Management of cases of abuse in public procurement by courts and prosecution in Kosovo
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Executive Overview

Justice Today, a platform created by the Group for Legal and Political Studies in the framework of the project "Monitoring of the judicial and prosecutorial system in Kosovo", has conducted a research on cases related to the criminal offence "Abuse and fraud in public procurement" from Article 415 of the Criminal Code of Kosovo (hereinafter CCRK), as well as cases related to the criminal offence "Abuse of official position or authority" which are related to violations of the Law on Public Procurement.

Public procurement is a process that public institutions follow to make purchases of goods and services, mainly from the private sector. Public procurement is part of the economy, which continues to be one of the most important pillars in public processes of spending public money. Moreover, it is a crucial process for ensuring accountable governance that supports sustainable economic development.

Recognizing the importance of public procurement, Justice Today during the period of more than two years (June 2019-November 2021) of monitoring the justice system in Kosovo, has treated with priority cases of abuse and fraud in public procurement in the courts, and the drafting of indictments of the prosecution regarding criminal offences of this nature.

During the monitoring, Justice Today in the basic courts has identified 18 cases of this nature for which a court judgment had been issued, more precisely cases from the Basic Courts of Prishtina, Mitrovica, Peja, Prizren, Gjakova, Gjilan, and Ferizaj. Meanwhile, regarding the prosecution, 5 indictments filed by the basic prosecutions in Ferizaj, Gjilan and Gjakovahave been analysed.

In a narrow sense, the elaboration of this topic is of a high importance for the fact that the criminal offence "Abuse and fraud in public procurement" under Article 415 of the CCRK, is a recent addition in the Criminal Code of 2018 which entered into force in April 2019, and the monitoring of some cases has shown that there are challenges and dilemmas in court practice regarding the full implementation of this legal provision. Meanwhile, in a broad sense, for the justice system this topic is important to address since it will highlight the management of cases of abuse and fraud in public procurement in terms of punishing the perpetrators of this crime, and other criminal offences related to violations of the Law on Public Procurement.

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1http://www.legalpoliticalstudies.org/
2The project "Monitoring the judicial and prosecutorial system in Kosovo", funded by the Ministry of Foreign Affairs of the United Kingdom, through the British Embassy in Pristina.
Introduction

Public procurement is a process that attracts the attention of the public, since a large percentage of the state budget is spent on procedures through which the public sector buys goods and services from the private sector, the values of which usually constitute a significant part of GDP.

Public procurement is an important factor of economic development and at the same time the target of the fight against corruption, due to the complex nature of public procurement with economic operators from the private sphere, this process is often seen as a tool for abuse of public money and corruption.

Therefore, in our country, in 2018 an important step has been taken in this direction, as the Criminal Code has incorporated the criminal offence of "abuse and fraud in public procurement" as a separate criminal offence. Justice Today during the monitoring prioritised the monitoring of cases which fall into the chapter of criminal offences of corruption, and in particular the monitoring of cases which are related to violations of the Law on Public Procurement and the issue of implementation of Article 415 of the CCRK.

Using monitoring data and judgments published on the websites of basic courts in Kosovo, the analysis shows the challenges of the justice system in Kosovo, the lack of law enforcement, and the existence of legal gaps in the Criminal Code.

Based on the findings of Justice Today, the institutions of the judicial and prosecutorial system in our country face dilemmas and challenges in dealing with public procurement cases, followed by gaps in legislation, which result in the lack of outcomes.

The results of the analysis show that despite the legislative progress in the field of public procurement, there is still room for future improvement towards achieving fair and practical implementation of legislation.

The purpose of this analysis is not to analyse administrative procedures in the field of public procurement, but the focus is on the implementation and actions of judiciary and prosecution in dealing with criminal cases in this field. The findings presented in this analysis are based on formal sources, namely the Criminal Code of Kosovo, and on material sources such as judgments of cases of abuse in public procurement, as well as daily reports of Justice Today, the content of which is based on direct monitoring of court hearings.

From all monitored and analysed cases by Justice Today, there were 18 cases pertaining to abuse in public procurement where the basic courts have rendered a judgment, acquittal, conviction or rejection. Whereas, in 5 cases it was found that the indictments contain
deficiencies in their content. At the end of the analysis, recommendations were given to the relevant institutions, with special emphasis on recommendations related to punishment of perpetrators of criminal offences in public procurement and legislative recommendations.

**Legal Basis**

The field of public procurement in Kosovo is regulated by primary and secondary legislation. Primary legislation includes Law no.04 / L-042 on Public Procurement of the Republic of Kosovo as amended and supplemented by Law no. 04 / L-237, Law no. 05 / L-068 and Law no. 05 / L-092. Meanwhile, secondary legislation includes by laws which ensure procurement activities.

The purpose of the Law is to provide the most efficient, transparent and fair way of using public funds, public resources and all other funds and resources of the contracting authorities in Kosovo by determining the terms and conditions that will be applied, the procedures that will be followed, the rights to be respected and the obligations to be fulfilled by people, economic operators, enterprises, contracting authorities, work concessionaires and public bodies that develop, are involved, participate or are interested, in procurement activities or that are involved or relate to such funds or resources. This law also aims to ensure the integrity and accountability of public officials, civil servants and other persons performing or being involved in a procurement activity by requiring that the decisions of such individuals and the legal and factual basis for such decisions, not to be influenced by personal interests, to be characterised by non-discrimination and a high degree of transparency as well as to be in accordance with the procedural and essential requirements of this law. This law aims to promote the creation of a professional institutionalised culture unaffected by material, impartial, ethical interests, among officials who perform or are involved in a procurement activity, by requiring such persons to behave following the principle of the most efficient, cost-effective, transparent and fair use of public funds and resources, while strictly adhering to the essential procedures and conditions of this law.

In addition to the Law on Public Procurement, which contains the rules of procurement activities, the Criminal Code of Kosovo (CCRK) in Article 415 has systematised the criminal

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5 Laws on Public Procurement: no.04 / L-042, no. 04 / L-237, no. 05 / L-068, no. 05 / L-092 [https://gzk.rks.gov.net/ActDetail.aspx?ActID=2772](https://gzk.rks.gov.net/ActDetail.aspx?ActID=2772)
7 Law on Public Procurement no. 04 / L-042, article 1, paragraph 1, [https://gzk.rks.gov.net/ActDetail.aspx?ActID=2772](https://gzk.rks.gov.net/ActDetail.aspx?ActID=2772)
8 Ibid, article 1, paragraph 2.
9 Ibid, article 1, paragraph 3.
offence "Abuse and fraud in public procurement", which Code entered into force in April 2019. Article 415 of the CCRK, defines the elements of committing this criminal offence and sanctions for any person who violates the rules of public procurement during a bid for the award of a public procurement contract and fraud in public procurement procedures. Before this criminal offence was set in the Criminal Code (entered into force in 2019), the actions related to abuse and fraud in public procurement were incriminated and considered in the context of other related criminal offences in the Criminal Code (entered into force in 2013). Meanwhile, officials who abuse public office in case of non-compliance with public procurement procedures, are charged with the criminal offence "abuse of official position or authority", or other criminal offences which are consistent with the incriminating actions of officials.

Management of abuse cases in public procurement by the courts

<table>
<thead>
<tr>
<th>BASIC COURT</th>
<th>Case number</th>
<th>Criminal offence</th>
<th>Judgment</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Prishtina</td>
<td>PKR.no.16/18</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Convictive</td>
<td>Sentence of imprisonment for a term of three years, which will be executed after the judgment becomes final. Supplementary sentence of prohibition to exercise public functions in public administration or public service, for a period of 2 years after serving the prison sentence.</td>
</tr>
<tr>
<td>2. Prishtina</td>
<td>PKR.no.185/18</td>
<td>&quot;Subsidy fraud&quot; Article 336 of the CCRK</td>
<td>Dismissal</td>
<td>-</td>
</tr>
<tr>
<td>3. Prizren</td>
<td>PKR.no.57/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Acquittal</td>
<td>-</td>
</tr>
<tr>
<td>No.</td>
<td>Location</td>
<td>Case No.</td>
<td>Offence</td>
<td>Disposition</td>
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<tr>
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<tr>
<td>4.</td>
<td>Prizren</td>
<td>PKR.no. 53/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Conviction</td>
</tr>
<tr>
<td>5.</td>
<td>Prizren</td>
<td>PKR.no.87/18</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Acquittal</td>
</tr>
<tr>
<td>6.</td>
<td>Prizren</td>
<td>PKR.no.54/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Conviction</td>
</tr>
<tr>
<td>7.</td>
<td>Prizren</td>
<td>PKR.no.111/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Acquittal</td>
</tr>
<tr>
<td>8.</td>
<td>Peja</td>
<td>PKR.no.41/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Conviction</td>
</tr>
<tr>
<td>No.</td>
<td>Location</td>
<td>Case No.</td>
<td>Offence Description</td>
<td>判例</td>
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<tr>
<td>9. Peja</td>
<td>PKR.no.25/18</td>
<td>&quot;Conflict of interest&quot; from Article 424 paragraph 1 of the CCRK</td>
<td>Conviction</td>
<td>1 year sentence of imprisonment.</td>
</tr>
<tr>
<td>10. Gjilan</td>
<td>PKR.no.231/18</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Conviction</td>
<td>A fine of 3000 Euros.</td>
</tr>
<tr>
<td>11. Gjilan</td>
<td>PKR.no.125/21</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Conviction</td>
<td>A fine of 5100 Euros.</td>
</tr>
<tr>
<td>12. Gjilan</td>
<td>PKR.no.78/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Acquittal</td>
<td>-</td>
</tr>
<tr>
<td>13. Gjilan</td>
<td>PKR.no.160/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK and &quot;Fraud in office&quot; from Article 426 paragraph 2 of the CCRK.</td>
<td>Acquittal</td>
<td>-</td>
</tr>
<tr>
<td>14. Mitrovica</td>
<td>PKR.no.82/17</td>
<td>&quot;Abuse of official position or authority&quot; from Article 422 of the CCRK, and &quot;Fraud in office&quot; from Article 341 paragraph 3 of</td>
<td>Acquittal</td>
<td>-</td>
</tr>
<tr>
<td>Case No.</td>
<td>Type of Case</td>
<td>Description of Offense</td>
<td>Conviction Details</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>15. Gjakova PKR.no.14/19</td>
<td>&quot;Abuse of official position or authority&quot; Article 422 of the CCRK.</td>
<td>Conviction</td>
<td>A fine in the amount of 3400 euro.</td>
<td></td>
</tr>
<tr>
<td>16. Gjakova PKR.no.118/16</td>
<td>&quot;Abuse and fraud in public procurement&quot; Article 415 par.1 of the CCRK.</td>
<td>Conviction</td>
<td>A fine in the amount of 3000 euros. Imposition of the ban on participation in the procedures for awarding public procurement contracts.</td>
<td></td>
</tr>
<tr>
<td>17. Ferizaj Smil: 2021:026882</td>
<td>&quot;Abuse and fraud in public procurement&quot; Article 415 par.1 of the CCRK.</td>
<td>Conviction</td>
<td>A fine in the amount of 2000 Euros. Imprisonment for a period of 1 year, which sentence will not be executed if the accused does not commit another criminal offence within 1 (one) year. Measure of prohibition to participate in the procedures for awarding public procurement contracts, for a period of 6 (six) months.</td>
<td></td>
</tr>
<tr>
<td>18. Ferizaj PKR. no. 99/20</td>
<td>&quot;Abuse and fraud in public procurement&quot;</td>
<td>Conviction</td>
<td>Unique sentence with a fine in the</td>
<td></td>
</tr>
</tbody>
</table>
Table 1. Decisions of the basic courts on cases of abuse and fraud in public procurement and criminal offences related to violations of the Law on Public Procurement (period June 2019 - November 2021).

| Article 415 par.1 of the CCRK. | amount of 1500 euros. Imposition of the prohibition on participating in the procedures for awarding public procurement contracts for a period of 6 (six) months. |

The data presented in the table no. 1 show the handling of cases of abuse and fraud in public procurement and criminal offences related to violations of the Law on Public Procurement (June 2019 - November 2021) by the basic courts in Kosovo regarding the guilt, of the accused, and the type and severity of the sentences. From the monitoring data reflected in table no. 1, it is noticed the low punishment of persons who have violated the public procurement law.

From these data, it was found that in 11 cases the accused were found guilty, in 6 cases were acquitted, while in 1 case the court rendered a rejection verdict.\(^1\) Although, we have a larger number of convictions than acquittals, the disparity between them is modest and as such is worrisome. Regarding the type and height of sentences from the case data presented in the table, fines lead, followed by suspended sentences, then sentences of effective imprisonment. The additional sentence "prohibition of exercising functions in public administration or public service" was imposed only in 2 cases, respectively in the basic court in Prishtina and Peja. Whereas the ban on participating in the procedures for awarding public procurement contracts was imposed in 3 cases, respectively in 2 cases in the Basic Court in Ferizaj, and in 1 case in the Basic Court in Gjakova.

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\(^1\) With a rejection judgment the court rejects the indictment of the prosecution. This judgment is rendered: when the prosecution for the accused has withdrawn from the indictment from the beginning of the court session until its end, when the accused for the same criminal offense has been previously tried with a final judgment or the criminal proceedings against him are terminated by a final decision, when the criminal offense is statute-barred (obsolete) or included in the amnesty or pardon, or when there are other circumstances that exclude criminal prosecution. Meanwhile, with an acquittal, the accused is acquitted. Unlike a rejection judgment, an acquittal is rendered: when the offense with which the accused is charged is not a criminal offense, when there are circumstances that preclude criminal responsibility, and when it has not been established that the accused has committed the criminal offense for which he is charged.
In general, from the data presented in table no.1 Justice Today has found that the punitive policy of courts in Kosovo, is continually characterised by low sentences compared to the gravity of corruption criminal offences as in this case the criminal offence of abuse and fraud in public procurement and criminal offences related to violations of the Law on Public Procurement. In these cases, the sentences of imprisonment imposed for these criminal offences by the courts of first instance vary from 6 months to 3 years of imprisonment, conditional sentences lasting 6 months with a verification period of up to 1 year, while fines vary in height from 1500 euros to 7000 euros. Whereas, in the case of imposing an additional sentence "prohibition of exercising functions in public administration or public service", this sentence was imposed for a period of 2 years. The prohibition on participating in the procedures for awarding public procurement contracts in 2 cases was imposed for a period of 6 months, while in 1 case such it was imposed without any time period of detention. According to Justice Today, such sentences are not satisfactory, given the nature of the criminal case - the violation of public procurement rules in which there is a budgetary damage.

Management of abuse and fraud cases in public procurement by prosecutors

<table>
<thead>
<tr>
<th>BASIC PROSECUTION</th>
<th>Case number</th>
<th>Criminal offence</th>
<th>Damage / benefit according to the indictment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Gjilan</td>
<td>PP/I.no.103/21</td>
<td>“Abuse and fraud in public procurement” article 415 par.1 of the CCRK.</td>
<td>Unspecified</td>
</tr>
<tr>
<td>2. Gjilan</td>
<td>PP/I.no.105/21</td>
<td>Abuse and fraud in public procurement” article 415 par.1 of the CCRK.</td>
<td>Unspecified</td>
</tr>
<tr>
<td>3. Ferizaj</td>
<td>PP/I.no.28/21</td>
<td>“Abuse and fraud in public procurement” article 415 par.1 of the CCRK.</td>
<td>Unspecified</td>
</tr>
<tr>
<td>4. Ferizaj</td>
<td>PP/I.no.100.A.464-2/2020</td>
<td>“Abuse and fraud in public procurement” article 415 par.1 of the CCRK.</td>
<td>Unspecified</td>
</tr>
</tbody>
</table>
From the data provided above in table no. 2, Justice Today has found that there are obvious shortcomings in the content of 5 indictments presented in the table, which as a result has preceded the circumvention of paragraph 3 of Article 415 of the CCRK. (no.06 / L-074).

The identified shortcomings of indictments are due to based on the fact that the prosecution has not authorised the financial expert to conduct the financial expertise report, in order to ascertain the value of the illegally obtained benefit or caused damage. Due to this shortcoming, the prosecution has filed an indictment without a financial expertise report, unclear if an illegally obtained benefit has been realised or that certain damage has been caused. In this way, the prosecution has not considered the fact that such expertise is crucial evidence for the criminal offence of abuse and fraud in public procurement. The importance of determining and documenting the damage caused or the benefit obtained as a result of committing the criminal offence, consist in determination and documentation sets also the level of punishment for committing the criminal offence of abuse and fraud in public procurement.

To make it clearer, article 415 paragraph 1 of the CCRK (with which paragraph the accused are charged), foresees that “Whoever intentionally violates the public procurement rules during a bid for awarding a public procurement contract, presenting false documentation, illegal secrecy agreement or undertakes any other illegal action for the purpose of fraud in public procurement procedures and for purpose of influencing the decision of a contracting authority in the public procurement procedure, shall be punished by a fine and by imprisonment of up to five (5) years”.

Meanwhile, paragraph 3 of the same article stipulates that “If the perpetrators of the criminal offenses referred to in paragraphs 1. and 2. of this Article, acquire or cause substantial property damage, in values over five thousand (5,000) euro, then the perpetrator shall be punished by a fine and imprisonment of one (1) to eight (8) years.”. Consequently, it is understood that this paragraph charges the perpetrator of the criminal offence who has benefited for themselves or for another or has caused damage exceeding the amount of over 5,000 euros.

In this regard, according to Justice Today, the lack of determination of damage caused or benefits obtained, and non-authorization of financial expertise by the prosecution, has significant consequences. First, the legal qualification of the criminal offence with the appropriate paragraph is prejudiced, because as mentioned above the value of benefits or damage under the Criminal Code of Kosovo (2018), sets the the level of prison sentence for
the criminal offence of abuse and fraud in public procurement (Article 415 par.3), and if this value is not known, then the prosecution may erroneously qualify the criminal offence only under paragraph 1 or 2 of Article 415, and not according to paragraph 3\textsuperscript{11} of this Article.

Secondly, since paragraph 3 foresees a harsher punishment for the perpetrator if they acquire or cause substantial property damage, in values over five thousand (5,000) euro, whereas in the case of qualification only under paragraph 2 of Article 415 (defining as an element of commission of the of the criminal offence the intent to benefit or cause damages, where the verdict in such a situation if based on a just and objective assessment of the court, still the prosecution indictment would fail in court and the perpetrator would be acquitted, because the value of the damage/profit as an element of commission of a criminal offence under Article 415 paragraph 2 of the CCRK was not provided.\textsuperscript{12}

Thirdly, in some cases, another consequence was caused regarding the court decision\textsuperscript{13}, because the court approved the guilty plea of the accused in the initial hearing, respectively it had approved the plea bargaining agreement, without the determination of the value of the damage or benefit, and imposed the sentence for the accused according to paragraph 1 of Article 415 of the CCRK, which foresees a milder sentence for the perpetrator. Such a situation has occurred in 4 cases presented in table no.2, where the court acted on the indictments with marked with PP/I.no.103/21, PP/I.no.94/21, PP/I.no.100.A.464-2/2020, and PP/I.nr.28/21, against the accused who were charged with the criminal offence under Article 415 paragraph 1 of the CCRK, has imposed a fine, suspended sentence or both. Meanwhile, in another case marked with PP/I.nr.105/21, the court dismissed the indictment, arguing that there are no elements of a criminal offence, not mentioning that the indictment was missing the estimated level of damage obtained benefits in the indictment.\textsuperscript{14}

Undoubtedly, the importance of determining the value of the benefits obtained or the damage caused has an essential role in the adjudication and progress of cases related to the criminal offence of abuse and fraud in public procurement, for which cases the prosecution and the court should be cautious intaking procedural actions.

**Challenges in implementation of the Article 415 of the Criminal Code**

The provision of Article 415 of the CCRK in which the criminal offence of "abuse and fraud in public procurement" is systematised, contains 4 paragraphs. Paragraph 1 defines the

\textsuperscript{11} See Article 415 paragraph 1, 2 and 3 of the Criminal Code of the Republic of Kosovo, no.06 / L-074.

\textsuperscript{12} Paragraph 2 of Article 415 of the Criminal Code of the Republic of Kosovo: “Responsible persons or anyone who intentionally and in violation of public procurement procedures and rules, does not implement the obligations arising from the public procurement contract for the purpose of self-benefit or by caused budget damage, if the characteristics of other criminal offences are not contained shall be punished with a fine and imprisonment of up to five (5) years.”

\textsuperscript{13} PKR.no.125/21, PKR.no.118 / 2016, also in case no. 2021:026882 (number of case based in SMIL-Case Information Management System).

\textsuperscript{14} New from Justice Today: https://www.rolpik.org/hudhet-aktakuza-e-prokurorise-themelore-ne-gjilan-ne-rastin-per-keqperdorim-dhe-mashtrim-ne-prokurim-publik-2/
incriminating actions of each person who violates the public procurement rules and the envisaged punishment. Paragraph 2 defines the incriminating actions of the responsible person or anyone who intentionally violates the public procurement procedures and rules, does not comply with the obligations arising from the public procurement contract with the intent to benefit for themselves or causing budgetary damage, and it determines the sanctions. Furthermore, paragraph 3 determines the level of punishment based on the determined value of damages caused or the value acquired from the commission criminal offence.

Meanwhile, the last paragraph - paragraph 4 stipulates "In cases when the perpetrator is found guilty, in addition to the punishment, the court shall impose on the perpetrator the prohibition on taking part in the procedures for awarding public procurement contracts".

According to Justice Today, the legal provision of paragraph 4 of Article 415 of the Criminal Code is debatable and leaves room for misinterpretation and wrong implementation in court practice. This provision forsees the possibility of the court, in addition to the sentence, to impose on the perpetrator a prohibition on participating in the procedures for awarding public procurement contracts. Hence, the legislator has only emphasized that the perpetrator of the criminal offense is prohibited from participating in the award of public procurement contracts, not being really clear that this type of prohibition is a punishment, also is not set the duration of this prohibition, which issues will be elaborated later in this chapter. But, according to this, Justice Today considers that the legislator has implied that the prohibition of participating in the procedures for awarding public procurement contracts is not in fact a punishment, despite the fact that the rights of the perpetrator of Article 415 of the Criminal Code are limited.

Restriction of certain rights of the perpetrator of the criminal offence in the specific case of prohibition to participate in the procedures for awarding public procurement contracts, can be applied only if this prohibition would be defined as an additional punishment specifically in the Article 59 of the Code. Criminal, which is not really specified.15

Additional punishments are special types of criminal sanctions, which arose as a result of the knowledge that the main punishments may not be the only effective means against all perpetrators of criminal offences. For this reason, in criminal law, the opinion was formed that in addition to the main sentence, other criminal sanctions of a supplementary nature should be provided, which would possibly make more effective prevention of crime and re-socialisation of convicted persons. The perpetrator of the criminal offence is imposed an additional sentence in order to be deprived or restricted of some rights, which due to their nature can not be taken away or limited to main and alternative punishments.16 Article 59 of the Criminal Code defines the system of supplementary sentences. This criminal-legal provision is important for the system of these criminal sanctions, similar to the provision which provides for the main punishments. This provision also outlines the principle of legality which

15Criminal Code of the Republic of Kosovo NO.06 / L-074, article 59.
16Commentary on the Criminal Code of Kosovo, pg235.
consists in the fact that criminal sanctions must first be determined by law. This provision lists the types of additional sentences that may be imposed on perpetrators. Whereas in the other provisions, in which the additional punishments are foreseen separately, the special conditions that must be met are decisively mentioned in order to be able to impose each of these punishments.\textsuperscript{17}

The shortcomings of paragraph 4 of Article 415 of the CCRK, which stipulates "prohibition of participation in procedures for awarding public procurement contracts" consist first of all in the lack of definition as an additional punishment, and secondly in the absence of determining the duration of the ban on participating in the procedures for awarding public procurement contracts, as the legislator has not determined the duration (period) of such a prohibition.

According to the above, due to legal gaps, in practice it is illegal to impose a prohibition on participating in procedures for awarding public procurement contracts, since initially this type of prohibition is not defined as an additional punishment and consequently such a situation is not in line with the principle of legality. Furthermore, paragraph 4 of Article 415 of the CCRK does not specify the duration of such a prohibition which makes it impossible to apply it, even in cases where this prohibition would be defined as an additional punishment specifically.

Regarding this issue, Justice Today, during the monitoring of court hearings, has encountered a case in which there were dilemmas regarding the imposition of such a prohibition. It is about the case with the mark PKR.nr.125 / 21 which was tried in the Basic Court in Gjilan. In this case, the perpetrator for the criminal offence of "abuse and fraud in public procurement" under Article 415 paragraph 1 of the CCRK, was found guilty and convicted to 6 months imprisonment which with the consent of the accused was replaced by a fine of 3,600 Euros, as well as another fine in the amount of 1,500 Euros (in total fines 5,100 Euros). The dilemma of the court in this case was whether or not the accused should be prohibited from participating in the procedures for awarding public procurement contracts, and in the end the court decided not to impose it on the accused. Justice Today considers as appropriate the decision of this court not to impose such a ban, because it is not in line with the principle of legality, a principle which will be discussed later in this chapter.

Unlike the case of the Basic Court of Gjilan, in three other cases tried in the Basic Court of Ferizaj and Gjakova, have been imposed a prohibition on participation in procedures for awarding public procurement contracts. Thus, in 2 cases tried in the Basic Court in Ferizaj (one case with the mark PKR.no.99/20 and the other case with case no. 2021:026882\textsuperscript{18}), the court has prohibited the accused from participating in procedures for awarding public procurement contracts for a period of 6 months. Meanwhile, in the other case, the Basic Court in Gjakova (PKR.no.118 / 2016), has imposed the prohibition on participating in the procedures for awarding public procurement contracts.

\textsuperscript{17}Ibid, page 236-237.
\textsuperscript{18}Judgments published by the Basic Court in Ferizaj in the links: https://ferizaj.gjiqesori-rks.org/wp-content/uploads/verdicts/FE_PKR_2021-026882_SQ.pdf
procedures for awarding contracts in public procurement, qualifying it as an additional penalty. The fact that the Basic Court of Ferizaj and Gjakova are based on the imposition of this prohibition in a period of 6 months, respectively of 1 year, where in one case it is considered as a "measure" and in other two cases as an "additional sentence" it is quite odd, while in the CCRK neither any such measure nor punishment is determined. Furthermore, the duration (period) of this detention is not foreseen, which these courts, thus have acted outside the legal provisions in force. From these cases, it is noticed that the courts in different regions have a lack of uniformity of criminal cases related to the criminal offence "abuse and fraud in public procurement" under Article 415 of the CCRK. Moreover, in these 3 cases, the courts have imposed the prohibition even contrary to the principle of legality.

According to this principle, no person may be sentenced to any kind of punishment or other criminal sanction or measure of compulsory treatment, unless provided by law. In this regard, the Commentary on the Criminal Code of Kosovo states that the principle of legality may be violated even in cases where criminal law norms do not define criminal sanctions. Such a case of violation of legality related to criminal sanctions would be, for example, if it is said "whoever causes bodily injury to another, will be punished". Such a way of predicting the sentence would be contrary to Article 2, paragraph 1, because in such cases the type and amount of the sentence is not specified. In line with the example given in the Commentary, Article 415 paragraph 4 of the CCRK is included, which states that “In cases of finding the perpetrator guilty, in addition to the sentence, the court will impose a prohibition on the perpetrator participating in procedures for awarding public procurement contracts”. This article does not specify the amount of detention-punishment, and moreover this prohibition is not defined as an additional punishment in the legal provision of Article 59 of the CCRK. This provision specifically mentions the types of additional punishments that can be imposed on perpetrators of criminal offences, while the expression "specifically" has the meaning "compulsory defined or strict", which means that in this provision are strictly defined the types of supplementary sentences and the court should impose on the accused only those additional sentences that are specifically enumerated in Article 59 of the CCRK.

Based on the above mentioned cases, Justice Today regards the decisions of the courts concerning the imposition of participation in the procedures for awarding public procurement contracts as arbitrary decisions, where from these decisions it is argued that in judicial practice the legal provision of Article 415 paragraph 4 is a challenge for judges and on the

other hand its application has detrimental consequences for the accused as their rights are illegally restricted, therefore this provision should be revised.

Conclusions

In this analysis, Justice Today, has addressed the issue of public procurement cases’ management by courts in Kosovo during the period June 2019 - November 2021, explaining the concept and importance of public procurement, the legal basis, cases’ management by courts in terms of punishing perpetrators of criminal offences of abuse and fraud in public procurement and criminal offences related to violations of the Law on Public Procurement, as well as the management of these cases by the basic prosecutions regarding the legal qualification of the criminal offence. Moreover, Justice Today in this analysis with special emphasis has addressed the challenges of practical implementation of the legal provision of the Article 415 of the Criminal Code of Kosovo.

First, from the analysis of 18 cases of the basic courts, Justice Today, has found that in almost all cases in general courts have imposed minimal sentences, despite the fact that in these cases we were dealing with officials and other persons who have abused duty or have defrauded, by not respecting the rules and procedures of public procurement.

Secondly, from the analysis of 5 basic prosecution cases, Justice Today has found that in the indictments of these cases the prosecutors have obstructed paragraph 3 of Article 415 of the CCRK, because they did not specify the value of the damage caused, or the benefit realised with the case of committing the criminal offence of abuse and fraud in public procurement, such an obstruction has resulted in consequences in court decisions where in cases for which there is a court judgment, a sentence has been imposed (without expressing the value of the damage or benefit) according to paragraph 1 of Article 415 of the CCRK, which stipulates a milder punishment for the perpetrators of the criminal offence of abuse and fraud in public procurement.

Thirdly, Justice Today has found that the full practical implementation of the legal provision that defines this criminal offence (Article 415 of the CCRK), presents challenges and difficulties for judges regarding the application of paragraph 4 of Article 415 of the CCRK, which deals with the issue of imposing a prohibition on participation in procedures for awarding public procurement contracts. Although legislative changes were made in 2018 where the criminal offence of abuse and fraud in public procurement was incorporated in the CCRK as a separate criminal offence, however during this analysis it was noticed that this provision has legal gaps and as a result problems of implementation in practice constantly arouse.
Thirdly, Justice Today has found that the full implementation of the legal provision that defines this criminal offence (Article 415 of the CCRK), presents challenges and difficulties for judges regarding the application of paragraph 4 of Article 415 of the CCRK, which deals with the issue of imposing a prohibition on participation in procedures for awarding public procurement contracts. Although legislative changes were made in 2018, where the criminal offence of abuse and fraud in public procurement was incorporated in the CCRK as a separate criminal offence. However, during this analysis it was seen that this provision has legal gaps and as such presents problems of implementation in practice.

Moreover, it was found that in 3 cases contrary to the law, the court has imposed a prohibition on participation in procedures for awarding public procurement contracts against the perpetrator of the criminal offence of abuse and fraud in public procurement, which according to Justice Today violate the principle of legality and as such are arbitrary decisions. Furthermore, in terms of the imposition of this prohibition it has been found that the courts of different regions lack uniformity in reaching these decisions.

In conclusion, the findings of this analysis are concerning, considering the field of public procurement should be treated with maximum seriousness by justice institutions, given that public procurement is a process of spending public money, and as such is of a high importance for the state and citizens.

Recommendations

Justice Today, in order to respond institutionally to the findings, gives the following recommendations:

- The Kosovo Prosecutorial Council, in cooperation with the Academy of Justice, should consider the organization of trainings related to the preparation of indictments for the criminal offences of “Abuse and fraud in public procurement”, when defining policies and guidelines for the training of prosecutors, so that the indictments are in accordance with the procedural and material provisions.

- The Kosovo Judicial Council, in cooperation with the Academy of Justice, should organize trainings for management of public procurement cases and unifying the practice of not imposing a “prohibition on participating in procedures for awarding public procurement contracts.”

- The Kosovo Judicial Council should identify and make efforts to eliminate problems that arise in practice when implementing the provision of Article 415 paragraph 4 of the CCRK.
• The Kosovo Judicial Council should, on the occasion of the implementation of the Strategic Plan for the Effective Resolution of Corruption and Organized Crime Cases 2022-2024, in the internship provided in point 2.1.3 for these cases, include practical cases related to the criminal offense "Abuse and fraud in public procurement" for the purpose of uniformity of cases and orientation of judges.

• Prosecutors should authorize or propose specialized financial expertise when preparing indictments related to the field of public procurement, which would determine the damage, the value of the damage or the acquired benefit.

• Judges should not impose “a prohibition on participating in the procedures for awarding public procurement contracts “, from paragraph 4 of Article 415 of the CCRK, until the Criminal Code is amended/supplemented in this aspect.

• Judges should change the way of punishing perpetrators of public procurement-related offences, in order to achieve the purpose of sentencing.

• The Ministry of Justice should propose to the Assembly the review and amendment of paragraph 4 of Article 415 of the CCRK and Article 59 of the CCRK, in order to harmonize them.