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The impact of the International and European Law in protecting the rights and detainees in Kosovo

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1. Introduction.

There are a number of ⁽¹⁾ International acts regarding the issue of imprisonment sentence execution and protecting the rights of persons who are sentenced and those in custody. The issue of why we have so much legislation about this topic is that during sentencing of convicts we face a large amount of abuse and fraud. That is why there is a general rule that should be respected regarding the above mentioned legislation towards any prisoner without distinction. Another issue is also the efforts of international union in unifying the right for execution of criminal sanctions in different countries.

We will present below some acts which are directly related to the rights of convicted persons.

2.1 The prohibition of cruel, inhuman and degrading treatment of convicted persons

On one side we have the status and treatment of people who are imprisoned and persons who are in custody and on the other side is the official personnel behavior at the correctional institution against prisoners, both of these are determined by international and national principles and standards which prohibit brutal actions and inhuman or degrading treatment of the persons deprived of liberty.

“The prohibition of cruel, inhuman and degrading treatment is provided by the United Nations Convention against torture, 1988, and the European Convention for the Prohibition of Torture, adopted by the European Council in 1987 and the Protocols 1 and 2 ”.²

These international laws are intended to obligate states to incriminate in their legislation and to investigate those acts as criminal offenses against persons that are imprisoned. Torture is

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² Dr. Ismet Salihu, E Drejta Penale Ndërkombëtare, p . 92, and Article 3 of this convention <http://dejure.org/gesetze/MRK/3.html> 17.12.2015

defined in the Kosovo Criminal Code as a violation of freedom and human rights, in Article 165. This Article says:

“ 1) The officer or the person acting with the purpose of pressure or with the consent or acceptance of an official, who performs an act of torture, is sentenced to imprisonment of five to fifteen years.

2) An act of torture means conducting or not conducting an act which deliberately causes severe pain or suffering whether physical or mental for the purpose of getting information or statement from the person that has committed or is suspected of having committed an offense, or intimidating and obligating that or a third person to commit such an act. The act of torture does not include any act or its omission arising only by inevitable actions or as a characteristic of lawful sanctions”.³

The prohibition of torture and other inhuman and degrading actions against persons serving sentences in prison or those who are in custody is provided also in medical ethics principles regarding the role of medical personnel, especially doctors, in protecting prisoners and other persons deprived of freedom, against torture, punishments and other cruel treatment, inhuman or degrading treatment prohibited by the General Assembly of the UN in 1982.

“Besides torture, other actions violating the rights of persons serving sentences in prison or those who are in custody are also provided by the Corps of Principles for the rights of all persons who are in any form deprived of freedom, approved by the General Assembly of UN in 1988”.⁴

2.2 Minimum standard rules about behavior towards prisoners

With the approval of minimal standards of prisoners regulations approved by the First Congress of the United Nations about crime prevention in Geneva, in 1955 begins the process of creating norms, rules and standards about the modern prison system in international terms.

“Minimum standards regarding behavior towards prisoners are defined by the framework on respecting the rights of prisoners in modern prisons, emphasizing in particular the principle of humanism, the respect of human dignity and socialization. Based on these principles are defined also guarantees against harassment, various abuses and other forms of power abuse against prisoners”.⁵

With the minimum standards a number of other issues are also considered, but the most important one is that prisoners are entitled to certain standard of living conditions, clothing, food and hygiene, ensured contact with the outside world, that every correctional institution must have

³ Kosovo Criminal Code, Article 165, para. 1 and 2

⁴<http://www.hrweb.org/legal/cat.html>

⁵Dr. Ismet Salihu, E Drejta Penale Ndërkombëtare, fq. 93

a doctor who, besides having knowledge in the field of medicine, should have knowledge in the field of psychiatry. There should be clearly determined actions which are considered punishable offenses and definite penalties set for these violations. Any form of physical, inhuman and degrading punishment is prohibited. The doctor is obliged to visit prisoners in solitary confinement and must determine whether this form of deprivation negatively affects the physical and mental health of the prisoner. If this is the case than the doctor should advise the prison authorities to terminate this action of detention.

Another issue is the use of violent means such as cuffs and chains, the use of which is prohibited as a form of punishment. The form and type of force used agained prisoners is determined by the Penitentiary Department within the framework set by law, as long as it is necessary.

“Every country is obliged to definie in its national legislation the rules –minimum standards for the treatment of prisoners and these rules should be known not only by the penitentiary staff but also by the prisoners. At the same time, every five years, each state is obliged to infrom the Secretary General of the UN about the implementation of these rules-standards in the penitentiary practice”.⁶

2.3 European Prisons Rules

These rules are also somewhat the same as the minimum standard rules for treatment of prisoners, however, these rules give more space in domain of prisoners’ defense. The main characteristic of these rules is that under these rules, prisoners have the possibility of lodging an appeal at the European Commission of Human Rights if he or she feels that his or her rights, as set under these rules, have been violated.

Empfehlung CM/Rec(2010)1 des Ministerkomitees an die Mitgliedstaaten über die Grundsätze der Bewährungshilf edes Europarats (Angenommen vom Ministerkomiteeam 20. Januar 2010 in der 1075. Sitzung der Ministerbeauftragten)

Im Hinblickauf: - die Erklärung und den Aktionsplan, welche die Staats- und Regierungschefs des Europarats bei ihrer dritten Gipfelkonferenz (Warschau, 16. und 17. Mai 2005) angenommen haben, insbesondere hinsichtlich der Sicherheit von Bürgerinnen und Bürgern; - die auf der 26. Konferenz der Europäischen Justizminister (Helsinki, 7. und 8. April 2005) angenommene Entschließung Nr. 2 (Rdnr. 19); unter Berücksichtigung: - der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (SEV Nr. 5); - des Europäischen Übereinkommens über die Überwachungsbedingterurteilteroderbedingentlassener Personen (SEV Nr. 51); - desEuropäischenÜbereinkommensüberdieinternationaleGeltungvonStrafurteilen (SEV Nr. 70); - derEmpfehlung Nr. R (92) 16 zu denEuropäischenGrundsätzenbetreffend „communitysanctionsandmeasures“; - derEmpfehlung Nr. R (97) 12 überBedienstete, die mit

⁶Dr. Ismet Salihu, E Drejta Penale Ndërkombëtare, fq. 94

der Durchführung von Sanktionen und Maßnahmen befasst sind; - der Empfehlung Nr. R (99) 19 über die Mediation in Strafsachen; - der Empfehlung Nr. R (99) 22 betreffend die Überbelegung in den Strafanstalten sowie übermäßigen Anstieg der Zahl inhaftierter Personen; - der Empfehlung Rec(2000)22

zur Verbesserung der Durchführung der Europäischen Grundsätze betreffend die „community sanctions and measures“; - der Empfehlung Rec(2003)22 über die bedingte Entlassung; - der Empfehlung Rec(2003)23 über die Behandlung der zu lebenslanger Freiheitsstrafe Verurteilten und anderen Langzeitgefangenen durch die Strafvollzugsverwaltungen; - der Empfehlung Rec(2006)2 über die Europäischen Strafvollzugsgrundsätze; - der Empfehlung Rec(2006)8 über die Unterstützung der Opfer von Straftaten; und - der Empfehlung Rec(2006)13 betreffend die Anwendung von Untersuchungshaft, die Bedingungen, unter denen sie vollzogen wird, und Schutzmaßnahmen gegen Missbrauch;

Sowie anderen Bestimmungen: Diese Grundsätze sind im Zusammenhang mit der Empfehlung Nr. R (92) 16 zu den Europäischen Grundsätzen betreffend „community sanctions and measures“ zu verstehen. Des Weiteren ergänzen diese Grundsätze die einschlägigen Bestimmungen der Empfehlung Nr. R (97) 12 über Bedienstete, die mit der Durchführung von Sanktionen und Maßnahmen befasst sind, der Empfehlung Nr. R (99) 19 über die Mediation in Strafsachen, der Empfehlung Rec(2000)22

zur Verbesserung der Durchführung der Europäischen Grundsätze betreffend „community sanctions and measures“, der Empfehlung Rec(2003)22 über die bedingte Entlassung, der Empfehlung Rec(2003)23 über die Behandlung der zu lebenslanger Freiheitsstrafe Verurteilten und anderen Langzeitgefangenen durch die Strafvollzugsverwaltungen, der Empfehlung Rec(2006)2 über die Europäischen Strafvollzugsgrundsätze, der Empfehlung Rec(2006)8 über die Unterstützung der Opfer von Straftaten und der Empfehlung Rec(2006)13 betreffend die Anwendung von Untersuchungshaft, die Bedingungen, unter denen sie vollzogen wird, und Schutzmaßnahmen gegen Missbrauch, und sind im Zusammenhang mit diesen zu verstehen.

Empfehlung CM/Rec(2012)5 des Ministerkomitees an die Mitgliedstaaten über den Europäischen Verhaltenskodex für Vollzugsbedienstete (angenommen vom Ministerkomitee am 12. April 2012 in der 1.140. Sitzung der Stellvertreter der Minister)

Empfehlung CM/Rec(2010)1 des Ministerkomitees an die Mitgliedstaaten über die Grundsätze der Bewährungshilfe des Europarats (angenommen vom Ministerkomitee am 20. Januar 2010 in der 1075. Sitzung der Ministerbeauftragten)

Under the European prisons regulation, as well as other international legal acts, different issues for prisoners are regulated, like : the prohibition of brutal, inhuman and degrading physical punishment of the convicted persons, respect for human dignity during the execution of a sentence; the execution of the sentence should be supervised by trained and experienced inspectors ; prisoners residential spaces must meet the necessary requirements, be hygienic, lit,

heated, ventilated and in general meet standards of legality of sentence execution for a person convicted”.⁷

In the European Union are also established the european centers for helping convicted people and victims.⁸

United Nations rules on the protection of minors deprived of freedom

Having in mind the discrimination and maltreatment of children in many parts of the world “The General Assembly of UN (UNICEF) in 1990 paid special attention and care to minors deprived of freedom and brought rules about this category of prisoners”, a part of these rules is also “The Convention on the Rights of the child”, European convention on human rights protection. Through these rules the United Nations arranged exceptionally important issues, as its states that freedom deprivation of minors should be as short as possible, the time of appeal proceedings should be shorter, also to allow easier visits they shall be closer to the family. During the execution of minors punishment must be respected all the rules, international standarts also the legal provisions that govern such issues. The convicted minors during their sentence serving should not stay in the same place or cells with the adults and they should have more frequent visits. Disciplinary punishments and the procedures and tools applied to delinquent minors should be defined clearly, on the other hand, the the minors institution guards should not carry weapons etc. The minor should have the right of appeal against any action taken against him.⁹ It issued a special regulation in children protection whose freedom was taken by court decisions, demanding special provisions for this category.

2.5 Recommendation of the Committee of Ministers of the Council of Europe about protection of prisoners who are foreign nationals

This recommendation was approved in 1984 and with the amendments and changes for all categories of the Council of Europe in 2006¹⁰ it has regulated the position and protection of the rights of prisoners who are foreign nationals. Under this recommendation, to any foreigner who is in custody or detention should be given the possibility to exercise specific requirements.

“Since these people are in a foreign country, with different language and culture, then should be given to him/here the opportunity to associate with other prisoners who have the same nationality. Another very important issue is that the prisoners should be provided with an interpreter so he/she can

⁷<http://www.uncjin.org/Laws/prisrul.htm>

⁸Europäische Beratungsstelle für Straffälligen- und Opferhilfe, Hotherstraße 31, 02826 Görlitz. Schandauer Straße 4a 01796 Pirna Tel.: 03501 5091890 Fax.: 03501 5091890

⁹Lexo më tepër në <https://bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/archiv/kindesentfuehrungen.html> 17.12.15

¹⁰Lexo me tepër ne

[webhttp://www.bmjv.de/SharedDocs/Downloads/DE/StudienUntersuchungenFachbuecher/Freiheitsentzug_Empfehlung_des_Europarates_europaeische_Strafvollzugsgrundsaeetze2006.pdf?__blob=publicationFile&v=3](http://www.bmjv.de/SharedDocs/Downloads/DE/StudienUntersuchungenFachbuecher/Freiheitsentzug_Empfehlung_des_Europarates_europaeische_Strafvollzugsgrundsaeetze2006.pdf?__blob=publicationFile&v=3)

execute his/her rights as a foreigner. He/she can have visits from diplomatic or consular representatives of his country. In order to have a successful rehabilitation and resettlement there should be someone from prison staff that speaks the language of the foreign prisoner".¹¹

The Care of the International Community and especially of the member states of the European Council for foreign prisoners was noticed also in documents issued by the Committee of Ministers of the abovementioned body.¹²

2.6 Recommendation of the Committee of Ministers of the Council of Europe about dangerous prisoners

This recommendation was approved in 1982 and with the amendments and changes for all categories of the Council of Europe in 2006¹³ it has regulated some issues about organisation and operation against dangerous prisoners as a special category of prisoners. According to this recommendation, even though we are dealing with dangerous prisoners, however this does not mean that it is allowed the use of uncontrolled violence and without any restriction. Usually the means and actions must be in proportion with the needs set by various penal institutions.¹⁴ Unfortunately in many states even in many democratic states there is a use of violence during investigation procedure and sentence as well. In Kosovo, considering the after war period of 1999 under international supervision of UNMIK and then after the declaration of independence, there were built high security prisons but under international standards, we can say that there is *Megjithatë edhe nga burgjet e Kosovës kemi arratisjen e të burgosurve të rrezikshëm (fusnota do të vjen nga burgju i dubraves nuk ka nevojë të përkthehet)* observance of abovementioned conventions about the prisoners of serious offenses.

2.7 Resolution of the Committee of Ministers of the Council of Europe about short-term treatment of young offenders up to 21 years old

¹¹<http://portal.coe.ge/downloads/European%20Prison%20Rules.pdf>

Empfehlung CM/Rec(2012)12 des Ministerkomitees an die Mitgliedstaaten über ausländische Gefangene (angenommen vom Ministerkomitee am 10. Oktober 2012 in der 1152. Sitzung der Stellvertreter der Minister, *dhe* http://www.bmjbv.de/SharedDocs/Downloads/DE/StudienUntersuchungenFachbuecher/Freiheitsentzug_Empfehlung_des_Europarates_europaeische_Strafvollzugsgrundsaeetze2006.pdf?__blob=publicationFile&v=3

¹²Lexo rekomandimet e Këshillit të Evropës në CM/Rec(2012)5 des Ministerkomitees an die Mitgliedstaaten über den Europäischen Verhaltenskodex für Vollzugsbedienstete (angenommen vom Ministerkomitee am 12. April 2012 in der 1.140. Sitzung der Stellvertreter der Minister)

¹³Lexo me teper ne Web.http://www.bmjbv.de/SharedDocs/Downloads/DE/StudienUntersuchungenFachbuecher/Freiheitsentzug_Empfehlung_des_Europarates_europaeische_Strafvollzugsgrundsaeetze2006.pdf?__blob=publicationFile&v=3

¹⁴ Recommendation CM/Rec(2014)3 of the Committee of Ministers to member States concerning dangerous offenders (Adopted by the Committee of Ministers on 19 February 2014 at the 1192nd meeting of the Ministers' Deputies)

“This resolution was approved in 1966, amended and supplemented in 2008 and other conventions and recommendations as counted at the first part of this recommendation (see footnote above). From the title itself we can see that this resolution regulates the treatment of young offenders ie until the age of 21 who are deprived of freedom with a short-term sentence. If it comes to the implementation of this penalty then it should be shorter for the young convicted and its execution must be done in special institutions and in such a way that do not have negative consequences in physical and mental development of young prisoners”.¹⁵ This recommendation includes also basic and general principles about the rights of minors, by not making them feel insulted because of their age. In this recommendation are made categorizations of the minors. Kosovo has a number of minors serving the sentence.

Conclusion

From all this elaborated so far we can see clearly the major changes that have occurred in today's penitentiary systems. During historic development the penitentiary system has been advanced along with other social advancements. Initially this sentence was too harsh and its goal was repressive to the person applied. Only after a long period of social development the character of sentences has been changed from repressive to preventive one. Better saying, these rules are foreseen by international organizations such as the United Nations and particularly the Council of Europe. Our focus about this topic is based not only on national jurisdiction but also on the international conventions with global and regional character. The fact of the adoption of international conventions and their observance regarding prisoners is not only national issue but international as well.

A number of facts are only recommendations, therefore, do not represent a direct legal obligation for countries, however, there must be a moral obligation meaning that indirectly to adhere to these standards, rules and regulations, for humanitarian and human reasons.

However, we should not forget the fact that even though the countries foresee within their national legislations the rights of prisoners, however, there are not rare cases of violations and abuses of basic rights of prisoners, so, the factual side is different from the formal one. This is proved by various national and international reports as well as the large number of complaints against violators of these rules...

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¹⁵<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=582910&SecMode=1&DocId=628128&Usage=2>

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