

THE LEGAL BASIS FOR THE EXECUTION OF CRIMINAL SANCTIONS IN THE REPUBLIC OF KOSOVA

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ABSTRACT

The legal and practical aspect of the execution of criminal sanctions in Kosovo from 1945 until today has evolved through several periods and socio-political changes. Since 1945, when Kosovo was part of Republic of Serbia within the former Yugoslavia, laws of Yugoslavia were in place. With the changes in the Yugoslav system, Kosovo wins its political independence in 1974 and becomes part of the Yugoslav Federal System. During this period Kosovo adopted its laws and in compliance with the laws, it established its correctional institutions. This period was very fruitful and successful for Kosovo in every field, and with this also on the establishment of the legal basis for the execution of the criminal sanctions. Yet, in 1989 this autonomy was violently abolished by Serbia and Kosovo became again part of Serbia and Serbia laws started being implemented. In 1999, with the help of the international factor Kosovo, and as result Kosovo started growing in every aspect. In 2008, Kosovo declared its independence and subsequently it adopted its own Constitution. Many laws were promulgated in compliance with the Constitution and at the same time some of the existing laws were amended. Criminal sanctions derive from the Constitution of Kosovo¹, Criminal Code and Criminal Procedure Code², the Law on Execution of Criminal Sanctions³, Juvenile Justice Code⁴, Internal Rules of Procedure of Kosovo Correctional Service, Administrative Directives of Ministry of Justice, International Prison Rules, European Prison Rules and other international documents in the field of protection of human rights and liberties. The Convention against torture and inhuman and degrading punishment has found its place in the Constitution of Kosovo.

The Constitution of Kosovo⁵ has foreseen the Right to Fair and Impartial Trial where it guarantees to every individual equal protection of their rights in the procedure before the courts, other state institutions and public officials.⁶

The Criminal Code is of significant importance in the justice field since it stipulates the criminal offences, sanctions and measures against perpetrators of such offences.

The Criminal Procedure Code stipulates the role of the parties, evidence, initial investigation actions, first and second preliminary hearings, indictment, plea agreement and other alternatives from trials, the trial process as well as legal remedies. Of great importance in this Code is the part which includes the provisions which regulate the pretrial detention, rendering and announcement of judgment etc.

¹ Constitution of Republic of Kosovo, 2008, Prishtina.

² Criminal Code of Republic of Kosovo, no.04/L-082,Prishtina, 13 July 2012. The law entered into force on 1 January 2013.

³ Law on Execution of Criminal Sanctions, no. 04/L-149, 23 July 2013 Prishtina.

⁴ Juvenile Justice Code of Republic of Kosovo, no.03&L-193Prishtina, 20 August 2010.

⁵ Constitution of Republic of Kosovo, 2008, Prishtina, Article 31.

⁶ Ibid.

The Law on Execution of Criminal Sanctions regulates the execution of the criminal sanctions, minor offence sanctions and measures for mandatory treatment, as well as the detention on remand.⁷

Sub-legal acts, Administrative Directives, Internal Rules of Procedure, House Rules, etc., in compliance with the law, regulate precisely the work of the Correctional Institutions.

Keywords: *Kosovo, Legal basis for execution of criminal sanctions in the Republic of Kosovo, Legislation, Constitution, International authorities-UNMIK-*

INTRODUCTION: LEGAL BASIS FOR EXECUTION OF CRIMINAL SANCTIONS IN THE REPUBLIC OF KOSOVO

The legal and practical aspect of the execution of criminal sanctions in Kosovo from 1945 until today has evolved through several periods and socio-political changes. Since 1945, when Kosovo was part of Republic of Serbia within the former Yugoslavia, laws of Yugoslavia were in place.

This period lasted until 1974, when Kosovo wins its political independence and becomes part of the Yugoslav Federal System.

During this period Kosovo adopted its laws and in compliance with the laws, it established its correctional institutions. This period was very fruitful and successful for Kosovo in every field, and with this also on the establishment of the legal basis for the execution of the criminal sanctions. Yet, in 1989 this autonomy was violently abolished by Serbia and Kosovo became again part of Serbia and Serbia laws started being implemented.

During this period Kosovo started refusing all orders and tasks given by Serbia, as such many people were forced to leave while many others were sentenced to long imprisonment, were tortured and mistreated enormously. In 1999, with the help of the international factor Kosovo, and as result Kosovo started growing in every aspect. In 2008, Kosovo declared its independence and subsequently it adopted its own Constitution. Many laws were promulgated in compliance with the Constitution and at the same time some of the existing laws were amended.

The execution of criminal sanctions is done in accordance with the hierarchy of the highest constitutional and legislative acts of the state as well as in accordance with the international norms. Criminal sanctions derive from the Constitution of Kosovo⁸, Criminal Code and Criminal Procedure Code⁹, the Law on Execution of Criminal Sanctions¹⁰, Juvenile Justice Code¹¹, Internal Rules of Procedure of Kosovo Correctional Service, Administrative Directives of

⁷ Law No. 04/L-149, Prishtina, 29 July 2013, Promulgated with the decree no. DL.035-2013, from the President of the Republic of Kosovo.

⁸ Constitution of Republic of Kosovo, 2008, Prishtina.

⁹ Criminal Code of Republic of Kosovo, no.04/L-082,Prishtina, 13July 2012. The law entered into force on 1 January 2013.

¹⁰ Law on Execution of Criminal Sanctions, no.04/L-149, 23 July 2013 Prishtina.

¹¹ Juvenile Justice Code of Republic of Kosovo, no.03&L-193Prishtina, 20 August 2010.

Ministry of Justice, International Prison Rules, European Prison Rules and other international documents in the field of protection of human rights.

Deprivation of liberty according to the Constitution of Republic of Kosovo

The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.¹² We find such answers when we read the Constitution of Republic of Kosovo – Art. 16 count 1. The Constitution is the document which serves as the basis for all the state legislation, which regulates the relationship between the state and the individuals, the relationship between the state bodies and it even determines the basis for regulating the relation between the individuals. The legislation, should not only have the basis on the Constitution, but it should also be in compliance with it. The Constitution serves as the source, a starting point and a framework for other laws. The Constitution determines the general and special principles and mechanisms for the state. It establishes the government institutions by dividing the powers between them so that order starts from the state mechanisms.

Usually the powers given to the state institutions are limited and an inter-control mechanism is placed between them, to preserve in this way the balance for their normal functioning. When referring to the judiciary, there is a need to mention, that an independent judiciary, as ensured by the Constitution, is the foundation for the functioning of the State of Law. In order to ensure the state of law, the Constitution of Republic of Kosovo has stipulated the direct applicability of International Agreements and Instruments.¹³

Human rights and liberties, guaranteed with the international agreements and instruments are guaranteed with the Constitution too. The International Conventions are directly applicable and in case of conflict, have priority over provisions of laws and other acts of public institutions¹⁴. The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, has found its place in the Constitution of Kosovo. Additionally, the most essential element- the Right to Life is addressed in the Constitution,¹⁵ where it is mentioned that every individual enjoys their right to life. Another important element in this article is that death sentence is forbidden.¹⁶ The Constitution guarantees the right to liberty and security; therefore no one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court pursuant to a sentence of imprisonment for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law.¹⁷ Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation. The written notice on the reasons of deprivation shall be provided as soon as possible. Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought

¹² Constitution of Republic of Kosovo, 2008, Prishtina, Article 16.

¹³ Ibid. Article 17.

¹⁴ Ibid. Article 22, Basic Human Rights and Liberties.

¹⁵ Ibid. Article 25, The Right to Life.

¹⁶ Ibid. Article 25 count 2.

¹⁷ Ibid. Article 29 , count 1.2.

before the court. Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial. Everyone who is deprived of liberty shall be promptly informed of his/her right not to make any statements, right to defense counsel of her/his choosing, and the right to promptly communicate with a person of his/her choosing. Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful. Everyone who has been detained or arrested in contradiction with the provisions of this article has a right to compensation in a manner provided by law. An individual who is sentenced has the right to challenge the conditions of detention in a manner provided by law.¹⁸

The Constitution of Kosovo, stipulates the Right to Fair and Impartial Trial, guaranteeing equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.¹⁹

The Constitution, when addressing the Principle of Legality and Proportionality in Criminal Cases, stipulates that no one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.²⁰

No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed. The degree of punishment cannot be disproportional to the criminal offense. Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favorable to the perpetrator.

The Constitution of Kosovo, on the Article on the Right not to be Tried Twice for the Same Criminal Act, ensures that no one shall be tried more than once for the same criminal act.²¹

The basic rights and freedoms of the citizens are guaranteed with the Constitution, but may be subject to limitation only if regulated by law.²²

The basic rights and freedoms of the citizens guaranteed with the Constitution, may be limited only if deemed necessary for a democratic and open society to fulfill the purpose for which the limitation is allowed. Limitations of rights and liberties guaranteed by the Constitution may not be done for purposes other than those for which they were determined. In cases of limitation of human rights and the interpretation of those limitations, all public institutions, and in particular the courts, are obliged to consider the reason for such limitation, the importance of the purpose of limitation, the nature and extent of limitation, the relation between the limitation and the goal intended to be achieved as well as possibility of achieving that goal

¹⁸ Ibid. Article 29.

¹⁹ Ibid. Article 31.

²⁰ Ibid. Article 33.

²¹ Constitution of Republic of Kosovo, Prishtina, 2008, Article 34.

²² Ibid. Article 55.

with as less limitation as possible. One of the authorities of the President according to the Constitution is also pardoning of individuals in compliance with the Law on Pardon.²³ The President, in compliance with the special Law on Pardon, pardons the criminal sanctions rendered to individuals. The Constitution serves as the foundation and framework for the hierarchy of the country.

The principles of criminal sanctions according to the Criminal Code of Republic of Kosovo

Besides the Constitution of the Republic of Kosovo, the Criminal Code is of special importance for the Rule of Law, as it codifies the criminal offences and sanctions as well as measures against the perpetrators of various criminal offences. This code stipulates the criminal offences and sanctions only for such conducts which violate human rights and liberties as well as other rights guaranteed and protected by the Constitution of Republic of Kosovo and the International Law.²⁴ When determining the criminal sanctions and measures for the mandatory treatment of perpetrators, the Criminal Code of Kosovo considers the following principles:

- The principle of legality,
- The principle of humanity,
- The principle of fairness,
- The principle of individualization of punishment

In compliance with the principle of legality, no person may be sentenced for a criminal offence if before the commission of the offence, such offence has not been stipulated by the law as a criminal offence and the criminal sanction or measure of mandatory treatment for that offence was not foreseen. When determining the guilt and the sentence, all perpetrators of the criminal offence are equal before the law and accountable. The determination of the punishment shall be fair and in compliance with the weight of guilt. This shows that the Criminal Code of Kosovo, when determining the guilt and sentence for the person considers the principles of fairness and humanity.

The Criminal Code, by stipulating the criminal offences, measures and calculation of punishment, has also foreseen the scale of risk of the criminal offence and along with the obligation to respect human rights, it considers the principle of proportionality, meaning that a criminal sanction shall be rendered to a perpetrator based on the proportionality between the offence and the scale of the risk that offence presents for the society. The definition of the criminal offences with this Code is done in a precise manner and no interpretation based on analogy is allowed. In case of doubt, the defining of the criminal offence and the criminal sanction is done in favor of the individual against whom the criminal procedure is ongoing. The Criminal Code of Republic of Kosovo, respectively Art.4 stipulates the types of criminal sanctions and the measures of mandatory treatment, which are rendered to perpetrators of criminal offences.²⁵

²³ Law on Pardon, No.03/L-101,12 December 2008.

²⁴ Criminal Code of Republic of Kosovo, No.04&L-082, Prishtina, 13 July 2012.

²⁵ Ibid.

The Criminal Procedure Code of Kosovo

The criminal matter represents the basic object of the criminal procedure.²⁶ The criminal matter is a real event, which in itself shows a specific criminal action and its perpetrator against whom the criminal procedure is taking place.²⁷ After the war in Kosovo, the justice system faced various problems and difficulties. Before 1999, according to the Yugoslav criminal procedure code there was an inquisitorial system of criminal justice when investigations were conducted based on the criminal reports and they were investigated by the Investigating judge. The possibilities and means to investigate crimes of serious nature such as organized crime were very limited.²⁸

The United Nations Mission in Kosovo (UNMIK), in cooperation with international and local experts, in 2003 drafted and adopted the Provisional Criminal Procedure Code of Kosovo, in which the court would still maintain some of its investigative authorities, but the prosecutor and the defense attorney had significantly larger roles. The Code of 2003, was amended in 2008, due to some irregularities as it foresees more judicial resources than necessary to guarantee human rights. Secondly, there were some provisions which presented an obstacle in successful investigation of serious crimes. Thirdly, human rights, necessary for EU membership, stipulated some comprehensive criteria that Kosovo needed to fulfill, and that were either missing from the Code or were unclear. Additionally, there were many instances where the Code needed to be clarified in order to clarify the procedures.

The Criminal Procedure Code of 2013, includes more powerful guarantees for respecting human rights and recognizes the needs and the limitations of Kosovo as well as its legal tradition. This new Criminal Procedure Code, includes changes in the structure of the judicial system as stipulated by the Law on Courts, it removed the need for confirmation of indictment hearing, etc. The Code stipulates the role of the parties, evidence, initial investigation actions, first and second preliminary hearings, indictment, plea agreement and other alternatives from trials, the trial process as well as legal remedies. Of great importance in this Code is the part which includes the provisions which regulate the pretrial detention, rendering and announcement of judgment etc.

The Law on Execution of Criminal Sanctions

The purpose of this law is execution of penal sanctions, sanctions on minor offences and measures of mandatory treatment, as well as the detention on remand.²⁹ According to this law, the criminal sanctions are as follows:³⁰

- principle punishments,
- alternative punishments,

²⁶ Sahiti, E.; *The Criminal Procedure Law*, pg. 54, printed by "Rominor" Prishtina, 2005.

²⁷ *Ibid.* pg.5.4

²⁸ Criminal Procedure Code of Kosovo, no. 04&L – 123, 13 December 2012, Prishtina. Promulgated by the decree no. DL-057-2012, of the date 21.12.2012, of the President of Republic of Kosovo.

²⁹ Law No.04&L-149, Prishtina, 29 July 2013, Promulgated by the decree No. DL.035-2013, of the President of Republic of Kosovo.

³⁰ *Ibid.* Article 2, count 2, pg.

- accessory punishments; and
- court admonition

It is worth mentioning that the execution of measures of mandatory rehabilitation treatment is done in a special institution, in compliance with this law. The provisions of this law apply to the execution of criminal sanctions rendered by the local and international courts, in accordance with the Criminal Procedure Code, Juvenile Justice Code, Law on Minor Offences and International Agreements.³¹ The goal for execution of criminal sanctions according to this law is re-socialization and reintegration of the convicted persons into the society as well as their preparation for life.

The execution of criminal sanctions ensures human treatment, as sanctions are executed in unbiased manner, respecting in its entirety the rights of the persons convicted as well as encouraging the convicted persons to re-socialization and reintegration in the society. This law regulates the process of sending the convicted persons to the correctional institution and their admission, settlement, separation, searches, food, activities, health care, visits as well as individual re-socialization and correctional program. The rehabilitation program includes: placement in an institution or a section within an institution; participation in educational activities; participation in vocational training activities; participation in cultural, formative and sport activities; work and improvement in professional skills; family links and contacts with the outside world; conditions for eligibility for home leave, conditional release or early release; and measures aiming at preparation for the final release.³² According to this Law, the Minister of Justice adopts the secondary legislation- House rules, which regulate the arrangements and the treatment of the convicted persons. Compared to the previous law on criminal sanctions, it is obvious the absence of the internal institutional rules which were adopted by the Directorate of Correctional Service of Kosovo and not by the Minister of Justice. We believe that the Minister should promulgate Administrative Directives to supplement and make this law more applicable. The law should be followed by Administrative Directives promulgated by the Minister, Internal Rules of Procedure promulgated by the Directorate of Correctional Service of Kosovo and House Rules which should be adopted by the Correctional institutions in compliance with the Law. This Law regulates also the benefitions for the convicted persons such as visits in and outside the institution, spending time in separate facility with the spouse, leave outside the correctional institution³³. I think that the home leave, annual leave are no benefition but a legal entitlement same as the conditional and early release, pardon and amnesty.

Secondary legislation on execution of criminal sanctions in Kosovo

Considering that the Law on Execution of Criminal Sanction regulates only the main competencies, responsibilities, the organization and the functioning of the Correctional Service, the secondary legislation (regulations, administrative directives, internal rules, house rules etc.), determines and completes the legal infrastructure of the Kosovo Correctional Service.

³¹ Ibid. Article 3, pg.

³² Ibid. Article 55, p.2, pg.15.

³³ Law No.04&L-149,Article 93, Prishtinë, 29 July 2013.

The internal normative acts of the Kosovo Correctional Service are numerous and very important. The sensitivity of the work of this service requires the establishment of various rules with the purpose of regulating all segments of work in this service.

The required discipline, internal hierarchy and the decision-making, determination of clear responsibilities of all actors of Correctional Service, various technical and health standards, rules of communication with the outside world; all these require complete legal infrastructure.

Administrative Instructions

Ministry of Justice has adopted the following Administrative Instructions referring to Kosovo Correctional Service:

1. Administrative Instruction for the admission and placement of the convicted persons at the correctional institutions;
2. Administrative Instruction on offering medical services at the correctional institutions.
3. Administrative Instruction on dress code of the uniformed staff of the correctional service of Kosovo;
4. Administrative Instruction for the prisoner meals at the correctional institutions;
5. Administrative Instruction on calculation of punishment and release of convicted persons;
6. Administrative Instruction on visits to prisoners;
7. Internal regulation on management of the individual money of the prisoners;
8. Administrative Instruction on the work conditions and the payment for the work of the prisoners at the correctional institutions.
9. Administrative Instruction on treatment of prisoners at the correctional institutions;
10. Administrative Instruction on leave outside the correctional institution;
11. Administrative Instruction on hygienic and food packages;
12. Administrative Instruction on correspondence;
13. Administrative Instruction on the working conditions and the compensation in case of work related injury for the prisoners;
14. Administrative Instruction for the working hours for the personnel of Kosovo Correctional Service;
15. Working hours for the uniformed staff of the correctional service;
16. Administrative Instruction for the leave of personnel of Kosovo Correctional Service;
17. Administrative Instruction on disciplinary procedures;
18. Administrative Instruction on personnel files;
19. Administrative Instruction on termination of the working relationship for the personnel of the Kosovo Correctional Service;
20. Administrative Instruction of performance evaluation;
21. Administrative Instruction on the organizational structure of the Correctional Service of Republic of Kosovo;
22. Administrative Instruction on equal opportunity procedures;
23. Administrative Instruction on dispute resolution and complaint procedures;
24. Administrative Instruction on the probation period;
25. Administrative Instruction on the staff recruitment procedures;
26. Administrative Instruction on job descriptions;

27. Administrative Instruction on spending time at the special facilities of the correctional institutions;
28. Administrative Instruction on management of archives of the Kosovo Correctional Service.

Internal Regulations

Kosovo Correctional Service as a service responsible for ensuring the safety and the lawful functioning of the correctional institutions, has adopted the following Internal Regulations:

- The goal and meaning of rules;
- Confidentiality of the information;
- Distribution and revealing information;
- Prisoner complaints and dissatisfactions;
- Instruction for medias;
- Prisoner meals;
- Admission of prisoners;
- Management of prisoners- high and very high risk;
- Escort of prisoners by correctional service officers;
- Use of extortion measures;
- Release procedures;
- Prisoner transfer;
- Number of prisoners;
- Death in prison;
- Procedures for phone cards;
- Management of prisoners with high risk of escape;
- Checking the surrounding security area;
- Checking prison entrances and exits;
- Checking vehicles entering and exiting prison;
- Checking keys (their functionality);
- Checking the tools;
- Checks- Searches of (prisoners and visitors);
- Prisoner disciplinary violations;
- Violation of law by prisoners;
- Separation of prisoners (sending to solitude);
- Separation of juveniles;
- Preventing security incidents;
- Use of force;
- Use of fir arms;
- Firearm administration;
- Visits;
- Breaks outside prison;
- Providing medical services;
- Conclusion on the medical condition and approval to medical treatment;
- Protests by refusing the food;

- Preventing suicide and self-injuries;
- Prisoner escort in extraordinary situations;
- Internal Rules of Procedure for the Prisoner Transport Unit;
- Internal Rules of Procedure for the use of firearms;
- Prisoner classification;
- Treatment-regime of convicted persons;
- Juvenile treatment-regime;
- Detainee treatment-regime;
- Treatment-regime for convicted females.

House Rules for the Detention Centers and Correctional Centers

- Prisoner House Rules for the Correctional Center for long term imprisonments in Dubrava,
- House Rules for juveniles at the Correctional Center in Lipjan,
- House Rules for detainees at Detention Center 06.

Rules of Procedure at the Kosovo Correctional Service

- Procedure for giving benefitions to convicted persons and juveniles;
- Classification and reclassification of prisoners;
- The prisoner education concept;
- The prisoner employment concept at the correctional institutions;
- Developing programs for convicts and juveniles;
- Training of staff of all levels of Kosovo Correctional Service;
- Designation of correctional institutions;
- Planning of prisoner punishment;
- Procedure for home leave for prisoners;
- Procedure for education of juveniles at the Correctional Center in Lipjan.

Rules for the Staff of Correctional Service

- Code of professional conduct;
- Disciplinary Code;
- Working hours for the personnel;
- Uniform for the correctional staff;
- Rules for civil servants which apply to Correctional Service.

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