



The certificate for criminal record history - violation of legal certainty

Analysis of legislation and practice about the issuance by the Kosovo Police of “certificates for criminal record history” as a direct violation of legal certainty of citizens and legal persons in the Republic of Kosovo



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ABOUT KLI

KLI, Kosovo Law Institute, is non-governmental and non-profit organization of public policy, specialized ideal in the justice sector.

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I. Executive summary

The development of criminal proceedings is in some way a violation of human rights and fundamental freedoms. But this is justified with the fighting criminality. In order to make a balance between these two goals, each restriction of these rights and freedoms is expressly defined by law and any action of the institutions should be based on legal provisions, which constitutes also the main meaning of the rule of law. The same explanation is given also for keeping criminal records history, as their keeping and especially the disclosure of the same presents a kind of interference on human rights and fundamental freedoms. For this reason, each legal state contains legal provisions on the content of criminal records and the procedure for their disclosure. All this in order to ensure the principle of legality and legal certainty for natural and legal persons of a country.

Criminal Code of the Republic of Kosovo (CCRK) has also acted in this way when determining the content of the criminal record and the proceeding for their disclosure. According to this Code, on criminal records are only included final judgments and their execution, not other data. In order to ensure the principle of legal certainty of natural and legal persons of the Republic of Kosovo, the CCRK and the Criminal Procedure Code of the Republic of Kosovo (CPCRK) have precisely determined that when the effects of conviction begin and when the effects of the criminal proceedings begin. To manage with the criminal records, the Law on Courts has defined as a mandated institution the Kosovo Judicial Council (KJC). To implement this legal obligation, the KJC has issued a Regulation on Keeping Criminal Records, by which the KJC has exceeded its legal determinations.

But, by not interpreting properly the legal provisions within the unique legal system of the Republic of Kosovo, in the field of issuance of the certificates for criminal record history is created a dualism of the judicial system and the Kosovo Police. The result of this dualism is extreme violation of the legal certainty of the citizens and legal persons of the Republic of Kosovo. Kosovo Police based on Article 31 of the Law on Police and article 105 of the CCRK, upon their request, issues certificates from the criminal record history to natural and legal persons in the Republic of Kosovo. These same certificates are needed to the same persons to participate in various proceedings and procedures, in which is criterion also deposition of this certificate, otherwise known as "*certificate for criminal record history*". From the public institutions of the Republic of Kosovo, this certificate is required along with the certificate from the criminal record, which is issued by the regular Courts of the Republic of Kosovo. Although Kosovo Police declares that it refers to the CCRK in case of issuance of this certificate, the Kosovo Law Institute (KLI) finds that the Kosovo Police cannot invoke in Article 98 of the CCRK (Article 105 of the previous Criminal Code)¹ to issue these

¹*Clarification:* Currently 3 Criminal Codes are applied in the justice system of the Republic of Kosovo, where mostly is applied Criminal Code no.04/L-082 of the Republic of Kosovo, respectively Criminal Code of 2013, and Criminal Code 06/L-074 of the Republic of Kosovo, respectively Criminal Code of 2019. In this report the latter will be referred to as Criminal Code of the Republic of Kosovo (CCRK) and in some cases also as new Criminal Code, whereas Criminal Code of 2013 we will refer as previous Criminal Code of the Republic of

certificates. This article initially does not authorize the Police to do this. Also, the content of the certificate of Police on criminal record history is not in accordance with this article, which stipulates that in criminal file are only kept the data on the conviction and execution of conviction, and not data on criminal reports and investigations initiated by the prosecution.

KLI estimates that keeping citizens in criminal records for the only reason that against them exist a document with the stamp of an institution, and which is called criminal report, violates the legal certainty in the legal system of the Republic of Kosovo.

It is an extraordinary opportunity for any person who wishes to damage another person during a process, only to file a criminal report against the same, thus preventing him from merit participation in a particular process or proceeding, because the same can not be provided by the Kosovo Police with a certificate of criminal record history. As to the reasoning that the applicant of this criminal report could be prosecuted for false reporting, the systematic monitoring that KLI has made to the justice system for several years has shown that this is not a serious threat to persons that act in this way, due to the fact that are excluded cases when investigations are initiated or certain persons are judged for false reporting. In these cases, prosecutors simply dismiss criminal reports and do not deal at all with the applicant of the criminal report. The other problem in this case is that until the dismissal of this criminal report, a long time passes, that in some cases, KLI has found that this period exceeds the decade. Consequently, it is understood that for all this period, a particular citizen cannot participate in many processes and cannot develop many legal proceedings due to the fact that against him is filed a document that holds a stamp of the prosecution and that is called a criminal report. The same may be completely unfounded or the offense may reach the statutory limitation, but the persecution continues. In this sense, the denial of a citizen's right to participate in various processes and proceedings for the only fact that against him is filed a criminal report, entails numerous violations of human rights and fundamental freedoms, which are stipulated by the Constitution of the Republic of Kosovo and the international acts which are directly applicable in the Republic of Kosovo. In this way, this act of the Kosovo Police and this demand of the institutions becomes an unstoppable source of violation of many human rights and fundamental freedoms by the constitutional corpus of the Republic of Kosovo.

Public institutions, and in particular the Ministry of Foreign Affairs, should understand the legal nature of the criminal report and investigation process, the legal consequences of criminal proceedings and the legal consequences of conviction, in order not to exclude citizens in an unconstitutional and unlawful manner only for the fact that someone has submitted a criminal report against them.

Likewise, the Kosovo Police should not allow to become a toy of some persons to damage and blackmail others persons filing criminal reports against them, namely enter them in these

Kosovo. For the purpose of this research, the main provision that will be treated in this report is article 98 of the new Criminal Code, respectively article 105 of the previous Criminal Code, that are with identical wording.

criminal records, which fact would exclude the same from many processes and proceedings that take place before public institutions.

II. Content of Criminal Records of the European Union and its member states

Since April of 2012 within the European Union (EU) functions Criminal Record Information System (ECRIS). This system provides electronic exchange of criminal record on a decentralized basis of member states. This system enables authorities that manage with criminal records within the EU member states to take information regarding convictions that were imposed to a citizen of EU from the member states of the EU.

Within the European Security Agenda it was also the advancement of this system so as to create a centralized database of criminal records where the authorities that manage with the criminal records in member states of the EU, would have access to the criminal records of other member states of the EU, in the criminal records of citizens of third countries (that are not part of the EU) and stateless citizens. This was realised on April 17 2019, when the EU Parliament and Council have adopted Regulation no. 2019/816 of the European Assembly and Council to establish a centralized system for identifying member states that hold compelling information for citizens of third country and stateless persons. This regulation has fulfilled the previous system and amended the previous regulation.

According to this regulation, criminal record means national registries or registries that keep records for convictions in accordance with national law. Whereas, according to this regulation, with conviction we mean any final judgment of a criminal court against a natural person regarding an criminal offense, until such judgment be entered in the criminal record in the State that has imposed (submitted) the judgment.

From this content of criminal records it is understood that in the Criminal Records Information System of the European Union is relevant only the final judgment imposed, and not other stages of criminal proceedings, such as criminal report, investigations proceedings or indictment.

In this regard, the Republic of Kosovo should also adapt to this system of keeping criminal records, in the sense that in criminal records, to take as relevant only the imposed conviction, and not other stages of criminal proceedings, such as criminal reports, the investigation process (the ruling to initiate investigations) or the indictment.

Moreover, one of the main paths of the Republic of Kosovo for membership in the European Union is also the Stabilization and Association Agreement. In this agreement, the approximation of Kosovo legislation with the legislation of the European Union (EU) is one of the basic categories of this agreement. Among other things, this agreement stipulates that "The Parties know the importance of approximation of existing legislation of Kosovo with that of the EU and its effective implementation.

Kosovo will try to ensure that its existing laws and future legislation gradually move towards compliance with the EU Acquis. Kosovo will ensure that existing laws and future legislation will be properly implemented and applied². For this reason, the approximation of the legislation of the Republic of Kosovo and its implementation with that of the EU, is a necessary condition of the Republic of Kosovo for further advancement on the path to the EU.

In this regard, except at EU level, Member States of the EU regarding the criminal file or criminal records, as relevant receive only the final judgments.

As an example for this we can take France, Federal Republic of Germany, Austria and Slovenia.

The Criminal Procedure Code of France in Article 768 stipulates the national authority that manages with the criminal records, and that is the National Service of the Criminal Records Automatic Service. This authority is located within the Ministry of Justice in France. The same article also defines the data held in criminal records.

These data include final convictions of various types, disciplinary decisions, bankruptcy decisions, decisions that impose the prohibition on the exercise of paternity, decisions on expulsion of foreigners, sentences of foreign courts that are known or are applicable in France and suspension of criminal prosecution.

In the Federal Republic of Germany, the issue of criminal records is regulated with the Act on the Central Criminal Registry and the Registry of Educational Measures.

According to this act, in criminal files are included criminal convictions, some types of decisions of courts related to the trial, and persons against whom was imposed the conviction for criminal offense carried out under the influence of drugs and some administrative decisions.

In Austria, criminal records are managed by the Department of Police Records which is a department within the Federal Police Headquarters in Vienna. Even in Austria, only the imposed convictions are held in criminal records. The certificate issued to the citizens of Austria, is issued whether they have or not convictions. Other data are not included in this certificate³.

The Criminal Procedure Code of the Republic of Slovenia in Article 80, paragraph 1, stipulates that the legal consequences of the conviction enter into force on the day the conviction enters into force, while paragraph 6 of this Article stipulates that the legal consequences of the conviction are suspended with the removal of conviction from criminal

² Stabilization and Association agreement between Kosovo*, on the one hand and European Union and European Community of Atomic Energy, on the other hand. Article 74. (see the link http://www.mei-ks.net/repository/docs/msa_shq.pdf). (Recently accessed on September 22 2019).

³ See the link: <https://www.bmeia.gv.at/en/austrian-embassy-abuja/service-for-citizens/identity-papers-and-other-documents/criminal-record-information/>. (last time accessed on July 04 2019).

records. Article 82 of this Code also stipulates the proceeding for removing the conviction from the criminal record.

Thus, regarding criminal records that are kept at EU level, but also by its member states, of almost single importance is the final conviction imposed by the Court. Other facts of criminal proceedings, such as criminal report, process of investigations or file of indictment, do not constitute relevant facts. In this way, also the legal certainty is achieved, as we are not dealing with legal certainty when a natural or legal person is held in criminal record with the fact that against the same person someone has filed a document which is called a criminal report. As seen above, this does not happen in the EU and its member states.

III. Criminal Records System in the Republic of Kosovo

Keeping criminal records by the state, in some form is interference of state on human rights and fundamental freedoms. But, under strict conditions, this is allowed for the reason of anti-criminal general policies.

Given the fact that the very existence of these criminal records represents interference of state on human rights and fundamental freedoms, each legal state gives particular importance to this field, in the sense that for keeping and, in particular, for the disclosure of such records are defined specific rules and procedures by law. In these states, the principles of this category are set by law, and never by sub-law act.

In this way is also the CCRK. Pursuant to Article 98 of the new Criminal Code, namely Criminal Code No.06/L-074 of the Republic of Kosovo (CCRK), stipulates strict and clear rules on what the criminal record contains, to whom these data may be disclosed and in what proceeding.

This Article stipulates that “1. In criminal file are included the following data: **personal data on the perpetrator of criminal offense; data on conviction, court reprimand, measure of mandatory treatment or acquittal of the perpetrator from the imposed conviction; changes on data that are entered in the criminal record; and data on convictions held and removal of wrong convictions.** 2.Data from the criminal file can only be disclosed **in relation to convictions that are not removed** and may be disclosed to the court, prosecution and police regarding criminal proceedings conducted against a person who has previously been convicted; competent responsible bodies for the execution of criminal sanctions; and the competent bodies participating in the procedure of pardon or for the removal of convictions. 3. Data from the criminal record, upon a reasoned request, may be disclosed to public authorities if additional convictions or mandatory treatment measures are still in force at the time when the request is submitted. 4. In cases when a conviction has been served, the record regarding that conviction can only be disclosed **to the court, the prosecution and the police in relation to the criminal proceedings that is conducted against the person whom the previous conviction was removed.** 5. Any person, with his request, may be given data for **his criminal record** when such data is needed, unless this would endanger national security

or general security or endanger the prevention, investigation, disclosure and prosecution of criminal offenses”.

As to this article, the most important part of it is to determine the content of the court file and the principle confidentiality of this file.

On the other hand, taking into consideration the fact that keeping a criminal record for convicts, and especially the disclosure of this record is a kind of interference on human rights and fundamental freedoms, here we are dealing with the consequences that criminal proceedings creates and imposed conviction. With regard to Criminal Proceedings, the CPCRK expressly stipulates that “When it is known that the initiation of criminal proceedings has the consequence limiting some certain rights and when the criminal proceeding is conducted for any criminal offense for which the conviction is foreseen for more than three years imprisonment, such consequence enters into force from the moment of entering into force of the indictment, unless is not otherwise defined by law. If the criminal proceeding is conducted for any criminal offense for which is foreseen punishment with a fine or imprisonment up to three (3) years, such consequence enters into force from the day when the conviction judgment becomes final, unless is defined differently by law”. Whereas, with regard to the legal consequences of the sentence, Article 93 of the CCRK clearly stipulates that the legal consequences of the conviction can only be foreseen by law and that the legal consequences of the conviction are not created when to the perpetrator is issued a fine or judicial reprimand.

Regarding these principle determinations, Law No.06/L-055 on the Kosovo Judicial Council clearly stipulates that within the KJC's duties and responsibilities and that the KJC “ensures the managing of central criminal record system in accordance with the regulation adopted by the Council.”⁴.

To fulfill this legal obligation, the KJC has adopted Regulation 01/2018 on the Central Criminal Record System in Kosovo. The purpose of this Regulation is to establish a unified structure within the KJC and the Courts of Kosovo for the Criminal Record Central System of Kosovo (CRCSK), that consists of the central database for convicted persons, the process of issuance of certificates for criminal status and extracts, regulations and procedures for the removal of convictions and access to such information as stipulated by the law.

Before that this regulation also defines the functioning of the CRCSK, this regulation also defines the content of the criminal record itself. Also through this regulation is defined the procedure for access to this data by certain institutions, as well as the issuance of certificates for criminal records by natural and legal persons. In terms of protection of the principle of presumption of innocence, this regulation in Article 17, paragraph 4, expressly stipulates that in the certificate of criminal status are noted only final sentences that are not removed.

In addition to the above-mentioned provisions, a type of such criminal records are also kept by the Kosovo Police. Article 31, paragraph 1, of the Law on Police stipulates that the police

⁴ Law no.06/L-055 on the Kosovo Judicial Council. Article 7.1.21.

is authorized to collect and keep personal data, records on crime and other records. Personal data are data relating to an identified or identifiable person that include but not limited in name, date of birth, place of birth and residence. Crime records are records relating to certain criminal offenses that include, but are not limited to the type of criminal offense, the time and place of the commission of the offense, methods and ways used to commit the offense, any injuries to persons or damage of property that is a consequence of criminal offense and its motive. According to paragraph 3 of this Article, the police collect and keeps personal data and criminal offense records only for analysis and use in the protection of public order and security, the disclosure and prevention of criminal offenses, in the identification, location and apprehension of perpetrators of criminal offenses and for the achievement of other legitimate objectives of police.

As another purpose for which such records may be used, pursuant to paragraph 8 of this Article is their use for statistical or analytical purposes by the police or ministry. Finally, paragraph 10 of this Article stipulates that the Police ensures with the request of any person, any personal data kept by the police regarding to the person that makes the request, unless in those cases the provide of data may damage investigations or when the interest of credibility from the other person or the public is more important than the interest of disclosure of person who made the request. After the disclosure that the personal data kept in the registry are incorrect, the police will correct or remove those personal data.

IV. Functioning of these provisions within the legal system of the Republic of Kosovo

Regarding the Law on Police, this law entered into force on April 3, 2012, whereas Criminal Code no. 04/L-082 of the Republic of Kosovo entered into force on January 1 2013. Both these laws, have provisions that regulate the issue of criminal records.

Article 439 of the previous Criminal Code of the Republic of Kosovo stipulated that “with the entry into force of this Code, UNMIK Regulations and the Criminal Code of Kosovo (UNMIK REG 2003/05) shall be repealed as well as **other legal** and sub-legal acts **that cover the issues treated in this Code.**”

Whereas, the Criminal Code of the Republic of Kosovo entered into force on April 14 2019 is a continuation of this code. Pursuant to Article 433 of this Code, the previous Criminal Code, is repealed, respectively Criminal Code *no.* 04/L-082 of the Republic of Kosovo amended and supplemented by Law no.04/L-129 and Law no. 04/L-273

On the other hand, the Law on the KJC clearly stipulates that as responsible institution to manage the central system of criminal records is the KJC.

In terms of this chronology, we mean that any provision of the Law on Police which is not in accordance with the CCRK and the Law on the KJC is considered repealed.

On the other hand, Article 31 of the Law on Police itself stipulates the purposes for which criminal records can be used. Paragraph 10 of this Article which stipulates disclosure of such records to a party, at his request, violates the Law on Police itself, namely Article 6,

paragraph 2 of this Law which stipulates that the Police cooperate and report to the Office of Public Prosecutor⁵ competent for information regarding charges for suspected criminal activities, for which the police was informed in accordance with the applicable law. Thus, the criminal information and records provided by the police, the latter can only use them only for purposes of anti-criminal policy and the same to provide exclusively only to the prosecution and the courts, and not to the citizens, even at their request.

Further, in the legal system of the Republic of Kosovo, the Criminal Code is an organic law, which has the advantage to other laws. This code stipulated the content of the criminal record and the proceedings related to access and disclosure of these data. By this we understand that in addition to the above-mentioned argument, this is an additional argument that the Kosovo Police cannot create legal duality within the legal system of the Republic of Kosovo. This conclusion otherwise is translated with the same conclusion as above, that the Police have no right to issue, disclose to the parties the data from the criminal file, even less if these data are not in accordance with the CCRK criteria on the content of the criminal record. Moreover, the creation of institutional dualisms in terms of non-compliance of laws is a violation of the principle of legal certainty. According to the Venice Commission, the instability and inconsistency of legislation or executive action can affect a person's ability to plan his or her actions. According to this commission, the stability and consistency of the law is one of the main elements of the principle of legal certainty⁶.

V. Illegality of criminal records of the KJC

With the purpose of application of the Law on the Kosovo Judicial Council, the KJC on May 2, 2018 adopted the Regulation on the Criminal Records Central System of Kosovo, which repealed the Regulation 01/2015 on Keeping Records for Convicted Persons.

KLI estimates that the main achievement of this regulation is the fact that the same it has sufficiently strengthened the respect of the **presumption of innocence**, which according to Article 31 paragraph 5 of the Constitution of the Republic of Kosovo is also a constitutional principle. So far, in the criminal record certificates issued by the Courts are shown also the criminal proceedings that are ongoing, even at the investigative stage. This regulation, with regard to convictions, stipulates that **“in the certificate of criminal status are noted only final convictions which are not removed”, and in this certificate “should not be noted none information for none case or criminal proceeding that is ongoing before any court of Kosovo”**⁷.

⁵ This law refers to the State Prosecutor as the Public Prosecutor, since this institution was named so before the reform of 2013 in the Justice System, that correspond with the time when the Law on Police entered into force.

⁶ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW. “*RULE OF LAW CHECKLIST*”. Study No. 711 / 2013. Strasbourg. 18 Maj 2016. (see the link: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)). (last time accessed on July 04 2019).

⁷ Shala G. “*Independence, efficiency, accountability and Integrity of the Judicial and Prosecutorial system*”. Kosovo Law Institute. January 29 2019. p. 10-13 (see the link <https://kli-ks.org/wp-content/uploads/2019/01/Raporti-KGJK-KPK-2018-Final-29.01.2019-1-1.pdf>).

However, the KJC in this regulation did not respect the legal determinations of the CCRK on the content of the criminal record. Initially, in Article 9, paragraph 1, points a and b, this regulation stipulates that in the criminal record are included the data on the conviction and the data on the sanctions, including the main, alternative and supplementary convictions. Whereas, in paragraph 4 of this Article, for the data on the execution of the conviction, this regulation also stipulates the date of payment of the fine. In terms of Article 93 of the CCRK, a fine in this case cannot be included in the criminal record, as the CCRK clearly stipulates the lack of legal consequences in the case of the imposition of punishment with a fine and court reprimand. Thus, the KJC has correctly used the categories of the criminal record, but has exceeded the legal determinations when has specified that what is included in these categories.

In this regard, KLI sees as concerning the KJC's access towards restricting human rights and fundamental freedoms through secondary legislation. Apart the fact that the KJC should put the judicial system on the right track through secondary legislation and adopted policies, this institution first should consult the legal basis, so as not to have disorder of the functioning of the legal system on one hand, and decrease of human rights and fundamental freedoms on the other hand.

VI. Violation of legal certainty by the Kosovo Police through the certificate for criminal record history

Kosovo Police, with the request of natural and legal persons, issues for the same the certificate for criminal record history. KLI has provided from a citizen such a certificate, and for the same has requested additional clarification from the Kosovo Police, regarding the nature of this certificate and the legal basis under which this certificate is issued to natural and legal persons by the Kosovo Police.

In the written response of the Kosovo Police, states that this certificate is issued to natural and legal persons upon their request, that this shall be done pursuant to Article 31 of the Law on Police, and that the Kosovo Police pursuant to paragraph 1 of this article, is authorized to collect and save data under Article 105 of the Criminal Code of the Republic of Kosovo⁸.

In this response it is stated that “the proceeding to issue this certificate starts with the application of the natural person at the Police Station, fills the request, the statement for which reason he needs it, with a copy of a valid personal document and is initially verified in KPIS, the person who has applied for a certificate for personal purposes (visa abroad, weapons permit, employment, gain/release of citizenship of the Republic of Kosovo, etc.).

Then, if the person does not appear that has initiated cases by the Kosovo Police, a certificate shall be issued to the party, whereas when there are criminal cases initiated by the Kosovo Police, and in the capacity of the suspect, the person's request is completed according to internal rules of police, is sent to the Legal Affairs Sector of the Kosovo Police, and after giving confirmation at the Legal Affairs Sector, the certificate is issued to the applicant with

⁸ Electronic response from the Public Information Office of Kosovo Police, February 22 2019

or without a criminal record or with the remark that the case is in the proceeding at the Prosecution or Court. Whereas, this certificate contains personal data, legal basis, date of issuance of certificate, the Police stamp, signatures of authorized persons. If the applicant, after verification in KPIS, has not a initiated case at the Kosovo Police, the certificate is issued to him, there is no criminal record. Upon ascertainment of the Legal Affairs Sector, the certificate is issued to the applicant with or without a criminal record or with the remark that the case is in the proceeding at the Prosecution or Court”.

Further, in the response of the Kosovo Police it is stated that if a criminal report is submitted against a citizen in the Kosovo Police and the latter has proceeded the same to the Prosecution, this case appears in the criminal file of citizen, even if the State Prosecutor has not officially initiated investigations (has not issued the ruling to initiate investigations). According to the Kosovo Police, this case appears until the party does not provide evidence that the proceedings against him have been ceased. On the other hand, in the certificate of a citizen, which is provided by the KLI, states that this certificate is issued based on Article 105 of the previous Criminal Code (Article 98 of the new Criminal Code).

a. Cases when the certificate of Kosovo Police on criminal record history is required

For many administrative proceedings, the citizens of the Republic of Kosovo are obliged to issue this certificate as well. KLI has done a simple search on the internet, and has seen that in various annunciation as a criterion is also this certificate of Kosovo Police, otherwise known as *"the certificate for criminal record history"*.

The request for this certificate is mostly expressed in the foreign service of the Republic of Kosovo, where the consulates of the Republic of Kosovo in foreign countries request this document in case of different procedures. An example of this is the General Consulate of the Republic of Kosovo in the United States of America⁹, Embassy of the Republic of Kosovo in Belgium¹⁰, Embassy of the Republic of Kosovo in the Netherlands etc¹¹.

This document is also required in various job vacancies, for example, for employment in the State Agency of Air Navigation¹², on boards of various public enterprises¹³ etc.

Also, this document is required in various administrative procedures at local level of governance¹⁴.

⁹ See the link: <http://www.konsullata-ks.net/ny/?page=1,14>, (recently accessed on July 2 2019)

¹⁰ See the link: <http://www.ambasada-ks.net/be/?page=1,67>, (recently accessed on July 2 2019)

¹¹ See the link: <http://ambasada-ks.net/nl/?page=1,103>, (recently accessed on July 2 2019)

¹² See the link: <https://kk.rks-gov.net/mitrovicjeejugut/wp-content/uploads/sites/18/2019/04/Konkurs.pdf>, (recently accessed on July 2 2019)

¹³ See the link: <https://kk.rks-gov.net/mitrovicjeejugut/wp-content/uploads/sites/18/2019/04/Konkurs.pdf>, (recently accessed on July 2 2019)

For more, there are a number of administrative instructions that for certain procedures that these administrative instructions regulate, have sanctioned as a criterion also the deposit of this document¹⁵.

b. Unconstitutionality, illegality and violation of legal certainty by the Kosovo Police through this certificate

KLI has analyzed the certificate issued by the Kosovo Police, where besides this certificate, has also reviewed the legal basis of this document and all relevant laws. The conclusion is that also the issuance and the application for this certificate is unconstitutional, illegal and violate the legal certainty in the Republic of Kosovo.

Firstly, from the response of the Kosovo Police it is understood that in the certificate of Police are other data except final judgments. Moreover, except in the cases when the citizens are under investigation, in these certificate is also marked as criminal record history also the existence of any criminal report deposited by the citizens at the Police or by the Police to the Prosecution, even in cases when the latter has not taken any inquiry action.

Regarding the limitation of human rights through certificates from criminal records, the Constitutional Court of the Republic of Kosovo in Judgment KI 06/10 (Valon Bislimi vs. Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice) issued on October 30 2010 had ascertained that while we do not have a court ruling that restricts human rights (in this concrete case freedom of movement), is violation of the constitution, to limit human rights for the fact of existence of a case in criminal proceeding.

“...80. Constitutional court notes that in the proceeding against the Applicant, the Municipal Court has not issued any decision in accordance with Article 271 of the Criminal Procedure Code. Instead, the court refrained to issue a certificate that was according to the established practice, the necessary criterion for the issuance of passport, although this document was not marked in Article 23.2 of the Law on Travel Documents83. Regarding the fact if the authorities have fulfilled their obligation to regularly review the measures, which restrict the freedom of movement to the Applicant, the Constitutional Court notes that no review of the challenged measures was made85. She concludes that the authorities have failed in their obligation under Article 2 of Protocol No. 4 of the Convention to ensure that any interference on the applicant's right to leave his country is, from the beginning until the end of its

¹⁴ See the link: <https://kk.rks-gov.net/podujeve/drejtorite-2/administrate/sektori-i-gjendjes-civile/>, (recently accessed on July 2 2019); See the link: <https://kk.rks-gov.net/gjakove/administrate-3/sherbimet-administrata>, (recently accessed on July 2 2019)

¹⁵ Ministry of Internal Affairs, *ADMINISTRATIVE INSTRUCTION (MIA) NO. 10/2015 FOR THE CONDITIONS AND PROCEDURES OF CHANGE OF PERSONAL NAME*, entered into force on May 22 2015. (see the link [https://kk-arkiva.rks-gov.net/mitrovica/getattachment/Services/Ofiqaria/Ligjet-dhe-udhezimet-administrative/5--UDHEZIM_ADMINISTRATIV_\(MPB\)_NR-_10-2015_PER_KUSHTET_DHE_PROCEDURAT_E_NDERRIMIT_TE_EMRIT_PERSONAL.pdf.aspx](https://kk-arkiva.rks-gov.net/mitrovica/getattachment/Services/Ofiqaria/Ligjet-dhe-udhezimet-administrative/5--UDHEZIM_ADMINISTRATIV_(MPB)_NR-_10-2015_PER_KUSHTET_DHE_PROCEDURAT_E_NDERRIMIT_TE_EMRIT_PERSONAL.pdf.aspx)), (recently accessed on July 2 2019).; Ministry of Internal Affairs, *ADMINISTRATIVE INSTRUCTION (MIA) NO. 05/2015 ON THE PROCEDURE AND CRITERIA OF DETERMINING THE STATUS OF PERSON WITHOUT CITIZENSHIP, THE WAY OF GAINING CITIZENSHIP FOR THE PERSON WITHOUT CITIZENSHIP AND PERSON WITH REFUGEE STATUS*. Entered into force on April 30 2015. (See the link: <https://www.refworld.org/pdfid/553f3f864.pdf>). (recently accessed on July 2 2019).

deadline, justified and proportionate with the circumstances of the case. 86. Therefore, there has been a violation of the Applicant's right for freedom of movement, guaranteed with Article 35 of the Constitution in conjunction with Article 2, paragraph 2 of Protocol No. 4 of the Convention”.

On the other hand, keeping citizens in criminal records and limiting their rights through these records, in the cases when they do not have a final judgment, moreover they are not even under investigation by the prosecution, is a violation of the constitutional principle of the presumption of innocence. Article 31, paragraph 5 of the Constitution of the Republic of Kosovo stipulates that “Everyone charged with a criminal offense, is presumed to be innocent until his/her guilt is not evidenced, in accordance with the law”.

Further, the certificate issued by the Kosovo Police, although as a legal basis mentions Article 105 of the CCRK, its content in no form is not in accordance with the determinations that CCRK does in this article. As explained above, Article 105 of the previous Criminal Code or Article 98 of the new Criminal Code of the Republic of Kosovo stipulates that the criminal record contains the data on the conviction and the data on the execution of the conviction, and in no way does not contain other data relating to criminal proceedings. Under this way, it was attempted to draft also the KJC Regulation, treated above in this report. For this reason, the Kosovo Police improperly uses the CCRK when issues such certificates, which are at least in accordance with the CCRK, and therefore are unlawful, due to the lack of any other legal basis.

Regarding the limit of human rights for the only fact that against a person was initiated a criminal report, there is no provision in the CPCRK that allows such a thing, whereas the CPCRK expressly stipulates that “before taking the final judgment, freedoms and other rights of the defendant may be limited **only** under the conditions set forth in this Code”.

Also, the CPCRK stipulates clearly and precisely when the consequences of criminal proceedings begin, where in this determination, the CCRK does not take as a relevant point the file of criminal report and the conduct of investigations, but takes the entry into force of the indictment for more serious criminal offenses and final judgment for some lesser criminal offenses. In this regard, the CCRK stipulates that “When it is known that the initiation of criminal proceedings has for consequence to limit some certain rights and when the criminal proceedings are conducted for any criminal offense for which is foreseen the conviction for more than three years imprisonment, such consequence **enters into force from the moment the indictment enters into force**, unless otherwise provided by the law. If the criminal proceedings are conducted for any criminal offense for which is foreseen punishment with a fine or sentence imprisonment up to three (3) years, such consequence enters into force from the date when the conviction judgment is final, unless otherwise provided by the law”.

Moreover, a legal provision such as paragraph 10 of Article 31 of the Law of Police cannot persecute citizens for the only fact that against the same someone has filed a criminal report against them, whose value is zero. Regarding this provision, on pages 8-9 of this report is

explained also what is the legal power and position of this provision within the unique legal system of the Republic of Kosovo.

Regarding institutions that oblige citizens to receive such certificate from the Kosovo Police, there is no such requirement mentioned in the basic laws. As for the administrative instructions that sanction the obligation of the citizens to be equipped with this certificate, this sanction is excess of legal determinations, in that way that in this part, the institutions have deviated to adopt secondary legislation which for the exclusively purpose has the implementation of primary law.

Institutions that for various proceedings of citizens require also this certificate, and in particular the foreign service of the Republic of Kosovo, should be aware on the content of this certificate and the legal nature of the criminal report and the investigation stage. On the contrary, the citizens will be persecuted for the fact that someone from the citizens or institutions has filed a criminal report, which as alone, has no legal power and consequence. Institutions should be aware that any person can file a criminal report, and only after the prosecution body has been activated, the same make sense. On the contrary, the criminal report is a document which holds a stamp of acceptance, which exclusively shows that the criminal report is technically accepted and does not estimate nothing of the merits of that document.

Moreover, remove of citizens from the obligation to receive this certificate only protects the various processes from external interference and compromise of these processes and proceedings. It is a exceptional opportunity for any person who wishes to damage another person during a process, only to file a criminal report against the same, and thereby he is deprived from merit participation in a particular process or proceeding, for the reason that the same cannot receive a certificate of criminal record history by the Kosovo Police. As to the reasoning that the same could be prosecuted for false information, from the systematic monitoring that KLI has made to the justice system for several years now is seen that this is not a serious threat against persons that act in this way, because that are exclusionary cases when investigations are initiated or certain persons are judged for false information. In these cases, prosecutors simply dismiss criminal reports and do not deal with the applicant of criminal report at all. The other problem in this case is that until the dismissal of this criminal report, a long time passes, which in some cases, KLI has found that this period exceeds the decade. Consequently, it is understood that for all this period, a particular citizen cannot participate in many processes and cannot develop many legal proceedings due to the fact that against him is filed a document that holds a stamp of the prosecution and which is called a criminal report. The same may be completely unfounded or the offense reached the statutory limitation period, but the persecution continues. In this sense, the denial of a citizen's right to participate in various processes and proceedings for the only fact that against him is filed a criminal report, him entails numerous violations of human rights and fundamental freedoms which are stipulated with the Constitution of the Republic of Kosovo and international acts directly applicable in the Republic of Kosovo. In this way, this act of the Kosovo Police and

this demand of the institutions becomes an unstoppable source of violation of many human rights and fundamental freedoms by the constitutional corpus of the Republic of Kosovo.

The most endangered principle in this case, is the principle of legal certainty. The sanctioning of criminal proceedings itself presents a violation of human rights and fundamental freedoms, but justified with the aim of fighting criminality. In theory this is explained through the doctrine of the efficiency of criminal proceedings and the protection of human rights and fundamental freedoms. But, in order to keep the bigger balance, the principle of legality and legal certainty determines that when one prevails and the when the other. But, in the lack of a legal definition, should prevail human rights and fundamental freedoms, for the fact that the Constitution of the Republic of Kosovo is built on the theory of absolute freedom of citizens.

Regarding this issue, the Ombudsperson has confirmed that also the Ombudsperson Institution (OI) is also handling this issue. According to the Ombudsperson, from the investigations so far of this institution, it is considered that acting in this way with the criminal records violates the legal certainty of the citizens of the Republic of Kosovo and other basic principles.

“If we enter in the criminal record also the persons against whom there is no ruling for initiation of investigations but only a criminal report or something similar, then it means that almost every second resident of the Republic of Kosovo is in criminal record, that the finding turns out to be that Kosovo is the most criminalized country in the world. The entry into the system of criminal records should be done after the initiation of the criminal proceeding, respectively after the issuance of the ruling for the initiation of investigations by the State Prosecutor. We have found that in the system of criminal records are entered persons without a specific proceeding. In this way is violated the legal certainty of the citizens and other basic principles. It is well known that criminal proceedings begin with the issuance of a ruling for initiation of investigations and not in other preliminary stages”.¹⁶

Regarding the findings of this report, the University Professor of Criminal Law and the former President of the Supreme Court of the Republic of Kosovo, estimates that in the field of criminal record, on that which is known as a criminal record history, enter only final convictions. He estimates that no institution does not have the right to condition citizens that for participation in certain proceedings to receive the certificate of police, where in addition to final judgments, criminal reports also appear. “Institutions can not condition citizens with this certificate. It is important to look at the evidence of final convictions that have not been deleted. There is also a criminal report. Even in the pre-war period, a certificate from the criminal record was not required, where as the criminal record is considered also the existence of a criminal report. Anyone can file a criminal report, it can be a written criminal report, oral, false etc. This should not be seen, but should be seen only in the register of final

¹⁶ KLI interview with Mr. Hilmi Jashari, Ombudsperson. September 2019.

convictions that have not been deleted. A criminal report is not a determining factor for a criminal record history of a person”.¹⁷

Regarding the issuance of these certificates by the Kosovo Police, Hasani has requested that the KJC, Kosovo Prosecutorial Council (KPC) and the Kosovo Police to hold a joint meeting and treat this issue.

“In this case, KJC, KPC and Kosovo Police should be activated. They should hold a joint meeting and agree that the existence of a criminal report will not be taken as relevant fact, but only final decisions that have not been deleted. These statements can only be given by the court, focusing only on criminal record of final convictions. This access is unconstitutional, illegal and against established standards. In this way, the rights of citizens are violated, as he is forced to receive a certificate from an institution that is not authorized to issue certificates from these records”.¹⁸ KLI reminds the Kosovo Police that the data provided by the Police serves only for the purposes of the anti-criminal policy of the Kosovo Police, for the needs of the Prosecution and the Courts. In fact, this is the mission itself of the Kosovo Police from which cannot come out. KLI appeal to the Kosovo Police not to turn into a toy through which certain persons blackmail other persons, by placing them in a total position of legal uncertainty, and the disaster is that, all these to do through the main security institution in the Republic of Kosovo. Kosovo, that is the Kosovo Police.

Also, KLI reminds the Kosovo Police that it cannot invoke in Article 98 of the CCRK (Article 105 of the previous Criminal Code) to issue certificates that contain data on criminal reports and the investigation process, as this article does not stipulate that this data are saved in the criminal record, but only the data on convictions and the execution of convictions are saved.

KLI estimates that the issuance of this certificate by the Kosovo Police exceeds the legal powers of the Kosovo Police, creating determinations beyond the law and creating institutional and legal dualism to the judicial system of the Republic of Kosovo, namely the KJC as a mandated institution to manage with the criminal records in the Republic of Kosovo. The process of collection and keeping of records by the Kosovo Police is not a problem, but its their disclosure in illegal way by misinterpreting the CCRK, presents no less than a destruction of legal certainty in the Republic of Kosovo, in particular the principle of legal certainty of natural and legal persons in the Republic of Kosovo

On the other hand, even the demand of institutions for this document is unconstitutional and illegal. Regardless of whether or not the Kosovo Police issues this document, the institutions of the Republic of Kosovo should be well informed about the legal consequences of criminal reports and other actions during criminal proceedings, and not to violate their rights and fundamental freedoms of citizens for the mere fact that against the same was submitted a criminal report.

¹⁷ KLI interview with Mr. Fejzullah Hasani, University professor, former President of the Supreme Court of Kosovo. September 2019

¹⁸ Ibid.

If this is done in this way, this criminal record will become a source of violation of human rights and fundamental freedoms, that in case of the membership of Kosovo in the Council of Europe, will create an unbearable budgetary burden for the Republic of Kosovo, due to appeals to the European Court of Human Rights.

VII. Conclusions

1. Keeping criminal records by the state in some way is interference of state on human rights and fundamental freedoms. But, under strict conditions, this is allowed due to the general anti-criminal policies. For this reason, each action should be based exclusively on law, which is also the most important meaning of legal state.
2. Article 98 of the CCRK (Article 105 of the previous Criminal Code) stipulates that in criminal records are included only information on the conviction and execution of the conviction. The same article also stipulates the proceeding for disclosure of these data.
3. Regarding the legal consequences of the conviction, Article 93 of the CCRK clearly stipulates that the legal consequences of the conviction can only be foreseen by law and that the legal consequences of the conviction are not created when to the perpetrator was imposed punishment with a fine or court reprimand.
4. The CPCRK stipulates clearly and precisely when the consequences of criminal proceedings begin, where in this determination, the CCRK does not take as a relevant point the file of criminal report and the conduct of investigations, but takes the entry into force of the indictment for some more serious criminal offenses and the final judgment for some lesser criminal offenses. In this regard, the CCRK stipulates that “When it is known that initiation of criminal proceedings has for consequence limitation of some certain rights and when the criminal proceeding is conducted for any criminal offense for which the conviction is foreseen for more than three years, such consequence enters into **force from the moment the indictment enters into force**, unless was not otherwise stipulated by the law. If the criminal proceeding is conducted for any criminal offense for which is foreseen the punishment with a fine or imprisonment sentence up to three (3) years, such consequence enters into force from the date when **conviction judgment is final**, unless was not otherwise stipulated by the law”.
5. According to the Law on the KJC, the KJC is the mandated body that manages with the criminal records in the Republic of Kosovo. To implement this legal obligation, it is primary that the KJC’s regulation on Criminal Records to be in full accordance with the CCRK.
6. Kosovo Police can use data from criminal records only for its anti-criminal policies, for the needs of the prosecutorial and judicial system.
7. After the adoption of the Law on the KJC, paragraph 10 of Article 31 of the Law on Police is considered repealed, as according to this law, the KJC is responsible to manage with the criminal records. For this reason, following the adoption of this law, the Kosovo Police has no power to issue certificates for the criminal record history of natural and legal persons.

8. Kosovo Police cannot be invoked in Article 98 of the CCRK (Article 105 of the previous Criminal Code) to issue these certificates. This article initially does not authorize the Police to do so. Likewise, the content of the certificate of Police on criminal record history is not in accordance with this article which stipulates that only criminal records on conviction and execution of conviction are kept in the criminal record, and not records for criminal reports and investigations initiated by the prosecution.
9. Keeping citizens in criminal records for the only reason that against them there is a document with a stamp of an institution and which is called a criminal report, violates the legal certainty in the legal system of the Republic of Kosovo
10. Such action of the institutions creates a source for the violation of a great number of human rights and fundamental freedoms set forth in the Constitution of the Republic of Kosovo and other international acts directly applicable in the constitutional and legal system of the Republic of Kosovo.
11. Other institutions, especially Ministry of Foreign Affairs, should understand the legal nature of criminal report and the process of investigations, legal consequences of criminal proceeding and legal consequences of conviction, in order that not to exclude citizens in unconstitutional and illegal way for the only fact that someone against them has filed a criminal report.
12. Kosovo Police should not allow to become a toy of some persons to damage and blackmail other persons with the file of criminal reports against them, namely entering them in those criminal records, which fact will exclude the same from many processes and proceedings that are developed at public institutions.

VIII. Recommendations

1. Kosovo Police to stop the issuance of certificates for criminal record history for natural and legal persons, and in particular for data which are not part of the criminal record under Article 98 of the CCRK (Article 105 of the previous Criminal Code).
2. KJC to amend the Regulation on Keeping Criminal Records and the same to harmonize it with the CCRK, in order not to create consequences for punishments with a fine.
3. Public institutions in the Republic of Kosovo should stop putting obligation on citizens to receive the so-called certificate of criminal record history or certificate on criminal record history. In any process or proceeding that is developed at these institutions, sufficient is a certificate issued by the Courts, which is done in accordance with the rules set by the KJC, which regulations should be in accordance with the basic laws.
4. Public institutions of the Republic of Kosovo should be well informed about the legal nature of the criminal report and the investigation stage, in a way that not to persecute citizens in a unconstitutional and illegal way. In this regard, the Ministry of Foreign Affairs of the Republic of Kosovo should give a special contribution, where this contribution should be in two directions: prohibition of embassies and consulates of the Republic of Kosovo in other countries to oblige citizens to receive this document as well as advocacy to foreign embassies in Kosovo, to explain the legal nature of this certificate, criminal report and investigation stage, that citizens not to be excluded even in the proceedings that are developed at these embassies or consulates of foreign countries, for the only fact that against them was filed a criminal report.
5. Ombudsperson to come up with an ex-officio report and recommend to the Kosovo Police the prohibition of issuance of these certificates and request from the public institutions the prohibition of the obligation of natural and legal persons to receive this certificate. Also, through this report, the Ombudsperson to recommend to the KJC the harmonization of the Regulation for Keeping Criminal Records with the basic law, namely the CCRK.
6. Institutions of the Republic of Kosovo as in this case but also in other cases in the future, should have a emphasized and constant care that within legal system of the Republic of Kosovo to keep the principle of legal certainty of citizens.