

The Role of the Investigative Prosecutor and Judge in the Pre-Trial Proceedings in Kosovo (1999-2013)

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Abstract

The journey of the human society has gone through many challenges, the organization of which was based on written and unwritten rules that were used to preserve the kind. Later on these rules are replaced with written codes and laws. The separation in between criminal law and criminal procedure has its genesis with the appearance of the Austrian Criminal Code (1803). As it is historically known, after the Balkan Wars (1912), Kosovo was invaded by Serbia and Montenegro. On the Paris Conference (1919-1944) it was appended to the Yugoslavian Kingdom. Tito's Yugoslavia (1945-1989 constitutive element of Yugoslavia). On March 23rd 1989 Milosevic destroyed its Autonomy with violence. On 1998-99 the war with Serbia breaks out, which on 10th of June 1999 ended (after NATO's intervention), therefore installing the UNMIK Mission and administration that even after the Declaration of Independence of Kosovo (17th February 2008). After UNMIK's administration in Kosovo, the Law of the Criminal Procedure of ex-Yugoslavia was an applicable law. Its application was extended until the drafting and application of the Temporary Criminal Procedure Code of Kosovo (2004). The comparative methodology, written sources and different official reports are used to write this paper. The comparative data shows that with new Code, the authority of the Prosecution is empowered therefore weakening the role of the Court in the pretrial procedure, the number of the prescribed cases has risen and the discontent of the citizens also, towards the judicial system.

Keywords: Justice System, State Prosecutor, the Defendant, Kosovo, Criminal Procedure Code

1. Introduction

1.1. The differences in different social areas in the world have affected largely in the changes of the recent times, including the changes in the Criminal Procedure area. These changes have incorporated in itself sanctioned universal values of Convents, Protocols and different international Treaties. In this aspect, such changes in the justice area have seen advancements and as such are constitutional categories, on the foundation of which lays the protection of the human and citizen life as one of the main categories of the Human Rights and Freedom Corpus.

The advancement of the Human Rights is incorporated in Kosovo's Criminal Procedure also. Particularly this advancement has marked a positive development in the area of the criminal law, criminal procedure, the execution of criminal sanctions, mediation procedure etc., although it is not pretended that there will not be any violation of the human rights in the future of our country.

With the purpose to minimize these violations of the human rights from different state institutions there should be operational control organs of the accusatory body (including the judicial police) and not only of it.

Firstly, a law should be approved, which should be clear, adaptable and available to the public. (Hering, 2013, page 12)

Secondly, law enforcement institutions (judicial police, prosecutors, judges and officials part of the investigative actions) should act responsibly and conform to their legal authorizations. (Islami, Hoxha, Panda, 2012, page 41)

Thirdly, the independence of the Courts must be operational and so its control through all of the investigative phases, especially including the phase of pre-trial procedure.

Fourthly, the public opinion must be operational (civil society, different organizations for the protection of the human rights, protection of women, children and nature etc.)

1.2. Based on the premises that the rights are legally recognized by the state, that does not mean that the same rights are and cannot be violated by different state institutions. With the purpose to preserve this balance "right-violation", the state has created control mechanisms to reduce them to the minimum, if as such cannot be completely eradicated. These legal mechanisms are created with the purpose of clearly determining the legal authorizations of each institutions in general and the rights of each subject taking part especially in the legal procedure. During different historic developments of the justice system the accusatory body and judiciary are in two different positions. In the Inquisitorial Procedure the accusatory body had to submit every information and data in possession against the defendant and the Court had solely to decide the guiltiness or the innocence of the defendant. In the Adversarial Procedure, the roles of the parties included changed in favor of the defendant, although the accusatory body still had to submit evidence to support and prove the guiltiness of the defendant, but the court was no more indifferent but reflected its authority throughout the entire judicial process. This procedure of control of the accusatory body by the courts was legislated by the Criminal Procedure Law of the former SFRY, which was applicable in the entire Yugoslavia, including the Socialist Autonomous Province of Kosovo as a constitutive part of it. (Salihu,2012 page 113-117) Within a 10 year period from 1990 to 1999, Serbia had classically occupied (invaded) Kosovo therefore violating the Yugoslavian Constitution. For these violations of the human rights and national rights of the Kosovan Albanian the international opinion was notified for 10 years continually, from credible international institutions such as Humans Rights Watch and Amnesty International etc. As a result of these violations the war with Serbia broke out (1998/1999). After the war, on 10th of June 1999, a temporary UN Interim Administration was installed in Kosovo's territory, who with a regulation listed as an applicable law within the territory of Kosovo the Law of Criminal Procedure of the former SFRY. It should be noted that this law was the only law applicable in the whole Yugoslavian Federation until its desolation, meanwhile in Kosovo this law was applied until it was replaced by the Provisional Criminal Procedure Code of Kosovo on March of 2004.

Methodology

This paper is a result of a quantitative and qualitative research where the comparison in between the Criminal Procedure Law of ex-Yugoslavia (1977) that was applicable in Kosovo until March of 2004, the Provisional Criminal Procedure Code (2004-2012), the Criminal Procedure Code of Kosovo (2013) and other juridical acts, are the case of study. The analysis of this study using the comparative method has shown and brought to light the similarities and differences in between each law, in the pretrial procedure respectively the relationship between the investigative judge and public prosecution (according to the 1977 law), the pretrial procedure judge and the state prosecutor (after 2004). The similarities, changes and differences that are present in the solutions presented in these laws (codes) are also a result of the time, ideological and historic context. After the analysis of the role of the pretrial procedure judge and the state prosecutor according to the new code, it results that the judge of the pretrial procedure is only involved upon the prosecution request. Through the analysis of the facts, it shows that not always do we have a satisfactory solution. This is argued and evidenced using quality methods, based on secondary sources from year 2012 and forward. According to these reports, that refer to the judicial field, in Kosovo there is an enormous number of presubscribed cases that affect directly to the politics of the rule of law, security and the protection of the rights and freedom of citizens.

2. The competences of the accusatory body according to the CPL of ex-Yugoslavia

2.1. According to article 45 of the CPL (1977), the prosecution of the offender was the right and duty of the Public Prosecutor. He was competent to investigate and reveal the offender, to direct the investigations in the pre-trial procedure, to require the execution of the investigation, to indict and represent the indictment, respectively the charges in front of the competent court, to exercise the right to appeal against Court decisions and exercise the extraordinary legal remedies against final judgement.

According to this law, the Criminal Procedure had two phases of development: a) pretrial proceedings and b) criminal procedure.

2.2. The pretrial proceedings was initiated from the competent Public Prosecution after different physical and juridical subject had submitted in a written form or verbal form (article 148). The Public Prosecutor had the right to dismiss a criminal report when convinced that there were no conditions for criminal prosecution and of this he had to notify the injured party within eight days of the dismissal (article 60, CPL) who had the right of private prosecution within eight days (article 60, point 2, CPL – subsidiary prosecution). In the conditions set by the law, the Public Prosecutor could dismiss a criminal report in the latter phases of the criminal procedures, also. This dismissal from criminal prosecution could also turn into the main hearing. In this case, the injured party had to declare, in written form, whether the criminal prosecution should continue or not (article 61, point 1).

When the Public Prosecutor concluded that there were conditions for criminal prosecution against a suspect, the criminal report with his written request was sent to the investigating judge, of the court competent for the execution of investigations. When the investigating judge agreed with the evidence submitted by the Public Prosecutor, he would draw a Verdict to initiate the investigation and this Verdict was sent to the defendant and the Public Prosecutor (article 159). When the investigating judge did not agree with the evidence submitted by the Public Prosecutor for the initiation of investigations, after consulting with the Public Prosecutor, the case was transferred to the three judge panel who then had to decide within a 48 hours (article 159, point 7 and 8). In cases of criminal acts, which the Criminal Law had foreseen a conviction of 1 to 5 years of imprisonment, the Public Prosecutor could write the indictment without the investigation, but this only in agreement with the investigating judge (article 160, point 2, 5 and 6)

2.3. The Criminal Proceedings began only with the ruling of the investigative judge and as such was executed by him (article 161, point 1 and 3). The Public Prosecutor was given the possibility of assisting during the investigation procedure (article 162, point 2), whereas the orders issued by him were executed by an internal affair's organ (article 162, point 3). In accordance with the authorizations by the investigative judge, police investigators could undertake other investigative actions such as the investigation of criminal acts against the juridical constitutional order, photographing of the defendant, take fingerprints (article 162, point 4 and 5). The investigative judge was the one who decided to expand the investigation (article 165, point 2), to accept the proposals from the injured parties (article 167, point 1 and 2), to accept the assisting of the claimant during the interrogation of witnesses (article 168, point 4), to deny the presence of the defendant and his defender during the execution of specific investigative actions (article 168, point 5), responsible for notifying the parties included in the proceedings (article 168, point 6), to accept the clarification (explanation) of the specific cases related to the defendant, witnesses and experts (article 168, point 8, and 9).

The investigative judge had legal authorization to terminate the investigation when the defendant presented temporary mental disorder or disability during the criminal proceedings (article 169, point 1), when the defendant had no known address or when he was on the run, a fugitive. In this case the termination came with the proposal from the Public Prosecutor (article 169, point 2), whereas when these obstacles seized to be, the investigation would continue (article 169). The investigative judge would terminate the investigation with a ruling even when the Public Prosecutor dismissed the prosecution, but was obligated to notify the injured party who had the right for subsidiary prosecution within eight days (article 170). The three judge panel with a ruling could suspend the investigation when the offence charged to the defendant was subject to the exclusion of criminal responsibility, because of the period of statutory limitation for criminal prosecution or because the criminal offence is covered by an amnesty or pardon, or when there were no conclusive evidence to support that the defendant had committed the criminal offence. During the criminal proceedings the investigative judge was obligated to investigate into details not only the criminal act but also the circumstance that led to commit the offence, he had legal obligation to investigate and research the past of the defendant, health history and criminal record (article 172, point 1) information that would serve in the imposed sentence. The investigative judge had legal obligation to notify the defendant and his defender with the evidence and testimonies gathered against him would allow their proposals to collect new evidence on his account by prescribing the period of time when to answer (article, 173, point 1).

According to this Law, the investigation conducted by the investigative judge should end when he concludes that sufficient grounds were provided to file the indictment (article 174, point 1). After the investigation has been completed, case files would pass to the Public Prosecutor who after reviewing, within fifteen (15) days had the right to propose for and expansion of investigations or to file the indictment (article 261). The Public Prosecutor had the possibility of withdrawal from prosecution (article 174, point 2).

If the file for indictment is not completed within a period of six (6) months, the public prosecutor had to submit to the investigative judge a written application supported by reasoning of the delays and reasoning for an extension of the investigation. If the delays of this prescribed period of time were to reasonable or if the prescribed period of time has

passed, the investigative judge would notify the president of the court for the causes of incompleteness and if he would not authorize another extension then the investigative proceedings would terminate and the investigation concluded (article 175, point 1 and 2).

3. Competences of the accusatory body according to the Criminal Procedure Code of the Republic of Kosovo (2013)

3.1. After the Interim Administration Mission of the UN was established in Kosovo, the law of Criminal Procedure of the former SFRY was an applicable law until the year of 2004 when the Provisional Criminal Procedure Code of Kosovo entered into force. (UNMIK/REG/2003/26, 2003). According to Article 46 (1) of this Code, the public prosecutor is an independent body, responsible for investigating criminal offences, prosecuting persons charged with committing criminal offences which are prosecuted *ex officio*, or on the motion of an injured party, supervising the work of the judicial police in investigating persons suspected of committing criminal offences and collecting evidence and information for initiating criminal proceedings, to prosecute criminal offences on the motion of the injured party (article 47, point 2, of CPCRK). Thus with this Code the competences of the Public Prosecutor are larger, while the role of the pretrial judge (replacing the investigative judge) is paler. With this Code the investigations are initiated with the Public Prosecutor ruling.

3.2. After the Declaration of the Independence, the Republic of Kosovo has issued a new Code that has entered into force after the date of signature on 1st January 2013 (Code Nr. 04/L-123)

According to the Criminal Procedure Code of the Republic of Kosovo, the investigation of the criminal proceedings is initiated only with the decision of the State Prosecutor when there is reasonable doubt that a criminal offence is committed. In the investigative matters the role of the police is depended from the State Prosecutor who has the right to authorize specific actions, but always under its administration and supervision (Latifi & Beka, 2013 page 160). The police, as any other public body, such as citizens and other institutions, are obligated to submit criminal offences in the Office of State Prosecutor at the competent Prosecution through criminal reports (Code, 2013, article 78, Latifi, 2004, page 45). Upon receipt of the Criminal Report, the State Prosecutor may require further evidence from the submitter of the Criminal Report (Halili, 2011, page 185 - 191). If the State Prosecutor accepts the Criminal Report after being ascertained that there is evidence of committing criminal offence, he issues a ruling to initiate the investigations, otherwise, he dismisses it. With this Code the subsidiary prosecution is not allowed, a prosecution that was allowed to the injured party from whom the Public Prosecutor withdrew from criminal prosecution.

The Public Prosecutor has a duty to consider the inculpatory as well as exculpatory evidence and facts during the investigation of criminal offences and to ensure that the investigation is carried out with full respect for the rights of the defendant (Code 2013, article 48) and the defendant and the State Prosecutor shall have the status of equal parties (Code 2013, article 9)

In addition new to this Code is the power given to the State Prosecutor to negotiate and accept voluntary agreement with the defendant to cooperate or plead guilty (Code 2013, article 49), to request from the court for temporary freezing of assets of the defendant (Code 2013, article 104, par. 8)

In this Code we have another balance of "forces" in between the Pretrial Proceedings Judge and the State Prosecutor. It is a competence of the State Prosecutor to detect, investigate the criminal offence and the perpetrator of the criminal offence. To complete this task he can order the use of covert measures against the suspects for the criminal offence foreseen in this Code (Code 2013, article 91, point 1).

The control role of the pretrial proceedings judge is especially obvious when it comes to the execution of covert measures of the investigation, but not listed. For the execution of the cover measures of the investigation the Judicial Police is authorized by the State Prosecutor and should be allowed with an Order issues by the Pretrial Proceedings Judge of the competent court (Code 2013, article 91). The covert measures of the investigation must be initiated within a fifteen (15) day time period from when the Order has been issues by the court. The pretrial proceedings judge who allowed the measures should be immediately notified. The name of the official to execute, conduct these measures should be cited, which in most cases these measures have a prescribed period of time of sixty (60) days with the possibility of repeat within 360 days. For the investigation of the criminal offences categorized by the Code, the possibility of applying covert measures is foreseen even when the identity of the subject to whom these measures are applied is unknown, i.e. interception of

telecommunication. In such cases it is sufficient to have a known telecommunication number to arise suspicion if used to commit criminal offence, although the user (owner) is unknown (Code 2013, article 84, point 1 and 2).

According to Article 91 of this Code, there is a large number of criminal offences that require the execution of covert measures of investigation to detect, for which measures the State Prosecutor must submit a request in written form and allowed by an Order issued by the pretrial proceedings judge of the competent court. The set procedures in this Code that refer to cover technical surveillance measures and investigations are strict and subject to the judicial procedure of admissibility. The admissibility of the collected materials, upon the request of the defendant, is the right of the judge or the president of the three-judge panel, who rule as to whether it is admissal before the indictment. This admissibility is subject to the procedure of admissibility even before the indictment is final. If found that there has been violation of the procedure while obtaining the evidence upon the implementation of the covert measures, the court issues a ruling and when this ruling is of final form, the judge or the president of the three-judge panel that conducts the procedure declares all the evidence inadmissible, thus sending all the evidence with a report to the Surveillance and Investigation Review Panel who through the president of the basic court issues a ruling to compensate the injured party. The Criminal Procedure Code in Article 97, point 4 obligates the judging authority to review the admissibility of evidence throughout the entire judicial process in account to the defendant.

3.3. Based on the solutions offered by the CPL of former Yugoslavia (article 14), the role of the Criminal Proceedings Court was active and had a control over the accusatory body respectively the prosecution and had a duty to care of :

- The Criminal Proceedings
- The respect of the rights of the defendant and other persons part of the proceedings
- Ascertaining the true facts, with a special role of control over the prosecution and other bodies part of the pretrial investigative proceedings
- Ascertaining of all the facts that are inculpatory or exculpatory to the defendant (article 15)

3.4. Besides the positive changes that the Criminal Procedure Code of Kosovo brings in the enforcement of the supervising role of the Court towards the accusatory body (article 64, 91 and 97), we see:

- The empowerment of the prosecutor's role and his authority, which in most cases conflicts the solutions offered by this Code in protecting the human rights and freedom.
- Transfer of the authorizations to the judicial police, a "transfer" (considering their qualifications) might result in unlawful arrests, 48 hour custodies in police stations with no legal grounds, indictment with no juridical grounds (not even with a declaration), the unreasonable extension of the investigative procedure to the dismissal of the investigations
- A wrong overview of crime representation in state level, which for many reasons represents an artificial growth not a real one (the offences are recorded as criminal offences when instead they are not)
- Violation of the economization principle during the pretrial proceedings and as a result considerable damages are caused to the state budget
- Deviation from the predetermined objective by the security organs in the fight of serious crimes organized crime, money laundry, human trafficking, terrorism and corruption etc.)
- A "imbalance" in between the prosecution and court position in exercising the functions in the pretrial phases of investigation, that as a result have brought the prescription of many criminal cases in the police, prosecution and courts (ODAD – Monitoring Report, 2012)

Conclusion

With the social and economic developments in Europe, especially after the Bourgeois French Revolution of the year 1789, we have a profound reform in the criminal procedure as well. This reform started in 1808 with the French Code of Criminal Instruction, an era that belongs to the ruling of Napoleon Bonaparte. With this Code the separations from the old and clean accusatory system start, to a mixed inquisitor system, where the defendant had the right for legal protection and the role of the court was active. The court had no more the role as the "Libra protector" where justice was "measured", but it took care to respect the rights of all the parties included in the criminal procedure. Thus, with the new solutions the rights of the parties advanced and with this Code we have elements of a mixed system, which came to improve and finally was crowned

in the Continental Europe as one of the most advanced Codes of the time, in the French Criminal Code of 1958 (Sahiti, 2013, page 50). It is obvious, the impact that these Code had in composition and development of different Codes of different countries, respectively the solutions given by this Code were constituted in the Criminal Procedure Law of the former SFRY (Overview, IKSH, 1979). The Criminal Procedure Law was the only law into force in the Socialist Federative Republic of Yugoslavia, including the Autonomous Socialist Province of Kosovo, as and equal eighth unit. This law was into force until 2004 although in Kosovo (after the war with Serbia 1998-1999, respectively with the former SFRY) the Interim Administration Mission of the UN (UNMIK) was established conform to the 1244 Resolution of the SC of the UN. In 2004 we have the new Provisional Criminal Procedure Code of Kosovo that was into force until the date of 31st December 2012, when it was replaced with the CPCRK on 01st January 2013.

Besides the novelties and the advancements that are regulated within the Criminal Procedure Code of Kosovo, the position of the defendant and the human rights are at a crossroad were the law and the human rights barge. Article 9 of this Code, says that the State Prosecutor and the defendant have the status of equal parties. Referring to this article we should assume that the parties have equal positions but are they in equal positions?

According to article 49 of the Criminal Procedure Code, the State Prosecutor has a duty to consider the inculpatory as well as the exculpatory evidence and facts and fully respect the rights of the defendant. Having in mind the period of our society's development, its position and the difficulties faced during the exercise of the prosecutor's duty, could he be impartial? Could he present inculpatory as well as exculpatory evidence and facts towards a defendant, against whom he issued a "guilty" ruling for the initiation of the investigation based on reasonable doubt that the suspect had committed criminal offence?

Despite that article 23 of this Code provides that the court in on the "side" of the defendant, who administers the criminal investigation through the pretrial proceedings judge until and indictment is issued, by reviews the requests submitted by the competent prosecutor. Issue of rulings and orders based on those requests, reviewing the lawfulness of freedom deprive of the defendant, who in the last instance could order his release in procedure violation grounds, either way the procedure conducted by the judicial police or the prosecutor leaves room for abuse that leads to the violation of the Human Rights and Freedoms during the investigation phase of the pretrial proceedings.

By comparing these two laws that refer to the criminal procedure and with the purpose to improve and to a more efficient work of the State Prosecution and the protection of the parties included in the criminal procedure, I think these are the steps to be taken:

- To empower the position of the pretrial proceedings judge and his inclusion starting with the initiation of the investigation
- The coordination in between the pretrial proceedings judge and the state prosecutor in all of the criminal procedure phases
- To strengthen the control of the cases proceedings starting from there initiations in the police, state prosecution and the court, with the purpose to not let them be prescribed
- A professional audit of the judged cases should take place, with the purpose to verify the appeal procedures in all the levels (verification of the use of regular measures or extraordinary measures in the appeal procedure)
- The amendment of the Criminal Procedure Code should take place, particularly emphasizing the empowerment of the role of the criminal procedure judge starting from the first phases of the investigation
- The Law of the Judicial Police should be issued
- The legal, criminal and administrative measured should tightened towards all of those that deliberately or by negligence have allowed the prescription of the criminal prosecution, the prescription of the criminal offence after the indictment or the prescription of the execution of the criminal judgments and cases

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