EJIS

EUROPEAN JOURNAL OF
INTERDISCIPLINARY STUDIES

January-April 2016
Volume 2, Issue 1

ISSN 2411-958X (Print)
ISSN 2411-4138 (Online)

REVISTIA

PUBLISHING AND RESEARCH

EUROPEAN JOURNAL OF INTERDISCIPLINARY STUDIES

January-April 2016

Volume 2, Issue 1

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Address: 11, Portland Road, London, SE25 4UF, United Kingdom

Tel: +44 2080680407

Web: https://ejis.revistia.org

Email: office@revistia.org

ISSN 2411-958X (Print), ISSN 2411-4138 (Online)

Indexed in Elsevier's Mendeley, WorldCat, RePEc & Ideas, Google Scholar, Index Copernicus, Crossref & DOI and PKP

Key title: European journal of interdisciplinary studies

Abbreviated key title: Eur. j. interdiscip. stud.

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Labour Law of E.U. About the Free Circolation: a Comment on Recent Discussion According to Most Relevant Pronunciations of Justice Court

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Abstract

Today, into Shengen's area, some of the european countries -among which the Austrian Republic- because of illegal immigration and because of the terrorist attacks too, decide for the temporany national frontier closing: directly between the same countries that build up the European Union. If it happens, in this period, it would mean also the unavoidable restriction of the working rights among the european citizens. But what did represent and does represent the freedom of circulation among the workers in the law Community system? Naturally there will be a law discussion about: in this occasion we try to give an aswer to this question, according to the right, but -above all- let's try to bring back the discussion on a line of law correctness, according to the recent decisions of the European Court of Justice that set limits to the topic.

Keywords: Labour Law of E.U., Free Circolation, Justice Court

1.Il principio di libera circolazione delle persone

Nel diritto comunitario, com'è noto, le normative che regolano la circolazione delle persone all'interno del territorio dell' Unione Europea costituiscono uno dei capitoli più rilevanti e significativi.

La libera circolazione dei cittadini della U.E. ha una sua propria caratterizzazione, prettamente economica, che tuttavia pare essere funzionale soprattutto al raggiungimento degli obiettivi europei in materia di politica sociale. Invero il diritto alla libera circolazione (dei lavoratori) è finalizzato alla costituzione di un unico mercato del lavoro su scala europea: per tale motivo a tutte le persone che lavorano all'interno del'Unione, proprio in quanto soggetti economici, deve essere assicurata la piena libertà di spostamento tra i vari Stati-membro che costituiscono la Comunità: siano essi lavoratori subordinati, lavoratori autonomi o persone giuridiche (1).

In particolare, sul punto, si è osservato che la libertà dei lavoratori ha implicato la abolizione di qualsivoglia forma di discriminazione *ab origine* basata sulla nazionalità delle persone, con riguardo al diritto di ingresso nel territorio comunitario, all'accesso al lavoro, alle condizioni, al soggiorno ed al diritto di mantenervi la propria residenza (2).

Per l'effetto, quindi, l'esigenza di favorire la mobilità intra-comunitaria dei lavoratori ha superato i criteri (obsoleti) basati sulla nazionalità, interni ai sigoli Stati-membro: non a caso si sono succedute nel tempo una serie di norme di attuazione, a partire dal 1961, e la stessa Corte di Giustizia ha avuto modo di pronunciarsi più volte sull'argomento. (3)

Nel campo di applicazione delle normative sulla libertà di circolazione rientrano anche i componenti della famiglia del lavoratore (il coniuge e i discendenti che siano minori di anni ventuno): tuttavia c'è da dire che il diritto di soggiorno dei familiari non costituisce un diritto autonomo, bensì è naturalmente collegato alla circostanza che il lavoratore abbia già esercitato il suo proprio diritto di libera circolazione e che disponga di un alloggio. (4)

In patica l'esistenza di un mercato del lavoro comunitario permette che lavoratori e datori di lavoro possano scambiare in piena libertà le domande e le offerte di impiego, dando esecuzione ai contratti di lavoro conclusi. (5)

Quanto ai contenuti del diritto medesimo, esso si estrinseca innanzitutto nella parità di accesso ai posti di lavoro disponibili in ciascuno dei Paesi-membro della UE, ed è identificabile nella garanzia della parità di trattamento nell'accesso all'impiego tra lavoratori nazionali e lavoratori che provengono da altri stati comunitari. (6)

In buona sostanza la garanzia di parità di trattamento trova fondamento nella impossibilità di far dipendere la assunzione del lavoratore a criteri discriminatori in ragione della sua nazionalità. (7)

In effetti il divieto di discriminazione, *a contrario*, rappresenta un autentico limite giuridico sia per i comportamenti dei poteri pubblici, sia per la autonomia dei privati: sicchè le clausole discriminatorie che siano contenute in norme, o contratti (individuali e/o collettivi), sono da considerarsi radicalmente nulle. (8)

Ovviamente la libera circolazione può essere parzialmente limitata dalla (legittima) richiesta di attestati di qualificazione professionale, poiché le regole per il rilascio di tali attestazioni risultano ancora essere diverse nei vari Stati-membro, in prevalenza per ciò che riguarda i lavoratori autonomi. (9)

2. La libera circolazione dei lavoratori

Sempre in ordine al contenuto del diritto in esame e sulla base del diritto alla libertà di circolazione di chi lavora, il principio di parità di trattamento del lavoratore costituisce, evidentemente, una parte integrante del diritto di libera circolazione: trattasi di una garanzia di carattere generale – la quale inerisce alle condizioni di lavoro e che deve trovare puntuale applicazione in relazione a tutta la materia lavoristica - su cui, peraltro, si è più volte soffermata la Corte di Giustizia. (10)

Il principio di parità gode comunque di un'ampia valenza protettiva: non a caso tale garanzia è funzionale sia alla integrazione dei lavoratori migranti che alla tutela degli stessi cittadini del paese di accoglienza. (11)

Ciò detto, si osserva quanto segue: il principio di libera circolazione non può che implicare il diritto a spostarsi liberamente nel territorio degli stati-membro e, quindi, il diritto del lavoratore a lasciare il proprio territorio nazionale, onde accedere ad una attività lavorativa in un altro paese comunitario. Quanto alle formalità, esso sarà applicabile semplicemente con la presentazione di un documento di identità, senza il rilascio di alcun visto di uscita: detta facoltà coincide con il diritto di ingresso del lavoratore migrante in ognuno dei paesi della UE, che non è condizionabile da alcuna forma di visto di ingresso. (12)

Altresì, la libertà di circolazione del lavoratore si concretizza nel diritto di soggiornare senza il rilascio di alcun permesso costitutivo del diritto. (13) Accanto a tale diritto esiste la ulteriore facoltà, esercitabile dopo la cessazione dell'attività lavorativa, di continuare a risiedere sul territorio dello stato ove è stata esercitata l' attività lavorativa, sempre ricorrendo determinate condizioni di durata del lavoro. (14)

Infine, quanto alle residue limitazioni legali che sono, ad oggi, ancora poste alla libertà di circolazione dei lavoratori, giova ricordare che sussistono ancora due limiti: un primo, di carattere meramente residuale, che riguarda l'accesso dei lavoratori extra-nazionali all'impiego pubblico nelle amministrazioni dei singoli stati-membro (limite che, occorre dire, si va riducendo sempre più, sia grazie alle direttive di coordinamento in materia, sia alla luce delle numerose pronunce della Corte).

Ovviamente sussiste anche un altro -ed ulteriore- limite: il quale concerne, invece, le ragioni di ordine pubblico, di pubblica sicurezza, ovvero di sanità pubblica, su cui conviene soffermarsi alla fine del presente articolo.

Dunque è facile notare che, quanto all'oggetto del divieto, esso non può che riguardare i singoli provvedimenti, adottati in casi eccezionali da uno (o più) stati-membro, relativamente al limite di ingresso sul territorio nazionale, o alla espulsione di soggetti dal territorio medesimo (16).

Ovviamente non possono sussistere mere ragioni di carattere economico, ma solo motivazioni gravi che riguardino minacce all'ordine pubblico, alla sicurezza, o per la sanità e l'igiene: anzi, a tal proposito, l'Unione sta cercando di armonizzare i vari criteri nazionali, ancora oggi non uniformi, pur restando fermo - in capo alle competenti autorità nazionali - un certo potere discrezionale, con riferimento, in particolare, alla procedura di espulsione. (17)

3. La libera circolazione di servizi

A completamento della materia che ci occupa, si deve sottolineare che il Trattato sul funzionamento della Unione, nell'evidente intento di assicurare la piena mobilità dei fattori produttivi in senso ampio, con gli articoli 56-62 TCE prevede, inoltre, la libera prestazione e circolazione dei servizi: questa costituisce, in un certo senso, il pieno completamento del diritto alla libera circolazione dei lavoratori.

In effetti per "servizi" devono intendersi, secondo l'art. 57 TFUE, «le prestazioni fornite normalmente dietro retribuzione, in quanto non siano regolate dalle disposizioni relative alla libera circolazione delle merci, dei capitali e delle persone». Tali prestazioni comprendono attività di carattere industriale, commerciale, artigiane e, infine, le libere professioni. (18)

L'art. 56 TFUE, rispetto all'esercizio dei servizi, peraltro, prevede il divieto di restrizioni nei confronti dei cittadini degli Stati membri stabiliti in un paese della Unione che non sia quello del destinatario della prestazione.

In secondo luogo, con l'art. 57 paragr. 2 TFUE, è previsto che per il prestatore (il quale, a titolo temporaneo, eserciti la propria attività in un paese diverso da quello di origine) il pieno diritto di esercitare la propria attività «alle stesse condizioni imposte da tale Stato ai propri cittadini». (20)

La libera prestazione dei servizi non può che comporsi - analogamente alla libera circolazione dei lavoratori subordinati e al diritto di stabilimento - sia del diritto di accesso all'attività che del diritto al trattamento nazionale: ma, mentre il primo diritto presuppone l'esercizio continuo e permanente di un attività in un altro Stato membro, la libera prestazione dei servizi riguarda anche un esercizio solo temporaneo e occasionale di un'attività non salariata (all'interno di ognuno degli Stati-membro).

Come per il diritto al libero stabilimento, anche nella libera prestazione dei servizi sono in primo luogo vietate le discriminazioni ''dirette'', ossia quei casi in cui la normativa nazionale prevede espressamente un trattamento diverso e meno favorevole per i liberi prestatori rispetto a quello applicabile ai soggetti stabiliti (come nel caso della norma francese, che vietava ai soli medici stabiliti in altri Stati di visitare più di un paziente per un periodo complessivo di due giorni).

Naturalmente è fatto divieto anche delle discriminazioni ''indirette'' (dette anche ''occulte''): ossia, per meglio dire, è vietata qualsiasi forma di discriminazione dissimulata che, sebbene basata su criteri in apparenza neutri, nella vita pratica vada a produrre lo stesso identico risultato discriminante.

Il principio è stato affermato, ad esempio con riferimento alla normativa italiana, in materia di concessione di lavori pubblici che, per quanto riguarda i subappalti, accordava la preferenza alle imprese che svolgevano la loro attività prevalentemente nel territorio della Regione interessata dai lavori (21).

Sono, infine, vietate le discriminazioni ''materiali'', cioè quelle che derivano dall'assimilazione della situazione del prestatore di servizi straniero a quella del prestatore nazionale rispetto a requisiti che risultano per il cittadino di uno Stato membro più difficili da acquisire (come nel caso delle normative professionali, in cui lo Stato, imponendo ai liberi prestatori la risposta a requisiti previsti dalla normativa nazionale, non tiene conto del fatto che tali soggetti sono già tenuti a rispettare i requisiti richiesti per l'esercizio dell'attività nello Stato di stabilimento) .

Si noti che, come già osservato in tema di diritto di stabilimento, mediante una giurisprudenza ormai consolidata la Corte ha assunto -nei confronti delle discriminazioni indirette o materiali alla libera prestazione dei servizi- un approccio diverso, che non si limita ad accertare l'esistenza di una discriminazione, quanto piuttosto verifica se sussiste un ostacolo alla libera circolazione dei servizi (22).

Sicchè il principio del trattamento nazionale, che è stato sancito all'art. 57, terzo comma TFUE, non può e non deve essere inteso nel senso restrittivo della necessità della applicazione integrale della disciplina nazionale alle attività di carattere temporaneo, che siano esercitate da imprese stabilite in altri Stati: invero, piuttosto, la libera prestazione dei servizi, come del resto quella dei lavoratori -in quanto principio fondamentale sancito dal Trattato- potrà essere limitata sempre e solo da normative di carattere temporaneo che siano giustificate dal pubblico interesse e che siano rese obbligatorie per tutte le persone e le imprese che esercitano la propria attività sul territorio di tale Stato.

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The Modern Mind, Religion, and the Spiritual in the Thinking of Frank C. Doan

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Abstract

The problem of modernism presented itself as a challenge to traditional Christianity. It argued in favor of different values, both human, as well as spiritual, that came into conflict with what Christianity had known up to that point. Frank C. Doan is one of the thinkers who spoke in favor of the spiritual and the need of this realm for the true seeker of the eternal. He also spoke against any kind of exagerations and obsolete forms of religion/spiritualty/preaching that were present in Christianity at the beginning of the XXth century. This article presents the way he Doan argued in favor of the spiritual, to the detriment of the materialist way of life, as well as a comparison with certain thinkers of his own time, some modernists, others traditionalists. The essay brings forth a century old set of arguments in order to aid the contemporary thinker and believer in setting forth a personal and better informed way of thinking about the historical heritage of religion in general and Christianity in particular.

Keywords: modernism, religion, Christianity, heritage, preaching

Introduction

The Genuine Manhood

At the turn of the XXth century the modernist movement saw a set of books that argued in a modernist manner about religion in general, and Christianity in particular. The presented ideas argued in favor of a bigger picture than that presented to that point. He ideas presented by Frank C. Doan argue in favor of Christians looking at a bigger picture than that they had known until then. It is important for the contemporary believer and religious thinker to look back at the historical heritage of religious modernist thought, in order to better assess the present state of religion and Christianity.

The 'Preface' of Doan's book is essential for understanding the way he organized the chapters within it. The essays were delivered on various occasions, from lectures before students, to the Billings Lectures for the American Unitarian Association. In spite of various locations and dates, the essays are about religion and its place in modern society. Religion, God, God-Man, and larger Life are terms used by Doan to express what and how religion works in itself, but also how it is perceived by the early XXth century modern man. From these terms I would consider 'God-Man' as most important in relation to what conservative or traditional Christianity is. This concept will be encountered in the first chapter of his book 'Religion and the Modern Mind', which will be analyzed in the following paper. First of all, God-Man is an experience. Doan explains that in order to have this experience, one must

'strip your manhood most scrupulously, most painfully bare of all its filthy parts, to lay aside your bestialities and liberate your manhoods, to expose the naked, cold-as-steel soul of you to the eternal tempering energy of the world's fire-dust; then by reacting to transpierce the universe's self with this pure and strong manhood you bear, and call the resulting experience God, God-Man, Man-God, or by what name soever God may will. That experience is your religion's sole deep concern. That experience *is* you; it *is* God.' (Doan, 1909, p. v)

Such ideas are rather puzzling, at least for those of us who come from a traditional line of theological interpretations – such as the reformed Baptist (*The Baptist confession of faith*, 1765) - of the relationship between God and man. God is seen as outside creation, but also within it, but not one with it. God is transcendent and personal, but also personally involved in the life of man. The Christian religion encourages the creation of moral life, but in an automatous manner. This is due not too the fact that God is seen in Christianity as a law giver, but at as a Spirit giver, therefore, Christianity is not a religion of law, but a religion of Spirit (Evans, 1911, p. 431). Doan's perspective does not cancel the existence of God, but it morphs into a connection within man. He puts a strong emphasis on primordial reactions and feelings in order to describe the religious life of man, in connection to what/who God is. He argues that the image of God is shaped by one's age. The God of the

young is enthusiastic, whimsical, and shallow, while the God of the old is aged, level-headed, and senile (Doan, 1909, p. vi). In order to get passed such negatives and reach the universal true religious feeling one must revert to temperament and the freshness of one's soul, regardless of age. 'Perpetual youth against congenital agedness' is the fundamental essence of conflict between man of different generations (Doan, 1909, p. vi). If one considers the description of God in light of man's image, this is a conflict between gods. The accusation can be that since man created God, he gave it spiritual qualities greater than the one's man possesses, but this God has also a low animal nature, such as that of man (Macculoch, MCMVIII, p. 76). Wisdom is acquired in time and Doan argues in favor of a constant critical reassessment of one's beliefs. This means that if at a younger age some things are considered shallow, but at a latter age are considered valuable, it means one is destroying one's soul and humanity. That would equate to blasphemy against the One Doan calls God. In this context, the God/God-Man of Doan is one of 'everlasting youth and perpetually buoyant Life' (Doan, 1909, pp. viii–xix).

The Use and Abuse of Religion

The first chapter of his book is entitled 'Religion and the modern mind' and it begins with an expected question: what is the place of religion in modern life? Before answering the question, Doan marks the fact that for over twenty five years the question had been posed and answered so many times from all sorts of weak points of view, that it became annoying for the a true modern mind. The book where he writes this remark was published in 1909, but the speech itself had been given in previous years. The problem is that the issue of church and human life is real, but the way it was handled lead to contempt for the honest, truth seeking people (Doan, 1909, p. 1).

The issue at hand is that the arguments in favor of keeping religion in the modern world are 'too secular; or too apologetic; or too defensive; or, if you please, too *practical*' (Doan, 1909, p. 1). This perspective argues in favor of balancing the purely spiritual aspect of reality with the practical one. There should not be too much of any of one in the detriment of another. Forcing the simple, clear truth of the spiritual realm with fabricated and excessively rational arguments brings no benefit to the genuine modern man. There is a need of the theoretical/doctrinal element, in order for the practical aspects of the religious life to make any sense at all (McComb, 1910, p. 18). Doan does not deny the need for the practical aspects of the spiritual and he does not deny that the spiritual has practical aspects, but he criticizes forcing the argument in favor of the practical side. Doan speaks, in this context, for a healing element for such deviations, namely a 'revival of those eternal verities in which all men of whatever culture have always instinctively believed' (Doan, 1909, p. 1). Such an approach flattens the *spiritual* to a universal kind and to a universal way of basic experience.

Doan's point argues in favor of a spiritual realm that can be sensed and experienced in the same way - at least at a basic, primordial level – by all humanity, without exception. The church becomes a simple, but quite important, 'distributer of the bread of life, of the pulpit as a place of moral and prophetic vision' (Doan, 1909, p. 1). The purpose of the church is not to indoctrinate, but to present and transpose the spiritual into the life of the believers via the message of the pulpit. The other problem is that the pulpit becomes too mundane, too ordinary. It lacks the 'spaciousness of the New Testament', putting a far too great emphasis on duty, but leaves God outside. Thus, the church lives in an environment it created, with no valuable and deep motives (Jackson, n.d., p. 78).

The *bread of life* can refer to Christ Himself as an exposer of the spiritual realm, as well as a materialization of a spiritual reality in the Eucharist. I must admit that the later perspective is a personal one and a slight exaggeration of the first. If the spiritual realm can be explained through language, thus offering meaning to the words that make up ideas, it is proper to argue in favor of the pulpit as a promoter of moral values and warnings against evil actions. The prophetic aspect of the pulpit is not related to the idea of some sort of direct dialogue with God, but a refined understanding the *spiritual* and a capacity of taking meanings from this realm and explaining them in plain language, but with great authority. If man is a spiritual being, than Christianity, in spite of a larger package of common themes shared with other religions, is set apart by the intrinsic values promoted by Christ. Man is to act in accordance with an disinterested love of God (Macculoch, MCMVIII, p. 93). Doan argues that people, or in his case the genuine modern man, desires the spiritual, as well as the church. There is no inconsistency between modern man and religion, one does not exclude the other. Modern man desires to know as much about reality as possible. This desire includes the spiritual. In spite of this desire, the modern man will reject any exaggeration, any theatrical, any dogmatic approach or explanation of the spiritual and religion. In Doan's own words: 'put it for him frankly, unaffectedly, above all undogmatically, and he will bow his assent' (Doan, 1909, p. 1). Modern man needs the spiritual, but he will reject the traditional way in which it is presented. In other words, modern man needs a natural,

human/humane, clear, genuine presentation/explanation/dialogue on the subject of the spiritual and religion. If he feels truth and sincerity, Doan believes that modern man will not only accept, but bow his assent. The truth of the spiritual does not reside in one's affections and affectionate manner in which one presents it, but the meaning of the arguments.

The battle between truth and fiction was expressed vividly by Mr. Garrick in a dialogue with a minister, who asked him why was that those who talk of fiction gain huge crowds, while those who preach the truth have a small attendance. The answer was quite poignant: 'you preach truth as if it were fiction; and we deliver fiction as if it were truth' (*The Quarterly Christian Spectator*, 1833, p. 518). This was in 1833, but in a dialogue between Doan and a certain Mr. Pratt, he asks the later on what he should tell the students preparing for the ministry. Doan marks the words of Mr. Pratt as saying that 'since religion is the profoundest instinct, the deepest concern of human being, to be its sponser before men is indisputably a man's most sacred calling' (Doan, 1909, p. 2). However, Doan continues the words of Mr. Pratt, who ended his thought with a quotation - possibly from the 1833 *The Quarterly Christian Spectator* – 'he preaches the truth as if it were fiction!' It is not the full quotation from the *Quarterly*, but it is a reference to the modern minister, who preaches in such a way.

In spite of the massive amount of information from previous centuries of Christian doctrine, history, and various teachings, Doan argues in favor of using these in a 'simple and passionate emphasis of eternal truth' (Doan, 1909, p. 2). When talking about the practical side of arguing in favor of religion to the modern man, Doan refers to forcing the argument simply on the side of making the church a 'vital power in the lives of men' (Doan, 1909, p. 2). In another book on the subject of religion and the modern man, J. Macbride Sterrett – a pastor in the Protestant Episcopal Church – argues that the real modern man acknowledges the heritage of the past ages and uses them not as a slave, but as a competent and mature critic, searching the good and the valuable, in order to prosper the present and prepare the future (Macbride Sterrett, 1922, p. 16). Unlike the advice of Sterrett and the appeal to common sense of Doan, those he calls 'religion's ill-advised promoters' are suggesting churches should give up certain types of architecture, such as medieval, in order to adopt the style of modern buildings, with the sole purpose to make people feel more at home. Doan also marks that the church is ill-advised to serve man in one's needs, from food to spiritual matters. Entertainment is not forgotten and the ill advice is to transform the church into the mirror of modern forms of entertainment, because it cannot compete with the theater or the concert hall. The political sphere is also included and here the advice is in favor of a model of Christian Socialism. He does not explain in great detail these changes, but he proves to be greatly irritated by such puerile and futile modifications, to the detriment of religious values and honest spiritual quest (Doan, 1909, p. 3). Religion should be more than the external forms that symbolize the spiritual world. A church building is the result of a certain type of theology, which is the result of a certain type of exegetical interpretation. For Christianity they both stem from the same book, the Bible. The problems appear when the pulpit and the buildings are considered the essence of what people from outside should adhere to, not the message that is received, evaluated and then accepted.

The tragedy for the church, and implicitly for Christianity is the remark made by one of Doan's friends. This friend, a psychologist of religion, argued two extremes. First he believed that the days when priests could impose an external authority on the lives of men are now dead. Doan calls these dead influences 'hocus-pocus' days (Doan, 1909, p. 3). The office of the priest, the pulpit, and the church itself do not and should not command political or social authority in the form of dominion over the lives and freedoms of men. Authority in religion should be personal. There must be no hindrance between man and God. Christianity works of principle of direct authority upon man, by God, with no mediation, except the direct work of Christ (Butler, 1922, p. 135). However, Doan presents the other extreme that his friend goes into, namely that all that is left for the church is to transform itself into a sort of club, which would debate the `deep and eternal concerns of life' (Doan, 1909, p. 3). The power of the church is thus leveled. Besides the debates on the eternals, the church is of no use to mankind. With this perspective Doan cannot agree, since he believes strongly in the presence and the existence of the spiritual realm, which is manifested, in the case of Christianity, through the pulpit prophecy and the moral teachings.

The harm done by the ill-advisors is ever groaning, due to the perspective the offer the members of the churches, namely that their church is dying and there is an honest need to revive it. The very thing that should bring people a message about the connection between the spiritual and the physical is that which has been perverted, the sermon. Doan reiterates that a practical sermon does little good to the church, unless coupled to mature explanations of dogma, or the teachings of the church. He points to the fact that those who argue in favor of an excessively practical sermons believe that the congregation is unable to understand the doctrine or the creed - the very identity of a denomination. Christianity would be reduced literally to a club, with no basic, fundamental values that would transcend the human condition. The use of the practical side of sermons is aimed, together with theoretical part, to feed the soul of man. Doan calls this the 'milk of truth', from the Biblical

text. The theoretical and the practical do not exclude one another. They should be in harmony, for all the theory must find its place in the practical. In other words, any explanation of the spiritual realm, must find an application in every-day life (Doan, 1909, p. 4).

Religion and Church

Doan explains that religion and the Church should not be overlapped. He underlines that *religion* and the institution of *the Church* should not be overlapped. There should not be an overlap between religion and a specific denominational theory. According to Doan the 'eternal impulses of religion' are fear, faith, love and 'the like' (Doan, 1909, p. 5). These must not be confused with an institution of whatever sort. Modernists argue in favor of an immanent God, who reveals himself to man continuously, with no interruption, while the church argues that God transcends man's ability to understand him, thus 'God reveals himself only through means transcending reason, dramatically, in signs and wonders and it rests all religious authority in the hierarchy of the church, a constituted custodian and interpreter of the supernatural revelations' (Torrey, 1910, p. 26) These impulses are not characteristic only to Christians, but to all humanity from the beginning. They were not developed as humans created culture, but are at the very essence what human being is. These impulses were not used by the church/es to further and better the human condition and human existence, in the manifestation of, culture, for example. Doan resorts to the knowledge of any historian, according to which the church has been a stumbling block for civilization. First of all fear is not something to give up, because it has its precise place in relation to the spiritual. Man fears the unknown, and if the unknown reveals itself under any form, fear is not an equal of terror, but it takes the form of deep respect. According to Doan the church has managed too many times to block the religious impulses of fear, love, and faith, due to institutional interests. The marriage between church and state did lead to an obstruction of care for the average human being, to the benefit of the institution (Doan, 1909, p. 5). Therefore, the church/es should acknowledge man in one's spiritual aspect as well. The institution of the church should never be more important than the individual, or the body of believers that make up a certain denomination. If the church is to fulfill its role as a shaper of civilization and a careful attendant to the needs, both spiritual and physical, of mankind, it must submit to acknowledging the importance of the individual, as well as the congregation/s. The idea that the church, as an institution, through its leaders, is actively teaching the congregants/believers, is not new (Finlay, 1917, p. 149), but the level of authority it has over one's life varies and it should be revisited repeatedly.

The church, as an institution, has been going against civilization also by the wrong use of the dogmas. Doan argues that the church, in its useless conflict with the sciences and philosophy, lost the 'instrumentalities of civilization and enlightenment' (Doan, 1909, p. 5). Needless to say that according to Doan is thoroughly against the dogmas that drown or negate the living impulse of religion. Dogma itself does not appear to be the problem, but the institution of the church that has put dogma before man and one's primordial religious instincts. Also, Doan, makes a most sorrowful observation, namely that the church as an institution of dogma is dead (Doan, 1909, p. 6). The modern mind cannot and will not work with such an institution, due to the fact that modernity looks for truth beyond the visible realm, even beyond an administrator of the spiritual realm, such as the church. The modern man looks within and without to understand reality and the spiritual reality, but there cannot be any obstruction from such institutions as the church, for example. Any such institution must be in harmony with the transcendent character of the spiritual realm, which is transposed in the form of religion and religious feelings. Christ created spiritual life and the church is the natural result. However, man is left to decide how the church is organized and how it is to be administered (Evans, 1911, p. 432).

In spite of the good reputation of the genuine modern man, Doan does admit that not all modern men are alike. There is no single relation between all modern men and religion. Modern men differ amongst themselves and men, in general, are completely different. However, Doan reduces the argument to those whom he calls modern men. In spite of the fact that not all men are in a perfect single relation to the church, as Doan notes, there is a predominant way of interacting with religion. He notes three types of people with whom he interacted, which he calls indifferent, confused and modern (Doan, 1909, p. 7).

The Indifferent, the Confused, and the Modern Man

The indifferent mind, for Doan, is represented by people who renounced religion altogether. He is the kind of man who came to the conclusion that there is nothing outside physical reality. Even if one believes that there might be

something/someone beyond the physical realm, religion and its kind is still considered useless. The worst characteristic of such a man is that he is an unconscious materialist, besides the lesser problem that he is a practical person. According to Doan the problem of the unconscious materialist is that he gave up the conscious principle of materialism, and became one by 'commonplace exercises of his daily rounds of affairs' (Doan, 1909, p. 7). Religion set against the values of materialism does not result in the church being superior by default, but it does offer parallel values that can be evaluated (Butler, 1922, p. 22). The lack of any aspiring and poetizing art, which would offer them an insight into the unseen realm of human thought, keeps them indifferent towards culture. Doan classifies them as miserable, but he believes that the reality of their inner life is contrary to the practical applications of their indifferent minds. He explains that these people who conceal their terrible longing to the 'Eternal' (Doan, 1909, p. 7). Their desire to be in a veridic and authentic relation with the spiritual, makes them act in such a way as to revolt against the simplistic and meaningless way of life, characteristic to such unconscious materialists. The joy for Doan is that these men are coming together to change the church from that which is, into something more lively (Doan, 1909, p. 8).

Perhaps one of the truly sad issues that Doan marks is that the simple men, who have no theological background are more serious and more capable to understand the spiritual, than the clergy or the pastors. This conclusion proves to Doan that an honest quest for the inner impulse is not connected intrinsically to one's academic instruction. Being serious in matters of religion offers the upper hand. Religion takes a great amount of time in considering the serious arguments that allowed it to stay alive for millennia. Religion is also about sincere, honest thought (Finlay, 1917, p. 154). A minister who tries in desperation to be overtly apologetic, ends in tampering the sacred offices of religion. Such an approach towards religion will make the average man avoid the church altogether, due to the theatricality of the service. In other words, it will seem fake, processed, and artificial. Bowing before the deity of such a church is simply unacceptable. For Doan preaching is fundamental for the correct description of the spiritual and it is the proper means to draw people to it. Doan describes a good sermon a

'honest preaching, simple and abandoned, with nothing concealed or withheld between preacher and people; where there has been no timidity nor sensational clap-trap, but a free, unafraid and unashamed giving of his whole, honest and solemn person in the preacher's weekly meditation before his people; where there has been no apology nor nervous self-defense but simple and straight-forward reflection upon the eternal instincts and passions of life' (Doan, 1909, p. 9).

For Doan, the battle is given in the field of honesty towards one neighbor. The oration from the pulpit should be as natural as a discussion between friends in an informal context, provided the preacher is non-theatrical in every-day life as well. Some tend to put on a mask of seriousness and stoic resilience with regards to normal dialogue when engaged in debates on the spiritual or religion. His idea of correct and honest preaching is not idealistic. He does not dream of such a way of preaching, as if it had never happened before. Doan gives the example of Brooks, Beecher, Hale and others, but these are 'giants of God' who do not confront the indifferent laity (Doan, 1909, p. 9). It is this laity that must find a voice and guidance in the church. The cry of Doan is against the foolishness with which the church treated the non-clerical masses. It is here that Doan presents the idea of the 'Larger life', with reference to an engulfed present life by the spiritual/religious life. Preacher have lost their power to move people, partly due to the fact that they are not confronted by the practical aspects of life, as in the case of the layman, who can work out the issues better and easier (Doan, 1909, p. 10). Preaching can be a disaster and the 'smart, flippant, jocular is surely the words (Jackson, n.d., p. 208). Doan makes the brilliant point that a clergyman should stay as such, and in his debates with any layman he should not believe that he can win them over by becoming a layman himself. Am grotesque misunderstanding on the part of the preacher is not to understand one's place in the realms of the spiritual and the physical. According to Doan each has a well established purpose in life. The preacher must not know practically the issues that face the layman, in order to win one over, but the preacher should understand him by 'touching somehow each week, simply and solemnly, the things the layman himself in all his spiritual silence, modesty and sensitiveness' (Doan, 1909, p. 11). This is a challenge for the ages: the man thoroughly standing between two worlds, comes to understand those from one world, not by becoming them, but by understanding them.

The main issue that comes into conflict with, for example, the contemporary protestant environment, is related to what Doan calls the confused mind. This confusion is to be read in a negative connotation, as if the confused are not moral or secularized, or faithless in God or towards the congregation. Instead they are confused in comparison with Doan's set of beliefs. Therefore he mentions first the simple country ministers. He describes them in warm images, as men of faith, quiet and unobtrusive, fameless, but with a moral compass pointing accurately towards righteousness, where they lead their flock of believers. These men are connected intrinsically to the faith and teachings of their predecessors. They are men of

valor, who have become gentler and more sensitive with regard to their fellow men. Doan's appreciation for such men stems from the fact that they argue their faith with a mystics conviction, but are also simple, untutored and unspoiled (Doan, 1909, p. 12). Their arguments and way of theological insight is borderline mystical. According to Doan, they are qualified to be rightfully in the direct line of apostolic succession. The fact that they are not spoiled by 'Christian Evidences' and `Sacred Oratory' makes them think in lines of every day life needs (Doan, 1909, p. 12). The question could if the power of preaching is lost (McComb, 1910, p. 283), or whether it was kept safe by these honest, simple preacher. They look at the Bible, at the people in the pews and then they work their way to argue in such a simple and straight forward way, as to makes sense of the how and why God works in the world of humans. They do not have the skills of the highly educated, or the scientifically versed preacher. Instead they see the spiritual, the religious and the physical in the most sincere way.

These men have interacted with dogmas and they have certainly been subjected to their influence, but they were never able to understand them in their deepest significance. Hence they took what they understood. The lack of formal education prevented them to fully understand what doctrines contain. The people who listen to such a sincere preacher do not believe in God dogmatically, instead they look at the preacher, they know him, in time they come to trust him, and later they are willing to 'stake their own eternal lives' on his honor (Doan, 1909, p. 13). This is the case that Doan had made previously, when arguing that some preach truth as if it were fiction. Doan believes these preachers do this precise thing, but they are convinced that their fiction is truth, therefore that 'truth' is sacred and everlasting. Dogmatics, in this context, pose as impertinent elements that come against the inner conviction of man. The inner is of such strong build that they create their own doctrines, not too seldom, different from the original doctrines, which have the indestructible status of absolute truth. The problem that Doan remarks is that even if these people believe in God and their dogmas make sense for their religious experiences, they confuse the eternal values: 'belief in God, eternity, human destiny and the like' with their historic denomination (Doan, 1909, p. 13). In other words the values described in the previous phrase, according to Doan, are universally valid. They are believed by any man, on any continent, in any historical period, but the problem is that all paint the values in the colors of a certain religion or denomination or sect. By doing this, all these religious groups evaluate the rest of the world in the light of their personal/denomination absolute truth. If Doan argues that Christians do this for the eternal values that are experienced by all men, it would be safe to argue that all religious groups on in the world, in any historical period, did the same error, that all believed their view was the only correct one, thus ignoring the eternal religious values.

'Back to Christ' is a formula used by Doan to describe those preacher and honest intellectuals who tried to urge the believers to a dogmatic form of spirituality and religion, that aimed at seeing Christ as the sole owner and deliverer of truth, thus ignoring the eternal impulses of the spiritual realm. However, the problem is that these helpful intellectuals paid the 'price of intellectual confusion for the precious freight of practical goods conveyed to them within the wrappings of a former faith' (Doan, 1909, p. 14). The slogan 'back to Christ' is used in contemporary Evangelical circles, from pulpits, with the more or less precise argumentation according to which the foundation of true spirituality and the correct connection between God and the world is only through Jesus Christ, the only begotten Son of God, who was incarnate, died on the cross, rose three days later, and now sits at the right hand of God, being forever in the lives of every believer. Regardless of one's perspective on Christ, it is doubtless that the example set forth by Christ is of excellence in matters of morals (Torrey, 1910, p. 131). As Doan remarks the problem of this kind of speech is that it shifts almost instantly 'turns the corner from the essential to the unessential, from the spontaneous to the dogmatic, from the inner life to its external forms, from the eternal to the transient things of religion' (Doan, 1909, p. 14). For Doan dogmatized religion represents the fake and egotistic representation of the inner, original, true religious impulses that are within each human being. We, as a species, have these within us, but we cannot act upon them. For whatever reason, we would rather go after our formalized, fake and destructive dogmatic representation of the inner spiritual realm. The inner spiritual life is spontaneous, non-dogmatized and free from any unnecessary embellishment that reason can put forth. All external forms of the spiritual, which range from liturgy to church architecture, or to any other kind, are mere corruptions, which take away the attention from truth. Apparently man has truth within. This truth is not born within man, but man is connected to the eternal, by way of owns existence. Even if this inner cannot be fully comprehended, or fully understood, it can, however, be masked by doctrine and the external life. According to Doan, after two millennia, the original Christianity is to be found only in the early times, during the 'early patristic Christianity' (Doan, 1909, p. 15).

The development of early Christianity is documented as being of simple liturgy, honest attempts to understand God and the development of dogma had a different pace and purpose, than after it became legalized. Justo Gonzales argues that Christianity was much simpler, due to political pressure and the threat of persecution. This context forced Christians to think

their faith in simple and honest terms, because they could not afford the luxury of debates on unnecessary issues. The simplicity and honest faith – with the threat of persecution one had to be certain of one's faith – were replaced by the freedom and privileges offered by the new status, and to this politics were added (McGrath, 2010, p. 43).

If in the beginning Doan was marking the fact that many of the modern people are, in fact, true seekers of the spiritual, but under the guise of unconscious materialism, he continues the description of his fellow modern men by arguing that they are not average, not at all. Their mind pattern is oriented towards a genuine seeking of the spiritual. However, these modern minds are few, for most of them belong to the afore mentioned category of the confused (Doan, 1909, p. 22). In order to make things clear, Doan defines the modern man as the

'rare and sincerely open mind, the man conscious of himself in relation to a full modern culture, unbound by historic forms and terms; his openness is natural and unaffected; with his whole person and without turning back he faces the prospect ahead; his is a spirit of iron constitution, radical to the very marrow, finding ravishing joy in trying to the heights and valleys of being the wings of his spirit, apt to reject as artificial and restrictive the familiar terms and dogmas of the historic church, eager to follow the pursuits of science and philosophy - in a word, unafraid, unashamed and *open* minded' (Doan, 1909, p. 22).

Such a complex definition requires a careful examination. The historical context of one's life can create various reactions towards the issues one faces. We have all been accustomed to hear the elder say 'back in my day the kids/people were better, much more respectful and much more polite', while the young might say 'I should have been born in another age, not in this one'. Unlike such examples, the genuine modern man acknowledges his historical existence in a certain age. There is no rejection of the age and its values, but a conscious assessment of one's environment. The modern man will not look back in history with envy, but with a critical apparatus that would allow him to see things as they were. This action offers the possibility of filtering the values of the past from the evils of each age. The present age, or the age in which the modern man lives, will only have to benefit from his honest input. Overlooking the value of history can prove to be more deceitful, than looking back into what has been said with a critical eye (Butler, 1922, p. 107). The values will be judged and evaluated in such a way that it will bring value to the present age, and mark the future of the generations to come. The modern man will fit and integrate fully in the historical context he lives in. There are no regrets concerning the past, but there is no full rejection of history either. The will of such a man is aimed at the pure truth. However, this truth is not that of the church, or the doctrinal one. It is a truth that he searches on his own, with his own methods. There is a desire and a joy to seek out the new, the unexplored. In this context, the modern man does not look at the church for guidance, but looks beyond the veil of tradition. Therefore, if there is truth in science and philosophy, the modern man will accept it, without hesitation. The main characteristic of the modern man is that he does not have any fear of the new and of exploring the various elements that make up life. Coupled to this, the modern man will explore even if it means going against the traditions of a culture, including the tradition of the church. The final emphasis is that the modern man has an *open mind*. He explores everything, to the best of his abilities and acts in accordance to his own inner conscience, built on the critical assessment of all aspects of life.

Doan continues the ode to the modern man by describing him as an innovator and an undaunted explorer. The cynics and the sceptics are close behind, trying to push him down and stop his efforts to find truth. In spite of all barriers the modern man is 'clean and pure in his mind; eager and sensitive in his soul; searching always for a positive and honorable experience of things eternal' (Doan, 1909, p. 23). This is an important aspect about the modern man, because even if he accepts the challenges and the novelty of science, he does not reject the spiritual. There is a connection that he makes between these apparently opposite realm of knowledge. He not only accepts both, but he goes with philosophy as well. He is not radical against any of these three domains and he does not accept only one of them. The modern man seems to be better than the ones who accept only one of these three domains and rejects without any problems the other two.

Perhaps one of the most important aspects of modern man's spirituality is that he is not afraid of meeting God, or 'That he may yet call God' (Doan, 1909, p. 23). The modern man is not anti-God, anti-divinity kind of human being. He does not dismiss this possible reality, unless he has come to such a conclusion after a series of trials. However, as Doan believes the modern man is open to meet God and even 'stand silent and conquered' (Doan, 1909, p. 23). He will not question the God he meets, but once this happens he will accept the reality of His presence with an open mind. He will fully understand where he stands in relation to the divinity, to God, and he will understand that God means more than him, therefore he will no problem accepting the authority and power of this God. When such an encounter will take place, one might expect a rallying of the modern man to a certain religion or denomination. Doan argues against this. He believes that once modern

man meets God, he will, by conviction and in all truth, not adhere to any historical religion. Even if he does accept any of them, he will never accept that denomination or religion as final. He will see God and the spiritual above and beyond any religion. The church divine authority will play a major role in understanding and accepting God as God with absolute authority (Finlay, 1917, p. 135).

Conclusion: Spontaneity of Spirit

At this point, Doan returns to the spontaneity of spirit. This is the element that, if understood and interiorized, will prevent modern man to allow the institutional religion to corrupt it. Doan points out that all institutional religions are inextricably connected to history in a negative way, by being full of 'past forms, myths, untruths and dead weight' (Doan, 1909, p. 23). The real problem with institutional religions is that they are made up of misleading formulations, that are able and willing to stop and spontaneity of spirit. This is the real danger for the modern man: allowing oneself to be brought down by forms of religion that go against his own convictions. Because he has an iron will, all these will be rejected by conviction. He will look at the eternal realities of religion with a peaceful heart. The reality of such spheres of knowledge will bring an insight into the realms of the outer and the inner man, in such a that will bring benefit to one's neighbor (Jackson, n.d., p. 160).

The idyllic picture of modern man is concentrated in a statement, according to which 'the modern man by temperament face ahead with his whole person. He is a bad historian and critic, if you please; an unloyal child of a long line of culture that bred him "modern"' (Doan, 1909, p. 24). It does not mean that the modern man will dismiss history and its heritage, but in least he is not connected consciously to the heritage. He is created by the culture of ages past, but he feels no connection to them. However, he claims them unconsciously. He is the product of the development of the ages, he sees the world around as the final product of the ages.

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Notes About the Commemoration of the Powerful Men in the Medieval Art in Macedonia

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Abstract

Rulers' portraits as symbols of the institution of monarchy were used on coins, legal acts and seals, as a guarantee of authenticity and legal effectiveness. They are usually the highest category of propaganda images. Each civilization has the praxis of representing to a certain extent real or "beatified" image or portrait of the emperor. By adding various symbols of power, like crowns, caps, beard, throne, supendium, chariot, and number of the animals driving it, we are directly observing the image of the most powerful representatives of people, nations, states, empires, era, usually blessed by or alike god(s). Roman emperors preferred to be represented in sculpture, and the copy of the ruling emperor was placed in every city of the Empire. It was roman art and sculpture where actually the portrait was invented in the 2nd century B.C. Sometimes Emperor's portrait in Byzantium had the status of replacing the real presence of the sovereign. The early portraits of byzantine emperors in monumental art are preserved in St. Vitale in Ravena, where the emperor Justinian I and his wife with ecclesiastical and court dignitaries attend the liturgy.[1] St Sophia in Constantinople has preserved later portraits of the emperors Justinian and Constantine, who are giving the church St. Sofia and the city of Constantinople to the Mother of God (2/2 of the 10th C.), the portrait of Constantine IX Monomachos or initially Romanos and the empress Zoe[2], from 1034–1042; the portrait of John II Komnenos and the empress Irene from the beginning of the 12th C.[3] In the time of the Komnenian dynasty (especially the time of Manuel I Komnenos), group royal portraits were frequently depicted.[4] Negrău says in churches, the images of the rulers expressed the relation of monarchs with God, who gave them the power of monarchy in exchange to undertake the defense of Christian law. The images are addressed to the masses with the purpose to present monarchs as generous donors, as well as ubiquitous authorities."[5]Usually God is representing putting the crown on ruler's head from above or blessing. The medieval artistic treasuries are united by the ktetors who, using their political power, social reputation, cultural impact, theological erudition, as well as artistic taste, "have enabled the creation of artistic legacy of representative sacral monuments." As producers of the artistic enterprises, they were "playing the role of creators of the cultural matrixes in certain periods maintaining the traditional values in the artistic practice or establishing a background for their transformation in sustainable components of the progressive development of artistic innovations."[6]

Keywords: Notes, Commemoration, Powerful Men, Medieval Art, Macedonia

Introduction

The founders' portraits were most often painted in royal palaces (Vlahernae, mosaic of John II mourning his late father)[7], narthexes, exonarthexes (Holy Virgin Zaumska, Staro Nagoričino), naoses (Holy Archangels, Lesnovo) and refectories of the monastic churches where the founder was the emperor or member of a royal family and a high dignitary, as well as on

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1Richard Krautheimer, Early Christian and Byzantine Architecture *(4 ed., New Haven, CT: Yale University Press, 1986, p. 234*

2 The panel of Zoe and Constantine IX in Hagia Sophia has been altered, and it is possible that it originally depicted Zoe with Romanos, thus making it a striking pendant to the panel at the Constantinopolian Peribleptos monastery. See Mark J. Johnson, *The Lost Royal Portraits of Gerace and Cefalu Cathedrals, DOP 53,* 237-262, 258.

3 Viktor Lazarev, *Istoriia vizantiĭskoĭ zhivopisi II,* Moscow 1986, figs. 135–142;

4 Andre Grabar, *L'Empereur dans l'art byzantin,* Paris 1960.

5 Elisabeta Negrău, The ruler's portrait in byzantine art, a few observationsregarding its functions, *European Journal of Science and Theology*, June 2011, Vol.7, No.2, 63-75, 74.

6 Elizabeta Dimitrova, V. I. Personalities in Medieval Macedonia, Five *Paradigms of Supreme Commissionership (11th – 14th century), in Folia Archaeologica Balkanica 3, Skopje 2015,* 601-621, 601-602.

7 Bakirtzis, Warrior Saints or Portraits of Members of the Family of Alexios I Komnenos? In *British School at Athens Studies* Vol. 8, MOSAIC: Festschrift for A. H. S. Megaw (2001), 85-87 87.

the facades of the churches, as in Kurbinovo, probably in St. Panteleimon, Nerezi (1164), St. Nicholas Bolnički, Old St. Clement (30es of the 14th C.),[1]St. Demetrius, Sushica, Marko monastery near Skopje (1389) etc.

There are numerious preserved examples of founders' portraits painted in the narthexes or exo- narthexes of orthodox churches elsewhere within the Byzantine Empire in the period of the 12th-15th C. like in Bulgaria (Boyana), in Serbia and Kosovo (Mileševa, Gračanica, Studenica, Lipljan), Greece (Daphne, Fere), monastery church of the Virgin in Apollonia, Albania, St. Sophia, Constantinople, the Mother of God Pamakaristos=Fetie Mosque (Andronicus II Palaiologos and his wife Ana, narthex)[2]etc.

Portraits of Byzantine emperors on seals coins and chrysobulls had the meaning of a guarantee of authenticity. Portrait of the rulers were also embroidered on costumes of the empress, officials, churchmen or foreign vassals, as a sign of honor and obedience. These mobile portraits and the portraits in mural painting were viewed equally; they only had different functions, to commemorate/to express obedience. In image is being revealed the emperor's essence of being", theorized Saint Athanasius of Alexandria in the 4th century, about icon as portrait, using the widely shared perception of the image of emperor as analogy in his argument concerning the veneration of icons.[3] It seems a monument is not tied only to a single figure but often involves the desire to establish a memory of the 'political family' of predecessor and successor rulers tied together by a continuous political tradition. The role of the monument in Byzantine tradition is thus essentially memorial: through his work, the founder wishes to remain alive over time in the memory of society.[4]

The icon of St Theodor Thiron from the shrine of St. John Theologos on Patmos represents actually the portrait of Theodor I Laskaris (1173-1222), before he became despot of Nicaea in 1204. The portraits were made from approved model sent by the Emperor-made by court artists and then redistributed when needed. Even in Byzantium the chief commander of the army and governor of Constantinople, the megalos dux Alexius Apohawk has his portrait made iconographically following some model of St. Demetrius on horse back, as the Codex graecus 2144, fol. 11r, collection of the works of Hipocratus shows. He was described as very highly ambitious man with megalomaniac plans to reach the political top in the Roman Empire. So he might have considered himself appropriate to be identified with the very much appreciated martyr and protector of Thessalonica, St. Demetrius.
There is another portrait of the same saint, that is regarded as portrait of Byzantine emperor, painted in the late 12th C. (the portrait has been repainted in the 14th C.). In 1105 in the nartex of the Holy Virgin church Asinou Panagia Phorbiotissa, in Cyprus, there is a lord represented like St. George some scholars think represents Alexius I Komnenos–1118. His shield shows large half golden moon with a small cross between its ends. The whole shield is filled with small suns-stars.[5] Built around 1100, the edifice is decorated with accretions of images, from the famous fresco cycle executed shortly after initial construction to those made in the early 17th C.
The sebastokrator Isaac Komnenos in the typic of his monastery of Holy Virgin Kosmosoteira mentions there were icons of his father and mother in the monastery church.[6]

In the case of Macedonia, the portraits of the rulers and members of the ruling family are represented not only as ktetors of churches or actual rulers next to the feudal lords who are the ktetors, but on icons and frescoes as holy warriors, to mention only the icon of Virgin Mary with child from the Virgin Perivleptos in Ohrid iconostasis, the holy warriors in St.

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1 Lidia Hadermann-Misguich, Une longe tradition byzantine. La décoration exté- rieure des églises, *Zograf* 7 (1976), 7–8; Cvetan Grozdanov – Donka Bardžieva, Sur les portraits des personages historiques à Kurbinovo, *ZRVI 33* (1994), 74–80; C. Grozdanov, *Ohridskata slikarska škola od XIV vek,* Skopje–Belgrade 1980, 50, fig. 54, C. Grozdanov , Portreti *na svetitelite od Makedonija od 9-18 vek,* Skopje 1983, 56, drawing 5.
2 T. Velmans, Le portrait dans l'art des Paléologues, in: Art et société à Byzance sous les Paléologues, Venise 1971, 99–100. Donka Bardžieva-Trajkovska, New Elements of the Painted Program in the Narthex at Nerezi, *Zograf 29,* 2002-2003, 35-46, 36.Andre Grabar, Portrait oubliés d'empereurs byzantins, in: *L'art de la fi n de l'Antiquité et du Moyen Age I*, Paris 1957, 192–193; Zabraveni portreti na vizantijski imperatori, in: *Izbrani sochinenija II,* Sofia 1983, 158–160; Branislav Todić, *Staro Nagoričino*, Belgrade 1992; Todić, *Gračanica, Slikarstvo,* Belgrade–Priština 1988, 171, fig. 105, 17 Smiljka Gabelić, *Manastir Lesnovo,* Belgrade 1998, 167–172.
3 Saint Athanasius, Oratio III contra Arianos, in Patrologiae cursus completes, Patrologiae graecae, J.P. Migne (ed.), vol. 26, Imprimerie Catholique, Paris, 1857, col. 332. http://www.earlychurchtexts.com/public/athanasius_orat_con_arianos_III_29-34.htm (http://www.ccel.org/ccel/schaff/npnf204
4 Negrau, The rulers portrait in byzantine art, 72.
5*Asinou across Time*, Studies in the Architecture and Murals of the Panagia Phorbiotissa, Cyprus, DOP 43, ed. by Annemarie Weyl Carr and Andréas Nicolaïdès, 2012, 315.
6 Bakirtzis, Warrior Saints or Portraits, 87, footnote 16.

Panteleimon, Nerezi or St. Constantine and Helene in St. George, Kurbinovo are exclusive and enable us to see what kind of religious practice the rulers practiced in the 12th century.

The monastery church of St. Panteleimon in Nerezi, near Skopje, from the 12th century (1164), erected by Alexios Angelos Komnenos[1], who belongs to the Komnenian dynasty on his mother's side – Theodora, the youngest daughter of the late Emperor Alexios I Komnenos and sister of Manuel I Komnenos. The fresco painting has exceptional quality, painted by anonymous masters that were best Byzantine imperial fresco painters of the period. The walls from the entrance to the naos contain saints images of six holy warriors with heraldic shields.[2] It seems to me not only are they saints represented as high dignitaries and high rank soldiers but they are portraits of the members of the Imperial family. The frescoes in the church date from 1164, and some parts were repainted in the 15th, 16th, and 19th centuries.[3] The Nerezi frescoes represented a break with the contemporary painting because the painter didn't depict the saints in the customary representative-type manner but introduced figures from the real life**.** It may be related to the intention of the ktetor to represent the Emperor and the family he belonged to as it was done in the church of Virgin in Fere, Greece, around 10 years earlier. There torsos of Isaac (St. Menas, the ktetor and sebastokrator), and his sons Andronic (St. Procopius), St. Theodor Stratilat (John II) and Theodor Thiron (Alexius) are represented.[4]

The fragment of a fresco on the very end of the second zone of the eastern wall in the narthex of Nerezi may indicate a royal portrait was painted in full length, on a purple pillow decorated with precious stones and pearls. From the royal figure, the lower decorated part of the divitision is visible. As a member of the Komnenos dynasty, Alexios may have demanded a founder's composition to be painted with the contemporary Byzantine emperor Manuel I Komnenos (1143–1180) with his second wife.[5]

The next church where we face again portraits of at the already late Emperor Manuel I Komnenos is the church of St. George in Kurbinovo. It is among the most beautiful, most original, though fragmentary preserved frescoes from the late 12th C. The work of the three anonymous masters in Kurbinovo is a continuation of the work of the Nerezi masters, with a great deal of originality in style and expression. Here the emperor and his wife are represented as St. Constantine and St. Helene.[6] The preserved portrait of the royal family in Kurbinovo so far is considered the oldest of this type of Byzantine art. According to Grozdanov and Bardjieva, there is also a representation of Isaac II Angelos in Kurbinovo.[7]

The imperial images at Hagia Sophia are scattered about the galleries and in the narthex, while Justinian's image at San Vitale in Ravenna appears in the sanctuary. There seems to have been no set policy regarding the placement of such images in the Byzantine world, and none in the Norman kingdom either'.[8]

Several examples of combining portraits of donors with documents may be cited, including the two above mentioned imperial panels of Hagia Sophia.[9] Very similar to the decoration at Cefalu is a fresco found in the exo-narthex of the

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1 Ida Sinkević, The Church of St. Panteleimon at Nerezi. Architecture, Program, Patronage, Wiesbaden 2000

2 Филипова, "Medieval Paintings in Macedonian Churches and Applied Arts as the Echo of the Heraldic Society", *Culture of Memory in East Central Europe in the Late Middle Ages and the Early Modern Period*, Conference Proceedings, Poznan 2008, 277-287; Filipova., Ликовни хералдички извори во Република Македонија, Зборник на трудови од Simpozium na INI Skopje & BAN Sofija, *Tranziciite vo Kulturata*, Скопје, 2008; Filipova, Комненовската династија и нивното хералдичко влијание врз фрескосликарството во Македонија", *MH 36,* 2010, Filipova, *Studii za heraldikata vo Makedonija,* Makedonika Litera: Skopje 2015.

3Sinković, *The Church of St. Panteleimon at Nerezi;* Donka Bardjieva, St. Panteleimon at Nerezi : fresco painting, Skopje, Sigma Press 2004. In 1923-1926 the Russian prof. Nikola Okunjev uncovered the old 12th century frescoes in one part of the St. Panteleimon church. The conservation work from 1954-1957 completed the removal of the late frescoes and the exposure of the old.

4 D. Mouriki, Stylistic Trends in Monumental Painting of Greece during the Eleventh and Twelfth Centuries, DOP 34–35, 103–107, 125–177; Bakirtzis, Warrior Saints or Portraits? 85, 86.

5 Donka Bardžieva-Trajkovska, New Elements of the Painted Program in the Narthex at Nerezi, 37.

6 Lidia Haderman Misguish, *Kurbinovo. Les fresques de saint Georges et la peinture Byzantine du XII siècle*, Bruxelles 1975, 43-318, 321-551, fig 141; Lydie Hadermann-Misquich, La grande Theophanie se Saint-Georges de Kurbinovo et le décor du registre des prophetes, *Zbornik posveten na Dimče Koco*, Arheološki Muzej Skopje, 1975, 285-316.

7 Grozdanov–Bardžieva, Sur les portraits des personnages historiques à Kurbinovo, *ЗРВИ 33* (1994), drawing on pages 72–73.

8 Mark J. Johnson, *The Lost Royal Portraits of Gerace and Cefalu Cathedrals, DOP 53, 237-262, 258.*

9 The panel of Constantine IX Monomachos and Zoe is offertory in nature, with the emperor holding a moneybag, and Zoe a scroll that seems to be a charter of donation, but is unopened. So the inscription simply identifies the emperor but has the function of giving authority to the charter. In the panel of John II Komnenos and Irene, it is again the empress who holds a closed scroll of donation.

monastery church of the Virgin in Apollonia, Albania, which contains a family portrait of Michael VIII Palaiologos with his wife, Theodora, their son, Andronikos II (1282- 1328), and his son, Michael IX (1294-1320). There are parallels with Cefalu, a dedicatory panel with several Family members, the founder who presents a church model, and the pictorial legal document, all depicted near the entrance on the west wall of the church. [1]

At the end of the 12th C. golden square crosses on red began to be used as an emblem of the emperors bodyguard, that is saint protector. Such small part of the shield is visible on an icon of St Theodor Thiron from the shrine of St. John Theologos on Patmos. It is actually the portrait of Theodor I Laskaris (1173-1222), before he became despot of Nicaea in 1204. The portraits were made from approved model sent by the Emperor-made by court artists and then redistributed when needed. It is only in the Komnenian art that we see the one head or double headed eagle embroidered on the suppedaneum under the feet of the emperors. Later on, in the 13 and 14th C. this fantastic animal became much more frequent on the cloth of the dignitaries in the Byzantine empire.

In Macedonia the Palaiologan style begins with the works of the Constantinopolitan painters Michael and Eutychius, who, in 1295, on invitation from Progon Zgur, the great heteriarch of Byzantium, started decorating the church of the Most Holy Theotokos Peribleptos in Ohrid and represented his and the portrait of his wife, Eudoia Komnenos (who was also relative to the tsar Andronic II Palaiologos).[2] According to Grozdanov, in Perivleptos church the painters have represented within the composition of the Virgin the ruling byzantine emperor Andronic II Palaiologos with his wife, Irene from Monferato, and his father, Michael IX Palaiologos, represented with his mother, who stand in the group of rulers behind the archbishops, leaded by St. Constantine and Helene. [3] The same tsar was represented in Holy Virgin Perivleptos within the composition of the Eastern hymn, and in the cave church of St. Erasmo around 1300.[4] Todić explains that while the Byzantine emperor attempted to recapture Balkan territories by military force, the archbishop of Ohrid, Makarios, strove to demonstrate visually on the walls of the church of the Virgin Peribleptos the supposed origins of his archbishopric and thus also to claim its rights, through the images of the apostles Peter and Andrew and saints Clement and Constantine Kabasilas. Because of its political engagement, this painted decoration remained unique in medieval art and should be explained by particular ideological and political motives.

On the other hand, we have here the images of the ruling Byzantine emperors and their family. The painters seem to found their way to oppose the political program of the ktetor by representing the real rulership.

Within these Paleologian monuments in Macedonia we already face frequent representation of double headed eagle (golden on red) on the ceremonial cloths of the high dignitaries ktetors and as well representations of St. Helene (Lesnovo). Again it is this saint and ruler painted in the time of Manuel I Komnenos to represent the late empresses, Maria of Antioch.

At the monastery church dedicated to the holy Archangel Michael, in Lesnovo from 1347[5] there are the portraits of the ktetor despot Jovan Oliver[6] and his wife Ana Maria Lavarina, their monograms on the liturgical equipment from the contemporary time, but also extraordinary larger than any other full figure portrait of the ruling Serbian tsar Dušan and his

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1 Mark J. Johnson, *The Lost Royal Portrait,*

2 Todić Branislav**,** Frescoes in the Virgin Peribleptos Church referring to the origins of the archbishopric of Ohrid, *ZRVI 39*, 2001, 147-163. Later, these painters painted the churches of St. George in Staro Nagoričane, in Kumanovo (around 1317) and of St. Nicetas in the village of Banjani, in Skopje (around 1320). Their work is a masterpiece, extraordinary in its expression and its high artistic and spiritual qualities.

3 ΣΥΜΜΕΙΚΤΑ. Collection of Papers Dedicated to the 40th Anniversary of the Institute for Art History, Faculty of Philosophy, University of Belgrade, Cvetan Grozdanov, Les Portraits des premiers Paléologues dans le narthex de l'église de la Vierge Péribleptos (St-Clément) à Ochrid, une hypothese, Belgrade 2012, 227-236, *235*

4 Grozdanov, *Portreti,* 140, drawing 23. He bases it on V. Djuric opinion (Voislav Djuric, Portreti na poveljama vizantijskih I srpskih vladara, *ZFF*, VII-1, Beograd 1963, 268. Goce Angelicin Zura, on the contrary, thinks it is Theodor Komnenos Ducas. See Goce Angelicin Zura, *Pesterni crkvi vo Ohridsko Prespanskiot region,* Struga 2004, 95, 100.

5 The names of three out of the four painters of this fresco painting are known: Michael, Mark, and Sebastos. The name of the chief master is damaged and thus unknown.

6 Despot (from Greek: δεσπότης, *despótēs*, "lord", "master") was a senior Byzantine court title that was bestowed on the sons or sons-in-law of reigning emperors, and initially denoted the heir-apparent. From Byzantium it spread throughout the late medieval Balkans, the Latin Empire, and the Empire of Trebizond. It gave rise to several principalities termed "despotates" which were ruled either as independent states or as appanages by princes bearing the title of despot. For the title and its meaning in the Balkans see Ferjančić, Bozidar (*Despoti u Vizantiji i juznoslovenskim zemljama,* Belgrade1960 .

wife Helene. The tsar is even larger than Christ which indicates the ktetor have indicated which power was more important or what power prevailed, or that the king becoming a tsar while Byzantium went through crisis the very year when the church has been finished must have changed the usual iconography.

Another detail related to heraldry in this church is the blue double headed eagle with lily between the heads painted on the frontal side of the altar table. This is the only known image of blue double headed eagle with a heraldic lily between eagle's heads.[1] This color of the eagle may be related to the blue color being dedicated for the sebastokrator title.[2]

There are various kesar, despot and sebastokrator's portraits in the Ohrid area of the 14th C. painted as frescoes in the churches, as well as in Prilep, containing embroidered double headed eagle enclosed in a circle, made of pearls. But none of them has lily between the heads except the cloth of kesar Duka adjoined by his son Demetrius from Holy Archangels church on Plaošnik (he wears red cloth decorated with golden double headed eagle). It is mere coincidence or has to do with the dedication of the church to the Holy Archangels where ktetors use such eagle?

In the cave Holy Virgin church, isle Mal Grad, near Ohrid[3](1369), kesar Novak wears blue-green costume decorated with golden double headed eagle, as well as Grgur Golubić, known as Caesar Gregory -Kesar Grgur in the Holy Virgin church, Zaum, near Ohrid (1361). The cloth of the kesar Duka represented as ktetor with his son on the southern wall of the Old St. Clement church dedicated to St. Panteleimon in Ohrid, 3rd decade of the 14th C. [4], has also such golden double headed eagles on red, with the difference there is a heraldic lily between the heads.

Icons and the realistic portraits

Even in Byzantium the chief commander of the army and governor of Constantinople, the megalos dux Alexius Apohawk has his portrait made iconographically following some model of St. Demetrius on horseback, as the Codex graecus 2144, fol. 11r, collection of the works of Hippocrates shows.[5]

Another portrait of the same saint is regarded as portrait of Byzantine emperor, painted in the late 12th C. (the portrait has been repainted in the 14th C.). In 1105 in the narthex of the Holy Virgin church Asinou Panagia Phorbiotissa, in Cyprus, there is a lord represented like St. George some scholars think represents Alexius I Komnenos–1118. His shield shows large half golden moon with a small cross between its ends. The whole shield is filled with small suns-stars.[6] Built around 1100, the edifice is decorated with accretions of images, from the famous fresco cycle executed shortly after initial construction to those made in the early 17th C**.**

The sebastokrator Isaac Komnenos in the typic of his monastery of Holy Virgin Kosmosoteira mentions there were icons of his father and mother in the monastery church.[7]

The icon of Virgin with child, 14th C. from the iconostasis of the Perivleptos church is special type of western icon of Italian gothic style made for eastern donor, either to be gifted to the very church, or later on, after the death of Dušan in 1355 by his wife who became a nun. Some of the authors that were mentioning this icon think of Dušan as donor of this and several more icons of the iconostasis of this church. It is related to the archbishop Nicholas of Ohrid who was also present at the coronation of the king into a tsar in Skopje. We know that his wife Helene stayed in 1350 in Venice. What could be the reason to order such an icon for the church together with the icon of St. Nicholas (the latter may not be from the same time and author or region, since it is heavily repainted in the 19th century.)[8]My theory is it was a private icon of

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1 Smiljka Gabelic, *Lesnovo,* Stubovi Culture, Beograd 1998, fig. 64.

2 Dragomir Acović, *Heraldika i Srbi,* Beograd 2008,Zavod za Udjbenike, 145, footnote 344. He has in mind the color of the shoes this feudal lords wore, according to Pseudo Kodin.

3 Goce Angeličin Žura, *The cave churches in the Ohrid-Prespa region,* 164. He ruled with Ohrid from 1366-78.

4 Zagorka Rasolkovska Nikolovska, Arhimandritot Jovan, igumen na klimentoviot Manastir vo Ohrid, *Kulturno Nasledstvo 28-29*, 2003/3, 104.

5 Миодраг Марковић, Запажања о најстаријим иконама из Марковог манастира, *ЗОГРАФ 37* (2013) [147–167], 157.

6*Asinou across Time*, Studies in the Architecture and Murals of the Panagia Phorbiotissa, Cyprus, *Dumbarton Oaks Studies 43*, edited by Annemarie Weyl Carr and Andréas Nicolaïdès, 2012, 315.

7 Bakirtzis, Warrior Saints or Portraits, 87, footnote 16.

8 Milco Georgievski, *Icon Gallery Ohrid,* Ohrid 1999, 67.

Helene, maybe painted to celebrate the coronation of the king, or her giving a birth to a child?[1] When her husband became a tsar or when he died in 1355, she gifted this icon to the church of Perivleptos and became a nun.

Imperial portrait as commemoration

The mid 14th C shows not only examples of Serbian rulers –represented as almighty and even larger than Christ (tsar Dušan, Lesnovo), but also images of the Holy Virgin resembling a lot the wife of the tsar (Helena, wife of Dušan, icon from Perivleptos church in Ohrid)[2].

The monastery of St. George, near Polog is located on the shore of the Crna, region of Kavadarci. A 1340 charter of King Dusan states that his brother Dragušin was buried in this monastery. So it is another funeral monument meant to commemorate the members of the Serbian dynasty. The oldest layer of frescoes (1343-5) contain the portraits of Dušan, his wife and son, and the ktetor despot Dragušin and his wife, son and mother.[3]

It is interesting to note that the dedication of the funeral churches in the 14th C. Serbia is related to the Holy Archangels (Prizren, the tomb of Dušan; Lesnovo, the planed tomb of despot Jovan Oliver), St. George (Polog) while at the time of Komnenoi, it was Holy Virgin (Fere, Greece). Constantine, Justinian and some other emperors were buried in the Rotunda of the Church of the Holy Apostles. Basil II was buried in the Church of St. John the Theologian outside the walls. All those who ruled before Leo V and after his reign until the beginning of the 11th C. were buried in the church of the Holy Apostles [4]

As we see, the praxis of representing the dignitaries and emperors and rulers as holy warriors prevailed. Komnenos preferred to have St. Theodor as personal protector, representing him on the coins, icons and his images show shield decorated with golden lion on blue (Church of the Holy Virgin in Studenica, Kosovo and Holy Virgin in Matejče, Kumanovo). Also some of the Serbian rulers considered this saint as protector, beginning with Nemenja, St. George church, Ras (1170), and others (Milutin) prayed to St. George who gives his a sward (Staro Nagoričino, Kumanovo, Macedonia). This composition seems to be directly inspired by an image of Manuel I Komnenos.[5] King Milutin also dedicated a church to this saint in Skopje (unknown location, probably near Kale).

The genealogical tree from the fresco in the Monastery church near v. Matejče, created after 1347, shows certain disputable facts, the kinship with the Emperor Isaac Komnenos, and through it the right of the Nemanjić dynasty to the Byzantine Imperial Crown to precede the right of the Palaiologos and Kantakouzenos families.[6]

The portraits of the rulers and members of the ruling family represented on icons and frescoes as Virgin Mary, holy warriors or St. Constantine and Helene are exclusive and enable us to see what kind of religious practice the rulers ruling parts or the whole region of Medieval Macedonia practiced.

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1 Snežana Filipova, Examples of icons with Western influences in iconography in the Art of Macedonia, *ICON 9,* 2015 (in print).
2 *Idem.*
3 Viktoria Popovska Korobar, *Pološki manastir Sv.Gorgi,* Skopje 1998 (catalogue)
4 Glanville Downey, The Tombs of the Byzantine Emperors at the Church of the Holy Apostles in Constantinople, *The Journal of Hellenic Studies,*Vol. 79 (1959), pp. 27-51, 41. About the other funeral churches, Monastery of the Augusta. (Justin I and Euphemia.), ***2.*** St. Mamas (Maurice and his family.), **3.** Staurakion. (Stauracius and Theophano), 4. The Lady Euphrosyne (Constantine VI and his family; Anna, daughter of Theophilus), 5. Gastria. (Theodora, wife of Theophilus, and her relations), 6. St. Euphemia in Petrion. (Basil 1's relations), 7. St. Michael Promotou, see Philip Grierson, Cyril Mango and Igor Ševčenko The Tombs and Obits of the Byzantine Emperors (337-1042); *DOP, vol*. 16 (1962), 1-63, 7, 59-60.
5 Miodrag Markovič, O Ikonografiji svetih ratnika u istočnohrišćanskoj umetnosti I o predstavima ovih ratnika u Dečanima, u: *Zidno slikarstvo manastira Dečana,* Posebna izdanja SANU, knjiga 22, 567-630, 601.
6 Pirivatrić, Ulazak Stefana Dušana u Carstvo, *ZRVI XLIV,* 2007, 409; Elizabeta Dimitrova, *Matejče,* Skopje 2002.

Supervision and Control of Local Governance in the Republic of Kosovo

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Abstract

In this paper we have treated supervision and control of local governance in context of fair governance in Republic of Kosovo. Analyse of law framework and European standards of governance autonomy of local self-governance and administrative supervision of local governance. Treating of supervision of local authority governance and the main mechanism of government for legal administrative review of local authority governance and legality as well as the rights of the supervising authority for administrative review of legality of general acts of municipalities. The purpose of this paper is to analyse and tackle the challenges of supervision and control of local government institutions in Kosovo.The mandate and powers of the central government to review the legality of local authorities in the field of enhanced competencies and the legality and appropriateness of their scope of activities of in the field of delegated powers. The challenges of preserving the autonomy of local self-government and local government supervision by the central authorities. One of the challenges of the supervisor in the future will be to supervise and control of municipalities with extended competences (municipalities with Serb majority), shall these municipalities consider requirements to be review the unlawful acts and harmonize them with the applicable legislation in Kosovo. The methodology of the paper will be mixed, such as: as comparative methods, descriptive, requesting explanatory, predictive.

Keywords: local governance, autonomy, supervision, control, good governance

1. Introduction

Kosovo after war in year 1999 was ruled under the Administration of the United Nations.

Resolution 1244 (1999) adopted by the Security Council at its 4011th meeting, on 10 June 1999 decides that the main responsibilities of the international civil presence will include: organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections. Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities.In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement (Resolution 1244 (1999) article 11).All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General. The Special Representative of the Secretary-General may appoint any person

to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person.(Regulation No. 1999/1 UNMIK Section 1).The Special Representative of the Secretary-General shall appoint, and may transfer or replace, a Regional Administrator for each of the five regions of Kosovo (Pristina, Pec, Mitrovica, Prizren and Gnjilane) to act on his behalf. The Regional Administrators shall report to the Deputy Special Representative of the Secretary-General for Civil

Administration. The Regional Administrators shall control, discharge or otherwise supervise the functions entrusted to public services and local government bodies in the

respective regions and may require that those services or bodies seek his or her prior approval for specific decisions or initiatives.(Regulation No. 1999/14 UNMIK Sections 1and 2).Authority to administer public, state and socially-owned property in accordance with the relevant UNMIK legislation in force, in cooperation with the Provisional Institutions of Self Government. (Regulation No. 2001/9 Chapter 8 drops q). The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government.(Constitution Article 123).In the Republic of Kosovo the basic unit of local government is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies. Municipalities have their own, extended and delegated competencies in accordance with the law. The state authority which delegates competencies shall cover the expenditures incurred for the exercise of delegation. Municipalities have the right to decide, collect and spend municipal revenues and receive appropriate funding from the central government in accordance with the law. Municipalities are bound to respect the Constitution and laws and to apply court decisions. The administrative review of acts of municipalities by the central authorities in the area of their own competencies shall be limited to ensuring compatibility with the Constitution of the Republic of Kosovo and the law.(Constitution Article 124).

The main purpose of this paper is to examine the role and influence of the supervision and control of local government to ensure professional, effective, efficient, accountable, transparent and accountability of local government in local level, which shall be be at the service of municipal citizens.

The structure of the paper includes the supervision, control and types of supervision and control of municipalities, including the supervision and internal control. Also, legal supervisory authority of municipalities and review of the legality of acts of Municipalities of Kosovo and in the end we have presented the conclusions.

We have supported the methodology of research based on primary and secondary sources, analysis of all legal frameworks on which relies the supervision and control of local government in Kosovo and the literature of various authors and reports of the Ministry of Local Administration

2. Meaning of the Supervision and Control of local government

Related to control of administration says H. Fayoll said that the control is the verification, if the works are carried out with the approved plan, given command and certain principles (Sokoli, 2009, p.11). The purpose of the control exercising and undertaking of measures to ensure the legality, in the first place to make the violated law function properly and secondly to specify the accuracy of the authorities or employees of public apparatus that have violated or have allowed violation of the law.(Dobajni,2004,p.19). The purpose of control is to make impossible the determination, namely the application of that general normative legal act that would oppose the constitution or the law. As a result, even with sanctions, as stipulated with special legal systems, tends to avoid from the legal system those general bylaws normative legislation acts that are not in accordance with provisions with the principles expressed in the Constitution, respectivlley, laws.(Polozhani, Dobjani,Stavileci, & Salihu,2010, p. 49). Since 1999, when Kosovo was placed under international protectorate, it was confronted and was challenged by multiple transitions, three of which were main for the socio economic development and good governance in the country, as: the transformation from the authoritarian political system into that democratic; the transition from a state planned economy to the market economy and the transfer of powers from the UNMIK temporary structures to the independent institutions of Kosovo.(MLGA Organization and functioning of Local Self-Government in Kosovo, 2013, p. 5)

The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the European Charter on Local Self Government to the same extent as that required of a signatory state. Local self-government is based upon the principles of fair governance transparency, efficiency and effectiveness in providing public services having due regard for the specific needs and interests of the Communities not in the majority and their members.(Constitution of the Republic of Kosovo article 132).Also, article 124 of Constitution of the Republic of Kosovo provides that Municipalities enjoy a high degree of local self-governance and encourage anad ensure the active

participation of all citizens in the decision-making process of the municipal bodies.(Constitution of Kosovo article 124). Our control system is oriented more in supervision than in control. In the Republic of Kosova, the monitoring system of local government is regulated by the Constitution, Law on local self-government as well as other sectorial laws. This system is more limited in the possibility of the consulting intervention and recommendation, in case of exercising the competencies of the bodies of local self-government and is built as part of relationship between the central and that local level.(MLGA Organization and functioning of Local Self-Government in Kosova,2013,p.51).The the European Charter of Local Self-Government commits the ratifying member states to guaranteeing the political, administrative and financial independence of local authorities.(Council of Europe Charte européenne de l'autonomie locale et rapport explicative, 1986).

The administrative and territorial organisation of the Republic of Kosovo is currently comprised of 38 municipalities, respectively 27 Albanian-majority municipalities, 1 Turkish-majority municipality and 10 Serb- majority municipalities.(MLGA Municipal performance Report 2014 p.11).Local self-government is an autonomous system of governance, through which, their political governance, legal, financial and administrative, were attributed to them. This system promotes democratic behaviour, transparency and accountability as well as ensures a mutual system of control at the municipal level to prevent illegal actions. Thus, municipalities are obliged to exercise the activity under the Constitution, laws, norms issued by them, the norms which can have the same impact as the state norms, although dependent on these latter.(MLGA Organization and functioning of Local Self-Government in Kosovo, 2013, p 52). Municipalities are subject to supervision of the legality of their activities with regard to performance of own and extended responsibilities. Insofar supervision is carried out according to the Law on Local Self Government. Municipalities carrying out tasks delegated by the state administration are subject to supervision of the legality and of the expediency including effectiveness and efficiency of their delegated activities. (Law No.03/L –189 articles 65).

2.1. Types of supervision and control of Municipalities

Constitution of the Republic of Kosovo article 124 provide that Municipalities have their own, extended and delegated competencies in accordance with the law. The state authority which delegates competencies shall cover the expenditures incurred for the exercise of delegation. Municipalities have the right of inter-municipal cooperation and cross-border cooperation in accordance with the law. Municipalities have the right to decide, collect and spend municipal revenues and receive appropriate funding from the central government in accordance with the law. Referring to article 124 paragraph 6 to the Constitution provides that Municipalities are bound to respect the Constitution and laws and to apply court decisions. The administrative review of acts of municipalities by the central authorities in the area of their own competencies shall be limited to ensuring compatibility with the Constitution of the Republic of Kosovo and the law.(The Constitution of Kosovo article 124).

Monitoring and supervision of municipalities is the right of the Ministry of Local Government to monitor and supervise the implementation of the responsibilities of municipal bodies ensuring that municipal acts are in full compliance with applicable legislation, the municipality framework of Kosovo competencies.(Administrative Instruction No. 2008/4 article 2).Kosovo has strengthened its cooperation between the central and local level. Ministry of Local Government has made an advancement with monitoring system and assistance to municipal authorities.(MLGA Organization and functioning of Local Self-Government in Kosovo, 2013,p.4). However, despite the individuality of the municipalities in carrying out of their activities, legislation has established a degree of dependence in relation to the central authorities. In this context, determination by law of the supervisory nature function of Ministry of Local Government Administration and other line Ministries towards municipalities is particularly important as it enables partial restriction of the municipality activities. This coincides with control of law respecting as determined by law and established only for relevant public reasons.(MLGA Monitoring report of the Republic of Kosovo Municipalities January-December 2012,p.3).

Comprehension of supervision and control of the municipalities in Kosovo is determined in two fields:

- Internal control; and
- External control

Within the supervision, should be mentioned also the social supervision, which is realized through various forms of the direct democracy.

2.2. Supervision and the Internal Control

Supervision and Internal Control in the municipality means the right of municipality bodies legally authorized, for provision of respect of the legality and constitutionality by the lowest level bodies within the municipality. Taking into account the structural separation the Assembly / Executive within the municipality, there also exist responsibilities for controlling the work of these bodies, taking into consideration their field of activity. The legal framework has set possibilities of municipal bodies control in two ways:

- control that the Municipal Assembly performs towards the Executive and
- control made by mayor of municipality in relation to municipal directorates

2.2.1. Control of the Assembly on the Executive of the municipality

Although in terms of control, are not foreseen specific provisions which regulate the manner of control (Assembly-Executive), this issue can be understood on the basis of the hierarchy established by law according to the Law on Local Self-Government, the Assembly of municipality is defined to be the highest body in the municipality and at the same time the supervisory organ at the local level, competent for ensuring the provision of services by the executive in accordance with the legislation in force.(MLGA Organization and functioning of Local Self-Government in Kosova,2013 pp 52 and ,53). Law No on Local Self Government article 35 Municipal Assembly is the highest representative body of the municipality and shall be directly elected by the citizens in accordance with the Law on Local Elections. **(**Law No. 03/L-040 article 35**).** Municipal Assembly, hold meeting regular, Extraordinary Meetings how and Open Meetings to the public.(Law No. 03/L-040 Arts 43, 44, and article 45). The Municipal Assembly is the highest body of the Municipality which exercises the function of local government, as defined by the Law on Local Self-Government and the Statute of the Municipality. Responsibilities and Municipal powers have to be exercised by the Municipal Assembly and the Mayor, unless otherwise provided by the Law on Local Self-Government and other laws and Municipal Statute.(Municipal Statute of Pristina Article 29).The Municipal Assembly is the highest representative body of local government and at the same time legally authorized supervisory body for provision of services by the municipal executive in accordance with the legislation in force. To exercise its function, the Municipal Assembly should meet regularly in order to carry out responsibilities within the municipal powers, to adopt the necessary the normative acts for functioning of the municipality, the acts explicitly required by the applicable legislation or which laws are those that are left open to to activate them depending on the needs of municipalities and to discuss and decide upon the matters of interest for the municipality.(MLGA Report on Functioning of the Municipal Assemblies of the Republic of Kosovo, 2013, p.10).

The Mayor represents and acts on behalf of the Municipality, leads the municipal government and its administration and conducts the financial administration of the municipality. The Mayor exercises all competencies not explicitly assigned to the Municipal Assembly or its committees. Mayor has for dutie to executes the Municipal Assembly acts, appoints and dismisses his deputies, appoints and dismiss his advisors who assist him in discharging his duties organizes the work and directs the policy of the municipality. The Mayor proposes municipal regulations and other acts for the approval of Municipal Assembly, proposes municipal development, regulatory and investments plans; proposes the annual budget for the approval of the Municipal Assembly and executes the budget adopted. The Mayor reports before the Municipal Assembly on the economic-financial situation and the implementation of the investment plans of the Municipality at least once every six months or as often as required by the Municipal Assembly, and may request the Municipal Assembly only once to review a municipal act when he deems the act to violate the applicable legislation and/or the interests of communities. The Mayor shall consult the Deputy Mayor for Communities about the matters related to non-majority communities; and other activities assigned to him/her by the statute. (Law No. 03/L-04 article 58). Municipal acts approved by the Municipal Assemblies of the Republic of Kosovo have regulated many fields, but the most important ones that we can mention are: adoption of urban regulation plans, acts in the environment field, adoption of the decisions regarding the use of municipal immovable property, decisions for the names of streets, adoption of the acts in the area of public services, regulation of the internal organization of the administration, acts that regulate generation of the municipal revenues, municipal safety mechanisms, etc.(MLGA Monitoring Report of the Republic of Kosovo Municipalities January-December 2012, p.7). With the strengthening of Mayor's role, local self-government in Kosovo has remained without control mechanisms, since municipal assemblies in most of the cases are composed of a majority which comes from the party and coalitions that have won the elections, but even in case of the contrary it is impossible to exercise any control over the Mayor. The lack of institutional

tradition has left room for party mechanisms to interfere in the work of municipalities. Mayor of municipality in most of the cases has two addresses of accountability, one to the entity that has nominated him and the other to the citizens as stipulated in the law. However, one of the accountability addresses, i.e., to citizens, is very weak because most of the ideas expressed by citizens in public debates have never been followed up, which means that Mayors organize such public meetings just to meet a formal requirement. The real address of accountability in practice is the party which he or she represents and which is turned into an address of obligations that Mayor has to fulfil during his/her mandate. This is explained by the fact that in many municipalities Mayors are usually presidents of party branches. (Tahiri,B.,2012, p.10).

2.2.2. Control carried out by the Mayor of municipality in relation to municipal directorates

Mayor, pursuant with the provisions of the Rules and the Statute of the Municipality, is responsible for: call the meetings of the Assembly, their presiding and the progress of the Assembly activity; perform the function of Chairman of the Policy and Finance Committee and has a casting vote in case of vote equality pro and against; presiding the meeting of the Board of Directors; appoint of the directors to assist the President in performing his/her duties, except the Head of the Directorate of Administration and Personnel; appoint the member of the Board of Directors, which shall exercise the responsibilities of the President in his absence; take care to implement the provisions of the Regulation on self-government of municipalities in Kosovo and other legal provisions dealing with the responsibilities of municipalities; monitor the overall financial management of the municipality and the implementation of decisions taken by the Municipal Assembly; determine the establishment, organization and activity of the municipal administration, and the constituting of institutions and enterprises; make the assignment or temporary separation and coordination of duties and responsibilities between departments, as appropriate, taking into account the particular project area or etc.(Municipal Statute of Pristina article 51).

The municipal administration shall be organized into directorates. Each municipal directorate shall be managed by a director who is employed and dismissed by the Mayor. The directors shall manage their directorates in accordance with the strategic and political strategies of Mayor and in accordance with Laws and municipal applicable regulations. Directors shall regularly report to the Mayor for the matters that are under their responsibility and shall provide him/her all necessary information and reports for the decision-making process. (Law No. 03/L-040 article 62). The municipal administration shall have a Head of Personnel. The Mayor shall announce the post, recruitment and dismissal of the Head of Personnel in accordance with the applicable law on civil service. If the position of the Head of Personnel becomes vacant, the Mayor shall appoint in an acting capacity a senior member of the municipal civil service.(Law No. 03/L-040 article 66). As mentioned above, Board of Directors consists of Directors appointed by the Mayor, the Head of the Directorate of Administration and Personnel and the Director of the Office of Communities. each member of the Board of Directors: a) regularly reports to the President on matters that are their responsibility; b) assists the President, the Municipal Assembly and its Committees by providing all the necessary information and reports for the decision-making process; c) implement all regulations and decisions of the Municipal Assembly and the laws passed by the Assembly of Kosovo; d) prepare the activity program and presents periodic reports of the activity to his department; f) is responsible for the daily management and control of directorate; d) prepares and presents periodic development plans in their area of responsibility and monitoring of these plans; e) responds effectively to any complaint relating to its sphere of responsibility; f) participates and contributes to the activity of the Municipal Assembly, its Committees and the activity of the Board of Directors; g) ensures that it shall provide fair and equitable access o for those public services that are in its responsibility; j) it has met all the tasks and orders assigned in appropriate way.(Municipal Statute of Pristina Article 59).

2.3. Reporting of the Mayor in the Municipal Assembly

The Mayor has responsibility to report before the Municipal Assembly on the economic-financial situation and the implementation of the investment plans of the Municipality at least once every six months or as often as required by the Municipal Assembly. ((Law No. 03/L-040 article 58 drops J). However, this law does not clarify whether the reports presented will undergo a voting process, and the consequences of their disapproval. In practice, it is has been noted that the mayors present written reports to the municipal assemblies, the approval of which is an internal issue of municipalities and has no legal consequences. Other forms of reporting are verbal ones, where the assembly membership ask direct questions or in writing, depending on the nature of the case. Such practices have been noted as a good opportunity of

executive accountability before the Assembly and provision of answers to many questions. Some municipal assemblies prioritize direct questioning of the municipal executive by regulating this segment with a priority on the agenda. In order to successfully implement this type of control, is needed the presence of mayors, municipal deputy-mayors and municipal directors in the assembly meetings. It is noted that the mayors did not always pay attention to their presence at the meetings of the Municipal Assembly, as this obligation, to most cases bear the deputy mayors and directors of departments. During this period, the presence of mayors is not observed to three municipalities. Municipalities four, mayors have not always been present to assembly meetings, while in other municipalities their attendance has been present. (MLGA Report on functioning of the Municipal Assemblies of the Republic of Kosovo January -June 2013, p.12). For example, during the six-month period of 2014 from the collected data for the reporting of Mayors in Municipal Assemblies, it appears that in 38 municipalities there are 37 reports, but there are 6 municipalities in which their Mayors have not reported to the Municipal Assembly.(MLGA Six-moth report of functioning of the Municipal Assemblies of Republic of Kosovo 2014, p.10). From the collected data for the reporting of Mayors in municipal Assemblies during 2014, it appears that in 38 municipalities ther have been 88 rapors. Mayors 6 municipalities have not fulfilled the obligation to report to the Municipal Assembly at least twice year.(MLGA report of functioning of the Municipal Assemblies of Republic of Kosovo, January-December 2014, p.13).

Although, regarding the obligation of mayors to submit quarterly budget report, this is done in all municipalities. Although Law No. 03/L-048 on Public Financial Management and Accountability has not called for the voting (approval) of financial reports from the Municipal Assemblies, the adoption of these reports is the practice of most municipalities. While municipalities that do not practice voting of the executive financial reports are: Kaçanik, Partesh, Deçan, Graqanica, Gjakova, Mitrovica, Rahovec and Suhareka.(MLGA Report on Functioning of the Municipal Assemblies of the Republic of Kosovo January – June 2013, p.13) .

2.4. **Supervisory Authorities for the local government**

The ministry responsible for the local government is the supervisory authority unless; the responsibility for the review of municipalities is assigned by law to the responsible ministry or institution with respect to a specific field. The review of the delegated competencies is exercised by the body of central government which has delegated them. Referring law on Local Self-Government article 77 provides that Municipal and supervisory authorities are obliged to cooperate with each other in the process of administrative review. All measures of review shall be taken by review authorities through the relevant legal acts. Such acts shall state the legal basis and explain the reasons for the application of a certain review measure.(Law No. 03/L-040 articles 76 and 77).The supervisory authority has the right to receive and obtain full information on all matters concerned, including the right to visit the municipal offices and municipal facilities and to request access to municipal documents. The Mayor shall be responsible for making this information available to the supervisory body. During such visits, the representatives of the supervisory body shall not give direct instructions to the staff of the local self-government bodies. The ministry responsible for the local government has the right to be regularly informed by the municipalities on the areas of which the ministry it is not the supervisory authority.(Law No. 03/L-040 article 78). In order to facilitate the supervision and create a more efficient system in carrying out the review of legality of municipal acts, ministerial committees were established according to specific fields.(MLGA Report on functioning of municipalities of the Republic of Kosovo 2013, p. 24). The possibility of supervision of local self-government bodies by the supervisory authority is the raised issue on constitutional level. Although municipalities have a high degree of local self-government, the central authorities have the jurisdiction and control of their supervision in order to ensure the legality of municipal acts. In compliance with the legal framework applied in Kosovo are defined the mechanisms of administrative review and oversight of the law enforcement from central level. Supervision of municipal authority activities should be in accordance with the law and the European Charter of Local Self-Government which doesn't allow to violate the autonomy of local government in exercising its supervision.(MLGA Administration Monitoring report of the Republic of Kosovo Municipalities January-December 2012, p.57). Monitoring of the activities and supervision has be in proportion with the legal purpose to be achieved. The monitoring activity and supervision should have as little impact as possible on the interests of municipalities and to minimize the time commitment of the officials of the municipality in this process. (MLGA Administrative Instruction No.2008/4 article 4) Monitoring and supervision of municipalities in e exercising of their own competencies shall be limited only with monitoring and supervison of legality, it means (Ibid article 6). The review conducted by the supervisory authority to ensure that municipal acts have been issued in conformity with applicable legal provisions and that the issuing body has not acted in excess of its legally recognized mandate.(Law No. 03/L-040 article 3).

Monitoring and supervision of municipalities in exercising of delegated authority should include, supervision of lawfulness and supervision of suitable actions,(MLGA Administrative Instruction No.2008/4 article 6), but also effectiveness and efficiency of activities,which also extends to the capabilities of officials who carry out these affairs.

In short, this type of supervision is similar to the hierarchical control that exists within the government administration.(Ivanisevic´,Kopric´,Omejec & Simovic,p.190).

Review of expediency shall mean the review conducted by the supervisory authority to ensure that delegated competencies have been executed in compliance with the rules, criteria and standards determined by the central government and if the measures taken by municipality were appropriate to achieve the results determined by the Government of Republic of Kosovo.(Law No. 03/L-040 article 3). Also, article 8 of The European Charter of Local Self-Government (KEVL) provides that Administrative supervision of local authorities' activities. Referring to article 8 Paragraph 2 provides that any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.(The European Charter of Local Self-Government art.8 paragraph 2). However, it is important that the local government body, when possible, to be allowed to take into account local circumstances in exercising delegated powers, providing that return to this delegation does not excessively violate the sphere of authority of the independence of local authority From the other side, it is recognized that in respect of certain functions, such as issuing of identity documents, the need for uniform regulations may leave no scope for local discretion.(European Charter of Local Self-Government and explanatory report article 4 paragraph 5). Also, KEVL provides that Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interest which it is intended to protect.(The European Charter of Local Self-Government article 8 paragraph 3). As mentioned above, State bodies shall supervise the lawfulness of the work of municipal bodies. In matters vested in municipalities by the state, state bodies shall also supervise the appropriateness and expertise of their work. The state supervision of the work of a local community body shall be exercised by the government and ministries.(Republic of Slovenia The law on Local Self-Government article 88**).** Ministry of Local Government Administration **(**MLGA) has developed an advanced system of monitoring supported in two main ways: through monitoring with direct participation in municipalities and through electronical monitoring realized in several different forms. Having into consideration the advantages of the information technology and for the purpose of decreasing the financial cost, MLGA has installed a special program to enable the supervision from distance through telepresence.(MLGA Organization and functioning of Local Self-Government in Kosovo, 2013, p .58).

2.4.1. Review of the Legality of Municipal Acts

The Municipal Assembly may adopt acts within their areas of its competences. Acts of the Municipal Assembly shall be effective in the territory of the Municipality enacting the act. These acts shall include: Statute of the Municipality; rules of Procedure; Municipal regulations; and any other acts necessary or proper for efficient operation of the Municipality. (Law No. 03/L-040 article 12). In the context of state supervision, a distinction is made between two kinds of supervision: legal supervision and functional supervision. As far as the municipalities act within their own sphere of activity, they are subject to legal supervision. (Jürgen Harbich, 4/2009, p.56). Supervision over the legality of general self-government acts of local representative bodies is carried out by all central government administration bodies, each within its scope of activities.(Ivanisevic´,Kopric´, Omejec & Simovic, p. 189) .

For example, in the Republic of Slovenia Supervision of the legal implementation of general acts and individual municipal acts relating to matters that fall under their jurisdiction shall be carried out by the ministries, each in the area of their competence. For the purpose of supervising the legal operation of municipal bodies, the ministries must ensure suitable cooperation, the mutual supply of information and professional assistance for municipal bodies. Ministries must warn the municipal body which they believe has issued an act which does not comply with the Constitution and the law, and shall propose suitable solutions. In addition, ministries must warn competent municipal bodies if they determine that the municipal administration is not acting in accordance with the law or other regulations, and shall propose suitable measures. At the proposal of a ministry, the Government shall propose that the Constitutional Court withhold the execution of a municipal general act which the ministry or the Government believes may cause major disturbances in the implementation of municipal tasks, have harmful effects on the health or life of people, or cause major economic damage, or whose

implementation would represent a violation of the Constitution or other legally guaranteed rights and freedoms of citizens. (Republic of Slovenia The law on local self-government Article 88a).

In Republic of Kosovo the government's main mechanism for the supervision of the constitutionality and lawfulness is the right of the supervisory authority for the administrative review for lawfulness of the municipalities' bylaws. (MLGA Report on functioning of the Municipal Assemblies of the Republic of Kosovo January – June 2013, p.27).

The ministry responsible for the local government is the supervisory authority unless; the responsibility for the review of municipalities is assigned by law to the responsible ministry or institution with respect to a specific field. The review of the delegated competencies is exercised by the body of central government which has delegated them. (Law No. 03/L-040 article 76).

Monitoring and supervising authority must be careful when monitoring and supervising activities that should have as little impact as possible on the interests of municipalities and to minimize the time commitment of municipal officials this process.(MLGA Administrative Instruction No.2008/4 article 4).

The administrative review of acts of municipalities by the central authorities in the area of their own competencies shall be limited to ensuring compatibility with the Constitution of the Republic of Kosovo and the law.(The Constitution of Kosovo article 124). Administrative review of municipal functioning in delegated competences is subject to legality review and suitability of actions. *(*MLGA Progress report on implementation of decentralization, 2012, p. 15) .The Mayor of a municipality shall forward to the supervisory authority by the 10th of each month, a list of all acts adopted by the Mayor and the Assembly in the previous month. Law No. 03/L-040 article 80). According to LLSG the following acts are subject to procedure of mandatory legality review of legality: General acts adopted by municipal assemblies; Decisions related to joint activities of partnership and cooperation; Acts adopted within implementation framework of delegated competences. (MLGA Progress Report on implementation of decentralization 2012, p. 15). For every registered act in protocol office, the Ministry of Local Government Administration (MLGA) must declare within 15 days from the date of registration the legality of the acty.In case undeclared by the Ministry of Local Government Administration (MLGA), the act is considered to be in accordance with the law in force.(MLGA Administrative Instruction No.2008/4 article 11).

The administrative review of the municipalities has the following objectives: to strengthen the ability of the local self-government bodies to meet their responsibilities through advice, support, and assistance; to ensure the lawfulness of the activities of local self-government bodies; and to ensure that the rights and interest of citizens are respected. (Law No. 03/L-040 article 74). MLGA has identified the MA acts through monitoring of meetings. Moreover, MLGA has evaluated the acts which were not under the competence of other authorities of the central level from the legal perspective. The acts for which MLGA was not competent were submitted to the responsible ministries, respectively ministerial committees. In this regard, a number of legal violations were identified during the issuance of acts from the MAs. (MLGA Report on functioning of municipalities of the Republic of Kosovo 2013, p.24)The data on the process of review of the legality of municipal acts are presented below for three years: Ministry of Local Government Administration, from years 2012 to 2014 has identified violations of the law based on the assessment of the legality of acts of municipalities, MLGA has found this situation regarding the legality of acts of municipalities: In year 2012 the acts that Ministry of Local Government Administration received for reviewing of legality and according to the estimations given by inter-ministerial commissions established especially for this purpose have been reviewed a total of 42 acts of unlawful content. Municipal review level of the acts is 50% respectively 20 acts have gone back for review while 22 remain unexamined. (MLGA Monitoring report of the Republic of Kosovo Municipalities January-December 2012, p. 8.). Also, in the year 2013 Municipalities have been active in issuing sub-legal acts, with 1107 decisions and 142 regulations were adopted in the period from January to December 2013. (MLGA Report on functioning of municipalities of the Republic of Kosovo 2013, p.15). The total number of unlawful acts issued by Municipal Assemblies is 59. Out of this number, municipalities have revised 39 acts (or 66%). 27 acts (or 69%) were harmonized in accordance with the recommendations of the supervisory organ. 12 acts (or 30%) were not harmonized in accordance with the demands of the supervisory body. 20 acts (or 33%) were not reviewed at all. (MLGA Report on functioning of municipalities of the Republic of Kosovo 2013, p.8. Similar to this, the Municipal Assemblies of the Republic of Kosovo in the first six months of 2014 held 25 meetings in total. From them 216 meetings were monitored, or 96% in percentage of held meetings. Regarding the acts 1,081, are approved in total, of which64 confirmations are given legality by the Ministry of Local Government Administration, and are recorded 29 violations of the bylaws of the municipalities, of which 18 were reviewed and 1 is still non-harmonized with the applicable legislation. In total they addressed 253 acts of municipalities for review and evaluation of legality to Ministries and Cectoral Committees for Assessment of the legality of

acts of municipalities as required by the decision of the Government of the Republic of Kosovo.(Report for the work the Ministry of Local Government Administration) In January-December 2014, the municipal assemblies have approved a total of 2,030 acts, of which 6 municipal Statutes, regulations 148 and 1876 decisions. It is apparent that municipalities have been very active in issuing of legal bylaw regulations.(Report on functioning of municipalities of the Republic of Kosovo January-December 2014, p. 14). Ministry of Local Government, in assessing the legality of acts has found that violations have made a total of 28 municipalities. Number of illegal acts is 52, of which 35 acts are revised and harmonized with the law, 12 acts were not reviewed by the request for reconsideration, and 5 are not harmonized acts upon reconsideration in the Assembly.(Ibid, p.20).

2.5 Inspection

Some public services are offered from the central authorities while some are offered by the local level. Municipality inspects provision of services for some services, such as: market inspection, inspection of construction, sanitary inspection etc. for the purpose of the protection of legality. Together with some competences the inspection services were also centralized. The central institutions also organize the services of inspection, such as: inspection of work, environment, education, health etc. The own competences of the municipalities, such as: water supply and canalization, fire extinguishing, regional waste landfills are offered by the publicly owned enterprises, agencies or units that are under management of the central level.(MLGA Organization and functioning of Local Self-Government in Kosovo, 2013 p.56).

2.6. Audit and Internal control in municipalities

Procedures of good governance are intended to confirm that management implemented a range of internal controls to ensure that financial systems operate as intended. It is important that they include the proper reporting to Management enabling an effective and timely response to the operating and financial identified challenges. Review made to higher management controls implemented in the main municipal financial system highlight a good or a poor control over expenditures and revenues. (Audit Report of the Municipality of Peja, 2014,p.15) .

Every public institution is obliged to audit the public money.(MLGA Organization and functioning of Local Self-Government in Kosovo, 2013, p. 56). It helps an organization to accomplish its objectives by providing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes. (Law No. 03/L-128 article 3). The audit of public finances is another very important process for ensuring transparency in the spending of public funds in accordance with the budget and procurement plans. Municipalities in Kosovo have established specific structures of auditing to make independent control and internal audit of the finances, but still some municipalities are not stable in this segment.(MLGA Report on capacity assessment of municipalities 2012,p.42).

Law No. 03/L-040 on Local self Government provides that the Municipal Assemblies shall establish and maintain the Committee on Policy and Finance and the Committee on Communities as permanent committees. The Policy and Finance Committee shall be responsible to review all the policy, fiscal and financial documents, plans, and initiatives including strategic planning documents, the annual Medium Term Budget Framework, the annual procurement plan, the annual regulation on taxes, fees and charges, the annual internal audit work plan, the annual medium term budget and any changes to the budget during a fiscal year as well as reports from the Mayor and submit recommendations for action to the Municipal Assembly.(Law No. 03/L-040 articles 51 and 52). Their role is expressed in the preliminary discussion of all issues that are foreseen to be dicussed in the Municipal Assembly, and for this reason it is considered as a prevention mechanism.(MLGA Organization and functioning of Local Self-Government in Kosovo, 2013, p.57). Apart from internal control, each municipality is also undergoing external financial audit by the Office of the External Auditor. The principle of accountability, efficiency and transparency in public money spending derives from the Constitution and Laws of the Republic of Kosovo. The public institutions, both local and central are obliged to respect these principles whenever spending public money. Audit financial reports of the financial statement of municipalities prepared by the Office of the Auditor General are one of the supervisory and measuring mechanisms of the public money spent by the local government institutions. In addition to auditing, each year OAG provides concrete recommendations to the municipalities to ensure that recommendations given by audit are properly addressed. According to the applicable law, the Auditor General shall annually conduct a Regularity Audit of the Kosovo Consolidated Budget, as well as the municipalities of the Republic of Kosovo. OAG currently plays two

roles: monitoring and giving recommendations regarding better management of public finances.(MLGA Progress report on implementation of decentralization, 2012, p.45). Poor accountability requirements and poor quality financial reporting reduced the efficiency of financial and operational management in the Municipality and may result in poor value for money and/or possible financial loss. Lack of effective Audit Committee reduces the focus and impact of internal audit activity and reduces the assurance that the internal audit provides to the Management. The Mayor should review current governance arrangements and related reporting requirements. The Mayor should strengthen controls on procurement planning and implementation securing that open procedures are used for expenditures of the same nature to achieve the highest value for money paid. (Audit Report of the Municipality of Peja, 2014, p.16**).**

3. Conclusion

Local governance in Kosovo after the war in 1999 faced many challenges since the efforts for constituting of local administration by international institutions, the transfer of responsibilities from international to local, local government reforms, constituting of new municipalities and decentralization. One of the challenges in the past was the three northern municipalities of Kosovo community with Serb majority about their not readiness for cooperation with the Central Institutions of Kosovo, a challenge that will continue for a certain period, which requires more activity and commitment from the central level as well as from International and local political structures. Local governance in Kosovo as other transition countries, which claim to integrate in the EU,are facing the challenge to achieve the provision of services under the highest standards of citizens.

The effort of municipalities to meet the needs and expectations of citizens and local organizations and to attract more investment as indoor and outdoor in their municipalities. However, the staff of the municipality to provide the best in service by providing the highest standards and to satisfy the expectations of citizens may only be successful, if the staff has been given autonomy and responsibility at work. Central Government of Kosovo should be committed to have local government with positive performance, have the ability to manage the high costs and provide services with the highest standards and be close to the citizen of their municipality.

Ministry of Local Government, is the responsible authority for the supervision of municipalities of Kosovo and assessment of the legality of municipal acts. This ministry has constantly had a surveillance about the identified legal violations of municipal bylaws.

- In the future all municipalities shall require to approve the municipality acts in accordance with the applicable legislation in Kosovo.

- Obligate the municipalities in case of unlawful adoption of the act to review the same and all municipal acts to harmonize with the applicable legislation in Kosovo in case of lack of compliance to address them to the Constitutional Court.

- All Mayors should report to the Municipal Assembly and meet their legal obligations and be transparent to the Municipal Assembly and the citizens.

- Supervision and control of local government has an impact in increasing of accountability, efficiency, and accountability transparencies local government and providing of high quality services for the citizens.

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The Role of the Investigative Prosecutor and Judge in the Pre-Trial Proceedings in Kosovo (1999-2013)

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Abstract

The journey of the human society has gone through many challenges, the organization of which was based on written and unwritten rules that were used to preserve the kind. Later on these rules are replaced with written codes and laws. The separation in between criminal law and criminal procedure has its genesis with the appearance of the Austrian Criminal Code (1803). As it is historically known, after the Balkan Wars (1912), Kosovo was invaded by Serbia and Montenegro. On the Paris Conference (1919-1944) it was appended to the Yugoslavian Kingdom, Tito's Yugoslavia (1945-1989 constitutive element of Yugoslavia). On March 23rd 1989 Milosevic destroyed its Autonomy with violence. On 1998-99 the war with Serbia breaks out, which on 10th of June 1999 ended (after NATO's intervention), therefore installing the UNMIK Misssion and administration that even after the Declaration of Independence of Kosovo (17th February 2008). After UNMIK's administration in Kosovo, the Law of the Criminal Procedure of ex-Yugoslavia was an applicable law. Its application was extended until the drafting and application of the Temporary Criminal Procedure Code of Kosovo (2004). The comparative methodology, written sources and different official raports are used to write this paper. The comparative data shows that with new Code, the authority of the Prosecution is empowered therefore weakening the role of the Court in the pretrial procedure, the number of the prescribed cases has risen and the discontent of the citizens also, towards the judicial system.

Keywords: Justice System, State Prosecutor, the Defendant, Kosovo, Criminal Procedure Code

1. Introduction

1.1. The differences in different social areas in the world have affected largely in the changes of the recent times, including the changes in the Criminal Procedure area. These changes have incorporated in itself sanctioned universal values of Convents, Protocols and different international Treaties. In this aspect, such changes in the justice area have seen advancements and as such are constitutional categories, on the foundation of which lays the protection of the human and citizen life as one of the main categories of the Human Rights and Freedom Corpus.

The advancement of the Human Rights is incorporated in Kosovo's Criminal Procedure also. Particularly this advancement has marked a positive development in the area of the criminal law, criminal procedure, the execution of criminal sanctions, mediation procedure etc., although it is not pretended that there will not be any violation of the human rights in the future of our country.

With the purpose to minimize these violations of the human rights from different state institutions there should be operational control organs of the accusatory body (including the judicial police) and not only of it.

Firstly, a law should be approved, which should be clear, adaptable and available to the public. (Hering, 2013, page 12)

Secondly, law enforcement institutions (judicial police, prosecutors, judges and officials part of the investigative actions) should act responsibly and conform to their legal authorizations. (Islami, Hoxha, Panda, 2012, page 41)

Thirdly, the independence of the Courts must be operational and so its control through all of the investigative phases, especially including the phase of pre-trail procedure.

Fourthly, the public opinion must be operational (civil society, different organizations for the protection of the human rights, protection of women, children and nature etc.)

1.2. Based on the premises that the rights are legally recognized by the state, that does not mean that the same rights are and cannot be violated by different state institutions. With the purpose to preserve this balance "right-violation", the state has created control mechanisms to reduce them to the minimum, if as such cannot be completely eradicated. These legal mechanisms are created with the purpose of clearly determining the legal authorizations of each institutions in general and the rights of each subject taking part especially in the legal procedure. During different historic developments of the justice system the accusatory body and judiciary are in two different positions. In the Inquisitorial Procedure the accusatory body had to submit every information and data in possession against the defendant and the Court had solely to decide the guiltiness or the innocence of the defendant. In the Adversarial Procedure, the roles of the parties included changed in favor of the defendant, although the accusatory body still had to submit evidence to support and prove the guiltiness of the defendant, but the court was no more indifferent but reflected its authority throughout the entire judicial process. This procedure of control of the accusatory body by the courts was legislated by the Criminal Procedure Law of the former SFRY, which was applicable in the entire Yugoslavia, including the Socialist Autonomous Province of Kosovo as a constitutive part of it. (Salihu,2012 page 113-117) Within a 10 year period from 1990 to 1999, Serbia had classically occupied (invaded) Kosovo therefore violating the Yugoslavian Constitution. For these violations of the human rights and national rights of the Kosovan Albanian the international opinion was notified for 10 years continually, from credible international institutions such as Humans Rights Watch and Amnesty International etc. As a result of these violations the war with Serbia broke out (1998/1999). After the war, on 10th of June 1999, a temporary UN Interim Administration was installed in Kosovo's territory, who with a regulation listed as an applicable law within the territory of Kosovo the Law of Criminal Procedure of the former SFRY. It should be noted that this law was the only law applicable in the whole Yugoslavian Federation until its desolation, meanwhile in Kosovo this law was applied until it was replaced by the Provisional Criminal Procedure Code of Kosovo on March of 2004.

Methodology

This paper is a result of a quantitative and qualitative research where the comparison in between the Criminal Procedure Law of ex-Yugoslavia (1977) that was applicable in Kosovo until March of 2004, the Provisional Criminal Procedure Code (2004-2012), the Criminal Procedure Code of Kosovo (2013) and other juridical acts, are the case of study. The analysis of this study usin the comparative method has shown and brought to light the similarities and differences in between each law, in the pretrial procedure respectively the relationship between the investigative judge and public prosecution (according to the 1977 law), the pretrial procedure judge and the state prosecutor (after 2004). The similarities, changes and differences that are present in the solutions presented in these laws (codes) are also a result of the time, ideological and historic context. After the analysis of the role of the pretrial procedure judge and the state prosecutor according to the new code, it results that the judge of the pretrial procedure is only involved upon the prosecution request. Through the analysis of the facts, it shows that not always do we have a satisfactory solution. This is argued and evidenced using quality methods, based on secondary sources from year 2012 and forward. According to these reports, that refer to the judicial field, in Kosovo there is an enormous number of presubscribed cases that affect directly to the politics of the rule of law, security and the protection of the rights and freedom of citizens.

2. The competences of the accusatory body according to the CPL of ex-Yugoslavia

2.1. According to article 45 of the CPLY (1977), the prosecution of the offender was the right and duty of the Public Prosecutor. He was competent to investigate and reveal the offender, to direct the investigations in the pre-trial procedure, to require the execution of the investigation, to indict and represent the indictment, respectively the charges in front of the competent court, to exercise the right to appeal against Court decisions and exercise the extraordinary legal remedies against final judgement.

According to this law, the Criminal Procedure had two phases of development: a) pretrial proceedings and b) criminal procedure.

2.2. The pretrial proceedings was initiated from the competent Public Prosecution after different physical and juridical subject had submitted in a written form or verbal form (article 148). The Public Prosecutor had the right to dismiss a criminal report when convinced that there were no conditions for criminal prosecution and of this he had to notify the injured party within eight days of the dismissal (article 60, CPL) who had the right of private prosecution within eight days (article 60, point 2, CPL – subsidiary prosecution). In the conditions set by the law, the Public Prosecutor could dismiss a criminal report in the latter phases of the criminal procedures, also. This dismissal from criminal prosecution could also turn into the main hearing. In this case, the injured party had to declare, in written form, whether the criminal prosecution should continue or not (article 61, point 1).
When the Public Prosecutor concluded that there were conditions for criminal prosecution against a suspect, the criminal report with his written request was sent to the investigating judge, of the court competent for the execution of investigations. When the investigating judge agreed with the evidence submitted by the Public Prosecutor, he would draw a Verdict to initiate the investigation and this Verdict was sent to the defendant and the Public Prosecutor (article 159). When the investigating judge did not agree with the evidence submitted by the Public Prosecutor for the initiation of investigations, after consulting with the Public Prosecutor, the case was transferred to the three judge panel who then had to decide within a 48 hours (article 159, point 7 and 8). In cases of criminal acts, which the Criminal Law had foreseen a conviction of 1 to 5 years of imprisonment, the Public Prosecutor could write the indictment without the investigation, but this only in agreement with the investigating judge (article 160, point 2, 5 and 6)

2.3. The Criminal Proceedings began only with the ruling of the investigative judge and as such was executed by him (article 161, point 1 and 3). The Public Prosecutor was given the possibility of assisting during the investigation procedure (article 162, point 2), whereas the orders issued by him were executed by an internal affair's organ (article 162, point 3). In accordance with the authorizations by the investigative judge, police investigators could undertake other investigative actions such as the investigation of criminal acts against the juridical constitutional order, photographing of the defendant, take fingerprints (article 162, point 4 and 5). The investigative judge was the one who decided to expand the investigation (article 165, point 2), to accept the proposals from the injured parties (article 167, point 1 and 2), to accept the assisting of the claimant during the interrogation of witnesses (article 168, point 4), to deny the presence of the defendant and his defender during the execution of specific investigative actions (article 168, point 5), responsible for notifying the parties included in the proceedings (article 168, point 6), to accept the clarification (explanation) of the specific cases related to the defendant, witnesses and experts (article 168, point 8, and 9).
The investigative judge had legal authorization to terminate the investigation when the defendant presented temporary mental disorder or disability during the criminal proceedings (article 169, point 1), when the defendant had no known address or when he was on the run, a fugitive. In this case the termination came with the proposal from the Public Prosecutor (article 169, point 2), whereas when these obstacles seized to be, the investigation would continue (article 169). The investigative judge would terminate the investigation with a ruling even when the Public Prosecutor dismissed the prosecution, but was obligated to notify the injured party who had the right for subsidiary prosecution within eight days (article 170). The three judge panel with a ruling could suspend the investigation when the offence charged to the defendant was subject to the exclusion of criminal responsibility, because of the period of statutory limitation for criminal prosecution or because the criminal offence is covered by an amnesty or pardon, or when there were no conclusive evidence to support that the defendant had committed the criminal offence. During the criminal proceedings the investigative judge was obligated to investigate into details not only the criminal act but also the circumstance that led to commit the offence, he had legal obligation to investigate and research the past of the defendant, health history and criminal record (article 172, point 1) information that would serve in the imposed sentence. The investigative judge had legal obligation to notify the defendant and his defender with the evidence and testimonies gathered against him would allow their proposals to collect new evidence on his account by prescribing the period of time when to answer (article, 173, point 1).
According to this Law, the investigation conducted by the investigative judge should end when he concludes that sufficient grounds were provided to file the indictment (article 174, point 1). After the investigation has been completed, case files would pass to the Public Prosecutor who after reviewing, within fifteen (15) days had the right to propose for and expansion of investigations or to file the indictment (article 261). The Public Prosecutor had the possibility of withdrawal from prosecution (article 174, point 2).
If the file for indictment is not completed within a period of sic (6) months, the public prosecutor had to submit to the investigative judge a written application supported by reasoning of the delays and reasoning for an extension of the investigation. If the delays of this prescribed period of time were to reasonable or if the prescribed period of time has

passed, the investigative judge would notify the president of the court for the causes of incompletion and if he would not authorize another extension then the investigative proceedings would terminate and the investigation concluded (article 175, point 1 and 2).

3. Competences of the accusatory body according to the Criminal Procedure Code of the Republic of Kosovo (2013)

3.1. After the Interim Administration Mission of the UN was established in Kosovo, the law of Criminal Procedure of the former SFRY was an applicable law until the year of 2004 when the Provisional Criminal Procedure Code of Kosovo entered into force. (UNMIK/REG/2003/26, 2003). According to Article 46 (1) of this Code, the public prosecutor is an independent body, responsible for investigating criminal offences, prosecuting persons charged with committing criminal offences which are prosecuted *ex officio,* or on the motion of an injured party, supervising the work of the judicial police in investigating persons suspected of committing criminal offences and collecting evidence and information for initiating criminal proceedings, to prosecute criminal offences on the motion of the injured party (article 47, point 2, of CPCRK). Thus with this Code the competences of the Public Prosecutor are larger, while the role of the pretrial judge (replacing the investigative judge) is paler. With this Code the investigations are initiated with the Public Prosecutor ruling.
3.2. After the Declaration of the Independence, the Republic of Kosovo has issued a new Code that has entered into force after the date of signature on 1st January 2013 (Code Nr. 04/L-123)

According to the Criminal Procedure Code of the Republic of Kosovo, the investigation of the criminal proceedings is initiated only with the decision of the State Prosecutor when there is reasonable doubt that a criminal offence is committed. In the investigative matters the role of the police is depended from the State Prosecutor who has the right to authorize specific actions, but always under its administration and supervision (Latifi & Beka, 2013 page 160). The police, as any other public body, such as citizens and other institutions, are obligated to submit criminal offences in the Office of State Prosecutor at the competent Prosecution through criminal reports (Code, 2013, article 78, Latifi, 2004, page 45). Upon receipt of the Criminal Report, the State Prosecutor may require further evidence from the submitter of the Criminal Report (Halili, 2011, page 185 - 191). If the State Prosecutor accepts the Criminal Report after being ascertained that there is evidence of committing criminal offence, he issues a ruling to initiate the investigations, otherwise, he dismisses it. With this Code the subsidiary prosecution is not allowed, a prosecution that was allowed to the injured party from whom the Public Prosecutor withdrew from criminal prosecution.

The Public Prosecutor has a duty to consider the inculpatory as well as exculpatory evidence and facts during the investigation of criminal offences and to ensure that the investigation is carried out with full respect for the rights of the defendant (Code 2013, article 48) and the defendant and the State Prosecutor shall have the status of equal parties (Code 2013, article 9)

In addition new to this Code is the power given to the State Prosecutor to negotiate and accept voluntary agreement with the defendant to cooperate or plead guilty (Code 2013, article 49), to request from the court for temporary freezing of assets of the defendant (Code 2013, article 104, par. 8)

In this Code we have another balance of "forces" in between the Pretrial Proceedings Judge and the State Prosecutor. It is a competence of the State Prosecutor to detect, investigate the criminal offence and the perpetrator of the criminal offence. To complete this task he can order the use of covert measures against the suspects for the criminal offence foreseen in this Code (Code 2013, article 91, point 1).

The control role of the pretrial proceedings judge is especially obvious when it comes to the execution of covert measures of the investigation, but not listed. For the execution of the cover measures of the investigation the Judicial Police is authorized by the State Prosecutor and should be allowed with an Order issues by the Pretrial Proceedings Judge of the competent court (Code 2013, article 91). The covert measures of the investigation must be initiated within a fifteen (15) day time period from when the Order has been issues by the court. The pretrial proceedings judge who allowed the measures should be immediately notified. The name of the official to execute, conduct these measures should be cited, which in most cases these measures have a prescribed period of time of sixty (60) days with the possibility of repeat within 360 days. For the investigation of the criminal offences categorized by the Code, the possibility of applying covert measures is foreseen even when the identity of the subject to whom these measures are applied is unknown, i.e. interception of

telecommunication. In such cases it is sufficient to have a known telecommunication number to arise suspicion if used to commit criminal offence, although the user (owner) is unknown (Code 2013, article 84, point 1 and 2).

According to Article 91 of this Code, there is a large number of criminal offences that require the execution of covert measures of investigation to detect, for which measures the State Prosecutor must submit a request in written form and allowed by an Order issued by the pretrial proceedings judge of the competent court. The set procedures in this Code that refer to cover technical surveillance measures and investigations are strict and subject to the judicial procedure of admissibility. The admissibility of the collected materials, upon the request of the defendant, is the right of the judge or the president of the three-judge panel, who rule as to whether it is ad missal before the indictment. This admissibility is subject to the procedure of admissibility even before the indictment is final. If found that there has been violation of the procedure while obtaining the evidence upon the implementation of the covert measures, the court issues a ruling and when this ruling is of final form, the judge or the president of the three-judge panel that conducts the procedure declares all the evidence inadmissible, thus sending all the evidence with a report to the Surveillance and Investigation Review Panel who through the president of the basic court issues a ruling to compensate the injured party. The Criminal Procedure Code in Article 97, point 4 obligates the judging authority to review the admissibility of evidence throughout the entire judicial process in account to the defendant.

3.3. Based on the solutions offered by the CPL of former Yugoslavia (article 14), the role of the Criminal Proceedings Court was active and had a control over the accusatory body respectively the prosecution and had a duty to care of :

- The Criminal Proceedings
- The respect of the rights of the defendant and other persons part of the proceedings
- Ascertaining the true facts, with a special role of control over the prosecution and other bodies part of the pretrial investigative proceedings
- Ascertaining of all the facts that are inculpatory or exculpatory to the defendant (article 15)

3.4. Besides the positive changes that the Criminal Procedure Code of Kosovo brings in the enforcement of the supervising role of the Court towards the accusatory body (article 64, 91 and 97), we see:

- The empowerment of the prosecutor's role and his authority, which in most cases conflicts the solutions offered by this Code in protecting the human rights and freedom.
- Transfer of the authorizations to the judicial police, a "transfer" (considering their qualifications) might result in unlawful arrests, 48 hour custodies in police stations with no legal grounds, indictment with no juridical grounds (not even with a declaration), the unreasonable extension of the investigative procedure to the dismissal of the investigations
- A wrong overview of crime representation in state level, which for many reasons represents an artificial growth not a real one (the offences are recorded as criminal offences when instead they are not)
- Violation of the economization principle during the pretrial proceedings and as a result considerable damages are caused to the state budget
- Deviation from the predetermined objective by the security organs in the fight of serious crimes organized crime, money laundry, human trafficking, terrorism and corruption etc.)
- A "imbalance" in between the prosecution and court position in exercising the functions in the pretrial phases of investigation, that as a result have brought the prescription of many criminal cases in the police, prosecution and courts (ODAD – Monitoring Report, 2012)

Conclusion

With the social and economic developments in Europe, especially after the Bourgeois French Revolution of the year 1789, we have a profound reform in the criminal procedure as well. This reform started in 1808 with the French Code of Criminal Instruction, an era that belongs to the ruling of Napoleon Bonaparte. With this Code the separations from the old and clean accusatory system start, to a mixed inquisitor system, where the defendant had the right for legal protection and the role of the court was active. The court had no more the role as the "Libra protector" where justice was "measured", but it took care to respect the rights of all the parties included in the criminal procedure. Thus, with the new solutions the rights of the parties advanced and with this Code we have elements of a mixed system, which came to improve and finally was crowned

in the Continental Europe as one of the most advanced Codes of the time, in the French Criminal Code of 1958 (Sahiti, 2013, page 50). It is obvious, the impact that these Code had in composition and development of different Codes of different countries, respectively the solutions given by this Code were constituted in the Criminal Procedure Law of the former SFRY (Overview, IKSH, 1979). The Criminal Procedure Law was the only law into force in the Socialist Federative Republic of Yugoslavia, including the Autonomous Socialist Province of Kosovo, as and equal eighth unit. This law was into force until 2004 although in Kosovo (after the war with Serbia 1998-1999, respectively with the former SFRY) the Interim Administration Mission of the UN (UNMIK) was established conform to the 1244 Resolution of the SC of the UN. In 2004 we have the new Provisional Criminal Procedure Code of Kosovo that was into force until the date of 31st December 2012, when it was replaced with the CPCRK on 01st January 2013.

Besides the novelties and the advancements that are regulated within the Criminal Procedure Code of Kosovo, the position of the defendant and the human rights are at a crossroad were the law and the human rights barge. Article 9 of this Code, says that the State Prosecutor and the defendant have the status of equal parties. Referring to this article we should assume that the parties have equal positions but are they in equal positions?

According to article 49 of the Criminal Procedure Code, the State Prosecutor has a duty to consider the inculpatory as well as the exculpatory evidence and facts and fully respect the rights of the defendant. Having in mind the period of our society's development, its position and the difficulties faced during the exercise of the prosecutor's duty, could he be impartial? Could he present inculpatory as well as exculpatory evidence and facts towards a defendant, against whom he issued a "guilty" ruling for the initiation of the investigation based on reasonable doubt that the suspect had committed criminal offence?

Despite that article 23 of this Code provides that the court in on the "side" of the defendant, who administers the criminal investigation through the pretrial proceedings judge until and indictment is issued, by reviews the requests submitted by the competent prosecutor. Issue of rulings and orders based on those requests, reviewing the lawfulness of freedom deprive of the defendant, who in the last instance could order his release in procedure violation grounds, either way the procedure conducted by the judicial police or the prosecutor leaves room for abuse that leads to the violation of the Human Rights and Freedoms during the investigation phase of the pretrial proceedings.

By comparing these two laws that refer to the criminal procedure and with the purpose to improve and to a more efficient work of the State Prosecution and the protection of the parties included in the criminal procedure, I think these are the steps to be taken:

- To empower the position of the pretrial proceedings judge and his inclusion starting with the initiation of the investigation
- The coordination in between the pretrial proceedings judge and the state prosecutor in all of the criminal procedure phases
- To strengthen the control of the cases proceedings starting from there initiations in the police, state prosecution and the court, with the purpose to not let them be prescribed
- A professional audit of the judged cases should take place, with the purpose to verify the appeal procedures in all the levels (verification of the use of regular measures or extraordinary measures in the appeal procedure)
- The amendment of the Criminal Procedure Code should take place, particularly emphasizing the empowerment of the role of the criminal procedure judge starting from the first phases of the investigation
- The Law of the Judicial Police should be issued
- The legal, criminal and administrative measured should tightened towards all of those that deliberately or by negligence have allowed the prescription of the criminal prosecution, the prescription of the criminal offence after the indictment or the prescription of the execution of the criminal judgments and cases

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Rule of Law: Its Impact on Quality of Life

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Abstract

Quality of life has very much to do with justice. Even though justice is hard to define but the basic idea remains that what is right is good and what is oppressive, is bad. So applying the same formula to all set of circumstances be it economy, social, and politics, will invigorate justice. The failure of world monetary system due to the crave for money and power has led the seekers to abuse and oppress the weaklings. The govt, financial institutions and commercial industries are no exception. Since justice is seen as obstacles to fast money and power, accountability have been regarded as a nuisance and justice is sidestepped and suppressed. Notion of Rule of Law emerge due to the need to address all these wrongdoings. Thus this paper seeks to discuss the problem underlying the situation and the means of overcoming it. One way is by imposing accountability and Rule of Law. Closely related to this issue too is the quality of life. Despite the increase standard of living; we still witnessed the glaring economic disparity between the rich and poor countries. Do this indicator project better living standard? Or it is measured from the view of the rich and the elite only? Hence this paper seeks to discuss that to implement justice there must be distribution of wealth and resources. What sensible person would deem as right, thus good. Apart from the western system that promotes Rule of Law, what is just and unjust has been clearly underlined by Islam. Man become just when they are able to restrict themselves from oppressing and tormenting others and Islam provide complete guidance to the existing crisis we faced now. Nevertheless we saw failures everywhere. They are due to the refusal of the followers to follow it, not the fault of the religion. It is attributed by their ignorance. This paper is important to show economy and social as well as quality of life devoid of justice stemming from manipulative capitalism and greed, are unsustainable and destructive. Unless and until this is understood, economic, political, environmental and social imbalances will never subside.

Keywords: Justice; Rule of Law, Accountability, Good Governance

Quality of life: a sign of Rule of Law

Many studies have shown that qualities of life were decoupled due to the monetary system that is destructive. The high cost of living all point out to the need to improve the situation. It has been shown that the monetary system that focuses on maximum profits has domino effects that incapacitated the society. The report revealed the following

In a report by The Financial Times, co-head of Asian economic research at HSBC Hong Kong Frederic Neumann said, "Household debt is a growth problem. The report warned that if debt became unsustainable and households deleveraged, it would affect consumer confidence and positive momentum, leading to a negative effect on economic growth (The Malaysian Insider, 2016). “If you look at primary market transaction, there’ll be less launches this year, take-up rate will be lower, the oversupply that is in the property market, the overhang, will build up if you talk to the banks more auction and foreclosures of properties this year,” Wong said during a press conference here today. National House Buyers Association (HBA) honorary secretary-general Chang Kim Loong also says Demographia’s report house prices, especially in the urban and sub-urban areas, have risen beyond the reach of many average Malaysians (Malay mail, 2016)

Is quality of life simply measured by the standard of the rich or the opposite? Given such accountability and Rule of Law (ROL) are inevitable. It is popular principles to address the problem of inequality and disparity between the authorities and the subject as well as the rich and poor. It offers the people with the fair quality of life they deserve.

For a country to have better quality of life there must be Rule of law. Rule of law not only demand legal justice to the community but extended beyond that. The govt owed a duty to provide its inhabitants with the proper quality of life. In order to achieve that, the govt must be held accountable for their actions. ROL exert accountability and impliedly restraint the govt from misusing the power. Powers more often were used to protect the rich and not the poor. Whilst in others impede public complaint of bad administration (The Malaysian Insider, 2016). This method of running a state has affected also the price of propriety to rise tremendously and tarnish the quality of life. Therefore, this paper will explain the danger of power that impedes accountability to be acquired and the role of ROL in limiting govt abusive conduct which is often eluded due to its capacity to cripple government's arbitrary power. It is the harm of unguided power and the rejection of any form of despotic government that gave rise to ROL and justice.

Standard of Rule of Law

ROL is synonym with justice. Justice lies in a subjective domain. No mention has been made on how this subjectivity can be maximized to increase or improved, the level of justice. Nevertheless despite the difficulties Australia has been seen to come up with initiatives to raise their standard of justice, whereas United Kingdom and United States likewise have made the requirements to be fair, a legal matter. The standard portrayed by other advance country shows that there is ROL. Apart from legal and social aspect, providing economic justice is also a reflection of ROL which illuminates the quality of life. Subsidies given to the people purportedly to the unfortunates are one way of addressing the problem. Question is, is it sufficient? The gap between the rich and poor are still prevalent in fact were getting wider and wider. The global financial fiascos were attributed to among others flawed credit rating agencies and blind regulators as well as avaricious, bonus-hungry bankers (The Guardian, 2016). How to narrow it down? Justice hence cannot be ignored when speaking of these economic gaps.

Given the above, not only in economy, justice is gravely needed and how regulators manage the financial system is also within public domain thus merits control. Justice is also marred in public setting. This obstacle is achieved by having a controlling body that scrutinizes any abuses of power. In legal sense manifestation of justice in UK and Australia is done via ombudsman. The wide power of ombudsman can be seen not only in reviewing legal error but actions that are unjust and in all circumstances, wrong. These are a reflection of broad content of administrative justice. Even actions and policies that are against Rule of Law can be subject to examination by the Ombudsman. It is sometimes inevitable that even proper conformity with law produces unacceptable result as it is not always easy to deal appropriately with constant changes of circumstances. That's why such power is given to the ombudsman to ensure accesses to justice are wide, supported and protected.

Trevor Buck and Richard Kirkham demonstrated that administrative justice has been extensively exercised in UK since 1967 inter alia through the establishment of ombudsman (Trevor buck, Richard Kirkham et al, 2011). The process has been ongoing since then. They asserted that administrative justice has been important to overall system of justice and because of that there is official faith in the ombudsman enterprise. With various review undertaken, proposal drawn up and reforms introduced, ombudsman enterprise was ignited. The development of admin justice apparatus inter alia can be seen from Lord Woolf's influential Access to Justice report (1996), The Leggatt Review of Tribunals (2001), the crucial government's white paper Transforming Public Service: Complaints redress and Tribunals (2004) and the transformation of the Council on Tribunals into the Administrative Justice and Tribunal Councils (AJTC) under the Tribunals, Courts and Enforcement Act 2007. Reforms continue to take place to complaint-handling arrangements as recommended in reports such as the Independent Review of Regulations and Inspection and Complaint Handling of public services in Scotland (Trevor buck, Richard Kirkham et al, 2011).

The same with Australia, all states in Australia have their own Ombudsman which thrives to incorporate the idea of admin justice more comprehensively. To name a few there are Commonwealth Ombudsman Act 1976, Australia Capital Territory Ombudsman Act 1989, New South Wales Ombudsman Act 1974, Northern Territory Ombudsman Act 2001, Queensland Ombudsman Act 2001, South Australia Ombudsman Act1972, Tasmania Ombudsman Act 1978, Victoria Ombudsman Act 1993 and Western Australia Parliamentary Commissioner 1971 (Trevor buck, Richard Kirkham et al, 2011).

The above illustrations provide brief understanding to the ways public powers are exercised and how concept of restricted government works to prevent the oppression. This information would inform us on how to deal appropriately with public flaws that spread across all level of government administration. The underlying governmental operations that bypass justice and accountability become the source of arbitrariness. These phenomena if allowed to flourish would inevitably lead to

public deprivation and injustices. To combat this danger, the idea of restricted government embraced in the Rule of Just Law provides the people the right to encounter government unacceptable conducts. It is repugnant for government to deny this reality. These understandings are important to the government, not only in acquiring legitimacy and accountability but in securing its continuity.

Rule of Law

Many scholars have defined Rule of law in various angles. Some in ethical while others in legal sense. The root of Rule of law is actually divine in nature. Findings have shown that Rule of law has a divine standing. From divinity stems public good and ethics which later bred to more constitutional principles. This account was made by Aristotle. He claimed that law guided by divine rule will lead man to righteousness and reasons, unlike law by men, if unguided by just principles, are beastly.

Now absolute monarch and arbitrary rule of sovereign over all citizens in a city which consist of equals, is thought by some to be quite contrary to the nature ...that is why it is thought to be just that among equals everyone be ruled as well as rule and therefore that all should have their. And the Rule of law, it is argued, is preferable to that of any individual. On the same principle even if it be better for certain individuals to govern, they should be made only guardian of the law ...therefore he who bid the law rule may be deemed to bid God and reason alone rule, but he who bids man rule adds an element of beast; for desire is a wild beast and passion perverts the minds of rulers; even when they are the best of men. The law is reason unaffected by desire (Brian Z. Tamanaha, 2004).

Both Plato and Aristotle asserted law should further the good and enhance moral virtues of all citizens. Plato insists that law devoid of good and justice is bogus law. What is just is lawful and what is unjust is unlawful (Brian Z. Tamanaha, 2004). Thus for government, to be lawful it must be just, not the opposite. Justice is the prerequisite to accountability. Without accountability, justice is blind. That's why the passage of justice is founded in the divine nature which no man can construct without true guidance. A man is accountable when he is just and righteous. Justice is a subtle concept, controversial yet very useful to the people. Through justice, only can accountability deficit be addressed. Aristotle thus taught us to differentiate between just government and unjust government. He draw the line that, "true government will have just laws but bad government will have unjust laws".

Plato emphasized that law devoid of justice is a reflection of tyrannical government (Brian Z. Tamanaha, 2004). Government will be ruled by the best man not by rule of law. As a result, the law becomes rigid and meaningless to address clear or hidden injustices etc. Law in absence of just principles thus, is bad and repressive. It is justice that will steer the laws towards righteousness at all times. In fact to Plato where a good king rules, law is a hindrance standing in the way of justice like an obstinate and ignorant man. For Plato to avoid unjustness, Rule of law is needed to fill the human weaknesses of corruption and tyrannies.

Harm of power that affects the quality of life

The philosophy behind what justice stand for has led us the need to curb tyranny power. Undoubtedly the government exercises wide discretionary powers, in administering the state. Discretionary powers are inevitable. Its use is important for a modern government to function effectively. Characteristic of discretionary power are laid out in the statutes, express and implied. The statute books shows how wide ranging are the activities of states in matters of social welfare, public order, land use and resources planning, economic affairs and licensing. In all this matters increased discretionary power is displayed (DJ Galligan, 1986). Problems arise when these powers are abused. These disturbing trends are affirmed and agreed by many scholars. Many factors contribute to these flaws. Within this discretionary power lie policy choices. Policy choices are mostly unjust because choices are exercised within the rules not outside it. Joel Handler asserts that abuse happens when officials often conceal their choices behind the excuse of rules. Officials have a lot of choices (Joel Handler, 1992). Choices are made within legal boundaries to abuse, not to dispense justice. They exercise the conferred discretion often abusively. It is argued that it is the discretion that allowed the bargaining away of publicly defined normative standards and these will further disadvantage the weak and the powerless.

Shad Saleem Faruqi in the same tone admits that the levels of accountability deficit are alarming. Control mechanisms to measure accountability are not always effective. A wide gap exists between theory and reality, between promise and performance. In the legislative field, parliament legitimates government policies not legislate them (Shad Saleem Faruqi, 1995). Their controls on national expenditure are really inadequate because executives were allowed to spend large

amounts of unauthorized public expenditure at will. The immunity of financial institution from scrutiny by Public Account Committee of the Dewan Rakyat and Parliamentary techniques of scrutinizing government administration are not sufficient be it on statutory bodies or privatized project. Privatized project receiving soft loans from the government and civil servant protected by doctrine of ministerial responsibility are abundant. In executive discretion, principle of openness and transparency are largely absent. Home Ministers power to grant licenses and permits for printing presses and publication and to impose "such condition as he deems fit", the grant of planning permission and alienation of state land to private individuals, grants of forest and sand concession, allocation of shares in government all are freely conferred without serious control.

Absolute power that corrupts, as such led to huge accountability deficit. Joel Handler thus asserted that without procedural protection on the poor and the weak, government agencies are prone to exploit the rules and create unfair advantage (Joel Handler, 1992). Many literatures as illustrated above showed exercise of discretionary power were unfairly exercised. Everyone is assumed to be relatively equal. Whereas everyone cannot be treated the same when discretion itself is unfairly applied. Discretion gave the official the choice to decide unfairly. In fact this is the main factor that causes discretion to be abused. Thus, this part will explain on how choices are manipulated in government administration.

Choices should work normatively through careful weighing of conflicting interest and needs, by giving regards to public concern. Discretion demands official to deal with the public especially the less dominant and the weak using values and norms so that they will not be unfairly disadvantaged. Yet, this is not what happened. The less dominant group are often badly disadvantaged as they lack the information, skills and power to persuade the authority. According to Joel Handler, this is "one among numerous forms of informal injustice." To him, neglecting and omission to account to the plight of unskilled and disadvantage person often produce injustice in an indirect or informal way. The officials can exercise unfair advantage because they can choose to consider the need of the powerful over the less fortunate group. It is a symbol of indirect oppression (Joel Handler, 1992). No doubt discretion is inevitable especially in human services agencies but it should be used to nurture public interest not manipulated to achieve private end. To avoid exploiting power advantages, there must be effective bargaining involving all parties especially the less dominant. Unfortunately powers are seldom exercised to uphold justice but exercised to suppress the weak. Joel Handler even claimed that poor clients get poor service and rich clients get better service.

This tendency is also affirmed by Norman Lewis and Patrick Birkinshaw (Norman Lewis and Patrick Birkinshaw, 1993). They asserted that if the dissatisfied client is persistent enough then he will get himself heard. On the other hand, if the poor and uninformed citizens approached, they will be told nothing of the opportunity of review of decision. Since decision for this type of group was rather low, therefore chances to have their case considered become slim too (Norman Lewis and Patrick Birkinshaw, 1993).

MP Jain also asserts that the poor onslaught of the government against the people is mirrored in how weak the citizen can be in the hand of the mighty government (MP Jain, 1997). The government has certain powers and privileges that put them above the citizen. Government can do a lot of good but at the same time a lot of damages too. It can choose to become a welfare state or a totalitarian state. So the question is not so much about the need for the state to have power but how to control them.

All these show accountability is a petite subject that can be manipulated at will. Thus, knowing what accountability stand for can help to improve justice and eventually increase the quality of life.

Accountability increase quality of life

Accountability and justice is synonym. Put it another way, in order to get justice the govt must be accountable. It is vague yet very important to all of us. Both terms are pertinently precious to man in order to lead a meaningful life. Justice is putting things at its rightful place. In administrative law context Trevor Buck et al expounded that "justice is 'setting it right', to resolve dispute with the view to 'putting it right' and where failures in administration have been identified, to contribute to the process of 'getting it right' first time around by feeding back the public authorities knowledge and advice on good administration." (Trevor buck, Richard Kirkham et al, 2011). Besides the above suggestion, there are also other guidelines to be follow, to know what is rightful to do and not. There is no single method to pursue, so long as it create justice or the right equilibrium, it can be followed. The guiding principles that can be relied upon are numerous. For instance, besides accountability standards, admin law and the constitution provides principles and doctrines that can be used to gauge the

extent of injustices espoused or justice omitted. There is no hard and fast rule to gauge injustices but indicator of abuse can be measured by the extent of corruptness, unfairness and unscrupulousness in public dealings. Making them accountable for such administrative flaws is what makes it just and fair. In other word, to be just one must be accountable. So if accountability promote justice then whatever means that is crucial to achieving accountability must be supported. If being responsive to the public cry is just then resolving it effectively constitutes accountability. Likewise if the purpose of complaint handling system is accessibility then providing easy access and effective remedy to the aggrieved denote justice. The two ideas are inseparable. To be just one must be accountable and to be accountable one must be just. This is how the two ideas merge together. The upshot is that they are significant in containing arbitrariness.

The guiding principles thus can be wide- ranging too and attempt to discuss everything under this part would be impossible. It is sufficient to show some background picture of what accountability stands for and the guiding principles it poses. If Prof Shad Saleem Faruqi claimed that controlling the government without crippling it, is the purpose of law, it is the same with Royal Commission investigation on commercial activities of government in Australia, to them accountability standards are not meant to prevent government from governing (Shad Saleem Faruqi, 1995). It would defeat the very purpose of power given by the constitution to the government, public officials and government agencies, to rule. The whole idea of imposing accountability standards to government, public officials and government agencies thus are to hold them responsible for their manner of stewardship (Robin Creyke and John McMillan, 2005). Even though power is given to the government to govern but it must not be misunderstood as being unbridled. The power is trust given by the people to the elected government. Accountability thus provides the test of that trusteeship (Robin Creyke and John McMillan, 2005).

Other guiding principle to make government answerable for their actions is that accountability must become the essentials to all public service. The methods of discharging accountability may vary but the core conditions of accountability i.e. justice remains. The rational is that when government is entrusted with public power to lead, the public is likewise entitled to reasonably expect from the government machineries, proper management and just use of powers. The expectation varies over time but the basic norms remains similar like compliance with the constitution; compliance with appropriate standard of official conducts, its justice, its efficacy, its economy, its effectiveness, its equity etc. All these expectations if appropriately address led to meaningful accountability.

The Australian Senate Select Committee gave its view of the guiding principle, though it is complex to translate them. It asserted that accountability is multi-faceted thus hard to define. Accountability is a notoriously imprecise term. It must be approached as a multi-level faceted problem encompassing more than one meaning. Balancing accountability with flexibility thus is the toughest challenge to public administration nowadays. Accountability requires rigidities yet in that rigidity, flexibility is needed so that justice can be dispensed with appropriately. For example, in order to innovate, take reasonable risks, and learn from mistakes, administrators need a degree of discretion and flexibility to act. Yet accountability for too many or unneeded rules and procedures can impede innovation and lead to inefficiency, ineffectiveness, and frustration. Certain basic rules and regulations, laws, and guidelines are indispensable to sound administration and accountability but they should be few, easily understandable, and consistently applied.

The Australian Senate Select Committee also gave a brilliant insight of what accountability should inter alia embrace. It asserted that public department must account for their performance and to achieve that they must be responsive to the legitimate interest of the affected parties. In other words, there is a duty of care. The citizens have the right to information about expenditure of public funds, how decisions are made as well as the capacity to question those decisions if it is ineffective.

In fact the need of accountability as the guiding principle is rooted from the higher law which is above parliamentary sovereignty as substantiated by Justice R Finkelstein,

Judicial review is more or less the enforcement of the Rule of law over executive actions. Like most of the common law, those statements go back at least to the writings of Edward Coke. In fact, Coke would have gone even further by promoting the idea (long since abandoned) that fundamental laws are superior to the kings (or in our case the legislatures) and that government answers to a 'higher authority.' (Justice R Finkelstein, 2006).

All the illustrations above show common attitude towards accountability though their focus differ from government to the aggrieved and from public to private rights but the spirit is the same i.e. to uphold justice. Accountability seeks not only to empower the government towards good administration but pertinently to help safeguard the people from the tyranny and

oppressive conducts. The underlying idea is to uphold incorruptibility, accountability and fairness. In order to achieve such standard, the guiding principles of accountability expands also to values among others like openness, fairness, public participation, accountability, consistency, rationality, legality and morality must be instilled. Accountability thus involves wide scope of government responsibilities towards the people.

Facets of ROL

Since ROL promote justice thus ROL is the sign for better life. This is because the more just a govt is the more contented the people will be. Contentment reflects that the standard of govt service and product are satisfactory and pleasing. This part will demonstrate how ombudsman in Australia has led to better govt accountability and improved the quality of life of its people.

Australia ombudsman has projected how to uphold admin justice standard. Below are some of the report that reflects the sensitivity and high awareness of admin justice culture in Australia. The advance standard of admin justice in Australia was projected in 2005 and 2006 (Ombudsman Australia, 2005) The standard in 2012 is certainly much more sophisticated and advance. Table 1.1 is the report by Ombudsman office in 2005 and 2006 which indicate high observance of justice in Australia.

Table 1.1

Problem areas in government decision making

UNHELPFUL LEGALISM

Australian Government administration is bound by a large and growing volume of complex legislation. Lawyers and legal considerations will therefore have a role in resolving many disputed issues. Given that all administrators have a duty to act lawfully, they will often need legal guidance.

On the other hand, there is a growing risk that in the complex legal environment of government, legal approaches will overshadow the important role of administrative discretion and judgment in finding a practical resolution to problems. Although lawyers can make a positive contribution to administrative decision making, this does not mean that the more lawyers involved, the better the decision-making process.

The Ombudsman's office has often had cause to criticise unnecessary or unhelpful legalism by agencies. When agency lawyers become closely involved in deciding how to respond to the Ombudsman's office, there is a greater chance that jurisdictional and technical issues will be raised. Such issues include the scope of the Ombudsman's jurisdiction to investigate, the relevance of the **Privacy Act 1988** to disclosure of information to the Ombudsman's office, the legal obstacles that would confront the agency in varying the decision about which a complaint has been made, or the broader ramifications for the agency of varying that decision. Those issues all have a role to play, but when they become the focus of discussion between the Ombudsman's office and an agency, more time can be spent discussing how to address a complaint than the complaint itself. The attention given to finer points and procedural issues can be at the expense of the whole picture and a discussion of outcomes and solutions.

'The Ombudsman's office has often had cause to criticise unnecessary or unhelpful legalism by agencies.'

There is a danger of a trend towards unhelpful legalism. There has been a steady increase in the number of lawyers in and outside government; all aspects of government are regulated to a greater extent by laws of increasing complexity; and legal considerations are intertwined with other social trends, such as an emphasis on risk management and human rights protection.

It is not easy to reduce the emphasis that agencies (and society generally) put on legal solutions and approaches. In a system based on the rule of law, there is no alternative to acknowledging and dealing with relevant legal issues raised in complaints or by agencies.

Nevertheless, our experience is that there is much to be gained by a readiness to stand back from any problem and to put legal issues to one side while discussion proceeds on other aspects of the problem. Sometimes, for example, a person's

complaint about the correctness of a decision might in fact stem from some other dissatisfaction with an agency. Or there may be an acceptable way of working around the problem, or finding a remedy that will satisfy the complainant (such as an apology, a conciliation meeting, or payment of administrative compensation).

We have also found that some agencies are more likely than others to emphasise legal issues and limitations. Conversely, some agencies have been prepared to change their style of response to the Ombudsman's office when we have been critical of a trend towards legalism in the agency. This experience suggests that there is scope for agencies to adjust the emphasis they put on legal considerations in deciding how to resolve problems encountered by members of the public.

Similar concerns have at times been expressed by the Ombudsman's office to lawyers who have complained, either personally or on behalf of clients. Sometimes we find that lawyers' advocacy of complaints can be unduly strident or too focused on legal niceties. This can impede rather than assist the sensible and effective resolution of a complaint.

This is how justice is translated in Australia that impacted on good governance and ultimately, better quality of life of its people.

Capitalism vs justice

As mentioned above, accountability in Australia has been shown a success to the delivery of justice. If accountability standard has been satisfied, there is yet another puzzled that strikes our mind. How could high cost of living effect quality of life when it is these high cost that made the rich, richer? If so accountability standard are satisfying why is there rising cost of living. In fact it never decreases yet mounting nonstop. The high cost of life in reality was driven by the capitalist system. The capitalist system, for instance, is created with a purpose only to benefit the elite group. This in turn has caused a big gap between the rich and the poor. The so-called economic developments have caused more havoc than tranquility (Nik Mustapha, 2012). Among the many negative impacts were environmental degradation and unsystematic ways of managing nature and huge waste. The clearing of forests too has caused natural disaster like floods and global warming. Thus, when developments disregard nature, destruction ensues. To achieve justice therefore, man must uphold what is right and avoid evil (Nik Mustapha, 2012).

The damages can be seen again from the financial crisis we encountered today. The fall of Lehman brothers was contributed by the greed for money and competitiveness in business. In fact these have led to world crisis where USA controls the world's currency. Due to the drive of being super rich, Lehman has use LBO (leverage buyout) to prey on the victim. The insider of Lehman bro, Lawrence mc Donald revealed that there was too many leverage in the company that camouflage the failure and gave the false impression of its strength (Lawrence Mc Donald, 2009). He asserted, 'money that was not real money, home price that were not real prices, mortgages that were not grounded in any definition of reality with which it is acquitted.' All this were due to false and unacceptable means of stimulating the economy. Unacceptable because they are demonstrably false and they are powerful because they make everyone feel richer and people believe they are richer. - the Lehman brothers for eg was buying 300 thousand mortgages package and making it into collateralise bond - 1% commission for 3 billion bundle of collaterised debts - this enable Lehman to obtain 1% commission for every sale made and those mortgages keep increasing. The harm arose when mortgage holder were unable to afford payment. The money was not founded on real means with which it is supposed to be thus the collapse.

The greed does not end there. Being the legions for home owners is not enough, Lehman took the chance of taking-over debts or leverage loan and trying to buy overweight US corporation. And there are powerful demands for leverage loans globally. The common victim targeted is corporation that were claimed as weak in management, unable to maximise profit and evoked for bad management. Leverage buyout takeovers are often predators and hostile. The buyer armed with borrowed cash from firm such as Lehman start buying up the stock in enormous quantities until they gain control of the shares. They then take over the company private and start selling off the asset and repay both the interest and the loan from the profit of the original corporation which could be saved and did not need change of ownership in the first place. For eg Leverage Buyout of Mervyns' department stores for 1.2 billion which they had force up 800 million debt on the company as soon as it was purchase and paid 400 million to themselves as dividend. But no one knew about it (Lawrence Mc Donald, 2009).

These unjust and inhumane patterns of managing money have spread to other parts of the world. Malaysia is no exception. All these have led to severe rise of cost in all aspect of life that resulted in ruining the quality of life of the less fortunate and the like. The suffering is also felt by middle income group equally. Unless proper system is in place the quality of life of people especially the destitute will remain the same, in fact worsen.

Reform

Thus there must be morality in law governing the monetary system. That's why Costaz Douzinas opposed that legal structure is the only expression of ethical values as if justice is self-embedded in the law, whereas it is not. That's why Douzinas criticized when values are replaced with blanket certification of forms, "normativity has forfeited its claim to substance and values." (Costas Douzinas & Adam Gearey, 2005).

Alexander Solzhennitsyn at Harvard also agreed that laws without justice are barren and empty. In fact Islam is the one that promote the morality of law. He forcefully averted that

Islamic values system stress on truth, justice, brotherhood. The real success is through hard work. This is the truth. The desire for a short cut thru unethical means does not satisfy the demand of truth. A society based on letter of laws will never reach any higher becuase it fail to take advantage of full human possibilities. A letter of law is too cold and formal to have beneficial in society. Whenever the tissue of life is woven with legalistic relationship it creates an atmosphere of spiritual mediocrity that paralyses men noble impulses (Nik Mustapha, 2012).

Robert Baldwin also concurred that the use of rules only strengthens abuse not otherwise. Rules may increase level of discretion and choices. When wide choices are given to the administrators, abusive choices are free and uncontrolled. It is unlikely the outcome of regulatory process will lead to efficiency because resources are displace and disproportionately distributed due to abusive and partial choices (D.J Galligan, 1986).

Given the above scenario and since the conventional system has bring about hardship to mankind especially to the poor and underprivileged, turning to Islam might shed light to overcoming the misery of the people in the world. The basic aim of Islam is to ensure well-being (Falah) of its followers in this world and in the Hereafter, and also to establish brotherhood among the members of the Muslim community (Ummah). This aim cannot be achieved if distribution of wealth among the members of Muslim community is uneven, the gulf between the rich and the poor is very wide and class conflict exists in the society. Therefore, the economic system of Islam tries to establish fair and equitable distribution of wealth among the members of the Muslim community by taking very effective measures. Al-Qur'an, the revealed book of Islam, declared in unequivocal terms:" That it (wealth) become not a commodity between the rich among you."(59:7). It means that the wealth should not form a circuit among the rich only, rather it should remain in circulation amongst all the members of the community meeting the genuine needs of all. That is why the Quran has strongly condemned, with threats of punishment, those who hoard wealth. "They who hoard up gold and silver and spend it not in the way of Allah, unto them give tidings (O Muhammad) of a painful doom."(9:34) (Muhammad Sharif Chaudhry, 1999).

The means of Equitable Distribution among others is zakat, which is compulsory levy or tax collected from rich by the Islamic state or the community and distributed to or spent on the poor. The relevant verses of the Qur'an pertaining zakat is in (Chapter 2, v 43). Establish worship, pay the poor-due, and bow your heads with those who bow (in worship). The hadith of Muhammad (PBUH) also strengthen this, Abdullah-bin-Amr reported that the Messenger of Allah said: Zakat is not lawful for the rich, nor for one possessing health and strength (Tirmizi Abu Daud). Here it is clear the money of the rich is to be shared and support the less wealthy. One way among others is to narrow the gap between the rich and poor hence refining the quality of life of all living soul.

In summary for the monetary system to be effective it must be just to all types of people especially to the poor. If the law governing the public and private fiscal fail to address this, in there lies the harmful effect. Returning back only to the original state of justice will ensure social, economic and political sustainability that will finally improve the quality of life.

Conclusion

The basic working of ROL and justice have been portray. The upshot is that the accountability standard is imperative. The better it is implemented the better the quality of life of the people. This paper is unique as it has highlighted the importance of justice in stimulating good governance that ultimately improves the quality of life of not just the rich but the poor. It is a good indicator to show that the more rigorous justice principles are applied the higher the quality of life. It also indicates that for the law to be effective it must be just. It is not a vehicle of the rich and powerful to oppress the people. Even though Islam has laid the appropriate measures to address the problem but we are still witnessing the problem and failures. This is due to the ignorance of its followers to translate them. Man become just when they are able to restrict themselves from oppressing and tormenting others. Unless and until this is understood, economic, political, environmental and social disaster will never subside. It is not surprising to find the quality of life as empty and worthless, they are the reactions of man's own doing, and their greed and selfishness spurred from unbalance economic system, lack of justice and accountability and unbridled capitalism.

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Brain Circulation, the Phenomenon and Challenges

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Abstract

The world of today which seeks globalization, while the economic inequality, corruption, political instability, and moreover wars prevail, it is always associated with the movement of people towards what might be called the 'best for their future'. This movement is not just a mechanical action, but is a phenomenon associated with social, economic and political consequences not only to the country of origin but also for the host country. The departure of the people from their land is a well-known and proven phenomenon mainly of the developing countries. This phenomenon includes also the so-called brain drain emigration, the departure of skilled people, professionals and researchers from their own country to other places. The brain drain is not only a phenomenon that belongs to developing countries, or former communist states, or those countries in war, but it can also affect the developed Western countries. Brain drain does not always constitute a brain gain in the host country. In most of the cases, people who have to leave the countries in political instability or former communist countries, even if they are qualified and holders of university degrees, they are obliged to work in humble jobs which can be simply exercised by persons without university qualifications. Consequently, the brain drain phenomenon is not automatically turned into a benefit 'brain gain' for the host country; on the contrary, it might even be turned into the so-called brain-waste. A social challenge in this context remains the turn of "brain drain" into "brain gain" or "brain circulation". Therefore, one of the current priorities for governments is to create effective economic and social conditions which would enhance the integration of the graduates, researchers and professionals into their national and regional markets

Keywords: Brain drain, brain gain, fund of excellence, economic growth, development.

1. Introduction

This article will treat and examine the phenomenon of human capital flight or brain drain, a phenomenon which is widely encountered in developing countries as well as in the developed ones. It will also provide an analysis of the main factors, which lead to the phenomenon of brain drain and its crucial consequences. Skilled migration is nowadays a known trend of migration patterns, which seems fueled by the development of the economy and the emergence of a global labor market demanding for skilled professionals. Migration is also a major concern for the less developed countries, which experience mostly the concern of negative consequences of the loss of their citizens, who are professionally capable in terms of contributing to the economic and human development. Albania, as a developing country in its transitional period encountered this phenomenon for its first time, after 90'. During this period, a substantial part of the phenomenon of the national migration, it was consequently accompanied by the brain drain process. Many qualified people including university professors, decided to leave Albania and migrate to western countries. Since 1997, there have been continuous efforts to tackle this phenomenon and to facilitate the return of the brain, by creating incentives starting from the reduction of the bureaucratic recruiting procedures in public and private sectors, to the fund raising initiatives even from the state budget sources specifically to facilitate the brain circulation of scholars. It's worth mentioning, two of the Albanian Government's programs, that of Brain Gain program and the Fund of Excellence which will be further elaborated in this article.

2. General factors that lead to a brain drain occurrence

Among the main factors that could cause the phenomenon of brain drain is commonly the aspiration and choice of individuals to strive for new economic perspectives, broader spaces in their professional career and above all, attaining higher incomes and better living standards.

These factors have been categorized into two main types: first, there are the factors related to national context, the so-called internal factors of the country of origin which push toward immigration (i.e., push-factors), such as the lack of employment opportunities, low wages, economic instability and the aspiration to have a well-recognized qualification by a

world-class system of higher education, and second type, those external factors which are related to the favorable conditions and level of the wellbeing of the host countries which frequently attract the immigrants.

The continuing increase of youth unemployment rate evidently in the countries of Southern and Eastern Europe pushes predominantly the university graduates of this region to seek professional opportunities primarily abroad. Brain drain causes serious consequences foremost for the central government, since it invests public money to provide further qualifications to the young people, in order to better respond to labor market demands and to contribute to the economic development of the country both, in the public and in private sector. So, this type of loss in this case can be called a crosscutting one which effects respectively: the economic, human and social aspects.

Brain drain, as a phenomenon across states, markets, and people should not be considered and cannot be analyzed solely as an economic issue and effecting only a given context. To this point, it appears that the brain drain is not only a problem for developing countries but it influences even the developed ones.

3. The elements that have contributed to the growth of brain drain phenomenon

Economic Crisis (2007)

The phenomenon of brain drain has been more vulnerable to Europe especially since 2007, when the economic crisis had its major effects in some Southern European countries like Greece, Spain and Portugal, accompanied by the integration of Romania and Bulgaria into the European Union. A considerable number of the well-qualified populations of these countries decided to move to other European countries. Consequently, the most effected regions by brain drain phenomenon remain the countries located in Southern Europe (Greece, Spain and Portugal) typically because of the high level of unemployment rate of educated and qualified individuals and in particular youth, followed by some countries in Eastern Europe, (Romania and Bulgaria), where principally the low salaries in education, research and medicine sector have caused exodus of the population towards western countries. In this context, Romania is significantly affected by the migration of doctors and nurses from its national health care system, subsequently bringing a reduction of qualified staff in this sector. Further, in Spain, the reduction of the state budget funds dedicated for education and research induced the dismissal of a large number of employed professionals and researchers. Concerning the negative consequences of this immigration on the Spanish economy and society, there was organized a meeting of 50 Rectors of Spanish Universities in December 2012, who appealed to the political class that if they would continue to cut the education budget, this would harm in return the future of the country and would leave thousands of young researches without a professional perspective thus, consecutively would lead to the deterioration of the Spanish economy's future. (Morel, 2013)

Regarding the Greece situation, it is definitely the case when it can be stated that it is the most affected country by the economic crisis, where its unemployment rate reached the highest figures of 56,8 %, in the period from March 2014. Therefore, the economic instability has turned brain drain into a real problem for the governmental structures in this country.

Expansion of the European Union mainly with Balkan countries

The expansion of the European Union with countries from Eastern Europe such as Bulgaria and Romania has caused the aggregate of the brain drain phenomenon towards the western countries. The consequent immigration in these cases undermines the respective future progress of these countries and their obligations to better respond to union duties. Good parts of the displaced population choose United Kingdom. In an article of «The Guardian" by Ivan Krastev (March 24, 2015), the author stated inter alia that immigration is damaging Bulgaria, at a time when this country needs qualified and professionals.

Here's a popular joke doing the rounds in Bulgaria at this period, which is extracted from the above mentioned article. "Three Bulgarian men, dressed in traditional Japanese costume and armed with swords, are walking down a street in Sofia. One of the passersby asks them who they are and what they want.

"We are the seven Samurai and we want to make this country a better place," say the men.

"Why are there only three of you then?"

"The other four are all working abroad[1] ."

The opening of borders was something considered good and bad. Mass migration of people aged between 25 and 50 years has severely damaged economic and political system of this country. A part of the young people, prefer to earn more by taking care for a family in London than to work with a low-paid to their country, and exercising their own professions. However, Bulgarians, but mostly not only them prefer to work abroad and alongside carry out their studies. Apart of the Chinese, the Bulgarians are the second largest community of foreign students in Germany. So, apparently, the most active and critical citizens left their country, leaving behind only 'three Samurais' to make a difference and the enhance progress in the country.

The brain drain is not a new phenomenon at a certain period of time. Over the years, professionals and scientists always have moved for centuries seeking better work conditions and opportunities, in the most developed countries. United States and Canada because of their legal frameworks concerning immigrants have been the most preferred destinations for foreign intellectuals. But, it is worth noting that in addition to that, the top level universities located in both countries have also attracted foreign students and keep doing so by offering professional development opportunities for future careers to all candidates.

Brain drain in the European Union (EU) is potentially possible and supported by the right of free movement and employment of citizens across European countries. The fundamental principle guiding these procedures allows these people to live and work wherever they want within the boundaries the EU.

It is very important for national authorities to find opportunities and effective tools to prevent the brain drain and adjust the ratio of the workforce with higher education qualification among all Member States of the European Union in order to ensure and stimulate sustainable economic growth within the union.

4. Some data of Brain Gain phenomenon, according to the reports of international organizations [2]

According to a recent report of the Organization for Economic Cooperation and Development (OECD) "Immigration World in Figures" (2013) emigration of professionals skills qualified (certified) is increasing rapidly, leading to figures of about 232 million migrants worldwide. The United States, Russia, Germany, Saudi Arabia, UAE, United Kingdom, France, Canada, Australia and Spain, according to the 2013 report were the host countries, where there have been placed more than half of the all international migrants. According to OECD-UNDESA, the number of migrants with tertiary education in the OECD increased to 70% in the past decade, reaching to 27 million migrants in 2010/2011. About 30% of all migrants in OECD countries were highly educated.

One in every 9 (nine) persons with higher education (university) born in Africa, lived in OECD countries in 2010/2011. The corresponding figures for Latin America and the Caribbean, Europe and Asia have been respectively 1 (one) to 13 (thirteen), and 1 (one) to 30 (thirty).

Brain drain is particularly acute in small countries and island states which part of Africa, Latin America and the Caribbean. In 2010, nearly 90% of people with higher education and training born in Guyana lived in the OECD countries. On the other hand, in contrast to this fact, most OECD countries as well as non OECD countries with large populations, including Brazil, China, India and the Russian Federation, had rather low emigration rates of highly-skilled population which was approximately less than 3.5%.

Over the past ten years, the emigration of highly-skilled workers has increased for some countries, while it has decreased in others. While the absolute number of migrants with tertiary education in OECD countries has increased, from all countries of origin, in some cases, the number of people with higher education in countries of origin, rose faster than the number of highly educated immigrants.

1 http://www.theguardian.com/commentisfree/2015/mar/24/britain-east-europe-brain-drain-bulgaria

2 Immigration World in Figures" (2013) http://www.oecd.org/els/mig/World-Migration-in-Figures.pdf

5. Negative and positive consequences of the brain drain

Brain drain as being studied today by a group of economic analysts, it does not only bring negative consequences, because some of those who had to emigrate, if returned to their country, they have gained more professional skills. In some other cases, displaced people are unemployed or employed not in their own profession in their country of origin, so their departure cannot be considered a great loss to the sending country.

On the one hand, the exodus of professionals, scientists, students, information technology engineers, medical staff and researchers from south to north and from east to west, has rather straight negative consequences on the economy and society of the countries of origin.

But in other cases, the departure of skilled workers from one country is offset by the arrival of skilled workers from other countries, as this phenomenon has been described in one of the Chapters of the OECD report "Trends in International Migration "(2004). The typical case of this domino effect is the movement of the medical professionals into the developed countries meanwhile this contingent of professional is being replaced with doctors coming from Cuba. For very poor countries, such as Cuba for example, prospects for emigration may enhance incentives to increase the level of education and qualifications enabling additional funds to be invested in the education sector. When the 'Brain Gain' within a country is higher than 'Brain Drain', the impact to strengthening of the welfare level and development of the country can be extremely positive. With the manifestation of brain drain, the education level and contribution of those who remain in the country may be higher than what it would be in case of no migration at all. Moreover, it is important to understand that the brain drain cannot only be used to tell that part of the story about the overall impact of immigration on the economy and society, but it also can result into other impacts such as remittances, inward investment, transfer technology, increasing the flow of trade, donations supported by diaspora community. Therefore, it should be considered and recognized that the impact of this phenomenon can somehow be positive too.

The negative effects of brain drain phenomenon are not only economic but also social ones. The countries with significant loss of the brain can experience decrease of production, lack of innovation and reduce of well-educated human capital, and increase in the number of overqualified employees. In the case of Eastern European countries, the brain drain has created a reduction of professionals in the labor market, mainly in the field of medicine, scientific research and information technology. On the other hand, there are several benefits associated with their countries of origin, such as remittances, creating scientific and business networks, as well as the possibility of potential returning of emigrants with more professional skills, earned abroad.

Remittances are very important for developing countries as in the case of Albania. Remittances are an important source of poverty reduction and economic growth. Remittances[1] in Albania had increased from $ 377.9 million EUR in 1994 to $ 780m in 2003 and to 951.7 million EUR in 2007. Further, the remittances have suffered a big drop, especially after the deepening economic crisis of Eurozone. During 2014, the remittances resulted in the figure of 592 million EUR, compared with 951.7 million EUR in 2007. These figures confirm the decline in the contribution of remittances in the national economy, as the economic crisis in Europe has significantly decreased in parallel their income.

6. Policies undertaken by the Albanian Government for the return of highly-skilled employees

The brain drain is not unknown for Albania. After the fall of the communist regime, thousands of Albanians fled to developed countries. During '90, almost 40% of lecturers and researchers left the country. Among them 66% were holders of an academic title "Doctor of Science" (Ph.D.). Equally, there are many cases of experts and students who chose to study in different countries such as in Greece, Canada and Germany, among whom it is estimated that only 5% of them return. Albania is one of the Eastern European countries with a high level of brain drain, a phenomenon that has accompanied this country during its transition period. Albania has faced twice a massive brain departure, the first one in the early '90s mainly

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1 http://open.data.al/sq/lajme/lajm/lang/sq/id/1443/Remitancat-2002-2014-origjina-sipas-vendeve

for economic reasons and the second one in the period of 1997-1999 due to the political instability caused by the so-called pyramid schemes.

According to a study conducted by the Center for Economic and Social Studies, supported by the Open Society Foundation for Albania, in the period 1991-1998 about 31.45% of experts with higher education level had left Albania, while 63% of the respondents in this study expressed the desire to emigrate. Each year about 2000 students leave the country to study abroad in foreign universities. The major reasons that drive Albanians to leave the country are not only the internal factors but as it has also been defined, the people are significantly influenced by the external factors. Albania is a country of the Western Balkans with a high rate of immigration where about 30% of families have members living abroad, serving to pull the rest of the family members. Similarly, the most attractive factors for the group of immigrants with high professional skills remain the necessity to ensure better knowledge and sharing of their academic and scientific work outputs. To respond to this phenomenon, constant measures have been undertaken by the Albanian Government in particular through its program called "Brain Gain" which aimed at returning of scholars and encouraging the return or bridging the stay specifically for the highly-skilled professionals and experts.

In 1997, Mr. George Soros donated $ 1 million to support the development and modernization of public administration in Albania through the process of increasing the wages of those people who came to work in the administration with Master's degrees, earned abroad at foreign universities. This project lasted six years and was extended to public administration levels of the local government units. According to the data emerging from various studies, about 150 people have benefited from this program. These studies have shown that increases in wages (sometime doubling or tripling of salaries) of civil servants is not fully an effective tool for developing human resources in the state administration. These data are part of several studies and reports carried out by the Soros Foundation to evaluate the effectiveness of this financial scheme during 2005.

The "Strategy for the promotion of employment for students who are employed abroad" in 2004, defined several improvements of the legal framework in the field of recruitment to give more priority to those who had studied abroad. The document included provisions which facilitated procedures aiming at"... providing the best choices in favor of improving the recruitment process, which would give priority to employment of those candidates who had studied abroad, without prejudice to the principles of equality, trust and non-discrimination " and "…giving priority to people who belonged to this category, in the case of selecting three best candidates by the ad hoc committees on a base of the competition procedures... "

7. Brain Gain Program

The 'Brain Gain Programme' (BGP), is a cooperation program between the Government of Albania and United Nations Development Program (UNDP), which dates back to April 2006. BGP is an executive national project, funded by UNDP with about (40%) and the Albanian Government (60%). This program addresses the diaspora and graduates from recognized foreign higher education institutions with a Master and PhD degrees. Diaspora with Albanian origin established during the last decade of 20th Century and it is represented by a group of qualified individuals who contribute professionally in different sectors, to advances science and technology, in countries where they have emigrated. The contribution of the Diaspora in the development of country of origin is a proven reality and stands for the case of Albania. The income that entered in the country in form of remittances is a visible impact. In this context, the withdrawal of this group of people, to Albania remains a priority for the persistence of development of the country. The objective of BGP was i) to provide support to the government in creating and promoting elements of mechanisms of policy-making and ii) to effectively enhance the engagement of diaspora and skilled emigrants in the development of scientific research sectors, administrative and economic development.

During the period 2008-2011, the program has supported with reintegration financial package about 137 individuals who returned to Albania or have given their contribution as visiting professor at various academic institutions in the country. Diaspora as the intellectual capital of the highly qualified migrants returning to the country has been considered as a valuable asset for Albania in its path towards integration into the European Union. Despite their contribution in building the human capital of Albania, these individuals have shown that they have appropriate professional potentials to stimulate research and development of technology in the country.

Brain Gain Program with its direct achievements to enable return and reduce loss of professionals, it has also made somehow possible to curb the Albanian Brain Drain. Additionally, with its encouraging schemes, this program has made possible the return of 137 individuals highly qualified in various sectors in the country. It has in some ways institutionalized the real opportunity of the return for other individuals and highly qualified candidates to come and be employed in various sectors in Albania.

Table:Data of the BG program beneficiaries (scientific level, the sectors of employment, etc.)

Institutions	Individuals	Female	Male	Female		Male	
				Master	PhD	Master	PhD
Public Administration	21	7	14	7	-	12	2
Public Universities	57	24	33	13	11	17	16
Private Universities	20	8	12	2	6	8	4
Visitor Professors	39	10	29	4	6	12	17
Total	137	49	88	26	23	49	39

The Albanian Government, in accordance with its development program, it has planned to reorganize the concept of this program in the Program of Brain Circulation by December 2016 aiming at enhancing the contribution of Diaspora by increasing the number of the returned professionals in the country.

8. Fund of Excellence Program

Fund of Excellence Program was created in 2007, as one of the Albanian State objective to financially support Albanian excellent students, who have been accepted for doctoral and post-doctoral studies abroad, or authors for their publications in journals with impact factor, prices for the participation in international Olympiads. Periodically this program has been change. In 2010, the range of applicants to this program was expanded, including students who will attend the studies in top 15 universities in the world, at the level of Bachelor and Master. To respond to membership of the country in NATO in 2010, priority was given to specific fields such as National Security.

During 2012, the Council of Ministers has determined that the categories of beneficiary candidates will be the students who would enroll at Bachelor, Master and Doctorate programs. In July 2014, the Council of Ministers defined changes to the program determining the ranking of the host universities would refer to international classification published by Times Higher Education Ranking. Further, in the framework of capacity buildings within the public administration reform, this program included the category of civil servants, who can apply for financial support in case that they are admitted to perform master studies (duration of one year) at the top 300 universities according to the Times Higher Education Ranking in the following fields:

- Education policies;
- Health policies;
- Public policies;
- Urban development;
- Management and public finances;
- Administrative Law / Public;
- European Studies.

According to the Ministry of Education and Sports, in the framework of this program for the period 2007 - 2015 there have been financed about 200 individuals. The major fields, in which the successful candidates of this program have studied or continue to study, are Health, Economic Science, Engineering, Computer Science, Law etc.

The main obligation for the beneficiaries of this program is that after completion of studies they have to return and contribute to implement the competencies acquired, in the respective sectors, for at least 3 years. In those cases, when the beneficiaries are students of the first cycle or second cycle, this program allows the continuation of the studies at the next level to the end of all cycles of university studies. The categories of civil servants, at the accomplishment of their studies have to work in Albania for at least 4 (four) years in the Albanian institutions. The major objective of this program is to create excellence by funding the study of excellent students, supporting their education in the best universities and enable them to contribute in Albania, in public and private sector, by increasing the level of scientific research and innovation. Most of the beneficiaries of this program who have completed doctoral studies are currently employed and exercise their professions in the institutions of higher education.

The Albanian Government through the Ministry of Education and Sports has made available to Albanian excellent students a fund of 150,000,000 ALL per year according to the relevant decision of the Council of Ministers No 483, date 16.07.2014.

What might be called the challenges of this program today? The success of the program would be related to the employment of graduates in the respective sectors. Presently, apart from the obligation to return and work in Albania, there is no written regulation how to improve the procedures and create more possibilities in recruiting these young professionals.

The Prime Minister of Albania, Mr. Edi Rama, during his official visit to the United States in September 2015, had the opportunity to meet with activists of the Albanian - American community and partners of the Centre for International Development, Harvard, focusing on gaining further support to enhance joint studies between Albanian-American community and finding ways of involving experts from this community into the activities of political and social life in our country. In this context, the Albanian Government will work with all stakeholders to make possible the organization of the first Summit of the Albanian Diaspora around March 2016 in Tirana.

Conclusions

Despite the fact that Albania has been affected by the phenomenon of brain drain, we need to recognize that we are a country with great desire and aspirations to be educated, to be eligible to prepare experts and young professionals who would be able to respond not only to the national labor market but to also be integrated into regional and European one.

In this context, it remains crucial to support the return of qualified Albanians living abroad and to better facilitate the cooperation with diaspora. Enhancing quality in higher education institutions to make Albanian diplomas competitive in the global market, and foster the modernization and internationalization of higher education institutions, in order to make it more attractive for young Albanians inside the country and abroad as well as for foreign students, remains a key element.

Albania as a country that has already got the status of candidate country for membership in the European Union, has an indispensable requirement to support the young Albanians who have been educated abroad, as well as to involve the qualified professionals, engaged abroad, to bring home their contribution in the preparing the legal framework in alignment with European Directives, by directly contributing to the development of key sectors of economy and technology. This would enable the real circulation of knowledge and science, the so-called 'brain circulation' by implementing the up-to-date experiences developed abroad, to support the realization of national reforms and the practical application of the legal framework across sectors.

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Personal Security Measures. An Analyze of the Albanian Legislation

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Abstract

The personal security measures are directed against the suspected person of the committing a criminal offense depriving of some rights charging him with specific obligations. Referred to Criminal Procedure Code of Republic of Albania personal security measures are divided into coercive measures and prohibitive measures. The Supreme Court by an unifying decision is expressed that[1] "The distinction between coercive measures and prohibitive measures consists on the fact that in different from coercive measures, they prohibitive can be implemented not for all criminal offenses, but only when is proceeding for criminal offenses for which the law sets a punishment of imprisonment higher in maximum than a year, and the fact that the only purpose of taking these measures is preventive". The aim of this paper is to make an analyze of the Albanian legislation about the personal security measures.

Keywords: security measures, personal security measures, legislation.

9. Introduction

One of the reasons of assignment and implementation of personal security measures is the need to guarantee in continuity the presence of the defendant in penal proceeding in his charge, as to ensure the normality of the investigation and the trial in the case against him, the need to avoid the risk of committing further offenses by him, as well as to ensure that he does not leave, hide but to undergo to execution so to suffer the sentence when the decision has become final. The security measure set in every stage of proceeding has no connection with the defendant's right to not be present personally at the hearing, or to leave it on his own free. The needs of security are set for the other purposes, they have not any connection or influence on allowing or limiting of the right of defendant to participate in the trial that is held against him. To the defendants with or without security measure is guaranteed the right to participate in the judgment of accusation against him.

10. Types of coercive measures according to Albanian legislation

In article 232 of Criminal procedure Code are determined the types of coercive measures. They are:

- Prohibition to leave the country;
- The obligation to appear before the Judicial Police;
- The prohibition and the obligation to stay in a certain location;
- Property guarantee;
- House arrest;
- Arrest in prison;
- Temporary hospitalization in a psychiatric hospital

Some of the personal security measures intended to restrict the right of free movement within and abroad. Such are: the prohibition to leave the country, the obligation to appear before the Judicial Police and the prohibition and obligation to stay

[1] Look the decision no.3 date 27 September 2009 of Supreme Court

in a certain location. How can we interpret this ranking of coercive measures, a chronological order or simply as a random order?

11. Criteria for setting of personal security measures according to the Albanian Legislation

The security measures are setting when:

- There exist important reasons that put in danger the obtaining or the truthfulness of evidence.
- The defendant has leave or exist the risk that he may leave.
- For the reason of circumstances of fact and of personality of defendant exist the risk that he may commit serious crimes or of the same type with which it proceeded.

Exist important reasons that put in danger the obtaining or the truthfulness of evidence - The evaluation of circumstances on existence or not of the risk for "poisoning" of evidences, is made step by step. Among the other things, can be evidenced the verification that makes the court to the circumstance on the time that has passed from the moment of notifying of the defendant for criminal proceedings against him, in connection with the circumstance if he has committed or may commit any action or behavior that "risks" the process of obtaining and truthfulness of evidence.

In this context, in principle, the right of silence of the defendant as a strategy of his defense does not constitute "risk" that can serve as motivation to request appointment of a security measure against him. However, this circumstance can be evaluated in harmony and in connection with other his behaviors on offense that he has committed and the started criminal proceeding, which could lead the court in the conviction that exists a doubt based on the evidences that the defendant if will be left free he will poison the evidence and the process of verification, such as search, obtaining, authenticity and preservation of evidence and sources of evidence by the defendant.

When the defendant has left or exist the risk that may leave - Relating to this condition for the assignment of security measure, while "escape" "leaving" of defendant is a matter of fact, is the to highlight that the acceptance by the court of the existence of the possibility, so "the risk of leaving", must be motivated, based on concrete elements, on facts and objective circumstances. For the effect of motivation of assignment of security measure, one of cases that constitutes objective element to lead the court in conclusions on leaving or risk of leaving, is the case of leaving without trace of the defendant.

This situation, in itself, embodies logically and legally the defendant's tendency to infringe and not implement security measures , his being permanently in the position of illegal disobedience before the law, the tendency to avoid investigation and trial, and the suffering of punishment. This risk situation normally remain the same even if the defendant declared gone, after shows his availability to be present or when he is presented voluntarily before the authorities of proceeding. If it deems not to participate in the hearing, he is free to not appear or to leave the room, but if he is under the security measure of home arrest or arrest in prison, the defendant necessarily stays or returns to its isolation.

When for the reason of circumstances of fact and of personality of defendant exist the risk that he may commit serious crimes or of the same type with which it proceeded – The content of this disposition relates to the need for the appointment of a security measure to fulfill the special preventive function of state for guarantee of public order and public security, the inviolability of life, health, property and interests and other legal rights from committing of other criminal acts by the defendants. In this regard, to legitimize the restriction of the freedom of the defendant the appointment of security measure, among others, the object of the judgment is the verification of the specific circumstances of fact which serve to the court to assess and to conclude on the risk of author and on the other hand to determine the criminal offenses that can be committed by him.

In this sense, to accept the existence of appropriate security of the concrete risk to the community, the violation of public order and public security, which justify the appointment of security measure under this disposition, subject to judicial investigation should be concrete evaluation of the circumstances of the fact, drawing by the whole behavior of defendant valid concrete elements on which to base the decision giving.

Based on the evaluation of evidences on existence of concrete elements of circumstances of fact and of the personality of the defendant, not necessarily cumulative, the court concludes that if exist the reasonable suspect about his the dangerousness of and the need to guarantee the inviolability of community, if exist the real possibility that the defendant in the future, being free can commit serious criminal offenses or of the same type as that for which it is proceeded.

"Serious crimes" in the meaning of the letter "c" of paragraph 3 of Article 228 of the Criminal Procedure Code include not only those for which there is competence of Court for Serious Crimes, as well as other serious criminal offenses, which, for their self-danger and consequences, are recognized as such in our judicial practice even before the creation of these court

Article 229 "The criteria for the assignment of security measures" of Criminal Procedure Code:

In the assignment of security measure the court takes in consideration the suitability of each of them to the degree of security needs that must be taken in concrete case.

- Every measure must be in proportion to the importance of the fact and to the punishment provided for the offense in question. Are taken into account the continuity, repetition, and the mitigating and aggravating circumstances provided by the Criminal Code.
- When the defendant is a minor, the court shall consider the request to not interrupting the concrete educational processes.

Article 230 "Special criteria for assignment of measure of arrest in prison" of Criminal Procedure Code:

- Arrest in prison can be set when any other measure is inappropriate for the reason of special the dangerousness of the offense and of defendant. Of course, in evaluating of this criterion may have shown of the subjectivity due to overestimation or not understanding of certain aspects of the case therefore the caution should be special, especially by courts that examine the appeals against measures.
- Cannot be set arrest in prison against an woman who is pregnant or breastfeeding, against a person who is in a especially heavy health or has passed the age of seventy years or to a drug addict or alcoholic, for which is applied a therapeutic program in a special institution. In this disposition come out the human character that characterized the penal law in some cases. It is understood that the definition of pregnancy, serious illness or age must be proven with documents and expertise and justified in given decision. Likewise, when these factors are not taken into account, should be explaining the reasons that make necessary the arrest and the sanction of disposition that provides the criminal offense attributed to the defendant.
- In the cases provided in point 2, the arrest in prison can be set only when there are reasons of a special importance for crimes punishable in maximum not less than ten years imprisonment.

Article 231 "Replacement or merger of personal security measures" of Criminal Procedure Code:

- In case of violation of obligations related to a security measure, the court may decide replacing or merging with another measure heavier, taking into account the importance, motives and circumstances of the offense. For the violation of the obligations related to a prohibitive measure, the court may decide the replacement or merger with a coercive measure.

Conclusions

Referred to article 228 "the conditions and criteria for assignment of security measures" of Criminal Procedure Code: No one shall be subjected to personal security measures if in his charge does not exist a reasonable suspicion, based on evidences. Through the right analysis and interpretation of this disposition, in particular of the expression "reasonable suspicion, based on evidences", in harmony with the other procedural institutes, can be distinguished and reached to the right conclusions, not only regarding to the prerequisites conditions for setting a security measure but also why this measure can be set in trial phase of the criminal case. Consequently it can be understood and be distinguished the trial on a reasonable suspicion based on evidence for setting of security measure by the judgment of evidence for the purpose to

form the conviction of the truth, beyond any reasonable doubt in the decision of dismissal, the innocence or conviction of the defendant.

Reasonable suspicion based on evidence according to this paragraph means that it comes to the existence of reasonable suspicion based on evidence, so for the existence of those sufficient legal elements and factual circumstances that create obedience to judges in terms of the possibility that the person under investigation and the defendant has committed the criminal offense.

Consequently, for setting of the security measure is necessary that direct or indirect evidences, be such as to make it seem possible the responsibility of the investigated or the judged about the charges brought against him. So not to find ourselves before a priori procedure.

Suspicion based on evidence does not request to be exhaustive, necessarily one direction, thus in terms of culpability. Despite this reasonable suspicion based on evidence that the judged has committed the offense, at the end of the trial can be certified as a result of defendants guilty, as well as the defendant's innocence.

Therefore, the Joint Colleges come to the unifying conclusion that "reasonable doubt, the evidence where it is based to justify the setting and the continuation of implementation of the security measures, there is no need to have the same degree of security and probative value to conclude as evidence that are necessary for the giving or not of the sentence against the defendant. It is sufficient that they be such that, in the situation where are the acts of the proceedings, from which can take conclusions that against to the investigated or judged exists a reasonable possibility degree of culpability for committing the criminal offense in his charge.

The criteria provided by article 229 of Criminal Procedure Code, even they give to the court a wide discretion to decide clearly, intended the proportionality, specific suitability of type of security measure with self-security needs for that specific case. If there are no reasons to exclude the author from criminal responsibility, these criteria impose the obligation of the court to base the decision on the one hand, on reasonable suspicion based on evidences on the commission of the criminal offense by him and, on the other hand, on the evidences that contains the sufficient objective and subjective elements , the circumstances of the case, which shows that exist the situation of dangerousness, and the level of risk, at least according one of the cases under Article 228.

As in the case when the security measure is set for the first time, also when is considering the replacement of the existing measure, the court has no obligation to analyze why the other types of security measures are not adequate, is sufficient to argue that the measure ordered by it in specific case against the defendant is the appropriate measure. In any case remain the obligation of the court that, initially, to argue that exists a reasonable suspicion based on evidences in charge of the defendant for commission of the criminal offense by him.

Therefore, even when set security measure of arrest in prison, the court is not obliged to analyze in detail why other kinds of measures are not appropriate in the case in trial. Based on objective elements on the nature of the offense, the means and the manner of its commission, the caused consequences, as well as subjective elements related to the personality of the defendant and the state of dangerousness, the court argues that the only appropriate measure against the defendant in proportion to type and level of dangerousness is that of arrest in prison.

Point 3 of this article presents a special importance because it has to do with the minors to which the law recognizes the right to be treated differently from adults and that as a result of their need for a differentiated treatment. At the moment that the court argues that the only appropriate measure to a minor is the arrest in prison, should set him associated with the continuity of the educational process of minor. Only in this way the measure will realize the goal of its setting.

I assess that in paragraph 3 we have to do with a legal deficiency because this article should include the minors and the students. The interruption of the educational process will not bring any good to the student's rehabilitation after committing of a specific criminal offense, except that it will have an adverse impact on his psyche.

Penal Chamber of the Supreme Court, said: “Penal Chamber assesses that in setting as the security measure "arrest in prison" are not taken into account the general criteria for setting of security measures and specific circumstances of the case. The courts have not done an analysis of specific dangerousness of author, but they are satisfied with citation of dangerousness of the criminal offenses committed in collaboration and its spread. In view of the evidence gathered by the prosecution, this college without wanting to enter in their analysis at this stage of the preliminary investigation, in this case

has taken into account several criteria for changing of the measure of personal security given to the person under investigation, such as: The fact that leaving free the person under investigation does not risk the obtaining of new evidences related to probationary of the elements of the criminal offense for which the prosecution is investigating The fact that has two children one of them is minor, the fact the husband is invalid and is treated with work disability payment; the fact that the suspected person in the detention facilities has shown health problems and is recommended to be hospitalized. And in the end it is not certified the existence of circumstances in proportion to the crime and its suspected author"..

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