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Dear readers,

“Justicia” magazine has already started to become a tradition, just like the basic program on legal education attended by its authors.

This is the third edition of the magazine which is a result of professional research and creativity of candidates for third generation of the basic program on legal education.

In their professional work upon producing this edition of the magazine, candidates discussed subjects from all areas of domestic and international law, which makes the magazine complete and competitive in legal literature in Kosovo.

Upon reading the works, you will notice that it is written in rich legal and clear language. This proves that candidates used various study methods upon producing the magazine bringing a new spirit to publications in legal field in Kosovo.

Through this magazine we are making efforts to establish new practice for the future judges and prosecutors of Kosovo on publications of case laws and prosecutorial practice in Kosovo.

We hope that this edition of “Justicia” will serve your daily professional work only to young legal officers, but also to judges, prosecutors and other legal professionals in Kosovo and wider.

Mr.sc. Lavdim Krasniqi
Director of Kosovo Judicial Institute

Ardita Beqiraj Sylejman Shumolli Sebahate Hoxha

MANDATORY DEFENCE IN CRIMINAL PROCEEDNGS

General observations on the defence of the defendant in criminal proceedings

1.1 The right of the defendant to defence

The right of the defendant to defence is considered as one of the most important rights in criminal proceedings. The defendant can exercise this right either personally or through a professional defence lawyer.

The necessity of appropriately determining the material truth compels the authorities that implement the proceedings (police, prosecution, court) that in a correct and complete manner prove the facts which are important for reaching a legal decision. The Criminal Procedure Code of Kosovo, in Article 7 par. 2 foresees that "Subject to the provisions contained in the present Code, the court, the public prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favour, and to make available to the defence all the facts and pieces of evidence, which are in favour of the defendant, before the beginning of and during the proceedings". From this we can derive that the main burden for proving the existence or non-existence of guilt on the part of a defendant that is being tried is on the

1 Dr. EjupSahiti, Criminal Procedure Law, Prishtinë 2005, page 90.

authorities that implement the proceedings and that the role of the defendant can be subject to his or her choice. However, the appointment of a defence lawyer can assist in the sense of realising his or her rights in the procedural aspect and to avoid the potential consequences which the defendant may face in absence of legal knowledge. The existence of professional defence for the defendant is important also due to the fact that during the development of the criminal proceedings against him or her, the defendant is in a different spiritual and psychophysical condition.

Therefore, with the aim of realising this defence the law has foreseen the principle of equality of arms which balances his or her position with that of the plaintiff authorised as a party in the proceedings except when foreseen differently by the Code (Article 10, paragraph 1 KCPC). Furthermore the KCPC in a very clear manner specifies this principle, as it foresees in Paragraph 2 of this Article that the defendant has the right to declare himself and he should be allowed to declare all the facts in his favour. He has the right to examine or require the examination of witnesses against him, and require the presence or examination of witnesses in his favour under the same conditions applicable for witnesses' against him. Therefore, the principle of equality of arms means that both parties in litigation should have equal opportunity to present their declarations in relation to the case. As such this principle should be guaranteed throughout all the phases of the criminal proceedings, regardless of the level of punishment foreseen for that criminal act. Therefore, authorities that enforce the law, the Police, Public Prosecution, preliminary procedure Judge or the chairperson of the tribunal, including the Judge confirming the indictment, are obliged to instruct the suspect or defendant on his rights to hire a defence attorney and that the defence attorney has the right to take part during his examination.

Therefore, with the objective of equally treating the defendant with the authorised plaintiff and in relation to the above mentioned, we can ascertain that the defendant through all the phases of the criminal proceedings can have a defence attorney and that in some certain cases defence is mandatory. In this regard the Criminal Procedure Code of Kosovo, Article 12, paragraph 5 foresees that "the court or other competent authority conducting criminal proceedings shall inform the defendant of his or her right to a defence counsel, as provided for by the present Code".

Therefore, based on all the above mentioned we can freely conclude that defence in a criminal proceeding in accordance to the Criminal Procedure Code of Kosovo, can be an:

- Optional defence
- Mandatory defence, which will be the object of further study in this paper.

1.2. Appointment of a defence attorney, declining and inability to decline defence

The defendant is free to appoint a defence attorney according to his choice. If he does not appoint a defence attorney, his legal representative, spouse, extramarital spouse, next of kin of direct blood lineage, adopted parents, adopted child, brother, sister and supporter, can appoint a defence attorney for him, but not against his will, Article 69, paragraph 6 of the CPCK. The defendant can have up to three defence attorneys and the right to defence is considered to have been satisfied when one of these defence attorneys is present in the proceedings[2]. A defence attorney can only be one who is a registered lawyer with the Bar Association and under conditions determined by law a lawyer can be replaced by an intern, while the latter cannot be presented as a defence attorney before the Supreme Court of Kosovo, however for criminal cases which deal with crimes for which a penalty of less than five years of imprisonment is foreseen, the intern lawyer can replace the lawyer only if he has passed the bar exam.

One can decline a defence attorney, except for in cases of mandatory defence (Article 73 of the CPCK), if the decline is made in clear circumstances, in an informed manner and voluntarily. The decline of defence has to be done in writing and has to be signed by the suspect or the defendant and the authority which is implementing the procedure or is done verbally through a audio or video recording, the authenticity of which is verified by the court.

Persons under the age of eighteen can decline the right to appoint a defence attorney with the approval of the parent, guardian or representative from the

2 Criminal Procedure Code of Kosovo, Article 71 paragraph 2, page 264,

centre for social work, except for in cases of domestic violence in which the parent is involved or the guardian to whom he/she is entrusted, then the parent or guardian cannot give their consent to the declining this right.

Persons that exhibit signs of mental instability or mental inability cannot decline the right to appoint a defence attorney.

When the suspect of the defendant who has declined the right to defence subsequently requests such a right, he can exercise this right immediately.

2. MANDATORY DEFENCE

2.1 On mandatory defence in general

Mandatory defence means the existence of circumstances under which the criminal proceeding against the defendant cannot be applied without defence. These circumstances are determined in a specified manned through the provisions of the CPCK and are foreseen in relation to the physical and psychophysical attributes of the defendant in the procedure, with the criminal act or the penalty foreseen, as well as in cases where the defendant cannot cover the expenses of a defence attorney.

According to Article 73, paragraph 1 of the CPCK, the defence is mandatory, and hence the defendant should have a defence attorney in the following cases:

- From the initial examination where the defendant is a deaf-mute or exhibits signs of mental instability or disability and hence is unable to successfully defend himself,
- During examination while in detention and throughout the times while he is detained,
- From the filing of the indictment, where the indictment against him is related to a crime for which a penalty of at least eight years of imprisonment is issued, and
- In proceedings based on extraordinary legal remedies where the defendant is a deaf-mute or exhibits signs of instability,

mental disability or has been issued a penalty of long-term impris onment.

In such cases the defendant should have a defence attorney despite his will, even though this practically can be questioned in certain cases, specifically when the defendant is examined during detention or from the moment of an indictment being filed for a crime for which a penalty of at least eight years of imprisonment can be issued and when in a persistent manner he objects to the presence of any defence attorney that could be appointed to him. Surely the objective of the legislator in the concrete case was to provide larger reassurances and procedural guarantees on observing the rights of the defendant.

Furthermore, if the defendant in a case of mandatory defence does not hire a defence attorney, and the appointment in not made by anyone in accordance with Article 69, paragraph 6 of this Code, the president of the court or the competent authority which applies the procedure in the preliminary phase, appoints an ex officio defence attorney under public expenses. When a defence attorney is appointed ex officio after the indictment has been filed, the defendant is informed of this when the indictment paper is served. [3] According to Article 127, paragraph 3 of the CPCK, mandatory defence is also applicable when a defendant who does not have a defence attorney is to be served with the verdict through which he is issued with an imprisonment punishment, while the verdict cannot be delivered in the previous address. In such a situation the court will appoint a defence attorney who exercises this duty until the address of the defendant is found. The defence attorney is allowed a necessary period to acquaint himself with the paperwork and is subsequently handed with the verdict and the procedure continues.

When there are no conditions for mandatory defence as in the previously mentioned cases, the defendant, in accordance to Article 74, paragraph 1 of the CPCK, is appointed with the defence attorney under public expenses upon his request or that of his relatives (Article 69, paragraph 6 of the CPCK), but not against the will of the defendant:

3 Criminal Procedure Code of Kosovo, Article 73 paragraph 2, page 264,

- The procedure is applied for crimes punishable with at least eight years imprisonment, or
- When the defendant cannot pay the expenses of defence and if the court of competent authority which applies the procedure in the preliminary phase determines that the appointment of a defence attorney under public expenses is in the interest of justice.

This defence is different from mandatory defence in line with Article 73 of the CPCK, as it cannot be applied contrary to the will of the defendant, either in a general sense of defence or that of the appointed defence attorney, and that this particular defence is related to the crime punishable with at least eight years of imprisonment, or when the defendant cannot pay the costs of defence and the court determines it to be in the interest of justice to appoint a defence attorney. Therefore, according to the conditions foreseen by the Code, the defendant who cannot cover the cost of the defence and due to this he cannot engage an independent and experienced defence attorney who is competent in the field of the given crime, upon his request an independent defence attorney is appointed covered by budget funds when this is in favour of justice (Article 12, paragraph 4 of the CPCK) .This form of defence in the theory of criminal proceedings is known also as defence for the poor. However, the appointment of an ex officio defence attorney in such cases and in particular from the time of the Criminal Procedure Code of Kosovo entering into force since 2004 and onwards, was often criticised by the monitors of law enforcement, as often this was used to fulfil only the legal procedural requirements, while from a substantial aspect this was not satisfactory, a circumstance which has brought the defendant into an unfavourable position and has damaged his rights.

It has been concluded that legal representation from defence attorneys in criminal cases has often been below standards and ineffective. This could violate the legal framework of Kosovo, the Code of Professional Ethics of lawyers and international law[4]. This includes both the defence attorney appointed with authorisation by the defendants or their family members and also those appointed ex officio.

4 Ineffective legal representation, Department for Human Rights and Communities / System for monitoring of Legal System / OSCE

No evidence gathered during the examining of the defendant is considered as admissible evidence in the proceedings if the report does not include the instructions on the right to appoint a defence attorney and the declaration of the suspect or the defendant related to this instruction. Furthermore, inadmissible evidence in criminal proceedings is considered the examination of the defendant when conducted in violation of provisions from Article 231, paragraph 2 and 3 of the CPCK, which covers the rights of the defendant on assistance from a defence attorney and consultations with the attorney before and during the examination session.

2.2 Defence of the injured party (authorised representative)

According to Article 82 of the Criminal Procedure Code of Kosovo, the injured party has an authorised representative from the outset of the criminal proceedings when:

- The party is a child,
- The party is family related with the defendant,
- The proceedings are applied for crimes under Article 139 of the of the Criminal Code of Kosovo or for crimes against sexual integrity from Chapter XIX of the Criminal Code, except for crimes under Article 203 of the Criminal Code of Kosovo,
- The injured has mental instabilities or inabilities, or
- The court determines that the injured is unable to defend himself and requires the assistance of an authorised representative.

The capacity of the authorised representative in these cases is exercised by a professional legal defender (lawyer), with the aim of defending the interest of the injured in the criminal proceedings. The appointment of the legal representative in these cases is foreseen to be mandatory having in mind either the nature of the crimes which have caused the injury (victims of trafficking and victims of crimes against sexual integrity) or taking into consideration the degree of psychophysical development of the injured, like children or persons with mental instability or inability.

2.3 Mandatory defence in criminal proceedings against minors

When we refer to the institution of mandatory defence, there is no doubt that cases of mandatory defence for minors in criminal proceedings have to be treated with a special attention also. If we look at local criminal legislation, specifically Criminal Law on minors before the amendments, it is worth mentioning that Criminal Law on Minors of Kosovo in Article 40, determined that: "a minor has a right to defence in cases of mandatory defence", which means that the minor was appointed with a defence attorney only in cases of mandatory defence determined by the CPCK, which were elaborated earlier in this sense.

However, after the amendment made to the Criminal Law on Minors, through which the name Criminal Law on Minors was changed to Justice Code for the Minors, this Code in Article 43, determines that: a minor shall have a defence attorney from the outset to the conclusion of the proceedings[5]. This novelty represents a significant importance as far as guarantees for professional legal protection of a minor is concerned in a criminal proceeding against him.

Even though a careful reading of this Article confronts one with a dilemma, as in the fourth paragraph (4) of this Article it is determined that upon the request of the minor, of the legal representative or his family member, a defence attorney is appointed under public expense, if he cannot cover the costs of the defence himself, but not against the will of the minor. This fact can cause one to doubt if defence is mandatory or not in criminal proceedings against minors. However, taking into consideration the best interests of the minor, a defence attorney has always to be appointed even in cases when a minor refuses such a thing.

In addition to local legal acts and international instruments on human rights, specifically the European Charter of Children's Rights, Article 40, paragraph 2, item (b) of this Charter, determines the minimum legal guarantees for minors in criminal proceedings, and that in addition to respecting the principle of presuming innocence amongst other rights that

5 Article 43, par. 1 of CMR

6 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6

are guaranteed is specifically the obligation to provide legal support for the minor in the preparation and presentation of an effective defence in the criminal proceedings against him.

This means that states which have ratified this charter should undertake measures to create conditions in regard to upholding the minimum of rights in criminal proceedings against minors, where the provision of professional assistance is foreseen due to the best interests of the minor during a criminal process. Furthermore, the non provision of legal assistance by a professional defence attorney would represent a violation of children's rights as determined by this important international document.

When we refer to similar international instruments, also Article 6 (3) of the European Convention on Protection of Human Rights and Fundamental Freedoms (ECPHRFF), provides individuals with the right "to defend himself personally or through legal assistance of his choice or if he does not have sufficient funds to pay for legal assistance, this will be provided free of charge when the interests of justice require such a thing"[6].

This Article of the European Convention on Protection of Human Rights and Fundamental Freedoms determines the right to defence where this is necessary, the provision of legal assistance free of charge as required by the interests of justice, which to a large degree are related to observing the principle of equality of arms as mentioned above.

Conclusion

In general the provision of mandatory defence by a professional legal defence attorney is considered as a great achievement for the justice system and also a guarantee for the proper application of criminal proceedings against the defendant. Even though the right of the suspect or defendant to legal defence is considered as one of the most important rights of the defendant in the procedural aspect and one of the elementary standards which determines the possibility of observing human rights, equally important is for legal representation through a defence attorney to be practical and effective, which unfortunately is not up to standards in Kosovo.

This phenomenon was also an object of frequent criticism from international monitors of the justice system in Kosovo.

The achievement of a higher standard in this regard should be a primary objective of the law enforcers in Kosovo and the justice system in general.

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- Criminal Procedure Law, Dr. Ejup Sahiti, Prishtina 2005,
- Criminal Procedure Code of Kosovo,
- Criminal Law on Minors,
- Justice Code for Minors,
- European Convention for Human Rights and Freedoms,
- International Convention for Children's Rights – Peking Rules,
- Non-effective legal representation, OSCE report.

Besim Susuri

DISREGARD FOR DEADLINES AND EFFICIENCY OF CRIMINAL PROCEEDINGS

Introduction

"Laws are as good as the people who enforce them"

Enrico Ferri

Based on the principle of criminal procedure law, that it is a system of legal rules through which the subjects of criminal proceedings are determined and through it their relation to the criminal proceedings are regulated by undertaking procedural-criminal actions, all directed towards the objective of shedding light and resolving a criminal issue as a case and a duty of the criminal procedure law[7]. Hence based on provisions of Article 1 of the Criminal Procedure Code of Kosovo (CPCK)[8], rules are determined which guarantee that no person who is innocent will suffer punishment, while the guilty will be sentenced with a punishment or another appropriate sanction deserved, according to conditions foreseen with the Criminal Code of Kosovo (CCK) based on the prescribed legal procedure. This leads to the conclusion that criminal procedure has multiple functions.[9]

Therefore, from one side, criminal procedure is an efficient tool for the protection of society from criminals, as during the criminal procedure important issues are resolved, like:

7 Prof. dr Stanko Bejatović: Krivično procesno pravo-Opšti deo- Kultura Beograd, 1995 page 25.
8 "Official Gazette of the FSRY", no. 4/77, 14/85, 36/77, 74/87 and 3/99.
9 Dr. Đorđe Lazin: Efiksnost krivičnog postupka i zaštita sloboda i prava gradjana zagarantovana medjunarodnim paktom o gradjanskim i političkim pravima: JRK i KP 1985 page 117.

1) The that criminal act was really committed,
2) That is the criminal act was committed, who is the perpetrator of it,
3) That against the person for who it has been proven during the investigations and in the main hearing, that he the defendant has committed the crime, within the meaning of the provisions of substantive criminal law he will be sentenced with a punishment determined by law.[10]

From the other side criminal procedure is a defence tool for the rights of the citizen who is suspected of committing a criminal act.
The criminal procedure has been constructed on the bases of two tendencies. The first, the classical one, with the objective of society being defended in an effective manner from criminality, and the second, the civil one, which to the largest extent possible defends the rights of the citizen.
However, in essence these tendencies are in contradiction with one another.

It is logical that the regulation of criminal procedure should be based on reasonable compromise.

Therefore, the Criminal Procedure Code of Kosovo, to a certain extent has achieved agreement between the above mentioned tendencies because through numerous original solutions it has created original legal conditions for regulating criminal procedure and the protection of citizen's rights.

1. PRINCIPLE OF CRIMINAL PROCEDURE EFFICIENCY

The word efficiency is derived from the Latin expression *efficacilis* which means successfulness, however the efficiency of criminal procedure is a more wide and complex matter, which is conditioned by many circumstances. In theory there is not comprehensive term for the notion of criminal procedure efficiency. The aim of this paper is not the issue of defining it by giving answers on this issue but rather the presentation of basic principles of criminal procedure efficiency in the context of deadlines in criminal procedure. It is undisputed in this matter that by criminal procedure efficiency we mean

10 Dr. Vladimir Bayer: JKPP, knjiga prva, Zagreb 1960 page 4.

the swiftness of criminal procedure development, specifically its conclusion with the shortest possible time I order to arrive to the appropriate court verdict or to the appropriate verdict for its termination. The criminal procedure efficiency can be defined as the swiftness with which the subject of criminal procedure act in the context of resolving the legal – criminal event, specifically the concrete criminal case initiated by subjects authorised to initiate a criminal case in accordance with the Criminal Procedure Code. The swiftness of the criminal procedure development as one of the factors of efficiency, can be justified with justifications of the policy on crimes but only to the extent that it does not effect the legality of the criminal procedure development and the reaching of a legal and proper court decision. We should have in mind that the swiftness of the criminal procedure development and legality are two correlative elements which are were difficult to harmonise.[11]

Based on this, by efficiency of criminal procedure we mean the high level of swiftness which ensures legality in the successful development of the criminal procedure and makes the same efficient. Despite this, there is often mention of non-efficiency of criminal procedure which is anyway conditioned by the deficiencies and frequent mistakes at work and during the work of principal criminal procedure subject, which primarily are related to the disregard of legal deadlines which condition the whole procedure of its inefficiency.

In the determination of his civil rights and obligation or of any criminal indictment against him, every person has a right to a fair and open process within a reasonable period of time in an independent and impartial court, established according to law. [12]

2. DEADLINES IN CRIMINAL PROCEDURE

2.1. Meaning and objectives of deadlines in criminal procedure

With the objective of implementing criminal procedure in an appropriate manner and swiftly, it is necessary to respect as accurately as possible the

11 O. Cvijovič: Uticaj medjusobnih odnosa glavnih procesnih subjekata na efikasnost krivičnog postupka JRK i KP 1995 page 70.

12 Article 6 paragraph 1, European Convention on Human Rights

legal regulations related to the deadline for undertaking specific criminal procedure actions.

With regard to deadlines in criminal procedure the Criminal Procedure Code of Kosovo determines the necessary time for undertaking certain procedural actions in two ways, initially by defining this by determining the generally expressed norm of *"without delay"* (Article 199 § 3 of the CPCK).

In this regard the Procedural Code determines also if the criminal report through which the criminal procedure is initiated, was submitted to the police or to a prosecutor without authority, the same should be accepted and without delay submitted to the prosecutor with authority, (Article 254 § 2 of the CPCK), while the person deprived of his freedom should without delay be presented to the preliminary procedure judge to decide of the detention, (Article 213 § 1 of the CPCK), and afterwards the person is informed of his rights on the immediate assistance of a defence attorney after his arrest in accordance to his wish, (Article 281 § 1 of the CPCK), and that the preliminary procedure judge, specifically the court can set the detention period or free the suspected person from detention, (Article 212 § 1, 2 of the CPCK), or from the arrest and holding by the police authorised by the prosecutor, (Article 306 par. 2 of CPCK), and also after receiving the indictment, the judge confirming the indictment verifies if the indictment has been prepared in accordance with Article 305, (Article 392 par. 1 of the CPCK) and if the same can be confirmed or not, then the issuing of the verdict, (Article 395 § 1 of the CPCK), and the phase of writing the verdict within the legally determined deadline.

The necessary time for undertaking procedural actions is regulated also with the general expression like ***"without delay"*** (Article 211 CPCK), therefore the police can deprive the suspected person of his freedom when there are reasons for holding him based on Article 281, par. 1 of the CPCK, but that they are obliged to bring him without delay before the preliminary procedure judge so that he can decide on his detention, or Article 409 § 1 of the CPCK, when the materials of the case according to the appeal reach the court of the second instance, the reporting judge forwards the case file to the prosecutor with authority, who reviews it and without delay gives his opinion and returns it to the court for a decision to be reached.

The time required for undertaking procedural actions, determines the accurate time related to the deadline within which the procedural actions need to be undertaken. The deadlines determined are foreseen according to different procedural situation which range from 6, 24 and 48 hours; 3, 8 15 days; 1, 2, 3, 5 and 6 months and 1, 2 or 3 years, therefore deadlines are calculated in hours, days, months and years.

The Criminal Procedure Code does not determine the meaning of deadlines. However, in the theory of criminal procedure law we encounter different definitions related to deadlines.

The deadline is a time period set, within which a procedural – criminal action should, can or is allowed to be undertaken[13] and in accordance to all the elements, especially to rights and obligations, this definition is more complete. Some other definitions do not include all the elements of defining a deadline, specifically criminal procedure deadlines.

However, some authors who in criminal procedure law treat deadlines as a science, by deadline imply: initially the moment, day, accurate time determined when a procedural action should be undertaken or the time when the undertaking of such action should start; secondly the time distance in which the action should be undertaken or that the same is not allowed to be undertaken[14]. In the first case it refers to a session, while in the second to a deadline in the legal understanding . [15]

However, without taking into account the previous definition, from the meaning deadline we should distinguish the meaning of session (term). From many criminal procedure sessions, the Criminal Procedure Code of Kosovo, has specifically regulated the main hearing, a session called-set by the court. Abandonment of this session can have procedural repercussions which is dependant of the case foreseen by law or the decision of the court. In this regard, if parties of the determined criminal procedure have been regularly invited but have not come to the main hearing: the defendant can

13 Criminal Procedure Code of Kosovo 2004.

14 Dr. Ejup Sahiti. E drejta e Procedurës Penale, Prishtinë 2005.
Dr. Davor Krapac. Ligji i Procedurës Penale, edition IV, Zagreb 2006.

15 Dr. Dragoljub V Dimitrijević: Krivično procesno Pravo 1965 page 219.

be brought to the following session by force or even be detained (Article 341 of the CPCK); a witness or expert can also be brought by force a also be fine (Article 336 CPCK), while a private plaintiff, under certain conditions can lose the right to criminal prosecution (Article 54 of the CPCK).

The common aim of the criminal procedure, specifically the observing of deadlines and its efficiency is to achieve the most consistent application of the economisation principle and the establishment of conditions for a criminal process which is swift and as efficient as possible. However, in addition to this the aim of observing deadlines and efficiency in criminal procedure is to protect the rights of the citizen, i.e. relief from procedural situation which are tough especially for the detainee, hence detention should be set to the shortest possible time period in order for that suspected citizen detention no to be turned into a suffering of punishment.

The rules of criminal procedure regulate the procedural deadlines, specifically the deadlines of implementing all the determined criminal procedures, while criminal law regulates the substantive deadlines. Therefore, in essence these deadlines differ. While the procedural deadlines represent a set time distance within which the procedural action should, can or is allowed to be undertaken, while substantive deadlines deal with the institutions of substantive criminal law, i.e. prescription of criminal prosecution (Article 90 of the CCK), prescription of enforcement of punishments (Article 92 of the CCK) which are a basis for cessation of rights, in this case of criminal prosecution or specifically enforcement of the punishment.

2.2 Types of deadlines in criminal procedure

The classification of deadlines in criminal procedure is done according to set criteria while the most important division of deadlines is in those *legal* and *judicial.*

Legal deadlines, are deadlines, the duration of which is directly determined by law, i.e. the deadlines for filing an appeal against to verdict of the court of first instance (Article 400, par. 1 of the CPCK). According to the rule these deadlines are preclusive, which means that they cannot be extended, except for in cases specifically foreseen by law (Article 94 of the CPCK), for instance the extension of the deadline for changing the indictment (Article 306, par. 2 of the CPCK), which determines that immediately after receiving the indictment, the judge who implements the procedure for

confirming the indictment verifies if it has been written in harmony with Article 305 of the CPCK and when he evaluates it to have not been written in harmony with provisions of Article 305, he sends it back to the prosecutor to make the changes within a legal deadline of 3 days. However, this 3 day deadline in cases where there are reasonable circumstances, the judge acting on the proposal of the prosecutor can extend this deadline. While is the subsidiary plaintiff or private plaintiff, does not respect the legally set deadline, in such cases it is considered that the private –subsidiary plaintiff has withdrawn from prosecution and the criminal procedure is terminated.

Legal deadlines according to the methods of their regulation are divided into deadlines of set duration, i.e. 8 days and in deadlines of unlimited duration but which are connected to specific procedural moment (i.e. the damaged party might have a limited right to review the material of the case file under Article 80 of the CPCK), he can have a temporary limitation on reviewing the material of the case file if there are special reasons for this, which have to do with national security or something similar.

Judicial deadlines are deadlines the duration of which is set by the court, based on legal authorisation. Judicial deadlines are divided into direct and non-direct deadlines. For direct deadlines, the setting of these judicial deadlines is left to the court to decide. In these cases we are dealing with the discretional right of the judge, without any legally set limitation, during which the judge considers the circumstances of the case, i.e. the deadline within which an expert will present again his opinion-conclusion. If the date from the conclusion of the experts change substantially or when the conclusions of the experts are unclear, incomplete or in contradiction with one another or the circumstances reviewed, and in the event that there deficiencies cannot be overcome with an additional examination of experts, in these cases the expert evaluation is repeated with the same experts or other experts (Article 184 CPCK), or in relation to the deadline for filing a new indictment (Article 376, par. 2 CPCK).

On judicial deadlines in the non-direct sense of the word, the court sets a deadline within the limits set determined by law, and bases this on the set criteria along which the judge set a deadline in line with the law.[16]

16 CPCK 2004 Prishtinë, CPL of BiH 2003 Sarajevo, commentary of the CPL of Montenegro 2006 Podgorica.

According to the ***effects of the deadline*** for undertaking a procedural action, deadlines are divided into ***dilatory*** and ***peremptory.***
Dilatory deadlines are deadlines are those during which period the realisation of certain procedural activities is prohibited, which are legally allowed only after the elapsing of the set time period.

Peremptory deadlines are deadlines as part of which certain procedural actions can and are undertaken, as with the elapsing of deadline the right to undertake such action can be lost.

Deadlines differ from one another by taking into account the criminal-procedural actions for which they have been determined. In consideration of this we distinguish between *court actions, actions by parties and actions from third parties.* This difference in deadlines is interesting due to the repercussions which become apparent in the event of missing the deadlines. The consequence of missing a deadline depends on who has missed it, the court or the party. When the missing of the deadline is made by the court, in this event there are no damaging repercussions. However, if the deadline is missed by the parties, according to rules this has a preclusive effect, meaning that the specific action cannot be undertaken. For the prosecution as a party this applies in cases of the deadline for filing an appeal.

According to the **criteria of cause of consequence** which follows the missing of a deadline, deadlines are divided into *preclusive* deadlines and *instructive* deadlines.

Preclusive deadlines are deadlines the missing of which produces the consequence of losing the opportunity to undertake the criminal-procedural action, and with it is lost the right which would have been fulfilled by undertaking that action, which means that we are dealing here with deadlines which if missed will produce legal repercussions as criminal-procedural actions can no longer be undertaken. In comparison to preclusive deadlines, *instructive* deadlines are deadlines the missing of which does not result in losing the right to undertake criminal-procedural action, which means that we are dealing with deadlines that if missed they do not produce legal repercussions but only (the judge of prosecutor) has unsanctioned duties.[17]

17 Mr. V. Pjanović JRKK 1997, Rokovi u krivičnom Postupku

In the Criminal Procedure Code of Kosovo, for certain actions of the court or of the prosecutor there are instructive deadlines foreseen.

Instructive deadlines according to the CPCK have been foreseen with the expression like "immediately" (Article 210) or "without delay" (Article 221, par 1) . [18]

2.3 Calculation of deadlines in criminal procedure

Deadlines are calculated with hours, with days, with months and years (Article 95, par 1 of the CPCK).[19]

For the setting of important deadlines it is required to determine the moment of its initiation and that of its expiration. The deadline begins to elapse from the moment foreseen in accordance to the law, or from the moment determined by the court.[20]

On deadlines set in hours or days, the hour or day when the notice was served or when the event occurred which is considered as the beginning of the deadline is not calculated as part of the deadline, but rather the first following hour or day is considered as the beginning point of the deadline. A day is calculated as twenty four hours, while a month is calculated according to the calendar (Article 95, par 2 of the CPCK).

Deadlines set in months or years expire in the last month or year, at the end of the same day of the month when the deadline began. If such a day does not exist in the last month, the deadline expires in the last day of that month (Article 95, par 3 of the CPCK).

When the last day of the deadline is on a official holiday, on a Saturday or Sunday or on another day when the competent authority does not work, the deadline passes to the following working day (Article 95, par. 4 of the CPCK).

18 CPCK.

19 CPCK 2004 Prishtinë, Dr. Ejup Sahiti, e Drejta e Procedurës Penale Prishtinë 2005, Kodi i Procedurës Penale i Shqipërisë, Krapac Davor, Kazneno Procesno Pravo II izmenjeno i dopunjeno izdanje, prva knjiga, Zagreb 2003.

20 Hoxha, Artan, Islam, Halim, Panda Ilir, Procedura Penale Tiranë 2007.

This method of calculating deadlines provides for the criminal-procedural party which has been given a deadline in hours or days a complete unit of time which has been expressed wither in hours or days. The hours or day in which the claim was filed is not calculated into the deadline but rather the first following hours or following day. On deadlines expressed in months or days, the method of calculation results in the party having a whole month or year at his disposal.

Deadlines set in hours, for the activities of state authorities, elapse without regard to working hours, holidays or the following days, because here we are dealing with urgent actions, which in criminal procedure have to be undertaken by all means. If the deadline set in hours elapses in favour of the party and passes the date of the holiday or the following day then this deadline is not extended.

When the declaration is linked to a deadline, this is considered to have been delivered within the deadline, if it has been delivered to the person authorised to receive it before the deadline has expired, (Article 92 § 2 of the CPCK).

When the declaration is sent through the mail, registered mail or through other means (telex, fax or other similar means), the date of mailing through registered mail or delivery is considered as the date of filing for the person addressed to. The sender of the declaration is considered not to have missed the deadline, when the person for whom this was intended has not received it because of a failure in the means of delivery for which the sender was not aware of (Article 94 § 3 of the CPCK)[21].

The defendant who is in detention can give a declaration which is linked to a deadline, by including this in the record of the court which is applying the procedure or by filing this at the prison-institution Head Office, which is considered as the day of filing to the authority authorised to receive it. When the submission, the filing of which is linked to the deadline, for reasons of unawareness or a clear mistake of the sender was sent to a court not authorised to received it and hence is received after the passing of the foreseen deadline, will be considered to have been submitted in time (Article 94 § 5 of the CPCK).

21 CPCK Prishtina 2004, Dr. Ejup Sahiti, e Drejta e Procedurës Penale ,Prishtinë 2005.

Filing of giving the declaration after the deadline has expired does not have a legal effect, which is in line with the principle of legality and efficiency of the criminal procedure.

2.4. Return to the previous condition - (Restitucio in integrum)

With the aim of having an efficient criminal procedure and protection of citizen's rights, the criminal procedure should be developed swiftly. For this reason in order to undertake criminal-procedural actions deadlines are foreseen, which according to the rule are short. However, as much as this is good it is also dangerous. Is the deadline is missed damaging consequences can follow for the parties in the procedure, because the missing of the deadline can be missed without it being the fault of the party, therefore the damaging consequences would be unjust. In such situations the law foresees the possibility of the deadline being missed by the party which through this has been affected, and in this regard this party can require from the court to return to the previous condition. From the other side, as much as this institutional rule is in the interest of the principle of the material truth it is also a suitable tool for the extension of the criminal procedure. In consideration of this, the return to a previous condition is not a general institutional rule but is foreseen only for instances foreseen by law, as it has been foreseen by the Criminal Procedure Code of Kosovo that return to a previous condition in certain conditions foreseen by the provisions of the CPCK are to be used by: the defendant, private plaintiff, the damaged party as a private plaintiff and the damaged party who has not been appropriately invited to the main hearing in which a verdict of acquittal was reached due to the withdrawal of the prosecutor. Therefore, for example a defendant that has missed the deadline due to justified reasons for filing an appeal against the verdict, the court will allow the return to previous conditions, in order for the appeal to be filed within a 8 (eight day period.

If the private claimant does not attend the main hearing despite the proper invitation, or that the invitation was not able to be delivered due to the private plaintiff not having informed the court of a change in his address or place of domicile, as he is obliged to do so, the chair of the panel of judges will consider that the damaged party has withdrawn from his legal right to a lawsuit.

The Chair of the Panel of Judges, after the filing of plea for return to a previous condition by the private plaintiff, will allow such a thing, only in cases when the private plaintiff for justifiable reasons could not attend the court session or in cases of an address or place of domicile change, and could not inform the court in time on this matter, and therefore the invitation could not be delivered. In this situation, the damaged party – the private plaintiff within an eight day deadline from the day of this legal limitation being lifted is obliged to file a plea for a return to a previous condition, specifically in a situation after the reaching of the verdict to file a plea for return to a previous condition also, within the legally foreseen deadline of eight days, during which the private plaintiff declares that he continues with the criminal prosecution. In this case a court session is set and with the verdict reached based on the new judicial review the previous verdict is annulled.

If the private plaintiff who was properly invited does not attend the newly set court session, in this event the previous verdict remains in force. The plea for a return to the previous condition can be filed within a deadline of three months, and after the passing of this deadline from the date of it being issued a plea for return to a previous condition cannot be filed as the legal deadline for this has been missed (Article 60 to 68 CPCK)[22].

An appeal against the decision that allows return to a previous condition is not allowed.

The plea for return to a previous condition according to the rule does not prohibit the enforcement of the verdict.

3. DISREGARD FOR DEADLINES AND EFFICIENCY OF THE CRIMINAL PROCEDURE

The efficiency of the criminal procedure is a complex issue, and there is no agreement even in theory on what we mean by efficiency of criminal procedure. It is undisputable that with efficiency of criminal procedure we mean the swiftness of procedure development, and that the swiftness of the criminal procedure can be justified to an extent that does not affect the

22 Articles 60 to 68 of the CPCK

legality of the criminal procedure being applied or violates the rights of the citizen. All of these actions should be regulated with provisions which should be harmonise contradictory tendencies: the efficiency of criminal procedure and the protection of citizen's rights.

The criminal procedure law of 1953 and the many revisions made latter on which have led to the harmonisation and advancement of legal provisions, when in 1967 the requirement for an increased efficiency of the judiciary was made, since then we have an increasing demand for procedural guarantees for the defendant, with a specific orientation in the periods of the following years with tendencies for this relationship to somewhat improve in favour of a better efficiency but including in it all the guarantees in favour of the defendant. [23]
From this we can derive that legal regulation affect the efficiency of criminal procedure.

For a criminal procedure to develop properly and efficiently it is necessary to foreseen an set with this aim in mind deadlines for undertaking criminal-procedural action, therefore in principle it can be said that the observing of deadlines set for undertaking criminal-procedural action have an effect in the efficiency of the criminal procedure. This is the general principle and above all it deals with legal deadlines, the duration of which is regulated by law and that these deadlines cannot be changed by the court nor the parties based on their agreement, except for when such a thing is regulated by law.

Legal provisions on deadlines, important for the protection of the rights of citizens we can slow down the procedure, i.e. when the last day of the deadline is on a official holiday, on Saturday or Sunday, or on another day when the competent authority does not work, the deadline is transferred to the end of the following working day (Article 95, par 4 CPCK), some of the provisions for the submission of letters and review of the case files, in principle letters are sent by mail. The submission can be done also through the authorised municipal authority, to the officer of the authority that has taken the decision or directly through that authority. Letter, the submission of which has to be done in person are delivered directly to the person to

23 Dr. Jovan Buturović, Najnovije izmene ZKP'a i njihov značaj za efikasnost krivičnog Postupka JRKK 1985.

whom it is addressed. The invitation for examination in the preliminary procedure is personally delivered to the defendant, before the judge of the preliminary procedure, in the session for the confirmation of the indictment and judicial review. The receiver and sender both have to sign the delivery slip with the objective of proving the delivery, and the receiver marks in the delivery slip personally the date and hours of receiving the material, which is important for initiating the calculation of the appropriate deadline (Articles 124-134 of the CPCK).

Legal deadlines the duration of which is not limited in time but is linked to a specific procedural moment, like with the right of the subsidiary plaintiff and private one to review the court record, letters and things that serve as proof (Article 61, par. 3 of the CPCK), and is however, an important procedural action which effects the efficiency of the criminal procedure.

Judicial deadlines can also slow down the criminal procedure, especially the real judicial deadlines, i.e. the deadline within which (after the rejection of the indictment by the court) the prosecutor should prepare and file a new indictment. When the plaintiff during court proceedings determines that the evidence considered indicate that the factual conditions presented in this indictment have changed, the one in the court proceedings can change the indictment verbally, and can propose for the court proceedings to be halted to allow the preparation of a new indictment. In the event of halting the court proceedings to allow the preparation of the new indictment by the plaintiff, in this case the deadline is set within which the plaintiff is obliged to present the indictment (Article 376 of the CPCK)

The prolonging of the criminal procedure is affected by the so called instructive deadlines, even though these are rules intended to make the procedure swifter. A specific risk is represented by these norms-deadlines because they are numerous and are dedicated to important and urgent procedural actions. Therefore, investigation in its nature is considered urgent and the law has not determined a deadline for it, but rather the law foresees an instructive deadline: is the investigation is not concluded with a period of six months, the public prosecutor will make a written request to the preliminary procedure judge, together with the reasons for the investigation not being concluded and requests the possibility to continue with the investigation (Article 225 of the CPCK).

After the conclusion of the investigations the prosecutor is obliged within the shortest period possible to take a decision to file the indictment act, which forwarded to the competent court for confirming the indictment, where after accepting the indictment the judge confirming the indictment, is obliged to control formally the indictment, to confirm or refuse it on some or all points of the indictment.

If the indictment does not contain all the obligatory elements, the judge responsible for confirming the indictment is obliged to reject it and return it to the prosecutor in accordance to Article 306, par. 2 of the CPCK, and through this the formal control of the indictment is conducted.

If the prosecutor does not present to the judge in time proposals or other actions or undertakes these in the procedure with considerable delay and through this procrastinates the procedure, in such situations the senior prosecutor is notified (Article 146, par 3 of the CPCK).

In order to prepare the main hearing and setting the main hearing an instructive deadline is provided which is thirty days long, after receiving the indictment, within which the panel of judges, if they do not set the main hearing, will obligate the chair of the panel to inform the president of the court on the matter on the reasons for not setting the hearing, who in turn will take measures if this is seen as necessary in order to set the main hearing (Article 319, par. 1 of the CPCK).

Instructive deadlines are foreseen also for the drafting of the written verdicts, in a regular procedure, specifically within a deadline of fifteen days when the accused is in detention, and within thirty days in other circumstances. When the verdict is not prepared within this deadline, the chair of the panel of judges informs the president of the court on the reasons for its non-preparation. In these cases the president of the court undertakes all measures necessary for the quickest possible preparation of the verdict, but not later than thirty days from the announcement of the verdict, if the accused is in detention and forty five days in all other circumstances (Article 395, par 1 of the CPCK).

A judge for minors is obliged to set a main hearing or session of the panel within a deadline of eight days, after receiving the proposal of the prosecutor

from the day of the preparatory procedure being concluded, or from the day when in the session of the panel it was decided to hold a main hearing. For any extension of this deadline the judge for minors the approval of the president of the court is necessary (Article 69, par. 1 of the KDPM of Kosovo)

Instructive are all deadlines which in themselves have general expressions *"immediately"* or *"without delay*".

Instructive deadlines are legal deadlines which by missing them, specifically by not observing them, there is no legal consequence. For parties missing these deadlines only an official obligation is foreseen which is not sanctioned. Based on these reasons and many others of the objective or subjective nature, instructive deadlines are usually not observed, which directly affects the procrastination of the criminal procedure.

Disregard of deadlines is of an absolute character, and the criminal procedure last too long and is not efficient.

Instructive deadlines are in the interests of the rights of citizens which limit the duration of certain procedural actions. The disregarding of deadlines in the criminal procedure reflects negatively in the development flow of the criminal procedure.

Having in mind that all instructive deadlines are foreseen with the objective of criminal procedure efficiency and also for the protection of citizen's rights who are suspected of committing a criminal act, however such deadlines are not respected and their disregard does not produce legal repercussions, even though it would have a logical or legal basis for the disregard of deadlines in criminal procedure to be considered as a violation of law.

Deadlines in the criminal procedure are above all aimed at the efficient functioning of the criminal procedure. Some of the legal provisions on the deadlines in criminal procedure (i.e. provisions on the passing of the deadlines, on the deadlines for filing paperwork, then provisions for the extension of deadlines, of legal deadlines the duration of which is not limited in time, and similar), can slow down the efficiency of the criminal procedure.

24 CPCK, Prishtinë 2004, Pravna Enciklopedija "Savremena Administracija 1985.

Additionally, the disregard for deadlines affects the efficiency of the criminal procedure, but a specific matter in this is disregard for the so called instructive deadlines. [24]

Only an efficient criminal procedure, which entails a swift uncovering of the criminal act and its perpetrator, the undertaking of criminal prosecutions and the issuing of the criminal punishment, can serve the crime fighting effort, specifically it would be an answer to the objectives of special and general prevention.

Otherwise the procrastination and inefficiency only encourage the potential perpetrators of crimes, as with the procrastination of criminal procedure only strengthens sub-consciousness that time *(will do its bit)* is sufficient to favour especially these young improperly formed persons.

The period of transition and crises which a citizen of the state of Kosovo has gone and is going through, is providing a suitable terrain for the development and perfection of classic criminality, and new aspects of criminality.

In order to fight this occurrence which is being fought but without a proper degree of success, the necessity which faces the proper state authorities and those of the judiciary is the necessity for the criminal procedure to develop swiftly, without delay and efficiently.

The old maxim for the procrastination and fulfilment of justice says: *"How achievable is justice if the criminal procedure last for long and in that case it results in the devaluation of all that which would be achieved through efficiency, which rightly alludes to a state with rule of law".*

What can be done in the improvement and strengthening of efficiency from the quantitative and qualitative aspect, without delay, it is necessary for the author of the law to be raised to the highest level. Primary this means that law enforcement does not depend on the price and evaluation of political parties, and even less on the individual. We should ensure that All those violating the law to be held accountable, as well as those who do not apply the law, and against violators of legal norms. Further we should ensure a unified judicial practice for the whole territory of the Republic of Kosovo, when we are dealing with law enforcement in the whole territory of the state.

What can be done *immediately,* by not waiting for changes in the law and the human resources that we have (when we talk about the problems of human resource nature, primarily we refer to the overburdening of judges, the deficiency in the number of judges and prosecutors, improper conditions for the exercise of these functions, inadequate legal education or similar), it should necessarily to define as accurately as possible all the deadlines foreseen by the CPCK, especially those of the instructive nature, because most of the reasons for the procrastination of the criminal procedure is related to these deadlines.

Therefore, we need to harmonise the Law with our reality, so that it becomes applicable and is in the interest of the parties in the procedure, and would relieve it from romanticism of norms.

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Bujar Muzaqi

EXPROPRIATION OF REAL ESTATE

1. INTRODUCTION

By expropriation we mean that real estate can be expropriated when this real estate is necessary for the construction of commercial, residential, municipal, healthcare, cultural and other buildings of general interest.

Real estate can be expropriated even when this is necessary for the development of other types of work which is of general interest.

2. OBJECTS OF EXPROPRIATION AND THE EXPROPRIATION AUTHORITY:

An object of expropriation according to the Law of Expropriation of Real Estate no. 03/L-139 of the Republic of Kosovo,[25] can be private property rights or other private rights over an immovable property, excluding rights over real estate which are part of a category of property which based on the Constitution or the Comprehensive Proposal are expressly determined to be objects for which expropriation is prohibited.

Real estate can be expropriated for the following reasons:

- Construction of railways, roads, bridges, airports, channels;
- Development of settlements, roads, parks, squares;

25 In Article 4 par.1, and 2 of Law no. 03/L-139 on expropriation of real estate, of the Republic of Kosovo, the expropriation authority is foreseen, and the object of expropriation;

- Construction of water supply systems, and other Municipal buildings;
- Construction of schools, museums, art galleries, and other buildings for educational and cultural purposes;
- Construction of hospitals and other buildings for healthcare and social purposes;
- Construction of buildings for physical arts and sports;
- Exploration of mineral wealth and other assets beneath the ground;

The expropriation authority (Government, Municipality) is authorised to make the expropriation of real estate only after the fulfilment of these conditions: expropriation is implemented to achieve a legal public objective within its authority; a legal public objective cannot be reached in practical terms without completing expropriation; the public benefit from expropriation is greater than the interest which would be negatively affected by expropriation; and real estate which is the object of expropriation has no other aim or discriminating objective.

3.COMPENSATION AND PAYMENT OF COMPENSATION[26];

Compensation is made on the basis of the properties market value.

The compensation for expropriated real estate is paid in €uro[27].

If a person refuses to accept compensation, these funds are deposited in a trust account in the Central Bank of Kosovo (CBK) in the name of the person in question.

All the funds deposited in a trust account are considered to have been "paid" with the aims foreseen by the Law on Expropriation of Real Estate of the Republic of Kosovo.

26 In Articles 15 par. 1 of Law no. 03/L-139 on expropriation of real estate, of the Republic of Kosovo, foresees compensation for the expropriated object;

27 In Article 16 par. 1, 2, 3 of the Law no. 03/L-139 on expropriation of real estate, of the Republic of Kosovo, foresees compensation for the expropriated object;

As far as evaluation of the property is concerned, an office is established within the Ministry of Economy and Finance for the evaluation of real estate, which is the competent public Authority for the evaluation of all real estate which is an object of the expropriation procedure conducted by any of the Expropriation Authorities.

The Office for evaluating Real Estate will issue the final evaluation act within one-hundred-and-fifty (150) days from date of receiving the request from the Expropriation Authority.

The written evaluation act should contain: the overall value of the property which is the object of expropriation, an evaluation of all damages – if any – which should be paid for according to this law, personal information on persons which will be paid with compensation; the sum of the compensation which will be paid to each one of them, and the list of persons that have required compensation, but which have been determined not to have a right to this.

4. LEGAL REMEDIES AND PROTECTION OF PROPERTY

Law no. 03/L-007[28] of the Republic of Kosovo on non-dispute procedure regulates the method of utilising legal remedies as in the following: if parties in the expropriation procedure do not achieve agreement for compensation of the real estate, the competent administrative Authority will forward the final decision on expropriation, along with all the paperwork, to the Competent Court where the expropriated real estate is located, in order to determine the compensation.

If the Administrative Authority does not forward to the Competent Court the Decision on Expropriation, then the owner has the right to directly address the Competent Court with a claim for determining the compensation for the expropriated property.

28 In Article 215, Article 216 par. 1, 2, 3, and Article 217 par.2 of the Law nr. 03/L-007 on non-dispute procedure, of the Republic of Kosovo, the determination of compensation has been foreseen by the Competent Court for the expropriated real estate;

The procedure within the Competent Court should be concluded as swiftly as possible, and latest with a 60 day deadline, from the day of the proposal being filed with the Competent Court.

However, Law no. 03/L-139[29], on the expropriation of real estate of the R. of Kosovo regulates this as follows: The person who is not satisfied with the decision of the Expropriating Authority, has the right to an Appeal before a Competent Municipal Court.

If the Government expropriates then the appeal is filed with the Supreme Court of Kosovo.

The appeal should be filed within 30 days after the entry into force of the Decision on expropriating the real estate.

The Court will consider the appeal of the appellant in an urgent manner.

Protection of Property is foreseen also with Article 17, par. 2 of the General Declaration on Human Rights, which amongst other states:

"No one can be deprived arbitrarily from their property"

Protection of property is ensured also based on Protocol no.1 of the Convention[30] for the protection of human rights and basic freedoms which amongst other states:

- ***Every natural or legal person has the right to peacefully enjoy their property;***
- ***No one can be deprived from their property, except for reasons of public interest and under conditions foreseen by law and under general principles of international law".***

The protection of property is also guaranteed by the Constitution[31] of the Republic of Kosovo, which in Article 46, par. 3, states that:

29 Article 35 of the Law no. 03/L-139 on expropriation of real estate, of the Republic of Kosovo, foresees legal remedies;

30 See Protocol no. 1 of the Convention for the protection of human rights and fundamental freedoms;

31 See the Constitution of the Republic of Kosovo, Article 46 par. 1, 3;

"No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated."

5. TRANSFER OF PROPERTY IN THE NAME OF THE EXPROPRIATION AUTHORITY

As the decision on expropriation of real estate takes a final form, and after the payment of compensation, the appropriate cadastral office registers the property in the name of the:

- Appropriate municipality, if the Expropriating Authority is the Municipality:
- Republic of Kosovo, if the Expropriating Authority is the Government.

6. RESTITUTION OF EXPROPRIATED PROPERTY AND LEGAL DEADLINES

Initially we cite Article 22, par. 4 of the Law on Expropriation of Kosovo "Official Gazette SAPK" 25/73[32] which determines that:

"The final and binding decision on expropriation can be annulled also based on the request of the former owner, if the party utilising expropriation within a term of three years after the Decision on expropriation has taken a final and binding form, has not conducted, in accordance to the nature of the object, any substantial works in the construction of that building"

The same matter is the same manner is regulated also with the Law on Expropriation of the SAPK of 1978 – Article 21, par. 4; the Law on Expropriation of 1986 – Article 21, par. 4; and also the one of 1989.

32 See Article 22 par. 4 of the Law on Expropriation in Kosovo "Official Gazette SAPK" 25/73

While Law no. 03/L-139 of 2009[33] on expropriation of real estate in the Republic of Kosovo, states that: The person the property rights of whom over the real estate have been expropriated, has the right to file an appeal before the competent court and to require from the Court to issue an order for the restitution of the property rights over the given property. The right to an Appeal can be exercised only within 10 years after the final decision entered into force.

This Appeal before the competent Court can be presented for the following reasons:

- The property which was expropriated by the Government has not be expropriated for a legal public objective;
- The expropriated property, has be used by the Expropriating Authority in an active manner for a period of 3 (three) years for an illegal public objective, and;
- During an eight year period the expropriated property has not been utilised for any purpose;
- The former owner agrees to reimburse the paid or ensured compensation for the expropriation of the real estate, and if the compensation was done in cash then interest is also payable.

Conclusion:

Based on the Articles, Protocols foreseen with above mentioned Laws, European Convention, Kosovo Constitution, the general Declaration on human rights, we come to the conclusion that protection of property rights is guaranteed with the Constitution of Kosovo, the laws of the Republic of Kosovo, European Convention, and the general Declaration on human rights, and that private real estate can be expropriated by applying applicable laws, but only when this is necessary for the aim of developing works that are of general social interest and the fulfilment of certain conditions like: the expropriation is done to achieve a legal public objective; the real estate which is the object of expropriation has not other discriminating objective

33 See Article 27 of the Law no. 03/L-139 on expropriation of real estate, of the Republic of Kosovo

or aim, and that Compensation has to be done in a fair manner and based on the market value of the real estate being expropriated.

Laws that we mentioned and are not in force in the Republic of Kosovo were mentioned because in Article 40 of the Law no. 03/L-139 On the expropriation of real estate in the Republic of Kosovo, states that:

"In relation to expropriation procedure initiated before the entry into force of this law, legal provisions applicable until the day of this law entering into force are applicable".

By applying in a proper manner all the Articles foreseen in the above mentioned laws, it will be easier for the Republic of Kosovo to guarantee property rights during the process of acceding to International Organisations.

LITERATURE:

- Law no.03/L-139 on expropriation of real estate, of the Republic of Kosovo
- Law no.03/L-007 on non-dispute procedure, of the Republic of Kosovo;
- Law on expropriation in Kosovo "Official Gazette SAPK" 25/73;
- General declaration on human rights;
- Constitution of the Republic of Kosovo;
- European Convention for the Protection of Fundamental Human Rights and Freedoms.

Diellza Hoxha

Servet Metaj

1. EUROPEAN CONVENTION FOR THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

Brief background

Introduction

Taking into considering that the General Declaration on Human Rights announced by the General Assembly of the United Nations on the 10th of December of 1948;

Taking into consideration that this Declaration is aim to ensure the recognition and universal and effective application of rights determined by it;

Taking into consideration the objective of the Council of Europe which is comprised of 47 member states to fulfil a more close cooperation between its members and that one of the tools to achieve this objective is the protection and development of fundamental human freedoms and rights;

By emphasising again their deep commitment to these fundamental freedoms which constitute in themselves the foundations of justice and peace in the world and the protection of which is supported mainly on a political reaction that is truly democratic from one side and from the other side is a concept and a joint adherence to human rights which they have undertaken to protect;

By being a government of the European states motivates by the same spirit and a wealth of ideals and common political traditions for respecting

freedom and the rule of law state, determined to undertake the first appropriate measures to ensure collective guarantees of a number of rights mentioned in the General Declaration, agree as in the following

Parties to the contract recognise the rights and freedoms of every person who is located under their jurisdiction determined in the first part of the Convention.

The Convention was adopted on the 4th of November 1950 in Rome. The Convention has entered into force in September 1953.

The first part of the Convention deals with the fundamental human rights and freedoms –

Article 2 – the right to life
Article 3 – prohibition of torture
Article 4 – prohibition of slavery and forced labour
Article 5 – the right to freedom and security
Article 6 – the right to a proper process
Article 7 – no punishment without a law
Article 8 – the right to respect of private and family life
Article 9 – freedom of thought, conscience and religion
Article 10 – freedom of speech
Article 11 – freedom to assembly and association
Article 12 – freedom to marry
Article 13 – the right to effective appeal
Article 14 – prohibition of discrimination

These rights are divided into those absolute, qualified and limited

Articles **2, 3, 4 (1)** and Article **7** are **absolute rights**
Article **5, 6** and **12** are **limited rights**
Articles **8, 9, 10** and **11** are **qualified rights**

The second part of the Convention

With the aim of ensuring the adherence to commitments for contractual parties resulting from this Convention, the following was created:

European Commission of Human Rights and the European Court of Human Rights

The European Court of Human Rights and Freedoms is located in Strasburg of France. This Court acts on the initiative of the individual or contracting parties to the Convention, specifically the State.

The Court is comprised of an equal number of judges as member states, which are 47 judges which are selected by the Parliamentary Assembly. The Court considers individual claims and those of states.

The Court rules in:

- Committees of **3 Judges**
- Chambers of **7 Judges**
- Higher Chamber of **17 Judges**

The Procedure before the European Court is initiated with the filing of a claim, while its continuation is subject to the fact of whether this claim will be accepted.

The claim from any of the above mentioned contracting party can be referred to the Court pertaining to any violation of the convention or its protocols by another contractual party;

A natural person, non government organisation or group of individuals who are victims of a violation made by one of the contractual parties;

The European Court of Human Rights is a court of precedence is bases its work on its own decisions related to similar cases.

2. ARTICLE 8 AND ARTICLE 12 OF THE CONVENTION

2.1 Article 8 – The right to respecting private and family life

Article 8 is divided into two parts:

Paragraph 1 of this article prescribes the accurate rights which are guaranteed to an individual by the state – the right to private life, specifically family, residential, and correspondence.

Paragraph 2 of this article clarifies the fact that these rights are not absolute so far as in making it acceptable for the public authorities to intervene in the right under article 8 in certain circumstances. Circumstances in which public authorities can intervene in a legal manner in the rights under paragraph 1 are: only an intervention in a democratic society in the pursuit of one or more legitimate objective specified in paragraph 2 will be considered as acceptable limitations by the state on the rights of the individual according to article 8.

2.1.1. The essence of private life concept

According to the Court private life contains a wide concept that cannot have a accurate determination, however the notion of private life would be very narrow if it was limited to a narrow circle in which the individual would be able to live his personal life according to his choice and to exclude everything else that is out of the notion that includes this narrow circle. The respect for private life should contain also to a certain degree the right to create and develop relationships with other human beings, also in foreign countries.

2.1.2 Life of the family

The concept of the life of the family was developed in a slow manner during the life duration of the Convention and continues to be developed in order to take into consideration social and legal changes.

The Court like in the concept of private life holds the same balanced position in interpreting the life of the family, by taking into consideration the diversity of problems of a modern family, issues of divorce and medical advances. In this article the life of the family is directly positioned to belong to the private sphere, where it has the right to act without the arbitrary intervention of the state.

What does the life of the family contain.

The family based on marital relations.
The protection ensured by Article 2 is always related to marital relationships

which can appear as legal and true. Those that have deficiencies and exist formally like, for example a fictitious marriage which has taken place in order to avoid rules of emigration or in order to obtain citizenship, it is possible not to fall under the aim of Article 8.

A child born from parents that are legally married will based on this fact truly be part of that relationship from the moment and the fact of his birth.

Article 8 is applied automatically in the relation between a mother and her child, irrespective of her marital status.

Unmarried couples which live together with their children are normally considered to be enjoying their family life.

Is living together enough to enjoy the life of the family?

Living together is not a necessary condition of family life irrespective of the marital status of parents, therefore members of families which do not live together due to divorce or separation or even agreement can of course be provided with protection under Article 8.

Family life can exist between children and their grandparents, kinships, relations between the uncle or aunt and their nephew or niece, relations between parents and extra marital children, adopted parents and children.

2.1.3 Place of residence

Residence is the location where one person lives or where this person is based, and within this all the places of residence comprise the place of domicile within the meaning of Article 8, par. 1.

2.1.4 Correspondence

The right to respect correspondence of one person is a right which is related to uninterrupted and unimpeded communication with others.

The meaning of correspondence includes materials which are forwarded by main, but this concept also will be considered continuously by being

interpreted step by step in parallel to technological developments which can bring new communication methods, like the email, within the sphere of protection guaranteed by Article 8.

The identity of the sender or receiver of the correspondence will play an important role in determining what is required by Article 8. The court has made the fact clear that the protection offered for such correspondence like letters and other like this which are exchanged between lawyers and their clients and especially the imprisoned is very high.

Article 8 par. 2 states that the public authority will intervene in cases where it is necessary for a democratic society in the interest of national or public security or economic welfare of the country to prevent the destabilisation or a crime, for protection of health or morals, or for the protection of human rights and freedoms of others.

What does intervention involve? [34]

Intervention involves:

- Taking children from their parents and sending them to public case centres.
- Prohibiting the correspondence of inmates
- Searches in the houses of persons
- Collection and storing of information in a secret archive of the police.

If the intervention has occurred in one of the rights under Article 8, the comes the question?

1. Is the intervention in accordance to law?
2. Does the intervention follow a legitimate objective?
3. Is the intervention necessary in a democratic society?

Meaning of in accordance to law

The intervention should have a legal basis and the law in question should be very accurate and contain a measure of protection against arbitrariness of the state.

34 Manual for the implementation of the European Convention – manual on human rights

The intervention should have a legal basis, as measures will open up problems in this regard when these were not authorised specifically by a state and regulated from administrative practice or other guidelines in mandatory force.

Example: the case Malone against England; the Court considered the fact is the authority to listen in to telephone call had a legal basis.

At that time the surveillance of telephones was regulated by administrative practice the details of which were not published and there was no specific statutory authorisation, therefore the court concluded that there was no sufficient clarity on the objective or manner in which the freedom of the authorities to secretly tap into telephone conversations because this contained an administrative practice which could change at any time and this constituted a violation of Article 8.

In order to fulfil the legal requirements of Article 8, the quality of the law should be formulated with sufficient accuracy in order to allow for persons, if necessary even through counselling, to determine to a certain extent if the measures taken where reasonable in comparison to the circumstances, the consequences of which have caused a given action, is known as the condition of being foreseeable.

Does the intervention follow a legitimate objective

At the moment when an intervention is determined to be in line with the law, the court will continue to consider if it is following a legitimate objective according to Article 8, par. 2 which contains the list of objectives based on which the state can request to support its actions as part of it: The State can argue that:

- Collection and storage of information on individuals is of interest for national security.
- The checking of correspondence of inmates aims to prevent instability and crime.
- Removal of children from a abusive household, or denying custody of a couple or contact with the objective of protecting the health or morals, or the rights and freedoms of others.

- Order of deportation of removal serves the interest of economic welfare of the country.

Is intervention necessary in a democratic society?

Within the context of Article 8 the importance of a rule of law state was highlighted for a democratic society and the need to prevent arbitrary interventions in the rights of the Convention. The Convention was written to protect and promote ideals and values of a democratic society. In general what is necessary for a democratic society for the purposes of Article 8 is to determine from the reference the equilibrium gained between the rights of the individual and the public interest through the application of the principle of proportionality.

The principle of proportionality recognises the fact that human rights are not absolute and that the exercise of the rights of one individual should always be checked in line with a larger public interest.

An overarching principle in the Convention is the effort to create a fair equilibrium between the requirements of general interest of the community and the conditions of protecting the fundamental rights of the individual.

Freedom to evaluate

The Court gives the State the freedom to evaluate when it takes decision is an intervention in one of the rights of Article 8 is justified according to paragraph 2 of this provision. The freedom of evaluation which is given to competent national authorities will be varied based on circumstances, subject matter and its background.

2.2 Article 12 – The right to marry

A husband and wife from reaching the age of being eligible to marry have the right to get married and create a family according to national laws that regulate the exercise of this right. [35]

35 Article 12 of the European convention on human rights and fundamental freedoms

Fundamental rights are rights that a state guarantees to its citizens and which are included in its Constitution. Their application can be required by a citizen before a court. While human rights include the fundamental idea behind these fundamental rights.

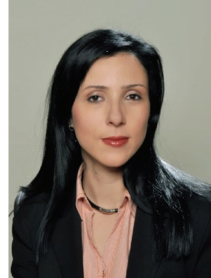
As part of fundamental human rights is also the right to marry. However, we need to have in that Article 12 of the Convention protects single occurring actions – marriage, while Article 8 protects continuously. This difference is best expressed in the fact that states cannot prevent inmates from getting married, but can prohibit the married inmates to live together.

Article 12 guarantees gender equality between the wife and husband in the privileges of this right. However, Article 12 does not determine the right to choose marriage (divorce) and neither the perspective to be remarried (case of Johnston and others against Ireland 1986). It is important to mention that Article 5 of protocol no. 7 foresees the equality of spouses both within marriage and in the event of choosing it, specifically the right to privacy and family under Article 8 and the right to marry under Article 12, and the equality between the spouses under protocol 7 and Article 5 are all interconnected and as a consequence together protect a range of rights that overlap and interconnect.

Conclusion

The Republic of Kosovo has a priority in attaining membership in the UNO and the Council of Europe by taking obligations for the application and advancement of human rights, all the rights guaranteed under the Convention are guaranteed under the Constitution of the Republic of Kosovo, specifically the rights guaranteed under Article 8 and 12 are guaranteed under Article 36 and 37 of the Constitution. [36]

36 Article 36 and Article 37 of the Constitution of the Republic of Kosovo



Franciska Zhitia Ymeri Saranda Bogaj Sheremeti

TORTURE

1. NOTION OF TORTURE

Torture is an inhumane, demining and degrading act undertaken by an official person, an action done on purpose with the aim of obtaining information from that person, or various statements for actions that he has committed or is suspected of committing.

Torture as cruel treatment has its roots in early history, but which is practiced by many states even now.

In order to better understand the review of the topic which we have chosen, initially we need to understand and elaborate that which we understand to be torture.

Torture means "serious bodily harm or torment with various means, which is done to someone in order to make him speak, reveal secrets, to subjugate him, to reveal his guilt and other guilty parties, etc; beatings, starvation, water and sleep deprivation, irritation of wounds, etc.

While, according to the international law norm, the notion of torture is defined with a wider notion: "torture means any action done to another person, with the aim of causing pain or serious physical or mental suffering in order to force him or a third person to give information or statements related to an act, which he or another third party has committed or is

suspected of committing, or with the aim of frightening or compelling him or a third party, or for any other reasons based on discrimination of any type, where such pain and suffering is caused by an official person or an ex officio third person, or with his endorsement or approval. This notion does not include suffering and pain which result only from legal sanction, which are related to it or caused by them.”

Torture was used since the beginning of human society. In Europe it reached its pinnacle in the period of the inquisition. Torture was used as the main tool for terror in the Soviet Union and in other communist countries of Eastern Europe. According to the UN Convention of the 26th of June 1987, torture is defined as: torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or any other motive”

The characteristics of this criminal act are:

1. On criminal responsibility, this criminal act can be done only on purpose,
2. This criminal act can be done only by an official person and that only if the crime is committed during the exercise of his official duty.
3. In order to consider if this criminal act has been committed and the specific aim on which the official person has used forced with the aim of obtaining a declaration from the defendant.

2. REGULATION ON THE INTERNATIONAL AND NATIONAL ASPECT

Many can make the question of: What kind of relation is there between human rights and the development of a county or issues related to it? What is the role and function they play in economic, social and moral development and prosperity of the country? The best answer to this was given by

statesmen of the European State after the destructions of the Second Wald War. They decided to build a Europe based on wider foundations than only economic development and open markets. It was thought to be necessary to rebuild the continent on the basis of respect for special values, rights and freedoms which define the concept of a rule of law state and constitute the main pillar of democratic societies. Therefore, they decided that a society cannot be constructed without placing the individual, his respect and dignity and rights which originate from him, as the centre piece of attention.

The Council of European and European Convention for Human Rights resulted from this need and from these beliefs.

Together with Magna Carta and the French Declaration of Human Rights, the Bill of Rights of the United States served as a model for the Universal Declaration of Human Rights, which stipulates that: "…it is necessary that elementary human rights be protected with legal provisions of the state, so that a person is not forced to the point of rebellion against tyranny and oppression". Additionally, one of the basic principles of international law on the protection of fundamental human rights and freedoms is Article 5 of this Declaration, which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; Furthermore, according to Article 7 of the International Pact on citizens and political rights, foresees the prohibition of all forms and other means of torture: "Every person has the right to his physical and mental integrity being respected and protected. No one should undergo suffering or inhuman and degrading punishment", because these forms of torture are not allowed, also with the Charter on fundamental rights of the EU (Chapter I, Articles 3 and 4), approved in Nice, on the 17.12.2000).

Additionally, according to provisions of the Convention on the protections of human rights and fundamental freedoms, Article 3 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Convention for the protection of human rights and fundamental freedoms, Rome, 04.11.2950 which entered into force on the 03.09.1953; European Convention for the prevention of Torture and of inhumane and degrading punishment and treatment, Strasbourg, 26.11.2987 which entered into force on the 1st of February 1989, paragraphs 3 and 4.

2.1 Torture according to Kosovo Criminal Code

This Code places the torture as a criminal offence among the Criminal Offences against Human Rights and Freedoms – Article 165.

According to KCC: An official person, or a person acting at the instigation of or with the consent or acquiescence of an official person who commits an act of torture, shall be punished by imprisonment of five to fifteen years.

This Code was promulgated in 2003, whereas it became effective in 2004; until this year there was a Serbian Criminal Act, which if compared to the current Kosovo Criminal Code there is a big difference especially in awarding the punishment.

Former Yugoslavia is recognized as one of the countries that has implemented the applicable laws the least, laws that were promulgated by its bodies, but also the implementation of agreements, conventions which it has signed and is state party to.

We are still suffering the consequences of that state of anarchy in Kosovo; in Kosovo's prisons, even today the rights of the prisoners are not practiced enough, whereby we often encounter different protests by prisoners.

According to the Kosovo Rehabilitation Centre for Victims of Torture, there were 500 victims of torture recorded in 2006.

3. EUROPEAN CONVENTION OF HUMAN RIGHTS

No one shall be subjected to torture, inhumane or degrading treatment or punishment.

Rights protected by Article 3 of the Convention are related directly with the personal integrity and human dignity of the individual. Thus, freedom from torture, inhuman or degrading punishment and treatment are the rights of extraordinary importance. At the same time, rules allowing to determine whether a country has violated one of these rights are to a large extent

subjective. These two elements have driven that the Commission and the Court interpret provisions from Article 3 in a strict way in majority of circumstances.

Hereby, the Court and the Commission differentiate between the three notions of Article 3 in compliance with the degree of severity of special treatment and punishment. For every notion they have determined standards of degrees of prohibited behaviour as in the following:

- Torture – inhuman treatment committed with the intent of causing severe and cruel suffering.
- Inhuman treatment or punishment - causing an intensive physical and mental suffering.
- Degrading treatment – ill-treatment striving to create among the victims a feeling of anxiety and inferiority capable of degrading and humiliating them and possibly break their physical and moral resistance.

It is worth noting in this regard that although many complaints have been made for violation of Article 3 by the individual prisoners, the Commission and the Court have rarely found violations in these matters. The Court found violations of Article 3 where individuals submitted documentation in time for the injuries they claim they had suffered while in custody by the police and where the Government offered no credible alternative explanations regarding the cause of those injuries.

The Court found a violation of Article 3 in case Soering v. United Kingdom (1989), in which a young German, whose extradition was requested by the U.S. for a murder which was punishable by death, whereby he would face the possibility of a long-term imprisonment in the "death row". Although it acknowledged that the death penalty was legal in the U.S., the Court stated that for it to submit the applicant to the death row phenomenon it would be in breach of the rights guaranteed by Article 3 and that the United Kingdom would be responsible for this under the Convention.

In another case the Court found a violation where the lack of financial or emotional support and low quality of health care in the country of return, were inadequate to meet the needs of an individual in the final stages of AIDS (D versus United Kingdom (1997).

4. STRASBOURG COURT

No state body or institution has the right to exercise victimization, arrests, persecutions, imprisonment, torture and terror against any person seeking the exercise of his/her rights and freedoms, because these cruel inhuman and anti-human acts of the civilized world are prohibited and punishable according to the norms and rules of the international law and international applicable legal order, hereby constituting a crime, namely for criminal offences which are strictly sanctioned by the International Court of the United Nations and the European Court of Human Rights.

Establishment of the Court with a unique jurisdiction in the world proves the desire to ensure that this Convention should be more than just another statement.

Since the establishment, operation of the Council of Europe is focused in supporting greater respect for these values in the law and practice in its member states. In this context, the Court plays a crucial role for the transformation of the rights into reality for hundreds and thousands of people who have found the solution to their rights in Strasbourg, whilst its decisions have resulted in incalculable changes in the law and practice of member states to the benefit of all.

The main responsibility for implementation of the ECHR certainly rests with the national authorities. The Strasbourg Court is the last option and provides a solution to only a small number of individuals. In order for judges and prosecutors to be able to fulfil this important role, they must be trained properly. The Council of Europe welcomes the efforts of the Albanian authorities above all on the training in the School of Magistrates. The more issues are resolved in the national courts, the less people will be forced to take their applications to Strasbourg.

4.1 How to address to Strasbourg Court

If you think your grounds of appeal are related to a violation of the rights guaranteed by the Convention or by one of the Protocols, first send a letter to the secretary of the Strasbourg Court containing the information listed below. This letter must be addressed to: Le Greffier de la Cour européenne des Droits de l’Homme Conseil de l’Europe F-67075 STRASBOURG

CEDEX FRANCE. Your letter may be written in Albanian or any other foreign language and must contain: A brief summary of the reasons for your appeal, and citing of the right or the rights guaranteed by the Convention that you assess to have been violated. You will do this after you have read the European Convention of Human Rights and find the relevant Article, e.g. Prohibition of torture (Article 3), the right to a fair trial (Article 6), the prohibition of discrimination because of a national origin, religion (Article 14) etc. Appeals you have filed for example to the Court of Appeals or the High Court.

List of decisions issued for your case by a public authority, specifying for each decision: the date, its contents in the summary and the issuing body. Attach your letter to the copy of these decisions. (These documents will not be returned to you. As a result, it is in your interest to send only copies and not the originals). Appeal can be made by you personally or your authorized lawyer or any other person authorized in writing by you. Court Secretary will respond to you. You will be probably requested to provide additional documents, information or explanations regarding your appeal. They may inform you on how the Convention was interpreted in similar cases. In case when acceptance of your appeal has any obvious obstacle, you will be made aware of. If from your correspondence with the Secretary it turns out that your appeal can be registered as an application to the Strasbourg Court, and if you wish for it to be registered as such, the secretary will send you the forms used to formally submit your application. Once you have completed and addressed them to the secretary, your application will be submitted to the Court. You will be made aware of the progress of proceedings by the Secretary. This procedure, at least initially, is conducted in writing. So, you or the person authorized by you, does not have to appear at the Head Office of the Court. If possible, it is better to engage a lawyer to file your claim. Later on, during the proceedings, if necessary, you can get legal aid if you do not have the means to pay for a lawyer. But such aid cannot be granted at the time when submitting the application, but after the appeal has been accepted for a review by the Strasbourg Court.

Conclusion

So any action of torture or any other cruel, inhuman or degrading punishment or treatment, is an affront to a human dignity and should be condemned as a negation of the goals of the United Nations Charter and as

a violation of human rights and fundamental freedoms declared in the Universal Declaration of Human Rights.

Although prohibited by the international law and condemned by a number of international conventions, torture continues to be the predominant reality and quite spread these days. Torture and ill-treatment continue to be practiced in many countries, including signatories to the Convention against Torture. International pressure could force these Governments to use their authority to prevent torture, giving us a ray of hope that one day torture would be just a history.
According to the United Nations data, torture is present in many countries; despite its condemnation by the international community it is still part of the justice system. Torture is a crime and its prevention is essential and indisputable. About 50 countries, including Iran, Burma and Vietnam have not signed the UN International Convention against Torture of 1987; therefore they are being called upon to sign the Agreement and open their prisons to a check by the UN. Human rights organization Amnesty International has forewarned that there will be efforts to prevent torture in these countries.

Torture destroys men, women and children, families and communities. Torture undermines human and economic development of the society, which is one of the rights of all people.

There are disasters that cannot be prevented, such as tsunami. However, torture is a disaster caused by a man himself. You can prevent torture and heal the victims affected by it.

Literature:

- Albanian language dictionary „Rilindja“ Prishtina 1976 f.569.
- Universal Declaration of Human Rights of 1948.
- Provisional Criminal Code of Kosovo.
- Criminal Law, Special Part, Prof. Dr. Ismet Salihu.

Minir Hoti

Mentor Hajraj

THE APPEAL AGAINST THE FIRST INSTANCE COURT VERDICT

"The procedural institute of the appeal was first born within the inquisition procedure. It was based on the right of the Emperor to interfere in the actions of its subordinates. The appeal made to the Emperor to interfere in the actions of his subordinates was called appellatio, therefore the appeal meant the right of the procedural subject to attack the decision of a lower instance judge in front of higher instance judges. Further on, every higher court had the right the review the case by giving a new decision, the procedural actions in two instances was based not on the subordination relation between a lower instance judge towards a higher instance judge, because judges are dependent by and from the law, but towards rendering as better as possible verdicts".[37]

The appeal towards the first instance court verdict and the procedure foreseen for its rendering is regulated by the Code of Criminal Procedure of Kosovo, precisely, from Article 398 to Article 429.

In Article 13 of the European Convention for Human Rights, is also foreseen the right to an effective appeal, where anyone whose rights and liberties, recognized by this Convention, are violated has the right to an effective appeal in front of an institution of his /her own country and also when the violation is committed by persons that act within exercise of their official duties[38].

37 Criminal Proceedings Law, Ejup Sahiti 2005
38 ECHR Article 13

In spite of the procedural guarantees foreseen in the procedure that aim finding the truth, in spite of the fact that through the verdict the verifying of the factual situation is aimed, in concordance with how the situation was developed when the criminal offence was committed, there are possibilities that the first instance court verdict, due to different reasons, could be unjust or could have violated certain legal provisions.

1. AUTHORIZED PERSONS FOR SUBMITTING AN APPEAL

Authorized persons only can submit an appeal within the limit of 15 days from the day of received of the verdict. The appeal submit within the time limitation can suspend the execution of the verdict, precisely the suspension character of the appeal.

Based on Article 399 an appeal can be resented by the parties, the defence attorney of the defendant, the authorized legal representative of the accused and the injured party, though only for the decision of the court related to penal sanctions for criminal offences against life and body, against sexual integrity, public traffic safety and for procedural expenses of criminal proceedings[39].

The right to fully submit an appeal has the public prosecutor, this due to the fact, that he/she can submit an appeal against the first instance court verdict be it against the interests or in favour of the interests of the defendant, because the prosecutor defends the general public interest thus aiming to have the criminal matter be tried in a just manner ad not have the sentencing of the defendant in each and every case.

The public prosecutor can submit an appeal in favour of the defendant even against his will because he works independently and protects genera; interests.

The defendant as a party in the proceedings has the right to submit an appeal in accordance with every appeal basis under the conditions as foreseen by the Criminal Proceedings Code.

39 Criminal Proceedings Code of Kosovo.

The Criminal Proceedings Code does not have any special provisions on the possibility for the defendant to submit an appeal against an acquitting verdict, such an appeal is not expressively forbidden by law, but this depends from the juridical interest of the defendant when submitting such an appeal. The right of the defendant to appeal an affirmative verdict does not have to mean that he/she will appeal to jeopardize himself/herself but there are cases when the juridical interest requires that one be released based on the factual situation and not based upon the juridical basis.

The injured party based on Article 399 par. 3 can submit an appeal against the verdict only in relation with the penal sanction in cases of criminal offences against life and body, sexual integrity and public traffic safety , but only if in that matter the injured party was in the position of a subsidiary plaintiff, the injured party can submit an appeal based on grounds for attacking an appeal.

The injured party can not file an appeal because of legal violations, be it procedural or material, and not because of erroneous and incomplete evaluation of the factual situation.

The defense attorney has an independent right of submitting an appeal, as compared to the defendant, the defense attorney can also submit an appeal which means that one appeal does not exclude the other one, however, and the defense attorney cannot submit an appeal that damages the defendant.

Based on Article 399 par 5 of the Criminal Proceedings Code, the defense attorney can submit an appeal even without a special authorization of the defendant, but not against his will, in such a case there is an exception and that is only cases when the defendant is sentenced with long imprisonment, as well as, the criminal proceedings against juveniles as per Article 77 par 2 of the Juvenile Criminal Code[40].

The right to submit an appeal also have the person's the wealth of which is confiscated or persons from whom the profit, ill gained through a criminal offence, is confiscated , also the right to submit an appeal have juridical persons the wealth of whom is confiscated.

40 The Juvenile Justice Code Article 77 paragraph 2

All of the persons which based on the law are entitled to submit an appeal are obligated to announce the submitting of an appeal at least 8 (eight) days after the announcement of the verdict.

When no one from the persons that have the right to submit an appeal does not announce an appeal within the legal time limits it is then considered that they have waived their right for this and in these cases it is not necessary to have it in the written verdict, the reasoning part, or the audio recording of the trial sessions. An exception to this represents the case when the defendant is sentenced with effective imprisonment.

2. THE CONTENT OF THE APPEAL

The content of the appeal is set forth as per Article 104; according to this provision an appeal should contain the following:

- Data on the verdict which is appealed ,
- Reasons why is the verdict objected,
- Reasoning of the appeal,
- The proposal for an entire or partial annulment or for changing it and the
- Signature of the appeal

If the appeal submitted does not contain the data given above, and it is submitted by the defendant, the injured party, the subsidiary plaintiff or the private plaintiff that do not have an authorized representative, then the first instance court requests from the appealing person that in a certain time period to amend the appeal through a submission or orally which must be mentioned in the court session minutes.

When the appeal does not contain data on the verdict towards which the appeal is submitted, in the first place, the court shall refute the appeal only when the court cannot determine to which verdict the appeal refers to. When the appeal does not contain data as foreseen by Article 401 par 1 subparagraphs 2, 3 and 5 of the Criminal Proceedings Code the court shall refute the appeal.

When the appeal is submitted by the injured party the subsidiary plaintiff or the private plaintiff that have an authorized legal representative, or if the submitter of the appeal is the public prosecutor and the appeal does not fulfil the requirements as per Article 401 par 1 subparagraph 2, 3 and 5 or when the appeal does not contain the data as per paragraph 1 subparagraph 1 of this article and cannot be determined as to which verdict the verdict refers to then the court shall refute such an appeal.

In the appeal it is allowed to present new evidence that have not been elaborated in the proceedings developed in front of the first instance court , but in these cases the appealer is obliged to give reasons as to why did he/she not present these evidence before.

When the appealer bases upon new evidence through which these facts can be proven, and when it refers to new evidence , then one is obliged to present arguments through which aims to prove them.

3. THE REASONS FOR SUBMITTING AN APPEAL TO THE FIRST INSTANCE COURT VERDICT

The appeal against the verdict can be submitted due to objective (real) or juridical flaws which were made because of mistakes and flaws of procedural subjects that were made by the court.

Based on Article 402 paragraph 1 of the Criminal Proceedings Code the appeal against the verdict can be exercised for the following reasons:

When the appealer considers that the court has violated the law error in iure , in this case the appealer should ground his appeal in one of the essential violations of the procedural provisions or because of the violation of the criminal law , whereas, when the appealer considers that the court has made an error based on the factual situation error in factis then the appealer shall use the erroneous conclusion or the incomplete conclusion of the factual situation as a basis for submitting the appeal[41].

41 Criminal Proceedings Law Prof Ejup Sahiti 2005

Essential violations can be separated in absolute violations and in relative violations.

Essential absolute violations of the provisions of the criminal procedure shall be considered when:

- The composition of the court was not in accordance with the law, or when rendering the verdict a lay judge has taken part that was not present in the main trial session or when through a decision he was expelled from the trial sessions;
- In the trial session has participated a judge that should have been expelled;
- The trial session was held without the presence of persons the presence of which is demanded by law, or when the defendants, the defense attorneys, the subsidiary plaintiffs, or the private plaintiffs , independently from their requests , were denied to use their language in the trial session and denied the implementation of following the trial session in their own language;
- The public is expelled from the trial session against the law;
- The court has violated the provisions of criminal procedure in relation to the issue whether there is an accusation from the authorized representative – plaintiff , the proposal if the injured party or the permission of the competent public institution;
- The verdict was rendered by the court that did not have the material competence to try the case or the court has refused the indictment due to material incompetence;
- Through the rendered verdict, the court has not tried in entirety the object of the indictment;
- The verdict is grounded on inadmissible evidence;
- The summoned defendant to give a statement on the guilty plea did not plead guilty for the entire indictment of some parts of it and was interrogated before being presented the evidence;
- The verdict has exceeded the indictment (Article 386 paragraph 1 of this Code);

- The provisions of Article 417 of this Code have been violated through the verdict, such is the case when the appeal is presented in favour of the defendant, whereas, as far as the juridical evaluation of the criminal offence and the penal sanction the verdict as such cannot be changed on the defendants' disfavour therefore in such situation the principle of reformation in peius – non aggravation of the position of the defendant, comes into force.
- The enacting clause of the verdict is not understandable, it is in contrariety with its content or the reasons of the verdict , when the reasons of the verdict are very unclear or in contrariety in a considerable measure , when for the decisive facts there are considerable contradictions between what is presented in the reasons of the verdict with the content of the case files or of the trial minutes for the statements given in the proceedings and between the case files and the proceedings' minutes.

The essential relative violations are the following:

The violations which are foreseen in Article 403 paragraph 2 of the Criminal Code of Kosovo , are essential relative violations , which the court during the time of the preparation for the trial session, including the pre trial proceedings, the court, the public prosecutor and the police officer if;

- A certain provision of the Criminal Code of Kosovo is not applied or it is applied wrong
- The rights to defense have been violated and this has influenced or could have influenced in the rendering of a free and regular verdict.

4. THE VIOLATIONS OF THE CRIMINAL LAW

The second group of grounds for appeal is composed of criminal law violations, or of any other criminal provision, that have to do with the non application or the erroneous application of a certain provision in relation to

the existence of a criminal offence, the criminal liability or the criminal sanction.

Based on Article 404 of the Criminal Code, the violations of the criminal law exist when the criminal law is violated in the following matters:

- If the offence for which the defendant is being prosecuted is a criminal offence
- If there are conditions that exclude criminal responsibility
- If there are circumstances that exclude the criminal prosecution, and especially if the criminal prosecution has undergone statutory limitation or is excluded because of amnesty or pardon or if before it was already tried and a legally binding verdict is rendered.
- If in relation on the tried criminal offence a law that cannot be applied has been applied
- If in the rendering the decision for sentencing , alternative punishment, judicial warning or taking the decision for the measure of obligatory treatment or rehabilitation or confiscation of wealth gained through the criminal offence, when the court has surely exceeded its competencies or
- If the provisions in calculation of the pre-trial detention into the served sentenced have been violated

5. THE ERRONEOUS AND INCOMPLETE STABLISHMENT OF THE FACTUAL SITUATION

The erroneous or incomplete evaluation of the factual situation has to do with the flaws of the verdict in relation to the factual situation – error in factis.

Based on Article 405 paragraph 2 of the Criminal Proceedings Code , the erroneous evaluation of the factual situation exists when the court has erroneously evaluated an important factor when the content of the document, the minutes on the evidence elaborated or the technical recording do question the exactness and the veracity of certifying of important facts

The erroneous evaluation of the factual situation exists then when the court based on the facts and certain evidence has established what the factual situation is, but when evaluating the evidence and when making the final conclusion on their truthfulness has made a mistake, therefore, the incomplete establishment exists then when the court has missed the establish all relevant facts and necessary evidence for rendering the necessary decision.

In the appeal presented due to the erroneous evaluation or the incomplete evaluation of the factual situation new evidence can be presented – Beneficium novorum , but based on Article 401 paragraph 4 of the Criminal Proceedings Code , if the appealer in the appeal presents facts and new evidence then he is obliged to justify as to why did he /she not present them before , when the appealer refers to new evidence he/she is obliged to present evidence through which these facts can be proven and when he refers to new evidence he is obliged to present facts through which he intended to provide justification for.

In Article 406 of the Criminal Proceedings Code another group of reasons for submitting an appeal if foreseen, therefore, in paragraph 1 of his Article the appeal can be submitted in relation to the decision on the rendering of the sentence or of the juridical remark when the court, taking into consideration the circumstances that influence in the judicial remark or in the height of the sentence , in spite of not exceeding the legal competencies, has not rightfully determined the sentence or the juridical remark , so in one word the court has not weighed the sentence appropriately.

In paragraph 2 of Article 406 of the Criminal Proceedings Code is also foreseen the possibility of submitting and appeal towards the decision on the measure of mandatory rehabilitation treatment for persons dependent on drugs or alcohol or for the confiscation of wealth gained through a criminal offence , in spite of the fact that the court has not violated of Article 404 subparagraph 5 of the Criminal Code , yet has taken an unjust decision or has not rendered the measure of mandatory rehabilitation treatment for persons dependant from drugs or alcohol or for the measure of confiscation of wealth gained through a criminal offence , in spite of that fact that legal basis for such had existed.

An appeal can be filed against the decision on the procedural expenses when the court, for such expenses, has decided in an unjust manner in contradiction with the provisions of the Criminal Proceedings Code.

Also, an appeal can be filed against the decision for the juridical material compensation request and also against the decision to make the verdict public via print media, radio or television when the court for such cases has taken a decision in contradiction with the provisions of the Criminal Proceedings Code

6. PROCEDURE RELATED TO THE FIRST INSTANCE COURT APPEAL

The procedure related to the first instance court appeal is developed in two parts, at the first instance court and at the second instance court.

6.1 The proceedings related to the appeal of the First Instance Court

In Article 407 and 408 of the Criminal Proceedings Code, the foreseen procure is developed at the first instance court in relation to the submitted appeal.

The appeal is submitted to the first instance court which has rendered the verdict for the second instance court in a sufficient amount o copies for the court, the opposite party and for the defense attorney in order to give a response to the appeal.

At the first instance court the appeal is accepted by the presiding judge that has rendered the verdict , he/she checks the appeal is it on time, is it submitted by an authorized person and does it contain the elements according to which it can be decided in relation to it.

The appeal presented out of the legally foreseen time limits, or the impermissible appeal shall be refuted through a decision by the presiding judge of the first instance court, against this decision the appeal to the second instance court is allowed.

An appeal submitted on time and in its fully correct content is then sent to the opposing party, by the presiding judge, which in a period of 8 (eight) days have the right to submit a response to the appeal. The first instance

court sends the appeal to the second instance court together with the response to the appeal if there is such and all of the other case files.

6.2 The proceedings in relation to the appeal to the second instance court

When the second instance court receives the cases with an appeal it hands it over to the reporting judge appointed as per the schedule of the court, the reporting judge has the duty of studying the case files especially the submission of the appealer in the appeal.

When in case of a criminal offences that are prosecuted as per official duty the reporting judge sends the case to the competent public prosecutor that elaborates the appeal and with no delay returns it to the court, in this case he/she can present a proposal or to declare that he will present the proposal in the collegiums session, after the prosecutor returns the case, afterwards, the presiding judge schedules the collegiums session.

The public prosecutor shall be informed for the collegiums session, as well as, his defendant, the non appearance of the parties summoned in a regular manner shall not hamper the holding of the session of the collegiums.

The collegiums session starts with the reporting of the reporting judge on these facts. The second instance court in collegiums session decides whether it will hold the session, the session will be held only when it is necessary, due to the erroneous evaluation of the factual situation or of the incomplete evaluation of the situation, and in order to take new evidence or the repeat the already taken evidence, as well as, when there exist well founded reasons to have the case not returned to the first instance court for a re trial.

If the second instance court decides to hold a session, then the session starts with the reporting of the reporting judge that presents the factual situation but with giving his opinion for the founding of the appeal.

The part of the indictment towards which the appeal is presented, and as needed, the minutes of the main trial session are read with the proposal of parties or as per official duty, afterwards the appealer is summoned to

justify the appeal, then the opposing party is invited to respond, the parties and the defense attorney during the session can present evidence and new facts , whereas, the defendant his defense attorney have the last word.

Based on the results of the elaboration the plaintiff can withdraw entirely or partially from the indictment or to change it in favour of the accused, when the prosecutor withdraws from the indictment in entirety the injured party has the rights as foreseen by Article 63 of Criminal Proceedings Code.

6.3 The boundaries of the elaboration of an appeal

After presentation of the appeal the second instance court shall elaborate the appeal in the parts for which the appeal is filed for, however, as per official duty every time elaborates on the following :

- If there are essential violations of the criminal provisions from Article 403 paragraph 1 subparagraph 1,2,6 and 8 until 12 of the Criminal Proceedings Code[42];
- If the trial session was held in absence of the defendant and in contrariety with the provisions of the Criminal Proceedings Code
- If in the obligatory defense case the trial session was held without the presence of the defense attorney and
- If the criminal law was violated aggravating the situation of defendant.

If the appeal was presented only in favour of the accused, in relation to the juridical evaluation of the criminal offence and of the penal sanction cannot be changed as to aggravate him.

7. The decisions of the second instance court related to the appeal

Acting as per the appeal against the verdict of the first instance, the criminal collegiums of the second instance court in the collegiums session of the main session can do the following:

42 Article 403 Criminal Proceedings Code

- To refute the appeal as such that has passed the limitations or as inadmissible
- To refuse the appeal as unfounded and the ascertain the verdict of the first instance court
- To annul the verdict and to return the case to the first instance court for a retrial and another decision or
- To change the verdict of the first instance court

The second instance court through a decision shall refute the appeal as one that has passed the statutory limitations when it concludes that it is presented after having passed the legally foreseen time limits, also through a decision refutes the appeal as an impermissible one when it concludes that it is submitted by a person that does not have the right to do so or by the person that has waived his/her right to appeal or when the appeal was withdrawn.

The second instance court through a verdict refuses the appeal as an unfounded one and ascertains the first instance court verdict when it concludes that there are no causes for which the appeal was submitted in the first place against the verdict , and that there is not violation of the ;aw as per Article 415 paragraph 1 of the Criminal Proceedings Code , whereas through a decision annuls the verdict of the first instance court and returns the case to a retrial when it s concludes that there are essential violations of the provisions of the criminal proceedings.

Acting as per the appeal or as per the official duty the second instance court changes the verdict of the first instance court through a verdict, when it ascertains that the decision making facts in the verdict of the first instance court are righteously ascertained, but however, taking into consideration the established factual situation as per the proper implementation of law another verdict was necessary to be taken.

Conclusion

In this piece of paper the object of study was the appeal presented against the first instance court verdict , the authorized persons for submitting the appeal, the content of the appeal , the reasons and the grounds for appeal, the procedure developed in front of the first instance court and the one of

the second instance concerning to the appeal presented and for the types of decision that the second instance court renders based on the appeal submitted.

LITERATURE:

- The Criminal Proceedings Code of Kosovo;
- The Criminal Code of Kosovo;
- The Juvenile Justice Code ;
- The Criminal Proceedings Code - Ejup Sahiti Prishtina 2005
- The European Convention for Human Rights

Musli Gashi Ilir Rashkaj

JOINT PROPERTY OF SPOUSES

INTRODUCTION

In this document we have tried to address the topic "Joint Property of spouses," which is very present in Europe as well as in our country.

The joint property of spouses is closely linked with the family and wedlock, transformations these two legal institutions have undergone have reflected on the joint property of spouses.

Property relations of spouses constitute the most important aspects of marital law, because they regulate the property to spouses as a very sensitive issue in the marital relationship.

While preparing this seminar, we have addressed the above topic in the following order: concept, nature of the law, administering, disposition and division of joint property of spouses.

The concept of joint property of spouses

Property relations between spouses are regulated by legal provisions on the Family Law. Living in wedlock, husband and wife jointly create material goods for their needs and to provide for their living. The set of legal norms which regulates property relations of a married couple is called marital property regime.

FLK legitimises two marital property regimes:

a. Legal regime and
b. Contractual regime.

Depending on the nature of property and the manner it is acquired, the spouses may have:

1. Separate property;
2. Joint property

1. SEPARATE PROPERTY OF SPOUSES

The property which has belonged to a spouse before entering into a wedlock remains his/her separate property; Article 46 of FLK. " Separate property is also property acquired during marriage through any legal means (inheritance, donation, games of luck, etc.), but, not through work. A work of art, intellectual work or intellectual property is considered separate property of spouse he/she has created".

2. JOINT PROPERTY OF SPOUSES

When speaking about joint property of spouses, the legal situation differs compared to the separate property. Joint property of spouses is property acquired through work during the course of marriage, including income deriving from such property (Article 47 par. 1 FLK), and the revenue derived from such property (Article 47 paragraph 1 LFK). "Joint property may comprise also of intangible and obligatory rights. Likewise, property acquired jointly through gambling games is considered joint property. Spouses are joint owners in equal shares of the joint property unless otherwise agreed on". For the existence of joint property of spouses, two conditions need to be fulfilled:

1. The existence of marriage
2. The joint work of spouses.

3. THE EXISTENCE OF MARRIAGE

Condition for the existence of joint property is the existence of marriage not only formally but also factually. Without the existence of marriage there can be no talk about the existence of joint property, because it would lack a legal basis upon which the joint property is created. Property created by spouses during the course of the breakup of matrimonial cohabitation is not their joint property, but separate property, regardless of the fact that the marriage has not yet dissolved.

Joint property of spouses can be created in two ways:

1. Direct work and
2. Indirect work.

Direct way exists when a spouse carries out activities which directly generate income, be it in cash or in kind. Whereas, the indirect way differs from the direct one because a spouse carries out other activities such as: housework, child care, etc.., which do not generate income but help the other spouse, and indirectly contributes to income generation.

The work of spouses in matrimony represents another condition for the existence of joint property. The work should be understood as an activity and contribution to fulfil the matrimonial community and family. The work of spouses may be joint or individual. Joint work exists when both have the same profession and do the same work, while individual work exists when spouses do not have the same profession and do not do the same work. The object of the joint property of spouses are the rights over the movable and immovable property, real rights such as servitudes and the right of pledge, etc.

4. LEGAL NATURE

The joint property of spouses is regulated by order norms.

When the value of shares of holders over the joint property is unknown, but both spouses are holders to a real right, for example the right of

ownership over an item, but it is not known which spouse has ownership over which part of that item, or both spouses are creditors to a right, for example, over the sales contract of an item, both spouses are entitled to the right of joint property, the sales price of the item, however, even in this case the value of their shares on that price is unknown until the division of joint property is executed.

Failure to respect the value of holders' shares regarding the right on joint property is another characteristic which makes joint property differ from co-ownership. When talking about co-ownership, it should be mentioned that it is clearly known the value of each share and its holder. Each co-owner has a part of a set share (1/2, 1/3, 30% etc.), in contrast to joint owners, where their shares on the property right over the same items are not known and are not defined in the most ideal and real way.

There are differences between these two institutions also in terms of rules that apply for registration of immovable property in public registers for recording immovable property. Thus, the rights of spouses on immovable property, which is joint property of spouses, is registered in the name of both spouses as joint property with undetermined shares (Article 50 par. 1 FLK). "When only one of the spouses is registered as property right holder on joint property in the immovable property rights register, it shall be considered as if the registration was carried out on behalf of both spouses. Property cannot be alienated without the consent of both spouses. In cases when both spouses are registered in the public immovable property rights register as joint owners for determined shares, it shall be considered that, in this way, they have portioned out their joint property. "

Whereas, the rights of co-owners over immovable property, which are co-owned, are registered in the name of each spouse.

5. ADMINISTRATION AND DISPOSITION OF THE JOINT PROPERTY

Spouses carry out the administration and disposition of the joint matrimonial property together and in agreement (Article 49 FLK).

Disposition of joint property includes measures and actions related to the alienation, authorisation and verification of the joint property right.

While in matrimony, spouses cannot waive their right of participating in the administration and disposition of the joint property, but they can enter into contractual agreements regarding the possession and administration, meaning that the spouses can contract to have the administration and disposition of the joint property, in whole or in part, carried out by one of the spouses (Article 51 par. 1 FLK). "The contract may also be limited only to administration or disposition only. Unless otherwise contracted, administration includes also possession within regular activities"

6. APPORTIONING OF JOINT PROPERTY

Apportioning of joint property can be done during the matrimony, as well as, after its dissolution. None of the spouses can be arbitrarily deprived of his/her property (Article 52). FLK in Article 53 par 1 provides that the spouses, at any time, may apportion their joint property through an agreement and stipulates that the agreement has to be made in writing, in accordance with the formal requirements defined by the applicable property law for conclusion of such agreements. According FLK, the right to request apportioning joint property have: spouses, successors of a deceased spouse or the spouse declared dead and the creditor of one of the spouses, if the request of the creditor cannot be realized from the separate property of that spouse.

Apportioning of the joint property of spouses in most of the cases is done through an agreement. But in cases when the shares of spouses are disputable or when the rights or when it is not clear whether certain items belong to the joint property, then the court decides in civic proceedings (contested) in the competent court (municipal).

When these issues are not disputable between the spouses, the apportioning of the property is done the non-contested procedure. (From the moment of apportioning the joint property, the share belonging to each spouse are their separate property).

If no agreement is reached while the share of each spouse belongs to the joint property, it shall be decided upon by the court. The decision should be based on the contribution of the spouses, by evaluating all the circumstances and not by taking into account only the personal income and other income of each spouse, but also the help provided by a spouse to the other spouse, such as: child care, housework, care and maintenance of the property, including other forms of work and cooperation regarding the administration, maintenance and enlargement of the joint property (Article 54 par. 1 of FLK).

Concrete apportioning is made by determining which are the items used exclusively for personal for personal use of spouses and items used for carrying out a craft or a profession. Upon the request of a spouse, from the total amount of the property, items serving exclusively for spouse's personal use will be separated and will be handed over to him/her for further use.

The largest share of the spouse in a determined object or determined right can be determined by the court, only if that object or right is economically independent compared to other objects and rights of the joint property, and the spouse, for obtaining such object or right, has participated with the income from his separate property (Article 55 FLK).

7. JOINT PROPERTY OF EXTRA-MARITAL SPOUSES

Property relations also appear in extra-marital community and the property acquired from the joint work of husband and wife in extra-marital relations is considered their joint property (Article 58 of FLK).

According to this legal provision, for the administration, disposition, apportioning, etc, of the joint property of extra-marital spouses, apply the same legal rules which apply for the property of marital spouses.

REFERENCE

- Family Law of Kosovo nr.2004/32, January 2006
- LMMF of Kosovo dt.28.03.1984,
- Family Law, mr. Gani Oruqi,
- Family Law, Dr.Sc.Hamdi Podvorica
- Family Code of the R. Of Albania
- European Convention on Human Rights
- The Constitution of the Republic of Kosovo.

Nushe Kuka Mekaj

COLLABORATION IN COMMITTING A CRIMINAL OFFENCE

1. THE CONCEPT OF COLLABORATION AND ITS FORMS

It is not rarely the case when more persons participate in committing a criminal offence. Practice has shown that in such cases there are many different forms of joint enterprise and different degrees of contribution by participants in committing a criminal offence. There exist well-organized criminal associations with leading structures that are engaged in criminality as a permanent type of activity, but there are other forms of joint criminal ventures with a lower degree of organization. These have mainly to do with ad hoc connections of more persons to commit a criminal offence.

Not only the theory of criminal law, but also the law and the practice have always paid particular attention to cases with more persons participate in committing a criminal offence. This is due to the fact that the accumulation of criminal energy is seen as greater social danger than in cases when a crime is committed by a single perpetrator.

It is not rare that in situations of collaboration in a criminal offence, organized crime comes on the surface which for every country and for the whole mankind represents the most dangerous form of criminality[43]. Different forms of trafficking, terrorism, politically motivated assassinations etc. are

43 Salihu, Criminal Law, general part, Prishtinë, 2005, p.372; Petar Novoselac, General part of Criminal Law, Zagreb, 2007, p.318.-

some of the criminal offenses that are usually committed in collaboration. Collaboration in modern criminal law is considered as an institute which is regulated by the general part of the criminal code. Due to the danger the collaboration in committing a criminal offence represents, in our Criminal Code, special incriminations are foreseen as the most severe forms of basic criminal offenses, for a perpetrator if he/she acts as a member of a group.

In order for the collaboration in committing a criminal offence to exist, participation of two or more persons is not enough, but an objective and subjective connection between collaborators must exist. This is because there could be a situation when two or more persons commit a criminal offence of theft, but their activities are independent. Thus, for example, one perpetrator breaks a window of a shop and takes away several items, and in the meantime, another person passes by and takes away also some items.

Objective connection of collaboration lies in the fact that each collaborator should undertake an action which contributes to the execution of a criminal offence, with an intention to cause certain effects as a result of joint actions of collaborators.

Subjective connection lies in the fact that all collaborators should be aware that they act in different ways with a common goal, and it is not necessary to know each other.

According to the Criminal Code of the Republic of Albania (CCRA), collaboration is called the execution of a criminal offence by two or more persons with an agreement among them[44].

2. FORMS OF COLLABORATION

Forms of collaboration in committing a criminal offence are defined in the provisions of Articles 23, 24, 25 and 26 of the Criminal Code of Kosovo such as complicity, incitement, assistance and criminal association. These four forms of collaboration, due to their important features, in the science of the criminal law are divided in collaboration in a broad sense, including

44 I. Elezi, etc "Commentary to the Criminal Code of the Republic of Albania, Tiranë, 2006, pg.176.

all forms of collaboration: complicity, incitement, assistance and criminal association, and in collaboration in a narrow sense, which includes only incitement, assistance and criminal association[45].

2.1 CO-PERPETRATION

Co-perpetration exists when two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence[46]. According to CCRA, co-perpetrators are persons who commit a direct action for commission of a criminal offence[47]. For example, two or more persons fire their weapons at another person and cause death. It happens to be difficult the distinction between co-perpetration and other forms of collaboration, therefore it is very important to make a clear distinction between them. In order to make a distinction between co-perpetration, as the most severe form and other forms of collaboration, there exist three theories: Formal-Objective theory; subjective theory and the theory of sharing an action (role).

Formal-Objective theory considers as co-perpetrator a person who has undertaken the action of committing an action or part of an action. So, this theory takes into account only objective elements of the criminal offense and considers as co-perpetrator only the person who has taken an action of commission, by not taking into account other forms of contributing to the commission of the criminal offence, as for example the chief of a criminal gang who, at the scene of the event, leads the operation of bank robbery.

Subjective theory considers as co-perpetrator all participants in the commission of a criminal offence. This theory represents an extensive concept of the notion of perpetrator, according to which, inciter and assistant are also considered perpetrators (co-perpetrators) in a criminal offence, however, having a special treatment in case of punishment. According to subjective theory, co-perpetrator is considered every person who has wanted the effects and considered the criminal offence as his or acted cum animo auctoris. Subjective theory does not take into account sufficiently objective contribution and minimizes the effects of this contribution.

45 Ibid, pg.374.-
46 Ibid, pg.375.-

Theory of sharing action (role) considers as co-perpetrator the person who jointly with another person, and based on the agreement to divide actions, executes his/her part in the process of the commission of the criminal offence, and in such cases he/she wants the act as his/hers or as a joint one. This theory qualifies as co-perpetrator any participant who has taken action under a previous agreement with other persons and wanted the commission of that criminal offence. Let's say that our court practice has largely adopted the theory of sharing roles.

Contemporary theories of criminal law and judicial practice have adopted the objective-subjective theory or synthesis of these two theories to determine the notion of co-perpetrator and other forms of collaboration. This is because the action, in its essence, is an indivisible whole of objective and subjective elements.

In the frame of co-perpetration, we have to distinguish the necessary co-perpetration. In cases when the criminal offence can be committed by a person, but in its commission, two or more persons take part, then we talk about optional co-perpetration. However, there are some criminal offenses which, because of their nature, can be commissioned only if more persons participate in its commission. This form of co-perpetration is known as necessary co-perpetration. We have to distinguish fictive co-perpetration from the necessary co-perpetration which exists when two or more persons participate in the commission of the criminal offense but who have not acted consciously or wanted or accepted the effects. Criminal offenses commissioned through necessary co-perpetration are divided into convergent and divergent criminal offenses. Convergent criminal offences exist when co-perpetrators have a joint aim, while the divergent criminal offence exists when co-perpetration is necessary, but co-perpetrators do not have a joint aim, or have opposite interests. Such cases are successive co-perpetration, co-perpetration in complex criminal offences and co-perpetration in criminal offences with non-action.
According to Article 23 of the CCK, each co-perpetrator is punished with the foreseen sentence for the commission of the criminal offence within the limits of intent or negligence, which means that co-perpetrator is not liable for the excessive criminal offence.

2.2 Incitement

Incitement is one of the forms of collaboration in a strict sense.

In theory and in practice incitement is defined as undertaking such actions which intentionally cause or strengthen the decision of another person to commit a criminal offence. According to CCRA, inciter is a person who incites other collaborators to commit a criminal offence. Incitement is a psychic influence on the main perpetrator to take the decision to commit a criminal offence.

Thus, in order for the incitement to exist, it is necessary that the perpetrator had no intention to commit a criminal offence, or has not taken the decision to commit a criminal offense, but the inciter with his/her actions has influenced in strengthening the decision for him/her to commit the criminal offense.

Incitement can be committed only with intent, meaning that the inciter has to be aware that with his/her action he/she is inciting the other person to commit a certain criminal offence. Incitement can be committed also out of neglect, but this form of incitement is not punishable.

According to Article 24 of the CCK, inciter is convicted for a criminal offence as if he/she had committed it himself/herself, provided that the criminal offence was committed under his/her influence.

Incitement is foreseen as a specific criminal offense in the special part of CCK, as it is the case with the incitement of hatred, discord or national, racial, religious or ethnic intolerance (Article 115), then, the incitement for the aggressive war (Article 130) etc.

Unsuccessful incitement exists when a person who had been incited gives up from committing a criminal offence for which he/she was incited to commit, when a person was prevented by objective circumstances to commit a criminal offence for which he/she was incited to, when the incited person has undertaken other preparatory actions to commit a criminal offence but those preparatory actions are not punishable, when the incited person had already taken the decision to commit a criminal offence even

without being influenced by the inciter, and when the incited person commits a completely different offence from the one he/she was incited to commit.

2.3 Assistance

Assistance is the second form of collaboration in the strict sense.

Assistance means undertaking actions by which a person intentionally assists another person to commit a criminal offence. According to CCRA, an assistant is considered a person who assists a perpetrator by giving advice, guidance, providing tools, removing obstacles, giving promises to conceal the criminal offense, the perpetrators, traces or objects derived from the criminal offense. In contrast to incitement, assistance can exist only after a person has decided to commit a criminal offence; otherwise such actions would be considered as incitement.

Assistance can be committed physically and psychologically. Physical assistance may be considered making available or providing tools to the perpetrator to commit a criminal offence or removing obstacles in view of committing a criminal offence, while psychological assistance is considered provision of advice or guidance how to commit a criminal offence and promises to conceal the criminal offence, the perpetrator or traces of a criminal offence.

Unsuccessful assistance exists when a person who has been given assistance has not committed a criminal offence or has made no attempts to commit it, or has not undertaken preparatory actions which are punishable. Unsuccessful assistance exists also when the perpetrator did not use the assistance of the other person to commit a criminal offense, but has committed the offence regardless of the actions of his/her assistant. Unsuccessful assistance is not punishable, because it does not represent a causal contribution in committing the criminal offence. However, unsuccessful assistance can be incriminated as a specific criminal offense, such as the cases of criminal offences for assisting in suicide (Article 151 of the CCK), assistance to pregnant women to terminate pregnancy (Article 152 of the CCK), assisting a perpetrator after a criminal offense was committed (Article 305 of the CCK), etc.

2.4 Criminal Association

Criminal association is the fourth form and most serious form of collaboration in committing a criminal offence in the strict sense.

Criminal association as a form of collaboration differs from other forms of collaboration in committing criminal offences. Based on the Kosovo Criminal Code, criminal association refers to criminal organizations or a group of persons who have made an agreement to commit a criminal offence. The issue of criminal networks has come on the surface particularly after World War II.

Criminal Code of Kosovo, under the influence of model criminal codes of some countries in Western Europe and Anglo-American concept, has included criminal association under the general part (article 26). According to paragraph 1 of this Article, persons enter in a criminal association if they have agreed to commit a criminal offence which is punishable by at least five years of imprisonment and if they have undertaken preparatory actions to execute the agreement. Attempts to reach an agreement are not punishable.

Criminal association, according to the Criminal Code of Kosovo, exists also as a specific criminal offense, such as organization, support and participation in terrorist groups, organization of a group to commit a criminal offence of genocide, crimes against humanity and war crimes, organization of persons or participation in human trafficking, unauthorized production and processing of narcotics, etc.

3. CONCLUSION

Criminal offense may be committed by one or more persons. If the offense is committed by two or more persons, it constitutes a higher degree of danger for the society. When a criminal offense is committed by two or more persons, criminal law and judicial practice is faced with the problem of determining the role and contribution of each collaborator in committing a criminal offence.

In order to exist collaboration in committing a criminal offence, objective and subjective connection has to prevail.

There exists collaboration in a broader sense, such as co-perpetration, incitement, assistance and criminal association, as well as, collaboration in a strict sense such as incitement, assistance and criminal association.

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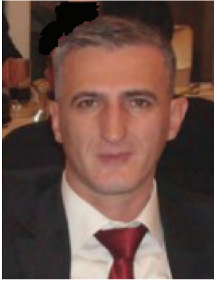

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CALCULATION OF PUNISHMENT, EXECUTION AND ITS PURPOSE

1. CALCULATION OF PUNISHMENT

By the **calculation of punishment we imply setting the type and the degree** of the punishment for the perpetrator, in order to award him/her the type and the degree of the punishment which would correspond to the weight of the criminal offense and social danger of the perpetrator by which the purpose of the punishment would be achieved the best.

Kosovo Criminal Code envisages the degree of punishment for every specific criminal offense, thus the highest and the lowest threshold of the punishment which could be awarded to the perpetrators. To set the degree of the punishment, the lawmaker starts from the social danger that the concrete criminal offense represents, to prevent the perpetrator from committing criminal offenses in the future, to provide for his/her rehabilitation and to refrain other people from committing criminal offenses.

Article 64 of the KCC recognizes the right of the court to take into account the purpose of punishment when setting the degree of the punishment, all circumstances affecting mitigation or aggravation of the punishment (mitigating or aggravating circumstances), especially the degree of criminal liability, motives that the criminal offense has been committed with, the intensity of endangering or damaging the protected value, circumstances under which the criminal offenses are being committed,

previous behaviour of the perpetrator, acceptance of guilt, personal circumstances of the perpetrator and his/her behaviour after committing a criminal offense.

Besides the punishment with the long-term imprisonment, the lawmaker has also envisaged the opportunity of awarding the punishment by fine, to award this type of punishment the court must hereby take into account financial situation of the perpetrator especially the amount of personal income and other income, his/her wealth and debts.

The Criminal Code envisages also alternative punishments for the same criminal offenses, among which the court has the choice of selection to award against a certain individual, for which preliminary legal conditions must be met in accordance with the law. The Code also recognizes the right of the court to award additional punishments to the perpetrators of criminal offenses.

To award the punishment, it should be characterized by the social benefit of the punishment and its individualization.

Social benefit of the punishment is related to the effect of the punishment in a concrete case, if the type of punishment awarded is the most suited for the concrete case. The benefit requires proper individualization of the punishment that the court will award to the defendant, by which it will achieve the purpose of the punishment. The suitable punishment not only prevents further criminal activity of the perpetrator, but it also extends its effects in other parts of the society, which means it refrains other individuals from committing criminal offenses.

Individualization of the punishment is the execution of punishment on the basis of provisions envisaged in the criminal offense, within the constraints envisaged by the law as well as in compliance with the character and the degree of social danger of the criminal offense and its author – perpetrator, the degree of guilt considering mitigating and aggravating circumstances which would effectively influence the re-education of the perpetrator, which means the punishment is to be adapted to the criminal offense and its perpetrator. This basic requirement of individualized punishment is the

observation of the principle of legality, which means that when awarding the punishment, the court has the obligation to take into account provisions of the general part and special part of the Kosovo Criminal Code, based on the principle nullum crimen sine lege, which means that an offense cannot be considered as a criminal offense if it is not envisaged in the law beforehand, as well as it has to be based on the principle nulla poena sine lege which means that no punishment can be awarded unless it has been envisaged in the law beforehand.

In Article 65 of the Criminal Code, in paragraph 1 it is expressly said that the perpetrator is awarded and envisaged punishment for the committed criminal offense, whereas mitigated or aggravated punishment may be awarded only according to the conditions envisaged by the Code, which means that in accordance with this paragraph, the principle of legality nulla poena sine lege consists of the forbiddance to award a mitigated or aggravated punishment unless that opportunity is envisaged in the Criminal Code.

Also the principle of legality of awarding the punishment respectively setting the degree of punishment due to its specific nature was regulated in a specific way with regards to the assistance in committing the criminal offense, criminal association, attempt, for which the awarded punishment must not be higher than three thirds of the maximum punishment envisaged for that criminal offense.

It is necessary that there is a criminal offense in order for the court to award the punishment. So that in actions undertaken by the individual there must be elements of a criminal offense figure, which means that awarding punishment against an individual for the offense which does not contain objective and subjective elements which according to the law establish the specific criminal offense figure is a violation of the law and at the same time is a violation of the convicted person’s rights, the rights which are guaranteed by the European Convention.

When awarding the punishment, the court must take into account the unlawfulness of the concrete offense as well as the social danger of the offense. So for the criminal offence to be punishable there must be elements

of a criminal offense figure as set in the law, but we have the cases when there are elements of a criminal offense figure spelt out in the law, but because of its minor importance, its danger is insignificant due to its nature or its weight, lack of harmful consequences which are minor, the circumstances under which the criminal offense has been committed, low degree of criminal liability of the perpetrator or due to personal circumstances of the perpetrator, in the concrete case although it may contain features of the criminal offense as envisaged by the law, such offense is not a criminal offense.

There are cases when individuals committing criminal offenses under the conditions envisaged by the law, concretely the actions of individuals committing criminal offenses from the legal provisions such as in cases of necessary protection -Article 8, Extreme necessity - Article 9, irresponsible individuals Article 11, shall be considered as not to have committed the criminal offense respectively their actions do not represent a criminal offense.

In individualizing the punishment, important is general and special prevention as the purpose of the punishment. The extent of the punishment awarded by the court must be capable of rehabilitating and preventing the perpetrator from committing criminal offenses in the future, as well as at the same time influence other individuals in refraining them from committing criminal offenses.

Advantage to the punishment individualization has the social danger of the offense which is determined by the subject, which is related to social relations affected by it, as well as the degree of social danger of the concrete criminal offense. The evaluation of these occurred circumstances, during or after the criminal offenses being committed, can show a higher or lower danger of the criminal offense. To evaluate the degree of the social danger of the concrete criminal offense, the consequences of the socially dangerous criminal offense must also be taken into account. Damage inflicted by the criminal offense affects the degree of social danger of the criminal offense and as a result it affects the degree of punishment as well.

In formal criminal offenses where the consequence is not required to take the criminal offense as committed, the importance of the inflicted damage

is taken into account, proportions of damage that could have been inflicted as well as higher or lower chances of inflicted consequences. To determine the social danger of the criminal offense, for example when the offense has remained in the stage of being prepared or attempted, or when the criminal offenses being committed in association, the court must take into consideration the degree of offense's preparation, the closeness of inflicting consequences and the reasons that the offense was not committed. The higher the degree of preparations is the higher is the degree of social danger and the perpetrator.

With regards to the association, the role of each individual must be looked at in a criminal offense. The association of two or more individuals may appear as a necessary element, as a qualifying element or as an aggravating circumstance. We have qualifying elements of the criminal offense, for criminal offenses of which the element of association is expressly envisaged in the respective provision. If the element of the association is expressed in the provision itself, in this/her case we are dealing with qualifying circumstances – a qualified form for example Article 193, paragraph 3, subparagraph 5, Article 195, paragraph 3, subparagraph 5 of the Kosovo Criminal Code etc.

Whereas it will be an aggravating circumstance when this element of association is not mentioned in the respective provision, but if the offense has been committed in association, the person will be qualified in accordance with the concrete offense in relation to Article 23 of the Criminal Code as an accomplice.

Inciter holds criminal liability the same as the perpetrator of the criminal offense, who could be awarded a punishment as he had committed the criminal offense himself. The accomplice has also the criminal liability, but such perpetrators are awarded a mitigated punishment; respectively in accordance with the Criminal Code it cannot be higher than three fourths of the maximum punishment envisaged for the criminal offense.

As we know the purpose of the punishment is to prevent the person from committing a criminal offense and from committing criminal offenses in the future. Therefore it is important to adapt the punishment to the personality

of the perpetrator. The concrete criminal offense committed by the perpetrator it in a way brings up to the surface the social danger of the perpetrator, but the court must also take into account other circumstances that can be the age of the defendant, his/her mental development, his/her intellectual and educational development, readiness to rectify – repair consequences, the degree of the repentance shown for the committed offense, etc.

Place and time of committing a criminal offense, motive, mode, subject or legal value towards which the commission of a criminal offense is addressed, affect also the degree of social danger of the crime – criminal offense. Area, zone or specific center where the criminal offense was committed is also important for the social danger of the criminal offense. The state of criminality in a specific area or zone, higher or lower proliferation of a certain category of criminal offenses, as well as the time, state of war, extreme situations etc., shows the degree of the danger of the criminal offense.

When issuing the decision to award the punishment, the court must also take into account the stance of the perpetrator, his/her actions to repair the consequences, his/her mental and intellectual development etc. In determining the degree and the type of punishment, the court must also take into account the subjective side, guilt, motives and purposes. The court must also take into account the way the person reacts towards the punishment or the effect that the punishment can have over him/her. Age, profession, being recidivist makes a prosecuted individual to feel more or less the punishment awarded to him/her by the court.

1.1. Aggravating and mitigating circumstances

These circumstances are various objective and subjective factors which show a higher or lower degree of danger of a criminal offense and the perpetrator, which affect the degree of punishment.

Aggravating circumstances prove high level of social danger of a criminal offense or of a perpetrator, whereas the mitigating circumstances prove lower social danger degree of crime, criminal offense and the perpetrator. These circumstances affect the determination of the degree of punishment both for aggravated or mitigated punishment against the perpetrator of the

criminal offense. In general for every concrete situation, both aggravating and mitigating circumstances are to be assessed completely by the court, in order to set their importance and influence to the danger of the criminal offense and the perpetrator and then to finally determine the type and the degree of punishment.

Besides mitigating circumstances envisaged in Article 64 of the Criminal Code, the lawmaker gives the court an opportunity to take into consideration other circumstances as well, especially those mitigating by affecting this way the mitigation of the punishment degree, which are the age, health situation, family troubles etc, which show a lower degree of danger of the criminal offense and the perpetrator, which are also to be taken into account by the court when determining the degree of punishment against the perpetrator within the constraints set by the law.

1.2 The degree of criminal liability

It is a circumstance dependent on the degree of two main components, one on the degree of liability and two on the degree of guilt. The liability as a psychological state implies different degrees of intellectual ability which can be complete, with reduced mental ability and with mental disability, which indicate that the perpetrator of the criminal offense was completely or partially liable, whether he/she had committed the criminal offense with direct or eventual intent, because of major or minor negligence. Reduced ability also reduces the degree of a criminal liability, which will also be taken by a court as mitigating circumstance with the condition that the perpetrator should not have brought him/her to that situation.

1.3 Personal characteristics of the perpetrator

These are the circumstances that affect the court in determining whether it will award the punishment; these are mental state of the perpetrator, marital status, age, health state, employment, profession etc.

1.4 Motives from which the criminal offence was committed

Psychological reasons are the ones that have urged an individual to commit a criminal offense, but in no way do they justify the commission of a

criminal offense; they can in no way indicate the reason of committing the criminal offense and therefore they carry a special character when determining the degree of punishment.

Motives are ethical categories and so by their character they can be positive and negative, respectively egoistic and altruistic and in this sense they can be taken as aggravating or mitigating circumstances. If a criminal offense has been committed because of egoistic motives, envy, hatred, evil-heartedness or revenge, gaining financial benefit, racial and religious hatred, than these motives will present aggravating circumstances, if in the law they are not mentioned as elements of the respective criminal offense figure, as for example Aggravated Murder, Article 147 of the Kosovo Criminal Code, whereas the compassion, affection, honour or the feeling of obligation etc, if for example the offense is committed to feed the family, then those can be taken as mitigating circumstances.

Commission of a criminal offense against individuals who due to their situation, old age, physical and mental disorder, disability or pregnancy cannot be protected from the criminal actions, prove greater danger of the perpetrator. To implement these aggravating circumstances it is required for the perpetrator to have had the knowledge of the victim's specific situation.

In the provisions of the special part the circumstances are envisaged as a special element of the criminal offense, for example Article 193 – Rape, Article 195 – Sexual assault etc. in this case the individual will be punished with that degree of punishment that the concrete provision envisages and so these aggravating circumstances will not be taken into account.

1.5 The intensity of endangering or damaging the protected value

It is an objective circumstance from which it depends how much was the good damaged or threatened to get damaged, always considering the nature of the offense, what the question is about, for the offenses against property, life and body, offenses against public traffic safety, attempted or committed criminal offense, for which in this case we must also assess means and the mode of commission, whereby the most attention is to be paid to the damage caused by the criminal offense.

1.6 Circumstances under which a criminal offense was committed

These are circumstances that can be of an objective and subjective nature, which are referring to the criminal offense and its perpetrator such as time, means, mode and place of committing the criminal offense, relations between the perpetrator and the casualty as well as the psychological situation between them.

1.7 Previous behaviour of the perpetrator

These are important circumstances to assess the personality of the perpetrator and his/her social danger, his/her behaviour in harmony with the applicable norms before the commission of a criminal offense; did they have correct behaviour in the area and the ambient they were living, recidivism, improper behaviour in the area where he/she leaves, divagation, gambling etc., for which circumstance the court in its assessment must come to an understanding that the criminal offense is a consequence of improper behaviour of the perpetrator or as a consequence of unwanted and accidental circumstances which have affected the commission of a criminal offense, which will be taken either as aggravating or mitigating circumstances.

1.8 Acceptance of guilt

Hereby the perpetrator indicates that he has been repented and that he promises not to commit criminal offenses in the future which would be considered as mitigating circumstances, whereas the lack of acceptance of guilt indicates that the perpetrator did not or does not wish to understand that he has committed a harmful offence which was envisaged as a criminal offence by the law, as well as he gives indications at the same time that he can repeat the same offence or commit other criminal offences, a circumstance which by the court will be taken as an aggravating one.

1.9 Personal circumstances of the perpetrator and his/her behaviour after committing the criminal offence

These are circumstances which indicate the attitude of the perpetrator towards the criminal offence and his/her behaviour after committing the criminal offence as well as after passing of some time, his/her attitude

towards the injured party and the damage caused, (provision of assistance to the injured party and his/her family, reparation or compensation of the damage inflicted), as well his/her stance during the criminal procedure, from which depends the determination of the degree and the type of punishment.

1.10 Commission of the criminal offence in association

The law in these cases speaks about the criminal offences committed by the two or more individuals in association between them. This is considered as aggravating circumstance because the association of many individuals in committing the criminal offense facilitates its commission. This circumstance cannot be taken as aggravating in determining the degree of punishment when the commission of the offense in association is a qualifying element according to the concrete provision, for example Article 274 of the Kosovo Criminal Code, Organized crime, which are special forms of association.

1.11 Voluntary surrender to the competent authorities after committing a criminal offense

These mitigating circumstances are applied when the perpetrator of the criminal offense reports the criminal offense before the perpetrator of the criminal offense has been discovered. Besides this, the person must show himself to be sincere in explaining the circumstances of committing the criminal offense. The acceptance of committing the criminal offense after its discovery or after he/she has been summoned by the competent authorities does not justify the disclosure of such circumstance.

1.12 When perpetrator shows deep repentance

This is related to the person's behaviour after the commission of the criminal offense, which means not only complete acceptance of the criminal offense but also explanation of circumstances, motives, purposes, disclosing accomplices, seeking public forgiveness etc.

1.13 Normalization of relations

Between the injured party and the perpetrator it is taken as a mitigating circumstance by the court. So when they have reconciled with one another and that normal relations have been established between them.

Kosovo Criminal Code foresees mitigating circumstances also in cases when it is related to criminal offenses committed by mental disability and reduced mental ability that offences have been qualified as such.

When a person commits a criminal offence as per order of his/her superior – shall be taken into account by the court in determining the degree of punishment, Article 10 sub-paragraph 1, 2 and 3 of the Criminal Code, so in these cases the court must take it into account as mitigating circumstance.

Characteristics of the Kosovo Criminal Code is that it foresees also severe cases of criminal offences; those are when they are committed by the officials as well as situations related to cases when the criminal offence was committed by making use of family relations, which are also qualifying elements of the criminal offences.

1.14 Other circumstances related to the character of the perpetrator

According to this category of circumstances, law obligates the court, when assessing the degree of punishment to take into account and assess all other circumstances which are related to the character of the perpetrator, which naturally cannot be related to the above mentioned circumstances. Hereby the law in fact specifically emphasizes the importance of subjective circumstances, however the opportunity must not be ignored that those can be some other circumstances for which the court deems important when assessing the punishment. In fact on the basis of this, the list of these circumstances becomes quite extensive, which depends on each individual case, for example for aggravating circumstances, our courts often take the fact that some criminal offenses are constantly increasing, such as criminal offenses of keeping under ownership, control, possession or unauthorized use of firearms, immigrant contraband, human trafficking, purchase,

possession, distribution and sale of dangerous narcotics and other psychotropic substances, or for mitigating circumstances they take the fact that long time has passed from the time the criminal offense was committed, with an exception that the perpetrator himself should not have contributed to this, then this could not be taken as mitigating circumstances.

1.15 General rules of calculating punishment

Before anything the law foresees the most important circumstances that the court must take into account when calculating the punishment, whereby first of all no circumstance is attributed as aggravating or mitigating circumstance. According to their character they are of an ambivalent character, as each of them considering how they have been created and are concrete specific circumstances may contain a character of aggravating or mitigating circumstances. So they may not influence for the punishment to be higher or lower, but within the constraints of the punishment envisaged for the criminal offense. On the basis of this we must make a difference between qualifying circumstances and those privileging, which also alternate the qualification of a criminal offense to a more severer or softer criminal offense, hereby the degree of punishment as well.

Circumstances that attribute an offense as qualified or privileged are determined by the law itself, for which in some criminal offenses the same circumstance may be a qualifying circumstance, on the other hand it may be an aggravating circumstance, or privileged at one side and mitigating at the other.

2. Punishment mitigation

Besides mitigating circumstances which are a factor that assist the court to understand the low social danger of the person, perpetrator of the criminal offense and determination of a softer punishment, Kosovo Criminal Code recognizes also the lowering – mitigation of the punishment within the boundaries envisaged by the law. Article 66 of the Criminal Code recognizes the right of the court when assessing the criminal offense and its perpetrator to have low social danger and there are some specific mitigating circumstances, it has the right to award a punishment under the minimum

or a type of a softer punishment than that envisaged by the respective provision for that criminal offense. When the court looks into the existence of some mitigating circumstances, instead of punishment with effective imprisonment it can award a suspended sentence, in cases when provisions of mitigation are implemented for criminal offenses for which the punishment is envisaged up to 10 years. Besides this when the court looks into the existence of some mitigating circumstances it can replace the punishment of imprisonment with the punishment of a fine, but only if some specific mitigating circumstances do exist.

2.1 Waiver of punishment

Besides the mitigation of punishment, irrespective of constraints envisaged for the mitigation of punishment, the court may also waive the perpetrator from the punishment, but only in cases when expressly envisaged by the law, which are spelt out in Article 68 of the Criminal Code, in this case the court determines that the criminal offense has been committed and that its perpetrator is criminally liable, but awarding the punishment would not be justifiable due to the low intensity of the criminal offense or because of criminal – policy reasons. In such cases the court is authorized by the law to pronounce such perpetrator guilty for the committed criminal offense, but it can also waive him of punishment in accordance with its discretion. Kosovo Criminal Code recognizes two groups of cases when the perpetrator may be waived of punishment, envisaged in the general and special part of the Criminal Code.

According to provisions of the general part, the opportunity of giving the waiver has been envisaged for criminal offenses such as for example exceeding the limits of necessary protection, exceeding the limits of extreme necessity in cases of an improper attempt, in cases of a voluntary withdrawal from the commission of a criminal offense, voluntary withdrawal from the criminal association, in cases of legal error etc.

Whereas in accordance with provisions of the special part of the Criminal Code, waiver of punishment has been envisaged for cases such as for example when the expert, interpreter, witness revokes false statement before the final verdict has been issued; if the person deprived from freedom resigned voluntarily from rebellion before he/she had used

violence or serious threat, if the assaulter against the official was provoked by the unlawful or brutal action.

These provisions both in general and special part of the Criminal Code have facultative character, as it was given to the court's discretion to decide whether or not it should waive the perpetrator from the punishment.

There are also cases of obligatory waiver from the punishment which is anticipated for the cases of punishable criminal offense attempts if such person resigns voluntarily from the commission of a criminal offense that he/she had started or if after such criminal offense was committed he/she prevents infliction of consequences.

Also in accordance with the Kosovo Criminal Code **special waiver grounds for punishment** have been envisaged for criminal offenses committed due to negligence, which are envisaged in Article 69 of the Kosovo Criminal Code. According to this provision this comes into expression for those criminal offenses which because of their nature, waiver from punishment may be used preliminarily for criminal offenses of endangering public traffic, in which first of all the damage inflicted by the perpetrator reflects consequences against his/her relatives, spouses or close next of kin.

The rationale of waiving from punishment in such cases consist of the fact that the perpetrator was struck so hard by the consequences inflicted, which in their substance exceed his/her deficiencies that he should have been punished for, for which reason in this case the cause of justice as well as the general and special reasons do not require punishment. In this case, the personal tragedy which is greater punishment for the perpetrator, makes awarding the punishment entirely irrelevant and insignificant.

In relation to implementing this rule a waiver from punishment, the law has envisaged two conditions related between each other and specify in a cumulative matter. First stands on the point that the criminal offense should have been committed by the negligence, the second is the consequence of the criminal offense has struck the perpetrator so hard so that awarding the punishment in these cases would not justify the purpose of the punishment.

According to this rule, the lawmaker has envisaged waiver from punishment also for the cases when the perpetrator after committing the

criminal offense has compensated the inflicted damage completely or partially.

For these cases the opportunity of giving waiver to punishment is facultative, as the court must beforehand ascertain if all legal conditions have been met for such a thing.

2.2 Aggravation of punishment

Besides mitigating the punishment or waving the punishment, the court has also a legal authority to aggravate the punishment; it has to do with cases related to multiple recidivism, Article 70 of the Criminal Code, taking into account the fact that the previous punishment did not exercise the effective influence in improving the criminal offense perpetrator. Even in these cases the opportunity of aggravating the punishment is facultative.

2.3 Alternatives to the imprisonment sentence

In the Kosovo Criminal Code there is a special chapter with alternatives awarded to the perpetrator. This once again shows the human character of the Kosovo Criminal Code. Usually these alternatives of imprisonment sentence are awarded when the court assesses that social danger of the perpetrator and the criminal offense is low, as well as when this court thinks that through the application of such measures the purpose of the punishment would be best achieved.

Punishment alternatives are not specific types of punishment but are a way of their execution. In this case the court decides beforehand the weight of the punishment against the perpetrator and if it sees that respective conditions have been met it decides to apply one of the punishment alternatives.

2.3.1 Semi-liberty

One of the alternative measures envisaged in Article 53 of the Criminal Code is also the semi-liberty.

This punishment alternative is applied against the perpetrators in those cases only when the court has given the punishment before which must by all means be imprisonment and should not be less than a year. In this case the punishment is executed in such a way that the convicted person is forced to go back to prison after completing the obligations outside the prison within the time set by the court. Application of this alternative punishment takes place as set when the person is convicted up to 1 of year imprisonment and only in cases when he/she has obligations related to his/her job, education, professional qualifications or training, essential family responsibility or a need for medical training or rehabilitation. Application of imprisonment sentence against an individual will not have any greater effect if he/she will not be given the chance of doing the semi-liberty. In any case the court will apply the punishment of semi-liberty when these conditions exist as well as when it is convinced that the purpose of the punishment can be reached with semi-liberty too; it might be reached even better.

However Kosovo Criminal Code envisages the opportunity of revoking the execution of imprisonment sentence with semi-liberty in cases when the individual benefiting from the semi-liberty does not meet the requirements as set by the court decision. In this case the individual shall spend the remaining part of the sentence in prison.

2.3.2 Suspended sentence

Besides the semi-liberty, the court can also put a condition to the execution of the awarded punishment for the perpetrator if he/she does not commit another criminal offense during the time of verification by the court, which time cannot be shorter than one year or longer than five years. In these cases envisaged by Article 42 of the Criminal Code the question is about conditioning the execution of imprisonment sentence for a specific time by the court, in order for the person not to commit another criminal offense during the time of verification. Effective spending of the sentence is not necessary in every case to deliver the purpose of the punishment, so especially on this principle this does the punishment alternative rely on. In this case the court awards an imprisonment sentence for the individual but the execution of this punishment in the future depends on the attitude of the perpetrator during the verification as decided by the court.

Conditioning of the punishment execution is awarded by the court when it assesses that the degree of social danger of the criminal offense and the perpetrator is such that the application of effective imprisonment sentence against him/her is not necessary. So for the application of a suspended sentence, we must first of all see the social danger of the perpetrator and the concrete criminal offense. The less social danger the criminal offense and the perpetrator represent the more will the court be leaned towards applying – awarding this type of alternative punishment. If the criminal offense is not of a social danger and the perpetrator has had a proper attitude at the court by repenting, and that the court has reached to a conclusion that by application of conditioning the execution of punishment would reach the purpose of punishment in the best way, then it may apply the conditioning – suspension of punishment execution with effective imprisonment.

Conditioning – suspension of punishment execution is related to a punishment in its own and must strive to achieve those purposes that the effective imprisonment sentence contains. If by applying the conditioning to punishment, special and general prevention purposes of the punishment are not achieved, then it is inappropriate for this type of punishment to be executed against the convicted person.

Also when applying the suspended sentence, mitigating circumstances of the criminal offense commission must also be taken into account, for example circumstances of the criminal offense commission, attitude of the convicted person after committing the offense, repentance shown by the person, his/her personal characteristics etc.

In any case towards a suspended sentence, several legal conditions are to be met in order for the perpetrator to be charged with punishable criminal offenses up to five years imprisonment, as well as for criminal offenses punishable up to 10 years imprisonment sentence, if punishment mitigating provisions are applied.

According to Kosovo Criminal Code, the court may also revoke the suspended sentence in any case when the perpetrator commits one or more other criminal offenses for which the punishment was awarded with imprisonment of at least two or more years during the time of verification.

Suspended sentence can also be revoked when the perpetrator commits one or more criminal offenses for which there was an award of punishment with less than two years of imprisonment or punishment with a fine whereby circumstances have been assessed which pertain the committed criminal offense as well as the convicted person and especially the similarity of the committed criminal offenses, their significance and motives for committing the criminal offenses, also if after awarding the suspended sentence, by a final verdict it is ascertained that the convicted person has committed another criminal offense before he/she was given a suspended sentence and if the court assesses that there would be the basis for awarding these suspended sentence if it would have known about that criminal offense.

In cases when it comes to the revocation of the suspended sentence, the court awards its unique punishment for the criminal offense committed previously as well as for the new criminal offense, by considering the revoked or suspended sentences as determined.

Timelines that the court can put an individual into probation ranges from one year to five years and are set considering the degree of social danger of the concrete criminal offense, which depends on the danger of the threatened subject by it, social danger of the individual, which depends on his/her personality, his/her attitude towards the committed criminal offense, the level of his/her repentance, stance at the court and presence of mitigating circumstances. During the verification, the person must not commit one or more same or other criminal offenses.

When awarding the suspended sentence and when verifying the convicted person, the court has the right to decide about the debts against him/her, such as return of the financial benefit gained with the commission of a criminal offense, compensation of the inflicted damage by a criminal offense as well as other debts foreseen by the legal provisions, which indicate that by the application of these measures, the person is given the chance of reintegration and retraining as well as the opportunity of getting included once again in the society as well as to positively influence its functioning. In case the individual against whom debts have been applied does not meet them for unjustifiable reasons, then the court shall decide to revoke the decision on suspended sentence. This is expressly foreseen in Article 43, paragraph 2 of the Criminal Code.

2.3.3 Replacement of the punishment with the order for community service work

Our Criminal Code authorizes the court to decide with the consent of the convicted person **to replace the imprisonment sentence** up to three months or punishment with a fine **with an order for community service work.** This is envisaged in Article 40 of the Criminal Code. Community service work is something from its character and substance which is to the public interest as maintenance, utility service, construction etc. Community service work cannot be awarded if the person does not want to do it. The court may never decide against the wish of the convicted person. Replacement of the punishment with the community service work may be given when the danger of the person and the criminal offense is low and when the concrete circumstances of committing the criminal offense, the court deems that it will achieve the purpose of the punishment. The community service work is given for a specific time that is from 30 to 240 hours and it must be completed within the time specified by the court, a time which must not exceed one year, by emphasizing that this work is with no reward.

If after the specific time expires the convicted person did not complete the community service work or has completed such work partially, the court may revoke such decision and set an imprisonment in proportion with the length of the community work time which was not completed. The imprisonment period may not exceed the initial imprisonment time when awarding the community service work order issued in accordance with Article 38, paragraph 3 or it should not exceed six months with the community service work order issued in accordance with Article 39, paragraph 3 of the Criminal Code. In cases when the convicted person does not agree with the replacement of the punishment of fine with the order for community service work as envisaged in paragraph 3, Article 39 of the Criminal Code, the court awards one day of imprisonment with equal of 15 Euros from the fine, with the condition that the imprisonment period does not exceed six months.

For the type of community service work, weekdays, specific organization where the community service work will be carried out and its supervision shall be carried out by the Probation Service.

2.3.4 Judicial admonition

The purpose of the judicial admonition is to admonish the perpetrator when taking into consideration all circumstances regarding the criminal offense and the perpetrator, the judicial admonition is sufficient to reach the purpose of the punishment. By the judicial admonition, the perpetrator is made aware that he/she has committed a punishable and dangerous offense, which presents a criminal offense that if he/she commits such offense again the court will award a more aggravated criminal sanction.

Judicial admonition is awarded for criminal offenses for which the law envisages punishment with imprisonment for up to one year or punishment by a fine, but with the law it is envisaged that it can be awarded for criminal offenses as well for which the law envisages imprisonment for up to three years, when such offenses have been committed in specifically mitigating circumstances. The law also envisages the opportunity of awarding judicial admonition for more than one criminal offense committed in association.

3. Execution of punishments

3.1 Association of punishments

Essential condition for association of punishments is if the perpetrator with one or more actions commits criminal offenses for which he/she is prosecuted at the same time. When they are not just at the same time and by the same court, there are cases when the decisions of punishing the person are met during their execution, so hereby the association of punishments takes place. In order to have the association of punishments we must have two or more criminal offenses committed.

Article 71 of the Criminal Code foresees association of punishments, whereby the court first of all pronounces the punishment for each offense and then awards and unified punishment for all those criminal offenses. Conditions for associating punishments are the following:

- if for any of the criminal offenses the court has pronounced the punishment with long-term imprisonment, then it awards only this punishment;

- if for each of the criminal offenses the court has pronounced the sentence with imprisonment, the unified punishment must be higher than any individual punishment, but the punishment may not reach the sum of all punishments as specified or exceed the period of 20 years;
- if the court has awarded the imprisonment sentence with three years for each of the criminal offense, the unified imprisonment punishment may not be higher than eight years;
- if the court has awarded punishments with fine for each of the criminal offense, the unified punishment with the fine may not exceed the amount of 25.000 euro, respectively 50.000 euro when one or more criminal offenses have committed in order to gain financial benefit;
- if the court has awarded imprisonment sentence for some criminal offenses, whereas for the others it has awarded a punishment by a fine, it awards the unified punishment with imprisonment and a punishment with a fine in line with item 2 to 4, paragraph 2 of this Article;
- supplementary punishment is awarded by the court if it is foreseen for at least one of the criminal offenses or if the court has awarded the punishment with a fine for many criminal offenses, then it awards one unified punishment with a fine in accordance with item 4, paragraph 2 of this Article.

3.2 Calculation of punishment of the convicted persons

If the convicted person is trialled for a criminal offense committed before he/she has started to spend the punishment awarded by a previous punishment, or for criminal offense committed during the time of spending the imprisonment sentence or long-term imprisonment, the court awards a unified punishment for all criminal offenses (Article 71 of this code), taking into account previously awarded punishment. The punishment or part of the punishment that the convicted person has spent is calculated in the unified awarded punishment.

Regarding the criminal offense committed during the time of spending the imprisonment sentence or long-term imprisonment, the court awards a

punishment to the perpetrator irrespective of the punishment awarded previously if the application of provisions from Article 71 of this code will not reach the purpose of the punishment, considering the length of the unspent time of the previously awarded punishment.

3.3 Conditional release

Article 80 of the Kosovo Criminal Code foresees cases that convicted person may file a request for early conditional release from spending the rest of the punishment.

Person filing the request for conditional release must have spent at least half of the punishment awarded by the court and that during the spending of the punishment he/she must have had a good attitude and by his/her behaviour must have shown that this punishment has really reached its purpose to re-educate the individuals. Conditional release request may be filed by a convicted person also who has spent 1/3 of the imprisonment sentence, he/she can be exceptionally conditionally released when specific circumstances related to the convicted person indicate that he/she will not be committing new criminal offense, as well as a person who has spent 3/4 of the long-term imprisonment punishment may be conditionally released.

This conditional release is decided by the trial panel established by the competent public body in the field of judicial affairs in accordance with the law. If the person enjoying the conditional release commits one or more criminal offenses for which the punishment award exceed one year imprisonment, the court may revoke the conditional release. The court may also revoke the conditional release in cases when the convicted person during the conditional release commits one or more criminal offenses for which the punishment award of imprisonment has been given for up to one year considering the similarity of committed criminal offenses and the motive.

In cases when the court revokes the conditional release, it implements provisions for punishment association, whereby the remaining part of the unspent punishment from the first criminal offense will be associated to the punishment to be awarded for the second criminal offense.

In cases when the conditionally released person is punished with not more than one year of imprisonment, the court may not decide the revocation of the conditional release, whereby the conditional release is expected for him/her as long as the convicted person has spent such punishment in imprisonment.

4. The purpose of punishment

The overall purpose of the criminal sanction is to determine and award punishment in order to eliminate harmful social activity, by which social protected values with the applicable legislation are endangered or violated, whereas the purpose of punishment is to hinder the perpetrator in committing criminal offenses in the future as well as his/her re-education (special prevention), educational influence to the others not to commit criminal offenses (general prevention) as well as strengthening social morale and influencing the development of social responsibility and civic discipline.

5. Brief summary related with the topic

Punishment awarding from the court is one of the most important moments, if not finalizing of the criminal process. By determining the criminal offenses, the law sets the boundaries of punishment for every criminal offense, by setting the type and the degree of punishment through the determination of the lowest and highest punishment degree, because in this way determining various levels of social danger of the criminal offense and the perpetrator. After proving the criminal offense, the court under the conditions set by the law, in terms of punishment awarded to the perpetrator sets an adequate punishment, which means that punishment awarding belongs exclusively to the court's competency. The law in its general provisions also foresees the opportunity of changing the punishment ceilings, besides this it also envisages waiver from punishment. Also in accordance with our code opportunity is envisaged of changing the punishment exceptionally with softer type of criminal sanction such as suspended sentence, judicial admonition or community service work, that the court has complete authority by the law to make such changes to the punishment.

On the basis of this, the court will assess the punishment of the perpetrator on the ceilings as provided by the law for that criminal offense, taking into account the purpose of punishment and considering all circumstances which affect the punishment to be higher or lower.

On the basis of all this, it derives that we have legal weighing of punishment, which is conducted by the lawmaking body, which when foreseeing the criminal offense has set the type and the degree of punishment, whereby we also have judicial weighing of the punishment, which is conducted by the court itself preliminarily in the criminal procedure when the perpetrator of the criminal offense is criminally liable for the criminal offense.

Semi-liberty – is a type of alternative punishment which consists on the fact that the person that has been awarded imprisonment sentence, can be allowed each day, within certain hours (six, eight or ten hours), to be able to spend time in freedom in order to continue his/her professional work that he/she has been performing even before the commission of a criminal offense, or to perform family business, attend education, attend treatment etc. so after he/she performs all works within permissible hours to spend time in freedom, the convicted person is obligated to return to the entity to spend the sentence.

Suspended sentence- in a way this is a forewarning measure which is awarded to the perpetrator whereby that could be a reasonable expectation that under the warning to execute the punishment, which is contained within the suspended sentence, whereby through non-execution of punishment the purpose of the punishment can be achieved. Based on this, the suspended sentence is a replacement of punishment with effective imprisonment. Hereby the perpetrator is warned and at the same time is made aware that at the time of specific verification by the court if he/she commits another new criminal offense or does not fulfil the obligations specified by the suspended sentence, the suspended sentence punishment will be executed.

Minor significance offense For an offense to be of a minor significance two conditions are to be met in a cumulative way, so on the basis of this social danger, the criminal offense should be insignificant as well as consequences are to be insignificant or harmful consequences in general must not have been caused.

Judicial admonition- is a special sanction which in its essence and in accordance with the purpose it is not a punishment but in fact a non-punitive measure, which in accordance to its nature is a measure to replace the punishment, especially the short-term imprisonment sentence which for the perpetrator represents a serious and public admonition which is conducted by the court against the perpetrator who is at the same time forewarned not to commit criminal offenses because on the contrary he/she will be punished with a more aggravated criminal sanction.

Waiver of punishment- is a new way to do with avoidance from the rule that a criminally liable perpetrator must always be awarded punishment. The question is about extraordinary legal opportunity which shows the best how high is the courts authority when weighing the punishment , which in a way can be called legal or judicial amnesty, whereby the existence of the criminal offense and the criminal liability of the perpetrator are proven but the punishment is not awarded, so the punishment is not awarded due to specific reasons. In fact the perpetrator is convicted without a punishment.

The rationale behind this institute consists of the fact that in specific situations, considering circumstances under which the criminal offense has been committed, the degree of dangerousness of the criminal offense and the perpetrator which had been slightly reduced, or because there are specific reasons which indicate that the perpetrator should not be awarded with the punishment.

7. Calculation of punishment for criminal offenses in association

In the science of the criminal law, as well as in the criminal legislations of contemporary countries there are three types of systems recognized in weighing the unified punishment for criminal offenses in association, such as absorption system, asperacion system and cumulation system, systems recognized by the Kosovo Criminal Code too, whereby the asperacion system is the most emphasized one because it is applied in practice the most, whereas the absorption system and the cumulation system are how should we say supplementary systems.

ABSORPTION SYSTEM- is a regular system in those criminal systems that recognize the severest punishment such as death punishment or life time imprisonment, because according to their nature they are the severest punishments and absorb other punishments, except for the fine punishment in the life time imprisonment.

Our code envisages this system too in the cases when we deal with some criminal offenses in association, in these cases the court proofs the punishment with long-term imprisonment which absorbs all other punishments.

In legal literature we can encounter opinions that such a solution is not adequate, because there are situations when application of such criminal policy system is debatable, respectively it does not comply with the reasons of justice and the requirements of the criminal policy.

Although the law has omitted regulating it, to the application of the absorption system comes then when a criminal offense has been verified with the imprisonment sentence of 20 years maximum legal punishment. According to the system, the unified punishment will not be awarded even in cases in which for one criminal offense imprisonment of 6 months punishment or more has been awarded, and for another criminal offense and imprisonment of 20 days, although the question is about the imprisonment sentence, the absorption system cannot come to function here, as the sentence above 6 months imprisonment cannot be expressed in days, whereby in accordance with the asperacion system the unified punishment cannot reach the amount of all punishments.

ASPERACION SYSTEM – this system in our criminal law is essential and the most important. This is proven by the judicial practice which uses this system the most when awarding a unified punishment. Initially the asperacion system is consisting of the fact that the unified punishment is given that way that the court awards imprisonment sentence for every criminal offense, the unified punishment may not be higher than the individual punishments, but the punishment may not reach the amount of all punishments specified nor exceed the period of 20 years. We must emphasize that this stance is justified, as in these situations the two other systems are unjustifiable as they would bring non-justification to a higher

or lower punishment for criminal offenses in association. With the application of cumulative system we would have sometimes very high punishments for which it would be impossible to execute as they would exceed itself the lifespan of the perpetrator.

Also according to this punishment calculating system for relatively mitigating criminal offenses committed in association, for which the court awards punishment up to three years for each criminal offense, the unified punishment may not be higher than eight years.

The cumulation system - it is the system on the basis of which the punishment is not proven that way so that for all punishments that the court has proven all criminal offenses are calculated in association. This system is used very seldom, mainly with punishments in fine, whereby the fine punishment awarded for each of the criminal offense cannot exceed the overall amount of the fine punishment specified as the overall maximum as provided by in the law. With imprisonment sentences, this type of a system is mainly avoided because it is considered unjust, because with mechanical accumulation of punishment, the overall effect is emphasized too much, and thus generally severe punishment is gained from the one sought and justified by the given – emphasized criminal situation.

CONCLUSION

At the end we try to treat in a detailed way the manner – methodology of calculating punishment, mitigating and aggravating circumstances envisaged by the Criminal Code as well as their execution and the purpose of punishment. We have tackled that more, considering the fact that it is a legal obligation of the court to take these circumstances into consideration which help it assess the social danger of the perpetrator and the criminal offense in a more objective way. Only by doing this weighing, the court may be assisted in awarding a just punishment, which would have proper educational and preventive effect.

In this elaboration we have also tried to treat the association of punishments. In this collaboration we have also treated the alternatives to imprisonment sentence, community service work, judicial admonition, suspended

sentence, as well as punishment calculation for criminal offenses in association.

LITERATURE:

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- Criminal Law–General Part, Dr. Ismet Salihu 2008
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INSPECTION OF THE CRIME SCENE

INTRODUCTION

Inspection of the crime scene has a great meaning and is of very high importance for the investigation authorities and the same shall pay special attention to it.

Inspection of the crime scene is nothing new in the investigation procedure, but it presents a preliminary action on the criminal offence, having in mind that criminal actions carried out by the criminals use to be major concern for the society since the time when states were established. Therefore for purposes of protection from such quite modified criminal actions, there was a need for further advancement of such criminal procedure. Often it happens that preliminary actions of the criminals, prior of undertaking their criminal actions they structure and modify the same, including the crime scene in a way that their alibi completely losses the traces to the investigation, or makes the investigation in a large extent rather difficult, so not rarely it happens that even the most professionally qualified investigation officers fail to find the truth and resolve the criminal case. This is why the site inspection is of special importance during the investigative actions of investigation authorities since any careless action may cause unrecoverable casualties during this phase of the proceedings.

1. CONNOTATION

Inspection of the crime scene is a process of investigative actions of gathering substantial evidences, where primary ground of proceeding

authorities for inspection of crime scene is Article 254 of the Criminal Procedure Code of Kosovo (CPCK). The CPCK provisions do not regulate the subject of Inspection of crime scene but only determines legal grounds of inspection.

Inspection of the crime scene is an investigative action, through which the proceeding authority establishes a direct perception about the environment where the criminal offence occurred, discovers, fixes, gathers material evidences and explains the circumstances that are of high importance for the criminal case.[48]

Inspection of the crime scene is first investigative action through which the proceeding authority starts to establish foundation for further investigation. As solid such foundation is as sound, complete and prompt the investigation will be.

Inspection of the crime scene, different from other actions, as a rule, it is considered to be a non replaceable and non repeatable investigative action. It is considered so, because the proceeding authority through such action establishes a direct perception about the traces and items left behind by the criminal offence and its perpetrator, as well as studies their objective and causing link with the case.

In this regard crime scene may be a territory, a respective premise which at a certain moment has suffered changes, compared with its prior situation, which came as a result of peoples actions committed with or without intent or due to lack of operation of mechanisms and equipments, damages in production, construction and transport or Force Majeure.[49]

Inspection of the crime scene is an investigative action, through which the proceeding authority establishes a direct perception about the environment where the criminal offence occurred, discovers, fixes, gathers material evidences and explains the circumstances that are of high importance for the criminal case.

48 Criminal Case (causa criminalis) is an event which with its content talks about the respective criminal offence and its perpetrator, because of whom the criminal proceeding is being conducted.

49 N. Korajlic, Kriminlistika, Prishtinë, 2009, p. 208.

From the criminality point of view crime scene is the place where the perpetrator had undertaken active criminal actions or where he was obliged to commit respective actions, here it is included also the place where the casualty came or should have come as a result of perpetrators planning.

Regarding the notion of the crime scene, it must be understood that crime scene is not just the place where the criminal offence occurred, but also the place where are identified circumstances that are linked with it and its casualty, regardless on the distance between these places.

Crime scene is the most important place of relevant information especially those of tracing character, whereas inspection of the crime scene comprises the core on which the investigation and the correct judgment of the criminal offence is based.

Main duty of the inspection of the crime scene is study of the environment where the criminal offence occurred, its mechanisms and circumstances, discovering, gathering, and fixing of traces, items- material evidences and fixing of the result that came from such inspection.

Main goal of the inspection of the crime scene is gathering of as much evidences as possible that are related to the testifying object.

Inspection of the crime scene, though it is a strong tool for gathering of traces, it does not have an obligation to provide final solution of the problem, on what occurred. The problem on the type of the criminal offence that was committed and which are the factors, will be identified later once all other judicial and investigation actions are completed and after the entire evaluation of gathered evidences through such actions are conducted.

2. BASIC ELEMENTS OF INSPECTION OF THE CRIME SCENE

1.1 Observation of the subjects and logical operations

Observation of the subjects and logical operations are basic elements of the inspection of the crime scene because every criminal case requires different

forms of actions and responsibility but also obligations. Main duty during observation of the subject at the crime scene is protection of life of the subjects who are found at the crime scene and prior of entering the crime scene the proceeding authority shall consider his personal safety, safety of other who arrive at the crime scene, life protection, secure of the crime scene and protection of the material evidences. Life protection does not mean just life protection of the victim but normally even the suspect and the police, too.

During nowadays practices in major crime cases (murders) often proceeding authorities arrive at the crime scene before the medical assistance, therefore I consider that medical assistance shall be organized in such way so to be able to act promptly as soon as it receives the information that their assistance is needed, but because often the person who reports the case initially calls the police thinking that the victim is alive.

Because of the great importance the crime scene has for the criminal offence and for the flaw of further criminal proceedings, the police officers shall operate in a logical manner aiming to draw attention of the medical personnel that while providing medical assistance to be careful on preserving traces of medical offence, though in addition to this they have to watch our medical intervention with purposes of recording changes made at the crime scene. This applies also for other bodies involved in the respective case.

3. PHASES OF CRIME SCENE INSPECTION

Regarding the phases of the crime scene inspection there is no common stand within the criminal science. Some consider that inspection of the crime scene is conducted in two phases (static and dynamic), a high number of authors mention three phases (securing, static and dynamic phase), whereas according to Dushko Modly inspection is conducted in five phases (informative, static, dynamic, controlling and final phase).

Crime scene Inspection phases:

3.1. Informative – Organizing Phase

Informative phase is the first phase when police authorities are being informed about the case Operation employees receive a phone call or have

the case reported by an appealing party at the police station or through other persons who inform the police about the case. During this phase operation employees shall obtain as many information about the case, as possible. This is done for purposes that the police authorities to arrive as soon as possible at the crime scene as well as to be prepared about the nature of the case. At this stage the operation employees shall suggest parties, about temporary securing of the crime scene until the police will arrive at the crime scene.

Upon arrival at the crime scene, police (investigation) authorities during this phase obtain information from the police or from other persons who have secured the crime scene or have knowledge about the event.

According to Nedza Korajlici, the territory of the crime scene, depending on the assessment of the inspection body and its team members, may be expanded or reduced.[50]

I consider that the crime scene may not be enlarged because the citizens may move freely out of the secured area with police tape, of the crime scene and during their movement they may destroy evidences; same may happen by the curious persons who approach near the securing police type. For these reasons securing of the crime scene shall be done in a wide range area and depending on the case the same may be reduced later. During this phase special attention shall be paid to in obtaining information on potential changes that are made to the crime scene after the criminal offence is committed.

At this phase investigation authorities issue a decision on the manner how the investigation shall be conducted, depending on the situation at the crime scene. In situations when the case is rather complicated a written plan shall be drafted. During this phase a decision on eventual expansion of the team or other professional persons or experts may be issued.

3.2. Static Phase

Static phase is the second phase where the proceeding authority studies and marks group and individual signs of the objects that are found at the crime

50 N. Korajlic, Kriminlistika, Prishtinë, 2009, p. 208.

scene, its size, positions, lengths, exact length related with two fixed points, orders to make photographing of the surrounding and each building separately.[51]

This phase follows upon informative phase and has to do with control of the crime scene.

Traces and objects found at the crime scene are recorded in the Minutes with numbers and words, the same are measured, the distance between the same is concluded (sketched), reviewed, an interpretation on the same is made, photos are taken jointly and in details but according to their logical. Numbers and words shall not be written differently.

It is appropriate that the identifying and recording procedure of the traces at the crime scene to be carried out at the same time in order that the damage or destroy of the objects does not happen due to lack of care.

The results must be described with high exactness and clarity in order to be easily identified during conclusions of the dynamic phase of investigation. At this phase a work plan for the next dynamic phase shall be drafted..

3.3. Dynamic or active phase

During the dynamic phase proceeding authority moves the object, if necessary, reviews and marks it with a sign in the side which cannot be seen from the static inspection.[52]

This phase is the core part of the crime scene inspection, which may have an impact both from the dimensions and the configuration of the terrain.

At this phase proceeding authority is more dynamic, more active, searches, identifies, and fixes traces and objects that are considered to be linked with the event and its relationship. It is allowed to make necessary changes and to conduct searching of some traces and objects paying attention not to

51 V. Latifi, Kriminalistika, Prishtinë, 2009, p.177.
52 V. Latifi, Kriminalistika, Prishtinë, 2009, p.177

destroy, contaminate or damage existing traces, respectively not to create new traces.[53]

During the dynamic phase investigation team observes, compares, experiments and builds up versions. Logic methods of observation, comparing and experimenting, and above all the method of making and verifying versions of investigation assist the same in finding links and circumstances that are significant for the case and for the explanatory mechanisms of the event.[54]

Worth mentioning that static and dynamic phase of crime scene investigation may not be separated mechanically because in practice, often during crime scene investigations, these two phases merge as the tracing situation at the crime scene requires.

Proper determining of the crime scene and proper assessment of the factual background enables creation of a clear picture on the event.

For discovery, fixing of traces and items – material evidences are used methods and technical scientific equipments that are recommended by the crime technicians for all sorts of traces.

Worth mentioning that static and dynamic phase of crime scene investigation is not a topographic dividing but it has a logic meaning and serves to better familiarize with the site where the criminal offence occurred, in order to collect traces, items – material evidences, in order to study and assess the same, as well as to explain the mechanisms of the crime scene.

3.4. Controlling Phase

During crime scene investigation omissions are always possible especially when we refer to complicated investigations when at the crime scene involves victims and where often standard methodologies have to be avoided. The essence of the controlling phase consist on the fact that all members of the team resume their investigation results and search for

53 N. Korajlic, Kriminalistika, Prishtinë, 2009, p. 213.
54 V. Latifi, Kriminalistika, Prishtinë, 2009, p.177.

eventual omissions which must be corrected by repeating certain tactical and technical measures and activities. Then, once it is clear that during the investigation there were various omissions, the same may be eliminated only before the completion of the on the crime scene investigation. During this phase the entire flow of the investigation shall be reviewed; an analysis of all conducted works is made and based on the circumstances another measure or activity is undertaken. If there is a need to repeat certain activity, this should be done during this phase. It is appropriate to correctly plan the entire flow of the crime scene investigation, but shall have in mind that plan shall serve as orientation and must be flexible, and must be confirmed whether everything is fully reasonable. Once this huge work is done, it may be assessed if something else can be done, which was not planned or which could have not been foreseen. This way most of the omissions made during the crime scene investigation are avoided.

3.5 Final Phase

Final phase is the last phase of crime scene inspection. During this phase Minutes shall be kept on the entire inspection at the crime scene and it is decided for **“corpora-delict”** in terms of preserving and forwarding it for other expertise. At this phase orientation authorities have the duty to compile minutes on the inspection based on the records or remarks which arose during the inspection. No delay of this work is acceptable from the criminal point of view.

Based on the material conditions it is good that the minutes is typed during this phase but everyday practice shows that minutes are being typed in the office, and even few days or weeks after, which is not good and such practice must be changed.

In the office takes place filming, photos are developed and request for expertise are made on the traces and objects found. As can be seen during the final phase are conducted some activities without which it is impossible to carry out proper crime scene inspection.

4. PREPARATION FOR CRIME SCENE INSPECTION

In order to have successful crime scene inspection, it is of great importance to have good preparations. Crime scene at every king of criminal offence has unexpected issues, various objects, which cannot be imagined. Therefore it is results that there is a need for organizing and predicting preparatory measures in order to overcome every obstacle that may appear at the crime scene.

4.1. Preparatory Measures when Authority is informed about the criminal offence

4.1.1. Measures undertaken to secure the crime scene

It aims secure and preserve of material evidences and traces. Securing of the crime scene is a set of activities conducted from the phase of having the police officer going for the first time to the crime scene and continues during the inspection of the crime scene and in some occasions even after the inspection at the crime scene is over. Securing of the crime scene may be done also by other persons, but they must be careful that people who are assigned to secure the crime scene are not affiliated or related or have interest with perpetrators of the criminal offence or the injured parties, because they may destroy the crime scene, hide or damage traces of the material evidences and also to lead the investigation in wrong direction.[55]

First duty of the patrolling police officers, upon providing first assistance to the victim and upon securing of the crime scene, is to inform the proceeding authority that will conduct the inspection.
„Time that has passed, has really gone", this French idea speaks about the importance of the delay of securing the crime scene.[56]

Situations at the crime scene bring out requests and priorities that are in contradiction with traceologic reasons i.e. providing assistance to the victim etc. Traceologic reasons often require that police officials enter the crime

55 V. Latifi, Kriminalistika, Prishtinë, 2009, p.173.
56 N. Korjlic, Kriminalistik, Prishtinë, 2009, p.192.

scene before the investigation team for purposes of protecting the traces and providing assistance to the victims. The success of the crime scene inspection as well as other investigation activities depend from the fact the crime scene is changed as less as possible. Securing of the crime scene includes also undertaking all measures for immediate identifying of persons, classifying witnesses and guilty persons as well as including them into a safe and effective supervision. It includes also removing uninvited and curious persons, and gathering of all kind of information etc. crime scene must be secured with physically visible tools, cons, yellow police tape (Police – do not cross) , with police vehicles, with police officers in uniforms.

Proceeding authority clearly determines crime scene border and decides on the respective perimeter. Such perimeter is defined as inner perimeter – a zone that covers entire surface, where evidences of criminal offence or accident may be found, while outer perimeter – is the zone near the inner perimeter of the crime scene, which has few chances to be directly involved in the criminal offence or accident. This is a place where stays the media which reports about the criminal offence; this is also the place where the commanding centre stays in order to coordinate efforts of all relevant agencies, if we are dealing with an high extent incident.

In the practice it was noticed that the most difficult task for the first police officer at the crime scene is to secure crime scene from other police officers and other people providing medical assistance, who arrive at the crime scene. It is clear that some people are put inside the crime scene but it is the duty of the first police officer to identify all other persons in order to prevent unauthorized persons entering at the crime scene. Special attention should be paid to record all changes at the crime scene before the arrival of the proceeding authority, and that nothing shall be touched or moved until the dynamic phase.

From the police officer who secures the crime scene it is required to possess professional knowledge in the area of traceology.

Crime scene not only needs to get secured but even protected. While securing the crime scene it is necessary that police officer conducts Standard Operation Procedure.

4.1.2. Verifying technical equipments

During inspection of crime scene a very significant role play also technical equipments, from because from their use depends the quality of the crime scene inspection. All necessary tools that are needed to identify traces, material evidences and fixing the surrounding of the crime scene and other inspection results are located in the investigation bags. Depending on the case proceeding authority may use other more sophisticated tools which cannot be found in the investigation bags such as binocular microscope, quartz lamp, metal searchers, illumination tools etc.

Proceeding authority keeps such technical scientific tools on standby; without such tools it will be very difficult identify, fix, obtain traces and material evidences, because at the crime scene often there more invisible traces or less visible that a human eye can see.

4.1.3. Assigning persons who will be involved inside the crime scene

Inspection of the crime scene, as an investigation action, cannot be carried out by a single person because this actions requires team work which in order to be successfully completed needs to be coordinated with prior defined specific tasks of each participant.

In this investigation action, primary role belongs to the Head of the Investigation Team, who is responsible for the welfare of the investigation team work, because he is the only person who is responsible for drafting minutes at the crime scene, which act will serve as guidance during the investigation phase and shall be administered as evidence during the criminal proceedings.

At the crime scene inspection take place two categories of persons:

- Persons authorized by law, Pre-trial Judge of Presiding Judge, Public Prosecutor or Police, Defendant, Defense Counsel and the Victim.
- Persons who are being assigned by the proceeding authority, experts, forensic specialists and other persons with various

professional qualifications depending on the case but this can be done on the request of the Investigation authority.

Expert takes place almost during entire crime scene inspection based on the nature of the criminal offence that has been committed. The same assists proceeding authority to focus in phenomena that fall under his area of expertise in this way the same assists organizing of the inspection, functioning of the mechanisms and other inspection equipments; draws attention to unclear circumstances.

Assistance of the specialist is required within some respective limits. The same cannot conduct chairing of the inspection; proceeding authority cannot terminate his initiative .i.e. when it refers to the identification of traces, material evidences or use of scientific technical tools used for taking photos, preparing samples and other signs. [57]

In practice the most often assistant to the proceeding authority are crime technique experts. Their involvement during the crime scene inspection is a necessity because most of the traces left behind at the crime scene by the criminal offence or the perpetrator and the same need to be searched, identified, fixed or experimented with tools and crime technical tools.

The Defendant, arrested or detained person, witness or the injured party take place during the crime scene inspection for purposes of identifying traces and material evidences and to clarify the surrounding and circumstances of the criminal offence.

Crime scene inspection is led by the proceeding authority, and all involved persons apply its instructions and person at all has the right to interfere in the work of that body.

Unfortunately, in practice, the Prosecutor goes out at the crime scene only for aggravated criminal cases whereas for light cases such as thefts, aggravated thefts, never attends inspections of the crime scene. I consider that such wrong practice shall change, because the Prosecutor even at First phase of investigation as supervisor of the investigation shall have knowledge about the nature of the case.

57 S. Begeja, Kriminalistika, Tiranë, 2004, p.344.

I consider that performance of procedural action of inspecting the crime scene or reconstruction should be taken more seriously by the Prosecutor, because if the Prosecutor does goes out and in person, takes place at the crime scene he will have a clear picture about the crime scene or the how did the event occur and all this would make possible for the Prosecutor to make more convincing during his presentation of the charge. This would also help him during the main trial while addressing questions. Another fact that shall not be under estimated during the court proceedings is creation of perception on professional knowledge about the case and if the Prosecutor makes such impression to the parties that indeed he has good knowledge about the case, not only from the information gathered from the second hand (police, case files etc) but also from the information gathered by the Prosecutor then I consider that, while presenting the charge – the Prosecutor is in advantage compared to the other party.

5. MEASURES WHEN THE PROCEEDING AUTHORITY ARRIVES AT THE CRIME SCENE

5.1 First contact with the police authorities

At the moment when proceeding authority arrives at the crime scene his first contact is patrolling officials who were assigned to secure the crime scene, but it happens in practice that sometimes at the crime scene arrive the investigation officials who immediately secure the crime scene.

First contact is very important because the investigation officer before undertaking any actions for inspection of the crime scene shall ask even himself how much knowledge does he have about the case and then to use golden questions about the crime (What, when, where, who, how, with what, with whom, why and whom).

During the first contact the proceeding authority shall obtain as much information as possible about the case by addressing the above-mentioned questions and based on the answers received from the first police at the crime scene will depend further investigation actions and it will be assessed whether investigation body needs to carry out an inspection of the crime scene or not.

5.2 Notification for providing assistance to the persons

At the very first contact the proceeding authority shall be notified if the victims need any assistance if the case involves victims.

Once there is an injured at the crime scene, the proceeding authority, with prior approval and in presence of the physician makes questions on the event and the suspects when the injured is able to answer the same. A difficulty is considered to address the above-mentioned questioned to a person who is seriously injured.

Medical personnel shall be notified about the material evidences and shall be instructed to reduce contact with the same and avoid cleaning the crime scene.

In practice it may occur that medical personnel arrives first at the crime scene in that case their data must be obtained.

If the victim is escorted to the hospital, it is the duty of the police which secures the crime scene to obtain data from the medical personnel, the vehicle registration plate and name of the health institution where the victim will be transferred. The police shall escort the victim at the health institution.

Even in cases when appears the need to transport the person who is suspected to have committed the criminal offence, the police escort is required, for purposes of direct physical protection of the medical personnel as well as from an eventual assault by the relatives of the victim, as well as obtain of the traces of the perpetrator in order to avoid destroy or damage be the perpetrator.

5.3 Informing about the case

One of very important preparatory actions when the authority arrives at the crime scene is informing about the case which may be done by the witnesses who saw or initially identified the case. Questions addressed to these persons have informative character aiming to collect as much data about the case in order to help organizing prosecution of the perpetrators

and their custody. Questions about the incident are made immediately after first observation of the place where the offence had occurred; questions at the crime scene are very useful since witnesses who have seen, heard or found out about the incident firstly may describe the same with high exactness without being influenced by other factors.

5.4 Verification fro arrival of relevant persons

Proceeding body upon undertaking preliminary actions when arrives at the crime scene, depending on the information obtained at the crime scene, verifies the attendants who will take place at the crime scene inspection.

Which persons will take place at the crime scene depends from the nature and type of the criminal offence the manner and the tools by which the same criminal offence was committed.

6. MINUTES AT THE CRIME SCENE

Crime scene inspection, without the Minutes would not present any testimonial value. For the investigation officers and composing of the minutes are applied basic rules “nothing shall change its position“, which means that there shall be no movement of the items, traces, no touching before the same are fully described in the minutes.

From this it results that Minutes presents the main document where the crime scene is reflected. Minutes are compiled to reflect the incident that has occurred and the situation found in the beginning of the inspection including description of the traces and material evidences, group and individual signs, their sizes, distance and everything that may facilitate, both, the investigation group and the court during the proceedings in order to have complete and objective concept of the results that are gathered from the crime scene inspection.

Basic conditions for complete and objective reflection of the results which come from the inspection are minutes at the place where the inspection was conducted. Drafting the same in the Police offices or the prosecution shall

be considered as a practice that results with bad consequences for compiling, especially the risk of reflecting in the minutes what it might sound more important.[58]

Description with words of an objective report, drafted based on direct methods during observation of the crime scene inspection and compiling of tem unites presents basic manner of presenting factual background, concluded from inspection of the crime scene.

For this reason omissions made during compiling of the minutes at the crime scene may have long term consequences in the flow of the proceedings, especially for future criminal proceedings.

For the minutes at the crime scene are applied general provisions of the Criminal Procedure Code of Kosovo on Minutes that are drafted while undertaking procedural activities.

Due to incorrectness of the Code provisions, contents of the minutes at the crime scene vary from one authority to another, which is expressed negatively in the work of the proceeding bodies. Minutes often are incomplete and incorrect, therefore they bring into question procedural validity, mostly due to lack of contextual character than due to formal/legal character of the omission.

According to its legal character and procedural importance, minutes on inspection at the crime scene presents a written document where respective body for inspection of the crime scene reproduces certain content on findings of factual background during crime scene inspection.

From the aspect of proving, minutes at the crime scene presents a proving document, which shall contain precise descriptions about crime scene inspection and shall not reflect thought and expressions of witnesses about the case. In the minutes there shall be no hypothesis of the authority that conducts the inspection of its members. In the minutes shall not be included versions or suspicions towards the suspects and their contribution in neither the criminal action nor their guiltiness.

58 V. Latifi, Kriminalistika, Prishtinë, 2009, p.178

Character of the minutes at the crime scene supposes such content which makes it undeniable, which as such with high confidence proves what is written in its content, in which case a great role has criminal content.

During inspection of the crime scene where the criminal offence was committed are compiled minutes which contain information of importance for inspection and for confirmation of identity of the items (description, sizes, and facility dimensions or traces etc.) and are made sketches, drawings, photo plans, video recording or other technical recordings, which shall be attached to the minutes.[59] Basis of the proceeding body for compiling minutes during inspection at the crime scene is Article 87, paragraph 5, of the CPCK.

Content of the minutes directs the manner of investigation, explanation of the type of the offence and dictates the content of the criminal report.

Minutes on inspection of the crime scene consists of three parts:

1. Introduction,
2. Description,
3. Conclusion.

6.1. Introduction

Introduction of the minutes presents initial part where is written name of the authority that conducted the investigation at the crime scene, name of the minutes keeper, if kept by that person, time (month, year, date) and place where the inspection is carried out, general description of the place and significant facilities in it, attendants involved in the inspection including their names and their role during the investigation, conditions in which the inspection is conducted, illumination, if the inspection is conducted in an opened area, then weather conditions in which the investigation was carried out shall be mentioned as well as the criminal case without legal qualification, in order to prevent prejudicing the essence of the case, which until that moment was unknown.

59 E. Sahiti, E drejta e procedurës penale, Prishtinë,2005, p.178.

Despite this if it is certified for sure that it is about a certain criminal offence, and then a legal qualification may be provided. The data about secure of the crime scene as well as name of the police officer or any other person who was assigned for secure of the crime scene.

6.2. Description

Description part of the minutes presents a reflection of factual background certified at the crime scene. This may be considered as the most important of drafting the minutes because the investigation authority in this part completely describes the situation found at the crime scene in accordance with criminal rules and methods.

In this part it is shown that everything is discovered from the inspection: general characteristics of the crime scene; object of the criminal offence. [60]

It is important that prior of describing criminal measures and actions, to describe in details and to determine factual background that was found and to prescribe changes that appeared after commitment of the criminal offence until the inspection started.

Having in mind that inspection is conducted during various criminal offences then the content of the description part depends from the concrete criminal offence, however description must be properly compiled, grammatically, wording should stick to its true meaning, in case necessary its explanation may be given, but what we should always apply is systematic description of the situation found. Any lack of respecting this methodology may cause confusion, even incorrectness of the minutes, which would make more difficult later works of resolving the criminal case.

While describing traces and tools, it must be concluded what was found and what was not found at the crime scene. During description, always have to be taken into consideration distinguishing characteristics which makes the same to be distinguished from similar tools and items, to prevent future suspicions of their authenticity. Inspection minutes shall contain no conclusions, opinions and versions but only objective findings.

60 V. Latifi, Kriminalistika, Prishtinë, 2009, p.179.

In cases when during inspection invisible traces were damaged, along with the description it should be told what kind of items were used and what methods were applied, as well as the name of the person who did that. Regardless what kind of tools and traces are concerned, during this description must be mentioned also photos and sketches, in order to create complete and realistic picture of the situation.

In this part of the minutes it must be visible how real evidence was obtained and which are the manners and tools by which the same were determined.

6.3. Final part

In this part is written the time when the inspection commenced and when the inspection ended at the crime scene, items and traces obtained during the inspection, photos were made, video recording, preparation of samples, fingerprints, footsteps, vehicles, equipments for breaking the samples, plans drafted and remarks of the attendants during the inspection at the crime scene.

Conclusion

In this work was presented the subject Crime scene Inspection, with special emphasize the understanding that crime scene inspection is an investigation action, through which the proceeding authority directly determines environment where the criminal offence occurred; discovers, gathers identifies traces and material evidences and explains circumstances that are significant for the case; the importance in the pre criminal and criminal procedure; basic elements of crime scene inspection; phases of crime scene inspection, preparations of crime scene inspection, measures to be undertaken by the proceeding authority once it arrives at the of crime scene and the minutes at the crime scene which at later phases of the proceedings may be introduces as testifying item.

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