

**ЧУЖДЕСТРАНЕН ОПИТ/ FOREIGN EXPERIENCE**

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**HISTORICAL AND COMPARATIVE OVERVIEW  
OF THE INDICTMENT REVIEW***Arlinda Hasani\**, *Saranda Leka\*\**

**Abstract:** *Indictments and their analysis from a historical and comparative perspective are of special importance for the field of law, in particular for criminal law. The courts of Kosovo have had different approaches to dealing with a criminal case in terms of indictment control. For this reason, this topic is important for scholars of legal studies. The inspiration to give impetus to the judicial practice in the direction of the fastest possible implementation of this instrument for resolving a legal criminal case in the judicial system is a strong reason to study this topic, specific to the circumstances of Kosovo justice. From this review, it can be affirmed that, during the initial review of the indictment, the public prosecutor, the defendant or defendants and their defence must be present. Without the presence of these entities, the initial review of the indictment cannot be held.*

**Keywords:** *indictments; Kosovo; review; historical and comparative overview.*

**INTRODUCTION**

The reason for dealing with indictment control is that the courts of Kosovo have had different approaches to the implementation of this level of addressing a criminal case. The indictment confirmation process has been a vitally important step in the proceedings, during which the judge provides an independent review of the indictment to protect rights against erroneous or wholly unfounded accusations. Another reason for dealing with this issue is the fact that no real work has been published on it to date. A third reason lies in the inspiration to give an impulse to

the judicial practice in the direction of faster application of this instrument for handling a legal criminal case in the judicial system.

In this paper, we have tried to address the topic related to the meaning of indictment control according to the legislation of three foreign countries: the Republic of Albania, the Republic of North Macedonia, and the Republic of Montenegro. Initially, we explain what prompted us to research and prepare such a topic. Then, we deal with the scientific methods to prepare this paper as good as possible. In the first chapter, we talk about the historical and comparative review of

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the indictment, including the meaning and historical view of checking the indictment according to the legislation of the three countries.

### Scientific Methods

The research and study of checking the indictment is quite complex. As such, the application of the relevant scientific methodology has also been requested. During the preparation of this paper, the following work methods were used:

*Sociological method:* This method was used with the purpose of better studying the nature of the paper that we have prepared, because it is used as a specific method to research and study legal sciences, through which we can examine the social factors that give a social character to the norms.

*Historical method:* This method was used to study the past of the criminal procedure, namely the holding of the hearing for confirming the indictment.

*Comparative method:* This method was used in order to consult the regulated legal acts during the preparation of this paper, and to present the various data that refer to the practical work of the Basic Court of Gjilan or even beyond.

## LITERATURE REVIEW

### Understanding Indictment Screening

The establishment and validity of the legality of the indictment is the second stage within the first stage of the criminal procedure, which comes after the end of the investigation.<sup>1</sup> In this course, after the end of the investigation, when the public prosecutor judges that there is complete evidence of the defendant's guilt, he/she decides to refer the case to court. For this purpose, he/she compiles the request for trial, namely the indictment, in which he/she shows the personal data of the defendant and the victim of the criminal offence. Immediately after accepting the indictment, the judge who applies the procedure for checking the indictment verifies whether the indictment contains all the necessary data.

### Historical Overview of Indictment Screening

Historically speaking, Kosovo has been under the rule of foreigners for a long time. Therefore, the law of the foreign ruler was applied in its territory, which was opposed with considerable success by the well-developed Albanian customary law.<sup>2</sup> After the end of the 1999 war, the entry of NATO and the establishment of the United Nations Interim Civil Administration (UNMIK) in Kosovo with the aim of not allowing a legal vacuum, the Representative of the Secretary General of the United Nations (PSSP), with UNMIK regulations Nos. 1991/1 and 1999/24, determined as applicable the legislation in Kosovo, which was in force on 22 March 1989, as well as UNMIK regulations.

Thus, as regards the criminal procedure issue, the applicable law in Kosovo was the Criminal Procedure Law of the RSFJ of 1977. According to the Criminal Procedure Law that was applied after the war in Kosovo until the entry of the KPPP of 2004 into force, the checking of the indictment as a rule was done on the basis of the opposition of the defendant or his defence and only exceptionally on the initiative of the head of the body judge. The Criminal Procedure Law of the RSFJ expressly defined the provisions related to the indictment and the rebuttal against it, where, among other things, it is stated that, after the end of the investigation, the indictment according to this law can be filed even without the implementation of the investigation, and that the procedure before the court can only take place on the basis of the indictment of the public prosecutor, respectively of the injured party as the plaintiff<sup>3</sup>.

According to Kosovo's Temporary Code of Criminal Procedure of 2004<sup>4</sup>, the checking of the indictment was done through the hearing of the indictment's confirmation on the basis of Article 309, so when the judge estimated that the indictment had been compiled in accordance with the relevant article of this Code, he/she immediately set the hearing for its confirmation. The court immediately notified the defendant and the public

<sup>1</sup> Hajdari, A. (2016). Commentary, Code of Criminal Procedure. Pristina/Kosovo.

<sup>2</sup> Sahiti, E., et al. (2014). Commentary, Code of Criminal Procedure. 1st edition. Pristina, p. 41.

<sup>3</sup> Law of Criminal Procedure of the RSFJ, Official Gazette of the RSFJ, No. 4/77.

<sup>4</sup> Temporary Code of Criminal Procedure of Kosovo, April 2004. Regulation No. 2003/26, Article 313.

prosecutor in the confirmation hearing. The indictment was delivered to the defendant and his/her defence attorney at least eight days before the confirmation hearing. The injured party was also called to the confirmation hearing.<sup>5</sup> The judge had the right to take these decisions in advance during the hearing:

- to drop the indictment and suspend the criminal proceedings;
- to declare the court incompetent and to refer such a case to the competent court;
- to confirm the indictment.

The confirmation of the indictment under the KPPP<sup>6</sup> was made by decision of the judge of the case when he/she considered that there was no circumstance under which he/she would reject the indictment and dismiss the criminal procedure or declare the court incompetent. The indictment became final when the judge decided that there was no circumstance that would exclude the confirmation of the indictment, when the defendant decided to withdraw from the confirmation hearing, and when the judge decided to confirm the indictment and to testify it has been accepted. After the indictment was finalized, the judge immediately sent the indictment and the criminal case to the presiding judge.

According to the Criminal Procedure Code (CPC) of the Republic of Kosovo (KPPRK) in force,<sup>7</sup> efficient and comprehensive control of the indictment is ensured through a multitude of provisions that regulate the initial and second examination. An important structural change in criminal procedure is the elimination of the confirmation hearing and the confirmation judge. Instead of holding the judge's position for confirmation, the single trial judge or presiding judge accepts the indictment and applies the initial proceedings. According to Article 245, the initial examination is followed by a period of 30 days, during which the defendant has the right to present objections to the evidence or a request for dismissal of the indictment.

In principle, the review of the indictment before the defendant is brought to trial takes

place at two levels: in the initial review and in the second review.

### **Checking the Indictment Under the Criminal Legislation of Some States**

In contemporary legislations, different solutions are encountered regarding the procedure of checking the charge. According to one solution, the court examines the merits of each accusation filed *ex officio*. According to another solution, the charge is examined exclusively on the basis of the defendant's request or objection. Thus, the first solution, according to which the court checks the charge *ex officio*, is not in accordance with the accusatory principle, and furthermore reduces the responsibility of the public prosecutor and slows down the criminal procedure.

The other solution, due to the possible misuse of the defendant and the defence by raising a large number of objections, prolongs the criminal procedure and contributes to the inefficient control of the presented charges. If we refer to the contemporary legislations, as we pointed out above, it can be seen that they, without exception, define provisions for checking the indictment.<sup>8</sup> Therefore, in this chapter, a comparison in terms of indictment control will be made between the criminal legislations of three countries: the Republic of Albania, the Republic of North Macedonia, and the Republic of Montenegro.

### **Checking the Indictment According to the Criminal Procedure Law of the Republic of Albania**

In the judicial system of Albania, after the investigative activity of the Judicial Police and the prosecutor is completed at the time when it is estimated that all possible actions have been carried out and the necessary data have been collected to reach the conclusion of what will be done with the specific case, the prosecutor or the Judicial Police officer who conducted the investigations notifies the defendant that they have ended with a special act, and makes all the acts and

<sup>5</sup> KPPPK, Article 309, paragraph 2.

<sup>6</sup> KPPRK, Article 318.

<sup>7</sup> Review of the Implementation of the New Code of Criminal Procedure in Kosovo, OSCE, June 2016, p. 34.

<sup>8</sup> KPPPK, Article 309.

evidence obtained available to him/her and his/her defence.

In the dismissal decision, which is approved by the Head of the Prosecution,<sup>9</sup> the circumstances of the fact and the evidence, as well as the reason for dismissing the case, are shown, referring to the specific case provided for by Article 328 of the Code of Criminal Procedure. When the case is dismissed because the defendant has not committed the crime or because this has not been proven, it is necessary to make a comprehensive and objective analysis of the data and evidence, because in this case a judgment is made which must be grounded and convincing.

As for the taking of this decision by the prosecutor, the legislator has decided, as an imperative prerequisite, that he/she must first be assured that the defendant or his/her defence are familiar with the acts of the case. The procedural actions of the trial are carried out according to a certain order that must be strictly observed. In the preparatory actions of the judge in the case of criminal offences that are prosecuted at the request of the injured party, the attempt at reconciliation is also included. After reading the request of the accused injured person for trial, the judge proposes the settlement of the case to them by agreement. When the agreement is reached, the appeal is withdrawn and the judge decides to dismiss the case. Otherwise, he/she sets the date of the hearing.<sup>10</sup>

### **Checking the Indictment According to the Criminal Procedure Law of the Republic of North Macedonia**

In the criminal legislation of the Republic of North Macedonia, the second stage of the criminal procedure is the accusation. After the end of the investigation, the authorized plaintiff presents the charge, so that the criminal case goes to court.<sup>11</sup> The indictment is drawn up by the public prosecutor or the subsidiary plaintiff, and it may follow as a result of the investigation or of the

fact that the public prosecutor considers that the information he/she has about the criminal offence and its perpetrator represents a sufficient basis for filing the indictment. The indictment is subject to judicial review by the presiding judge or panel. Further checking of the indictment follows if an objection is voiced against it, respectively the request of the president of the trial panel on which the panel decides.<sup>12</sup>

The presiding judge must deliver the indictment to the defendant without delay, with instructions regarding the right to object.<sup>13</sup> After the indictment is delivered to the defendant, he/she has the right to file an objection against the indictment within eight days. The defendant's defence counsel also has the right to file an objection without his/her special authorization, but not against his/her will. Objection is a special legal means by which the indictment is attacked, which is not only a court decision, but also the action of the criminal procedure party.

According to the nature of the case, the defendant must state in opposition why he/she thinks the indictment is unfounded, and present what the flaws in the procedure and the formal flaws of the indictment consist of, as well as his/her proposals. The indictment is subject to judicial review even when no objection or request by the presiding judge has been filed against it. In this case, the control shall be carried out by the chairman of the court at the moment when he/she finds that, even though there is no objection, there is no need for him/her to submit the request, but he/she sets the judicial review. The indictment enters into legal force on the day of receipt of the decision on its approval, namely with the registration of the clause on the approval of the indictment.

### **Checking the Indictment According to the Criminal Procedure Law of the Republic of Montenegro**

In the judicial system of the Republic of Montenegro, when investigations are carried out,

<sup>9</sup> Islami, H., et al. (2011). *Criminal Procedure, Commentary*. Tirana/Albania, p. 456.

<sup>10</sup> KPPRSH, Articles 333, 334, 335, 336, 337, 338.

<sup>11</sup> Sahiti, E., and I. Zejneli (2007). *Criminal Procedure Law of the Republic of Macedonia*. Tetova/North Macedonia, p. 227.

<sup>12</sup> Code of Criminal Procedure of the Republic of Macedonia. Official Gazette No. 150, Articles 319, 320, 323.

<sup>13</sup> KPPRM, Articles 325, 327.

the process before the court can only be conducted on the basis of the indictment of the public prosecutor or the injured party as a prosecutor. The CPC of Montenegro has determined the provision for control of the indictment according to Article 293 of the KPPRMZ.<sup>14</sup>

The indictment is submitted to the Council for reasons of checking and verification, and if the Council proves that there are errors and deficiencies in the indictment or that a better clarification of the situation is needed to examine the basis of the indictment, the indictment is returned to eliminate the deficiencies or to complete the flaws. The prosecutor has the duty to submit the corrected indictment within three days from the date of the Council's decision or to complete investigations within two months. However, for good reasons, the state prosecutor may request that this deadline be extended.

If the injured party as a prosecutor misses the mentioned deadline, it shall be considered that he/she has waived the process and the same shall be suspended. If the Council proves that the criminal offence, which is the subject of the indictment, is under the jurisdiction of another court, then it shall declare incompetent the court to which the indictment was sent, and, according to the finality of the decision, it shall refer the case to a competent court.<sup>15</sup>

The Council takes a decision on the suspension of the indictment, but during the decision it is not bound for legal evaluation of the offence which the prosecutor has mentioned in the indictment.<sup>16</sup> The CPC of Montenegro has determined in Article 296 the provision for verification of the indictment, which expressly states that, if the Council has proven that there are errors and deficiencies in the indictment (Article 293), and if there is not enough evidence but that for the defendant, there is suspicion based on the criminal offence presented in the indictment (Article 294 paragraph 4), but the prosecutor does not bring a decision. Then, the Council shall bring a decision (where the indictment will be ratified) within

a period of eight days or, in complicated cases, within a period of 15 days from the day of acceptance of the indictment. With the adoption of the decision for ratification, the indictment shall enter into force, and the Council will also decide on the proposals for joint or separate procedures.<sup>17</sup>

If a complaint against the decision of the Council has been made only by the injured party and if it is approved, it shall be considered that, by submitting the complaint, the injured party has taken over the criminal prosecution<sup>18</sup>. The Council shall submit the indictment of the defendant who is at liberty without delay, and if the defendant is in custody, the same shall be submitted within 24 hours after the confirmation of the indictment. However, if a measure of detention has been assigned to the defendant by decision of the Council under Article 298 of the CPC, the indictment shall be delivered to the defendant during his/her detention, together with the decision where the measure of detention has been determined.<sup>19</sup>

## CONCLUSION

The preparation of this paper required a lot of work, will, and commitment. Of course, we made such a commitment with dedication, through which we have tried to reach a conclusion regarding the review of the challenges with the indictments. On 1 January 2013, the Code of Criminal Procedure of the Republic of Kosovo entered into force, which significantly changed the structure of the previous CPC and introduced new solutions in terms of quality and volume. The provisions related to some procedural institutions of the previous CPC, which have been commented on in time (such as confirmation of the indictment, the procedure for granting international legal assistance, the execution of international agreements in criminal cases, etc.), are no longer part of the KPP in force.

Thus, according to the guide for the KPP, an important structural change in the criminal

<sup>14</sup> Code of Criminal Procedure of the Republic of Montenegro. Law No. 57/09, Articles 291, 293.

<sup>15</sup> KPPRMZ, Article 293, paragraphs 1, 2, 3, 4, 5.

<sup>16</sup> KPPRMZ, Articles 294, 295.

<sup>17</sup> KPPRMZ, Articles 296, 297.

<sup>18</sup> KPPRMZ, Article 297, paragraphs 1, 2.

<sup>19</sup> KPPRMZ, Articles 298, 299.

procedure is the elimination of the confirmation hearing and the judge for confirmation. The majority agree that this procedure did not protect any rights essentially, but only placed a heavy burden on judicial capacity. The indictment confirmation process has been a vitally important step in the proceedings, during which the judge provides an independent review of the indictment to protect rights against erroneous or wholly unfounded accusations.

In a report published in 2010, the OSCE expressed concern that the defendants' right to a fair trial was often violated at indictment confirmation hearings, particularly as the judge's confirmation of indictment decisions often included little or no reasoning. In other words, all the indictments have been confirmed regardless of whether they were supported by sufficient evidence or not, and regardless of whether the legal description of the offence was adequate or not. Therefore, the indictment review sessions within the KPP have been replaced with initial and final hearings (the second one with the new code).

According to the CPC in effect, during the initial review of the indictment, the public prosecutor, the defendant or defendants and their defence must be present. Without the presence of these entities, the initial review of the indictment cannot be held.

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