic, political or of any other type of social interest.

Any individual who claims that his/her right has been violated can ask its legal protection with indictment, but court will not admit claim of every individual as admissible if the claim is not presenting particular legal interest in relation with the threatened/violated right.

2. Legal interest in legal issues with small social value

Principaly, as mentioned above, the competent court, ex-officio is obliged to provide judicial protection for the subject who claims that his/her right has been violated. However, exclusively a dilemma is presented and the court should provide judicial protection even if the legal interest of the party represents small or large social value of the dispute. There are different opinions related to this issue , some think that the court should not provide judicial protection because small social value does not represent a real

[141] See Law on Contested Procedure, of the Republic of Kosovo, article 254.2 ,Second Part, Chapter XV
[142] Brestovci, Faik: "*The Law on Civil Procedure I*", Pristina, Edition 2006, page 161

genuine interest, which means it doesn't represent a sufficient basis for the approval of the claim as permissible, while another group of researchers think that despite social value, the court shall provide judicial protection even when social values are small, provided that it should not be considered as an abuse of procedural rights.

Regardless of the social value, whether great or small, the legal interest in relation with party has the same meaning, so it is special interest of the subject to ask judicial protection of his subjective rights. The dilemma here usually stands in the fact whether the competent court shall provide judicial protection for the claiming party or not due to the small social value of the dispute.

3. Indictment and legal interest in civil procedure

The indictment, as regular legal remedy, enablesthe legal subject to protect the right guaranteed by the law, through judicial way, and that by initiating the procedure for judicial protection of its violated right. So the indictment, namely by submitting the claim in court, presents the first step to start civil proceedings, and also expresses legal interest of the subject to ask judicial protection of the violated right, by the court. The judgement of a case in the court starts with the submission of a written claim (the binding indictment, attestation indictment and indictment for change).[143]

The indictment and legal interest have an interdependent connection, and it is because the indictment as a remedy arises from legal interest of the party to file a claim, and that also the legal interest presents sufficient basis or not for allowing the indictment as a regular one. The indictment can be made to ask for the restoration of a right or legitimate interest which has been violated.[144] After receiving the indictment the court among other also reviews whether the claiming party, which alleges through the claim that its right was violated, has a particular and concrete legal interest. In this case the legal interest could be civil, criminal, administrative or constitutional. If the Court finds that there is not a genuine legal interest for the provision of judicial protection, it may dismiss the indictment because of lack of particular legal interest. In this case, the party may have a particular interest of political or

[143] See the Law on Contested Procedure, of the Republic of Kosovo, article 252 , Part two, Chapter XV

[144] Civil Procedure Code of the Republic of Albania, article 32 (changed with law no.17.05.2001 article 5)

economic type, but this interest does not constitute a sufficient basis for the initiation of civil proceedings, namely the approval of the indictment as a real one, and in this case it is dismissed as inappropriate.

During the application of different indictments and claims, in some cases legal interest is expressed and has to be argued, while in some others there is no need for argument since the legal interest is understood, so there is a legal presumption that the party has a particular legal interest. The issue of legal interest is not presented in same way and equally in all kinds of indictments. Below we will describe three types of indictments and their relations with legal interest. Ex-officio court has a duty to consider each request for legal protection, even when objectively the claimant's subjective right is probably not threatened or violated.[145]

4. Legal interest versus type of indictment

The binding indictment is an indictment through which the plaintiff requests from the court that with the judicial verdict orders the defendant to fulfil the certain prestation that derives from a legal issue in favour of the plaintiff. Legal interest for this type of indictment has any creditor to whom the debtor doesn't fulfil obligation voluntarily.[146] In this type of indictment, the court assumes that the plaintiff has a certain legal interest (interest that is proved through legal work or the law itself) to the fact that the same has to gain the executive title for the obligatory implementation of its subjective law, so through binding indictment, the plaintiff (creditor) requires from the court to order the defendant with the judicial verdict, to fulfil a certain prestations in benefit of plaintiff (to return the debt, to deliver the item, etc.). Through this judicial verdict, the creditor obtains executive document (titulus executionis), with which, nevertheless, in the execution procedure and with the help of court realizes its subjective right. So, in this case the legal interest (legal gain) of the creditor is undeniable, and this presents the final stage of realization of the legal benefit of plaintiff (the creditor). In this type of indictment, the court does not ask to prove the certain legal interest, since as stated above, there exists the legal assumption.

Attestation indictment represents the legal remedy, with which the plaintiff proposes court to conclude a legal report.[147]. As a basic condition for

[145] Brestovci, Faik, *The Law on Civil Procedure I*", Pristina, Edition 2006, page 161
[146] Brestovci, Faik, *The Law on Civil Procedure I*", Pristina, Edition 2006, page 162.
[147] Pozniq Borivoje, *The Law on Civil Procedur*, Pristina, Edition 2006, page 161

presenting an attestation indictment is legal interest of the plaintiff party.[148] So, unlike the binding indictment, which is described above, attestation indictment doesn't request from the court to bring the judicial verdict for the realization of any certain prestation; but it is required from the court to ascertain, respectively to confirm through the judicial verdict if it exists a certain legal report or not. This kind of indictment can be made when it is determined with special provisions, but also in cases when the plaintiff has legal interest that court should confirm the existence or nonexistence of any right or legal report; also in the cases when is required the attestation of any document, before the request for prestation is needed from the same report.[149] Different from the other types of indictment, in the attestation indictment the court requests from the party to prove that there exists legal interest.

The Indictment for change as a legal remedy, differs substantially from the aforementioned two types of indictment. With the indictment for change is undestood the plaintiff's request for change of a particular legal report. Basically, by the judicial verdict cannot be created, modified or extinguished civil legal relations, but neither rights of civil subjects. In addition, except in certain specific cases, for the change of legal reports there should exist a judicial verdict issued by the court. This happens more in the category of statutory rights and in some types of real rights (absolute). Me anë të padisë së ndryshimit, the plaintiff doesn't need to prove the existence of a legal interest because in this case the court assumes that the plaintiff has a particular legal interest.

From what was said above, we can conclude that with the conduct of attestation indictment, the plaintiff must to argue also the existence of a legal interest (to make it reliable) before the court, while during the conduct of binding and change the indictment the plaintiff doesn't need to prove the existence of a legal interest, just for the fact that the court assumes that there is a certain legal interest.

5. Legal interest and third party interveners in a civil procedure Interesi juridik dhe ndërhyrësit e tretë në një procedurë civile

[148] Morina, Iset & Nikqi, Selim, *Comment of Law on Contested Procedure*, First edition 2012, pg. 463.
[149] See the Law on Contested Procedure, of the Republic of Kosovo, article 254.2 Part two, Chapter XV

Apart from parties which start a contentious procedure in order to protect their subjective rights, in practice often appear third party interveners who have a specific legal interest who complete contested proceedings in favour of one or the other party. Beside this, the parties involved in a dispute have the right to invite a third person, if the person concerned has a certain legal interest in the dispute. Anyone may intervene in a contentious process that takes place between other persons, when there is legal interest to support one or the other litigant party, with whom joins the judgment in order to help the same.[150] The Law on Civil Procedure of the Republic of Kosovo and the Code of Civil Procedure of the Republic of Albania, regulate the legal interest of the third parties almost in the same way. (See Article 271 and 276 of the LCP of Kosovo and Article 189 and 192 of the CCP of Albania).

The third person intervenes in a civil proceeding or has legal interest to intervene if any of its rights or obligations depends on the final judicial verdict of the dispute. As the third intervener, intervenes with the purpose of helping one side or the other, depending on legal interest that has. The intervener and other parties should fulfil the general requirements to be the party and he can perform the same procedural actions as the party itself to which intervener clams to help. With the legal interest of third intervener deals ex-officio court throughout the all procedure. A party, to which intervener doesn't provide assistance, can reject the involvement of intervener in dispute claiming that there is no legal interest in connection with the civil issue, and can claim in not respecting of deadline, and the phase of judgement. Third intervener in dispute has assistance character, in addition to this with the consent of the parties it may become a party in dispute. Besides ordinary interveners, there are also particular interveners (sui generis) which intervene with the purpose to make the court to not adopt the available actions of the parties, the actions that can be contrary to mandatory legal provisions and the morality of society. So, as the intervener of particular type is the public prosecutor. Legal interest of the public prosecutor is protection of mandatory legal provisions, as well as the morality of society from eventual abusers. The particular intervener in civil proceeding is not foreseen with Law on Civil Procedure, and this could be considered as a huge shortage of this law since it allows the misuse of the parties, of the legal provisions, and morality of the society, with the available actions that are in their favour, but to the detriment of public interest, and morality of society.

[150] See the Law on Contested Procedure, article 271.1 of the Republic of Kosovo, Part two, Chapter XVII

6. Conclusion

From everything that was discussed in content of this paper can be concluded that the legal interest in civil proceedings presents a basic premise for the start of a civil procedure, because without a certain legal interest the party is not interested in initiating civil proceeding for protection or securing his subjective right. Nevertheless, if the legal interest is proved in front of court, or court presumes that there exists real legal interest, it should exist, otherwise the indictment is considered impermissible. It is quite controversial dilemma how to act when the subject does not have a real legal interest, and yet requires judicial protection, so should the judicial assistance be provided or not. In these basically the ex-officio court is tasked to review indictment that makes the subject, but exclusively, the court for the approval of the indictment as the acceptable should ensure if the legal interest is unlawful. When explained the meaning of the legal interest above, has been said that it should be legal (i.e. by the law should be foreseen the legal consequences) in order to start a civil process. We should recall here that with the active legitimacy of an applicant should understand the verification of the legitimacy of his research. With the connection of these two legal notions derives that if an applicant requests initiation of a process for an interest foreseen by law, so when he lacks the legal interest, then at the moment when the legality of his claims are verified (that is, at the moment of legitimization), he would not be legitimized, and his indictment will be considered as not allowed. The matter is further complicated with the fact that what decisions the court would take when it concludes the lack of active legitimacy of the plaintiff, and there are two solutions in regards to this*: suspension of the judgement of the issue and declining of the request from the beginning.* In regards to these two solutions there are two point of views in practice, according to the first one, the court, after it concludes the lack of legitimacy by the plaintiff, should refuse the indictment as not permissible, so right at the start, whereas the second point of view considers that although concludes right at the beginning the lack of legitimacy by the plaintiff (with the insistence of plaintiff), it should initiate the procedure with the condition that the plaintiff's request as not permissible due to the lack of legitimacy by the plaintiff. So, completion of the civil issue (cauza civiles) is the same, only in the second case the plaintiff is given one more opportunity.

Legal interest must necessarily be legal. In case a legal interest is foreseen by law (without legal consequences) or is unlawful, it is not considered acceptable for initiation of a civil proceeding. For instance, it a lawsuit cannot be brought to force a subject with a recurring obligation in cash, without a legal basis, or to force a subject to sell drugs. This is because in the

first case this is not prescribed by law, while in the second case there is unlawfulness, so in both cases the realization of the plaintiff request is unable. So, as it is known, the dismissal of demand or suit is decided due to lack of legal basis in law (legal cause) or for lack of evidence (actual cause).

In conclusion, the legal interest shall be prescribed by law and not be unlawful, which conditions validate the raise of the claim. It is also considered that there is no genuine legal interest in the case when in a civil case, the object of the request of the plaintiff is determined earlier through some other ways e.g. administrative ones. So it cannot be called a legal civil interest, if it can be accomplished through some other administrative or judicial manner.

Ordinary interveners as well as the special ones should have a specific legal interest in order to be participants in civil proceedings. As a conclusion, I think that non-anticipation of the special interveners (Basic Prosecution Office), in the Law on Civil Procedure (Chapter XVII) presents a deficiency of this law, because this loophole in the law creates the possibility of manipulation of the parties with the actions at their disposal, with the public interest as well as mandatory legal provisions not excluding the moral of the society and damaging public property.

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Mr.sc. Hajrullah Mustafa

MEDIATION OF JUSTICE SYSTEM IN REPUBLIC OF KOSOVO AND ITS POSITIVE EFFECTIVNESS

ABSTRACT

In general term it can be said that the *conflict* can be defined as situation in which individuals do not agree or have different needs, interests or values, which results with disagreement, distrust and tensions between them. In such situations people often think that the usual form of the conflict solution is the *formal court proceeding*.

However, the judgement is not the only remedy of the effective settle of disputes between different parties.

The most basic form of the dispute settlement is that of negotiation, which mainly includes discussions between the interested parties with the purpose of conciliation of different opinions, or at least to understand different attitudes of the parties.

Based on this, and in general terms, *mediation* can be defined as *"negotiation concluded with the support of the third party"*. Saying in other words, *mediation is an extra-judicial action which is realized by a third person (mediator) for the settlement of the disputes between law subjects in accordance with the conditions foreseen by law.*

Key words: Parties, dispute - conflict, contest, negotiation, law, court, prosecution, mediation, communication, agreement.

1. General Overview on Mediation

Fast dynamics of economic development and social changes in contemporary world, and also in our country within these last years is characterized with huge increase of the disputes and conflicts between the people. The majority of those are determined by the impulsive flow of live, which is caused following huge changes in contemporary society, especially starting from the last decade of the past century. These are determined also by the interfering which are caused by social development based on market economy, where should necessarily coexist and act multiple private and public interests.

Development of these social flows definitely causes disputes, contest and conflicts between different parties. It can be generally said that *conflict* is defined as situation in which the individuals do not agree, or have different needs, interests or values, which results with disagreement, distrust and tensions between them. More concretely "conflict is the fact that is happening and is not perceived in the same way by the both parties. It is understandable that the perception depends on many factors. Such are the macro and micro environment where the person has grown up, educated, stereotypes and certain prejudices which are formed by the personal or others live experience, as are parents, sisters, brothers, relatives, and sometimes by the others that seems to not have influence in certain moment, but have influenced in certain deformation."[151].

In such conflictual situations people often think that the usual form of the conflict solution is the *formal court proceeding.*

The state poses the monopoly of the use of power, and is placing the courts in disposal which are applying procedures defined by law in order to settle the contests between the people. The implementation of the court decisions the state ensures by all means through its administrative tool. Nevertheless, the judgment is not the only remedy of the effective solution of conflicts between the different parties.

The most basic form of the dispute solution is that of negotiation, which mainly includes discussions between the interested parties with the purpose of conciliation of different opinions, or at least to understand different attitudes of the parties in dispute.

Based on this, and in general terms, *mediation* can be defined as *"negotiation concluded with the support of the third party"* or "*a form of assistance by the third party for the solution of a contest"*. Saying in other words, "*mediation is an extra-judicial action which is realized by a third person (mediator) for the solution of the disputes between the law subjects in accordance with the conditions foreseen by law. "*[152]

It can be emphasized that the mediation in essence is only an negotiation where is included the third party which knows the effective procedure of

[151] Restorative Justice and the Mediation on the Solution of Criminal Conflicts, *The Manual for Judges and Prosecutors*: Edition by UNICEF, European Comittion and Sida Tirana, 2007 pg.44.
[152] The Law no. 03/L- 57 On Mediation: Official Gazette of Republic of Kosovo No.41 dated:1 November 2008

negotiation, and that aims to support the persons in conflict, to coordinate their activities in order to make as much as effective in reaching the agreements between them. In this procedure and action emerges the role of the third party, respectively the role of mediator, and based on this the action is named as the mediation or mediation activity.

The role and importance of it by all means stands only in facilitation of the solution of contest, and reaching the agreement between the parties of contest. The mediation authority is not allowed to reflect the power of enforcement for the decision to parties, but only makes available an extended form of a negotiation among them, because the right for decision have only the parties of contest, which is finalized with the final act of the signing of agreement. Because of this, mediator should be the neutral party, respectively person which facilitates negotiation between the parties in conflict, by enriching the shortage in communication, by adding a different dimension and perspective to the contest, but also by enriching it with the provision of new ideas, always focused in the direction to make parties to be as much as possible near to the friendly agreements as concerns to their contest.

The essence, meaning and the philosophy of mediation stands on the fact that the disputes between the people are always undivided part of the development of normal life. Disputes derive as the consequence of misunderstandings. Therefore, it is important to know how to approach and treat them. Each constructive and substantial treatment, offers the possibility for progress, solution of conflict, and achievement of the agreement between the parties. In the contrary they can be transformed in a conflict that can be dangerous and harmful for the normal life of the parties.

Based on this can be concluded that the parties almost each time are interested to reach the agreement. However, in order to reach this there is need for a person who mediates, so the mediator, who without a doubt becomes the creator on solution of conflicts between them.

The main catalyst for the success of mediation as an activity surely remains the development and perfection of high communication skills. Good communication skills are undoubtedly the most influential tools in mediation. If the mediator during the mediation session communicates with high professionalism, confidence, sincerity and sensitivity, most likely there will be created very real possibilities for reaching agreements between the parties. Mediation is nothing else but the activity which in essence has only the dialogue or negotiation with the involvement of a third party, where through attitudes and equal communication clearly shows to the parties that

the agreement is their one, and that they are the "god" in solution of their conflict. Mediation is realized through several phases and it is right when the activity is often described as "*gradual way of establishment of order and cooperation between parties"*[153].

Therefore, we can conclude that, when all issues that are part of conflict will be settled through the mediation, there are created more real opportunities that the achieved success will resist to the time testing, by being considered as an advantage which has this process, more than the court solutions.

2. Legal Determination and Definition of the Mediation in Republic of Kosovo

2.1. Law on Mediation

Relying on the role and importance of mediation procedure in the justice system, today many countries of the contemporary world have applied this form of alternative dispute solution between the parties, outside the court proceedings, by adopting laws that decisively determine and define this activity through legal acts. Norway is a good example for the mediation process, where family issues have to be followed by mediator necessarily.

"*The origin of Mediation for the solution of the conflicts in peaceful way in Kosovo is a new legal institute, while in the past has been practiced also in the Customary Albanian Law as is the Kanuni i Leke Dukagjinit, Kanuni i Arbrit (Kanuni i Skënderbeut) Kanuni i Labit, and in Customary Islamic Law" (Sharia).*[154]Even though there is a strong genetic relation between traditional and modern mediation, there are also enough characteristics that make difference between each other. Among others, it is enough to analyse the position of the third party in this process. In "modern" mediation, the possession of the process is related with the parties in conflict, means that the parties are the "god" of the process, and that the mediator simply assists the parties to develop their solutions, while at the traditional one is seen the dominant role of the third party, suggestions of which have a great authority towards parties. So, there exist visible differences between the traditional and modern forms of the mediation activity. However, in general, mediation in contemporary world poses more priority for solution of different contest between the parties comparing with other forms and ways, from which will be pointed out following ones:

[153] Gulliver.P.H:.Disputes and Negotiation- AcrossCultural Prospective

[154] http//www.md.ks.net//Ndërmjetësimi si Alternative e Zgjedhjes së Kontesteve në Kosovë :Tryezë Shkencore, Prishtine, 9 March 2011.

- The solution is reached fast, and without losing a lot of time;
- For the initiation of the moderation procedure there should exist a full will of parties, and the procedure starts immediately when parties agree for it start;
- The cost of procedural expenses is to low comparing with other forms;
- The issue is always under the control, since the parties of the mediation have fully under control the results;
- During the mediation parties are educated with the real and legal situation;
- The active communication, and a lot of negotiations are developed during the process;
- The Mediation procedure lasts up to 90 days[155]
- The mediation procedure is of confidential type, since all other declarations and informations related with mediation procedure cannot be used as a proof in any other procedure, without the approval of the parties.

Like in many other countries, also the Assembly of the Republic of Kosovo, in order to create as much as can opportunities to advance the legal system, but also "in order to regulate, organize, functionalize, and settle the contests in the most effective way by mediation, as well as respecting the historic tradition of mediation in Kosovo,; *adopts the Law on Mediation - Law No.03 / L-057, promulgated by Decree DL-048 --2008, date: 03.10.2008.* The adoption of this law, although a bit late, encouraged the advancement of the justice system in Kosovo, creating good opportunities in affirming ways, alternatives of the dispute solutions between legal entities and outside the court proceedings, since in current Kosovo's reality, court procedures are very prolonged, cost a lot, are overloaded, and quite complex. This law, which now regulates the mediation process generally, the establishment, organization and functioning of the Mediation Committee, as well as rights, duties and responsibilities of mediators in level of state, surely marks an important step in the legal system of the Republic of Kosovo.

Without entering into a detailed analysis and interpretation of this law, we will focus only on some important issues. Thus, *Article 15- conflict of interest* where the Law in a very concrete way stipulates that *"In case when conflict of interest occurs, the mediator is expelled from the mediation*

[155] Law No.03/L-057- The Law on Mediation, Article -13

procedure, except if the parties, after being informed for the existence of such circumstances, agree that he conducts the procedure"[156].

In continuation, the law stipulates, *Mediation Committee Establishment and Competences (Chapter IV - article 17).* Mediation Committee shall be established by the Ministry of Justice (Article 17.1.), and the Committee shall consist of the Chairperson and four (4) members. (Article 17.2.of this law). While members of the Mediation Commission, respectively subjects represented in the Committee are:

a) Ministry of Justice;
b) Kosovo Judicial Council;
c) Kosovo Prosecutorial Council;
d) Kosovo Chamber of Advocates;
e) Ministry of Labour and Social Welfare of Kosovo (Article - 18.1.)

Likewise, a special place in this law takes also determination of required conditions for mediators involved in *Chapter V - Article 22.1 - 22.5.*

Therefore, in the full sense of the word, the adoption of this law, but also other legal acts which are necessary to materialize in a most positive way, for sure that are successes and initiative to reform the legal system in Kosovo

There always remains the undeniable fact that *giving the parties the opportunity to settle the disputes within mediation is a useful alternative. This requires not only the contribution of the mediators as such, but also of the entire community of lawyers, and those who understand well that access to justice also relies on realization on time of the right, because "delayed justice is denied justice"*[157.]

Important issue by which greatly depends the success of the mediation, are the *communication skills of the mediator*, without which there cannot be imagined the effectiveness and success of this process. Communication between humans always contains non-verbal messages (mimicry, body movements etc.) but also verbal messages expressed through words. However, in this dimension, there are often encountered misunderstandings, and exactly this puts it in the first place the importance of communication skills, especially of the mediators. *Communication skills that are requested*

[156] The same place, pg,107.
[157] Restorative Justice and the Mediation on the Solution of Criminal Conflicts, *The Manual for Judges and Prosecutors*: Edition by UNICEF, European Comittion and Sida Tirana, 2007 pg. 51.

from the mediator, who intervenes in a situation of conflict in successful way are the following ones:

- Professional attitude ;
- Strong verbal and nonverbal skills;
- Strong listening skills"[158].

Application and respecting of these principles during the process of mediation definitely are presented as main indicators for the success and effectiveness of the mediation.

2.2. Positive Effects of Mediation in Republic of Kosovo

According to analyses and received reports the adoption of the Law on Mediation in Republic of Kosovo has given positive effects in Kosovo reality. This law has given to the citizens an opportunity and mechanism of disputes solutions with the extra-judiciary instruments, has enabled the decrease of the number of the potential cases within the regular courts of Kosovo, has encouraged the greater approach to justice, as well has given the opportunity for an effective domination and function of law. Effects and benefits of the mediation among others are:

- Efficiency, (most of the cases are settled within few sessions)
- Sustainability, (mediation offers sustainable solution)
- Confidentiality, (parties and mediators preserve the confidentiality of the process) and
- Success (the percentage of the successful cases is too high and in further increase)

In development, promotion and advancement of mediation process the main role have Mediation Centres in Kosovo. These consolidated centres after the adoption of the Law, coordinated in accordance with the Mediation Committee. and supported by the Ministry of Justice of Kosovo but also by other international partners are operating in 6 cities of Kosovo. The focus of their activities is directed towards implementation of these objectives in level of their territory, and they are as follows:

- Receive, plan and manage the cases;

[158] The same place, pg.46.

- Support the mediators in coordination and implementation of activities through:
  - Creation and management of the databases for the issues of mediators in mediation;
  - Promotion of innovation and effectivity in mediation;
- Keep the confidentiality of all activities of the case and client information;
- Promote the mediation as the alternative solution of the contest;
- Develop and implement trainings for the mediators;
- Facilitate the working relation with judges, lawyers, social workers, service providers and other professionals, and individuals included in mediation process;
- Organize and coordinate activities of the Mediation Centres in accordance to the protocols of mediation, and the rule and regulations of Law on Mediation.

The effects of the activities of Mediation Centres are reflected with the following data.

Table 1. - Data on referred cases for mediation in country level for year 2013[*].

2013	**Prishtine/ Pristina**	**Ferizaj/ Ferizovic**	**Gjakovë/ Djakovica**	**Pejë/Pec**	**Gjilan/ Gnjilane**	**Mitrovicë/ Mitrovica**	**Total**
Cases referred by Court	86	139	57	75	70	4	431
Cases referred by Prosecution	74	/	6	/	/	/	80
Cases with self-reference	2	7	3	/	/	7	19
The total number of referred cases for Mediation	**162**	**146**	**66**	**75**	**70**	**11**	**530**
The total number of settled cases	**145**	**40**	**34**	**28**	**45**	**11**	**303**

The total number of unsolved cases	3	21	24	19	17	/	84
In process (the number of total varies)	/	2	4	48	9	/	63

*http//www.md-ks.net

Table 2. – Graphical presentation of the data in country level for year 2013

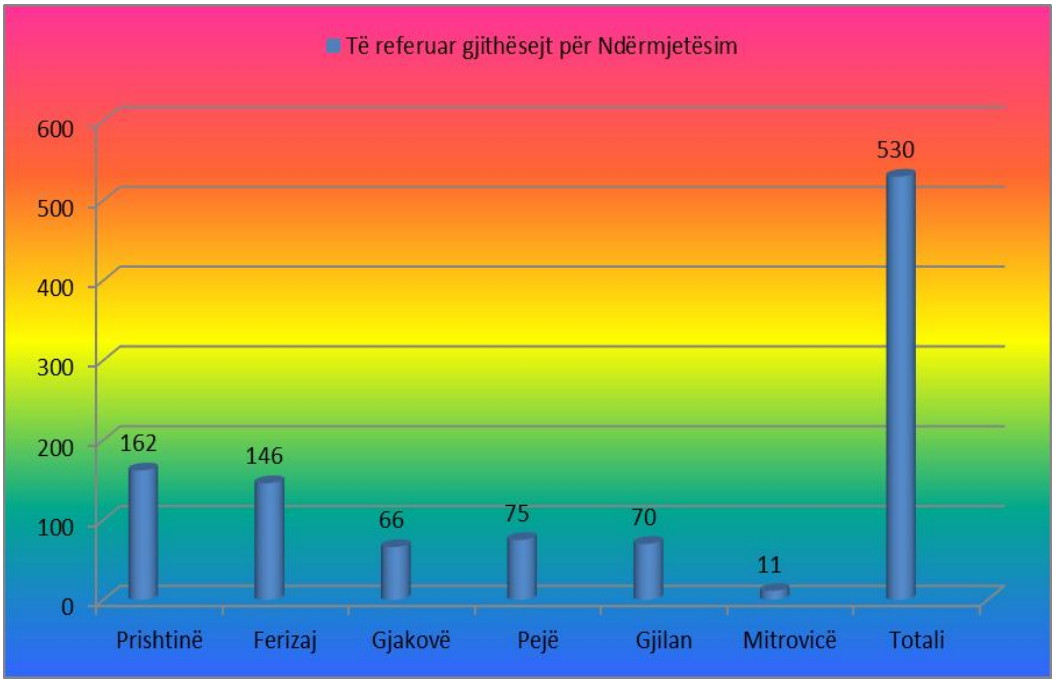
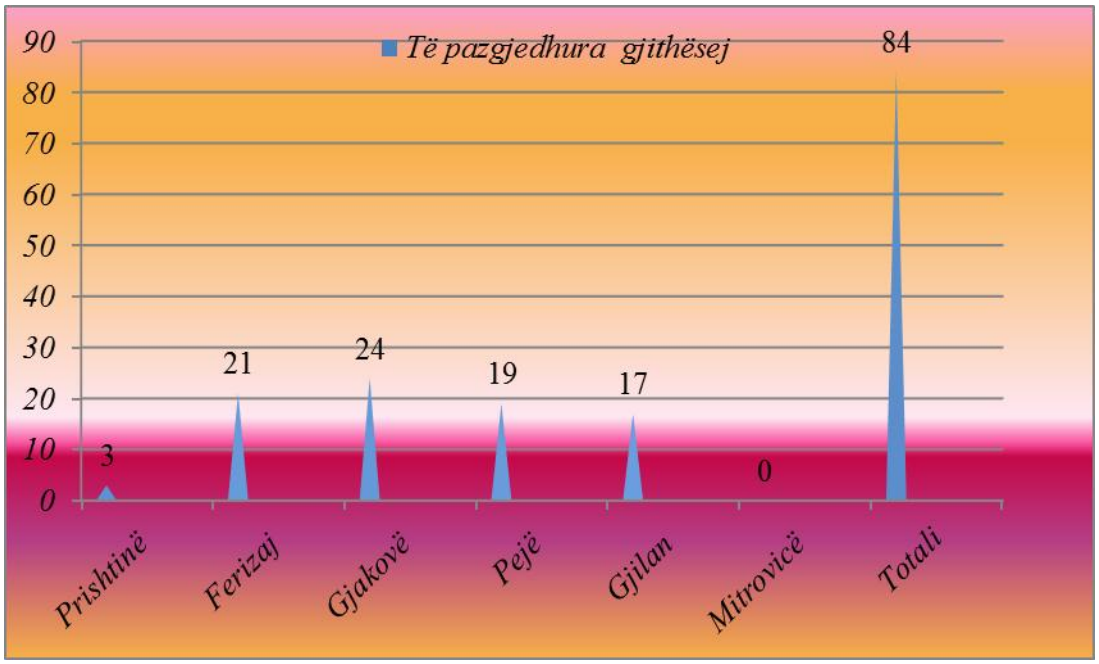


Table 3. Graphical presentation of data for the unsolved cases of mediation in country level for year 2013



Analysis of the data, according to the report by six Kosovo Mediation Centres in 2013, argues inter alia that:

- There is a general increase of interest by the parties for mediation since there are referred **530** cases, out of which **303** or **57.16%,** were settled successfully, by showing a positive effect but also the advantage compared to **84** or **15.84%** of the cases which are unsolved.
- These figures show that despite the positive effects that are emerging, still is little interest of **self-referred** cases, (still are dominating cases referred by courts and prosecutors), since through this form in country level for year 2013, there were only **19** or **3.58%,** of referred cases;
- Based on this data and by using the comparative method, the most noticeable cities are Prishtina/Pristina and Ferizaj/Ferizovic. Even though, these cities have great differences between each other as concerns to their number of citizens, still the number of referred cases for mediation is too close. In Ferizaj we have **16 or 3.01%** less referred cases for mediation, eventhough, Prishtina/Pristina has greater number of citizens.

- However, concerning successful solution of cases there is a huge difference between these two cities. Out of **162 cases,** Prishtina/Pristina has settled successfully **145 or 89.50% of cases,** which is considered as a real success, while in Feriza/Ferizovicj, out of **146** referred cases are settled only **40 or 27.39 %** cases**,** which is very low percentage. There is also difference between these two cities regarding the self-referral. In Prishtina/Pristina there were **2 cases**, while in Ferizaj **7 cases**, as much as Mitroviva have had.
- Another characteristic is seen in Mitrovice/Mitrovica, the city which in new reality of Kosovo differs with specific socio-politic flows. During the mediation process there were **11 referred cases**, out of which **7** were self-referred and all settled. This result shows the successful work of the Mediation Centre of Mitrovice/Mitrovica.
- A smaller effect of mediation cases and positive solutions of the contests according to this data is seen in Peja/Pec. The total number of referred cases is **75,** out of which are settled only **28 or 37.33%,** while **19 or 25.33%** of cases are unsolved, even though in process of solution were **48** cases.
- In Gjakova/Djakovica and Gjilan/Gnjilane successfully solved cases show a positive index, since more than half of the referred cases have reached agreement, although there is still need for a greater public awareness about the performance increase of mediation in these cities.

3. Conclusion

Mediation is important activity and alternative for the solution of conflicts between the parties. However, the process of mediation has greater purposes rather than simple stimulation of the consensual solutions, even though it contains final objective and goal. While elaborating the mediation process, we can see a lot of advantages, out of which we will mention only some:

- Mediation does not offer only the simple agreement for the parties. Mediation aims to assist the parties to achieve a functional solution, which will be in their favour, to improve communication between them, and to foster fair and rational division of actual responsibilities and in prospective.

- Mediation offers to the parties involved in the conflict permanent solution through a short period of time. Solution of conflict between the parties, through the mediation process allows to solve a conflict in a short timeline and quickly, being distinct from any other procedure. This process obviously enables deviations from long delays at the judiciary, significantly minimizing

the time and financial costs. For cases referred by the courts and the prosecution, mediation procedures in the Republic of Kosovo last up to 90 days.

- The mediation process is a process with a modest financial cost compared with other justice procedures.

- Mediation enables that the parties which have disputes to have equal positions. During the mediation process parties play active and equal role, being educated with the feel of tolerance and understanding. During this process the parties avoid insecurity which often is experienced in court, as a result of the "arbitrary" decisions in their judgement.

- The process of mediation gives the opportunity to parties to know with transparency the options of each other. Communication and language used during the mediation sessions is simple and closer, where the parties understand and develop dialogue in favour of the effective and useful solution for both parties.

Based on these and many other advantages that characterize the mediation process, today it is applied in many countries of contemporary world, as well as in Republic of Kosovo, which in year 2008 has adopted the Law and other legal acts. Contribution and promotion of this area are showing the constitution and functioning of the Mediation Centres in six major cities of Kosovo, by organizing and coordinating their activities in accordance with the Law on Mediation, and by sensitizing public opinion about the opportunities offered by mediation in conflict resolution, sustainability, and long-term benefits to the parties, and by creating substantial impact on the quality of their life development.

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Mr.sc. Isuf Sadiku*

LEGISTALATION RELATED WITH MONITORING AND INSPECTION OF PENITENTIARY INSTITUTIONS IN REPUBLIC OF KOSOVO

ABSTRACT

Penitentiary institutions are places where are executed penal sanctions, or measures of mandatory treatment, where the perpetrator's certain rights are limited only to the extent that corresponds to the nature, and content or measure of penal sanction, and only in the way which ensures the respect for human dignity. Therefore, to avoid the excess of competences or misuse of power by government officials during the execution of official duties "in the name of the state or other illegal interests", and that complaints of persons deprived of their liberty in penitentiary institutions are treated according to law and regulations, two procedures - above mentioned entities, monitoring and inspection are necessary, and serve as a barometer for the measure - of rule of law in a democratic state, and the expression of the culture of that nation over a certain situation – of the rights of persons deprived of their liberty. Moreover, current legislation states that the purpose of punishment, among others, is also the rehabilitation, development of proper personality, specialized education, to express social judgment for penal act, raising of morality, and strengthening of the obligation to respect the law, etc. of the perpetrator.

Key words: persons deprived of their liberty, monitoring, inspection, European Court of Human Rights, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), Ombudsperson, National Mechanism for the Prevention of Torture (NMPT).

The process of monitoring and inspection of places where are kept persons deprived of their liberty, wherever they are: stopping centres (in police centres), detention centres or prisons, psychiatric centres, mental health centres, asylum centres, detention centres for the minors, are of particular importance because of the fact that except as provided by the legislation, these processes directly affect the lives and safety of these persons while staying in the aforementioned institutions. If we refer to local legislation, we see that the Role (LEPS) No. 04 / L-149, promulgated by Decree No. DL-035-2013, dated 16 August 2013 by the President of the Republic of Kosovo, in Chapter XXIV clearly stipulates the

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institute of inspection, specifically defines the establishment and functioning of the Kosovo Inspectorate of Correctional Service, respectively, in Articles 242 to Article 247 where are regulated in detail the mandate and activities of this Inspectorate. The former LEPS of year 2010 and ex-Regulation No. of LEPS 2004/46 of year 2005, have clearly defined among others the inspection of correctional institutions, if corrective actions within the human resources system are carried out effectively, in particular those relating to admission procedures, the application of disciplinary punishments, security issues, insurance of health and medical services, and the provision of educational and social support, but there was stacked the establishment and functionalizing of inspectorate within the Kosovo Correctional Service.

The Law on Execution of Penal Sanctions, has defined also the interventions that could do the Ombudsperson in correctional system, by defining that letters, and other postal deliveries that are sent to the office of Ombudsperson of Kosovo by the persons deprived of their liberty should not be controlled in any way (article 58 paragraph 8), and in any way the documentation, files and confidential information from the work of Kosovo Correctional Centre cannot be banned from the Ombudsperson (article 232 paragraph 8), as well as by bylaws issued by Ministry of Justice.

Criminal Procedure Code, which entered into force on 1 January 2013, stipulates that the Ombudsperson or his deputy may visit detainees, and to correspond with them without prior warning, and without the supervision of pre-trial judge, or others persons appointed by such judge. Detainee's letters to the Office of the Ombudsperson of Kosovo[159] cannot be controlled. The Ombudsperson and his deputy may communicate in confidentiality orally or in writing with the detainees. Communication between the defendant and the Ombudsperson or his deputy can be seen, by not heard by a police officer. Restriction or prohibition of a visit or a correspondence does not apply to visits or correspondence with the Ombudsperson.

The Law on Ombudsperson, No. 03 / L195, promulgated by Decree No. DL-046-2010, dated 22 July 2010 by the President of the Republic of Kosovo, authorizes officials of the Ombudsperson Institution, that at any time, and without prior notice can enter, and inspect any place where are persons deprived of their liberty, as well as other institutions where are present limitations for the freedom of movement, and can be present at meetings or hearings where are involved such persons. Officials of the Ombudsperson Institute can hold meetings with such persons without the presence of officials of the respective

[159] Criminal Procedure Code, article 200 parag. 8.

institution. Any kind of correspondence of these persons with the Ombudsperson Institute is not prevented or controlled. In order to facilitate the execution of the two above mentioned procedures, especially the immediate access and without prior notice of the Ombudspersons officials in any place where are the persons deprived of their liberty, are developed special procedures between Ombudsperson Institute and competent authorities. Similarly, this situation was also arranged by the former Regulation No. 2006/6 on the Ombudsperson in Kosovo, dated 16 February 2006.
The Constitution of Republic of Kosovo, in article 27 stipulates that "No one shall be subject to torture, cruel, inhuman or degrading treatment or punishment".

If we refer, and analyse the national legislation, the legal basis of the processes - monitoring and inspection institutes, is the aforementioned legislation as: the Law on Execution of Penal Sanctions, Criminal Procedure Code, the Law on Ombudsperson, as well as bylaws issued by the Ministry of Justice.

All above mentioned legislation is relatively new to the criminal justice system - correctional system in Kosovo, because before there was no legislation where were clearly defined legal basis for the above mentioned processes, and mechanisms for implementing these processes.

Referring to the conditions and treatment of persons deprived of their liberty, prior to 1990, where in most of the European continent was dominating the one-party system, even if they were prescribed by law these institutions were mostly serving as "legal decor" than materialization of these institutes had in practice, and active role in the penitentiary system. Therefore, this legislation, being relatively new has encountered difficulties in its implementation, and particularly the establishment and mandate of the Ombudsperson which has appeared for the first time in the legislation of the Republic of Kosovo being defined by the above mentioned laws.

Besides the above mentioned legislation, legal bases of the functioning of mechanisms for the monitoring and inspection are bylaws[160], and internal regulations of the work of Kosovo Correctional Service[161], where beside the Ombudsperson are defined also the other mechanisms which are included in the

[160] Are known as Administrative Guidelines, as: for correspondence, visits, spend time in certain places, for allowing and implementation of half freedom, etc., issued by the Minister of the Ministry of Justice.
[161] Internal Regulations of Work are issued and adopted by the Commissioner of the Corrective Service, on 1 October 2007.

field of criminal justice as International Red Cross (IRC), Organization for Security and Cooperation in Kosovo (OSCE), UNICEF and UNHCR.

Moreover, the establishment and functioning of the monitoring and inspection mechanisms are strengthening the international legal acts, known as the international standard for human rights or standards for the administration of justice.

Some of the international legal acts are implemented directly in legal system of our country, according to article 22 of Constitution some of them are:

- Universal Declaration of Human Rights;
- European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- International Covenant on Civil and Political Rights;
- Convention on the Rights of the Child;
- Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
- In addition to these above mentioned international acts in the field of international law, there is also so-called "soft law", which includes: principles, guidelines, standard rules and recommendations, and the most popular are:
- Standard Minimum Rules for the Treatment of Prisoners,1977;
- United Nations Standard Minimum Rules for the Administration of the Juvenile Justice, 1985, known as " BEIJING Rules";
- United Nations Standard Minimum Rules for Non-custodial Measures, 14 December 1990, knowns as " TOKYO Rules";
- European Prison Rules, according to recommendation no. 2006/2, etc.

For the aforementioned local and international legislation, the establishment of monitoring and inspection mechanisms is defined as a necessity, in order to have an "outside observer eye" regarding the practices, provided conditions, and treatment of persons deprived of their liberty by state public authorities – officials, be they correctional and civilian personnel (guard, supervisor, director, physician, lecturer, etc.) in places where are kept persons deprived of their liberty.

From the above mentioned international legal acts have been defined also international mechanisms for monitoring and inspection of places where are kept the persons deprived of their liberty, as are:

- Council for Human Rights, (UN);

- Committee Against Torture, (UN) with HQ in Geneva,
- Special Rapporteur on Torture, (UN);
- European Court on Huma Rights[162],
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT); the first visit in Kosovo of this mechanism was 21 until 29 March 2007, while the second visit took place from 8 to 15 June 2010[163], following the visits by CPT, the same has published reports with findings, which are delivered to relevant institution of Republic of Kosovo.
- UN Sub-commission on Prevention of Torture and other Inhuman and Degrading Treatments

UN sub-commission on Prevention of Torture and other Inhuman and Degrading Treatments is new mechanism in international level, which is defined according to Optional Protocol (2006) of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatments. This protocol defines also the establishment and functionalizing of a National Mechanism for the Prevention of Torture at the state level.

It is worth to mention that Albania as a one of the first countries that ratified this protocol has established and functionalized this kind of monitoring and inspecting mechanism.

Similar to this has acted also the Republic of Macedonia, by establishing and functionalizing National Mechanism for Prevention of Torture at country level.

As concerns as Republic of Kosovo, the establishment and functioning of this mechanism is still at the level of public discourse, where for the first time the need for establishment of this mechanism was emphasized by the Ombudsperson, while in this effort for the awareness raising of the criminal

[162] The Europea Court on Human Rights has issued hundreds of decisions related with treatment of the persons deprived by their liberty and conditions in penitentiary institutions, for more see *Peers against Greece*, request no.28524/95 dated 19 April 2001, *Kalashnikov against Russia*, request no.47095/99 , dated 15 July 2002, *Mamedova against Russia*, request no.7061/05 , dated 23 October 2006, *Dybeku against Albania*, complain no .41153/06, dated 18 december 2007, *Gori against Albania*, complain no 25336/04, dated 7 July 2009, etc.

[163] www.cpt.coe.int;CPT/Inf(2009)4, further please refer to the reports of CPT/Inf (2009) 4 and CPT/Inf (2011) 26, following the year 2010 and until this paper has been written there were no more visits by the CPT. The agreement between the Provisional Mission of the United Nations in Kosovo (UNMIK) and European Council for the technical regulation related with the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment, is reached on 23 August 2004.

justice stakeholders, and broader public are to be highly appreciated the efforts of the Kosovo Rehabilitation Centre for Torture of Victims (KRCTV) in Pristina. The issue of the creation of this mechanism was discussed on 26 June 2009 in the "International Day Against Torture" and on 24 September 2009 as part of a discussion organized by KRCTV in Pristina.

However, in May 2011, the Ombudsperson Institute (OI), the Council for Protection of Human Rights and Freedom (CPHRF), and the Kosovo Centre for Rehabilitation of Torture of Victims (KRCTV), have signed a cooperation agreement, and have created a "Task Force" that plays the role of the national mechanism for the prevention of torture (NMPT), which mechanism has started operating until there is found more advanced legal solution in line with European standards, and particularly conform the recommendations of the Council Europe and the European Committee for the Prevention of Torture.

International legal acts, the ***European Prison Rules (2006/2)***, stipulate that all prisons should be subject to regular government inspection and independent monitoring, prisons should be also inspected regularly by a governmental agency in order to assess whether they are administered in accordance with internal and international legislation, and with the provisions of these rules, as well as during the independent monitoring that should be conductet to detention conditions and treatment of prisoners, that should be monitored by one or more independent bodies which findings should be available to public.

Optional Protocol of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatments **(2002),** defines that the purpose of this protocol is to establish a system of regular visits to places where are persons deprived of their liberty taken by independent national and international bodies, in order to prevent torture and other forms of cruel treatment or punishment, inhuman or degrading treatment and that each party state shall establish, create or retain at the country level one or several visiting bodies for the prevention of torture and other forms of cruel treatment or punishment, inhuman or degrading treatment.

International Convention on Civil and Political Rights **(1966),** defines that party states should guarantee that each person whose rights and freedom are violated recognized by this pact, will have the right for the effective legal remedies even if the violation has been done by the persons who act officially. The states should guarantee that the competent judicial, administrative or legislative authority, or any other competent authority based on states legislation will define the rights of this person that is using the legal remedies, as well as to develop opportunities for the legal judicial remedies.

The whole of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment, defines that a detained or imprisoned person or his lawyer shall have the right to make a request or complaint regarding the treatment of prisoner, particularly in cases of torture or other cruel treatment or punishment, inhuman or degrading treatment, to the responsible authorities for the administration of the prison or to the higher authorities, and if necessary to the relevant authorities that have been given the power to review, or for specific legal remedies ".

Standard Minimum Rules for the Treatment of Prisoners defines that the prisoner should have the right, on any working day, to submit requests and complaints to the director of the institution, or to person who is authorized to represent him, and that applications can be submitted also to the inspector of prisons during an inspection. The prisoner can talk to the inspector or any other officer charged with the inspection, without the presence of the director or other members of the staff of the institution. Qualified and experienced inspectors, designated by a competent authority should carry out regular inspections of prisons and their services. They should ensure in particular that these institutions are administered in accordance with applicable laws and regulations and in order to achieve the objectives of penitentiary and correctional services.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatments or Punishment defines that there should be established European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment "the Committee". The committee through the visits will control the treatment of the persons deprived of their liberty, with the aim if there is need to strengthen defence of such persons from the torture and inhuman or degrading treatment of punishment. Each party state should allow, according to this Convention, visits in any place within the legislation, where are persons deprived of their liberty by the public authority."

United Nations Guidelines for the Prevention of Juvenile Delinquency known as " Riyadh Guidelines", are defining that "there should be considered the establishment of an office of the Ombudsperson or any other independent body, which will provide support to the status, rights and interests of young people and proper referral to available services. The Ombudsperson or other designated organ would also supervise the implementation of the Riyadh Guidelines, the Beijing Rules and Regulations for the Protection of Juveniles Deprived of their Liberty. Ombudsperson or any other body, in regular timing intervals will publish a report on the progress made, and the difficulties which have arisen during the implementation of legal documents, and that there should be created child protection services".

UN Rules for the Protection of Juveniles Deprived from their Liberty are defining "Qualified inspectors or an equivalent authority, established on a regular basis, which does not belong to the administration of the facility, should be authorized to carry out regular inspections, and to undertake unannounced inspections by itself. These people should enjoy full guarantees of independence in execution of the function of this task. Inspectors should have unrestricted access to all employed persons, or that work in premises where are minors deprived of their liberty, or may have the minors deprived of liberty, and to all records of such facilities. Efforts should be made to open an independent office (Ombudsman) to receive and investigate complaints which make minors deprived of their liberty and to assist in achieving the right solutions".

International and local legislation obliges legally establishment, and functioning of the monitoring, inspection and supervision system of penitentiary institutions. The establishment, functioning and promotion of these mechanisms are the responsibility of the state's public institutions. The existence and functioning of the aforementioned mechanisms is preventive and protective for respect of human rights, for the treatment of prisoner's complaints, as well as protection for prison staff that may fall prey of baseless accusations.

Through inspection and monitoring of penitentiary institutions (police stopping centres, detention centres or prisons, psychiatric centres, mental health centres, asylum centres, juvenile detention centres), are implemented the objectives of regular visits, which are very important for the humane treatment of persons deprived of liberty, and more efficient management of the penitentiary system within the state legal system.

The prisons by their nature are closed institutions and as such should be subject to regular and ad hoc inspections and monitoring. Creation of procedures and adequate and effective mechanisms to investigate complaints concerning violations of human rights in penitentiary institutions is necessary.

Inspections and monitoring are procedures that should be incorporated in the state's legal systems, and there is the need to create mechanisms to functionalize these procedures. These can be the inspection unit which can be public government authorities, independent monitoring organizations, organizations, boards, various independent bodies as well as non-governmental organizations.

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Two of the above mentioned procedures, inspections and monitoring of penitentiary institutions may be of: preventive and reactive nature.

Mechanisms that monitor and inspect and that are of preventive nature, are aiming that through periodic, and ad hoc monitoring to penitentiary institutions do affect further improvement of conditions and the rights of persons deprived of liberty.

Mechanisms of reactive nature are usually those organisms that intend to act based on issued conclusions, following with further procedures within the state's legal system.

In the Republic of Kosovo, reactive mechanism which as a field activity has inspection of prisons is the Inspectorate for Correctional Services, which was established by the decision of the Minister of Justice[164].

With the establishment of the National Mechanism for Prevention of Torture and the Inspectorate according to Law on Execution of Penal Sanctions, are created premises for the functioning of an effective system of promotion, respect, protection and security of the rights of person deprived of liberty in the penitentiary system in the Republic of Kosovo.

While, as concerns as monitoring in penitentiary institutions the situation is different, more advanced. There is a large number of institutions, non-governmental and international organizations which within the field of their activities are also monitoring prisons, such are The International Red Cross (ICRC), Human Rights Watch, Amnesty International, Ombudsperson, the Council for the Protection of Human Rights and Freedoms (CPHRF), the Organization for Security and Cooperation in Europe (OSCE), Kosovo Rehabilitation Centre for Torture Victims (KRCTV).

Conclusions

Given that the scope of execution of penal sanctions is very broad and complex, law execution officials in their actions except that need to be professional and human, they also should be legitimate. Professionalism, humanity and legality are essential in achieving the objectives during the execution of penal sanctions. Therefore, the administration of the criminal justice system - the execution of penal sanctions requires that, in addition to the creation and existence of the above mentioned institutes and meeting the international standards during the execution of penal sanctions or other measures, the legislation and the above mentioned institutions, monitoring and inspection, should not be only a decor

[164] www.md-ks.org – the official electronic page of the Ministry of Justice.

within the patchwork of laws, but tangible to the criminal justice system, respectively, for persons deprived of liberty, and to find practical implementation of the rule of law. The functionalization of the above mentioned institutions, establishment of the appropriate mechanisms, are clearly indicating advancement of evolution of the criminal justice system of our country towards social reality, new knowledge and trends of democratization and humanism of penal policy of the state.

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Ma Sc. Isa Shala

ENFORCEMENT OF THE COURT DECISIONS AND OTHER DOCUMENTS THAT CONTAIN OBLIGATION

ABSTRACT

Through the research in this paper will be presented the latest developments in the enforcement system, and the start of privatization of enforcement services in Kosovo by making comparisons with systems in countries of the region.

Reform of the system of enforcement of the court decisions, and other obligatory documents is the most important part of the reform of justice. Our state has made significant strides in reforming the legal and judicial systems as a result of EU membership process, by foreseeing that legislation, procedures and practices to be harmonized with internationally accepted standards, such are the recommendations of the Council of Europe.

Progress Report of the European Commission notes that the existing enforcement systems in Kosovo and countries in the region do not meet the today's requirements. Courts have large number of remaining cases, and mainly subject to the execution. The possibility of excessive use of remedies causes lengthy and unnecessary procedures in the courts.

There should be identified some causes related to the legislative framework, where laws have had a high degree of protection of the debtor in enforcement cases. Performance and high standards of accountability, assessment and performance are absolutely critical for achieving improved enforcement system.

Kay words; Obligatory, performance, standards, enforcement, accountability

1. Introduction

In organized societies in states, primarily self-judgment is forbidden and punished. The state is the one that gives legal protection of the right to subjects for subjective rights that were violated by others. State is doing this

by bodies which operate according to the laws.[165] Protection of violated individual rights is made in the proceedings held in regular courts, administrative bodies or through private agencies specialized for enforcement. The obligation of the state to protect legally subjects does not end only with the issuance of decision, or the finding of violations of individual rights and the obligation of the opposing party to perform certain actions, or to refrain in certain actions.

If the party which has the obligation does not perform his obligation voluntarily, then the other party for the realization of this right should request the support of the competent courts or private enforcement agent.

Fast, effective and efficient enforcement of the judgments is the key to public confidence in the courts, while the successful enforcement of judgments creates and maintains the credibility of the courts. Effective systems for the enforcement of judicial decisions represent vital element for economic growth, job creation, foreign investments and prosperity increase.

In recent years, many countries in the region, and even beyond, have made efforts and have introduced the most effective solutions related with these ineffective enforcement procedures, our country has been also part of these processes.

Delays in execution of court decisions in Kosovo severely damage the right to a fair judgement within a reasonable time, by undermining the rule of law in general.

The most problematic cases arise when dealing with the enforcement of decisions based on reliable documents, such as bills of public services due to the large number of cases, and cases where the debtors are state bodies such as municipalities or ministries.

Thomas Hammarberg, Commissioner for Human Rights at the Council of Europe in 2009 said, "incomplete enforcement of final judiciary decisions must be seen as a refusal to accept the rule of law, and is a serious problem for human rights".[166]

[165] Brestovci, Faik The Law on Civil Procedure II, Pristina 1997 page 17.
[166] Thomas Hammarberg, the Commissioner for the Human Rigts within the European Council. A flawed Implementation of Court Decisions Erodes Trust on State Justice" 31 August 2009. Available in web page http://www.coe.int/t/commissiner/viewpoints//090831 en.asp. accessed in iternet on 27 September 2011.

The European Commission regarding Kosovo Progress Report for 2010 states "unexecuted judgments have violated the public trust, in the ability, professionalism and fairness of the judiciary, by limiting effective access to justice".[167]

2. Implementation of international acts in enforcement of judicial decisions

The European Court of Human Rights (ECHR), which judges the legal issues arising from domestic cases, and that involve civil and penal issues, has found that the enforcement procedures should be seen as an integral part of the judgement for the purpose of Article 6 of the Convention.

The European Court of Human Rights is very clear in the interpretation of this provision: "It would be no conceivable that Article 6 paragraph 1 to describe in detail the procedural guarantees granted to parties of proceedings that are fair, public and expeditious, if implementation of judicial decisions are not protected. If Article 6 is interpreted as has to do only with access to the court and the conduct of proceedings, it would lead to a incompatible situation with the principle of the rule of law, which was taken over by the contracting states, and which have to be respected during the ratification of the convention. Enforcement of the judgment given by any court should be seen as an integral part of the "judgement" for the purposes of Article 6, and the court has already accepted this principle in cases related to the length of proceedings".[168]

In Delcourt against Belgium case, the court stated that: "in a democratic society within the meaning of the Convention, the right for the right exercise of justice with a limited interpretation of article 6 (1) would not correspond to the intent and purpose of that provision in such important country".[169]

Kosovo's Constitution Article 22 stipulates that "Human rights and fundamental freedoms guaranteed by international agreements and instruments are guaranteed by this Constitution, are directly applicable in the

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[167] European Commision, The Progeress Report for Kosovo for year 2010, Brussels 9 November 2010.

[168] OSCE Report, Delays on execution of the final court decisions present violation of domestic law, and the right to fair judgement, September 2007 page 3-4. http://www.osce.org/sq/kosovo/ 28298 (accessed on 25 July 2011).

[169] Nuola Mole and Catharina Harby, The Human Rights Manuals, no.3.

Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions".[170]

Based on this, it can be particularly mentioned Article 6, paragraph 1 of the European Convention on Human Rights which deals with civil issues.

In reforming the justice system our country has made the harmonization of laws with those of the EU and within this, in Law on Enforcement Procedure No.04 / L-139 has taken into account the recommendations of the Council of Europe on enforcement, by foreseeing organizational changes, offering effective enforcement mechanisms, and by the gradual development of legal and logistical infrastructure, believing that standards of accountability, assessment and performance are of a vital importance for an effective system of enforcement.

On 17 December 2009, European Commission for Efficiency CEPEJ has published a guideline for better implementation of enforcement based on the recommendation of European Council.[171]

The recommendation (and instructions) is based on efficiency, transparency and its easy understanding. But it does not describe the ideal system. There is no ideal system for enforcement. But what is possible, is a forecast of basis and principles of enforcement. As such, these recommendations and guidelines can be used to assess the enforcement procedures and practices. It is clear that the Recommendation REC(2003)17 and the guidelines have no

[170]Article 22 of the Constitution of Republic of Kosovo [Direct Applicability of International Agreements and Instruments]
Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:
(1) Universal Declaration of Human Rights;
(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(3) International Covenant on Civil and Political Rights and its Protocols;
(4) Council of Europe Framework Convention for the Protection of National Minorities;
(5) Convention on the Elimination of All Forms of Racial Discrimination;
(6) Convention on the Elimination of All Forms of Discrimination Against Women;
(7) Convention on the Rights of the Child;
(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

[171] Guidelines for better implementation of existing recommendations of the Council of Europe for enforcement, of the European Commission for the efficiency of justice (CEPEJ), CEPEJ (2009) 11th review, hereinafter CEPEJ (2009) the 11th revision (see Annex).

obligatory force. However, it can be taken as a reference point for further definition of an effective and efficient enforcement. Recommendations and guidelines prescribe a number of guiding principles related to enforcement. More specifically, it prescribes certain principles and standards regarding the definition, the legal scope of application of the recommendation, the procedure of enforcement and enforcement officials.

Perhaps the recommendations and guidelines can be considered as "regulation" or guideline. National systems are so different that it is very difficult to create an ideal system of enforcement, or ideal enforcement official.

But what is adequate enforcement system? How does it work? Do we have the ideal system? Is there an ideal enforcement system? There are no answers yet. This is utopia. However, through the recommendations and guidelines can be possible to apply the certain bases and principles of a system.[172]

In Resolution no. 3 of the 24th Conference of Ministers of Justice in Moscow (4 and 5 October 2001) is noted that the "proper, effective and efficient enforcement of court decisions is of capital importance for States in order to create, implement and develop a strong and respected judiciary". Based on this conclusion, the Committee of Ministers of the Council of Europe has adopted a recommendation for enforcement.[173]

3. Enforcement of the judiciary decisions by the judicial authorities

As regards to competence in judicial practice there have been different interpretations, about that if creditors have a right to go to court again with the entry into force of the new Law on enforcement procedure no. 04 / L-139.

In Article 5 paragraph 2 of this law is cited "the competent court has substantial competence to order and carry out enforcement, and to decide the issues in the proceedings in accordance with the provisions of this Law,

[172] The enforcement agent in Europe: Utopia or reality, Kluwer, 2004, page 313, in March 2004 in Utrecht of Netherlands was held an international conference titled : "Enforcement Agent in Europe: Utopia or reality?". Douwe Striksma, enforcement agent one of the speakers, said: "When the enforcement agents in Europe can work on the same bases of working model, there will be an adequate enforcement system, so legally sound and pragmatic".

[173] Recommandation 17/2003, adopted on 09 September 2003.

unless the courts and other enforcement authorities have jurisdiction to order and carry out enforcement, and also to decide for the issues in the proceedings.

Whereas article 5, para. 6, states "The court is competent to decide on the enforcement procedure and to implement the enforcement of judicial decisions related with:

- all issues from the family law
- the return of employees and civil servants in work and other compensations

This provision is exceptional one, in order for the court to decide on other issues unless provided by law to decide on issues such as to decide for the issues relating to any objection, complain, irregularities in enforcement proceedings under article 52 and 67 of this law, or any procedure against actions taken by the enforcement agent, the competence has the competent Court in the territory of which the debtor has residence, or if there is no residence in Kosovo, then in the territory in which is the place of residence if he is the natural person.

If the debtor is a legal person, the territorial competency has competent Court within the residential area of debtor. If the debtor does not have temporary residence in Kosovo, the competency has the competent Court in the territory of which are located movable and immovable assets which are subject to enforcement.[174]

Regarding the issue for decision, in the first instance the procedure of enforcement is conducted by the enforcement agent, and exceptionally is conducted by the individual judge (only) when the Law assigns the enforcement to be determined and applied by the court (the first instance organ). There is defined also a timeline where the enforced body decide for the enforcement proposal within 7 days of receipt of proposal.[175]

According to the above mentioned provision "in the second instance decision is issuing individual judge", which has not been the practice until now, knowing that in the second instance decides the panel for review of complain.

[174] See article 5 parg.5, LEP no.04/L-139
[175] See article 3 parg.1 LEP no.04/L-139

4. Enforcement of the decision for return in working place and hand-over of child

Most important and sensitive issues have been remained within the competence of court. The Court has exclusive competences for the enforcement of decisions regarding the return of employees, and civil servants in work.

The decision body for the proposal of enforcement based on enforcement document, with which the employer is ordered to return the employee to work, or to systemize in appropriate working position, and apply the enforcement, is the Court of territorial competency in territory where is created the working relation.[176]

The proposal for enforcement based on document of enforcement for return to the workplace, with which the employer is ordered to return the employer to work, can be presented within ninety (90) days from the day the decision becomes final.

Enforcement, based on the enforcement document by which the employer is obligated to return the employee to work, or to systemize in appropriate working position, is applied through the determination of fines in money against employer and responsible person in it.
Cash penalty determined under the provisions of article 15 and 16 of this law, and enforcement provisions for purpose of realization of credit for the action which can be committed only by the debtor.[177]

Pursuant to article 317 of LPE the proposer of enforcement reserves the right of payment or compensation of monthly wage, or other payments while the person was unemployed because of an illegal decision of employer for the dismissal from work, and can request the case to be treated in contentious procedure.

If the enforcement Court has only partially approved the request for payment of monthly salaries, then it will instruct the creditor of the enforcement that the rest of the request to realize in judicial contested procedure.[178]

[176] See article 312 of LEP no.04/L-139
[177] See article 314 of LEP, no.04/L-139
[178] See article 317 parg.2 of LEP, no.04/L-139

As for the delivery and receipt of child, these provisions are implemented accordingly also in the cases of contact of the child, because in the practice court acts according to these proposals.

To decide on proposal for enforcement of the Court decision with which is ordered delivery of child to parent, or to other person, respectively to institution to whom the child was entrusted for the care and education, competent is the Court which is of the general territorial competency for the party who requests the enforcement, but also the Court in whose territory is child. For the implementation of enforcement, in territorial view is competent the Court in whose territory is the child at the time of enforcement.[179]

The proposal for enforcement of decision can present parent, or other person to whom the child is entrusted for the care and education, as well as custody. Special importance is paid to the way of application of enforcement where the court carries out the need to protect the interests of the child to the greatest possible extent.

5. The role of Judges and enforcement officials

In our system it is the competence of the judge to allow the enforcement, but that does not mean that even at this stage of proceedings to not have the help of enforcement officer, especially in cases that are not complex.

Pursuant to law the judge has the responsibility for these enforcement actions:

- To verify the proposal for enforcement,
- To decide on objections and complaints, and disputes that arise during the enforcement procedure,[180]
- As well as other duties prescribed by law that are in competence of enforcement judge such is delivery of child.

The enforcement officer has administrative tasks that include:

- Maintaining of the enforcement records,
- The proceeding of the informations for the parties,

[179] See article 318 of LEP no.04/L-139
[180] Article 73 of Law on Enforcement Procedure Nr.04/L-139.

- As well as compilation of the minutes regarding the registration, and sequestration of the movable items, sequestration of pledges, emptying and delivery of the immovable.

The obligations of the judges and enforcement officer are:

- Respect of the debtors dignity,
- Timely proceeding of the enforcement proposals, and according to the order of their receipts.

In enforcement procedure the court is obliged to act with urgency.[181] The court has a duty to receive cases for procedure according to the order in which received proposals for enforcement, except when the nature of the credit or special circumstances requires for the court to act differently.

The law has not clearly defined which are those special circumstances, but the court will act by assessing each case individually, unless the cases are priority as the family issues, or the return of employees at the workplace.

6. The obligations of other persons in process

The role of third parties in the procedure is particularly the provision of different informations, as are cadastral services, civil registration centres, vehicle registration centre, the Kosovo Police Service.

Another category of third persons in procedure are debtors of debtor's, where in practical cases are numerous, especially in terms of the enforcement procedure of sequestration of collateral. Third parties may be commercial banks where in most cases the debtors have open accounts in banks where they receive personal incomes through these accounts, or different business activities where various payments are done through bank accounts.

Important role for the development of the enforcement procedure has Cadastral Service. It would be impossible to develop an enforcement procedure regarding immovable property without the help of these services in providing necessary information. The same value for identification of persons, different addresses has civil registry service. For the safety of judges

[181] Article 6 of Law on Enforcement Procedure Nr.04/L-139.

and other personnel, if necessary is requested assistance from the Kosovo Police.[182]

7. The enforcement of decisions by enforcement agents

According to the Law on Enforcement Procedure No.04 / L-139 Kosovo as well as other countries in the region since 2014 have made private enforcement system operational. This system through private enforcement agents is expected to provide solutions to all the problems that already exist in Kosovo. Private enforcement agents tend to be highly motivated and professional in their work, and provide high level services to ensure their competitive success. They have direct control in the management of offices that manage and benefit personally from their performance, bringing a high level of responsibility for matters such as: engagement and removal, budgeting, information technology systems to support their work and office management.[183]

In addition to this, because the process of enforcement becomes private business instead of a public function, supply and maintenance costs of enforcement offices, and the training of agents and their employees are completely removed from the state budget, although the state holds the majority of expense of monitoring of enforcement agents to ensure the legality of their operations, and their availability when required.[184]

The private system of enforcement has also the advantage of removing the management responsibility of the enforcement process by judges and court enforcement officers. These responsibilities are transferred to private agents. The role of the courts still remains very important, because the sensitive issues such are family issues remain within the exclusive competence of the courts; also the legal remedies remain in responsibility of the courts. Other

[182] Article 53.3 of LEP cites "During the enforcement procedure the police have a task to provide to an officer of the court the necessary support for conduct of the enforcement actions. The court official person, in case of need might take pertinent measures against a person who obstructs the conduct of enforcement actions.
53.4 During the action of the police under the command of an officer of the court, there are applied propper provisions of law for the internal affairs respectively judicial police.
[183] See program Enforcement system of agreements and decisions in Kosovo (SEAD), Increase of the efficiency of enforcement of contracts, 30 April 2010 page 34.
[184] See program Enforcement system of agreements and decisions in Kosovo (SEAD), Increase of the efficiency of enforcement of contracts, 30 April 2010 page 34.

important function is supervisory function, because parties who think that private agent has violated any of their rights can request court support. [185]

However daily direct involvement of judges in the enforcement process ends by leaving judges with their basic responsibility of the judgement of the court contexts between the parties, and by depriving them from the burden of some management responsibilities that often take a significant part of their time.

For these reasons, enforcement systems based on private enforcement agents have become standard in most of Western Europe and in the former socialist countries, and in Central and Eastern Europe. It is also right to say that the United States and many countries that are applying customary law have private enforcement system, although at least in the USA is structured very differently than in the systems of the Balkan States.[186]

Profession of the private agent is not comfortable profession but it is very important. The importance of this profession is shown by the fact that in some countries like in Bulgaria the first private enforcement agent is appointed former Minister of Justice, while in Belgium the number of private enforcement agents is limited and to be appointed to this position should wait many years, while the procedure is very special because the appointments is made by the king.

LEP of year 2012 has provided strict criteria for appointment of private enforcement agents, which are apparently identical to the criteria required for appointments to judge by giving importance and special treatment to this profession.[187]

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[185] See article 5, parag.5 of LEP, no 04/L-139.

[186] See program Enforcement system of agreements and decisions in Kosovo (SEAD), Increase of the efficiency of enforcement of contracts, 30 April 2010 page 23.

[187] Article 326 of LEP 2012 is foreseeing the conditions for the appointments of privare enforcement agents

1.The person who meets the following conditions may be appointed as a private enforcement officer:

1.1. he/she must be a citizen of Republic of Kosovo;

1.2. he/she must have a legal capacity to act and must be medically fit;

1.3. he/she must have graduated the faculty of law, in the country or abroad, with nostrified diploma in Republic of Kosovo;

1.4. he/she must have passed the Bar Exam;

1.5. he/she must have at least three (3) years of legal experience;

1.6. he/she must have passed the enforcement examination;

1.7. he/she is not undergoing any investigation procedure for any criminal violation, respectively he is not convicted for any criminal offense with imprisonment for any act

In the region only Kosovo has provided by law that private enforcement agent has to complete the bar exam. Private enforcement agent in Kosovo cannot refuse requests for enforcement, it can be done only if the exclusion criteria are fulfilled, which apply also for exclusion of judges.[188]

Private enforcement agent in Kosovo has no right to perform additional actions in their professional lives[189] as it is in some other countries. Private enforcement agent in the Netherlands has the right to perform the role of advocate for the creditor if the amount which must be realized is not exceeding 5000 euros, and it is being discussed that he or she can perform the role of advocate for cases where the amount is up to 25,000 euros, while in Belgium the enforcement agents can make evaluation of the buildings before their alienation, or evaluation of facilities near to the roads which will be built.

Some researchers believe that a competitive market in professional services such as enforcement, works better than a government structure for the provision of that goal, but with sufficient care it could work better.

Law on Enforcement Procedure has had the goal to make enforcement more efficient, but there are still many obstacles to a more effective enforcement. It is necessary to highlight that there cannot be achieved the efficient enforcement only with the laws on enforcement procedure. After analysis in the area of enforcement it is determined that necessarily should be taken into account:

- The law on courts no.03/L-199
- The law on ownership and other real rights no.03/L-154
- The law on hypothec 2002/4
- The law on obligations 04/L-077

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punishable for at least six (6) months of imprisonment, which affects the integrity of enforcement agent.
1.8. he/she must provide a declaration of assets before a public notary, with all the consequences for providing false statement.
2. If criminal proceedings are pending against a person who has filed an application for appointment as an enforcement agent, the appointment decision shall be postponed until the final decision is reached in the criminal procedure.

[188] Article 325 of LEP (2012) The provisions of the Law of Contested Procedure that apply on the dismissal of judges shall accordingly apply to the dismissal of enforcement agent.

[189] See article 341 of LEP-së nr.04/L-139*

- The law on registry of civil status no.2004/46
- The law on contentious procedure 2009/03-L-006
- The law on contentious procedure – changes and additions 2012/04-L-118
- The law on out contentious procedure 2008/03-L-007
- The law on central Bank of Republic of Kosovo 2010/03-L-209
- The law on registration of pledge in registry of movables 2012/04-L-083
- The law on arbitration no.02/L-75,[190]
- The law on mediation no.03/L-057,[191]
- The European Convention for Protection of Human Rights

8. The decisions of the enforcement body

From 1 January 2014, the decisions of enforcement procedure, issued by enforcement body are in the form of a legal verdict or enforcement order. The law here has made a difference in terminology defining how should be called the court's decision and how should be called the decisions of private enforcement agents, but in essence gave sufficient explanation of what is meant by these decisions and what should contain these decisions. Enforcement order is private enforcement agent's decision with which is accepted fully or partially the proposal for the execution of enforcement.[192]

The legal verdict for the enforcement is the Court decision, by which the proposal for enforcement is fully or partially accepted, or enforcement is ordered ex officio.

[190] Article 38 of the Law of Arbitration "arbitration decision that was issued by an arbitral tribunal in Kosovo shall be enforced when declared enforceable by the court.
The request that the arbitration decision to be declared enforceable is dismissed if the court determines that there are one or more reasons for canceling the decision under Article 36.
Request for enforcement of arbitration decision is attached tribunal's decision or a certified copy thereof. Article 38 of Law on Arbitration"

[191] Article 14.4 of the Law on Mediation concerning judicial enforcement of decisions of the mediation foresees "reconciliation achieved in the mediation procedure when it is if approved by the court or certified by the competent authority".

[192] See article 2, par.1 subparag. 1.12 of Law No. 04/L-139 on Enforcement Procedure.

The Court enforcement officer is an employee in the judicial system which directly carries out certain enforcement actions, while private enforcement agent is a person appointed by the Minister of Justice in accordance with the provisions of this law, which in the performance of public authorities entrusted by the law decides on the actions of his competence for the application of allowed enforcement and takes action for enforcement.[193] The order for enforcement as well as legal verdict should have the same content.

9. Unsolved cases in courts

If in a whole, the courts in Kosovo expect about 200,000 cases of all natures to be solved, half of them are in the enforcement procedure. From this derives that courts in Kosovo are still not effective, since it is worrying that only for 3 months number of pending cases increases above the 500.

The Basic Court in Pristina in the third quarter of 2012 has received 457 cases based on enforcement document, at the beginning of this reporting period there were 24861 pending cases, while at the end of the reporting period there were 24895 unresolved cases, while based on reliable document in early reporting period there were 6915 unsolved cases, while by the end of the reporting period there were 6988 unsolved cases, and had received 661 cases. These data shows that the number of unsolved cases is rising. This court for this period has conducted 554 cases of all natures.[194]

If we look at the report of the former Commercial Court then the data is very worrying, because during the third quarter of 2012, this court has received 211 cases, while has resolved 88, and 2603 still remains unresolved[195].

10. Challenges in solution of the remaining cases

Increase of the number of unsolved cases, based on enforcement and authentic documents took off from the mid of the last decade.[196] But despite

[193] See article 2, par.1 subp.1.10 and subp. 1.11 of Law No. 04/L-139 on Enforcement Procedure
[194] Kosovo Judicial Council Secretariat, the statistics of the regular courts, quarter -III- 2012, pg. 34.
[195] Kosovo Judicial Council Secretariat, the statistics of the regular courts, quarter -III- 2012, pg 8.
[196] The Program Enforcement System of agreements and decisions in Kosovo (SEAD), 30 April 2010 page 14.

the growth of the number of unsolved cases in those years, as well as continuous accumulation during these years, today it is clear that there are some factors that hinder the completion of the remaining cases and resolving of new cases.

Below are some barriers that contributed to the existence of the backlog of cases which are submitted based on enforcement and authentic documents in Kosovo.

11. Insufficient Resources

Now it is very clear that there are insufficient resources in the enforcement offices at Basic Courts in Kosovo to do the review of collected cases on the basis of these documents. Based on the legislation in force there are many other cases in enforcement offices that are designated as the most important priorities than civil cases of enforcement, and which consume a large percentage of the available time of enforcement officers.[197]

In Basic Court of Pristina, which is the court with the largest number of cases in Kosovo are working two enforcement judges, and seven enforcement officers. In enforcement office annually arrive approximately 10.000 new cases, while less than half of them cannot be enforced during the year.

In this court as well as in other courts based on number of new cases, a number of them are priority cases and should be processed immediately, as cases related to child hand-over, return of the employee to work, alimony, and so many other, therefore, the old cases because of the small number of enforcement officials s cannot be processed and their numbers only grow.

The Law on Execution of Penal Sanctions has envisaged that for the execution of the penalty with fine to apply provisions of the law on enforcement procedure.[198] The fine penalty is a priority, and because of the limited time the court should urgently deal with these cases. Working time of enforcement officers is fully consumed by these cases with priority, and they simply do not have time to deal with enforcement of civil issues. In this new

[197] The Program Enforcement System of agreements and decisions in Kosovo (SEAD), 30 April 2010 page 14.

[198] In Article 143 of the Law on Execution of Penal Sanctions is provided *"provisions of the enforcement procedure shall be applied to the jurisdiction and procedure of execution of the punishment, unless the law provides otherwise.*

way civil cases are added to the pile of other cases, including all new cases of authentic documents.[199]

12. Problems related with obtaining of debtors addresses

One of the reasons for the backlog of cases is also the provision of accurate addresses of the debtors. Enforcement officials in proceedings related to these cases, in order to send notifications for enforcement encounter in inaccurate addresses. Due to the large number of cases that are presented, they proceed with notifications related to cases that are presented approximately three years ago, so it is not surprising if the addresses have changed, and of course during this decade there were a lot of movements in the direction of urban areas, and that the parties of the proceedings do not live where they used to live at the time when they are indicted.[200]

Neither the court nor the creditor has any easy method to find them. Registry of Civil Status, which the court can contact, is the only available source of information for verifying the addresses of debtors. In fact it does not contain information about the current addresses of individuals, although these data requirements often are sent to the Civil Registry, where local officials responsible for maintaining the registry in some cases even do not accept the court's requests for provision of information, or they accept them but never reply.[201]

We can conclude that Kosovo Civil Registry provides no help with this problem. Civil registry is apparently doing projects to fix this issue, and it is said that would probably be able to provide information about addresses during this year. In some cases frequent justification for the lack of success of enforcement officers in the enforcement of cases of authentic documents is that the debtors have moved and cannot be found.

13. The absence of items that can be sequestrated by law

[199] The Program Enforcement System of agreements and decistions in Kosovo (SEAD), 30 April 2010 page 15.
[200] The Program Enforcement System of agreements and decisions in Kosovo (SEAD), 30 April 2010 page.17.
[201] The Program Enforcement System of agreements and decisions in Kosovo (SEAD), 30 April 2010 page 17.

Another reason why the backlog cases for enforcement were not successfully enforced is the absence of the debtor's items that would be subject to enforcement as required by law. In the majority of the cases where enforcement is allowed based on the reliable documents-invoices there is nothing to be sequestrated because the debtor does not have the items, if we use the USA expression, the debtor is resistant to legal verdict.[202]

This problem is evident in a country like Kosovo that has high unemployment and poverty rate. The provisions of the current Law on Enforcement Procedure, do not differ much from previous laws of 1978 and 2008, which have provided a debtor with excessive protection by foreseeing a lot of items which cannot be the subject to enforcement, and in fact have only hindered enforcement.[203]

Movable items, as vehicles, could be transferred easily in order to avoid sequestration, while Kosovo has not effective means for their discovery and sequestration.[204]

14. Conclusion

The reform of enforcement system of the court decisions, and other obligatory documents is the most important one within the frame of justice reform. The European Court of Human Rights states "the recognized rights for a court proceeding are illusions if the country's legal system allows that the binding judiciary decision of the final form remains non-functional to the detriment of the party.

Kosovo and other countries in the region aim to join the European Union. Some have made significant strides in reforming the legal and judicial systems as a result of the EU accession process.

Based on progress reports by the European Commission it is concluded that judicial enforcement systems in Kosovo do not meet the requirements of today. Courts have large number of remaining cases, and mainly enforcement cases. The excessive possibility of use of legal remedies in the

[202] The Program Enforcement System of agreements and decisions in Kosovo (SEAD), 30 April 2010 page 17.
[203] See article 85 of the Law on Enforcement Procedure of year 2012.
The Program Enforcement system of agreements and decisions in Kosovo (SEAD), 30 April 2010 page 18.

enforcement procedure causes long and unnecessary procedures in the courts.

In some states several causes can be identified, that have led to delays such as those related with the legislative framework, where the laws have had a high degree of protection of the debtor in enforcement cases.

Privatization has become highly successful in some countries despite numerous alternatives in the public sector. If adhered to the principles of definition and strengthening of a clear legal framework, which defines the competences, rights and responsibilities of the parties, to enable them to understand more effectively their roles, and to comply with their responsibilities to cooperate properly in the enforcement process, then will be stopped misuse and abuse of enforcement procedures by the parties, this is foreseen by the Recommendations of Council of Europe on enforcement 17/2003.

When Kosovo makes improvements, then it would be clear that is preferable to move to the next step, and to comprehend a private enforcement system as part of the comprehensive reform process.

Well planned Kosovo organizational changes, the introduction of new, efficient mechanisms of enforcement and gradual development of the necessary infrastructure, and needed conscientiousness will produce improvements in the enforcement system.

It is also recommended that the Central Bank of Kosovo should establish a special department for enforcement of court decisions, including a database of bank accounts, in which the accounts are identified and searchable by personal identification numbers, or for legal persons based on the number of business registration.
Our legislation should clearly define executive titles and the way of sending of documents.

It is envisaged that private enforcement agents should possess moral standards and legal knowledge on law and procedure.

Legislation in general should provide legal security and transparency of the process by placing balance of interests of the creditor, debtor and third parties. It is recommended for the courts to create a mechanism to request information directly from the Tax Administration, Pension Fund and other agencies (including the centre for business registration, cadastre and

department of registration of vehicles and driving licenses) which have useful information for processing of cases.

During the enforcement process should be respected also the principle of debtor protection, and enforcement should be achieved only when the debtor has the means or ability to meet the obligation.

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Mr. sc. Ramadan Gashi205

BEING EQUAL BEFORE THE LAW AND GUARANTIES PROVIDED BY JUDICIARY

ABSTRACT

Equality of individuals before the law, and guarantee of the realization of the rights and freedoms guaranteed by the internal legal acts of the state and international standards, represents the highest democratic value of a country. Equal treatment and equal proceedings, not only are different in it, but reflect methods that express deep divergences which are closely related to the implementation of the law in practice by the relevant institutions. In this regard, the necessity of functioning of institutions, particularly the judiciary constitutes the main pillar of the rule of law that functions in a form and way by having as objective equal protection of human rights and freedoms, as well as determining the liability of all. In the context of this paper, I will attempt to somehow touch the most sensitive issues of the judicial system, by analysing the most problematic issues, in order to give to problem phenomenological characteristics.

Key words: Equality before the law, equal treatment, judiciary.

Introduction

This paper will review in the substantive way the issue of the respect of rule of law and equal treatment of the citizens before the law by state institutions. Initially, it will analyse the issue of rule of law and the law, and the legal security as an important element of the legal state. It is in the interest of society that the legal state, and the rule of law be guaranteed by implementing the laws in a fair and reasonable way for everyone in full equality, depending on which factual situation is individual.

Justice requires that every person has the right to a fair and objective judgment by a competent court, which is independent and impartial, which will exercise its functions pursuant to legal provisions in force, and based on the evidences. No court can be established that do not apply the established procedures regularly based on law, and aiming to take away the power of ordinary courts. Judges have an obligation to ensure in continuity, that the

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justice is that one to be served finally, taking into account all complex elements o all issues for which will decide the court. If act otherwise will risk the quality of justice that is the priority for society and the state, that would make the freedom and security of citizens more unsafe, and the state of law less functional.

1. The issue of the rule of law and the rights as well as legal security as important element of legal state

The issue of the rule of law has its roots in medieval England. In year 1066, William the Conqueror had set a central power. Although the king embodied the central governmental, legislative and judicial power, he himself did not stand above the law - it was the law that made him king. From this understanding, the common law courts, and the parliament together with the feudal, strengthened their influence in the domestic system, thus building the first parliamentary monarchy in Europe. Bases of development of the rule of law were Magna Charta Libertatum (1215), which was providing to feudal certain rights, and Habeas Corpus Act (1679), which gave people in custody the undeniable right to be informed about the reasons for restricting of their freedom. In the European continent, the rule of law gained importance during the XVII and XVIII century. The legal security means no-violation of acquired rights and legitimate expectations that ensure legal acts in force in a state, including the constitution and international standards. The main formal standards are considered accuracy, clarity, and sustainability of all legal order of a particular state. Not only specific norms, but the whole legal order is required to be understandable, predictable, easily implemented and not contradictory.

In this way, it is estimated that there is created the trust of citizens in the sustainability of this order, as well as their belief for the need to respect and its application in everyday life. At the same time, based on this, "the citizens determine the space of freedom or their behaviour in state and society".[206] Standards requested to be respected by all the state mechanisms and institutions, particularly from the central bodies of three main branches of state government. The legal security involves in itself reliability of citizens to

[206]Bross S., Reflections on the importance and the position of a Constitutional Court in a modern democratic state
under the rule of law–Taking in to account the position of the Federal Constitutional Court of the Federal Republic of Germany, Center on Constitutional Justice, Council of Europe.

state, and immutability of law for regulated relations, and their equal implementation without exception regardless of the differences.

The reliability has to do with the fact that citizens do not have to worry constantly about the diversity and negative effects of normative acts that harm and aggravate a condition set by previous acts. In view of the interests of individuals, as well as his reliability in the legal system, it is considered as particularly important also the order for prohibiting the retroactivity power of legal norms. Obviously, this case has to do with legal norms that prescribe penalties, put obligations or new rules for individual behaviour. Norms with the facilitating or favourable character for individual, in accordance with the principle of legal security, case by case can extend their effect also to an earlier period.

As an element of legal security, can be considered also obligation to execute final court decisions, the reasoning of court decisions, and others. However, even otherwise, it is understandable that in general terms it finds the appropriate space to be recognized and respected in practice, and within the principle of the rule of law.

Its special standards are reflected in many other provisions of the Constitution and in Codes or adopted legislations, and in its implementation. For example, the Constitution of the Republic of Kosovo states that "No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law".[207]

In order to consider that we really have legal security, the law in general or its specific provisions in their content should be clear, defined and understandable, and easily applicable in practice. It is for sure that they cannot predict each case that can derive by recognizing and applying them in practice. Therefore, primarily duty of the courts for certain shortages of the law is to fill them naturally through interpretation and its practical implementation that will be in accordance with international law (international instruments). But in order to achieve such a thing, first of all the law should be understood exactly and correctly. As in other areas of law, also in criminal law, the general principle is the prohibition of retroactivity power of the law. Such a thing is seen, first of all, because of the necessity of

[207] Article 33 of Constitution of Republic of Kosovo, 2008

guaranteeing the stability and security of legal relations which are established between different subjects of law.

In the case of penal law, which as a rule restricts individual freedom, it is very necessary that every citizen know the limits of his freedom and the sanctions that may come due to overcoming of these limits. He should not feel for any moment the risk that a new criminal law that can predict an act as the punishable, or certain omission, or that may aggravate his position as defendant, would have retroactive effect in the future. The exemption from the general rule, by giving retroactive power only to criminal law that favours the position of the defendant, aims to respond faster, but should keep in mind that the more lenient law should be applied by the courts as in terms of defining the criminal act, as well as the sanctions provided by it.

Based on above mentioned arguments it can be concluded that the retroactive power of favorable penal law should be respected immediately by all courts of ordinary jurisdiction, it is enough that the fortune of the case is not yet finally decided by them. Legal security presupposes, among others, the reliability of citizens to the state, and the immutability of the law for regulated relations. Reliability has to do with the conviction of an individual that should not be disturbed or live constantly with the fear for the diversity and the negative effects of legal acts, which could violate private or professional life, and to aggravate a condition set by previous acts.

The legal regulations dealing with the rights of citizens should be enough sustainable in order to ensure their continuity. As a rule there cannot be denied legitimate interests and expectations of citizens from the legislative changes and state should aim to change a previously regulated situation only if the change brings positive consequences. The assessment and reasoning of the courts regarding judicial decision presented as evidence by the applicant has importance in the context of respecting the principle of legal security, as one of the fundamental aspects of the rule of law. Legal security among other things means, guarantying the reliability of the individual to the state, its institutions and acts they issue based on their competencies.

Today, the principle of the rule of law is the basic principle of local, regional and international institutions worldwide. The rule of law is avoiding arbitrariness of any power (legislative, executive or judicial). In order to achieve respect and guarantee of human dignity, justice and legal security for all people regardless of differences that may have on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, relation with any community, property, economic and social condition,

sexual orientation, birth, disability or other personal status. Security of the rule is not relying on a precise drafting of laws, or only in the fact that there are written laws but, in the security on how much will be applicable in practice and how much will last. As part of this, "a legal order is legal because it allows people to direct to legal norms, in order to plan the way of their life and to find a warning that where the green and red lights are''.[208]

The law is "act by which the state formulates a norm of objective law." Therefore, the rule of law, primarily means the existence of laws known to citizens. These laws contain non-discriminatory laws and in accordance with the highest legal and political acts (the constitution).

Sustainable laws below to constitution and have their bases in it, and are easy applicable in practice by the respective institutions. We are aware that our life is now legally regulated. The law now reaches everyone's life, touching issues of different nature, only for citizen to benefit citizen's legal guarantees to realize the guaranteed rights.

The law is exactly the strength that makes possible the freedom and progress in contemporary democracy. It is precisely the law that gives people the legal security. The law, in fact, "regulates a certain social relations''.[209]Given this, the laws are not the same in all societies, although they regulate same social relations, because conditions of life are different, and social relations in some places are more developed, while in some others less developed. Positive laws that have ruled the society should be respected. These are intended to ensure the welfare of citizens and to enrich sublime human values which will apply to all equally.

Rightfully Cicero said that "the purpose of the laws is to provide citizens the integrity of the state and to make citizens life happy and peaceful." Their existence only, does not mean anything if those laws are not strictly and equally applied for all people by respecting defined legal procedures. There will be no rule of law where someone is placed above the law, all should obey to laws and other legal acts, and no one has the right to welch them, even lesser to act on their behalf for other purposes.

The history provides plenty of examples when the laws have only been legal decor. It is true that "there are little undemocratic laws, but there are quite

[208] Giovanni Sartori, Once more for the Theory of Democracy, Tirana, 1993, pg.341
[209] Akademic Esat Stavileci, Introduction to Administrative Sciences, Pristina, 1997, pg.50

undemocratic practices".[210] Therefore, a country (state) should establish institutions that supervise the legal system, including courts, prosecutors, police and other relevant institutions, which as their target have the precise functioning and its consequences. The rule of law is essential for maintaining public order and security of civil freedom and human rights. Respect of the rule of law does not only oblige individuals of a state, but also obliges state authorities and persons practicing public functions in these bodies. Although the rule of law is the cornerstone of a democratic society, there is not any full consensus on that, that which its constituent elements are.

However, more than controversial is the fact, that people are protected from arbitrary actions of public authorities only if their rights are foreseen by law. It is evident, that the practice of state power must be based on laws that are issued in accordance with the constitution, and that have the objective the provision of freedom, justice and legal security of citizens.

Citizens should be able to have data that are appropriate for the circumstances, the legal norms applicable in a given issue. These legal norms cannot be considered as laws if only are legally binding, but it is very important that these laws be implemented and interpreted strictly for everyone. The law should indicate the granting of any competence to relevant authorities, as well as the way of its practice with sufficient clarity, so that citizens can be provided with appropriate legal guarantees. "Citizens should be treated equally and legislation should have constitutional restrictions''.[211] The rule of law is safe, only if it roots are in social norms. Judicial decisions are acting fully and for a long time, if only rely on political tradition. People reach their goals, to that extent that "decisions and actions are directed by rules that have emerged from a revolutionary process, thus rely on the experience of generations".[212] Laws are not and cannot be drafted to take into account the person, therefore, cannot take into account the differences between people.

Therefore, as perfect are the laws more secure will be human welfare and happiness. Laws must be simple, clear and accessible. These are drafted in accordance with the conditions and the current state of society, but, at the moment when these reports are changing, these laws will cause legal harmful consequences. The state has a duty to establish the necessary mechanisms to protect the individual against arbitrary behaviour of the authorities practicing

[210] Ismet Salihu, The Penal Law (general part), Pristina, 2008, pg.139.
[211] Raino Malnes /Knut Midgaard, Political Philosofy, Oslo, 2003, pg. 273.
[212] Friedrich A. Von Hayyek, Law, Legislation and Liberty, London: Routledge – KeganPaul, 1982, pg.18.

the entrusted state functions, and to punish all those involved in the possible abuse of power. *All people are equal before the law, and enjoy in the same wat the right to be protected from it.*

World Conference on Human Rights in Vienna, 1993, has reaffirmed the inseparable relation between the principle of the rule of law, and the protection and promotion of human rights. During the conference was recognized that the absence of the rule of law is one of the biggest obstacles to the implementation of human rights. The rule of law ensures the basis for fair management of relations between peoples, and in this way supports diversity, opens paths of a general affirmation and legal security of citizens.

As Roger Warren stated, the retired president of the National Centre for State Courts “the rule of law is a double-edged sword", because it not that only ensures protection of the rights, but also implements responsibilities. The rule of law holds officials under responsibility to the citizens in order to prevent the misuse or negligence during the practice of entrusted public functions.

They have a moral, ethical and legal duty to support and advance the principles of rule of law and legal state in the sphere of action or their impact whatever it is. They should fulfil this obligation and competence each time and for every issue to be decided by them, either individually or in groups. Their responsibility as a citizen and as officer, which carry one of the three functions of power is to exercise the tasks for the benefit of society and the legal prosperity. At these should firm sense of awareness of the work, and the willingness to act towards all persons to protect their civil, public and private interests. No doubt that they should play an active role in the development and implementation of an efficient and coherent system of rule of law.

The rule of law is a dynamic concept closely related with many factors, be they social, economic, legal and political. With it is made legal restriction of the arbitrariness of power through legal guarantees, security and human freedom. According to this principle, public bodies are subject to the law, and can be rightfully concluded that the law is the one who is above all and for all. Consistent, impartial and firm application of the rule of law is intended to protect people from the violations of human rights, to the extent that they are recognized and respected by the rule of law that applies in a particular place. Each democratic society which target to foster and promote human rights as a fundamental principle, should recognize the supremacy of the law towards its citizens and to state itself, that has the fundamental purpose has the guaranteeing of the inviolability of human rights and freedom, and of

citizens on one hand, the legal limit of arbitrariness of power through legal guarantees, in other hand.

Prevalence of the law is not just a tool, with the help of which the state may use or misuse its power. With it is aimed, "to define the principles, which limit the ability of state and oblige to act in accordance with a prescribed set of rules and generally recognized".[213] Legal security can exist only when citizens are fully aware of what the state can do, and what is requested from it, what is not allowed to do and how to act for the strict adherence of the law or other legal norms, in a word for what they are self-responsible.

The rule of law is the domination and supremacy of state and law in respect of values, which have to do with democracy and legality, as well as the functionality of state mechanisms in all segments of life. This is a necessary condition for the existence of a free society and a strong basis for the existence of legal state, and a pillar of the democratic process. Here takes part the fundamental principle of state of law, according to which no one can be treated without legal basis. With this generally can be understood the strict compliance by the government of a series of legal character requests, which in their totality create legal security to citizen. Citizens for the realization of their rights have the right to request judicial protection, and use legal remedies against decisions, if they think that their rights are denied or restricted, or their interests damaged. The rule of law provides the legal responsibility and control over civil servants, and also affects various policy areas including political, constitutional, legal, as well as human rights issues, because human welfare and happiness depends on perfect laws, and their firm and fair application.

Legal security and independence of the courts constitute the basic elements, which have a strong influence on the functioning of the legal state. It is based on the general principle according to which all state activity is measurable, calculable and responsible for the failures that can occur either intentionally or unintentionally. From an institutional perspective, beside the legislative and executive bodies, also the judiciary has a special place and role in ensuring the legal security of citizens. Respecting legal procedures and deadlines, providing of full decisions based on the law, the implementation of timely and correct decisions given by the courts, etc., strongly influence the creation of legal security of citizens in the state and society.

[213] Neil J. Kritz, The Rule of Law in the Postconflict Phase: Building a Stable Peace, in Manging Global Chaos Sources of and Responses to International Conflic, 1996, pg. 587-588.

Based on this, the state should provide to judicial power strict application of court decisions, but on the other hand, it is the duty of the judicial authorities to pursue the regular application and development of the proceedings. Although, from one place to another, there are changes, the possibility to direct to the justice, and with equality, is essential to respect the principle of the rule of law that focuses not only on what is done, but how it is done.

Consequently, during the practice of judicial power by the courts, it is necessary to give an appropriate legal assistance to all those who are having in danger thire life, freedom, property or reputation, and are unable to afford services of a lawyer. The state has an obligation to comply with such legal rules as a whole, which has issued itself.

Actually, the majority of countries have provided criminal proceeding better than civil proceedings. The state and society have obligation to help the legal professions in fulfilling this task.

We live in an era of great democratic progress, and our commitment should be undertaking of number of initiatives to increase as much as possible the awareness and responsibility of all, to respect and progress of the rule of law, which will be opened all paths of progress of human rights and freedom by respecting in advance respecting human dignity.

State institutions should take all appropriate measures, whether they are general or particular, in order to ensure that fulfilment of the objectives for an effective rule of law and rights, according to which all state bodies are subject to the constitution, law and international acts adopted in one country. At the same time, it is important the fact that conviction to the law is a clear indication tand inspiration that are respected highest social values, is a guide that the practice of powers is functioning basen on law, which clearly shows that all the freedoms and civil rights are being respected in the highest possible degree.

Rule of law is a crucial issue for democracy and the main pillar of society, is an area that that needs huge commitment for all institutions and individuals who are part of those institutions. The rule of law is presenting the cornerstone of each society that seeks democracy, regardless of political status that enjoys. The rule of law does not mean only the order, peace and regulation, but also freedom. We are of the opinion that the rule of law is central to the foundations of democracy, which requires the strengthening of interactive mechanisms in the advancement and respect of the highest human values, which are guaranteed by the state. These values will be undermined

and damaged when main status in this vital policy area is in question, or is ignored regularly.

The prevalence of the rule of law in a country does not mean only formal legitimacy, which ensures the regulation and consequences in the achievement and application of democratic order, but at the same time is an element of justice, which is based on the recognition and full acceptance of the sublime values of the human personality, which is guaranteed by law and enforce the relevant institutions, which ensure framework of consequent application of norms and genuine values.

The condition of the existence of modern democratic state, is precisely the protection of human rights. This is confirmed by international standards, whiles the existence of rights without their protection mechanisms, and would be a worthless matter. The rule of law would be absolutely failed, if in a country does not function independent courts (Article 10 of the Universal Declaration and Article 6 of the European Convention). Arbitrary and irresponsible power of judges, prosecutors, government officials, police .etc, cannot exist in a legal state, therefore, we can say that these are "the consciousness of the legality and constitutionality".[214]

The rule of law has an important role in strengthening of social cohesion, guaranteeing a sufficient level of effective functioning of justice, affecting strongly the lives of citizens to live everything according to legal rules, by arguing that the law is the one who will dominate for all regardless of ethnicity, gender, political views, language, culture, social position, etc. The state has an obligation to promote, and encourage the strengthening of universal human rights and freedoms, and to be a promoter in the protection and the elimination of all obstacles that may arise in everyday life.

2. Being equal before the law and judicial power

With it we mostly understand legal equality of citizens, and their exclusion of any discrimination before the law and in their consumption of rights and freedoms guaranteed by the highest legal act. This right should be ensured to all citizens. In the constitutions of many countries of the world, this right is guaranteed by constitutional norms, such as "All are equal before the law. Everyone enjoys the right to equal legal protection without

[214] Ralf Crawshaw, Barrz Devlin, Tom Williamson, Human Rights and Policing Klouwer Law International, 1998, pg.44.

discrimination".[215] A Or, "All enjoy equal protection before the law".[216] More concretely, all people are equal before the law and enjoy the same right to be protected by it. Therefore, "the law is an act of a general character".[217]

The issue of equality before the law is also regulated by international acts such as the Universal Declaration of Human Rights, according to which "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".[218] Equal treatment and equal outcomes, not only are different in them, but also reflect the methods that express deep divergences.

In conspiracy with it, the goals and visions are the same in the prevention and combating of discrimination on the one hand, and in raising the level of effective equality and the realization of equal treatment before the law, on the other hand. Equality of citizens before the law and guarantee of the realization of the rights would not be effective if the citizens would not know enough about the laws in force. So, the publication of the law is an essential element that will make a direct connection between the state and citizens.

A country that does not publish the laws cannot be called the country of the rights. The transparency of the legislation puts the citizens in an equal position before the law. Therefore, only through the transparency of norms will be built and strengthened a sustainable legal system, which is one of the foundations of democracy. This transparency allows them to be exposed and in this way will be subject to the judgment of the citizens, and the possibility of efficient use of the guaranteed rights with these laws. There are two reasons that justify the existence of a law and they are:

- First of all, the citizen should have the data that are suitable for the conditions, applicable legal norms in a given issue;
- Secondly, a norm cannot be considered as a law, beside when it is formulated precisely that gives the opportunity to citizen to regulate their behaviour. Therefore, in order for one action or measure to be considered as legal, in accordance with law, should be accessible and predictable in the same time;

[215] Article 24 of Constitution of Republic of Kosovo, 2008.
[216] Luan Omari, The Legal State, Tirana, 2004, pg. 124.
[217] Kurtesh Saliu, The Constitutional Law, Book I, Pristina, 1998, pg.151.
[218] Article 7 of Universal Declaration of Human Rights, 1948.

The right to equality before the law means that the law should not be discriminatory, and that all those who practice public functions under the responsibility, they should not act in a discriminatory way during its implementation. No privilege can be given to an individual, family, ethnic group or class during the application and implementation of the law. In all procedures the state bodies, the judiciary and administrative authorities shall act in accordance with the principle of equality before the law. Equality gives steadily to all people many small joys. And rightfully Rees says that "equality or being equal means that each will be treated rigorously in the same way and in every aspect".[219] Therefore, we have individual responsibility for all our actions and inactions. All our decisions, actions and inactions draw consequences afterward. We should treat others as we wish to be treated by them. We are obliged to respect the freedom, life, dignity, individuality and distinctiveness of everyone, so that everyone can be treated humanely, without exception and without prejudice.

The right to equality before the law, or as it is often called, uniform protection by the law, is the cornerstone of a fair and democratic society. The essence of daily administration of the judiciary is consisting of promise for equal justice before the law, and the constitutional guarantees of protection for regular legal process. Equality or being equal is a symbol and an incentive for people to be treated equally, without crystallized privileges. Latini Breneto, being supported by other authors rightfully said that, "As justice is something equal, the same injustice is something unequal. So that one, who wants to establish justice, tries to reconcile things that are not equal". Equality and being equal with others is a phenomenon that depends on, and can only come as a result of human action. Equality lies in the fact that the law is equal for all, regardless of whether protects or punishes.

The right to equal protection of the law "prohibits discrimination in law or in practice in any field that it regulated and protected by public authorities".[220]Therefore, considering that discrimination is not only diverse and present at state and public structures, but also in civil society, it is the most common form of unequal treatment, which can affect people of different racial, ethnic, national or social backgrounds. The same could also be directed against the people of different culture, language or religious origin, persons with disabilities, older people, people who are infected with any disease, and also denial of merits and disregard of professional

[219] John Rees, Equality, NewYork –Praeger, 1971, pg. 98.
[220] Broeksv.the Netherlands, (172-1984) The Committee of Human Rights, 9 April 1987, Sel.Dec 196.

achievements including any other form of incorrect treatment during the assessment of any issue which will present sufficient base to discriminatory treatment.

However, this does not make discriminatory all differences of treatment, but only those that are not based on objective and reasonable criteria. Therefore, it is fair to conclude that, there cannot be issued any law or other act which intends to disrupt with the behind action a particular judicial decision or to change the composition of the court for influencing the decision.

Associated closely with equality before the law is the equal treatment before the court, which means that, regardless of ethnicity, gender, race or financial status of someone, each person who appears before a court has the right not be discriminated in the proceedings, and how the law is applied to the concerned person. The rights should be provided for each person equally, for persons that are suspected of minor criminal acts and also for those suspected for serious crimes, or for any civil, administrative, commercial issue, etc.

Therefore, in continuation of this, true judicial administration requires the protection of private rights through regular administration, which is in accordance with the foreseen forms, processes and rules. This is a regular process. The elements of regular process in criminal and civil law include notification, discovery, the right to liberty with condition, counselling, legal and regular process, hearings, questioning of witnesses, the right to call witnesses, the privilege against self-incrimination and, among others, public decision given at the right time and the right to appeal that decision to a higher degree. Everyone should enjoy the right to be treated equally in court and not feel discriminated, be it in a civil or criminal judgement, and to not have perceptions that issue will not be assessed right, because "without the power of judgment, the rule of law cannot be imagined."[221]

The judicial authorities are obliged to act without delay and efficiently based on freseen legal procedures by respecting the dignity of each party in proceedings. The Court during the practice of its work, "will be shown professionally perfect, independent, impartial and responsible in respect of the law for fair and objective review and evaluation of proves in the possible fairest way".[222]

[221] Basta – Posavec, L., Pravna Deržava i konstitucionalna demokratija, Anali Pravnog Fakulteta u Beogradu, 1993 No.1-2. pg. 26-31
[222] Ramadan Gashi, The Right for the Public Judgement and Publicity of the Judgement, Pristina, 2014 pg. 24.

The dignity of citizens is preserved and protected from the court. Nothing can be the basis for its violation. Equal treatment before the courts, provides guarantee during all phases of the judgement, in that way that each person suspected or accused have the right to not be discriminated by the way of investigations, proceedings or through law application against them. Primarily, equality before the courts will ensure that every human being should have equal access to the court, to request his/her rights. The special care should be given in order that everyone should have equal access to the court with the aim to request their rights, no matter is man, woman or child.

Rule of law, equal protection and a regular process have practically deep implications on society. These implications dictate that the aim of judicial administration is neither autonomy nor judicial independence, but freedom, social order, rule of law, equal protection and regular process of fair judgement. Central role in this regard has functioning of justice and respecting the law guarantees given to citizens, including equal access to justice, and promoting cooperation between the authorities that apply the law and order.

The court, prosecutor and attorney should play a key role in the regulation of these situations and ensuring that impunity of discriminatory acts are not tolerated, that such acts are properly investigated, punished, also the victims to have access to effective legal remedies to realize their rights and adequate protection.

In accordance with that what was said above, we can conclude that the equality aims to:

- Recognize the rights of each person guaranteed by law, and in other hand, each to have legal to oppose decisions that are issued based on law;
- All citizens to have same social and public importance, and to be ble to oppose discrimination;
- Give the equal possibility to each for increase and promote of merits;

3. The right judgement and civil security

The civil security cannot be achieved without the rule of law and fair judgement. Since the Virginia Bill of Rights of 1776 are provided guarantees for a fair judgement in which, inter alia, noted that “That in all capital or criminal prosecutions a man has a right to demand the cause and nature of

his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers".[223]

The principle of the rule of law contributes to one's personal safety. As it guarantees that nobody will be persecuted and arrested arbitrarily, everyone is entitled to a fair hearing and independent and impartial judgement. While these rights are recognized and respected, the judicial power can play a significant role in retaining them, whenever thre are made strong efforts to curtail them in an arbitrary or ad hoc way. The right to a fair judgement is a basic human right. This right is one of applicable principles universally which is recognized in the Universal Declaration of Human Rights, adopted by world governments, in which inter alia is stated that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[224]

Anyone who has access to court is subject of proceedings before the court, therefore it is required that everyone should be treated with the greatest respect, to preserve human dignity, privacy and personality of everyone. The same is guaranteed also in the Republic of Kosovo where the Law on Courts guarantees that "Everyone has equal access to the courts and no one is denied the right to a fair judgement in accordance with the regular legal procedure or the right to equal protection with the law. Any natural or legal person has a right to a fair judgement and within a reasonable timeframe".[225] More concretely, "all people should be equal before the courts and the panels".[226] This general principle of the rule of law means that everyone should have the same equal opportunity for the court, as well as equal treatment by that court.

Court proceedings and application of law on the facts in individual cases should be sustainable and predictable or better saying, to act with justice and on the basis of rules and procedures to each individual, to exist the permanent care that take and give what belongs to them or what he/she has the right to take. The judicial system is a whole of formal norms which define the way in

[223] Article 8 of Virginia Bill of Rights of 12 June 1776
[224] Universal Declaration for Human Rights, 1948.
[225] Article 7.1 Low on Courts (Law No. 03/L-199) 2010.
[226] Article 14 parag. 1 of the Convention for Elimination of all Forms of Discrimination of Woman, 1979.

which the judicial system needs to produce is own decisions, and to organize interactions between numerous actors such as judge, parties, lawyers representing them, witnesses, experts and other personnel that according to the relevant law should take part in the proceedings. So it so about the rules that aim to determine, not so content, but the model of action, to outline a framework of obligations and opportunities, give competences for initiatives and procedural development.

The main characteristic of a judicial process is that during the process will prevail a spirit of a duel of evidences from stakeholders participating in the procedure, in order to convince the court through these evidences, which will evaluate the court. The court remains to have the role of the administration of the process and arbitrary. It is not enough to have only the judicial process, but it is important that the process takes place effectively, and provide useful and clear reflection that the process will adhere to the regulations provided by law. In other words, "every person has the right to have his case heard fairly, publicly and within a reasonable time by a independent and impartial court, established legally, which will decide for the disputes over the rights and obligations of civil nature, and for validity of each accusation of a criminal nature against him".[227]

To clarify this issue, it is useful to consider the fact that a certain procedure leads to a decision that is not strictly defined and does not follow a similar trend. The progress of the process often foresees alternatives and is open to options of subjective decisions and strategies of actors who participate in it. However, in the targets of obligations set by the norms, "the road which is followed concretely also depends from solutions concluded by procedural actors and of course from the power that hold these actors to control the development of the process".[228]

Primarily should be considered decision body that gives the initiative to the process, so the rules that determine which stakeholders can participate in a specific case. In most of cases, to all judicial systems is recognized so-called "legitimacy to act" for individual subjects that have a direct and personal interest. There is talked about "the filter that is expected to close entry paths to justice to groups and that articulates requests with which aim to encourage or protect the collective interests".[229] The judicial process is a key issue and

[227] Article 6(1) of the European Convention on Human Rights, 1950.
[228] Damaska M.R, Structure of Authority and Comperative Criminal Procedure, in The Yale Law Jurnal, LXXXIV, Bolgona, 1975, fq.480-545.
[229] Komesar N.K, Imperfect Alternatives. Choosing Institutions in Law,Economics and Public Policy, The University of Chicago Press, Chicago–London,1994, pg. 24.

an expression of the balance that should exist between the parties in the process. Inferiority of any party should not exist but, at the same time, will not allow the domination of any party, except the force of the evidences on which decides the court. The judicial process should be public, except for those issues for which the law guarantees that the judgement will be closed to the public.

In most of democratic countries the judicial process is divided into two phases. The preliminary phase has the function of preparing the case, specifying the requests of parties, and collection of proofs, in order to open the way to the next phase. During the judiciary proceess the parties have the right to present evidence and to oppose those between them. What is important is whether there is opposition of statements or there happens the opposite, supporting statements with documentary evidence.

Especially in systems where the judgment on appeal or second instance are frequent, obligation of the parties to respect the decision, often is foreseen only after a final decision, which meaans when there are exhausted all means of appeal. In special systems, the distribution of competences which allow the control and development of the issue is different. In most of criminal issues, an official investigation is carried out and supervised by an executor of a public function (prosecutor or investigating judge), to whom with legal provisions is ensured and legitimated an active role.
An important factor is the different distribution of competences between the judge and parties.

a) Realisation of the individual right in civil judicial process

Usually, in civil judicial process are participating two opposing parties because of the dispute that have between each other. One party (plaintiff) claims that were violated a subjective right by the other party, while the other (the defendant) denies the existence of the claiming right for one or another reason. This is called a judgement with opposing parties - *juridictiocontentiosa.* The indictment can be raised jointly by many plaintiffs or against many defendants (litispendence). The judicial-civil process arises between two or more persons who are confronted with each other in front of a particular subject in charge in resolving of a civil case (*court*). The court as a state body in this process has a special position, and it is the only body that reviews a civil issue and makes the final decision. The judges are appointed regardless of the will of parties. The court is in close relation with the time of submittion of indictment to the defendant by it, and which is called

litispendence. This is because, that at the moment of the submission of the indictment, to the defendant is created dispute dependence, and at the time of submission of the indictment in the court is created *litispendence*. Besides the above subjects without which will not be the judiciary process, there could participate also other subjects *(third parties*) that may come alone, or be called in the process in order to protect their interests or parties interests with whom will join, or state or social interests.

All these participants, in the broadest sense conduct procedural actions. These actions constitute the contents of civil process. *These participants are aiming to resolve the issue and to realise their rights, which are pretended to be violated*. Parties and other subjects that participate to protect their interests conduct procedural actions in order for the court to resolve disputes between them. By the performance or non-performance of these actions are derived the certain procedural consequences such as: *birth, change or termination of procedural relationships, eg rejection of the indictment, dismissal of the judgement, bringing of evidence etc*.

Subjects cannot perform procedural actions as desired, but are dictated by the law, ie. in their procedural relations in civil judgement process they will perform only those actions that are stipulated and allowed by the law of contested procedure, or ordered by the Court, to resolve the issue. It has the task of the final solution of the raise issues and carries out certain procedural actions to resolve the issue, which are obligatory for the participants in the judicial process.

b) The criminal justice process and guarantees that provides the court for all those who face the law

In criminal cases the issue is different because here we have to do with social-state interest, even though the parties to the proceedings are equal, in these proceedings prevails collective interest (because the element of crime act presents social dangerousness). Therefore, the issue can be obligatory, to be a state issue, so to get a character that aims to establish and re-establish a legal order which was violated by anyone. All these issues were entrusted to a person, judge or panel. In support of this, the values that guide state action significantly present that the key factor in the judicial process is the judge.

Therefore, it would be more than logical that, in this respect the judge to have the main task to administer a well oriented judicial process which in essence has the resolving of conflicts that occur in society. If we take as

example an criminal proceeding in the USA and England, countries characterized by Anglo-Saxon system, the process as such approaches to opposing morphology, while as regards civil proceedings, occasionally gives the judge the right for significant interventions in preparatory phase. However, there are cases when a criminal case of the light nature can be solved without judiciary process, but with mediation as a very successful form of dispute solution.

When an individual goes to criminal judgement, he faces with all state mechanisms. The way as individual is treated when is accused for a crime, reflects a concrete indication to what extent the state respects individual human rights. The question is: when there is a risk of violation of human rights? The answer is that the risk exists from the moment when the competent authorities raise suspicion against a person from the moment of arrest, detention during the phases of security and of the presence of the defendant during the judgement, complain to the execution phase of punishment, as well as during the entire phase of the execution until the full integration into society.

We can say rightfully that it's not enough just to have judgement processes, but it is important that the process is being passed by respecting worthily the procedures and "without unreasonable delay", to respect the deadline of completion and published judgement, with which will be clearly demonstrated that the court acted with high efficiency and right altering, in useful and desired way.

The right to a fair and impartial is reproduced and developed in a coherent way in any society which is aimed at respecting the established international standards. This right is not only specified and codified in international treaties as well as regional and intergovernmental organizations, but it should ensure the fundamental issues with internal legal acts such as the constitution and laws of a country. These standards of human rights are designed to implement all legal systems in the world and to considering diverse variability of legal procedures that define the minimum guarantees to be provided by all systems. Our rights are the best guarantee of freedom and our security. Through their respect, even when it is very difficult to do such a thing, we ourselves become the greatest defenders of freedom and servants of our highest ideals of justice.[230]

[230] David J. Boden hamer, Our Richts, The Richt to a fair trial, Oxford University Press, 2006, pg. 106.

The requests of equal treatment in the courts in issues that are under consideration include within it two important aspects. On one side is the basic principle that the protection and the indictment should be treated in such a way to ensure that the parties in procedure have equal opportunity to prepare and present their case during the proceedings, and the other aspect is that, each person accused should be treated equally with other citizens put under similar charge, without discrimination and without degradation of personality.

We are aware that the degree of freedom of power of the court action is the absolute level which means that is not subject to any other power, and such a power shoud be practiced within the limits of the law and be subject to independent judicial review of evidences. This leads to the conclusion that in the field of criminal justice, the rule of law requires that no one is punished, besides the criminal cases that are defined by law, the rights should not be violated by past legislation and access to justice should not be too slow or too expensive. [231]

The judicial process should take place outside of any external and unjustified intervention, and any attempt to intervene should not affect the process. According to Article 14 (1) ICCPR "'all persons are equal before the court". At the same time, with Article 2 (1) of the agreement, interpreted in relation with Article 14 (1), are guarantee the rights of every individual for a fair judgement, without any difference whatsoever, without taking into account the race, color, language, religion, political opinion or any other opinion, national or social origin, means, position or other circumstances. Such a guarantee provides also the European Convention of Human Rights of 4 November 1950, which ensures the minimum guarantees which the member states of the Convention are obliged to ensure to their citizens.

According to the Convention, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial court established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the judgemet in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". [232]

[231] William Wade/ Christopher Forsyth: Administrative Law, Oxford, 2004, pg. 24.
[232] Article 6 of the Convention for Human Rights, 1950.

In a detailed view, respect of these guarantees which constitutes Article 6 ECHR ensures these rights for all people, when it comes to criminal cases as well as civil cases, which means that each person has the right to make any claim in respect of his civil rights and obligations before a court. In view of this the obligations of a court of a state is to respect the dignity of these rights for all persons in full equality.

The rights of the defendants in criminal issue ad their realization in the court:

- The court will respect at any stage of the proceedings the right to equality before the law and equal treatment of the parties;
- The court will continually respect with dedication the right to be treated humanely, without exception, all parties, regardless of their ethnic, cultural, racial, religious origin, and other status that he enjoys in society;
- The court will continuously respect the right of each person who is suspected or charged with a criminal act to be presumed innocent until proven guilty by a final judgment of a court;[233]
- No one can be prosecuted and punished for a criminal act if released or for which has been punished with a final decision, if criminal proceedings against him was terminated by a final decision of the court or the indictment was dismissed by final decision of the court (Ne Bis in Idem);
- The Court will respect continuously the principle of equality of arms to all parties, which means the obligation to offer each party the opportunity to present its case under conditions that do not put at a disadvantage the other party;
- In order to respect the rights of parties the Court shall pay attention that the parties be informed within a shortest time, in a language they understand in detail, for the nature and cause of the accusation issued to him;
- To defend himself or to be assisted by a defence lawyer of his own choosing or, if he has not sufficient means to pay for the lawyer, to be given free legal assistance when this are in the interest of law. The realization of the right to protection can be done only through such a procedure. At the same time, we cannot have a fair and impartial judgement if the right to defence is not respected;
- The courts have the obligation to respect the right to be present in the judgement for each individual without any differences;[234]

[233] Article 3.1 Code No. 04/L-123 of Criminal Proceeding, 2013.

- No one can be pronounced with a criminal sanction or measure of obligatory treatment for an action, if before its action is not defined by law as a criminal act and is not foreseen as a criminal sanction or measure of obligated mandatory treatment for that action;[235]
- To respect the right to public judgement,[236] , with the aim of guaranteeing the right to a fair judgement (except for cases for which are foreseen by Code that the judgement should be closed);[237]
- To respect the right to silence,[238] the right of the defendant to remain silent during the judgement cannot be considered that the defendant is accepting the charges against him. Rather, this right should not be trampled by the court. According to the European Court of Human Rights, a court can draw negative conclusions from the fact that the defendant does not explain his presence at the location of the crime during interrogation in court, without violating the presumption of innocence or the right or the corresponding right to not to be compelled to testify at the hearing. Therefore, as a consequence, the judge has the discretion to issue conclusions or not, which have to rely on his common sense.
- The court will guarantee that each person with the criminal procedure issue, to enjoy the rights for privileged communications with lawyer;
- During the course of a criminal proceeding, the court shall pay attention to the right of the defendant, that the defendant can make questions, or request to be examined witnesses, and ask examination of witnesses in their favour, with the same conditions with the witnesses of accusing;
- Each regular legal process implies the respect of a reasonable time and the right to an open hearing and the publication of the decision in the criminal process;
- To provide the free interpreter, if the defendant does not understand or speak the language used in court;
- The right to contribute in self-incrimination;
- The right to be considered innocent;
- The right to a judgement in a reasonable time;
- The right to a hearing with an opposing party;

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[234] Eur. Court HR, Brozicek Cae , Italy, judgment of 19 December 1989 Series A, No 167, pg. 19 parag..57.
[235] Article 2.2 Criminal Code of the Repuiblic of Kosovo (Code No. 04/L-082), 2013.
[236] Eur. Court HR, Weber v. Switzerland case, judgment of 22 May 1990, Series A, No 177, fq. 20 paragr.30.
[237] Eur. Court HR, Prettoand OTHERS V. Italy Case, judgment of 8 December 1983, Series A, No 71, paragr.27.
[238] Eur. Court HR, Case Marry v. United Kingdom, 8 February 1996 paragr. 45.

- The judge has the responsibility to verify if sees that the defendant is abused while in detention;
- The judge has the responsibility to define the admissibility of evidences;

These standards are aiming that each court should respect, and at any time to not exceed these guarantees. These guarantees aim and determine if are respected by a court of a state, then it can be estimated that we are dealing with a fair judgement, and if one of these guarantees are undermined then state within which functions the court is responsible for violations of standards for fair judgement.

Article 6 covers also the procedures after the hearing, such as the execution of a decision therefore covers proceedings taken as a whole. It is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law.[239] Each judge, in the beginning of a hearing, should consider the responsibility to ensure the above guarantees and the end of each hearing to check if he-she did its task accordingly.

Judgements should be made publicly open, with limited exceptions, such as cases that affect young people whose privacy should be protected, those that are related with marital discord and children protection cases. The judgment is public when it is pronounced orally in a hearing which is open to the public, or when the decision is published in writing.

The right to a public trial is violated when judgments are made only for a certain group of people, or when only for few people who have specific interests, is allowed to inspect the judgement. To the public hearing issue has dedicated special attention also the American Convention which requstes that "criminal proceedings to be public, except to the extent that is necessary to safeguard the interests of justice".[240]

The main purpose of a public judgement is to ensure that the administration of justice is public and open to public supervision. Therefore, the public judgement is imperative and can be requested by anyone, including people who are not party to the proceedings. Exclusively, the court has opportunity, in some reasonable cases, to hold judgment in closed session, at the same time to exclude the public from the hearing and impose sanctions to those who do not respect the order in the courtroom.

[239] Eur. Court HR Case Garcia Ruiz , Spain , Nb. 30544/96.
[240] Article 8.5 of American Convention for Human Rights 1969.

c) The right of the injured party that was the victim of crime

Penal Code primarily protects fundamental freedoms and human rights. Whoever violates or harm or risks these values, the Criminal Code envisages criminal sanctions. Injured party or victim of the criminal action is any natural or legal person to whom any good or right was violated or destroyed by criminal proceeding.[241] Victim of crime in criminal proceedings is further the object. Hence victimization is the process of suffering of the victim. It is the intentional and unintentional as well as conscious and unconscious. Victimization often is individual phenomenon, but it can take also dimensions of collective victimization. [242]

According to the UN Declaration, victims means persons who individually or collectively have had suffered, including physical or mental injury, emotional sufferings, economic loss or substantial deterioration of their fundamental rights, by conducting or not conducting of actions that are presenting violation of criminal laws including laws that affect the misuse of power. [243] According to the Criminal Procedure Code of Kosovo, the injured party or the victim is the person to whom any personal or property right has been violated or endangered by a criminal act.[244]

The rights of the injured parties that courts are obliged to recognize are:

- The right to be the active member in hearing which means that has the capacity of the party in criminal proceeding[245] since the injured party has presented declaration of damage[246] before the court;
- The right to be invited (notified) to take part in the hearing,[247] and to have translation if does not understand the language of the proceeding;
- The injured party, can request formally or informally from the state prosecutor to request the continuation of detention for the defendant[248];

[241] Zvonimir Šeparović, Victimology – the study on victims, Informator, Zagreb, 1998, pg.71.
[242] Ramljak A. Alija, Halilović Haris, Victimology, The Faculty of Criminal Scaincs in Sarajeva, 2004. pg.22.
[243] United Nations Declaration on Fundamental Rights of Victims of Crime and Abuse of Power,1985.
[244] Article 19 parag. 1.7 Code No. 04/L-123.
[245] Article 62 parag.1. 1.3 Code No. 04/L-123.
[246] Article 218 Code No. 04/L-123.
[247] Article 287 parag.1 Code No. 04/L-123.
[248] Article 191 parag.1 Code No. 04/L-123.

- The injured party, in capacity of witness, has the right to be treated in equal way as the other parties, as requires the legal provisions for his position as the victim, regardless his national, religious or sexual origin;
- Enjoys the right to refuse to answer specific questions when it is likely that this puts himself or any person close to him, to serious disgrace, significant material damage or criminal prosecution, and the court is obliged for this right to notify the injured party as a witness;
- The right to be treated with respect by the court during the whole criminal procedure;
- Injured party has the right to present the request for the protection mesures or anonymity;[249]
- The right for questioning directly, inderacty or to requestion the witness; [250]
- Enjoys the right to oppose qualifications or prejudices of the expert;
- After the state prosecutor, the injured party has the equal right sfor the introduction speech in judicial proceeding;
- The injured party has the right for the respect of his dignity, in order not to feel like the re-victimized during the judgement;
- The injured party may propose a review of new facts, collection of new evidence and to repeat the proposals which the single judge of the panel, president of the panel or panel has rejected earlier; [251]
- The injured party can question the defendant (in order to confirm or deny any fact, to review the reliability of witness or prejudice related with his testimony);
- In his or her closing statement, the injured party or his or her authorized representative may explain his or her declaration of injury or property claim and call attention to evidence of the criminal liability of the accused. 252
- The injured party is entitled to compensation. The injured party may be represented in criminal proceedings by a member of the Bar. Besides the member of the Bar, the injured party may be represented by the lawyer of the victims and by the self- injured party;
- The injured party may present a simple statement of the damage caused by the criminal action. The victims lawyer can help the injured party in filing the statement of damage;

[249] Article 221 parag.1 Code No. 04/L-123.
[250] Article 331 parag.1 Code No. 04/L-123.
[251] Article 329 parag.3 Code No. *04/L-123* .
[252] Article 354 Code No. 04/L-123.

Such a more active role in the procedure significantly strengthens the rights of victims and is requirement that derives from framework decisions of the EU. The role of the lawyer of victims is expanded. However, if the victim does not have its own lawyer to represent him, a victim defender can represent the interests of the victim in court. This, in fact, is not a new role of defenders of the victims, as they have done so for many years in the cases of victims of trafficking and victims of domestic violence.

ç) The realization of citizens' rights in court in cases when the court proceeding is opened when the administrative bodies have decided on their rights

Through this court proceeding, it is aimed the creation of conditions for an effective review by putting in place the rights violated by actions or administrative acts issued by public authorities, which have implemented the respective procedures. Judicial review of administrative decisions in this court proceeding is a procedural action of democratic court accepted and present in the main European practices to ensure order, especially to protect individual rights versus decisions issued by the administrative bodies.

Moreover, the administrative decisions play a decisive role for the economic development of a country. Almost all investment decisions or infrastructure projects must go through a licensing process, which may become a subject of legal scrutiny by the court within the respective department. The efficient functioning of this department also increases the transparency of administrative decisions and can play an important role in the fight against corruption. Nowadays, a state with the rule of law is inconceivable without access of all citizens to an independent and impartial court, established under the law and able to fulfil the requirements of having a fair trial.

During the court proceeding it will be decided on the legality of administrative acts with which it is decided on the rights and obligations of persons based on the law, for which an administrative body took a decision. Usually, these processes begin with an administrative dispute[253] to court, which in many countries are appointed as administrative courts whereas in Kosovo it functions the Department for Administrative Affairs within the Basic Court in Pristina.
These warranties are put in place to protect the physical and legal persons, because they enable them that the rights, freedoms and interests being violated both by the administrative procedures or administrative decisions, to

[253] Article 13 Law No. 03/l-202 on Administrative Conflicts, 2010.

request form the competent public administration body for the revocation or nullification of the decision or related administrative act, to decide upon the cancellation of the opposed administrative act, in order to protect their rights and interests.

d) The right to appeal against the court verdict

Constitution of Kosovo guarantees the right to legal remedies, specifically anticipating that "every person has the right to pursue legal remedies against judicial and administrative decisions which affect his/her rights or interests in the manner prescribed by law".[254] These warranties are put in place to protect the physical and legal persons, because they enable them that the rights, freedoms and interests being violated both by the administrative procedures or with administrative decisions to request form the competent public administration body revocation or nullification of the decision or related administrative act, to decide upon the cancellation of the opposed administrative act, in order to protect their rights and interests.[255] Therefore, the appeal is the institutional form of protection of fundamental rights and freedoms prescribed by the constitutional and legal provisions not only in judicial proceedings but also in administrative proceedings.

Against any judgment or decision, unsatisfied parties have a right to appeal within the legal deadline. The main purpose of the appeal is for the parties to request a review of the case by a higher court which must examine not only whether or not a fair trial has been respected throughout all court sessions, but they should consider the reasons for appeal. Right of appeal in penal cases is guaranteed to every person convicted of a criminal offense by a court and has the right to submit for review before a higher court plea of conviction or the sentence. There may be exceptions for petty offenses, as prescribed by law, or when the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against his acquittal.[256]

The right to appeal is guaranteed by the Constitution of the Republic of Kosovo, as a procedural right that serves to protect a substantive right. This right is based on the principle that "there can be no right without the right of appeal" or, "there is no right of appeal without having a right". The right of

[254] Article 32 of the Constitution of Republic of Kosovo, 2008.
[255] Article 126 Lawi No. 2/L-28, on Administrative Procedure.
[256] Protocol No. 7 of the Convention for Protection of Human Rights and Fundamental Freedom, Amended on with Protocol No.11, Strasburg, 22. XI. 1984.

appeal is one of the basic human rights and it is also foreseen in the European Convention on Human Rights and its additional Protocols. The same legal security the law provides for the courts, which states that every person has the right to use legal remedies against a judicial or administrative decision that violates his rights or interests in the manner prescribed by law.[257]

This marks a higher standard in the protection of fundamental human rights and freedoms than the one of "effective appeal" as stipulated in Article 13 of the Convention, which accepts the respect of Convention standards allowing the effective appeal in a higher instance without necessarily conditioning this appeal with the appeal to other court instances. The right of appeal should be understood as an opportunity for every individual to have certain procedural means to contest to a higher court decision issued against him by a lower court. In other words, the violation of this right presents a violation of fair and impartial trial.

4. Conclusion

We are aware that there are differences among people as to appearance, race, ethnicity, marital status, professional development, or in other skills so we need to understand a fact that every person is unique and unrepeatable. This is an important fact, because exactly that uniqueness or distinctiveness is the essence of human society and its existence. Equality does not mean that we are identically the same, but the treatment should be equal versus the state institutions at any level (legislative, executive, judicial).
The rule of law is aimed at removing the arbitrariness of the entrusted power with the aim to achieve respect and guarantee of human dignity, justice and legal security for all persons without distinction. Legal security includes clarity, understanding and sustainability of the normative system.

It is an undeniable fact that the judiciary contributes to the promotion and realization of the rights of citizens, provided that it has acted independently and impartially. In exercising their judicial responsibilities, judges should avoid any bias or discrimination with related to some insignificant matters and should treat all parties with respect, courtesy and in an equal manner.

Judges must exercise all responsibilities impartially and should ensure that this non-bias be observed in all their actions. The judge must act impartially

[257] Article 7.3 Law No. 03/l-199.

and independently in all cases free from any outside interference, and carry out judicial duties based on the facts and the law applicable in each case, without any restriction, improper influence, inducements, pressure, threats for interference, be it direct or indirect, from any circles. Judges have an obligation to ensure continuously that justice is to be served finally taking into account all the complex elements of all the issues upon which the court will decide. If they do otherwise, they would jeopardize the credibility of the justice that is of so high priority for society and the state that would make the freedom and security of citizens more uncertain and the rule of law state less functional.

In exercising his/her judicial function, the judge is obliged to ensure that law and international standards are being strictly enforced and that the issue in court will be treated with complete justice avoiding any form of discrimination against parties, that is, that the treatment will be the same regardless of gender, religion, race, age, political orientation, language, nation, property status, educational level, or any other status.

Judge activity consists in the fact that he/she is the only and main actor who will prove the factual condition, which serves as a basis for judgment, therefore this duty is a more complex, more difficult and more responsible task.

The evidence and the law will be the only impetus that will drive the judge in the case of settling a certain case being obliged to respect the human dignity, individuality and privacy at the same time maintain the dignity of the court as well as be a just performer of the legal norms, in order to materialize it with the right judicial verdict. No judge can take orders or instructions for the manner of court proceedings and in particular for the decision that he should give in a particular case.

The judiciary in a country is one of the main pillars of the rule of law state and the main guarantor of respect of human rights and freedoms. Human rights present the claim for justice as an ideal. They are indispensable in daily life even for those who do not respect them or ignore the equality between people and deny the freedom of others. Human rights are universal. They belong to all individuals and should be enjoyed equally by all.

These state institutions, independent of other institutions, are characterized in that the process and actions to impose expansion, strengthening and guaranteeing of human rights, which are increasingly being expanded day by day such as freedom of speech, freedom of religion, protection from

discrimination, the right to privacy, the right to a fair process, equal treatment, etc.
Equal treatment in the trial does not also mean the identical treatment. This means that when the objective facts are similar, the judicial system is similar too. Regular court procedures bring justice and faith of citizens within a certain jurisdiction.

The courts will guarantee the equality of citizens before the law and non-discrimination, the right to life, freedom of expression, the right to freedom and protection from arbitrary detention, freedom from punishment, humiliating and degrading treatment, the right to a fair trial process, and guaranteeing of a fair public trial within a reasonable time period.

Courts should be aware of their responsibility under the Constitution, but also judges, primarily as citizens and then in the current function they exercise, should consider the consequences their decisions could have. Of course, it is the obligation of judges to avoid any subjectivity, so that decisions they give in line with genuine legal criteria and on the basis of facts proved by the free and just conviction. The atmosphere that surrounds the courts and the events that occur in them are formal and unusual because the courts are unique. They resolve disputes by applying the law to the facts of particular cases, independently and impartially. During their activities, courts are entirely independent and only high courts have a competency to affect the work of the lower courts, in cases where the parties are dissatisfied with the decisions of the first instance. Therefore, their activities are very important and indeed indispensable in combating the crime. Court is the only body authorized by law to decide on the application of violence against all citizens, and especially if it is about life, freedoms, the violation of the human personality, the state order, property, etc.

Court is the only public institution, which will evaluate and weigh things, deciding on the merits of the case with a deeply reasoned court decision for all those issues that fall within its competencies.

Therefore, judicial function means degree of creativity, which embodies the law and puts matters on the normal and stable track, locking all the doors for self-judgment.

As a result of this, beside the fact that the court must be independent, professional, efficient, credible and with integrity, the court must also be reliable for citizens. Therefore, the courts must be oriented towards the exercising of their activity with full transparency towards the public, in order

to serve as a model for the exercise of authority and contributing to strengthening of the rule of law for which there is so much need in our society.

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