

## Legal comparison of the Kosovo and Austrian Criminal Law System with a special emphasis on diversity measures

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### Introduction

Object of this study, is a brief description and analysis of diversity measures in in comparative criminal law between the Kosovo and Austrian system. More specifically these measures will be analyzed within the criminal law area. The focus on diversity measures will extend on conditions of their application, types, categories of criminal offences to which these measures are applied to, as well as main effects of their application. The reason for such a comparison is the fact that Austria is taken as a model while setting norms and applying<sup>1</sup> these optional measures in relation to imposing classical sentences and that stands not for Kosovo only, but also for many other Western states that have an advanced criminal law system. Main aim of this manuscript is to include in the Kosovo criminal law system, a strong legal framework about the legal category of diversity measures. Based on this framework it would be possible to use extrajudicial practices to solve disputes in the Kosovo society from minor up to medium scale criminal offences. This legal comparison is mainly based on the written university literature that relates to the criminal laws of both compared states. Legal acts as well as legal practices of diversity measures, of both states, have been consulted. This manuscript is based on the comparative „Micro-legal“ model of the Max Rheinstein (1987). With such a micro-legal comparison we want to „*assess issues that are based on the single treatment of one phenomena or conflict with a special interest on various legal systems*“.

**Keywords:** Kosovo, Austria, Criminal law, diversity measures.

### Introduction

The term diversity measures derives from the word „*Diversion*“, the source of which is the Latin verb „*divertere*“ (Dimaichner, 1990, 17) which in English has also these meanings „*avoidance*“, „*deviation*“, „*declination*“ or even „*something different*“. In the legal aspect this name results with avoidance of regular court procedures developed by state prosecution and courts, toward people in conflict with the criminal code and other criminal laws in force, displacing them to extrajudicial procedures. Diversity measures are included in the so called „*Alternative Dispute Resolution*“ (ADR), category, presented for the first time in the '60s in USA aimed at extrajudicial solutions for disputes of juveniles (Dimaichner, 1990, 28). These measures were foreseen for the category of „*less risky*“ juveniles for which there is no need to apply repressive measures (Ludwig, 1989, 43). Disputes of such social values risk level were solved at the site (event), by police, in an extrajudicial way, leaving aside all procedural actions. Since '80s these optional measures of sanctions included in the Criminal Law were firstly applied in Great Britain, and after that in Germany (Heinz & Storz, 1994, 9). These were applied as a reaction toward delinquent juveniles through projects for the enforcement of diversity measures and options of classic sanctions.

<sup>1</sup> Approx. 50 000 diversity measures toward perpetrators are applied on yearly basis in Austria.

## 1. Legal systematization of diversity measures in the Criminal Law of Kosovo and Austria

The core difference between the Kosovo's and the Austrian Criminal law related to the diversity measures is detected from the perspective of legal provisions systematization and structuring in the criminal procedure codes. In the criminal law of Kosovo both in adults and in the one for juveniles, the diversity measures (analogous to the diversion in Austria) are not structured properly, since they were and still are scattered across chapters or different headings. Thus they were incorporated in the Provisional<sup>2</sup> Criminal Procedure Code of Kosovo (hereinafter PCPCK), and are now in the Kosovo Code<sup>3</sup> of Criminal Procedure now in force (hereinafter KCCP). In PCPCK they were foreseen in Chapter XXVI (Articles 226-227), as well as in Chapter XXVII (Article 228). Currently the KCCP foresees such alternative measures in Chapter X (Article 184) and in Chapter XIV (Articles 229-239).

In Kosovo Criminal Law for Juveniles, *diversity measures* were incorporated in Chapter V of the Criminal Law for Juveniles<sup>4</sup> (hereinafter CLJK) (article 16), as well as in the Chapter XII (articles 53, 54). Currently they are presented in the Kosovo Justice Code of Juveniles<sup>5</sup> (hereinafter KJCJ), Chapter III (articles 14 and 15), then in Chapter IV (articles 16 -18), as well as Chapter XI (article 56 (1) and (2)). Mediation as an optional measure in criminal cases was planned separately in the Kosovo Law on Mediation<sup>6</sup> (article 1. (1.2)).

In the Austrian Criminal (Procedural) Law for adults, these measures were incorporated in the Austrian Code ( the previous) of the Criminal Procedure, of year 1999<sup>7</sup>, in Chapter IX (articles 90a-90m), as well as in the Austrian Criminal Procedure Code in force<sup>8</sup>, in Chapter XI (articles 198-204) (*StPO from German to English hereinafter: ACCP* ) systemized in the same Chapter. Also the Judicial Law for Juveniles of year 1988<sup>9</sup> (*JLJ from German to English hereinafter: JLJ*) has incorporated diversity measures in articles 6,7 and 9.

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<sup>2</sup> Provisional Code of the Kosovo Criminal Procedure. UMIK Regulation, No. 2003/26. GZ, 6 July 2003, in force since 6 April 2004.

<sup>3</sup> Kosovo Criminal Procedure Code, No. 04/L-123. GZ, Pristina, no. 37/28.12. 2012, entered in force on 1 January 2013.

<sup>4</sup> Kosovo Law for Juveniles. UNMIK Regulation, no. 2004/8, 20.04.2004.

<sup>5</sup> Kosovo Justice Code no. 03/l-193 for Juveniles. OG of the Republic of Kosovo, Pristina, year V/ no. 78/20 August 2010.

<sup>6</sup> Law no. 03/l-057 on Mediation, OG of the Republic of Kosovo, Pristina: year III/ no. 41/1 November 2008.

<sup>7</sup> Strafprozessordnung- StPO (StPO 1975) StF: BGBl. Nr. 631/1975. The old KLAP with changes of the reform of year1999/55.

<sup>8</sup> Strafprozessordnung- StPO BGBl. I Nr. 19/2004. KLAP entered into force through the reformative Law, on January 1, 2008. Amended for the last time in article 3 paragr. 5 G. v. 23.12.2016 BGBl. I S. 3346.

<sup>9</sup> Jugendgerichtsgesetz- JLG. StF: BGBl. Nr. 599/1988. JLG1988 – entered in force on January 1, 1989.

## 1.1. Implementation of diversity measures in the Criminal Laws of Compared States

### 1.1.1. Kosovo Criminal Code on Juveniles

In 2004, in the Criminal Law for Juveniles ( see CLJ<sup>10</sup>) article 15 strongly expresses "*diversity measures for juveniles*". Application of these measures was set to the competency of the prosecutor or judge for juveniles. Since that time their enforcement created the possibility to implement the cease of criminal proceedings initiated toward juvenile perpetrators even without a court procedure being developed. Also, *preparatory procedures* in Chapter XII article 54 (1) and (2) of this Law foresee the possibility of *non-commencing the criminal procedure* in cases when delinquents of this age commit criminal offences that are convictable by fines or imprisonment of less than three years. In this Law certain favorable legal norms were incorporated because the aim was non-initiation of the preparatory procedure toward juvenile perpetrators and to enable them a faster integration in the society (*state criminal non-stigmatization*).

### 1.1.2. Criminal Law of Kosovo for adults

Even that PCPCK 2004 did not strongly foresee the diversity measures, those were ordered in Chapter XXVI, article 226 suspension, *termination or refrain from the prosecution of less serious crimes* as well as Chapter XXVII *Mediation procedure*. Further, article 227 of this Code defined that the Public Prosecutor *is not obliged to initiate the prosecution or that he/she has the possibility to waive from prosecution*. Moreover, based on article 228 of this Code there is a possibility to apply the institute of *mediation* for a certain category of criminal offences, for which, *a fine or imprisonment for up to three years* was foreseen.

In 2008, mediation was regulated by a special law (hereinafter KLM)<sup>11</sup>. This Law among other issues foresees to regulate legal criminal issues which are an object of criminal offences punishable by fine or imprisonment up to three years.

## 1.2. The Austrian Criminal Law for juveniles

The new form of the optional regulation in Austria, started in 1985 first through a pilot project for the probation service and social work for juveniles in Linz, then in Salzburg and Vienna, titled "*außergerichtlicher Tatausgleich für Jugendliche*" (ATA), which in the English language means "*extrajudicial consent regarding the juvenile offence*". The first dispute, which was the object of solution through this measure, was the so-called "*case of three juveniles that shot wild ducks in the foreign territory*". Its aim was to easily achieve through extrajudicial methods the compensation of the party damaged by the perpetrators (Schroll, 1992, 93). The success achieved in this pilot project and the success of over 1000 other cases strengthened the determination of the legislative to incorporate all these new optional procedures in the JLJ of year 1988.<sup>12</sup> According to article 6 cit leg 'the opportunity is provided to the public prosecutor not to initiate the prosecution in certain cases and to solve the issue without other additional obligations toward the perpetrator, in a form of *extrajudicial consent on the*

<sup>10</sup> Kosovo's CLJ. UNMIK Regulation, No 2004/8, 20.04.2004.

<sup>11</sup> Law no 03/L-057 on Mediation, 1.11.2008, OG of RK, Pristina, 41/2008.

<sup>12</sup> Jugendsgerichtsgesetz, BGBl. I Nr. 599/1988. JLJ entered in force on January 1, 1989 .

act, which is also considered as legal. Further, in article 9 of cit leg it was foreseen to cease the proceeding through fulfillment of the probation condition or by fulfilling their obligations. Application of the mentioned measure for the cease of criminal proceeding toward the perpetrator was also allowed to courts by the side of legislative. Articles 7 and 8 cit leg have defined the regulation on the consent (ATA) between the perpetrator and the victim or the damaged party for the act committed by the perpetrator. That is why, since the time this Law for juveniles entered into force in Austria the top priority was given to the enforcement of diversity measures compared to other reactive measure toward juvenile perpetrators. The legal practice proved that not only the number of the convicted has reduced but there was also a reduction of those that have repeated criminal offences (Schwaighofer, 2008, 276). Moreover the effect of classical convictions was not more successful compared to diversity measures (Pilgram, 1991, 269).

### 1.2.1. The Austrian Criminal Law for Adults

The first model of diversity measures of year 1992 tested by the Austrian District Courts toward adults was named „Außergerichtlicher Tatausgleich für Erwachsene“, which in Albanian means „ Extrajudicial resolution for adults“. The model proved to produce positive results especially in the aspect of reconciling parties and in the aspects of compensating the damage caused by the perpetrator to the damaged (Schütz, 1999, 161). In a national level it was achieved to extend diversity measures in the legal context with amendments of 1999 of ACCP that entered into force on January 1 of year 2000. With this legal reform of the Austrian CCP these measures were standardized in Chapter IXa, articles 90a-90m, as a guaranteeing model for disputes in the criminal law for adults and criminal offences categorized according to the social risk from: "minor to medium level".

## 1.3. Comparison

In the process of the criminal law humanism in the '90s in Austria, some projects were developed, initially for juveniles and later for adults aiming to create new options which include more human measures related to the sanctioning of the perpetrator. In Kosovo, diversity measures were incorporated in the Criminal Law in year 2004, by the promulgation of KCLJ. While in Kosovo's Criminal Law these *optional measures* had various names, in the Austrian Criminal Law for adults and the one for juveniles these measures are named with the unique name of *Diversion*. Compared to the Austrian Law where diversity measures can be imposed without exclusion till the end of the judicial review meaning also from the side of the court, in the Kosovo Law such a possibility was (is) too limited.

### 1. General conditions for application of diversity measures

#### 1.1. The Criminal Law of Kosovo for adults

In the Kosovo Criminal Law for Adults according to artiled 226 and 227 of the KCPC, of year 2004, there was the option of *suspension, termination or refrain from prosecution of minor offences* as optional measure analogue to the diversion. So, article 226 (1)

defined that the *public prosecutor with the consent of the damaged party might suspend the prosecution for a criminal offence punishable with a fine or imprisonment up to three years considering the nature, circumstances and importance of the criminal offence and the perpetrator, if the defendant vows that he will behave as was instructed by the public prosecutor and that he will fulfill certain obligation that reduce or eliminate harmful consequences of the criminal act.*

According to article 227 of PCPCK, the Public prosecutor is *not obliged to initiate the prosecution or he might waive from prosecution:*

➤ *If the criminal law provides that the court may waive the punishment of a perpetrator of a criminal offence and the public prosecutor determines that in view of the actual circumstances of the case a judgment alone without a criminal sanction is not necessary; and*

➤ *If the perpetrator of a criminal offence punishable by a fine or imprisonment of up to one year expresses genuine remorse over the criminal offence and has prevented harmful consequences or compensated for damage and the public prosecutor determines that in view of the actual circumstances of the case a criminal sanction would not be justified*

The public prosecutor might send the criminal report for the criminal offense punishable by fine or imprisonment for up to three years *also for mediation*. Before doing so, the public prosecutor had to consider the nature and nature of the offense, the circumstances in which it was committed, the perpetrator's personality and previous convictions for the same criminal offense or for various offenses and also the level of his criminal responsibility.

- The agreement could be achieved also *through mediation only with the consent of the defendant and the damaged party.*

## 1.2. The Austrian Criminal Law for adults

With the reform of the criminal procedure Law of year 1999 in Austria, to apply the diversity measures the following conditions had to be met:

- *Offenses should be prosecuted ex officio;*  
(i.e.: shoplifting, light bodily injuries, especially those in road traffic, conflicts between neighbours, in school or at work etc.).

- A sufficient clarification of the factual issue had been made

According to this procedural principle, the state of the investigation must reach that high level of intelligence and evidence as well as other circumstances that, with the utmost reliability, enable the filing of criminal charges (indictment)

- There can be no serious criminal offense

Whether it is considered a minor offense or a serious offense, it is primarily assessed according to the subject matter jurisdiction of the courts which consider them. Therefore, the Austrian lawmaker has determined here with the exception of rare cases that it is about criminal offenses for which the sentence of deprivation of liberty is foreseen for up to 5 years.

- No person has been murdered with the criminal offense;

- *The perpetrator of the offense cannot be charged with a high level guilt*

The guilty rate of the perpetrator and his attitude to the values of the society affects the decision whether a measure of diversity will be applied or not. So if the perpetrator

attempts to repair the damage or has agreed with his sanction, it increases the chances of implementing the measure of diversity.

- *Lack of prejudice for the application of special and general preventive measures;*  
In this case, the measure of diversity for the perpetrator does not adversely affect his resocialization or has no negative effect on the other potential perpetrators of criminal offenses.

- *Consent of the perpetrator for the measure of diversity*

### 1.3. Comparison

The first difference between the applications of these alternative measures was the fact that in Austrian law the high limit for sanctioning a criminal offense committed was determined in 5 years of deprivation of liberty, while in Kosovo with a sentencing fine or up to 3 years imprisonment. According to Austrian law on the application of the measure of diversity, its object should be only the offense that was prosecuted officially. The main constraint on both criminal law of comparative states is the fundamental condition *the criminal offense has not resulted in any persons death*. There was also consistency in the *expression of willingness to implement the measure of diversity* on the part of the defendant.

### 1.4. The Kosovo Criminal Law for Juveniles

KCLJ (2004) provided for the possibility of withdrawal from prosecution in the following cases.

Conditions (Article 14 KCLJ):

The conditions from paragraph 1 of Article 14 of the KCLJ, which have to be fulfilled in respect of the criminal offense committed. Therefore, we say that the basic condition for applying the diversity measures was that the criminal offense be sanctioned *by a fine or by imprisonment of up to three (3) years*; and

- The conditions under paragraph 2 of Article 14 of the KCLJ which the delinquent had to complete were:
- *That the juvenile accepts the responsibility for the crime for which he has committed;*
- *That the juvenile expresses readiness for reconciliation with the injured party as well;*
- *That the juvenile or adoptive parent or guardian on behalf of the juvenile agrees to apply the imposed measure of diversity.*

### 1.5. The Austrian Criminal Law for juveniles

JLJ of year 1988 has foreseen the possibility of waive from prosecution if the following conditions were met:

- *The underlying explanation of the factual issue;*
- *Maximum sanctioning (high sentence sentence) up to five years, with deprivation of*

liberty (but nevertheless the prosecuting authorities, especially the courts, were able to exclude from this rule virtually all offenses);

- *There should not be a great blame on the perpetrator;*
- *Not to foresee special and general preventative measures as well*
- *Grant consent to the perpetrator of the criminal offense for the implementation of the diversity measures.*

On the basis of that regulation, the possibility of applying the diversity measures was not extended to limit, but it was guaranteed by Article 5 paragraph 4 of the JLJ. This provision laid down the high limit of admissibility of the diversion application for criminal offenses, which were not sanctioned for more than 10 years of deprivation of liberty (Schroll, 1992).

## 1.6. Comparison

In the Austrian criminal law for juvenile the main condition for imposing the diversity measure was the maximum of the fine's highest level. This limit could not exceed five years of deprivation of liberty for the criminal offense committed (which means 10 years of imprisonment for criminal offenses under Austrian criminal law for adults). While in Kosovo the possibility of applying these measures was foreseen through fines or imprisonment for up to three years. Another distinction according to the Austrian criminal law on juveniles was also envisaged in the need for the existence of special and general preventive measures. According to the Kosovo criminal law on juveniles, as a condition, the request was also filed for acceptance of responsibility and guilty by the juvenile perpetrator for the committed criminal offense. Similarity in both legal system is noticed in the fact that they required the consent of the juvenile perpetrator (delinquent) as the main condition for the enforcement of diversity measures.

## 2. Types of diversity measures in compared states

### 2.1. The Kosovo Criminal Law for adults

The first alternative form of criminal law in Kosovo was the suspension of criminal proceedings. Article 226 (1) of the PCPCK provided for the benefit of the perpetrator if he / she fulfilled one of the following conditions:

1. *Elimination or compensation of damage;*
2. *Payment of a contribution to a public or humanitarian institution or fund to compensate the victims of criminal offenses or*
3. *Performing useful work.*

Further, pursuant to Article 227 (2) of the PCPCK, the Public Prosecutor was not obliged to initiate criminal prosecution or to waive the prosecution:

➤ *When the perpetrator of the punishable offense sincerely repents for the offense and forbids the damaging consequences or compensates for the damage.*

Chapter XXVII of the PCPCK provided for mediation in criminal matters. Through this institute, the conclusion of an agreement for compensation of material or personal damage was noted.

### 2.1.1. *The Kosovo Criminal Law for juveniles*

According to Kosovo Criminal Law for juveniles, these types of diversity measures are provided:

- *Mediation between the offender and the victim, including apology by juvenile perpetrators to the victim;*
- *Mediation between the juvenile and his family;*
- *Compensation of damage to the injured party through mutual agreement between the victim, the juvenile and his legal representative, in accordance with the financial situation of the juvenile;*
- *Performing free community work in accordance with the capacity of the juvenile perpetrator to perform such work;*
- *A commitment to regular school attendance, getting employment and training;*
- *Obligation to participate in traffic measures;*
- *Use of psychological counseling.*

## 2.2. The Austrian Criminal Law for adults

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1. *Payment of a monetary fine by the perpetrator*

The amount of this payment is calculated (divided) with the amount of the financial profit maximum of 180 working days.

2. *Charitable services of the perpetrator in general*

Maximum extensions of unpaid services can be applied up to 240 hours. These measures are mainly imposed in criminal offenses such as the case ex. Inscriptions on building walls, vandalism, etc.

3. *After the probationary term without any conditions or obligations for the perpetrator*

The conditional trial period may last one (1) to two (2) years. This measure may be imposed in combination with remedying the damage caused by the offense and with the possibility of joining the Probation Service.

4. *After extrajudicial reconciliation for the offense*

The main condition for applying this measure is that the perpetrator of the criminal offense accepts the responsibility for the criminal offense and expresses readiness to eliminate the consequences caused by his criminal offense.

### 2.2.1. *The Austrian Criminal Law for juveniles*

Articles 6 and 7 of the JLJ provided (foresees) the possibility of applying the diversity measures. Pursuant to Article 6, the termination of the follow-up, i.e. non-intervention diversity was defined. In this case, the prosecution or the court withdraws from any procedural action against the suspected delinquent. Further on, Article 7 of this Code provided for the so-called waive of the prosecution, respectively the intervention diversity, if the delinquent was willing to fulfill the obligations as follows:

1. *Pay a certain amount of money*

Imposed only if the juvenile will pay the amount of money by his/her own means and these means will not adversely affect him/her in the continuance of independent life.

2. *To provide service to the general benefit of society*

The duration of this measure may not last more than 6 hours a day, 20 hours a week,

and more than 120 hours in total.

3. *After being subjected to trial on conditions or unconditionally*

Unlike the implementation of other measures of diversity, the provision of consent of the injured party (victim) does not appear as a mandatory criterion

4. *After extrajudicial reconciliation*

### 2.3. Comparison

Whereas, according to Austrian criminal law of 1999, four identical measures of diversity were foreseen for both adults and juveniles, there were differences in Kosovo regarding the number of diversity measures. There were similarities to the following measures, such as: monetary payment and general social benefit work, as they were adjusted analogously. Similarly, criminal mediation or out-of-court reconciliation was envisaged, both for adults (as well as for juveniles).

### 3. Current reforms related to diversity measures in the Criminal Laws of compared states

#### 3.1. The criminal law of Kosovo for adults

KCCP in force introduced the new term- *diversion*. Article 184 of this Code provides for this alternative measure. Its application is provided by the prosecuting authorities as a possibility of extrajudicial reaction to criminal procedure options in the pre-trial procedure. The prerequisite is that the offense *is not punishable by more than one year of imprisonment*. The perpetrator's fault should not be considered as serious as well as *when the public interest for prosecution is not foreseen*.

Further, in Chapter XIV (Articles 229-239) of this Code, alternative procedures are envisaged as measures to *somewhat analogous* to form but not to the content with the diversion to Austrian criminal law. Thus, Article 229 explicitly states that the State Prosecutor reviews and uses *this procedure* from this chapter or the derogation from Article 184 of the present Code when such proceedings or diversion is in accordance with the duties and powers of the state prosecutor referred to in Article 49 this Code. Articles 230 and 231 provide for conditions and options identical to alternative measures under Articles 226 and 227 of the PCPCK. The exclusion of this procedure is expressly provided in paragraph 4 cit. Law, which states that in cases of domestic violence or sexual violence this article does not apply. Article 232 of the KCCP is foreseen as in the PCPCK the mediation procedure. Article 233 of the KCCP provides for the measure on the negotiation of the plea agreement. Pursuant to this agreement, the defendant and the state prosecutor agree on the allegations contained in the indictment and the defendant agrees to plea bargain in exchange for other considerations in the interests of justice under paragraph 1.2, such as exemption from punishment under Article 234 of this Code. Article 234 also foresees exemption from punishment as an opportunity to as a possibility of exemption from punishment for the perpetrator of the criminal offense. Thus under paragraph 1 the court may, upon the request of the state prosecutor, release a perpetrator who is not a co-operative witness from the punishment or punish him in accordance with article 75 of the Criminal Code when the perpetrator cooperates voluntarily and when his co-operation has

prevented acts other criminal offenses by others or resulted in successful prosecution of other perpetrators of criminal offenses.

### **3.1.1. The Kosovo Criminal Law for juveniles**

In the fourth chapter of the KJCJ, diversity measures are foreseen again, but with the extension of the possibility of applying to this category of persons. At present, such measures may be imposed on committed offenses by *negligence* on their part even if they are sanctioned up to 5 years of imprisonment (Article 17, paragraph 1). These measures under Article 19 of this Code have remained the same as those in the KLPJ.

### **3.2. The Austrian Criminal Law for adults**

In the ACCP<sup>13</sup> entered into force on January 1, 2008 all diversity measures according to this order were reorganized: payment of a monetary amount (article 200), charitable service (article 201), probationary deadline with different obligations and placing under probation service (Article 203), as well as the reconciliation of the offense (Article 204). Specific was the change regarding the regulation of the implementation of diversity measures. The novelty is the removal of the general preventive as a condition for the implementation of diversion, whereby the issues that relate to the juvenile perpetrator and the criminal offense committed (the special preventive measure) are most important. The possibility of applying these measures was also mitigated for criminal offenses resulting in the murder of a person by a juvenile. The public prosecutor is now fully competent to decide in the investigative procedure for the application of these measures. After the establishment of an accusatory act the court must take care for the application of these measures. Another novelty of these changes is the strengthening of the interests of the damaged party, respectively the victim. Compensation for damage is likely to be combined as a complementary measure with all other diversity measures. The last remarks in this regard are made in Article 198 (3) of the ACCP, in conjunction with Article 302 of the ACC. According to this change, the possibility of applying the diversity measures is also defined for the minor offenses of misuse of official duty.

#### **3.2.1. The Austrian Criminal Law for juveniles**

The fundamental change in the Austrian criminal law on juveniles is laid down in Article 7, paragraph 2, no. 2 and JLJ. According to this provision, the legislator has allowed the competent prosecuting authorities to apply the measure of diversity *even if the offense committed by the juvenile results in the death of a person*. Thus, *this exclusion rule* is foreseen only for the small category of criminal cases, such as the carelessness of a member of the family after an accident in road traffic. In these cases, the condition is for each case to be assessed individually. First, the elements and circumstances surrounding *the burden or the mental and emotional suffering* of the defendant should be considered when the victim belongs to a family circle or even to his immediate family (*compare with Article 72 of the KCC*). Since the reform of the Criminal Procedure Code Austria for criminal offenses of delinquents does not impose any restriction on the boundary of the high penalty wall for the application of this measure as well as for the judicial instance.

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<sup>13</sup> Based on the amendment no. BGBl I 93/2007, entered into force on 04.12.2007.

### 3.3. Comparison

In the Austrian criminal law in force, the same rules, as foreseen in the preliminary code, remained in principle to the application of the diversity measure. First and foremost, it should be mentioned, as the same rule that remains in force, the high limit foreseen as a sanction for offenses where the diversion may be applied, which is in 5 years of deprivation of liberty (*with the exception of the category of juveniles under Austrian criminal law, when the high limit of sanction no longer appears as a condition for the application of diversity measures*). On the contrary in Kosovo's criminal law this institute (diversion) is foreseen again through the chapters and various chapters of the KCCP.

### Conclusions

The Criminal Law in Kosovo needs to incorporate a legal institute similar to the Austrian criminal diversion, not only by name but also by the content since:

- Austria in the area of incorporation of diversity measures is at the top of the success pyramid regarding the results achieved since the beginning of their implementation;
- with each measure of diversity, the formal declaration of guilt against the perpetrator of the offense is waived;
- with their application *unchanged rules* remain on the principle of the presumption of innocence under Article 6 paragraph 2 of the ECHR for the suspect;
- easier to get compensation for the damaged party, for the damage caused by the perpetrator, and
- expanding the possibility of applying these measures will be reflected in the reduction of thousands of old, unresolved criminal offenses, which are waiting to be solved, in the drawers of prosecution offices and courts of Kosovo,
- it is also the task of states claiming to adhere to the major European family to harmonize their laws with its existing (EU) legislation;
- considering the indispensable orientation of European cooperation that is also the intent of the entire Kosovar society, the presentation of these ideas and important solutions to the issues, problems and processes of diversity measures in legal infrastructure and legal practice should be well-received, as well as very productive for the very sake of this society.

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