

## **THE DEVELOPMENT OF CRIMINAL AND PROCEDURAL LEGISLATION AFTER THE INDEPENDENCE OF KOSOVO**

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### **ABSTRACT**

The development of criminal and procedural legislation after the Second World War, respectively after 1945, was followed by a limited development by the fact that Kosovo at that time had not been an independent state. Therefore, its political status and criminal legislation was imposed by the authorities of the former Yugoslav system. In particular, the criminal legislation of Serbia was applied in Kosovo. Over time, Kosovo's status had began to advance and, along with the status, the initiatives for the creation of criminal and procedural law was considered as an immediate necessity for that time, in order to protect social values from criminality. In order to better understand the creation and development of criminal legislation in Kosovo, the objective of this paper is focused on the explanation and description of the development of criminal legislation in Kosovo, divided along the following stages: First Stage: 1945-1999; Second Stage: 1999 – 2008; and the third stage: from the independence of Kosovo until today.

**Keywords:** Phase, changes, investigation, initial survey, deadlines, conclusions.

### **THE DEVELOPMENT OF CRIMINAL AND PROCEDURAL LEGISLATION DURING THE FIRST STAGE: 1945 - 1999**

With regards to the status of Kosovo, essentially, it was not changed even after the Second World War. Initially Kosovo had been remained within the National Federal Republic of Yugoslavia and during that period it had been applied the criminal and procedural legislation of NFRY. This situation had continued also after the changes from the National Federal Republic of Yugoslavia NFRY to the Socialist Federal Republic of Yugoslavia (SFRY), and until the changes and to the approval of constitutional amendments in 1968 / 1971 and the approval of constitution of the SFRY of 1974, because by that time, in general the criminal law was provided by the criminal legislation of former Yugoslavia( Vesel Latifi, Ismet Elezi, Vaselika Hysi: Politika e Luftimit te Kriminalitetit, Prishtine, 2012, p. 95).

The beginning of important developments in the area of criminal legislation in Kosovo starts when Kosovo gains its autonomy within the former SFRY, on the constitutional basis of 1974, or with a rough approximation of the other republics of the Federation, where, the judicial system in cases of that period could not be understood apart from the developments. Because its development was closely linked with the development of other institutions or rather to its applicable, necessary and proper criminal and procedural legislation. The advancement of the status of Kosovo within the conditions of autonomy along other republics of former SFRY, Kosovo through the bodies of that time had the opportunities to issue Criminal Law of Kosovo (Constitution of the Socialist Autonomous Province of Kosovo of 1974. of 1977) pursuant to Article 283, paragraph 1, item 11 of the Constitution of Kosovo. It can be rightly said that the advancement was the basis of regulation of legal issues in the criminal sphere.

Although, for the first time Kosovo has its criminal law, nevertheless, it had not adjusted by this criminal law regulatory because most of the responsibilities and powers of some particular offenses had retained from the federal criminal laws, particularly, for important offenses. For instance, offenses against the constitutional order, crimes against wealth, offenses against security and territorial integrity, etc. This means that the responsibility was limited for such criminal acts for which the former SFRY had retained responsibility. After approval of the constitutional amendments of 1971 and the constitution of 1974, was made the decentralization of criminal law in the legal system of the former Yugoslavia. According to the documents referred to, the Federation had authority within the rights and duties by law to regulate certain matters of criminal law.

A group of criminal offenses had been left to the competences of jurisdiction of the federal criminal law, in that way, limiting the former republics and provinces to not envisage and decide for such offenses based on their legislation. Within the group of offenses envisaged by their Criminal laws are also regulated offenses against fundamental human rights and freedom. The group of such offenses have been envisaged by Kosovo Criminal Law of 1977 in Chapter VII (Kosovo Criminal Law of 1977). In this group of Offences were foreseen only seven offenses against fundamental freedoms and human rights, whereas, other criminal acts which protect freedom of citizen/person were regulated by the LPRs and not by the Criminal Law of Kosovo. In my opinion, the issue of competences and such criminal justice regulation to the head of offenses was not right and there was no constitutional basis and legitimacy. This opinion is put upon the basic argument that SAP Kosovo as a constituent element of the former Yugoslav Federation, had had the attribute of citizenship which means that Kosovo had also legal constitutional and legislative-executive basis and powers to completely regulate criminal legal issues. But the Republic of Serbia illegally, arbitrarily and subordinate powers took that competence, the issues of regulation of that group of offenses, concretely, for the offense of kidnapping and criminal offenses such as illegal deprivation of liberty.

In this way, Republic of Serbia expanded the action of its Criminal Law in Kosovo and Vojvodina, denying the right of arrangement of a certain number of offenses. This means that such a way of Serbia's, Kosovo action of the Criminal Law was in a secondary position to regulate cases in this field. Hence, as a result of such choices in terms of Kosovo's criminal justice were not scheduled offenses against liberty, but the offense is prescribed as restriction of liberty of vengeance/retaliation (Article 47 of the Code).

In other words, until 1999 Judicial Bodies in Kosovo were obliged that during the practice of judicial or prosecutorial functions to apply:

- A Criminal Law of the Socialist Federal Republic of Yugoslavia of 1977 , which with additions and changes had been applicable until 22. March 1989;
- Law on Criminal Procedure of the Socialist Federal Republic of Yugoslavia of 1986;
- Criminal Law of the Socialist Federal Republic of Yugoslavia of 1977.

It is worth noting that these three laws have been implemented even after the entry into force of the Constitution of Kosovo in 1974, although that period Kosovo Criminal Law was adopted first in 1977, by the social and political room meetings that were held on 28 June 1977<sup>1</sup>(From the

meeting of the social and political chambers, held on 28 June 1977), and that it had begun to apply from 1 July 1977 by the institutions of Kosovo Judicial System.

Another important point is that in the Criminal Law of Kosovo between 1977 to 22 March 1989 had no substantive changes.

### **THE DEVELOPMENT OF CRIMINAL AND PROCEDURAL LEGISLATION DURING THE SECOND STAGE: 1999 – 2008**

The advancing of constitutional position of Kosovo in the Federation in the 1974 Constitution, it had not been supported by the nationalist and chauvinist Serbian counties. In that way, after 1981 in that time when Kosovo people struggling to protect their rights and to have an independent Kosovo as a sovereign state. For that reason Serbian began assaults on Kosovo Constitutional position. Serbian aggression counties prepared amendments in its Constitution (Serbian Constitution) in 1989, such amendements that had suppressed even less autonomy that Kosovo had in the Constitution of 1974. Hence, Serbian authorities put Kosovo's subjectivity under their territory subjectivity, where after that Serbia through its people began termination of our central and local bodies, by expulsions people from work positions and also by using violent measures with its own quad in leadership positions in the institutions of Kosovo. Such actions were also present in the structure of the Judiciary System which began to expel and fire Kosovo prosecutors, judges and supportive staff. Except that, Serbian actions also suppressed making powers and decisions of the Commission of Judiciary exam that was given according to the laws of the Assembly of Kosovo. In order to test the violent power, the right for the graduated lawyers was denied for years during that period, along with other discriminatory laws also undertook violent power in Kosovo. Such laws that not only brought trouble to the recovery of the Judicial system, but also the difficulties in other Kosovo institutions that occurred after the war in Kosovo.

### **THE DEVELOPMENT OF CRIMINAL AND PROCEDURAL LEGISLATION AFTER THE WAR IN KOSOVO**

After the placement of Temporary Administration of United Nations Mission in Kosovo, the Special Representative of the General Secretary of the United Nations, made the effort to stabilize life in Kosovo, in which case the decision issued by the executive power was to abrogate all discriminatory laws that the Serbian bodies and their violent government had brought until June 22, 1989 ( UNMIK Regulation Nr. 1999/25). While the laws that were not discriminatory had still been into force and which were applied until the substitution of them to their criminal and procedural legislation which was originally issued by the United Nations Mission in Kosovo.

With the promulgation of UNMIK Regulation 2003/26 dt. 06. July 2003, which came into force immediately, and UNMIK Regulation 2004/46 which entered into force from the day of its publication in the Official Newspaper of Kosovo. With this Regulation has been made great progress in the criminal field based on the Criminal Law of 1977, based on that Kosovo finally was detached from the application of the Criminal Code of the former Yugoslavia. The characteristic of this stage is that in that time in Kosovo had been implemented three types of laws that was something special about the practice of drafting and implementing legislation as a

part of the law remained in force even after the abolition of discriminatory laws. Hence, a part of legislation was in place as the United Nations mission had issued many policies to regulate certain areas, while some of the laws were approved by the legislative body of the Assembly of Kosovo, where specific to these laws was also adopted by the most high-Legislative Assembly under the Constitutional Framework of Kosovo, their entered into force based on the regulations after final approval of the SRSG, Special Representative for Kosovo, (Constitutional Framework for Self-Government in Kosovo).

## **Stage II: 2004-2008**

With the formation of the Provisional Institutions of Self-Government in Kosovo, due to the initial document "Constitutional Framework for Kosovo" a document approved by a wide spectrum of local political parties and the international factor-UNMIK had been organized free elections for the election of central and local bodies, where after the elections started a common functionality for institutional development in Kosovo. With the election of the President, Parliament, Government and other bodies related to supporting the Judiciary, Executive and Legislative began an intense activity for issuing some legislation/laws in various areas. This activity also included issuing of laws related to the judicial system, such as: Provisional Criminal Code and Code of Criminal Procedure, which codes began to apply from 06. April 2004. Besides these two codes promulgated the Justice Law for Underage which entered into force on 19 Prill 2004, where with the issuing of these codes, Kosovo almost entirely seceded from former Serbia's judicial system. It should be noted that until the adoption of these codes were in force laws already mentioned above which belonged to the former system.

It is important to note that in order to affect the efficiency of the criminal procedure, intervention happened in the criminal as well as procedural law, particularly, in the procedural stages has been exactly reflected the procedural changes. In the first stage examination of the concept of judicial investigations of Criminal Law of 1977 passed to the prosecutor, a move/duty that was previously to the investigating judge, which means that the investigative authority of the investigating judge can be passed to the prosecutor. The main point of that case is the abandonment of judicial investigations that was the focal point of reform in the previous procedure, which means that it is a principle of strict and clear limits to the authority and powers of the subject of investigation, and thus avoid possible arbitrariness of any of them. These changes were mainly made in the structure and functionality of investigative structure, double investigative procedure (police analysis and judicial investigations has been replaced by the unique investigative procedure).

The public prosecutor and the CCK Code KPCC become the arbitrator of investigations (such as decision-making body of the new investigative procedure instead of a function that has so far been led by the investigating judge that the latter has so far collected data and evidence and decided on the proposal of the prosecutor's investigation. The former investigating judge is replaced and appointed as the preliminary/prior judge and his duties and powers are defined by the codes mentioned above, through which his role is reflected under the supervision of protection of human rights and the legality of the procedure, adjustment of the relationship between the accused and the victim and functional competencies in enterprise and allow special measures for collecting evidence for the termination of the judicial investigation, otherwise the

prosecution under these codes become dominant (litis) of investigations. Hence, the prosecutor has function in the decision-making procedure form the evidence which relates to court.

This right and duty first was to the investigation judge. New functional competence of the prosecutor also imposes new relationship between prosecutors and police. Depending on the cooperation and coordination between police and prosecutors in criminal proceedings depends on the success of the work in detecting crimes and their perpetrators. According the offenses that were committed, the police take all criminal and operating offenses to verify these allegations and to collect initial data that a crime is committed.

It is worth noting that a significant change is that in the Code of Criminal Procedure are shown some new Institutes which one of them has been already mentioned but will be emphasized other following new institutions:

- Institute for the confirmation of hearing by the prior/preliminary judge
- Institute of plea agreement (plea bargaining)
- Operation of mediation to achieve reconciliation between the victim and the defendant
- Law on cooperating witnesses, etc.

These are significant major changes which occurred in the Code of Criminal Procedure and as such are adapted to the western countries' legislation. Regarding the Provisional Criminal Code compared with the Criminal Law of Kosovo of 1977, changes are evident in added chapters of offenses, because in the prior Criminal Law have been a total of 19 (nineteen) chapters, while in the Provisional/Temporary Criminal Code of 2004 are foreseen a greater number of chapters through which are arranged new criminal offenses that previously have not existed.

Important to mention is that life/perpetual imprisonment which had existed under the CLK-es in Kosovo, with a special regulation of UNMIK was removed in 2001 that was the SRSG in Kosovo (UNMIK Regulation on the abolishment of life imprisonment) This sentence was later replaced by KPCC with long term imprisonment that was wide implemented until the 1 January 2013, where changes due to the addition of the same that been removed and again by supplementing the changes that are listed in the provisional codes of 2004, the Criminal Code of the Republic of Kosovo declared Nr.04/L-082 the Official Gazette on 13 July of 2012 , the application of which is from 1 January 2013 and is foreseen perpetual imprisonment for offenses, particularly, certain serious offenses. The changes mentioned and those which exist in the temporary codes have brought new innovations in the post-war legislation through both the Provisional Criminal Codes of Kosovo, which have been implemented until 31 January 2012.

Another important point of that period was that even though Kosovo had its bodies derived from legitimate free parliamentary elections, again and again the challenges still existed to adopt independently criminal and procedural law and it was argued by the fact that the criminal and procedural codes were temporary/provisional as a result of Kosovo eventually at that time still has not chosen the status, therefore, this situation hindered the provisional designation of the word, which later, after the declaration of Kosovo independence this temporary designation was replaced with the changes and amendments of the criminal and procedural code of the Assembly of Kosovo in 2008 ( Amendments and procedural criminal code of 2008).

### **THIRD STAGE - AFTER THE DECLARATION OF INDEPENDENCE UNTIL TODAY**

Taking into account the country development - when Kosovo declared the Independence Declaration of Kosovo as a sovereign and independent State on 17 February 2008, at that time have been presented the essential needs for amendments to the Criminal and Procedural Code of Kosovo, which codes until that period were considered as temporary/provisional. The Ministry of Justice had taken the initiative for the implementation of these changes. In the context of these efforts the Ministry of Justice had organized a working group on amendments to these codes where the reform process lasted almost two years. In that reform have been included representatives from the courts, Prosecution, Ministry of Justice, the Law Faculty of Pristina, American Embassy, European Commission, EULEX and other groups who came to finalize the complement and change of temporary codes. Hence, on 22. June 2012 agreed to adopt the Law on amendments supplement the codes mentioned above. It is worth noting that the Criminal Code now contains 444 articles, several articles that are in accordance with the Constitution of the Republic of Kosovo, the international and European rights and standards and compatible practices in the field of criminal law.

The objective of the changes has been the introduction of the innovative Criminal Code based on contemporary character and compatible to the Constitution of the Republic of Kosovo, the relevant international and European conventions and the European Union directives. At the same time, in that code has been incriminated offenses which represent changes compared with the Preliminary Provisional Code, incriminating reasoning because the same codes pose a danger to society and as such have not been provided with KPCC. Some of the main differences between the Provisional Criminal Code and the Criminal Code after the Independence of Kosovo, which has been applied since 01. January 2013, are presented below as follows:

The addition of new criminal offenses, to tougher violations for criminal acts / terrorist offenses, financing or supporting terrorism, economic crime, corruption and misuse of official position. Then, for crimes against life and body, offenses of voting rights and crimes against sexual integrity by not excluding offenses against vulnerable victims and other criminal offenses related to Chapter 23 and 30.

Another innovation in the present Criminal Code are the provisions that regulate the confiscation of the material benefit through criminal offenses and compensation of victims. This means that these provisions are much broader in comparison with the provisions that were in the previous Penal Code and through their respective bodies now have broader powers to law enforcement. This Code sets forth the body compensation for law enforcement and stiffer penalties for offenses of organized crime. Unable to elaborate each chapter separately, at the end of the changes that have occurred in the Criminal Code stated that the current structure of the Penal Code is now involved in a total of 35 chapters. It is worth noting that the general provisions are codified in 13 chapters, those that are particular in 20 chapters, while those that are considered as transitive or as last ones are in one chapter. The biggest change is in the chapter relating to offenses against sexual integrity where we have additional of the offenses which are codified.

Regarding the prior Criminal Procedure Code, it cannot be said that there is any major substantial change in the Code that has been implemented since 1. January 2013. Related to this

code changes have been reflected in the fact that in the first stage we cannot change it to the preliminary process, it has remained the same except some minor changes on acceleration and some procedural forms regarding deadlines.

Related to the changes that have occurred are those related to the Court that now there is no confirming judge in the court nor with the fact that the Institute of confirmation hearing has been removed. The changes are mainly reflected with deadlines and accelerated procedures. As in every country of the world likewise the state of Kosovo has the developed criminal right that is part of a unique legal system within its territory, which within this system has the particular duty. Its duty is to ensure the protection, strengthening and development of socio-economic relations and the social - political country. Based on these characteristics, the criminal law in the Republic Kosovo can be defined as a system of legal norms which define criminal offenses and sanctions and the basic conditions for the application of criminal sanctions against perpetrators of crimes in order to protect the freedoms and fundamental human rights and other rights and also social values guaranteed and protected in international and domestic law.

In order to protect these values of legislators of Republic of Kosovo, after the war in Kosovo (1999) has been developed the Criminal Code of Kosovo, the first in the history of Kosovo because Kosovo as known previously worked with the SFRY laws.

### **Innovation in Criminal Procedure**

The fact that any changes of laws bring new innovations comparing to the previous laws, and perhaps against the will of an adjustment and appropriate accordance the goal cannot be achieved as claimed. In the case of the criminal procedure code that is being implemented, a series of changes were identified for an effective procedural development. It is worth noting that these changes are reflected by the following procedural stages. At the trial stage cannot be said to have major substantive changes compared with the prior code, while there have been identified changes related to:

- Deadlines/terms of undertaking procedural actions
- Changes related to time and the decision to ban/prohibition or detention
- Removing of the hearing confirmation institute
- Forming of judicial bodies
- Mediation as an institute for offenses to three years
- Diversion as the new measure to ensure the defendant etc.

At other stages of the procedure are evident following changes:

- Review of the first and second initial and their maintaining legal terms
- The plaintiff being removed as a party to the subsidy proceedings
- Authorization of secret issues/measure from the judge of primordial procedure
- The opening/prologue of the parties in the procedures;
- The provisional competence of the prosecutor for seizure;

### **CONCLUSION**

Through this paper it has been elaborated the development of procedural and criminal law in Kosovo since 1945 to today in order to understand its formation/establishment and development,

and the challenges that have followed Kosovo in regulating this area. It can be concluded by highlighting the lacks, priorities, needs and also the necessity of repeated approaches to the responsible authorities should take action in the future to harmonize the current codes to the social development needs. From the study it has been identified that Kosovo had a specific path to the establishment and implementation of laws and after World War II until its independence has applied the laws of the former Yugoslav federation, the Socialist Republic of Serbia, UNMIK Regulation of the international mission that gave no opportunity to implement them in practice as a result of collision between the different laws often because at the same time have been applied laws of three different bodies.

Also, it has been found that throughout this period Kosovo has been deprived from the right to draft laws by the sovereign will. Although Kosovo in 1977 came up with the first issue of criminal law, however, it was not complete by the fact that many offenses had lacked to the jurisdiction of the federal criminal law, Kosovo also lacked its own criminal procedure law for that reason it has been applied the law of criminal procedure of SFRY. Advancements that are noteworthy are since the formation of the PISG and Kosovo's declaration of independence, such advancements that has brought the completion of temporary criminal and procedural law of Kosovo. After Independence of Kosovo later on have been completed all the criminal laws, in that way giving an end to the application of discriminatory of laws and laws issued without the will of Kosovo bodies.

From the practical application of the criminal codes that have come into force on January 1, 2013 after the reforms in the justice system, it is considered that they have made positive changes in relation to the compliance of laws with international standards. Nevertheless, our recommendation is that these codes need further completion and changes.

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