Judicial criminal system in kosova and the protection of human rights and fundamental freedoms

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I. Judicial Criminal System in Kosova

1. Introductory Review

As known (1), a military intervention of the international community took place in 1999 against the repressive forces of the dictatorial regime in Serbia (2), for the purpose of protecting the population from systematic and massive violations of human rights and freedoms in Kosova, hereby legitimizing the international intervention due to massive and systematic violations of individual and collective rights of the majority population in Kosova.(3) Thus, a new political, legal and social reality was created in Kosova, and based on Security Council Resolution 1244 of the UN in Kosova, a specific model of military and civil international administration was established, combined with local self-governance (4). Although Security Council Resolution 1244 of the UN preserved territorial integrity of the so-called Federal Republic of Yugoslavia over Kosova, the Yugoslav jurisdiction, the Serb respectively, in fact ceased to exist upon entry of the international military forces in Kosova, hereby creating a legal gap.

2. Procedural Criminal Legislation in Force upon Establishment of the International Civil Administration
So as fulfill the legal gap which was created, the UN International Administration Mission promulgated Regulation 1999/1, on 25 July 1999, which Regulation determined the Yugoslav laws, amongst others, to be applicable, namely the Serbian laws implemented prior of the military intervention of the international community in Kosova, on 24 March 1999. Obviously, such stand was strongly opposed by the Kosovar public opinion, particularly having a number of distinguished judges and jurists being in the lead. Thus, a large number of judges and prosecutors disregarded Regulation 1999/1 by implementing in practice the Criminal Law of the ASP of Kosova, which was in force in Kosova prior of the violent abolishment of the autonomy of Kosova in 1989. So, various political, legal, historical etc. arguments stand against the re-establishment of the Yugoslav legislation, the Serb respectively, in Kosova, where the Serb regime implemented, particularly during the last decade, a large number of discriminatory laws and other sub-legal acts (1). Some of these arguments may be found in the earliest history of Kosova and some in the newest.

Nevertheless, the Special Representative of the Secretary General (SRSG) of the United Nations (UN) continued to fulfill such gap by issuing relevant legal acts in the form of regulations. Such acts were to regulate the issue of continuity, namely discontinuity of the legislation in Kosova. Amidst such regulations, the most important worthwhile to emphasize is Regulation No. 1999/24, dated 12 December 1999, on the Applicable Law in Kosova, hereby replacing the contested UNMIK Regulation No. 1999/1. Such Regulation re-established the legislation which was in force in the period of the Socialist Autonomous Province of Kosova. Indeed, Regulation No. 1999/24 determined the regulations promulgated by the SRSG of the UN, and the laws applicable on 22 March 1989, one day prior of approving the amendments to the Constitution of Serbia, narrowing substantially the autonomy of Kosova, to be the applicable law in Kosova (2).

The SRSG of the UN promulgated a series of regulations from the criminal, civil, administrative etc. fields. Besides promulgating numerous regulations, the SRSG promulgated the Provisional Criminal Code of Kosova (PCCK) and the Provisional Criminal Procedure Code of Kosova (PCPCK) through special regulations (3). The approval of such Codes certainly presents a big achievement attempting to round up procedural criminal legislation in Kosova. With the approval of the PCCK and the PCPCK, the Kosova
judiciary was provided with the criminal procedural legislation material all in one place, rather than the up-to-then dispersed legislation, and simultaneously disconnecting the legal continuity with the previous legislation in this field. In the meantime, the Kosova Juvenile Code of Justice was approved (8), the Regulation on Criminal Procedure for Perpetrators with Mental Disorders (9) and the Law on the Execution of Penal Sanctions (10).

3. The Functioning of the Criminal Court System in Kosova upon Establishment of the International Civil Administration

Immediately after the entry of the international military forces (KFOR) on 10 June, and up to the promulgation of the first UNMIK Regulation No. 1999/1, in Kosova, and more precisely in those areas controlled by relevant military forces of the member countries of KFOR, relevant provisions of the legislation of the countries that had engaged their troops in Kosova, were applied against defendants and individuals detained by KFOR. Such time may be characterized as a period of the non-functioning of the court system in Kosova.

In the meantime, the SRSG established an emergent court system, through a decree, between June 1999 and September 1999, for a three months period, nominating in total fifty five judges and prosecutors (11). The temporary courts were established in Prishtina, Prizren, Mitrovica and Peja. In efforts to create a regular court system, the SRSG, during 1999 – 2000, nominated a considerable number of judges and prosecutors. Thus, in January 2000, the SRSG nominated 301 judges and prosecutors, amongst whom only 245 judges and 42 prosecutors took oath. In August 2000, however, the SRSG nominated 125 other judges, 17 prosecutors and 309 assistant judges (12).

Taking into account the aforementioned, it may be concluded that upon establishment of the International Administration in Kosova, a large number of incoherent legal provisions were applied, having a negative
impact to the establishment of a foundation for an independent and professional judiciary. The analysis of these legal acts regulating the court system upon establishment of UNMIK, shows that despite all efforts to ensure an independent judiciary, the current court system of Kosova, in essence reflects the court system that existed prior of the 1999 war in Kosova.

The Constitutional Framework for Provisional Self-government (Constitutional Framework) in Kosova, established the Supreme Court, the District Courts, the Municipal Courts and the Minor Offence Courts. A special panel were also to be established on Constitutional Framework related matters within the Supreme Court, which panel, inter alia, had the duty to decide whether any law adopted by the Assembly was in contradiction with the Constitutional Framework, namely with the international instruments on human rights. The special panel envisaged to replace the Constitutional Court was not established. Also, based on the Constitutional Framework, the Public Prosecutor’s Office of Kosova, the District Public Prosecutor’s Office and the Municipal Public Prosecutor’s Office, were established.

4. Establishment and Functioning of the Mixed Judiciary in Kosova

Establishment and functioning of a mixed judicial system characterizes the post-war judicial system of Kosova, comprised of international judges and prosecutors directly assigned by the SRSG. The International Administration in Kosova, as previously mentioned (through a large number of regulations), in efforts to create the foundations of an independent and impartial judicial system in Kosova, established a rather complicated and incoherent legal infrastructure, within itself and with other legal provisions in force, having a negative impact to the functioning of the judicial and prosecutorial system. Thus, since 2000, after the outbreak of the inter-ethnic riots in Mitrovica, for the first time one international judge and one international prosecutor were assigned for criminal cases to the District Court of Mitrovica (1). Meanwhile, in May 2000, international judges and international prosecutors were assigned in all District Courts and District Prosecutors’ Offices in Kosova. International judges were also engaged with the Supreme Court of Kosova.
In other words, the foundations for the establishment of a mixed judiciary were laid with Regulation 2000/6, so that within a judicial system we have international judges and prosecutors acting jointly with the local ones. Such a hybrid judicial system in Kosova is rather specific for international justice, given that the mixed judiciary also created after 2000, in many other countries (such as East Timor, Sierra Leone and Bosnia and Herzegovina), has no infinite acting and decision-making authority, as the international judges and prosecutors had in Kosova (\(^{14}\)). It is also worthwhile to note that one of the reasons why professional and human relations with local judges and prosecutors were not that good, was the highest authority vested to international judges and prosecutors, including here too the huge differences in their salaries (\(^{15}\)).

5. The Principle of Independence in the Judicial System of Kosova

The highest authority vested to international judges and prosecutors, carried in itself a series of deficiencies and shortcomings, which are firstly related with institutional and functional independence of the courts and prosecutors’ offices (installed by UNMIK), and by the executive power, also exercised by UNMIK (\(^{16}\)).

The analysis of the provisions in force with regard to the judicial and prosecutorial system shows that, institutional independence of judges and prosecutors in Kosova essentially involves the manner in which the SRSG nominates and removes from office judges and prosecutors, his way of imposing disciplinary measures and the manner of assigning cases to these judges. In the given context, if we are to consider the fact that international judges and prosecutors were employed through UNMIK competitions, implying that the judges and prosecutors were also employees of the international administration, leads to the conclusion that institutional independence of judges and prosecutors is violated, due to the possibility of relatively high political influence of UNMIK on the judges and prosecutors (\(^{17}\)). Apart from this, based on OSCE, institutional independence is also infringed in the manner of assigning various criminal cases to international judges and prosecutors through the SRSG. There is no justification for the executive power
to intervene in a democratic judicial system in assigning judges to judge relevant cases (18). It is important to mention here Albin Kurti’s case, which in the Kosovar public opinion is considered to be a political judgment, having international judges and prosecutors involved in the criminal proceedings against him. This case evidently differs from other cases given that international judges were previously assigned only for war crime cases, ethnically motivated crimes and in cases of organized crimes. Apart from this, such case is specific also because Kurti was accused by the International Public Prosecutor also employed by UNMIK, whereas UNMIK representatives were summoned to testify in this process in the capacity of injured parties. Meanwhile, it is also noted that the judges conducting the proceedings with the obligation to render a court decision, were also assigned and remunerated by UNMIK (19). In the given context, it is important to highlight that the international judges and prosecutors, besides sharing the same executive authority - the SRSG, they sometimes shared the same office (20). Furthermore, it is considered that limited duration contracts of international judges and prosecutors concluded with UNMIK, and criticized by OSCE, were a reason to increase the influence of the executive authority on their professional performance (21). Such manner of performance of the international judges and prosecutors in Kosova was in contradiction with the principle of dividing essential functions of the criminal procedure (prosecution, judgment and defenses), functions which in the systems of contemporaneous criminal proceedings are exercised by separate entities.

On the other hand, functional independence means non-interference from other non-judicial powers, such as the executive and legislative power, in the activities of the judiciary. Such non-judicial bodies should not decide on issues of a judicial nature, should not give obligatory instructions for courts in the field of their activity, and should not make efforts to amend legislation so as to influence a specific matter subject to a court process. Thus, according to OSCE, interventions to the functional independence were numerous, especially in 2001 when the SRSG utilized an unseen instrument until then, that on an executive order, through which he extended detention periods to those released by a regular court process. Such unlawful decision of the SRSG could not be contradicted by any court instrument. However, following a lot of criticism coming from the professional public opinion, the SRSG no longer used such executive instrument directly interfering into the activities of the judiciary. Along side with these, the post-war judicial system encountered other shortcomings, such as cases of detainees kept in detention
centers without going through a regular court process (22).

Interference of the legislative power bodies, for the purpose of altering the legal circumstances of a specific case being under consideration before a court, based on the European Court of Human Rights, violates judicial independence, particularly in cases where the country is a party to the case. Based on OSCE, in such context, the functional independence of the judiciary was infringed by the legislative power too, in particular upon promulgation of UNMIK Regulation No. 2001/18. Hereupon, the Committee established based on this Regulation is an ad-hoc judicial body, with a structure, function and composition not belonging to the regular court system of Kosova. Moreover, the establishment of the Extraordinary Court Committee for the reconsideration of detention issues in specific cases presents usurpation of competences belonging to the regular court system (23).

6. Judicial System upon Declaration of Kosova as an Independent and Sovereign State.

Upon declaring Kosova an independent and sovereign state on 17 February 2008, under international supervision based on Ahtisaari’s Plan, the situation in the judicial and prosecutorial system in Kosova, lead by the locals and internationals, makes no significant changes. Moreover, the part lead by the locals worsens. The difficulties emphasized particularly in the functioning of the judicial and prosecutorial system during UNMIK Administration jointly with the locals, are not overcome neither with the establishment of the European Union Rule of Law Mission (EULEX), officially commencing its activity in Kosova on 9 December 2008, declaring to be fully functional in April 2009.

Hereupon, the court cases were transferred from UNMIK to EULEX judges and prosecutors for review, receiving new cases in the meantime as well. Amongst cases inherited was Albin Kurti’s case too, which showed incredibly a lot of interest of the broad public opinion, amongst others also due to the denial of Mr. Albin Kurti to be judged by EULEX judges, given their neutral stand towards Kosova’s status. Nonetheless, Albin Kurti’s matter was concluded with the pronouncement of nine months imprisonment...
for the February 10th 2007 events, whereas against UNMIK police officers, who had murdered two Kosova citizens, previously UNMIK and now EULEX, no prosecution was undertaken, although demanded by the broad public opinion, in particular by the civil society. The murder of Kosova citizens during February 2007 riots constitutes violation of the right to life, guaranteed and protected with the Constitution of the Republic of Kosova (Article 25), the Criminal Code of Kosova (Article 146) and with all international documents on human rights. On the other hand, inability to initiate proceedings to shed light into the circumstances of these murders constitutes a violation of one other basic human right – the right to a fair trial, a right provided for and protected with Kosova legislation and international instruments on human rights. Currently, more than 40 international judges and approximately 20 prosecutors are employed with EULEX. EULEX officials state that investigations conducted on corruption and organized crime besides those against senior officials of the Ministry on Transport, Post and Telecommunications (MTPT), are another 50 cases within the jurisdiction of the District Court. On the other hand, with the Special Prosecutor’s Office are in total 190 cases, amidst which 50 involve corruption.

Concerning the competences of EULEX judges and prosecutors, criticism may be heard, amongst which, whether EULEX was to be involved in the judicial and prosecutorial system at all, given its neutral stand towards Kosova’s status, it has not recognized the independence of Kosova, respectively. Such a situation hinders the functioning of EULEX within a legal system derived from the Constitution of a country which EULEX does not recognize, at least formally.

The judicial and prosecutorial system, although based on the Constitution of Kosova is unified, continues to be divided given that Kosova does not exercise its judicial authority in its whole territory. Hereto, in the North of Mitrovica, after Kosova’s independence, Serb criminal groups occupied the courts, ousting all Albanian judges and prosecutors together with the administrative staff. The functioning of these courts and prosecutors’ offices is constantly deferred by EULEX-i, although lately we have heard of the possibility of refunctionalizing them. Again, voices are heard from the Kosova Serbs in the Government of Serbia that, reinstating Albanian and Serb judges in the District Court in Mitrovica North, may destabilize the situation in Mitrovica.
The given condition of the judiciary in Mitrovica North, inter alia, disables the judicial and prosecutorial system to act in the whole territory of Kosova.

Again, the judicial and prosecutorial system lead by the locals was followed with all difficulties from the time of UNMIK, with an increasing number of unresolved cases and decreasing number of judges and prosecutors. The evident decrease of judges and prosecutors was influenced by the commenced process of reappointment of judges and prosecutors, so needful for the establishment of an independent, impartial and, first of all, reliable judicial system, in which event a number of judges and prosecutors were not nominated, due to failure of compliance with basic requirements for judges and prosecutors. Compared to the time of co-governance with UNMIK, we now have an increasing awareness amongst the citizens and politicians too, for an independent and efficient judicial system. Hereto, from the initiation of investigations against the highest governmental officials, a greater interest of the highest state leaders - the President, Prime Minister and President of the Kosova Assembly, is noticed. In their statements, apart of emphasizing the necessity for an independent judicial system, critical voices may be heard addressed to the judicial and prosecutorial system, including the qualification of corruption in the Kosova judicial system. However, essential changes to the situation in the judicial and prosecutorial system require better organization of the representatives of the judicial and prosecutorial system themselves, so as to exert pressure on relevant decision-making political factors.

II. Protection of Human Rights and Fundamental Freedoms

1. Introductory Review

The described condition in the judicial system of Kosova has certainly a negative reflection to the efficient protection of human rights and freedoms, which are the foundations of any modern society. Nevertheless, the current Kosova legislation, same as other modern legislations, guarantees protection of human rights and fundamental freedoms (4). Hence, due to their significance, the Constitution of the Republic of Kosova (CRK), considers and protects human rights and fundamental freedoms by dedicating them a special
chapter. Also, the Criminal Code of Kosova (CCK) in its general and special part, gives due importance to the protection of human rights and freedoms.

Modern societies pay attention to the protection of human rights and fundamental freedoms given that nowadays, the level of democratization of a modern society is measured with the level of protection of human rights and fundamental freedoms in general and in particular with the protection of human rights and fundamental freedoms of the defendant in criminal proceedings. In criminal proceedings, human rights and fundamental freedoms are protected from any eventual arbitrary and unlawful actions of state bodies. In criminal proceedings, inter alia, the following are protected: right to integrity and human dignity, right to liberty and security of person, right to a fair trial, right to respect one’s private and family life, right to inviolability of home and correspondence etc. Such fundamental rights are protected in the criminal procedure, given that arbitrary actions of state bodies may violate them precisely in such proceedings.

1. Right to Integrity and Human Dignity (\(^1\))

The right to integrity and human dignity (physical and psychological) is a basic right which may be violated during the conduct of criminal proceedings (\(^2\)). For this reason, human dignity and personal integrity is guaranteed with the provisions of Article 23 and Article 26 of the Constitution of the Republic of Kosova. Furthermore, the general provisions of the criminal procedure prohibit obtaining statements from the suspect and defendant under coercion. Thus, Article 11 paragraph 3 of the Criminal Procedure Code prohibits and penalizes any action compelling a defendant or individual participating in proceedings to plead guilty or accept any other statement by torture, force, under threat, or under the influence of drugs or in any other way. Such procedural prohibition expands to other participants in the proceedings (e.g. witnesses, experts). The prohibition in question is further concretized while questioning the defendant or witness (\(^3\)). By prohibiting the use of force and threat while obtaining statements from such
entities in criminal proceedings, a humane postulate of criminal procedure is realized (").

As seen from the foregoing, the consequences of violations of basic rights to human and lawful treatment during criminal proceedings may be of a criminal-legal character and criminal-procedural one ("). Violations of a criminal-legal character are envisaged to be criminal offences as provided for in the Criminal Code of Kosova (for e.g. obtaining statements by coercion constitutes a criminal offence based on Article 163 of the CCK), and those of a criminal-procedural nature are reflected in the inability to render a court decision based on statements obtained in a prohibited manner (e.g. inadmissible evidence are provided for in Article 153, 161 and 235 of the CPCK). Indeed, unlawful evidence is one obtained in contradiction with the CPC. Such unlawful evidence may also be a statement of the defendant obtained in the absence of a defense council etc.. Despite the significance given to the incrimination of the violations of human rights and freedoms in the legislation of a country, such fact in itself is not an argument also for the level of protection of human rights and freedoms.

Worthwhile to mention that in Kosova, prior of 1999 international military intervention, human rights and freedoms were systematically violated to a large extend. In criminal proceedings, particularly during the dictatorial regime in Serbia, namely in former Yugoslavia, the most severest forms of violations of human rights and freedoms were applied, such as torture, unlawful arrest, beating, abduction and unlawful murder and murder by means of torture (").

2. Right to Liberty and Security of Person

The right to liberty and security of person is a basic human right recognized and protected with the most important international instruments on human rights and freedoms. Based on Article 5 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, everyone has the right to liberty and security, and no one may be deprived of liberty, save in cases determined by law ("). Nevertheless, as aforementioned, in contradiction with these international instruments, including the
Universal Declaration of Human Rights, flagrant violations of the right to liberty and security of person were noted in Kosova during 2001 by the Special Representative of the Secretary General (UN), in cases when through an executive order detention was extended to persons already released through a regular court process. In the post-war period, numerous cases of extra-judicial detentions by KFOR forces were also noted in Kosova, with no legal basis and no opportunity to have the detention issue dealt with by a court. KFOR’s authority in such cases to determine detentions was of a political nature as it was based in the Security Council Resolution 1244 of the UN (32). During this period, unfortunately, the right to personal liberty was infringed by the courts of Kosova too. In 2001, an absurd case of detention without a legal basis was noted, in duration of almost two years and eight months, despite the alibi of the defendant, namely at the time of the commitment of the criminal offence he was charged with, he was serving detention for another criminal offence (33). Besides, there were cases when the court (the three-judge panel) upon proposal of the public prosecutor in summary proceedings, prior of lodging a bill of indictment, extends detention period for a defendant for more than fifteen days, although the law provides no extension of detention in such cases (34). Besides unlawful impositions and extensions of detentions, it has been noted that court decisions with regard to detention, were followed with a series of shortcomings, such as lack of justifications in the decisions for imposing detentions (legal grounds supported by concrete evidence), lack of justification in the decisions for extension of detention periods etc. (35).

To avoid the possibility of arbitrary violations of such basic human right, the ECHR authorizes state bodies to deprive a person from liberty in specific cases, where it is strictly provided for by law and for needs of criminal proceedings. In fact, a person may be deprived of such basic human right in cases when criminal proceedings must be conducted against him/her. The CPCK, supported by Article 5 of the ECHR, has strictly set the conditions under which a person, for matters of criminal proceedings, may be arrested, confined (36) and detained, and be deprived from the rights he/she is entitled to during the time of undertaking such actions (37). Thus, a person caught in flagrancy while committing a criminal offence which is prosecuted ex officio, or he/she is being prosecuted for an already committed criminal offence, the police or any other person has the authority to arrest him/her without a court order. Under conditions determined by law, the police, with power of attorney granted by the public prosecutor, may arrest or detain an individual. In the event such power of attorney may not be obtained under urgent circumstances
prior of arrest, the police must notify the prosecutor forthwith after the arrest. Upon arrest, the arrested person is informed on the rights determined by law (\[^{38}\]).

Police detention may not last longer than forty eight hours (\[^{39}\]) from the time of arrest. As soon as it is possible upon arrest, and no latter than six hours from the time of arrest, the public prosecutor or the police official issues a decision on detention, which decision may be challenged by the detainee (within 24 hours from the time of arrest) (\[^{40}\]) with the pre-trial judge, which is to be decided within 48 hours from the time of arrest (\[^{41}\]).

Detention may be imposed only under the conditions and in compliance with the CPCK.

However, the case law of the European Court on Human Rights with regard to the application of Article 5 par. 1 of the ECHR, indicates that the right to liberty and security of person may also be infringed beyond cases of unlawful deprivation of liberty by arrest, confinement and detention, respectively. Indeed, this court has found that Article 5 paragraph 1 of the ECHR was violated also in cases when a person was confined for a long period in a psychiatric clinic, treated wrongfully as mentally ill without his/her consent and with no court decision. Therefore, Article 5 of the ECHR protects one of the basic human rights, the right of every person to be free, including mentally disabled individuals, be either real disability or only in case where mental disability is suspicious.

3. Right to a Fair Trial

Right to a fair trial is a basic human right determined with Article 6 of the ECHR \(^{42}\). The CPCK has adopted the aforementioned provisions of the ECHR and other international documents, which guarantee a fair trial to the person against whom criminal procedure is conducted. Based on the provisions of the
ECHR, a fair trial means providing a set of rights for any person against whom criminal proceedings are being conducted. Hereupon, the CPCK, supported by Article 6 of the ECHR, has determined that only an independent and impartial court may pronounce a criminal sanction against a perpetrator of a criminal offence, in a procedure initiated and conducted based on the CPCK ("__). In such context, any person suspected or accused for a criminal offence is entitled to request impartial proceedings conducted within a reasonable period of time ("__). Hence, the court should take into account conducting criminal proceedings without dragging, thus preventing abuse of rights belonging to the participants in proceedings. Furthermore, the CPCK, in support of the relevant provisions of the ECHR, has determined the accusatory principle, the one of publicity etc. Also, the CPCK has accepted presumption of innocence for the defendant and some postulates of the rights of the defendant to defense such as: the right to be notified on the reasons of the charge, the right to be provided with sufficient time to prepare the defense, right to defense (material and formal), the right to suggest witnesses to the defense, the right to question witnesses of the prosecution, and the right to interpretation free of charge ("__). The CPCK, by determining such rights to any person, indeed creates conditions for a fair trial. Referring to the implementation of the principle of independence in the Kosova courts, defined by international documents, despite declaratory efforts of the international civil administration to implement such principle, the functioning of the courts has shown that such principle, in some instances, as already mentioned above, was violated by this very organization. This principle is infringed with the contestable UNMIK Regulation No. 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors and Regulation No. 2001/2 referring to the same issue ("__). Thus, highest authority vested to international judges and prosecutors also carried in itself a rank of deficiencies and shortcomings, having a negative impact to the institutional and functional independence of judges and prosecutors from the executive power, also exercised by UNMIK ("__).

4. Right to Respect for one’s Private and Family Life, his Home and his Correspondence

Article 8 par. 1 of the ECHR determines that everyone has the right to respect for his private and family life, his home and his correspondence. Paragraph 2 however, precisely defines cases when such basic...
right may be limited by law for the benefit of a democratic society: in the interest of state security, interest of public safety, economic welfare of a country, protection of peace and order, prevention of crimes, protection of health, protection of morality, and protection of rights and freedoms of others (48). In the spirit of the foregoing provisions of the ECHR, it is the state’s obligation to respect the rights in question of the citizens, save in cases defined by law when the state is allowed to limit such rights, for the purpose of realizing the interests of a democratic society, where such interests are assessed to be of greater significance compared to others, and may not be realized otherwise (49). In order to provide an individual with the necessary defense from arbitrary interventions of competent state bodies in the field regulated with Article 8 of the ECHR, the generally recognized principles of international law on human rights must be respected such as: the person whose rights are being restricted must be under suspect for committing the said criminal offence; only the court may render a decision on the restriction of the aforementioned rights; the duration of restrictions must be limited; sanctions must be defined (material, legal and procedural) in case of failure to respect such rights, namely infringe the provisions protecting the right to ones private and family life (50).

The CPCK defines a series of covert and technical measures of surveillance and investigation (51) by means of which some of the abovementioned basic rights may be restricted, to achieve certain goals in the criminal procedure. However, the implementation of such measures requires strict fulfillment of conditions such as: ground suspicion that the person in question has committed a criminal offence prosecuted ex officio; when the information obtained by means of the measures ordered is likely to assist the investigations of the criminal offence, and would have not been possible to be obtained through other investigative measures without causing unjustifiable difficulties or potential danger to others (52). The CPCK decisively defines measures which may be ordered by the public prosecutor (53) and on the other hand measures which may be ordered by the pre-trial judge upon request of the public prosecutor (54). It is evident that the highest number of measures may be ordered by the pre-trial judge. Tapping of telecommunications may also be ordered by the professional three-judge panel of the district court (55). The CPCK determines that the order for such measures be in writing and include specific elements (56), including the validity term of the order etc. Where any of the conditions for ordering the measures ceases
to exist, the authorized official of the judicial police must suspend the implementation of the order.

Considering that measures undertaken in contradiction with the law constitute a violation of a basic human right, the CPCK has provided for the possibility where individuals included in the order have the right to lodge an appeal with the Panel on Surveillance and Review of Investigations (Article 265), through the head of the public body competent in legal affairs, within six months upon notification on the measure undertaken.

When implementing an order for tapping of telecommunications, tapping of communications via computer network or inspection of postal deliveries, such order may not be applied for communications between the suspect and his/her defense council, except cases where ground suspicion exists that the suspect and his/her defense council were jointly engaged in criminal activity comprising the basis of the order. Evidence obtained through covert and technical measures of surveillance and investigation are inadmissible if the order for imposing such measure and its implementation is unlawful. When one considers to have been subject to an unlawful measure or unlawful order, as previously emphasized, he/she may appeal to the relevant review panel, and the panel, amidst others, may decide to compensate the person/s being subject to such an order.

As the right to respect one’s home is a basic human right, the CPCK has provided a procedure and defined the conditions under which home and body search may be conducted. Given the importance of such basic human right, the CPCK has determined that home and body search be ordered in writing by the pre-trial judge upon proposal of the public prosecutor, and in urgent cases upon request of the judicial police. Exceptionally, the search may be conducted without an order, namely without an order of the pre-trial judge, when determined legal requirements are met. The CCK provides material and legal sanctions where the home and body search is conducted contrary to the law (e.g. infringement of inviolability of home constitutes a criminal offence provided for in Article 166 of the CC of Kosova), whereas the CPCK provides for sanctions of a procedural character (e.g. evidence collected through unlawful inspection
based on Article 246 are inadmissible).

Conclusions

In the spirit of the aforementioned, it may be concluded that the judicial system of Kosova, apart of being faced with difficulties in its functioning as a mixed judicial system, also encounters other challenges and huge weaknesses such as: insufficient number of judges and a large number of unresolved cases. According to the data of the Kosova Judicial Council Secretary, in total are around 224,000 pending cases in the Kosova courts, amongst which 209,780 cases with the municipal courts of Kosova, 9585 cases with the district courts, 2775 cases with the Supreme Court, and with the commercial courts 1751 cases, “Kosova Sot”, dated 6.09. 2010, p. 5. Further weaknesses of the judicial system may be considered poor financial support and lack of modern information system, inadequate infrastructure in some courts and outdated equipment, allegations on corruption cases difficult to discover etc.. Lack of experts and proper equipment, as well as lack of financial support to conduct expertise, are mentioned to be the factors of dragging criminal proceedings. Although assessed that some positive steps have been made for witness protection, it is further established that no efficient mechanism is in place to protect witnesses and their family members, exposed to jeopardy when accepting to appear in the capacity of witnesses for some criminal offences. There are numerous difficulties also in the procedure for the execution of court decisions. All such causes negatively impact the independent and impartial functioning of the judicial and prosecutorial system in Kosova, subsequently producing a negative reflection to a more efficient protection of human rights and fundamental freedoms. The slow pace in completing the legislation regulating the judicial and prosecutorial system makes the situation in the judicial and prosecutorial system in Kosova even worse. Indeed, the Kosova Law on Courts and the Law on Kosova State Prosecutor’s Office, approved some time ago, are expected to evidently improve the situation in the judicial and prosecutorial system in Kosova.

FETAHU A., Discriminatory Acts in the Context of Transforming and Privatising Social Property, Professional Roundtable, held on 21 May 2003 in Prishtina, organized by the Kosova Jurists’ Association. On this issue also see:


PAVISIC B., Kazneno pravo vijeća Europe, Zagreb, 2006, p. 64-69.


WOODWARD S. L., Balkan Tragedy: Chaos and Dissolution after the Cold War, Washington, 1995, p. 98.


1 Dr. Rexhep Murati, Associate Professor, Prishtina University.
2 Written version of the presentation at the “International Conference: Penal protection of human dignity in the globalisation era, 11 – 13 September 2010, Prishtina, Kosova”.

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5 Concerning these and other discriminatory legal and sub-legal acts see: A. FETAHU, Discriminatory Acts in the Context of Transforming and Privatising Social Property, Professional Roundtable, held on 21 May 2003 in Prishtina, organized by the Kosova Jurists’ Association. On this issue also see: A. ZOGAJ – Q. BERISHA – V. MURATI, Achievements and Deficiencies of the Kosova Legal System: Human Rights and

7 Thus, the PCCK was approved through UNMIK Regulation No. 2003/25, dated 6 July 2003, whereas the PCPCK through UNMIK Regulation No. 2003/26 of the same date. These two regulations determine that the Codes shall enter into force on 6 April 2004. It is worthwhile to mention that the exact naming of the codes in Albanian and English is: Provisional Criminal Code of Kosova and Provisional Criminal Procedure Code of Kosova. The same Codes in Serbian are named as Laws (not Codes). It remains unknown why the naming of these two Codes in Serbian has not been harmonised with the naming in Albanian and English. This issue, however, is resolved with Regulation No. 1999/1, based on which, in the event of discrepancies in the translated texts, the text in English prevails.

8 Adopted with UNMIK Regulation No. 2004/8, dated 20 April 2004, and entered into force on the same day.

9 Adopted with UNMIK Regulation No. 2004/34, dated 24 August 2004, and entered into force on the
same day.


12 For further details see: Id., p. 13


15 See: A. SCHRODER, Strengthening the Rule of Law in Kosova and Bosnia and Herzegovina: The Contribution of International Judges and Prosecutors. Zentrum für Internationale Friedenseinsätze -

16 Also, since 2001, the Department of Justice and UNMIK Police are under the authority of the SRSG.


21 See: OSCE Report, op.cit., Footnote 15, p. 24-25


25 Right to integrity and human dignity is provided for in Article 3 of the ECHR with the following content: No one may be subject to torture or inhuman or degrading treatment or punishment. In the same way, this basic right is protected with Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights.

26 For further details on prohibition of torture, namely various types and forms of torture based on Article 3 of the ECHR, and the stand of the European Court of Human Rights concerning the prohibition of torture, see: B. PAVISIC, Kazneno pravo vijeća Europe, Zagreb, 2006, p. 64-69.
27 See: Article 155, 161 subparagraph 4 of the CPCK.


29 Cf. Id., p. 353.


31 Such basic right is provided for in Article 3 and 9 of the Universal Declaration on Human Rights and Article 9 of the Covenant on Civil and Political Rights.


35 Cf. Id., p. 20-25.

36 Articles 210-219 of the CPCK.

37 Articles 279-287 of the CPCK.

38 Article 214 of the CPCK.

40 The relevant provision regulating such issue does not foresee any appeals deadline or the time when such term starts to run, causing dilemmas and unclarities when it comes to its application.

41 Article 212 par. 5 and 6 of the CPCK.

42 Such basic right is provided for in Articles 6, 7, 10 and 11 of the Universal Declaration on Human Rights and Article 14 of the International Covenant on Civil and Political Rights. However, the International Covenant on Civil and Political Rights provides more guarantees for the protection of the defendant rather than the ECHR. Thus, Article 14 par. 3 item b. of the Covenant states the right of the defendant to communicate with the defense council; Article 14 par. 5 includes the right to legal remedy due to factual and legal wrongs; Article 14 par. 3 item g. includes prohibition of forced compulsion of an individual to testify against him/herself or confirm the act; Article 14 par. 3 item d. the right to be tried only in his/her presence; Article 14 par. 4 - obligation of the state to constitute a special form of procedure for juveniles. The ECHR does not expressly provide for such rights, although some of them are drawn from other provisions (e.g. the right of the defendant to silence drawn from the provision of Article 6 par. 2, including the presumption of innocence, cited based on Krapac, op. cit. supra, footnote. 45, p. 21. The right to silence is not expressly provided for in the Convention, as an option to defend the defendant. It would be more adequate to consider the right of the defendant to not declare him/herself rather than the right to silence), cited based on Berislav Paviši?, Komentar Zakona o kaznenom postupku, Rijeka, 2003, p. 15.

43 Article 2 of the CPCK.
44 Article 5 par.1 of the CPCK.

45 For further details on all these rights aiming to ensure a fair trial see: D. KRAPAC, Europska Konvencija o zastiti ljudskih prava i temeljnih sloboda i hrvatski kazneni postupak, HLJKPP, Zagreb, vol. 2, 1995, No. 1, p. 23.

46 Buletin of Kosova Supreme Court Case Law, Prishtina, 1999-2002, p. 5. Concerning the violation of the independence of the judiciary in Kosova and the reactions amongst the Kosova public opinion, see letter of lawyer, Nekibe Kelmendi, addressed to the Chief Administrator, “Necessary Amendments to Attain the “Rule of Law” standard “Koha Ditore, 3 March 2004, p. 11

47 For further details on institutional and functional independence see: R. MURATI, Main Characteristics of the Judicial Criminal System in Kosova, in Bersilav Pavišić (ed.), Decennium Moztanicense: Collected papers, Law Faculty of the University in Rijeka, 2008, p. 348-352.

48 Such basic human right is regulated with the provisions of Article 12 of the Universal Declaration on Human Rights and Article 17 of the International Covenant on Civil and Political Rights. The ECHR is obviously harsher than the Covenant taking account of the manner how it regulates, in paragraph 2 of Article 8, cases of restrictions of such basic right. The Covenant, indeed, prohibits arbitrary and unlawful
interventions to private and family life only in principle, cited based on Krapac, op. cit., supra, footnote 43, p. 34.

49 The European Court on Human Rights, reviewing the issue of protection of liberty and privacy of correspondence, for the first time in the case Klass versus Germany, concluded that privacy of telephone conversations is included within the protection of privacy of correspondence. The European Court on Human Rights, besides Klass v. Germany case (1978), has dealt with the issue of tapping also in case Malone v. Great Britain (1985) and case Huvig and Kruslin versus France (1990), cited. Based on Krapac, op. cit. supra, footnote 45, p. 35.

50 H. SJERCIC-COLIC, op. cit. supra, footnote 26, p. 361. In relation to this matter see the other article of the same author: H. SJERCIC-COLIC, Prikrivene istražne mjere u svjetlu efikasnosti krivi?nog postupka i zaštitne osnovnih prava i sloboda ?ovjeka, Pravo i pravda, Sarajevo, Godina 1., No. 1, 2002, p. 27-43.

51 Articles 256-265 of the CPCK.

52 Article 257 par. 1 subparagraph 1 and 2 of the CPCK.

53 Article 258 par. 1 subparagraph 1 of the CPCK. The authorization for the public prosecutor to also
order relevant measures is in contradiction with the provision of par. 3 of Article 9 of the CPCK, based on which the decisions concerning the implementation of actions and measures in the pre-trial procedure, hereby restricting rights and fundamental freedoms of the person, are rendered by the pre-trial judge

54 Article 258 par. 2 of the CPCK.

55 Article 259 par. 5 and 6 of the CPCK.

56 Article 259 of the CPCK.

57 Article 263 par. 1 of the CPCK.

58 Article 260 par. 10 of the CPCK.

59 Article 264 par. 1 of the CPCK.
60 Article 265 par. 6 subparagraph 3 of the CPCK.

61 Article 240-246 of the CPCK.

62 Article 243 and 245 of the CPCK.