

Reforming of the Judicial System of Kosovo based on the Law no. 03/L-199 on Courts and its challenges

Azem Hajdari, Shpresa Ibrahim, Albulena Hajdari

Dr.sc. Azem HAJDARI, MSc. Shpresa IBRAHIMI,
MSc. Albulena HAJDARI

Abstract

Law no. 03/L-199 on Courts¹ represents a law of significant importance which regulates the organisation, functioning and jurisdiction of courts of the Republic of Kosovo. This law has made numerous reforms in the judicial system of the country. It has set the bases of a modern and sustainable judicial system. In fact the Law on Courts in addition to having changed the judiciary of Kosovo in the aspect of organisation, it has opened the paths in the aspect of ensuring an efficient functioning thereof. Moreover, this law has repealed the application of the Law of former SAP of Kosovo on Regular Courts which in some aspects did not correspond to the trends of contemporary developments in this field. Law on Courts in its solutions embeds the bases of an independent and impartial justice, further on being multiethnic, non-discriminatory, efficient and in principle having an advanced approach of the opportunity for the public opinion to follow the judicial activities. Consequently, within this work, the background of the development of judicial system in Kosovo shall be discussed, some aspects of its reforming and challenges currently the judicial system of the country faces.

In the course of preparation of this work, legal-historical

¹ Law on Courts, in its entirety, entered into force in 2013. With this law entering into force, the Law on Regular Courts of SAPK, UNMIK Regulation and the law on Criminal Offences were repealed.

method has been applied, the dogmatic method too, method of comparison and the method of analysis and synthesis.

Through the legal-historical method, the manner of organisation and activity of the judicial system in Kosovo has been reflected covering the time of Turkish rule up to 2013 basing it on the laws and the Albanian customary law.

The dogmatic method has helped on reflecting the manner of organisation and activity of the judicial system in Kosovo, viewing it in the context of regulating these matters through the Law on Courts presently applicable.

The comparative method has reflected the features of the new judicial system in Kosovo and a comparison has been undertaken to the characteristics of earlier judicial system.

The method of analysis and synthesis has been applied to elaborate in detail specific articles of the Law on Courts, they were commented and in some cases concrete proposals have been given for solution, considered as advanced.

Keywords: Court, Kosovo, Reform, Challenge, Law.

1. Introduction

Judicial system is one of the three most important powers of any country. Not only the level of rule of law in society depends from its way of functioning, but also the level of democracy that exists in a state, and the perspectives of development in general and of economic development specifically and other developments in the society. Seen in this context, the Law on Courts is intended that through regulating of organisation, functioning and jurisdiction of courts in the Republic of Kosovo to ensure an independent, apolitical, functional, modern and sustainable judicial system. In addition to it, this law regulates also the matter of judges' career, their responsibilities, and preconditions have been ensured to enable independent financing of this system. In fact, Kosovo in the legal aspect already has a modern judicial system, although in the practical aspect this matter still requires much to be done.

Within this short work, modest efforts will be made to present a background of development of Kosovo judicial system, to elaborate reforming aspects of judicial system of the country (viewing it in the

context of the Law on Courts) and to tackle some of challenges that this chain of state power is facing.

2. A brief history of development of judicial system in Kosovo until 2013

“One of the basic human rights is that during the period of an indictment having been filed against him, to have a regular, unbiased judicial process, before an unbiased and independent court” (Article 10, Universal Declaration of Human Rights (UDHR)). This survey started by identifying this natural right for the fact that Kosovo has inherited a violent history of foreign rules, since the Ottoman Empire, Serbian-Croat-Slovenian Kingdom and the Federation of Yugoslavia, and due to the fact that the above-mentioned invasions have left deep traces into construction of the judiciary in Kosovo.

When speaking of creation and building of one of the main pillars of the state - judicial system, we undoubtedly find parallelism in its functioning. The fate of justice system for Kosovars has been built in a way that it has not had in its central focus protection of human rights, but their degrading, including development of irregular judicial processes, resulting from discriminating position of procedural entities. Given this reality, village elders operated, who administered justice and this way they organised resistance against the invaders to disallow their rights and they themselves to be part of unfair and partial processes.

In order to understand the essence of the importance of reforming of judicial system, intending to understand challenges the justice system of Kosovo is facing, an analysis shall be made to history of functioning of courts, initially during the time of former SFRY following with the post war period - 1998 - 1999, until 2013.

The historical analysis of Courts in Kosovo is a heritage of territorial dispute, as a political history of Balkans (Baylis, 2007).

2.1. Kosovo judicial system during the period until the country was part of former SFRY

Kosovo had begun the history of establishment of independent bodies, and more specifically the judiciary since 1945, as the highest body of the Province called People’s Court of Province. Exercising of these competences as the highest judicial body was carried out by this institution for a short time until competences were abolished through the Law on

Regulating People's Courts which was issued by the Provisional People's Assembly of Yugoslavia on 25 August in 1945, thus leaving the competences to District Court to exercised the judicial power and to Supreme Court of Serbia (History of Development of Judiciary in Kosovo, Supreme Court of Kosovo).

With the constitutional changes of 1974, in former SFRY - Kosovo was given the status of province which had equal rights to those of the republics. Like other provinces, it created direct links with the federative authorities.² Based on these constitutional changes, Kosovo like other provinces participated with a right of vote in all substantial changes, such as: legislative, executive and judicial (Kosovar Institute for research and policy development, Political Analysis).

As regards to judiciary, Kosovo had the right to have regular courts and self-governing courts. Consequently, establishment, organisation, competences and composition of courts are determined by Law on Regular Courts in Kosovo in 1978. Regular courts would include the municipal and district courts. The highest authority, acting as the highest instance to decide on civil, criminal, economic and administrative matters was held by Supreme Court of Kosovo (History of development of the Judiciary in Kosovo, Supreme Court of Kosovo). Pursuant to the Constitution of former SFRY, the Assembly of SAP of Kosovo had the competence on appointment of judges of Constitutional Court, Supreme Court and other judges operating in Kosovo. Allocation of broad competences to autonomous units caused that within one year requests to be made for reviewing competences, this was with intention of strengthening the central power of Serbia, and towards lessening the competences of autonomous units (Baylis, 2007). For the first time, with the changes in 1971, the Constitutional Court was established having in its competence the control of constitutionality and equal legality to that of other autonomous units of former SFRY (History, Constitutional Court of Kosovo).

Later on, in 1989 Serbia issued amendments through which it disestablished the autonomy of Kosovo. Thus, competences began to be taken starting from the Assembly of Kosovo, Executive Council, and from the Judiciary. Thus, all competences were taken over by Serbia. Decisions

² Federative Constitution of 1974, Article 1: Although technically Kosovo was part of Serbia, it was declared as Socialist, Autonomous Province, 'having its own constitution, its parliament, supreme court and national bank'.

which were taken later express the arbitration and transgression of most basic rights of citizens of Kosovo. Through such decisions, creation of new cadres was prolonged, because the BAR exam was impeded too (History of development of the Judiciary in Kosovo, Supreme Court of Kosovo).

The period 1989 - 1999 finds Kosovo, its citizens and the whole economic, political and legal system in an extraordinary position. With the intention of protecting its citizens, Kosovo Liberation Army fought for an independent and democratic Kosovo, with the purpose of establishing institutional mechanisms in order to first of all guarantee an independent and unbiased judicial system, justice and impartiality in decision making process to the citizens; equal approach and treatment for all, in accordance with the law; honesty and integrity; transparency and accountability; efficiency and effectiveness; professionalism; responsibility and accountability for the use of public means, principles of justice which were violated in the most severe form by Serb genocide (Index on Reform of the Legal Profession, 2007).

2.2. Kosovo Judicial System in the period 1999 - 2013

Actions of Serb state institutions over the Albanian population, in addition to indisputable war of the fighters of KLA; they also encouraged the intervention of international mechanism. With the end of the war in Kosovo, grounded on the Resolution of Security Council of United Nations 1244 (10 June 1999), Kosovo was administered by United Nations Mission - UNMIK, and one of the primary pillars of administration was Police and Judiciary. Legal order of Kosovo inherited a destroyed judiciary, disappeared case files, lack of technology etc. One of the primary priorities of this Mission is presented to be the establishment of multiethnic justice with fair, unbiased and independent judicial processes. All this was as a result of problems and insecurity in which the citizen rights were. A consequence of this situation was parallelism in laws and in competences. This way, competences and social, economic and political order in Kosovo was regulated by the Constitutional Framework for Provisional Self Governance in Kosovo, and by the laws, sublegal acts which were issued until 22 March 1989. Intending to come out of this situation, UNMIK issued decrees which were referred to as Emergency System in Kosovo, establishing Prishtina District Court and the branches in Gjilan, Mitrovica, Prizren, which initially consisted of 36 judges and in the end of 1999 it ranged 309 judges: through this decree, the Joint Consultative Council on

Temporary Judicial Appointments was established (Contest Analysis, re-establishment and reforming of justice system 1999- 2011, May 2011). With the purpose of better management of justice, Administrative Department was established, and in 2001 Prosecutorial Council and Judicial Council were established thus to pass the competences to Kosovo Judicial Council.³ The Constitutional Framework for Provisional Self-Governance of Kosovo, for composition of Courts foresees as follows: the Supreme Court, District Courts, Municipal Courts and Minor Offence Courts. In the level of District Courts and Supreme Court of Kosovo, local and international judges operated (Framework for Provisional Self-Governance of Kosovo 9.4.4). Framework also determines the criteria and competences of appointment of judges, prosecutors and competences of Special College of Supreme Court of Kosovo. In 2004 in Kosovo, it was witnessed once again that justice has not delivered the message to the citizens of Kosovo for punishment of violence, this was confirmed by OSCE report in 2005 (Contest Analysis, re-establishment and reforming of justice system 1999- 2011, May 2011).

On 17 February 2008 the independence of Kosovo was declared, thus opening a new page of history and with it a new page of judiciary too, where upon issuance of Constitution of the Republic of Kosovo, all provisional systems of justice were quenched thus creating a strong legal bases for independent work of the judiciary. This way, this base of justice is determined that: *“Judicial system is unique, independent, fair, apolitical and unbiased, and it ensures equal access to courts. Courts adjudicate based on the Constitution and the law. In the course of exercising their function, the courts must be independent and impartial”* (Constitution of the Republic of Kosovo, Article 102. 2.3.4). Constitution of the Republic of Kosovo defines the conditions and manners of appointment of prosecutors, judges and competences of Supreme Court of Kosovo. Based on the Constitution, the Law on Courts of Kosovo is issued, the law regulating the establishment, composition, organisation and competences of courts in Kosovo. For the sake of processes Kosovo has gone through, a special competence in the field of courts has been allocated to EULEX judges, where through a special

³ KJC according to the legal applicable framework is responsible for proposing judges for appointment, and for processing policies for general management and reform of judicial system. KJC is an institution which evaluates disciplines and promotes judges and lay-judges. Moreover, KJC is responsible for general management and administration of all courts, for drafting and executing the budget of judiciary and for establishment of new courts and court branches.

law cases managed by EULEX are allocated. As we have noted above, Kosovar justice system has been followed by existence of parallel courts in the north of Kosovo, considering as valid their decisions only. Later on, the operation of the courts in Mitrovica stopped, where as a result, the Albanian judges now still continue working in Vushtri, and they face a range of problems, first of all technical, such as insufficient buildings, procedural expenses, lack of evidence and materials which have remained or have been destroyed in the northern part of Mitrovica. The judicial system of Kosovo has been accompanied during this whole period first of all by lack of public faith, lack of basic conditions starting from court buildings, case overload, their manual management, lack of professional judges, safety and unfair compensation of judges and prosecutors (Strategic Plan for the Judiciary of Kosovo, 2007- 2012, April 2007) Kosovo Strategic Plan for Kosovo Judiciary has as its mission and vision as follows: *“A judicial system of Kosovo which will be independent, with access for all, fair, efficient and responsible in its work and which will function in accordance with the highest standards of honesty, integrity, professionalism and transparency”*⁴. In January 2013, a new stage started for Justice System in Kosovo, court restructuring shall take place in Kosovo, all intended to have greater efficiency for the judiciary of Kosovo.

3. Reformation of the judicial system of Kosovo in accordance with No. 03/L-199 on Courts

Law no. 03/L-199 on Court of Kosovo accessed the reformation of the judicial system from many aspects. Attempts shall be made for many reasons but first of all for those that refer to the nature of this work, in

⁴ Realisation of the mission and vision of Courts 2007-2012, it aims to achieve this through these strategies: 1. Creation of a powerful legal and administrative framework on the organisation and functioning of courts; 2. Development and implementation of effective procedures for assignment, development, promotion and discipline of judges; 3. Creation of effective procedures and practices for the budget and finance management in and for the courts; 4. Creation of a relevant organisational structure as well as of a number of effective policies and procedures on the management of human resources which has of crucial importance for the functioning of courts; 5. Elimination of pending cases and timely resolution of all evidenced cases in courts; 6. Implementation and the effective use of contemporary communication systems and management of information; 7. Strengthening the capacity on inquiries, analyses and statistical reporting in relation with the work of courts.

order to reflect reforms which are determined by this Law in the aspect of the organisation of courts, extension of their competencies, development of the careers of judges, but also not leaving aside some other aspects touched by the reform. These issues shall be treated in brief points in the following of this work.

3.1. Reformation of judicial system in the aspect of the organisation of courts

As it is known, *“modalities of placement of relationships between the courts and the units inside them are determined through the way of the organization of courts”* (Today’s Albanian Dictionary 1984, pg. 1117). In comparison with the former relevant laws, Law No. 03/L-199 on Courts addresses the issue on the organisation of courts in two aspects: a) in the aspect of reflecting the way of the organisation of court at local level, and b) in the aspect of reflecting the internal organisation of the court.

According to the first aspect (see: Article 8, paragraph 1) it results that in the Republic of Kosovo the judiciary is exercised by: Basic Courts, Court of Appeal and the Supreme Court. Whereas, according to the second aspect – it refers to that which determines the internal organisation (see: Article 8, paragraphs 2 and 3) courts (the Basic ones and the Court of Appeal) in exercising the judicial act, functioning on the principle of segregation of works across branches, departments and divisions. Whereas, the Supreme Court of Kosovo, besides others includes also the Panel of Appeal of the Agency of Property and the Special Chamber on Privatisation Matters.

In conformity with the Law on Courts, Kosovo has seven Basic Courts (according to previous legislation, Kosovo had a Municipal Court for each municipality, five District Courts and the Supreme Court) which shall adjudicate on judicial cases of the first instance.⁵ In fact, this Law

⁵ **Prishtina** has a Basic Court located in Prishtina for the territory of the Municipality of Prishtina, Fushe Kosova, Obiliq, Lipjani, Podujeva, Glogoc and Graçanica, **Gjilan** has a municipality located in Gjilan for the territory of the municipality of Gjilan, Kamenica, Novoberda, Ranillug, Partesh, Vitia, Klllokot and Verboc, **Prizren** has a municipality located in Prizren for the territory of the municipality of Prizren, Dragash, Suhareka and Mamusha, **Gjakova** has a municipality located in Gjakova for the territory of the municipality of Gjakova, Malisheva, and Rahovec, **Peja** has a municipality located in Peja for the territory of the municipality of Peja, Deçan, Junik, Istog and Klina, **Ferizaj** has a municipality located in Ferizaj for the territory of the municipality of Ferizaj, Kaçanik, Shtime, Shterpeca and Hani i Elezit and **Mitrovica** has a municipality located in Mitrovica

prescribed that each Basic Court should have their own branches which operate inside their territories.⁶ When there is no branch founded inside a territory, then it is decided that the case from that municipality shall fall inside the jurisdiction of the main office of the Basic Court, whereas, in cases when in the territory of a municipality there is no branch of the Basic Court, then the opportunity was prescribed that this municipality upon the decision of the Municipal Assembly, request from the Kosovo Judicial Council to establish a branch in its territory or to include it in the jurisdiction of the Basic court or the branch of the geographically nearest court.

Law on Courts in Article 12 regulates the issue of the internal organisation of the Basic Court. According to the provisions of this Article, the Basic Court of Prishtina has the Department on Economic Matters and the Department on Administrative Matters that shall act for the whole territory of the Republic of Kosovo, whereas this court and other basic courts have also these departments: Department on Major Crimes, General Department, and the Juvenile Department.

Article 17 of Law on Courts addresses several principal matters, including that of the organisation of the Court of Appeal. According to legal resolutions included within this Article, the Court of Appeal acts as a court of second instance, with territorial jurisdiction in the whole Republic

for the territory of the municipality of Southern and Northern Mitrovica, Leposaviq, Zubin Potok, Zvečan, Skenderaj and Vushtrri.

⁶ The Basic Court of Prishtina has these branches: the branch in Podujeva for the municipality of Podujeva, branch in Graçanica for the municipality of Graçanica, branch of Lipjan for the municipality of Lipjan and the branch of Glllogoc for the municipality of Glllogoc. The Basic Court of Gjilan has the following branches: branch in Kamenica for the municipality of Kamenica and the municipality of Ranillug, branch in Vitia for the municipality of Vitia and the municipality of Klllokot and the branch of Novoberda for the municipality of Novoberda, the Basic Court of Prizren has the following branches: branch of Dragash for the municipality of Dragash and the branch of Suhareka for the municipality of Suhareka. The Basic Court of Mitrovica has the following branches: branch of Leposaviq for the municipality of Leposaviq, branch of Vushtrri for the municipality of Vushtrri; branch of Zubin Potok for the municipality of Zubin Potok and the branch in Skenderaj for the municipality of Skenderaj. The Basic Court of Gjakova has the following branches: branch in Malisheva for the municipality of Malisheva and branch in Rahovec for the municipality Rahovec. The basic Court of Peja: branch in Istog for the municipality of Istog, branch of Klina for the municipality of Klina and branch in Deçan, for the municipality of Deçan and the municipality of Junik. The basic Court of Ferizaj has the following: the branch of Kaçanik for the municipality of Kaçanik and the municipality of Hani i Elezit and branch of Shterpca for the municipality of Shterpca.

of Kosovo. As far as the internal organisation is concerned, in conformity with Article 20 of the Law on Courts, the Court of Appeal has these departments: General Department, Department on Major Crimes, Department on Economic Matters, Department on Administrative Matters and Juvenile Department.

Whereas, the Supreme Court of Kosovo, in accordance with the Article 21 of the Law on Courts, presents the highest judicial instance in Kosovo which has jurisdiction in the whole territory of the Republic of Kosovo. This Court consists of the Panel of Appeal of the Property Agency as well as of the Special Chamber of the Supreme Court of Kosovo on Privatisation Matters, with exclusive composition from judges of this Court.

As far as the internal organisation is concerned, a fact should be emphasised that each Basic Court, the Court of Appeals and the Supreme Court have their own president, who is responsible for the management and work of the Basic Court. Whereas, every branch of the Basic Courts a supervisory judge who shall respond to the president of the relevant Basic Court, assignment of judges in relevant departments as well as their exclusion from the judgement of concrete cases.

This way of organisation of the courts of Kosovo, viewed in the context of vertical organisation (Basic Court, Court of Appeal and the Supreme Court) probably is inspired from the need to assure efficiency in work, but also to reduce the budget expenses, in this case through job cuttings in court administrations. This is moreover relies on the fact that Kosovo now has no Minor Offence Courts and Commercial Courts, and has no Basic Courts in each existing municipality as it was before in relation to Municipal Courts. In the other hand, the way of internal organisation of courts is estimated to be in function of the raise of level of professionalism of judges and procedural efficiency (a more effective management of cases). Currently, it is so early to foresee the effects of implementation in practice of the Law on Courts in these matters (for these effects it shall be difficult to talk for a period that may last for years of the beginning of its entire application).

3.2. Reformation of judicial system in the aspect of jurisdiction

The word competency means the right and duty someone has (state body of a certain official) to review and resolve one or more matters on bases of applicable laws and rules. Concerning the courts, "competency presents the right and duty of a court to resolve a matter taking into

consideration the type and importance of the matter, its relation with the location in which the court exercises its function and the type of procedural action that is conducted” (Hajdari, 2013a, pg. 93 – 94).

The matter of the reformation of judicial system in conformity with the Law on Courts is extended also in the segment of addressing competencies. This Law has regulated the matter of jurisdiction in the way that it provides resolution for every level of courts and departments. Regarding the level of court, the Basic Courts are competent to adjudicate in the first instance all cases, except if the law prescribes otherwise as well as provide international legal assistance and decide on the approval of foreign court decisions, whereas, the Court of Appeal is given the competency to review all appeals exercised against the decisions of Basic Courts, to resolve the jurisdiction conflict existing between the Basic Courts and also to decide on other matters prescribed by law. In the end, the Supreme Court is addressed the competency to decide on the extraordinary legal remedies exercised against the final decisions, decide in the third instance as per appeal approved by law, for the revision against the decisions of the second instance of courts on dispute matters, to determine principal attitudes and legal opinions on issues of importance for the unique enforcement of laws by courts in the territory of Kosovo, on cases of Privatisation Agency, issuance of decisions which promote unique enforcement of laws and other issues prescribed by law.

Whereas, jurisdiction of courts regarded in the context of their internal organisation, the Law on Courts addresses them via specifying them to relevant departments. In this occasion, these competencies extend only to that level regarding the Basic Courts and the Court of Appeal. Consequently, at the level of Basic Courts, the Department on Economic Matters is given the competency to resolve disputes between local and foreign legal persons regarding their business matters, the reorganisation, bankruptcy and expurgation of legal persons, if it's not determined otherwise by law, disputes relating to hindrance of possession, except the real estate, between local and foreign persons, disputes regarding violation of competition, abuse or monopolisation and domination position in market as well as monopolist agreements, protection of ownership rights and intellectual property and disputes between aviation companies and in relation with the rights of travellers, and also other matters prescribed by law. The Department on Administrative Matters is given the competency to resolve administrative conflicts initiated according to claims against final

administrative acts and also of other matters prescribed by law. The Department on Major Crimes is given the competency to judge on criminal offences specified as major in accordance to this Law, criminal offences which fall under the exclusive or subsidiary jurisdiction of the Special Prosecution Office of Kosovo and of any other crime punishable with ten (10) or more years as prescribed by law. The Juvenile Department is given the competency to judge the juveniles and adults in cases when their crimes involve children as victims. The General Department is given the competency to judge in the first instance on all matters, except if that is in the competency of another department of the Basic Court.

Resolutions decided in the Law on Courts in matters that are related to the case jurisdiction of first instance courts determine the need to give necessary clarifications especially regarding the responsibilities of the General Department. The way matters were addressed let us understand that responsibilities of this department shall be very much extended. Starting from this fact, within this department, judicial cases shall be addressed for resolution almost of all natures (criminal, civil, offensive etc) which inevitably presents the need for its organisation, respectively, to be divided in special divisions. Although, due to this reason, a priori is difficult to prejudge the difficulties that may associate the functioning of this department, it is estimated that the judgement of criminal matters, without exception, should have been left in the exclusive responsibility of the Department on Major Crimes. In such as case, this Department should have been nominated as Criminal Department and its functioning should have been organised through division in two or more relevant divisions. Hence the specialisation and commitment level would be increased in resolution of criminal cases, and also a higher level of cooperation would be enabled between judges who deal with the resolution of criminal matters. The Court of Appeal, too, functions on the principle of segregation of responsibilities within the relevant departments, and that in the General Department, Department on Major Crimes, Department on Economic Matters, Department on Administrative Matters and Juvenile Department. Of course, this court adjudicates second instance matters, for appealed cases, decided on by basic Courts. Thus, the Juvenile Department of this Court deals only with the judgement of matters in which appeals were filed against the decisions of Juvenile Departments of the Basic Courts.

A novelty of Law on Courts is that it removes lay-judges from adjudication of criminal cases, with exception for juvenile criminal

proceedings. This resolution, regardless of current problems that may have caused for effective courts, it is estimated to be of pragmatic character, based on the bad experience of the functioning of lay judges in the past.⁷

3.3. Reforming of judicial system in the aspect of career development of judges

Law on Courts brings big novelties also related to the career of judges. Thus, within the so called qualification of judges, for a person to be able to be appointed as a judge, amongst others it is required that the candidate has successfully passed the vetting process in conformity with the regulations and procedures foreseen by Kosovo Judicial Council. Many novelties are related also to experience. Thus, for exercising the function of a judge in the Major Crime Department of Basic Court, the respective candidate should have at least three years of work experience as a judge in the General Department, in the Department of Economic Matters or in the Department of Administrative Matters, at least six years of legal work experience, including the experience in economic and administrative matters. To exercise the function of judge in the Court of Appeals, at least ten years of work experience as a judge are required, whereas for the Supreme Court, a minimum of fifteen years of work experience as a judge is required⁸.

Professional experience as a criterion must be viewed in function of adding the level of professionalism in courts, but also as an impediment for young generations to achieve their ambitions for exercising the function of a judge. This situation has created facilitations for the function of judge, to largely, be a monopoly of those judges that have exercised this function also in the communist regime.

Law on Courts addresses also the issue of professional activities of judges. They are allowed to participate in professional organisations which promote the independence of judiciary, extend the professional education

⁷ Lay-judges were very passive judges. They did not study the cases in which they adjudicated so that they did not provide any quality which would be needed for preserving the contemporary trends of development of judicial system.

⁸ It is worth noting the fact that Law no. 03/L-199 for Courts in future foresees toughening of the criterion for exercising the function of a judge. This toughening is related to years of experience of a judge

and encourage efficiency of the courts.⁹ Thus, judges have all legal opportunities to deal with research and scientific work and to hold lectures and trainings for new students of justice, and to participate in conferences of scientific training character, for as long as they do not amount conflict of interests.

This legal solution enables judges to be able to convey their important experiences related to practical experience that they do within concrete courts where they exercise the function of judges to the beneficiaries of other institutions, such as students of law faculties. Such legal solution also enables judges to benefit from experience of their colleagues to exercise the function of judge in various countries in the Region of Balkans or even broader, but also from other relevant experiences in the field of rule of law or in other fields, through participating in conferences and various professional and scientific meetings. However, this solution taking into consideration the level of responsibility and engagements the judges have, in particular the high number of court cases awaiting to be resolved by Kosovo courts of all levels,¹⁰ should not have been in the form it currently is. In fact on the basis of such facts, lawmaker would make a more pragmatic solution if within the given solution would set the borders, observing it in hours within a week, for the possibility of inclusion, respectively engagement of judges in the abovementioned activities.

3.4. Reforming of judicial system in other matters

Reforming of judicial system in context of the Law on Courts extends also in the field of protection, immunity, transfer and reassignment of judges. As for protection, article 30 of the law foresees that judges and their families are entitled to special measures for protection, such as they are in function of securing their life, which is threatened because of exercising the judicial responsibility. Authority that has responsibility for setting concrete measures of protection is Kosovo Judicial Council, to which, the requests must be submitted in written, by which the judge is required to clearly reflect existence of risk for his life or any of his family members, and that is related to the function of judge.

⁹ But judges are disallowed to be members of any political party, movement and political organisations and to participate in political activity.

¹⁰ Currently in the courts of Kosovo there are around 100.000 cases of all types, waiting to be resolved. This detail is presented before electronic media by the President of Kosovo Judicial Council on 23.02.2012.

The matter of immunity of judges and lay judges is not regulated specifically by the Law on Courts. In fact this law, regarding this matter in all its dimensions refers to Article 107 of the Constitution. According to this article, judges, including lay-judges enjoy immunity from criminal prosecution, civil lawsuits and discharge from function for the decision he/she has made, for voting, opinion expressed and for other actions undertaken but falling within their scope of duties and responsibilities as judges. Immunity does not extend to cases when judges violate the law on purpose. In these cases they can be prosecuted *ex officio* after being discharged from the function of judge.

The matter of transfer and reassignment of judges according to the Law on Courts has been entrusted to Kosovo Judicial Council (Article 38). In case of transferring and reassignment of judges, this body needs to take into consideration and respect the following: criteria for appointments determined by Constitution (Article 150, paragraph 1), integrity, experience, capacity and managerial skills evaluated during the process of reassignment and the will of the judge.

Through solutions set by this law, the lawmaker aims to ensure appointment of judges in the fields and the level of judiciary for which they are deemed appropriate, for their career on the basis of the criterion of meritocracy and advanced level of responsibility for the entrusted work. In this aspect, based on the provisions of this article, successes and working skills of judges that as a rule would need to be taken into consideration while reviewing and evaluating every request expressed by a judge for his/her enhancement in career towards a higher level of judiciary.

4. Challenges the Judicial System in Kosovo is facing currently

In the public opinion, especially in the professional one, internally and externally, an opinion dominates that the judicial system of Kosovo in its work has manifested problems of various natures, even quite serious ones. These problems mainly refer to the manner of its functioning. In this aspect, especially the matter of negligence and non-professionalism has been addressed in resolution of court cases, and particularly the issue of high inclusion of court personnel, especially of judges in many corruption affairs. This situation shall unavoidably reflect its influence, even essential also in the process of visa liberalisation and in membership of the country into European Union and other relevant regional and international

organisations (Hajdari, 2012a, pg. 12). For these and other matters, related to the challenges judicial system is facing currently, more details shall be elaborated in continuation of this work.

4.1. Independence and politicising

Independent is considered the judiciary where the courts of a country adjudicate pursuant to Constitution and other applicable legislation (Hajdari, 2013a, pg. 17; Hajdari, 2010, pg. 84 - 85; Sahiti, 2005, pg. 64 - 65; Halimi, 2003, pg. 50 - 53). In fact courts can be considered independent only when the holder of judiciary function (judges) in the course of exercising their responsibilities and when taking decisions act independently, in an unbiased manner and not impacted in any way by various natural or legal persons, including public bodies (Hajdari, 2013b, pg. 12).

Giving an accurate response a priori whether Kosovo has an independent judiciary, is not an easy task. We say this because in the legal aspect, Kosovo has already set up the foundations of a modern judiciary and independent of any influence. However, in the practical aspect this matter requires much to be done. We also say this because the public opinion, especially in the professional opinion it is expressed that political interventions, especially from the Government, but not excluding here other institutions of central or local level at the work of courts continue to be obvious. Reports from numerous relevant international institutions express this, such as Transparency International, USA Administration, Council of Europe, etc. Concluding by such a finding, we also base our opinion on the fact of dragging resolution of pending court cases, and the fact of avoiding local judges to be holders of resolving the aggravated criminal cases which are related to war crimes where high public officials are involved.

Influence of politics on the work of judiciary seems to be unavoidable and inevitable as long as certain political personalities have their influence on appointment of judges. In such situations obedience of judges to politics is always obvious.

4.2. Coping with many court pending and unexecuted cases

Kosovo judicial system, since the post war time up to date continues to face the problem of high number of unresolved and unexecuted cases from year to year. This fact is witnessed by numerous periodical and annual reports of Kosovo Judicial Council. This, according to the Report for 2013

from this institution, the number of pending cases is 466.155, out of which 363.506 are cases inherited from earlier years.¹¹ Statistics witness also for hundreds thousands resolved cases awaiting their execution.

This condition witnesses that almost every fourth inhabitant of the country has a court case filed waiting for a resolution, or to whom the court case is being dragged without any time limitations from year to year without any result or resolution.¹² Hence, the high number of unresolved and unexecuted cases represents a challenge for the country which would need to be dealt with much more seriously by the responsible authorities. In this aspect, alternatives to solving this problem can be from necessity to increase the number of judges up to increase of level of responsibility for the lack of their results at work or for low work quality. This is due to the fact that the problem of resolving cases with considerable delays or not resolving them at all, including execution of judicial decisions, determines now the low level of functioning of judicial system which challenges not only individual values but also the social ones, including the consequences in the integrating processes of the country into relevant international mechanisms. This condition unavoidably determines the low level of economic development, low quality education and health and so on.

4.3. Facing organised crime, corruption and other forms of aggravated criminality

An essential challenge for Kosovo comes also from facing with the organised crime, corruption and other severe forms of criminality. Numerous international acts, including those of European Commission, COG, declaration from Chancellor Merkel given in December 2011 etc., have addressed the need for the responsible institutions of Kosovo to enhance their efforts towards fighting organised crime and corruption. Partial data that have been made public related to organised crime in Kosovo witness for a high level of its presence in the country. Accordingly, based on a report of Kosovo Police during the period 2001 - 2012 466 kg. and 709 gr. heroin, 2.161 kg. and 987 gr. marihuana, 2 kg. and 84 gr. hashish, 239 kg. 156 gr. (this figure has not been written accurately) kg

¹¹ Annual Work Report of courts for 2012, Kosovo Judicial Council – Immediate Secretariat,

¹² This comparison has in consideration the new census of people's registration carried out by Kosovo Statistics Agency according to which Kosovo in 2012, without municipalities of north Mitrovica, Leposaviq, Zubin Potok and Zveçan had 1,733.872 inhabitants. Report holds the date of 29.02. 2013.

cocaine, 156 kg. and 214 gr. Cannabis plants, 3.168 kg. ecstasy and 73 kg and 553 gr. other drugs have been confiscated, for which 818 persons have been treated as suspicious persons 576 others have been arrested (Kosovo Police Report, 2013). According to Kosovo Police Report during the period 2004 - 2010, 108 criminal offences of smuggling with migrants were committed for which 188 persons were arrested. Whereas only in the beginning of 2012 4 persons were arrested for forging of 80 thousand US dollars (Kosovo Police Report, 2012). The details presented above witness that over 70% of defendants of criminal offences mentioned above have committed the offences within a criminal cooperation scheme. These details, although limited, witness that the values of Kosovo and its citizens protected by applicable legislation continue to be challenged, even quite frequently by this type of criminality (Hajdari, 2012c, pg. 11).

Corruption and war against it are also a big challenge for judicial system of the country. This is due to the fact that presence of such a criminal occurrence is considered to be in a high level. Thus, according to the international organisation Transparency International, in the list published related to the situation of corruption in the world, Kosovo has been ranked in the worst position in the south-eastern Europe. Also in an announcement made public by Anti-Corruption Agency, only during 2011 this institution has preceded over 100 suspected cases for public corruption. As for the high level of corruption in the country, there is also information provided by Report on Early Warning for Development by UN, which presents Kosovo as a country with a high level of corruption and many other reports (Hajdari, 2012b, pg. 12).

Also the presence of other forms of serious criminality is estimated as concerning. Politically motivated murders, war crimes etc., constitute one of the challenges with which the responsible institutions of the country, including courts need to deal.

A fact must be noted that organised crime, corruption and other forms of aggravated criminality extensively damage the state budget, economic investments, public services, thus deepening the economic crisis and isolation of the country, and they further motivate commitment of many other crimes.

As for offenders of crimes of such nature, when they have been treated, courts of the country have only pronounced soft sentences, often only fines. It is considered that this is not the proper way to deal with such crimes. Moreover, this approach of judiciary can only encourage offenders to continue with their criminal activity. A more severe combat within the law

framework must be undertaken by the courts of the country if they want to advance their mission of rule of law, development of democracy and regional and international integrations of the country.

4.4. Inclusion of young generations and professionals

Kosovo is a country with young population. Although there are no proper statistics, it is considered that Kosovo is marking an important advancement in educating the youngsters. Many young people continue to study in various universities in Europe and in the world. Many of them have become part of study of law science. Kosovo has already created important elite of the young generation which is expected to contribute to country development, in this case also through ensuring the rule of law. It shall necessarily be required to open the doors of institutions to this young generation, including courts in order to be able to apply their knowledge in function of advancement of judiciary. Few developments which have been undertaken are considered to be far from opportunities existing in the judiciary of the country to provide places to young generation members and professionals. Big obstacles have been placed through the criterion of experience that is required by Law for the Courts as regards to opportunities for the candidates to be appointed as judges. Hence, it is noted that there is a need that such obstacles are corrected in order for the situation in judiciary to change. This is one of the manners of coping with this challenge for which the institutions of the country need to be aware.

5. Conclusion

Results of this work have led to the following conclusions:

1. Kosovo in a large period of time was under rule of the others. Consequently, during the whole those times, the judicial system, let's say almost did not serve to interests of the country and its citizens. Following disestablishment of autonomy of Kosovo, until the second half of 1999 (in the end of the war) the courts were governed by Serbia, and the composition of judges (with few exceptions) were Serbs. These courts operated under the dictation of Serb political strategy which aimed at total serbisation of Kosovo. They developed made up political processes against Albanians and they were totally discriminatory.

2. Following settlement of UN mission in Kosovo - UNMIK, the judicial system of the country was administered by the fourth pillar of this Mission.

The aim of this mission was to ensure in Kosovo a multiethnic and transparent judiciary. It organised the judicial system of the country by appointing into positions of judges the judges who had earlier exercised such a function, and they also appointed many international judges. Regardless the aims this Mission had, it did not achieve to create a functional judiciary, so that its work was accompanied by many challenges and problems. During this time, courts operated according to the Law on Regular Courts and based on other laws which were inherited from the past when Kosovo was as autonomous unit of former SFRY.

3. Law on Courts reformed the judicial system by creating a new judicial structure which consists of basic courts, Court of Appeals and Supreme Court of Kosovo. In fact this law also set the bases of internal organisation of courts. In this aspect, as regards to basic courts and Court of Appeals, a solution has been determined according to which, while exercising their activity, these courts shall function on the principle of segregating work into branches, departments and divisions. This manner of organisation, grounded on the reasons having determined it, is expected to influence an increase of efficiency at work of all courts.

4. Law on Courts has reformed the judicial system by specifying competences of each level of courts and the competences within the departments and divisions. In this aspect concrete obstacles have appeared in the offered solutions. This is especially noticed in the context of regulating responsibilities of general departments, but not only. As a result it is expected that during the practical implementation of this law, to also have concrete problems appear which shall probably dictate the need to make certain changes of this law in a short period.

5. Law on Courts reforms the judicial system also in some other aspects. It addresses also the issue of protection, immunity, professional activity, duties and prohibitions of judges and their transfers and reassignments. However, in addressing these issues, many solutions are encountered which seem to be quite generalised, and it allows possibilities for eventual misuses.

6. Judicial system currently faces many challenges. Main challenges are related to the need to make it as independent as possible and uninfluenced politically, more professional and efficient in combating the crime, especially the organised crime and corruption, and to regulate it in a manner to enable winning the position of judges to the new generations and professionals.

List of References

- Albanian dictionary, Tirana, 1984;
- Baylis Elena, (2007), *Parallel Courts in Post-Conflict Kosovo*; *Yale Journal of International Law*, Vol. 32, p. 1.
- Constitution of the Republic of Kosovo, 15 June 2008;
- Constitutional Framework for Provisional Self-Governance in Kosovo;
- Contest Analysis, re-establishment and reforming of justice system 1999-2011, May 2011;
- Eulex Kosovo, *Kosovo Judicial Council*. Taken from: www.eulex-kosovo.eu/en/justice/kjc.php, date 13 February 2014;
- Hajdari Azem, (2010), *Criminal procedure*, Commentary, Prishtina;
- Hajdari Azem, (2012a), *What judiciary is needed for Kosovo*, *Kosova Sot*, Prishtina;
- Hajdari Azem, (2012b), *Corruption a phenomenon challenging the future of Kosovo*, *Kosova Sot*, Prishtina, 2012;
- Hajdari Azem, (2012c), *How and in what way is Kosovo challenged by organised crime*, *Kosova Sot*, Prishtina, 2012;
- Hajdari Azem, (2013a), *Basics of judicial system* Prishtina;
- Hajdari Azem, (2013b), *Law on criminal procedure*, General part, Prishtina;
- Halimi Islam, (2003), *Criminal procedure*, Commentary, Tirana;
- Index on Reform of Legal Profession, 2007;
- Kosovo Institute for research and development of policies KIPRED, (2007), *Political Analysis, Kosovo, State without a Precedent*; Prishtina;
- Kosovo Judicial Council - Secretariat, *Annual Work Report of courts for 2012*, http://kgjk-ks.org/repository/docs/raporti_final_ALB_2012_725938.pdf. 22 February 2013.
- Kosovo Police Report, Prishtina, date 07.01.2013;
- Kosovo Police Report, Prishtina, date 17.02.2012;
- Law No. 03/L-053 on Jurisdiction, Selection of Cases and Allocation of Cases to EULEX Judges and Prosecutors in Kosovo;
- Law no. 03/L-199 on Courts, (Official Gazette no. 79, date 24.08.2010);
- Law no. 04/L-115 on Amendment and Supplementation of the Laws related to conclusion of international supervision of the independence of Kosovo, (Official Gazette no. 25 date, 07.09.2012);
- Law no. 04/L-171 on Amendment and Supplementation of the Law no. 03/L-199 on Courts, (Official Gazette no. 37, date 28.12.2012);
- Report of Kosovo Agency of Statistics, date 29.02.2013.

Sahiti Ejup, (2005), *Criminal procedure law*, Prishtina;
Strategic Plan for Judiciary in Kosovo, 2007- 2012; April 2007;