

The Importance of Implementation of Constitutional Principles in Criminal Procedure¹

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Abstract:

Kosovo as a new state, aims to build an independent system of justice, based on euro-atlantic and democratic standards and principles. Kosovo Constitution as a basic state law, contains lots of criminal proceedings principles which guarantee humanism, justice and equality of citizens.

The importance of constitutional principles is significant with special regard in criminal law aspect, due to the importance and sensitivity that criminal procedure has. Consequently, each legal act must be in accordance with the spirit of principles that are proclaimed by Constitution, including here Criminal Code. Relation between Constitution and Criminal Code is inseparable and also mutually dependant, because of the fact that each violation of constitutional principles results with a criminal offence. The aim of this scientific paper is to elaborate the importance of criminal law nature principles that Kosovo Constitution contains, and their implementation during criminal proceedings. For preparation of this scientific paper I have used legal, analysis and sociological method.

From the results of this scientific paper it can be concluded that constitutional principles are very important on the basis of a

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criminal proceedings conducted lawfully and fairly and in order to fulfil this goal, these principles must be respected.

Key words: Constitution, principles, criminal proceedings, Kosovo.

1. Notion and the importance of constitutional principles in implementing criminal proceedings

Principles² are basic and guide rules on the basis of which is built and functions a law institution, fundamental rules or leading ideas, according to which something is built.³ Except principles of criminal procedural nature which are foreseen by Constitution, in practice exist also other principles which depending on the nature of a criminal case, must be taken into consideration.

These principles are foreseen in a lot of Criminal Procedure Code no. 04/L-123 provisions (hereinafter: CPC). Principles as guide general rules, are very important in implementing lawfully and fairly of criminal proceedings, guarantee of liberty and rights of humans and are also obstacle of abusive actions, arbitrariness and exceeding of legal authorizations from carriers of repressive power, during a concrete criminal proceedings.

2. Main constitutional principles of criminal law nature

Kosovo in its first year of citizenship has approved solemnly the Constitution.⁴ Constitution as a fundamental state law, so

² Milot Krasniqi, *The Role of the Agency against Corruption in prohibition and fighting of corruption*, Albanian Justice, Tirana, 2013, pg. 2.

³ Albanian Science Academy, *Nowadays Albanian Dictionary*, Tirana, 2002, pg. 935.

⁴ The Constitution of the Republic of Kosovo entered into force on 15 July 2008. Available at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf> (last accessed: 2 July 2014)

principled determines rules and basic principles of organization and functioning of state power. Consequently, by Constitution are foreseen also criminal law nature principles, which define the limitation of repressive power of the state and also guarantee that lawful actions will be undertaken during criminal proceedings. Constitutional principles of criminal law nature are very important due to the fact that they determine so principled also the content of the whole criminal proceedings. By Kosovo Constitution are foreseen the most important principles of criminal law nature, such as:

1. The principle of legality and proportionality (article 33);
2. The principle of the right to fair and impartial trial (article 31);
3. The principle of publicity (article 31, paragraph 2 and 3);
4. The principle of innocence presumption (article 31, paragraph 5);
5. The principle of free legal assistance (article 31, paragraph 6);
6. The principle of the right to pursue legal remedies (article 32);
7. The principle of the right not to be tried twice for the same criminal act, *Ne Bis in Idem* (article 34);

2.1. The principle of legality and proportionality

Criminal proceedings contain a lot of procedural actions which aimed in the case of existence of reasonable doubt that a criminal offence has been committed, to initiate the proceedings against the perpetrator and to impose the punishment in accordance with the law. The principle of legality is the most important constitutional principle which guarantees that undertaken actions in criminal proceedings are in accordance with the law. According to the article 33 (paragraph 1) of Kosovo Constitution it is specified that no one shall be charged or punished for any act which did not constitute a criminal offence under the 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. This principled solution determines that no one shall be charged or prosecuted for an action that at the time it was committed was not foreseen as a criminal offence. Such limitation put in this principle serves to general legal security of citizens and guarantee that they shall not be prosecuted for an action, which at the time of committal was not sanctioned with criminal law as a criminal offence. The principle of legality in criminal cases is known with the aphorism “ *Nullum crimen, sine lege*”.

According to the paragraph 2 of this article it is specified that no punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed. Our Constitution through this solution promotes the principle of proportionality in criminal cases.

Consequently, the criminal sanction shall be imposed to the defendant in accordance with social dangerousness of the committed act and also after reviewing and evaluating in detail mitigating and aggravating circumstances linked with the case. So, sanction shall be proportional with the caused damage and at any case shall not aggravate the defendant's position. In the paragraph 3 of this article it is defined that the degree of punishment cannot be disproportional to the criminal offence. In criminal cases the punishment imposed to the perpetrator of the criminal offence must be within limits of punishment foreseen for that concrete criminal offence. Mitigation or aggravation of the punishment it can be done in the cases when exist circumstances which justify this purpose and which are foreseen expressly by law.

In the end, according to the paragraph 4 of this article it is specified that 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. This principled solution

guarantees legal security of citizens. In fact this principle determines that in criminal cases is applied the law in force at the time a criminal act was committed. Exception from this rule are cases when subsequent applicable law is more favorable to the perpetrator. Thus, more favorable criminal law it is considered to be the law who is more favorable that a previous law, when does not foresee that criminal offence at all or similar to that. In these cases comes under consideration the principle of opportunity.

2.2. The principle of fair and impartial trial

In the article 31 of Kosovo Constitution are foreseen the most important principles which must be applied during criminal proceedings. In criminal cases other important principles are applied provided by international acts which are implemented directly in Kosovo according to the article 22 of Constitution. Regarding to this, article 6 (paragraph 1) of Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: CPHRFF) foresees that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

These principled solutions are accepted in our Constitution as well as in Criminal Procedure Code. Consequently, according to the article 31 (paragraph 2) of Constitution, it is foreseen that everyone is entitled to a fair and impartial public hearing or to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law. This provision determines very clearly that every citizen to whom a criminal charge is filed or any other law issue, must be adjudicated by independent and impartial tribunals based on law. This principle essentially determines

that only the courts have the exclusive right to adjudicate. This determination is also foreseen in the article 102 of Constitution, according to which the judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts, and courts shall adjudicate based on the Constitution and the law.

The principal of fair and impartial trial is also provided by Criminal Procedure Code. According to the article 5 (paragraph 1) of Criminal Procedure Code, it is foreseen that any person charged with a criminal offence shall be entitled to a fair criminal proceedings conducted within a reasonable time. Our Constitution promotes the right to fair and impartial trial in criminal cases. For the purposes of this principle, fair trial means that any person who is innocent shall not be punished whereas the person who is guilty shall be punished by law.

These provisions of Constitution and Kosovo Procedure Code, ex-officio oblige the courts to conduct criminal proceedings without unreasonable delay. In this context, courts must pay a special attention in particular to measures by which the liberty of persons is deprived, so they will last just for the period of time that is necessary, so in this way shall be protected the rights and liberties of humans well known worldwide. Attention shall be paid also to the issues and procedural actions who are linked with deadlines in the way that the defendants not to lose any right as a result of disrespect of deadlines by the courts.

2.3. The principle of publicity

The principle of publicity known also as the principle with open doors in criminal law procedure consists at the right and possibility of interested citizens to attend court activities during main trial in criminal cases.⁵ Publicity principle of court

⁵ Ejup Sahiti, *Criminal Law Procedure*, Prishtina, 2005, pg. 50.

activity, it is expressed also through presenting of periodical reports of court activity. Duly, courts work in Kosovo is public, except the cases when publicity is limited or prohibited expressly by the law.

Publicity in criminal cases is guaranteed by Constitution. According to the article 31 (paragraph 2) of Constitution, it is defined that everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law. According to the paragraph 3 of this article, trials shall be open to the public except in limited circumstances, in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.

The principle of publicity guaranteed by Constitution, is accepted also in the article 293 of Criminal Procedure Code as well as by the article 7 of the Law no. 03/L-199 on Courts. In fact, the principle of publicity in criminal proceedings may be a general publicity, limited publicity and parties publicity. By general publicity we understand the opportunity of attending criminal cases from all citizens, excluding minors and children, whose presence is considered that may affect negatively in their personality. In accordance with the article 339 (paragraph 2) of Criminal Procedure Code, if a child is present at a hearing as a witness or an injured party, he or she shall be taken out of the courtroom as soon as his or her presence is no longer necessary. The limited publicity is the situation when except the necessary participants in criminal proceedings, participate also some third parties. According to the article 294 (paragraph 1) of Criminal Procedure Code, these are the cases when according to the law conditions are fulfilled for excluding the general publicity, by protecting official secrets, maintaining the confidentiality of

information which would be jeopardized by a public hearing, protecting the interests of children. Parties publicity means the participation at a hearing only to the parties at criminal proceedings (state prosecutor and the defendant) as well as the court as an arbitrator between parties.

According to the article 71 of Code no. 03/L-193 On Juvenile Justice, at criminal proceedings against minors the public is excluded, whereas may be allowed to participate experts and persons which treat professionally minors wellbeing and education or fighting delinquent behaviours of minors.

The principle of publicity enables the opening of courts towards citizens and serves to transparency. Nevertheless, lawmaker set also principled limitations for participants as a public at criminal proceedings. According to the article 295 (paragraph 3) of Criminal Procedure Code, every person attending the main trial which is closed to the public, is obliged to keep confidential all information that comes to their knowledge at the trial and disclosing such information constitutes a criminal offence.

2.4. The principle of innocence presumption

Presumption or assumption of innocence is one of the most important guarantees of the legal security in criminal law and inseparable part of the fair trial. This principle has been incorporated in the article 31 (paragraph 5) of Constitution, by which it is defined that everyone charged with a criminal offence is presumed innocent until proven guilty according to the law. According to this principle every person is deemed to be innocent, until the competent court decides by final judgment for his culpability. This principle also enables the principle of objectivity to be implemented at criminal proceedings and ascertainment of the material truth, because the plaintiff has no burdens or prejudgments over the suspected culpability.

The presumption of innocence facilitates the procedural position of the defendant at a hearing and attributes the state prosecutor for confirmation of charge claims, respectively the burden of proof. On this base, it cannot be served as a culpability proof, the refusal of the defendant to declare at the court for charges but neither failure to present evidences in order to prove his innocence. The presumption of innocence is foreseen by Criminal Procedure Code in the article 3 (paragraph 1) according to which any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court.

The principle of innocence presumptions shall be respected at all criminal procedure phases. For procedural body the person under investigation shall be deemed innocent even though he was taken as a defendant and to whom any security measures have been imposed. The culpability of suspected persons, arrested or charged for criminal offences should never be prejudiced, because the practice has proven that in many cases, many persons that are charged for criminal offences in the end they turned out to be innocent, therefore a person shall be deemed guilty only after sentencing final judgment by which the court convicted and imposed criminal sanction.⁶

In any case when the accusation body does not confirm charge claims, the defendant must be released. Also, according to this principle every raised issue at the main trial that cannot be confirmed by reliable proof, goes in favour of the defendant according to the principle *In dubio pro reo*, in accordance with the article 3 (paragraph 2) of Criminal Procedure Code.

2.5. The principle of free legal assistance

Free legal assistance is a relatively new institution at the theory and legal practice in Kosovo. To us this institution is

⁶ Dardan Çela, *The rights of the defendant at criminal proceedings*, Albanian Justice, Tirana, 2012, pg. 10.

inaugurated in 2006, and our country is a pioneer and promoter of this institution in Southeast Europe. Free legal assistance means the right of certain categories of citizens to acquire professional law services free of charge in accordance with criterias which have been specified by Law no. 04/L-017 for Free Legal Aid. Consequently, free legal assistance is a professional legal service which is dedicated to the most sensitive categories of society which by their means cannot cover the expenses that criminal procedure contains.⁷ The purpose of free legal assistance principle is to ensure the equal access to justice for all citizens.

In the article 31 (paragraph 6) of Constitution, is defined that free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice. Free legal assistance in the criminal field is usually provided in the cases of mandatory defence, when criminal proceedings shall not be conducted without the defence counsel.⁸ According to the legal solutions in these cases shall be engaged only the licenced lawyer form the Chamber of Advocates.⁹ Consequently, free legal assistance in criminal field is provided in accordance with the provisions of the article 57 and 58 of Criminal Procedure Code and the article 43 of Code no. 03/L-193 on Juvenile Justice in cases of criminal proceedings against juveniles. According to the article 57 (paragraph 1) of Criminal Procedure Code, in cases of mandatory defence the defendant must have a defence counsel:

1. *From the first examination, when the defendant is mute, deaf, or displays signs of mental disorder or disability and is therefore incapable of effectively defending himself or herself;*

⁷ Milot Krasniqi, *The system of free legal assistance in the Republic of Kosovo*, Albanian Justice, Tirana, 2013, pg. 1.

⁸ See and compare: Azem Hajdari, *Criminal Law-Commentary*, Prishtina, 2010, pg. 170.

⁹ Article 54 (paragraph 1) of CPC and article 15 of Rule no.2006/36 on Free Legal Aid.

2. *At hearings on detention on remand and throughout the time when he or she is in detention on remand;*
3. *From the filing of an indictment, if the indictment has been brought against him or her for a criminal offence punishable by imprisonment of at least ten (10) years;*
4. *For proceedings under extraordinary legal remedies when the defendant is mute, deaf, or displays signs of mental disorder or disability or a punishment of life long imprisonment has been imposed.*

These are the engagement cases of defence counsel according to the official principle, which expenses are covered by state budget.¹⁰ Also, at criminal proceedings in accordance with the article 58 (paragraph 1) of Criminal Procedure Code, when there exist conditions for mandatory defence, to the defendant shall be appointed a defence counsel at public expenses at his request or his relatives, but not against his will in cases when:

1. *There exists no conditions for mandatory defence and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) years; or*
2. *When in the interest of justice, independently for the punishment foreseen, a defence counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defence.*

Free legal assistance is also applied at juveniles criminal proceedings in accordance with provisions of the article 43 (paragraph 1) of Juvenile Justice Code, according to which the minor must have a defense counsel from the beginning till the end of criminal procedure. This provision defines that juvenile criminal proceedings cannot be conducted without the presence of defence counsel. The defence counsel must be present during the whole criminal proceedings, regardless of the weight of

¹⁰ Milot Krasniqi, *The system of free legal assistance ...*, pg. 8.

committed criminal offence by minor.¹¹ According to the paragraph 2 of this article, if the minor, legal representative or his family member does not engage a defence counsel, juvenile judge or the competent body who conducts the procedure appoints a defence counsel ex-officio, on public expenses. Even if during criminal proceedings, the minor remains without defence counsel, the body who conducts the procedure must appoint another defence counsel on public expenses. Duly, the minor must be represented only by a licensed defence counsel.

Free legal assistance in Kosovo is managed by The Agency for Free Legal Aid (AFLA) in coordination with Kosovo Chamber of Advocates (KCHA). Kosovo Chamber of Advocates prepares the list of defence counsels names which express readiness to offer free legal assistance. And then The Agency for Free Legal Aid contracts with a defence counsel which offers legal assistance in a concrete case. Defense counsels do not get paid from parties but for their job they get compensated by The Agency for Free Legal Aid according to the tariff specified by-law act.¹²

2.6. The principle of pursuing legal remedies

The principle of second instance trial is a necessary element of the fair trial. Due to the aggravation of criminal sanctions, the right to a legal remedy has special importance at reviewing of judgments of the first instance.¹³ For this purpose, the Constitution guarantees each individual the right to use legal remedies as a mechanism to attack decisions by which he believes that he was denied or infringed from any legal right. Consequently, in the article 32 of Constitution, is determined that every person has the right to pursue legal remedies

¹¹ Azem Hajdari, *Criminal Law on Juveniles-Commentary*, Prishtina, 2010, pg. 106.

¹² Engaging of lawyers in providing of free legal aid made in accordance with Article 29 of Law no. 04/L-017 on Free Legal Assistance.

¹³ Enver Hasani and Ivan Cukalovic, *Constitution of the Republic of Kosovo-Commentary*, Prishtina, 2013, pg. 112.

against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law. The right of pursuing legal remedies at criminal proceedings is very important due to the fact that the same criminal issue is reviewed two times and from different perspectives, therefore the possibility for eventual errors is significantly lower. The right of pursuing legal remedies is guaranteed also by international relevant acts. This principle serves as a reviser of the faulty or unfair work that courts may carry out. Of course, through legal remedies there is a legal possibility that higher body to review in so principled and to decide fairly for the appealed decision. According to the provisions of Kosovo Criminal Procedure Code, at criminal proceedings may be used regular legal remedies and extraordinary legal remedies, under the special conditions.

2.7. The principle not to be tried for the same criminal offence

The principle of adjudicated issue (*Ne Bis in Idem*) does not allow the repetition trial adjudicated by final judgment. This principle for the interest of the defendant and legal security, prohibits the review of the adjudicated issue by final judgment, except the cases defined expressly by law. The first case has to deal with the same issue that has been adjudicated before whereas the second case has to deal with the issue which is not allowed to be reviewed.¹⁴

Of course, this principle prohibits prosecution of the person which for that offence has been adjudicated by final judgment and its aim is to protect citizens from prosecution and unfair trials, repeated, legally and socially unreasonable. Because of the principled importance, this rule is also provided in the article 34 of Constitution, which determines clearly that no one shall be tried more than once for the same criminal act. This principle is also provided in the article 4 by Criminal

¹⁴ Azem Hajdari, *Criminal Law Procedure*, Prishtina, 2013, pg. 68.

Procedure Code. Revision of criminal proceedings is possible only when this is foreseen expressly by Criminal Procedure Code, through legal remedies. But according to the paragraph 2 of this article, even in these cases, final judgment may be changed only in the favour of the defendant.

3. Conclusions

From the research made over the importance of constitutional principles in implementing of criminal proceedings may be issued these main conclusions:

1. Kosovo Constitution as the highest political and legal act of the country, besides other things contains also the main and the most important principles of criminal law nature. These principles are the base of building criminal legislation. Consequently, in the spirit as the principles are built, such is the criminal proceedings too.
2. Constitutional principles are very important because by law provisions they set the limits of state repressive power, prohibit abusive actions tendencies, arbitrariness of judicial power carriers towards citizens as well as guarantee that procedural actions undertaken from these subjects are lawful and just.
3. The importance of constitutional principles in implementing of criminal proceedings is the guarantee of the most important values of human society in relation to citizens. These principles come to consideration at all criminal proceedings stages, but mostly during the main trial.
4. Except the criminal law nature principles foreseen by Constitution, in practice exist also many other principles, provided by Criminal Procedure Code provisions as well as by international acts which are applied directly in our country. From this fact can be concluded that our Constitution is a modern act, that

guarantees the fundamental rights of the defendants, as well as promotes them at affirmative spirit. The large number of criminal law nature principles foreseen by Kosovo Constitution, proves for humanism goal of criminal proceedings at the best interest of the defendants. Constitutional principles are very important due to the fact they affect in implementing of fair and lawful criminal proceedings, therefore at any case they must be respected form the subjects that undertake criminal procedural actions.

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