

Transition and transformation of criminal law - legislation in the republic of kosovo and human rights

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“When I go to a place, I’m not there to see if there are any good laws, but rather whether they are being executed, because good laws are everywhere”⁽¹⁾

Abstract

The standard of respecting human rights and freedom is a universal perception accepted worldwide ⁽²⁾. The importance of respecting the standard becomes more delicate especially when a certain subject faces the competent authorities responsible to initiate and develop pre trial and criminal procedures ⁽³⁾. The contemporary progressive world which has inaugurated such standards today faces two main challenges. First challenge is related to rise of a series of new forms of criminal offences with high social risk. Combating effectively such criminal acts is almost not possible if standard individual rights are not respected in the maximum level. And the second challenge is related with the countries under transition and under social transformation which is due to change of governing system. The Republic of Kosovo has been with decades under the occupation of certain countries until its independence which interlocks a meaningful history of legislation. The changes that have taken place and deferment from the criminal legislation of former socialist Yugoslavia and Serbia are considered positive. In this transforming process a series of subjective and objectives weaknesses have been noted. Because of the importance and impact that regular criminal procedure has the same applies for the role and function of Prosecution and prosecutors. One of the challenges during the enforcing of prosecution functions is the perception of value

and efficiency of past legislation and hesitation to implement the new legislation under the framework of international standards including advancement, promotion and protection of human rights and freedom of the subjects under the criminal procedure. This whatsoever does not mean that human rights and freedom are not being respected in a drastic level in Kosovo. It is true that they are not being violated but very often are impinged because the quality of such obedience is more of a formal character and further fades even more because of the above mentioned difficulties.

Key words: Criminality, Standards for protection of human rights and freedom, criminal legislation, transformation, transform and transition, prosecution and prosecutor, etc.,

1. Introduction

Human society depending on its stage of development has made efforts through competent institutions to provide for itself an effective protection from particular criminal occurrences using particular effective processes. Certainly, since the birth of a institutional state, preventive and repressive forms and methods have continuously changed up to the development of new legal- criminal systems which were created through contemporary institutional actions on crime prevention, and at the same time meritorious punishments were issued to the perpetrators which in the final scale aim to re-educate and re-instate them in society as useful citizens. Now days, when human society faces new forms of criminality, classified as high risk as never classified before, in one side have brought into surface the difficultness for effectively combating such occurrences and on the other hand the challenge of pre-trial process and the criminal process by assuring protection of human rights and freedom. Commitment of institutions in preventing and combating such criminal forms and practical scientific interest oriented towards a system to control the criminality will certainly put a high attention to the role and functioning of the criminal law⁴.

In this sense recently given the known circumstances, even in Kosovo positive results have taken place in this area especially in adopting its own criminal legislation. The activity of societies in regional and global plan is focused on unification of the legislation into international legal acts which increasingly are being directly implemented in relevant countries without a prior ratification procedure.

In particular, the activity of these specialized international forums is oriented towards the governments and legislative bodies of countries with an urgent request when they adopt laws in the fields of criminal law, and implementation of these plans must concentrate in respect of human dignity and criminal procedure to justify and develop only under the humanist principles of human rights and also inaugurate the criminal substantive and procedural rights of these countries. In relation to this issue, the Republic of Kosovo as well is clearly oriented towards democratization of the legislation as a whole as well as in reformation of the criminal legislation based on the highest international standards that assure freedom and respecting of human rights. However, during adoption of this legislation, especially for practical purposes, several flaws have been identified which directly or indirectly reflect the phenomenon of violation of human rights and freedom in certain phases of the criminal procedure.

2. Brief background of the development of criminal legislation in Kosovo

Kosovo has been under occupation for decades but still has a significant and important history of the development of criminal legislation. Despite the dynamics of historical developments that we believe in the broad sense, this legislation can be arranged in two specific periods: the period from 1918 - 1999 and the period after the last war and the establishment of UNMIK - Police in June of 1999 and beyond. The criminal law procedure has been developed on the basis, the level and quality of criminal during the periods listed above. It is almost an unanimous conclusion of all authors and theorist panelists that July 1975, estimated as significant historical date of criminal law since at this time Criminal Law of Kosovo entered into force. This law, as in the general scope as well as in particular basis incriminated criminal offences which have threatened or damaged legal issues and property of citizens of Kosovo. Within this

legislation, Kosovo as well as all other units of the former Yugoslavia, except the time was under Serbian occupation (1989 - 1999)?, criminal procedure applied under the Criminal Procedure Law of Yugoslavia in 1967, supplemented and amended in 1986, which finally repealed until 6 April 2004 when the start of the application of the provisional criminal and procedural codes. The period of operation of the criminal procedure law of the former Yugoslav state since 1967, as amended and supplemented in 1986, has affected the institutions and personnel responsible for law enforcement to stabilize and specialize in the spirit of the state system of that time. However, doctrine and judicial practice have contributed to the Law on the formal basis and were relatively well implemented in practical and professional life. Viewing on scientific grounds we can conclude that the criminal procedure law of the former Yugoslavia - during the time of implementation has been quite advanced and has successfully regulated actions of institutions and legal entities. If we leave aside the abuses and misuses which were made as an impact of the political system⁵ then, we estimate that this law is professionally managed, easier, more qualitative manner, in accordance with all international standards for protecting and guaranteeing the freedoms and rights from the procedural plan. Criminal procedure is regulated by the LPC former Yugoslavia - which was a similar type of mixed legal systems - the criminal central European countries and South - East. Feature of this case was the fact that the function of prosecution has been granted to the prosecution (ex officio) and to private accuser, and the function of investigation was given to the court. In quality independent institution and not the procedural side, it is cared to illuminate the circumstances of the criminal act or omission which have gone to the detriment or benefit of the defendant in the investigation⁶. Without wishing to evaluate the role and importance of any of the institutions or procedural subject, this solution from the beginning has contributed toward respecting human rights and freedom for the fact that the Court, in the role of independent institution and not as the procedural party, took care of solving circumstances of criminal action or inaction which were of benefit or not benefit to the defendant in the investigation procedure.

The Kosovo criminal procedure code not only in the formal side but also in its essence differs from the previous procedural Law. Practically, the most meaningful difference of this code from the previous one is exactly the content. This means that except the new options which it provides regarding application of higher procedural standards, its direction is concentrated in respecting and protecting individual rights and freedom. This code also is a mix type but with the most significant change regarding the function of prosecutor during the investigation process. Under the prosecutor's competence is concentrated the

function of investigation, meaning that while directing the investigation process, he has also to direct and supervise the work of judicial police (article 200 paragraph 3 of KPPPK). With all the willingness of temporary institutions of the government of Kosovo and of experts to issue and functionalize in our territory legal acts which somehow would totally avoid the legal system of former Yugoslavia and YFR, their execution in several phases is facing difficulties and problems. Without wishing by no way to criticize the formal side of KPPK, we consider that its quick entry into force without serious preparations in advance, especially regarding the execution of investigation phase, change reformation of Law on prosecution in a new spirit, the prosecution institution would be found not too prepared in both the human resources aspect and unwillingness of particular prosecutors to responsibly and professionally execute the legal dispositions of this Code. It is evaluated that disadvantages, respectively critical points of the function and role of the case prosecutor are:

- Lack of legal regulation on prosecutor's scope of work in the investigation phase;

- Immanent weakness in the scope of investigation procedure development without relying in stipulated criminal and procedural principles to provide evidences which in this phase are a liability of prosecution; and

- Weaknesses relating the execution of disposition of article 46 paragraph 3 of KPPPK;

- Lack of judicial police;

- We think that with the entry into force of KPK and KPPK, in particular by referring to the new needs to extend the work scope of the charge body, it was supposed to be followed also with the issue and entry into force of the new Law on Public Prosecution in Kosovo. This law would precisely regulate activities of prosecutors based on the new spirit, to manage work in hierarchy and their relation with Kosovo Police in the pre-criminal phase. Issue of this law would even materialize clearly prosecutors' activities, the degree of their commitment and the responsibility they have in the pre-criminal process to provide the evidence material;

- Practice of investigation procedure as a function for the prosecutor is a new liability which is as much sensitive as complex. This sensitivity and complexity emerges from additional prosecution's tasks which in fact are not separately systemized in the legal dispositions, but are found in legal, criminal, and procedural principles to be executed by investigators. This has to do with the necessity for serious and comprehensive engagement of prosecutors in securing and verifying the evidence material (evidence burden) so that this phase would become a serious evidence filter and by no way for the prosecutor to be unilateral, but to be systemized in the case which after the investigation phase is submitted to the court for evaluation. It is known that the court according to the official duty practices the judgment function regardless of the attitude of parties in the procedure. But now the prosecution in the position of the case which represents the state has additional duties (ex officio) which in one side has to take care of fighting crime and at the same time to take care of its legal and moral duty in the function of respecting the human dignity of the defendants based on the highest acts which guarantee individual rights and freedom. Composition of investigation function with the supervision function of human rights and freedom is the legal logic which in the initial phase of KPPK execution is facing difficulties. Even though they are an obligation in this phase, principles in dubio pro reo, presumption of innocence and economy principle are not or hardly being executed. Not too, prosecution's assumptions regarding the existence or inexistence of the criminal act or its legal qualification should be solved by the court

with Verdict. There is the logic that issues from the investigating process should by no means be evaluated by the Court! We can come to the conclusion that the investigation function, load of evidenced and care for the defendant's personality should be finalized with rational prosecuting acts based on basic evidences. This means the fact that the prosecutor's function according to KPPPK is the most sensitive function with multidimensional duties. Avoiding or underestimating the logic on the necessity of prosecution's action according to the above mentioned perception is a direct violation of procedural principles and dispositions, and human rights and freedom.

No	Years	Indictment	VERDICTS BY WHICH INDICMENTS WERE CHANGED		Total
			Article	paragraph	
1	2000	148	17	3	20

2	2001	179	12	2	14
3	2002	276	5	1	6
4	2003	385	12	7	19
5	2004	452	24	12	36
6	2005	463	19	11	30
7	2006	681	13	2	15
8	2007	771	15	16	31

	Total	3356	Total	171
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Table 1. Statistical data on number of indictments practiced and number of those Changed (re-qualified) from the District Court in Peja during the period of 2000 - 2007⁷

In the above table it is clearly given that the issue is quite bad in the statistical viewpoint. In the contrary it can be ascertained that the number of indictments which were changed is low and here we can assess that the situation is good. Due to the nature of the paper work, based on the analysis of all statistical reports of this court, we can convincingly ascertain that this situation is not real by no way. First: due to the fact that in the total number of indictments there is a high number of criminal acts which are not considered as high social danger (e.g. illegal possession of weapons) ; second: there is a high number of changed indictments for criminal acts of serious nature (murder); third: there still the logic even in the courts of Kosovo that preliminary and procedural examination of indictment in its form and content is a accessory procedural duty.

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Based on the so far experiences, obligation of respecting the KPPPK dispositions where it is foreseen for the activity of solving the circumstances, which goes on the defendant's favor during the investigation procedure, relies on the prosecution. There are cases when particular prosecutors that are only formally invited in some current dispositions, whereas by inertia they act with the logic, perception and practice of the former Law on criminal procedure of former Yugoslavia which was into force. Thus, it is assessed that most of prosecutors 'forget' their legal obligation to precisely execute not only in the formal aspect all the dispositions of KPPK, especially the disposition of article 46, paragraph 3. As a person being present very often in legal processes, in any act charge or any other prosecution submission I have not clearly seen that the act justification was described in details. Therefore, these prosecutor's legal obligations during the investigation

process, in disfavor to the defendant in the sense of not executing the above mentioned disposition and solving and verifying evidences or circumstances which are of favor to the defendant, are considered a flagrant violation of human rights and freedom. In the contrary, in some prosecuting acts and submissions, which come out by prosecutions, it can be clearly seen that they are a template in the electronic form, the dispositions of which from the initial investigation phase up to the determined prosecuting act are contradictory with the given justification, and also it happens not very rare that they are in contradiction with the evidence material⁸ on which their conviction is created.

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The current law on organization and functioning of the Police of the Republic of Kosovo⁹ does not regulate at all the separation of ordinary police and judicial police. This act in none of the legal dispositions refers to the term of judicial police. With the disposition of article 6 and the disposition of article 10 are stipulated relations and obligations of police with prosecution and police authorizations. On the other hand the Criminal Procedure Code which came into force three years before the law on Police, in its content and form refers to the judicial police. From this point of view, it is considered that under the Police of Kosovo it was necessary to stipulate, organize and functionalize also the judicial police as specialized form for detection, investigation and fight of crime in the territory of the Republic of Kosovo.

As pointed out in the beginning, the purpose of society is to fight crime based on applied laws and treating the actors of these acts so that they can return to the society as reeducated and helpful individuals. But the stressed ascertainment for several subjective and objective weaknesses in executing legal dispositions in the investigation phase in practice is an undeniable argument. Focus of investigating and prosecution function within the competence of the prosecutor, knowing the long impact of former LPP in the

jurisprudence bodies, in practical life is reflecting an interesting mixed model which means formal execution of KPPK dispositions with the action logic according to LPP dispositions. If this phenomenon is added the lack of human capacities which Kosovo prosecutors are facing, then these directly impact in showing two negative phenomenons.

3. What is to be done

The above mentioned weaknesses in Kosovo legal practice in the implementation scope of several KPPK dispositions directly cause difficulties seriously threatening procedural standards which guarantee human rights and freedom. Being aware that we are in the phase of building a state and legislative transformation in which situation they could be justified. This condition cannot go on and we are convinced that there are possibilities to be used which in the quality aspect would contribute in precise execution of legal dispositions. In order to achieve these targets we propose to undertake these measures:

- The Ministry of Justice, respectively the Government of the Republic of Kosovo, should urgently draft and issue the Law on Public Prosecution of The Republic of Kosovo, but in the aspect which would highly democratize the criminal legislation by stipulating actions, rights and responsibilities of the prosecution body in pre-criminal and criminal procedure;
- To organize professional workshops related to professional training of prosecutors for proper execution of investigating procedures with new logic and aspect of action;

- To guide prosecutions that in the investigating phase they are obligated to execute all principles of criminal procedures which were not applied before;
- To guide prosecutors to practice their legal obligations in maximum which are in favor of defendants in the investigation procedure;
- Use possibilities in maximum for verification of evidences by engaging experts from all fields and by no way sending the expertise issue to the court even though it is allowed;
- To be more active in pre-criminal phase, respectively to be more operative and more cooperative with the judicial police with regard to providing evidence, security and examination of scene;
- To change Law on Kosovo Police and from this structure to establish the judicial police, which would be a bridge between the prosecution institution and all other segments of security in the police, and also in other institutions?
- Closer cooperation with prosecutor and international judges.

4. Conclusion

The Republic of Kosovo has a new background with the rise and development of criminal legislation. This background is closely related with the political development in years. At the beginning of XXI Century struggle against all kinds of crime, due to the rate of danger, it is not an obligation of an only country. This struggle according to the new practical and doctrinal perception it is an obligation and responsibility of all instances from the lowest local levels up to the highest international institutions. In a formal-legal point of view, the Republic of Kosovo has made serious steps towards transformation of criminal legislation. In this phase subjective and objective difficulties and weaknesses which are impacting in threatening international standards to respect and protect human rights and freedom during the criminal procedure. Weaknesses were verified in the willingness and preparation of prosecutors to execute legal dispositions in the investigation phase, which according to KPPK for the first time were transferred as procedural function. Moreover, avoiding the procedural weaknesses towards concrete investigative actions and prosecuting acts is assessed to be necessary for proper functioning of criminal legislation. The Republic of Kosovo is going through a difficult and specific social transition. With the purpose to respect the highest standards which guarantee efficient and quality protection of human rights and freedom during the criminal procedure, measures should be taken in both in the primary and secondary legislation scope. Harmonization of legislation and elimination of contradictions, together with rise of professional human capacities are a guarantee of human treating of parties in procedure, especially respecting the suspect or defendant in the procedure.

5. Reviewed Literature

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Prof. Ass Dr.sc. Armand Krasniqi, is a lecturer in the Faculty of Economy in the University of Prishtina, and without any breaks he has performed the job of a lawyer for several years.

3 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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V. KAMBOVSKI, Criminal Law - the general part, , Macedonia, II ed. 2007, pg. 58.

5 According to Prof. Dr. Ismet Salihu regarding the review of historical development of criminal law in Kosovo is assessed that it has the origin from the feudalism period, then it continues with the period between the two world wars (1918 - 1941), the period after the second world war, and finally after the last war of 1999 in Kosovo: See I SALIHU, Criminal Law - the general part, Prishtina, 2003 pg. 110 - 118. Dr. Ejup Sahiti also says about the historical development of law on procedural code in Kosovo that since Kosovo was under foreign occupation for a long time, in its territory there was applied the occupier's law which very often was in contradiction with Albanian customary law. See text E. SAHITI, Law on criminal procedure, Prishtina, 2005 pg. 16.

(⁵) Law on criminal procedure of former Yugoslavia, article 162 paragraph 4, with a previous request from the public prosecutor, allowed the investigative judge of Interim Affairs body to trust them on undertaking particular investigation actions for particular criminal acts which 'trust' was frequently misused in Kosovo in disadvantage of its citizens, and in contradiction with all high acts of human rights.

(⁶) According to this model the police has cooperated with the investigating judge and with the case prosecutor

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This statistical data was taken from the District Court in Peja.

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If case files are analysed for particular criminal issues, we can easily ascertain that there are no or only a few changes between the disposition and justification of Decision to begin investigation with disposition and justification of Indictment.

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Law on Police no.03/L-035

<https://www.diritto.it/transition-and-transformation-of-criminal-law-legislation-in-the-republic-of-kosovo-and-human-rights/>