



## Sources of Criminal Law

Diellzë Osmanollaj

Student in Faculty of Law / UBT - Higher Education Institution, Pristina, Republic of Kosovo

Email: do61551@ubt-uni.net

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### **Abstract**

The state has a high level of organization based on positive law as a fundamental element for social progress, in this positive law criminal law also plays a key role, precisely in the prevention and sanctioning of criminal offenses. Criminal Law is the main trunk and the key instrument by which the justice of a country is manifested, and as such it is of particular importance to acquire basic knowledge about the sources of this law. The main focus that this topic will address will be devoted to the sources of criminal law, including both material and formal sources. The paper will offer a wide spectrum of definitions on these sources as well as placing in the center the action and importance they have in the whole mechanism of law in Kosovo. In order to achieve the goal of the work, different methods were used, among them are; analysis methods, comparative methods, descriptive methods. The main aim of this study is to analyze in a detailed manner these sources of criminal law by providing fundamental information on them. A special space will be devoted to their role and functions, continuing then with the purpose that these acts themselves aim to achieve. The paper will contribute to students or young researchers of law or law faculty, as well as various researchers of NGOs.

**Keywords:** *Formal Source; Material Source; Constitution; Law, Criminal Code; Criminal Legislation; International Criminal Law*

### **1. Introduction**

Criminal Law is considered as the main branch of legislation, which aims to define and sanction criminal offenses, with the main aim of protecting the so-called social values. Already in the past, we can see that criminal law has had a key role in maintaining public order. In all the societies of the past, whether in slave-owning, feudal, peasant societies and many others, crimes were defined which according to them were to the detriment of the people and as such the punitive measures were defined based on customary law, which if you compare today they were much more cruel. Such were expulsion from the community, blood feud and revenge. In the past, this right has been characterized by inequality between social classes and many violations of freedoms and equality. "The birth of the first states in the

Slavery period brought a public and state reaction to criminality, brought the implementation of criminal penalties by the state, which were not written but operated on the basis of customary law". (Muçi, E Drejta Penale Pjesë e përgjithshme, 2012) The time of Feudalism can not be said to have progressed in terms of recognizing the rights of the people, the punishments continued as barbaric as in the period of slavery. "Its science began to develop in the Middle Ages, in the period of developed feudalism, with the opening of the first universities in Italy. Where some of the most important notions of criminal law have been elaborated, such as the operation of the law in time and space, guilt, attempt, necessary defense, etc.". (Muçi, 2012) With the transition from the feudal period to the Capitalist one, we also have the French Revolution. "The French Revolution of 1789 overthrew the feudal system in France and with its first legal acts stripped the feudal class of its privileges. In the Declaration on Human and Citizen Rights of the same year, the basic principles of the Criminal Code were sanctioned, such as the principle of equality of citizens before the law, the principle of humanity, the punishment should be prescribed by law and be in accordance with the dangerousness, of the offense". (Muçi, 2012)

The authors Jasarević and Maloku have also made an exceptionally large contribution to the criminal procedural field, (2021a, 2021b). Considering the importance that this right carries, special interest should also be given to the sources from which it derives or consists. This paper "Sources of Law" will elaborate in an efficient way everything that serves as a source on which criminal law relies for the interpretation of justice. Formal and material sources will be included, which will then be selected more specifically in their separate sections. Those rules or norms that are binding on everyone, including those who issue them, constitute the entire source of a state's law. The structure of this paper will be divided into two chapters. In the first chapter, we will deal with the Constitution, Criminal Law, Criminal Legislation, Criminal Code, and International Criminal Law, while in the second chapter with some of their sources which we can classify as indirect or non-direct such as Customary Law, Judicial Practices and the Science of Criminal Law, where all of these are part of the formal sources of criminal law, while the material sources are considered those social relations which are regulated by criminal legal norms. This paper will serve to provide a clearer overview of the sources of criminal law with the information it contains.

## **2. Literature Review**

Criminality as a negative phenomenon is analyzed in many aspects. In the sociological aspect, the authors Shabani and Maloku (2019a, 2019b), elaborate the criminological theories that influence the increase of criminality (2016a, 2016b, 2018). The criminal legal aspect is elaborated by the authors Jasarevic and Maloku (2021a, 2021b), while the authors Maloku and Maloku (2021) elaborate the criminal legal terms for journalists. The author Maloku (2019) in the terminological dictionary of victimology, among other things, elaborates the criminal terms that are related to victimology.

Criminal law is a way or means by which society is protected and criminality is fought, criminal offenses are defined and they are sanctioned. The literature used in this paper is mainly from published books, various online sources have been used, quotes from foreign authors and sources from various scientific articles that are included in the framework of criminal law have been used. In the material sense, criminal law is defined taking into account criminal offenses, the purpose and function of this branch, while in the formal sense it is a system of legal norms (Salihu, 2012). It aims to describe behaviors that are perceived as threatening, harmful or otherwise dangerous to the safety, property, health, and moral well-being of people. Seen as a corpus of juridical-penal norms, as part of positive law, criminal law is nothing but the criminal legislation of the state. (Muçi, 2012)

The criminal law performs the function of protecting society from criminality by providing which social acts are considered criminal acts and by providing criminal sanctions, as well as other measures against perpetrators of criminal acts. (Shala, 2013)

It's a proper criminal system and a proper international cooperation prevents and fights every form of criminality. (2015a, 2015b, 2015c).

### **3. Methodology**

The research in this paper has the characteristics of scientific theoretical research, which is necessarily qualitative in nature (Qerimi, Kastrati, Maluku, Gabela, Maluku, 2023:185). The research apparatus used in this paper is quite diverse using a number of research methods which have had a key role in fulfilling the objectives of the paper. Descriptive method was used to describe the importance and purpose of what this paper contains. The research method used is also exploratory, thus entering deeply into an extended literature to offer what really has a key role in the work. Both primary and secondary data have been used, based on what different researchers or scientists have said. The research will be detailed, systematic so that the result is tangible and sustainable. The work is built from qualitative data which result or derive from the qualitative method. The methods used are analysis, concretization, generalism, and classification. The collection of some scientific materials has been done, the systematization of existing scientific knowledge has also been done, making the logical connection between all parts of the work, with all the arguments used, interpretations, thoughts and researches, making this work vital in every aspect. The method of analysis and synthesis was used among the special scientific methods, which will be especially useful in researching the theoretical perspectives of domestic and foreign authors who have studied criminal law (Maloku, Qerimi, Maluku, 2022:176). The defined object of research requires the use of different methods and scientific knowledge from many scientific disciplines, in particular, the paper will use theoretical analysis methods, comparative methods and the unity of inductive-deductive methods. (Maloku,2021:76)

### **4. Results and Discussion**

In this part it will be discussed about the results collected and classified by the research methods for Criminal Law Resources.

The sources of Criminal Law are classified into two groups, Formal Sources, which include; The Constitution, Law, Criminal Legislation, Criminal Code, International Criminal Law, and Material Sources which include those social or other relations which characterize a society and are regulated by laws of a criminal nature.

#### **4.1. Direct Sources**

##### *4.1.1. Constitution*

The Constitution is presented to us as a formal source which is positioned at the top of the hierarchy from which all other laws and rules are derived hierarchically. "It, with a number of its provisions, is presented as a direct source of criminal law" (Salihu, 2012, p. 122). Its importance lies in the fact that compared to other acts, it has a greater value, and exercises a controlling position over other laws or acts. "A constitution is a set of basic principles or established precedents that constitute the legal basis of a state, organization, or other type of entity and usually determine how that entity should be governed" (McKean, 2005). In other words, those provisions or principles that are written in the constitution must be obeyed by all authorities or state bodies without exception. The Constitution

provides for rights and freedoms in all areas of justice, including criminal law. "It should be noted that the basic principles of the constitution define the foundations of some main principles of criminal law and the policy of fighting crime" (Salihu, 2012, p. 122). The constitution is the one which in criminal law prohibits or limits actions that are detrimental to society and not only, and then based on its principles, laws are administered which specifically regulate specific issues, always without creating retroactivity or inconsistency, where one provision conflicts with another. "The Constitution provides for the principle of legality in the case of determining criminal offenses and criminal sanctions, guarantees respect for human personality and human dignity in criminal proceedings and in any other proceedings, in case of removal, respectively restriction of freedom, as well as during the execution of punishment; citizens are guaranteed freedom of movement and residence; they are guaranteed the inviolability of the integrity of the human personality, personal and family life and other personality rights". (Salihu, 2012, p. 122) All these rights provided by the constitution are owed or offered to everyone equally. It is what, in addition to rights, defines the exercise of power of each state body. "Contains institutionalized mechanisms of power control to protect the interests and freedoms of citizens, including those who may be in the minority". (Gordon, 1999, p. 4)

#### 4.1.2. *International Criminal Law*

It is a direct formal source that focuses on the regulation of behavior between states in general, even of individuals who act outside national borders but whose act constitutes an international crime.

"The Constitution of the Republic of Kosovo provides that a certain number of international legal acts will be applied directly, therefore the criminal-legal provisions of these international legal acts are also considered an integral part of the criminal legislation in Kosovo". (Shala, 2013, p. 21)

"International Criminal Law is the set of criminal norms that define criminal offenses that contains international element, the mechanisms on which the punishment of their perpetrators is based, as well as cooperation between states in the fight against international criminality". (Xhafo, 2012, p. 11)

So, for a crime to be in the interest of international law, that criminal offense must be an act that violates or violates fundamental rights in international interest, but that the responsibility is individual towards the author of the offense. In the framework of this right, are used the four Geneva conventions on the humanity of war (1949); The Convention on the Elimination of All Racial Discrimination (1966) and the Convention on the Suppression and Prevention of the Crime of Genocide (1948)". (Salihu, 2012, p. 123) These conventions, also known as international contracts that are ratified, essentially have the obligation to provide legal-criminal protection for certain legal values. "The protection afforded by human rights conventions does not cease in the event of armed conflict, except to the effect of derogation provisions of the type found in Article 4 of the International Covenant on Civil and Political Rights." (International Court of Justice, 2003)

Q The main goal, like any branch of law, is to guarantee effectiveness in punishing criminal offenses provided for by international criminal norms. "The current system of international criminal law operates through ad hoc international courts, mixed or hybrid courts, and the International Criminal Court, as well as National Courts". (Geneva Academy, 2017) In a broader concept, this right means crimes that may have a direct impact on a possible humanitarian crisis. "The International Criminal Court of Rome has jurisdiction over the following crimes: The crime of genocide; Crimes against humanity; War crimes; The crime of aggression" (Rome Statute of the International Criminal Court., 1999), describing them as crimes that concern the international community as a whole. "Potential actions that are presented as a threat to public order, serve as an alarm to the attention of democratic states precisely to take action in time and stop behaviors that present a real risk potential". (Bishaj, 2011, p. 5) Crimes of international interest are considered all those crimes which harm a wide group of people, specifically the civilian population, either for political, national, religious or even racial reasons.

### 4.1.3. Penal Code

The Penal Code presents us with another direct formal source in the branch of criminal law. It presents collected laws that regulate issues of the same nature, so the Criminal Code means a collection of criminal laws.

"The Criminal Code of the Republic of Kosovo entered into force on January 1, 2013." (06/L-074 KODI PENAL I REPUBLIKËS SË KOSOVËS, 2019)

It protects basic human rights such as: the right to life; right to freedom; the right to human integrity and dignity and many other fundamental freedoms. "With the notion of the Criminal Code, we mean an important law in which the criminal-legal provisions are summarized in a complete and systematic manner". (Salihu, 2012, p. 125) All those provisions which foresee a criminal offense or sanction such are an integral part of the criminal code. The Criminal Code guarantees the protection of some of the fundamental human rights and freedoms for the citizens of the Republic of Kosovo. According to this code "No one can be imposed a criminal sanction or a measure of compulsory treatment for an offense if before its commission it was not defined by law as a criminal offense and the criminal sanction or measure of compulsory treatment was not foreseen for that offense ". (06/L-074 KODI PENAL I REPUBLIKËS SË KOSOVËS, 2019) The Penal Code contains criminal offenses that are recognized in the jurisdiction as such, punishments that are foreseen to be imposed for these offenses and some other general provisions. "The Criminal Code of the Republic of Kosovo has a total of 35 chapters with 444 articles and is divided into two parts: the general part and the special part. The general part consists of chapters I-XIII precisely articles 1-120, and the special part from chapters XIV-XXXIV respectively articles 121-437, as well as from the transitional provisions that make up chapter XXXV and include articles 438-444". (Shala, 2013, p. 19)

### 4.1.4. Criminal Law

The law is essential in the provision of any criminal offence. Like all other laws, even criminal laws are written, issued by legislative bodies, where their interpretation and implementation is mandatory even by those who issue them. It is the main source of criminal law. In essence, it means all the provisions that regulate matters of a criminal nature by providing it as a criminal offense and establishing the sanction for it. "Criminal offense is an illegal offense which is defined by law as a criminal offense, the features of which are defined by law and for which the criminal sanction or measure of compulsory treatment is determined by law". (KODI NR. 06/L-074 KODI PENAL I REPUBLIKËS SË KOSOVËS, 2019) The purpose of criminal laws is to prevent acts that are harmful to citizens and not only. "The Criminal Law stands out for the uniquely serious, possible consequences or sanctions for non-implementation of its provisions". (Baler, 2011) Criminal law is the foundation of the criminal justice system, it prohibits any behavior that is a threat to the civilian population. "Parliaments are competent bodies for issuing criminal laws. From this it follows that the criminal laws, which provide for criminal offenses and criminal sanctions, cannot be issued by other state bodies or by any other body of social and political communities". (Salihu, 2012, p. 124) The main purpose is to prevent crime, reform the crime, reform the perpetrator, ensure that appropriate punishment is meted out, and prevent further crimes. Although criminal offenses are defined by the criminal code, we also have provisions that guide the application of another law to clarify its content.

Criminal law has the essential role to maintain the level of behavior between individuals in a society where there is danger and that being based on the law is considered the most ideal way to provide a solution to all legal issues. Knowing that laws can only be issued by legislative bodies, in principle by the assembly, this is considered a constitutional principle. "Such a principle is based on the provisions of the constitution, which provide that criminal offenses and criminal sanctions can only be determined by

law. Since the declaration of Kosovo's independence, laws have been voted and approved by the parliament, namely by the Parliament of Kosovo". (Salihu, 2012, p. 124)

#### 4.1.5. *Legjislacioni Penal*

Every norm that contains provisions of a criminal nature or regulates matters of this field constitutes criminal legislation. "By criminal legislation we mean all criminal laws, including the Criminal Code, as well as the entire system of laws and other criminal provisions that are in force, which are applied in our country, or in the system of criminal laws that are in force in other countries". (Salihu, 2012, p. 125)

### 4.2. Non-Direct Sources

#### 4.2.1 *Other Laws, Sub-Legal Norms and General Acts*

In addition to direct or direct acts, we also have several other laws, sub-legal norms and general acts which serve as indirect or in other words secondary.

"Other sources of criminal law are considered:

- The code of the Penal procedure,
- Law on the execution of criminal sanctions,
- Law on the organization of courts,
- Law on the prosecution,
- Law on advocacy,
- Criminal law for minors etc." (Maloku, 2022)

They are sources that have provisions that regulate relations which, although they are not directly of a criminal nature, have importance and influence. "In situations where the law directly or indirectly refers to, or guides any other legal norm which clarifies or completes the legal-penal norm. These are the so-called blanket norms". (Salihu, 2012, p. 125) Indirect sources have a special function and importance because they come into use for those offenses that are not foreseen by the Penal Code because a code approved years ago may not regulate certain issues that have developed with the evolution of time. "In such cases, care must be taken to respect the **nullum crimen sine lege certa** principle with the blanket norms of the Criminal Code, which guide indirect and supplementary sources." (Salihu, 2012, p. 126) According to this principle, there is no crime that is no longer defined by law, or in other words, everything that is not defined by law as prohibited is allowed. So an offense is criminal only if a law specifically defines it as such.

Sub-legal norms are also secondary sources which are used only in certain circumstances, such as regulations, decisions, decrees, ordinances, instructions, decree-laws, statutes. General principles also do not have a primary role, but are used only in cases where no reference can be made to the main sources. General principles can be: the principle of justice, the principle of equality.

#### 4.2.2. *Customary Law*

Historically, in the past customary law was the only source of law. This right is characterized by certain behaviors that society has either accepted or considered unacceptable. This right simply means standards which were universal and accepted by society.

Even Customary Law is of particular importance in criminal law today, despite the fact that over time written sources have been preferred. It can be said that this right is of a conservative nature, therefore state bodies favor written sources. "The principle of legality, which has been adopted, excludes the

possibility that customary law is a direct source of criminal law. Therefore, it is not possible to provide for new criminal offenses, to abrogate existing offenses, or to extend or abrogate punishments by means of dockets. This would be in direct opposition to the principle of legality and would harm the legal security of citizens and the social community". (Salihu, 2012, pp. 125-126) On the other hand, there are still countries in the world that have customary law as part of the law and use customs that have been practiced since ancient times. Customs are created differently in different regions and countries. Meanwhile, we also have customary international law which can serve as a source. "While international treaties are written agreements by which states establish certain rules, customary international law consists of unwritten rules that derive from general practice accepted as law, come into play the moment a particular course of conduct is followed, first, as a general practice among states; and, secondly, accepted by these states as legally binding". (Israr, 2019) Customary law can also be defined as popular law or even as primitive law. This right is created in the form that if something has continued to be repeated for a certain time without objections, then it has automatically been accepted as a custom. Criminal law today can be said to rely heavily on the concepts of customary law in the definition of criminal offenses, so in certain cases they can be presented as an important source, so the importance of this right lies in the impact it has on the creation of appropriate concepts of law. "The norms of the criminal law do not define what is considered an insult. In order to ascertain whether the insult was committed in the specific case, the customs of the specific social environment must be taken into consideration". (Salihu, 2012, p. 127) It is worth noting that customary law was not imposed by a binding force, despite the fact that positive law today imposes certain behaviors by a binding force such as the state. Back then, the highest punishment was banishment from the family or social circle, while today the punishment for a criminal offense is imprisonment. Customary law can be referred to when there is a gap or even ambiguity in written law to resolve a case.

#### *4.2.3. Court Practices*

Court practices are sources which in some countries are direct and in others they are not. It is about how courts apply certain laws in a specific case and how they interpret those laws. "In Roman law and in the Middle Ages, judicial practice has been an important source of criminal law because the courts have decided on the basis of previous judgments. This was done because there were not sufficient criminal-judicial norms". (Salihu, 2012, p. 127) In case that a court practice will be taken into consideration for a trial, then the judge must apply the same principle and interpret the law in the same way as a judge of a higher degree judged on the same or similar issue. "In England and the United States of America, case law or judicial precedent is presented as an important source of criminal law and branches of justice". (Salihu, 2012, p. 127) In these states, a court judgment that resolves a specific case its an obligation for all other identical cases. This way also enables judges to get information on how their colleagues interpret and how they judge.

In our case, the decisions of the higher courts are not considered to have any direct impact on other subsequent cases. "The Supreme Court of Kosovo is the highest judicial instance in Kosovo and has jurisdiction over the entire territory of the Republic of Kosovo". (LIGJI Nr. 06/L-054 PËR GJYKATAT, 2018) And it has a key role in ensuring the unity of law enforcement by the courts. Although as such its decisions are not presented as a direct source, because a judicial practice cannot foresee a new criminal offense because in our law the law is the one that determines whether an action is a criminal offense or not. Although they are not a direct source, the Supreme Court still has sufficient influence on other lower courts with the authority it has. "In Albania, judicial precedent has not been recognized either before or today, expressly in any legal provision. However, in practice, the courts have referred as an almost mandatory model to the decisions of the Supreme Court of the period of the socialist system, a practice that was followed in the first years of today's democratic state". (Muqi, 2012, p. 57) The highest court of jurisdiction of Albania has not made the judicial practice mandatory.

#### 4.2.4. *Shkenca e së Drejtës Penale*

Science has an indirect impact on criminal law, as such it cannot determine whether an offense is criminal or have an impact on its abolition, but it has an indirect impact on law. "With the help of the science of criminal law, a series of notions and institutions of criminal law has been built. Also, this science exerts considerable influence on the development and reform of criminal law, namely criminal legislation". (Salihu, 2012, p. 128) While the science of criminal law is considered as a secondary source, it can be used in cases where there may be ambiguity or gaps in the direct sources to solve a specific case. Science itself also includes studies of different researchers who give opinions or comment on written laws, on various acts and on their interpretation, so researchers show their visions and points of view. "In this way, this contributes to criminal law being developed and perfected in harmony with the new demands of society and the progressive intentions for its further efficiency and humanization". (Salihu, 2012, p. 128) In other words, this science studies the criminal legislation and the criminal-legal institutions, preceding them with arguments and scientific views, it serves to show the way and the way on the most decent regulation of the criminal law, relying on the economic and social development. "It can recommend the introduction of new concepts or elements, but it cannot change or replace them with its own notions and formulations. It clarifies the material, sociological and political aspect of the criminal offense, its necessary and secondary elements, without abandoning or exceeding their legal notions". (Muqi, 2012, p. 19) So, it has its influence by taking positions or filling in the gaps in a criminal case, it is a science that is developing day by day to provide the highest standards of law. Its influence is made by suggesting new, more innovative ideas, attaching to it the reasons why it is worthy of becoming part of the legislation.

#### **Conclusion**

Considering law as the main pillar for the functioning of a society, this paper examines an issue of criminal law, as such it protects society from dangerous behaviors that belong to a criminal nature. From all the abundant information that this study provides, we come to the conclusion that the sources from which this branch of law originates and is supported. have a tremendous impact on the sustainability and stability of public order. All provisions or norms derived from each of these sources reflect a testimony to the great importance given to the protection of society's values.

What this paper essentially contains is the basis from which every principle, legal norm, provision or act derives. This paper manages to show us the importance of these sources and their unique role in law. We come to understand that they are argumentative tools, they are essential to distinguish between legal norms and customary ones, between norms that are directly applicable and those that are used in special moments, between norms that apply in our country and those that have international application. We come to the conclusion that the legal obligations that come to us do not originate only from a single author but from different sources of different spectrums and that with the absence of one of them, their function would be weakened.

The main findings of this paper should contribute to and initiate not only scientific workers, but also experts from practice, to launch a series of research projects in the future with the aim of obtaining relevant (scientific) knowledge (Maloku, Kastrati, Gabela, Maloku, 2022:139). This paper contributes to the existing scientific literature, especially in the legal field. (Qerimi, Maloku & Maloku, 2022:289)

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