

## Some measures for the advancement of the punitive policy against criminality

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### Abstract

Criminality as a negative social phenomenon results in consequences for the society and the citizen. Through state-owned institutional mechanisms the society takes measures to prevent and combat criminality. The measures are numerous and diverse, ranging from those of preventative educational character to repressive and sanctioning measures. The bodies that take these measures are diverse, starting from family and school that take precautionary measures against crime in society to the state institutions, the courts, that pronounce criminal sanctions as measures against the perpetrators of criminal offenses. In this paper, we will only deal with some measures that in our opinion contribute to the efficiency of the punitive policies against crime in society.

**Keywords:** *criminality, preventive measures, repressive measures, punitive policies, sanctions.*

### Introduction

The policy of combating and preventing criminality has its own history of development, dating back to the earliest times (Vesel, 2008). This policy has changed along with social developments and forms of criminality, which show a permanent evolutionary development. Particular importance in combating and preventing criminality is played by preventative measures. In this regard, it should be emphasized that the state that claims to be democratic and humane to its citizens, should it aspire to prevent and eradicate the criminality it must, in addition to criminal sanctions, possess and undertake various measures such as increasing the educational and cultural level as well as the awareness for the respect of laws, freedoms, rights, security and equality of citizens in all fields, including measures for the economic and social well-being of its citizens and the society as a whole (Salihu, 2012).

In addition to these preventive measures taken by the society to address criminality, repressive measures also play an important role. Every country has its own laws, its own justice, and criminal law as part of it (Muci, 2007).

In all instances when a criminal act has been committed and there are fundamental elements of a criminal offense, the state, via its body, the Courts, imposes to the perpetrator of the criminal offense a sanction as a repressive measure. Criminal sanctions are among the means employed by the society for the purpose of protection against criminality. These are a kind of society's reaction to the perpetrators, undertaken with the aim of protecting the citizens from harmful acts (Salihu, 2012).

For the punitive policies to be adequate in order to prevent and combat criminality, three basic elements are required: protection of society and individuals, re-education of perpetrators and general prevention. If a criminal policy meets these requirements, it is viewed as socially reasonable and adequate; otherwise, it does not respond to societal goals and needs to be replaced (Milutinovic, 1987).

Apart from the highlighted elements that criminal or punitive politics should have in order to be adequate, special considerations should be paid to several other elements. Such elements are the growth or decline of criminality, the degree of criminal acts on social risk, citizens' attitudes towards some incriminated behaviors, their sensitivity to social values, cultural and ethical levels of a given environment, etc.

From the scientific evaluation of the topic, we think that in any given society in general and in Kosovo in particular, some of the measures that will contribute to the advancement of the punitive policy against criminality can be divided into:

- General measures for the advancement of punitive policy against criminality;
- Special measures for the advancement of punitive policy against criminality.

### **Some general measures for the advancement of punitive policy against criminality**

Without punitive policies, prevention and fighting of criminality in a society cannot be thought of. In order for this punitive policy to be adequate, a whole range of measures are required from the institutions, bodies and other players according to their respective competences. In our opinion, some of the general measures for the advancement of punitive policy against criminality which should be undertaken are:

- The real functioning of the legal state on the principle of constitutionality and lawfulness and the basis of democratic regulation of the society;
- Economic, political and legal developments in the society;
- Independence of judicial bodies;
- Adequate individualization of criminal sanctions;
- Permanent reforms of criminal legislation related to prosecution and criminal punishment.

#### ***The real functioning of the legal state on the principle of constitutionality and lawfulness and the basis of democratic regulation of the society***

The prevention and combating of criminality in an organized society is done through special state bodies. The basic functions in this regard belong to the state.

The establishment of democratic relations in a society based on respect of fundamental principles of constitutionality and lawfulness is a precondition for the protection of citizens from criminality. This protection is ensured by observing the prosecution and punitive policies in the principle of lawfulness and constitutionality. Respecting the fundamental principles of constitutionality and legitimacy built on democratic legal relations in the society helps the punitive policy as it determines which offenses are considered criminal, how they are sanctioned, what are the conditions under which sanctions will be imposed, etc.

Regarding the definition and observance of the principle of lawfulness the Criminal Code of the Republic of Kosovo<sup>1</sup> in its Article 2 expressly states:

- Criminal offenses, criminal sanctions and mandatory treatment measures are defined only by law.
- No one shall be liable to a criminal sanction or a measure of compulsory treatment for a criminal offense if prior to its commission it is not determined by law to be a

<sup>1</sup> Code No.94/L-082 - Criminal Code of the Republic of Kosovo has entered into force on 1.1.2013.

criminal offense and no criminal sanction or measure of compulsory treatment for that offense is foreseen.

- The definition of a criminal offense shall be precisely determined and therefore interpretation according to analogy is prohibited. In case of uncertainty, the definition of the criminal offense shall be interpreted in favor of the person against whom the criminal proceedings are conducted.

From this legal provision emerges the juridical interpretation that this is the most fundamental principle of criminal law in general and punitive policy in particular.

#### ***Economic, political and legal developments in the society***

Economic growth and development is a fundamental condition for the overall social development. This development determines, respectively affects, the development and establishment of social, legal, political, cultural, scientific and other relationships in the society.

The improvement of the economic structure has an effect on increasing the social awareness of the society and on positive channeling of criminal and punitive policies, in particular in accordance with the general social, economic and legal-political developments. Economic development in a society imposes the need to follow it with new incriminations. Viewed from this perspective, social and economic developments in a society contribute directly or indirectly to punitive policies and abolition of criminal sanctions in accordance with the social and scientific achievements.

#### ***Independence of judicial bodies***

The independence of judicial bodies is one of the most fundamental conditions for the adequacy of punitive policies. Viewed from the scientific viewpoint, judicial independence is of paramount importance in order to secure court integrity and credibility within a given political system. This independence consists of two key components: the decision-making independence, which can be defined as respect and accountability of court decisions, and the structural independence, which means being free from political interventions in the selection, promotion, remuneration and day-to-day activities of judicial personnel.

Given the decision-making and the structural autonomy, it emerges that for the adequacy of punitive politics, court independence is a basic condition without which the punitive policy will in no case be adequate nor be based on the principle of lawfulness. Interventions from outside the court on its independence, namely legislative or executive bodies and institutions, will affect both the decision-making and the structural independence. This interference with the independence of the judiciary will have negative consequences in the proper definition and implementation of the punitive policy.

#### ***Adequate individualization of criminal sanctions***

Adequate individualization of criminal sanctions against the perpetrator and the criminal offense is one of the most fundamental measures for the adequacy of punitive policies. The individualization of the sentence means fitting the criminal offense with its perpetrator. The purpose of individualization is to impose an offense that will most effectively affect the re-education of the perpetrator (Salihu, 2012). Respect and

enforcement of the principle of individualization of the punishment, respectively of the criminal sanction, are of fundamental importance for the adequacy of the punitive policy. The courts should make it an essential principle when imposing a criminal sanction to have adequate individualization of punishments. The judgment of a conviction by a court shall be within the minimum and the maximum punishment prescribed by law for such criminal offenses, taking into account the mitigating and aggravating circumstances. The Criminal Code in its Article 73 foresees in general terms which of the circumstances will be taken into account by the court when measuring the punishment and lists the most typical mitigating and aggravating circumstances, giving the possibility to the court in any specific case to take into account other circumstances, which have the effect of imposing a more severe or a milder punishment. Among the circumstances foreseen by the Criminal Code, there are objective circumstances referring to the offense and subjective circumstances referring to the perpetrator.

### ***Permanent Reforms of Criminal Legislation related to prosecution and criminal punishment***

Bearing in mind the permanent social, economic, political and legal changes and the need for the protection of social and individual goods, every state claiming to observe the rule of law on the principles of democracy and lawfulness should undergo constant reforms of the criminal legislation related to prosecution and punitive policies. These reforms of criminal legislation must have an international legal basis that promotes and protects the most vital and fundamental societal and human values from any form of violation. In this regard, protection of rights related to criminal prosecution and criminal punishment in an unlawful manner is of particular priority (protection from the unlawful deprivation of liberty, violation of the principle of lawfulness, violation of the right to protection, violation of the principle of the presumption of innocence, defense against the imposition of arbitrary punishment and other fundamental human rights).

### **Some special measures for the advancement of punitive policy against criminality**

In addition to the general measures for the advancement of punitive policies for combating criminality, there are also some important measures of special character. Some of the special measures that can contribute to the advancement of the punitive policy against criminality in our opinion are:

- Adequate attestation of the form of guilt as a subjective element of the offense;
- Adequate attestation and fair assessment of the social risk of a criminal offense in concrete cases;
- The exclusion of the offense and its perpetrator from politicization and ideology;
- The separation, with dividing lines, adequately, accurately and qualitatively between the offense and criminal offense;
- Adequate attestation of the causal connection between action - intent as a serious form of guilt - the consequence caused - and the sanction imposed;
- The most adequate definition of the basic elements of accountability and

irresponsibility due to the mental state of the perpetrator;

- The determination and proper application of the legal notions of the perpetrator's motive and purpose in case of punishment;
- Respecting the principle of judges' impartiality according to political beliefs, financial position, nationality of perpetrator, etc;
- Permanent court orientation towards understanding and investigating the perpetrator's personality based on scientific achievements;
- Permanent professional development of judiciary employees, in particular of judges and prosecutors;
- Implementation and respect of the principle that upon requesting an expertise in the criminal procedure, the opinion be based on 2 or 3 experts and the court do not rely on the opinion of one single expert on issues of great importance for the just proceeding of a criminal case;
- Consistent application of scientific findings in the area of criminal liability of the perpetrator of a criminal offense;
- Proper definition of the division between necessary defense and incriminating action that results in criminal responsibility;
- Definition and respect of the principle that only the court, as a specialized state body, and no other body, has the right to impose punishments;
- Fair and reasonable assessment by the court of the consequences of an offense;
- Combating of negative phenomena in the judiciary bodies such as: bureaucratization, occupation of posts, corruption, etc;
- Possibility of alternative penalties or criminal sanctions for any criminal offense;
- The elimination of public influence or impact on the work of judiciary bodies, and in particular the court;
- The requirement that judges not be members of any political party and be non-political;
- The appointment of judges and persons with special authorization in other justice bodies, respecting the principle of competition, professionalism and special qualifications,;
- Enhancement and improvement of salaries for judges and other justice employees as an incentive element for their work;
- Application of the principle of rating and evaluating the work of judges and other justice employees as an incentive element for their work;
- Application of the principle of rating and evaluating the work of judges having as a criterion the fairness of the judicial decisions they have brought;
- Application of a compulsory system of special training courses, counselings, professional round tables and other forms of permanent professional and scientific advancement of judges;
- Establishment of special institutes that would conduct research in the function of the adequacy and progress of the punitive policy based on contemporary criminal policies;
- Following and permanently observing international human rights institutions in the judicial sphere;
- Monitoring of court proceedings by representatives of non-governmental

- organizations dealing in human rights;
- Mobilization of public communication means regarding the advancement of punitive policies, etc.

All of the above measures have their significance and value. Therefore, the application of these measures in the future will contribute to the adequacy of the punitive policy in Kosovo.

### **The importance of establishing an effective rule of law regime for an adequate punitive policy**

In the Kosovo context, establishing an effective rule of law system for an adequate punitive policy still remains a challenge and as such is perceived as critical for future developments in the country and integration into the European Union. Within 10 years Kosovo has developed from a state of total collapse of the justice system into a relatively good institutional grounds in this sphere. During this period, institution building was followed by partial institutional reforms and the creation of new bodies.<sup>2</sup> The justice system in Kosovo requires stability in order to consolidate and concentrate on improving its quality, efficiency and performance. This will not be an easy task, given that the new justice reform is still in the planning stage and awaits to be implemented. Appropriate resource utilization and efficient management are key to success in the justice system reform.

However, challenges exist and are mainly political. Establishing a uniform legal system throughout the territory of Kosovo is a big challenge. The reintegration of the northern part under the umbrella of the Republic of Kosovo justice system should be one of the top priorities for the Kosovar authorities. Moreover, due to recent decisions of the Constitutional Court, the Kosovar authorities must insist before the international presence that any exercise of judicial or prosecutorial jurisdiction in the territory of the Republic of Kosovo should be based and exercised in accordance with the Constitution of the Republic of Kosovo. A sincere dialogue with the European Union in this regard is an imperative.

Reforming the justice system and the rule of law in Kosovo should be seen as a continuous process towards an adequate punitive policy against criminality. The reform of the core criminal laws and international support for the judicial system in Kosovo will facilitate and speed up this process, directly reflecting on the efficiency of the punitive policy for preventing and combating criminality.

### **Conclusions**

From the scientific treatment of the measures for the advancement of punitive policy against criminality we have come to the following conclusions:

- Criminality is a phenomenon present in the society that reflects negative

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<sup>2</sup> Kosovo Center for Security Studies, Raport mbi rithemelimin dhe reformimin e sistemit te drejtesise ne Kosove 1999-2011, Analize Konteksti, [http://www.qkss.org/repository/docs/RI-THEME-LIMI\\_DHE\\_REFORMIMI\\_I\\_SISTEMIT\\_T%C3%8B\\_DREJT%C3%8BSIS%C3%8B\\_N%C3%8BKOSOV%C3%8B\\_105208.pdf](http://www.qkss.org/repository/docs/RI-THEME-LIMI_DHE_REFORMIMI_I_SISTEMIT_T%C3%8B_DREJT%C3%8BSIS%C3%8B_N%C3%8BKOSOV%C3%8B_105208.pdf).

consequences for the society and individual citizens.

- The policy of combating and preventing criminality has changed in line with social developments and the forms of criminality show a permanent evolutionary development.
- Special importance in combating and preventing criminality lies with preventive and repressive measures.
- The preventive measures are primary and taken by a large number of players in the society, while repressive measures are undertaken through state bodies for combating of crimes.
- Some of the measures that would contribute to the advancement of the punitive policy to combat criminality in Kosovo can be divided into: general measures and special measures for the advancement of punitive policies against criminality.
- Some of the general measures which should be undertaken are: the real functioning of the rule of law on the principle of constitutionality and lawfulness and on the basis of democratic regulation of the society; independence of judicial bodies; adequate individualization of criminal sanctions; permanent reforms of criminal legislation dealing with prosecution and punishment, etc.
- Some of the special measures that can contribute to the advancement of punitive policies against criminality in our opinion are: adequate attestation of the guilt form as a subjective element of the criminal offense; adequate attestation and fair assessment of the social risk of criminal offenses in concrete cases; exclusion of offense and its perpetrator from politicization and ideology; provision of adequate, accurate and qualitative dividing line between offense and criminal offense; adequate attestation of the causal link between action - intent as a serious form of guilt - the consequence caused - and the sanction imposed; the most appropriate definition of the basic elements of accountability and irresponsibility due to the mental state of perpetrator; respect of the judges' impartiality principle according to perpetrator's political beliefs, financial situation, nationality, etc.

The justice system in Kosovo requires stability in order to consolidate and concentrate on improving its quality, efficiency and performance. This will not be an easy task given that the new justice reform is still in the planning stage and awaits implementation.

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