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LEGAL POSITION OF THE PRE-TRIAL JUDGE IN RELATION TO OTHER SUBJECTS DURING THE PRELIMINARY INVESTIGATION

ABSTRACT

We have recently witnessed rapid changes to the criminal procedure legislation in almost all countries of the Western Europe towards promoting individual rights and expediting criminal procedure, changes which also engulfed Southeast Europe and Kosovo. A shared feature of these changes is adoption of the Provisional Criminal Code and Kosovo Criminal Procedure Code, for this first time in 2004 by the Parliament of Kosovo, in order to ensure a more functional judiciary relative to CPL of the previous system.

The implementation of the KCPC brought about a new outlook on the role of the justice, police and prosecution bodies with a shift from inquisitorial to accusatory system, as the former was rendered useless and non-functional. Under the accusatory system, currently in effect, the competences over investigations, which had previously been the prerogative of the investigative judge, have now been moved to the state prosecutor, an action similarly adopted in almost all Balkans countries.

Among many novelties contained in the KCPC is also the determination of the special position and the role of the pre-trial judge. Under KCPC, which entered into effect on 01 January 2013, the position of the pre-trial judge has been promoted considerably.

***Key words:* pre-trial judge, role, authorizations, competences, other subjects, etc.**

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Introduction

The key tenet of the preliminary procedure is that the pre-trial judge does not undertake any action by virtue of official position, with a minor exception, but always at the reasonable request of parties and other participants to proceedings, under the situations and conditions provided for in the Kosovo Criminal Procedure Code in effect since 01 January 2013, when deciding on the matters related to restriction of person's rights and freedoms. In this sense, the Criminal Procedure Code seems to strive to uphold the principle of the equality of parties also in the preliminary procedure, where the role of the state prosecutor is dominant. Although actions, decisions and orders are taken at the proposal of the parties rather than by virtue of official position, these actions of the pre-trial judge have an important role, as they affect the rights and freedoms of an individual, i.e. restriction of these rights, while the investigative action of prosecution and police is thereby granted legitimacy. If such actions were to be undertaken without due notice, i.e. orders from pre-trial judge, they would constitute inadmissible evidence during the trial, provided for in more detail under Article 257, paragraph 2 of the KCPC¹.

The role and activities of the pre-trial judge are placed in motion through adequate decisions, orders only at the request of parties and other participants in the preliminary procedure. This paper will therefore seek to reflect on the role and competences of the pre-trial judge in the following order:

1. Decisions, orders at the request of the state prosecutor - police,
2. At the request of the defendant and his attorney, and
3. Decisions, orders at the proposal of the injured party, his legal and authorized representative.

1. Decisions, orders at the proposal of state prosecutor - police

1.1. Commencement, continuation, expansion and termination of investigations

Upon deciding to commence investigations² on the case placed before him for review following analysis of the criminal denouncement and finding that the content constitutes reasonable doubt of existence of crime commission and in order to shed light on the criminal act, the Prosecutor performs informal and formal action by reaching a written decision to commence investigations, a copy of which is immediately submitted to the pre-trial judge in view of Article 104, paragraph 1 of the KCPC³. This action of the prosecutor also holds practical importance as it represents the starting point of the duration of an investigation against a person, for a period no longer than 6

¹Paragraph 2 states that the evidence obtained in violation of criminal procedure is inadmissible for cases when this Code or other legal provisions specifically state that.

²Article 102 paragraph 1 of the KCPC, p. 45.

³ Article 104 par.1 states that the investigation commences with the decision of the state prosecutor. Such decision shall specify the person who is subject of investigations, the time of commencement, description of the crime and its elements, legal designation of the criminal acts, circumstances and facts justifying the reasonable doubt on the crime, any provisions authorizing covert and technical surveillance or investigations measures as well as evidence collected.

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(six) months upon such date, with the longer durations requiring separate authorization of the pre-trial judge.

1.2. Duties of the State Prosecutor towards the Pre-trial judge

The State Prosecutor is also required to inform the pre-trial judge related to expansion of investigations in conformity with Article 157, paragraph 3 of the KCPC as well as on suspension of investigation in line with Article 157 paragraph 4 of the KCPC.

In cases when the investigations fail to conclude within a two years' period after the date of commencement, the prosecutor shall submit a written request to the pre-trial judge requesting continuation of investigation, along with justification (Article 159, paragraph 2 of the KCPC).

1.3. Request of State Prosecutor – an obligation to respond for the Pre-trial judge?

The pre-trial judge may authorize a continuation of investigation for an additional 6 months, when properly justified under the request of prosecutor by complexity of the issue. For criminal acts carrying a sentence of at least 5 years of imprisonment, the pre-trial judge, upon new request, may authorize an extension of up to 6 months. If, during this period, the investigations have not been completed owing to the complexity of the matter, only the Kosovo Supreme Court may, exceptionally, authorize an extension of additional 6 months.

Upon receipt of request for extension of investigations, the pre-trial judge shall notify both the defendant and the injured party as to the request of state prosecutor for extension. The defendant and the injured party may submit their statements regarding the extension in the course of 3 days upon notification. The decision of the pre-trial judge on the extension is appealable by both parties and the injured party.

During the period pending a decision on extension of investigations too, the state prosecutor shall, in the absence of a formal decision, notify the pre-trial judge in case he or she needs to undertake urgent action to acquire evidence.

1.4. Collecting evidence and expertise

Taking into account that evidence is a product of a criminal procedure, the evidence was formerly deemed admissible as those were acquired through the order of a judge or prosecutor and, as such, could be included in the indictment and be admitted by the judge at the confirmation hearing. This process was formal and may have not served the best interests of the rights of the parties or of the justice, as incomplete evidence may have been admitted or, important evidence not ordered to be collected may have been lost.

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Under the current Code, in effect since 01 January 2013, the role and importance of evidence is more elaborated, especially during the early stage, which is related to initial action. For example, under the Article 70 the police may acquire evidence during the initial steps without the supervision of the prosecutor; however, the person engaged in collecting evidence on behalf of police should be properly trained and capable of explaining the undertaken action to prosecutor and subsequently to the judge. This makes the evidence acquired without an order from prosecutor or a judge admissible under article 150 7 and 8. This also indicates a shift in the role of participants to proceedings in the last decade.

Under the provisions of the previous KCPC, specifically the article 176, the expertise was ordered by the court at the request of state prosecutor, the attorney of the defendant or of the injured party, without wishing to exclude occasions of requirements by virtue of official position. Under article 139, paragraph 1, the court shall order inspection of the body and the autopsy every time, while article 187 states that the expertise shall be directed by the pre-trial judge. In contrast, the current applicable KCPC, under article 137, specifies that the state prosecutor may issue decisions to assign an expert by also taking into account parties' proposals, to ensure that the latter have no disagreements and that they may put forward individual proposals. This selection may be challenged by the defendant or the injured party⁴, requiring the judge to reach a decision on the challenge in the course of ten days. Under the article 141, the defendant may ask the state prosecutor to assign an expert or may pay for an expert himself. In case of dissenting opinions between two experts, the judge or the state prosecutor may ask the opinion of a third expert.

The court shall also order toxicology analysis for any suspicious substance found within a body⁵. However, under article 144, paragraph 2, the physical examinations involving bodily invasion such as taking blood samples during the physical examination may only be taken with a court order or with the voluntarily consent of the person. The article 144, paragraph 9 of KCPC, reads that "duress for physical examination and similar control may only applied under a separate court order". It is interesting to note, though, that Article 76 of the KCPC, paragraph 5 states that in the cases when police conducts an alcohol test and needs to obtain urine or breathe samples, those shall not be taken under duress without a court order.

Under provisions of article 148, paragraph 2 of the KCPC, the autopsy, the physical examination, with the exception of cases specified under article 145, paragraph 2 to 4 and 76 of the Code, the psychiatric, molecular, genetic and DNA examinations may only be ordered by the pre-trial judge except in cases when a witness or an injured party agrees to these actions being undertaken by police or prosecutor. Under this provision, it is clear that these actions and orders are under the authority of the pre-trial judge, however, exceptionally with the consent of the injured party and

⁴ Article 137 par. 2.1 of KCPC, p. 61, states that the defendant, attorney, victim or victim's attorney may challenge the selection based on qualification or potential conflict of interest by submitting a challenge with the preliminary procedure judge. The preliminary procedure judge takes a decision on assignment of the expert within (10) days upon assignment by the prosecutor.

⁵Article 143 paragraph 2 of the KCPC.

the witness, these measures may be undertaken by police or public prosecutor and shall be deemed legal.

In cases when a witness or an expert fails or rejects to make an appearance before the state prosecutor without any legal grounds, at the proposal of the prosecutor, the pre-trial judge may cite a 250 EUR fine for the default⁶, provided that the summons has been serviced in conformity with the law. It is also worth noting that in cases when a witness has made an appearance when summoned, upon being made aware of the consequences of rejecting to testify without legal grounds irrespective of the fine, but persists in the refusal, he or she may be imprisoned for the duration of such refusal but no longer than one month or until such time when his or her testimony is rendered moot. Also, other measures related to assignment of experts to perform expertise of various areas shall only be ordered by the pre-trial judge, depending on the nature of the criminal act for which the investigation is ongoing.

1.5. Court warrant for search of premises shall have legal basis

At the request of the state prosecutor, the pre-trial judge may order a search of a house, other large premises or a property of a person when there is a reasonable doubt that the person has committed a crime, prosecuted by virtue of official position, and when there is a likelihood that the search will result with the arrest of the person or discovery and confiscation of important evidence for the criminal proceedings. By the same token, he may also order personal search upon an individual when there is a realistic opportunity that the search may result in discovery of traces or confiscation of persons related to a crime. The order shall be carried out by the court police. This issue has been regulated under the article 105, paragraphs 1, 2, 3 and 5 of the KCPC. This search is not the same with the temporary safety search carried by police without the court order, in conformity with the provisions of the new applicable code.

Exceptions to the article 110 of the KCPC may occur in urgent circumstances when a written search order may not be obtained in time and in case of a reasonable risk that the delay may result in loss of evidence or danger to the life and health of people, in which case the court police may commence the search based on the verbal order of the pre-trial judge. In cases when the police carries out searches without a written court order, under the circumstances prescribed by article 110, paragraph 1 and 5 of the KCPC, it shall submit a report to state prosecutor and the pre-trial judge in the course of 12 hours⁷.

In principle and legally, no search order shall be issued by the pre-trial judge, irrespective of a request from prosecutor and police to that effect solely on the basis of a reasonable doubt that the person to be subject to search has committed a crime, unless a decision has been reached to

⁶ See article 135 par.1 and 2 KCPC

⁷.Article 110 par.6 KCPC states that when police carries out a search without a written court warrant, it shall submit a report to the prosecutor and the competent judge in the course of 12 hours, if a judge has been assigned on the matter in order to obtain retroactive court approval in conformity with the constitutional provisions.

commence investigations against such person based on a reasonable doubt of a crime commission. This indicates that there should not be instances of this kind in the daily practice, without wishing to elaborate on the existence or otherwise of these cases occurring in the regions to a larger or smaller extent, not for the lack of professionalism but rather on the account of tremendous daily workload of prosecutors and judges as a result of an excessive number of cases brought before them and due to absence of sufficient staff. Moreover, they are often required to delegate these requests to support staff to look into them on behalf of judges and prosecutors and consequently, in the absence of adequate control, judges and prosecutors sometimes sign off without looking at the substance of the request or order, which at a later stage, due to such violations, are declared inadmissible by the court either *ex officio* or at a motion from a defendant or his/her attorney⁸, because they were not obtained in conformity with the legal provisions, thus risking losing the case for which charges have been raised in spite of the reality of the crime commission. In other words, no search order shall be issued in the absence of the legal basis described above, with the exception of the cases described and prescribed under articles 110 and 11 of the KCPC, unless a decision on commencement of investigation against one or more persons has been taken on the basis of existence of reasonable doubt.

1.6. Covert technical measures of surveillance and investigation

The pre-trial judge may issue a series of orders, at the proposal of the prosecutor and the parties, under chapter XXIX covert technical measures of surveillance and investigation.

Under article 91, paragraph 1 and 2 of the KCPC, the pre-trial judge, at the request of state prosecutor, may order any measure set out under the Code. The warrant involving covert technical measures requires an evaluation of concrete conditions and circumstances on case-by-case basis.

In urgent cases, where waiting the warrant of pre-trial judge under paragraph 2 article 91 would jeopardize the integrity of investigation or the life and safety of the injured party, a witness, an informer or their family members, the state prosecutor may issue an interim order for one of the 10 cited measures. Such interim order shall be revoked unless confirmed in writing by the pre-trial judge in the course of 24 hours upon issuance.

Under article 96, paragraph 6 and 9 of the KCPC, the state prosecutor shall inform in writing, sent via a certified mail, any person involved by the order of the fact that he or she are subject to covert measures and that he or she are entitled to appeal with the Surveillance and Investigation Review Panel, through the chairperson of the competent authority in the area of judicial issues in the course of 6 months and that he or she are allowed access to collected material in case the reasonable doubt of crime commission has ceased to exist or the state prosecutor has failed to file an indictment in the course of one year upon termination of order (article 96 paragraph 1).

⁸. Article 249 par.1 items 1.1, 1.2,1.3 of the KCPC, pp. 113-114

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In specific cases, at the request of prosecutor, the pre-trial judge may order to deny access to a person subject to surveillance order to items and materials acquired during the covert investigation if such an access would jeopardize the integrity of investigations or the life and safety of an injured party, witness, informer or their family members or decide to delay the notice by no longer than a year, if the obligation to do so before the expiry of such period would jeopardize the integrity of investigations, the safety of life of an injured party, witness, informer or their family members.

However, by virtue of paragraph 3 of the article 96, the pre-trial judge, at the request of state prosecutor, may order the informer or the authorized official of the court police who carried out measures under this chapter, to redact or avoid names, addresses, work places, occupations or any other information in the material that may lead to identification of such persons. Such order may be issued before the person, who is subject of the order, is notified.

Subjects that are part of the preliminary procedure are required to strictly comply with the procedures involving measures under this chapter, as any action in contradiction would render the evidence inadmissible in the course of proceedings, in view of article 97, paragraph 1.

1.7. The security measure of defendant's presence, prevention of recurrence and safety of criminal proceedings

The role and activity of the pre-trial judge is also prominent under chapter X, involving issuance of measures to ensure the presence of defendant to proceedings in view of article 173, paragraph 4 in relation to article 175 paragraph 4 of the KPPC. The pre-trial judge issues orders upon proposal and depending on the rationale of the proposal, he or she may cite one of the following measures:

- Arrest warrant (article 175)
- Promise of the defendant that he or she will not leave the place of residence (article 176),
- Restraining order (article 177),
- Report to police station (article 178),
- Escrow (article 179),
- House arrest (article 183 of the KCPC)
- Diversion (article 184) and
- Order detention (article 187)

Each of the measures above shall be cited at a specific time or under specific situation, such as those involving non-cooperative perpetrators, starting from failure to appear before the prosecuting authority. The kinds of orders issued by the pre-trial judge shall depend on the case and on the rationale of state prosecutor's request, under article 188, paragraph 1 of the KCPC. This means that notwithstanding the rationale and the need to ensure the presence of the defendant to proceedings, the application of a measure cited by the pre-trial judge is, nonetheless, conditional. Each of the measures is cited at the prosecutor's request, when the case is already before the

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prosecutor for investigation, and if the prior legal remedies have been exhausted by the prosecutor and provided that the legal requirements prescribed for each of the measures have been met, then the pre-trial judge, in accordance with the circumstances reasoned in the request, may cite one of the necessary measures to ensure the presence of the defendant.

The request for a measure does not necessarily imply its gratification, if alternatives to the measure are deemed sufficient to meet the needs of the prosecuting authority (prosecutor).

1.7.1. Detention, citation, extension, termination and enforcement of detention

As this is one of the gravest measures of restriction of person's rights and freedoms it will be elaborated in more detail.

In conformity with article 188, the detention is cited by the pre-trial judge at the written request of the state prosecutor, following a pre-trial hearing.

The hearing on detention requires the presence of the state prosecutor and the defendant's attorney. Even in the cases when a defendant has not hired an attorney, an attorney shall be appointed *ex officio* as it involves mandatory defence under article 188 paragraph 4 of the KCPC. At the hearing, the state prosecutor shall present arguments about detention, also verbally, while the defendant or his attorney may respond by stating their arguments, in view of article 188, paragraph 5 of the KCPC⁹.

Parties are entitled to appeal against the decision citing a detention in the course of 24 hours upon servicing of the decision. The Appellate Court Review Panel shall decide on the appeal in the course of 48 hours upon submission.

When the pre-trial judge rejects the request of state prosecutor for citing a detention, he or she may order any other measure under chapter X – measures to ensure the presence of the defendant.

Under provisions of article 190, the detention may last for a maximum duration of one month from the day of arrest under the first decision of the pre-trial judge. Thereafter, he or she may be held in detention only under a court decision for extension of detention¹⁰.

Once the indictment is submitted, the detention may last for a maximum of one year, i.e. if involving crimes carrying a prison sentence of 5 years the detention shall last for 4 months, while for crimes carrying a prison sentence of more than 5 years, the detention shall last for 8 months. In specific cases, the detention may be extended for 4 months for crimes carrying prison sentence of less than 5 years, or 12 months when the procedure involves a crime punishable by at least 5

⁹.Article 188 establishes the procedure for detention order, specifically, paragraph 5 states: at the hearing on detention on remand, the state prosecutor shall state the reasons for his or her application for detention on remand. The defendant and his or her defense counsel may respond with their arguments. The pre-trial judge shall rule on such motions, as per article 188, paragraph 6, see KCPC p. 86.

¹⁰.Article 191 par.1 of KCPC,

years of imprisonment, in extraordinary circumstances when failure to submit an indictment within the deadline prescribed by paragraph 2 of the article 190 is related to complexity of the case or with other factors not attributed to state prosecutor. If the indictment is not submitted before the expiry of said deadlines, the detainee shall be released.

In relation to article 191 of the KCPC, which regulates the detention extension, before an indictment is filed, any extension shall be granted only at the proposal of state prosecutor, duly justifying the reasons for citing and extending the detention and that all reasonable action has been undertaken to exclude implementation of the investigation.

Under article 191 par. 3, the detention cited by the pre-trial judge may be extended by the pre-trial judge, individual judge or the presiding judge, all dependant on the stage of the criminal proceedings. Unlike the applicable code, the earlier code of 2004, in effect until 31 December 2012, under articles 284 and 185, paragraph 3, provided for an initial detention extension of one month by the pre-trial judge and subsequent extensions not exceeding two months by the three-judge trial panel within the deadlines prescribed under article 284, upon submission of relevant interlocutory applications by the defendant and his attorney. The detentions cited by the three-judge trial panel could be extended by the pre-trial judge for a period no longer than one month, within the deadlines provided for under article 284 of the Code following the hearing. This indicates that a detention, once cited by the pre-trial judge, may be extended by the trial panel and subsequently by the pre-trial judge for a duration of one month following the hearing, thereby allowing for alternating maximum extension, as set out under article 284 of the Code. An injured party and victim's defender may ask the state prosecutor, formally and informally, to intervene with the request for extension of detention. The defendant and the defence attorney shall be notified of the proposal no later than three (3) days before the expiry of the detention cited under the last decision¹¹.

1.7.2. Termination of detention based on court's supervision

Based on article 197 of the KCPC, detention may be terminated by the pre-trial judge with the consent of prosecutor. In case of dissenting opinions, the trial panel shall decide in the course of 48 hours upon receipt of judge's request.

The statement above, that the pre-trial judge only acts at the request of parties to proceedings with few exceptions leads to repeated views involving provisions of article 192, i.e. decision on legality of detention by virtue of official position and that, before taking a decision on termination of detention, the pre-trial judge shall notify the state prosecutor three days in advance, who, in turn, may appeal the decision of the pre-trial judge for termination of detention with the review panel made of three judges. The review panel shall issue a decision in the course of 48 hours.

¹¹ . Article 191 par.2 of the KCPC

Provisions of the Criminal Procedure Code, specifically articles 192, paragraphs 2 and 4 set out a new procedure for termination of detention and review of legality of citing and extending detention or procedure *habeas corpus*. The detainee or his or her attorney may, at any time, appeal the pre-trial judge to decide on the legality of detention.

The pre-trial judge may conduct a hearing session in conformity with article 188, paragraph 3, 4, 5 and 6, if, at first glance, the appeal proves that:

Reasons for detention under article 187 of this Code since the first court order for detention have ceased to exist, the circumstances have changed, new facts have been brought to light, or the detention, for other reasons, has been rendered illegal.

The pre-trial judge may, at the hearing, order the immediate release of the detainee, if he or she finds that:

- The reasons for detention under article 187 of this Code have ceased to exist,
- The detention period ordered by the court has expired (the prosecutor failed to submit a request for extension of detention),
- The detention period determined by the court exceeded the terms prescribed under article 190 (8, 12 months), or
- Detention is illegal on other grounds¹².

1.7.3. Enforcement of detention in a Correctional Facility

The pre-trial judge shall decide, in agreement with the director of the facility, that a detainee is assigned to activities in the penitentiary institution commensurate with his physical and mental abilities (article 199, par. 2 of the KCPC).

With the permission of the pre-trial judge and under his or her supervision, or under supervision of a person assigned by him or her, the detainee may receive visits of close relatives, doctors or other persons (article 200 par.2 of the KCPC).

With the knowledge of the pre-trial judge, representatives of a liaison office or of a Diplomatic Mission may visit their citizen without the supervision of a judge, just as representatives of international organizations may visit the detainees who enjoy refugee status (article 200 par. 2).

The detainees may correspond or maintain contacts with persons outside of the facility, with the knowledge and under the supervision of the pre-trial judge. Upon consultation with the state prosecutor, he or she may terminate such communication on legal grounds (article 200 paragraph 4).

¹². See article 189 par.1,2,3 and 4 of the KCPC

Under article 201, the pre-trial judge may cite a disciplinary sanction of prohibition or restriction of visits and correspondence of the detainee who has committed a disciplinary violation (article 201 paragraphs 1 and 2 of the KCPC).

1.8. Protection of injured party, witness and cooperating witness

The state prosecutor, defendant, defendant's attorney, cooperating witness or a witness may, at any stage, submit a written request to competent judge for protection order or anonymity.

Under provisions of articles 220 and 222 of the KCPC, an accessory to crime may be declared a cooperating witness at the proposal of the state prosecutor.

Also, under articles 220 par.1 and 226 of the KCPC, a pre-trial judge may declare an injured party or a witness as a protected witness, at their request or at the request of state prosecutor.

For both these cases the order shall be issued by the pre-trial judge following a closed hearing.

2. At the proposal of the defendant and his attorney

Under the provisions of Article 125 of the KCPC, a defendant may submit an appeal to the pre-trial judge to decide on the legality of the requirement to appear before the prosecutor. This provision has stirred some controversy since the draft stages of Code review. In truth, the article 125 failed to thoroughly regulate this competence of the pre-trial judge.

However, the provisions of the criminal procedure shall be interpreted in favour of the defendant and take into account that the defendant is notified of the criminal proceeding against him when he receives the summons to appear before the state prosecutor. As the provisions of the Code of Criminal Procedure are based on the European Convention on Human Rights, the opinions of the European Court of Human Rights also state that "a criminal indictment shall be any notice of the state authority that a person is charged of a crime commission". This issue remains contentious as this provision has some gaps, especially as it relates to possible decisions of the pre-trial judge. To date, however, no such complaint has been recorded.

Under the provisions of Article 213, par. 3 of the KCPC, the defendant's attorney shall be allowed inspection, copy or pictures of any interlocutory applications, books, pictures or other items available to state prosecutor, i.e. materials that serve for preparation of defence as evidence acquired from the defendant or were previously under his property, as the case may be. The state prosecutor may deny access, however, the defendant may ask the pre-trial judge to allow inspection, copying or photocopying. Also, under article 214, par. 1, even if such a request is denied by the court and the prosecutor assigned under paragraph 2 of the article 214, the defendant and his attorney shall be entitled to appeal with the pre-trial judge. The ruling of the pre-trial judge shall be final and binding.

2.1. The decisions of the pre-trial judge are final and binding

The state prosecutor shall issue a decision on detaining a person arrested by police no later than 6 hours upon arrest, an authority also extended to the court police officer under the Code of 2004. Under the KCP, both the defendant and his attorney are entitled to appeal with the pre-trial judge in the course of 24 hours.

The pre-trial judge shall decide on the appeal within 48 hours of the arrest. Also, the defendant may ask the state prosecutor to obtain any concrete evidence¹³. If the state prosecutor rejects the request for obtaining evidence, the defendant may appeal such decision with the pre-trial judge. The Code of Criminal Procedure also fails to provide a thorough solution to this issue in that it fails to specify the possible decision and its character in the procedure.

3. Decisions, orders at the proposal of the injured party, his legal or authorized representative

The injured party under the current legal proceeding has seen an enhancement of its rights and more adequate treatment to the extent that, in some crimes, such as those involving bodily integrity and sexual violence, they are afforded equal rights to regular parties to proceedings (article 219 paragraph 1, item 7 in relation to article 374 par. 2 of the KCPC).

Also, during the preliminary criminal procedure (investigations) the injured party may ask the state prosecutor to obtain any evidence both within the country and abroad¹⁴, who shall then decide on the relevance of the evidence and its bearing on the further proceedings and, on the basis of such determination, shall either approve or reject the request with reference to article 217, paragraphs 1,2,3,4.

At the proposal of the injured party and in view of article 218 par. 2 of the KCPC, the pre-trial judge shall decide on the safety of any property-legal claim.

The injured party or his legal or authorized representative are entitled to inspect, copy or take pictures of the interlocutory applications and material evidence available with the state prosecutor, if his interest is deemed legitimate. In case the prosecutor rejects this request of the injured party, the injured party may appeal with the pre-trial judge.

The ruling of the pre-trial judge shall be final and binding, however, in case of denied access to evidence, the trial panel may decide further.

Also, as with the defendant, provisions of article 216 of the KCPC allow the injured party to request acquisition of any evidence by the state prosecutor. In case the prosecutor rejects the request, the injured party may appeal the decision with the pre-trial judge.

¹³ See article 216 par.1 of the KCPC

¹⁴ Article 219 par.1,2,3,4,5,6,7 of the KCPC

4. Special investigative opportunity

Article 149 of the Criminal Procedure Code allow for a special investigative opportunity whereby a state prosecutor or a defendant may ask the pre-trial judge to obtain the testimony from a witness or seek an expert opinion, for the purpose of preserving evidence in case of a unique opportunity to collect important evidence or in case of a potential risk that the evidence may not be subsequently available during the trial.

In cases when the pre-trial judge rejects the proposal submitted by the authorized parties under KCPC, an automatic entitlement to appeal before the three-judge trial panel shall be generated. In cases when the judge undertakes these investigative actions, he shall hold a hearing with the view of obtaining evidence from the witness and the expert in the presence of the defendant, defence attorney and the state prosecutor, while the injured party or his representative shall be informed of the hearing and are entitled to participate.

5. Conclusion

In view of the discussion above, the pre-trial judge has an important role among other subjects in proceedings. The role and position of the pre-trial judge, the prescribed competences and legal authorities are indicative of an advanced role for control of legality of police and prosecutorial action during the pre-trial investigations. The current utilization and application of measures have become commonplace, especially in situation when criminal denouncements are made in Kosovo prosecutions against NN persons involving a crime which has actually been committed. I believe that, in these situations, the rationale does exist.

We are also witness of everyday practices, as covert measures are introduced in Kosovo for the first time in 2004. This was also the time of introduction of a new designation for the institution of the pre-trial judge, which in itself encompasses the position, the role, authorizations and competences for this stage of procedures, as an entity that balances the legality of parties' requests, now recognized under the Criminal Procedure Code. Before that, Kosovo lacked both legal framework and technical capacity; inability to employ these measures contributed to a considerable number of unresolved cases in Kosovo, left pending to this date. The Criminal Procedure Code asks much more responsibility of the parties and of the judge himself, as safeguards of parties' rights provided for under the Law. In other words, the role of the judge changed significantly, as it has now been assigned a much more proactive role in investigating and adjudicating the actions and less so during the procedure, with a commensurate enhancement of rights of other parties to proceedings. The role of the pre-trial judge as part of the activities provided for by the KCPC during the pre-trial stage, actions undertaken at the request of parties to procedure, should be corroborated requests for citing measures with the mere fact that all judges in criminal proceedings, irrespective of their legal authorizations, should observe and implement those in practice as recognized under the law, as in so doing, they will have proven their

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professionalism, independence, impartiality and integrity as law enforcers and institutions respecting the human rights and freedoms in conformity with the Conventions we are required to observe, along with other internal acts we apply every day for cases brought before us.

6. Recommendations:

- It is recommended that applicants are spared of needless applications to the extent possible, in cases when a criminal investigation may be carried out without recourse to covert technical surveillance measure.
- It is recommended that pre-trial judges may also be equally vigilant upon receipt of such requests, analyse the conditions of each such request thoroughly to ensure existence of legal conditions to accommodate the request of the requesting authority (police or prosecutor), and decide further on the rationale of the approval, as in practice no request for such measure should be submitted and subsequently approved by the pre-trial judge, unless a decision on commencing investigation against any such person is reached, as has become the daily practice in some courts.
- Distinguish situations involving a suspect and a defendant, with the mere fact the with a suspect, there is situation which may entail a criminal denouncement only, perhaps even unsubstantiated by reasonable doubt. Amidst the inability to collect other evidence, we may resort to covert measures only as a last resort, although lacking a decision for commencement of investigations, because there is only a person suspected of committing a crime.
- For both the prosecutor and the pre-trial judge: the state prosecutor should not submit a request for search warrant of premises or houses of an x or y person with the pre-trial judge, unless there is a substantiated suspicion that a crime has been or will be committed, unless the person whose premises or home will be searched has a status of a defendant against whom a decision for commencement of investigations has been reached. The last two sentences should constitute grounds for pre-trial judge to reject any proposal in contradiction.
- The judges should first analyse any requests personally and may then delegate them to support staff, as in view of excessive workload, a similar practice seems to be lacking.
- Prosecutors and judges should strive to pursue professionalism and genuine legality in submitting requests to each other rather than relegate those to the level of mere formality always presupposing approval.

Due to inability to list all recommendations, it is hoped that in view of the significance of these six recommendations the officials carrying state authorities, the prosecutors and judges may consider them properly when implementing them in practice, in addition to many others, which we could not list separately.

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