

KJI NEWSLETTER

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This newsletter is published to fully inform the magistrates in Kosovo on the activities of the Kosovo Judicial Institute (KJI). This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles relating to issues of interest to judges and prosecutors working in Kosovo.

PROVISIONAL ARREST AND POLICE DETENTION

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INTRODUCTION

The measure of the provisional arrest and police detention is very important for the criminal proceedings. Therefore, the Provisional Criminal Procedure Code of Kosovo provides for a variety of legal provisions applicable on provisional arrest and police detention.

The elaboration of this topic aims to provide more clarifications of several elements on avoiding some of the actual dilemmas, in theory and judicial practice, in relation to provision of provisional arrest and police detention, in particular the issues related to the rights of the arrested or detained person, by emphasizing the rights for legal defense during this stage of procedure.

The elaboration of this matter is of special importance because of the fact that the theory and practice provide for different

opinions in relation to this matter, during this phase of the criminal proceedings the question raises whether the legal defense shall be mandatory or not, should the arrested or detained person have a defense counsel or it depends upon the free will of the arrested person to engage a defense counsel, are the statements of defendant given to the police or public prosecutor without presence of his defense counsel, admissible in court or not, etc.

Therefore, in relation to these and other matters related to this topic, I will try to provide you with more clarifications of the respective dilemmas, by not pretending to only speak but involving you as well during the elaboration in order to clarify many dilemmas so in the future we will have the unified implementation of the provisions regulating this matter.

PROVISIONAL ARREST AND POLICE DETENTION

The measure of the provisional arrest and police detention is provided for by the chapter XXIV, Art, 210 through 219 of the Provisional Criminal Procedure Code of Kosovo.

According to the provisions of Art, 210, this measure may be applied by the police and other persons, if a person is caught in the act committing a criminal offence prosecuted *ex officio* or is being pursued. As aforementioned, the police or any other person is authorized to conduct provisional arrest without Court order.

The arrest or deprivation from liberty is factual measure that the police can apply without any written ruling. While regarding the extension of arrest, there is no longer term in keeping the person under arrest. This measure shall only last according to the need for taking the arrested person in court or police station, informing the public prosecutor upon his arrest and for undertaking further steps in reasoning his detention.

The turn over of the arrested person in the Court or police station can be done in exceptional circumstances as for example the long distance between, or because of other elementary misfortunes: as flooding, blocked roads, raining, snowing etc. Therefore, the turnover of the arrested person in time because of these obstacles was unpreventable for the moment.

If such delays occur, the police shall issue a written reasoning upon the delay for apprehending the arrested person.

Whereas, the person deprived of his liberty by persons other than the police, shall be immediately turned over to the police or, where that proves impossible, the

police must be immediately notified upon the arrest and reasons for the arrest.

The police may deprive a person of liberty if there is a grounded suspicion that this person has committed a criminal offence prosecuted *ex officio* and when there are reasons for detention according to the Art. 281, paragraph 1 of PCPCK.

In such case, according to the Provisional Criminal Procedure Code, the police have two possibilities to act. The first is that the police are obliged, without any delay, to bring the arrested person to a pre-trial judge to rule on detention on remand, pursuant to the Art. 211, whereas, according to the second possibility the police shall inform the public prosecutor promptly and no longer than six hours from the arrest to rule on detention on remand.

The provision of the Art. 211 is unclear and has legal gaps, because this provision doesn't clearly determine which are the competencies of the pre-trial judge are in concrete case. This provision is also in contradiction with the provision of Art. 212, paragraph. 5 providing that as soon as possible after the arrest, no later than six hours from the time of the arrest, the public prosecutor or an authorized senior police shall issue for the arrested person a written decision on detention. Art. 282, paragraph. 1 of the PCPCK also provides for the detention on remand that shall be ordered by the pre-trial judge of the competent court upon a written application of the public prosecutor and after the hearing. Therefore, based on the right understanding of these provisions concluding that the pre-trial judge cannot order the detention on remand without the motion of the public prosecutor and

as such measure the provision of Art. 211 are inapplicable.

The provisional arrest and police detention shall be authorized by the public prosecutor. However, when due to exigent circumstances such authorization cannot be obtained prior to the arrest, the police can arrest and detain a person even without such authorization, but immediately after must notify the public prosecutor after the arrest.

The police, due to exigent circumstances, can arrest and detain a person even without the authorization of the public prosecutor under the following circumstances:

1. when there is a grounded suspicion that this person has committed a criminal offence which is prosecuted *ex officio*;
2. when the arrest and detention is necessary to establish the identity of the person, to check an alibi or to collect information and items of evidence for the criminal offence and when;
3. when there are reasons for detention, to establish the identity of the person or when there are reasons that the person can abscond, and when there is a good reason to fear that the person might destroy, hide, or try to change the evidence of the criminal offence, or when special circumstances show that the person is trying to impede the flow of the criminal proceedings trying to have an influence on the witnesses and victim or other co-perpetrators, and when the seriousness of the offence, his personal characteristics, previous behavior, environment and living conditions

showing the risk that he can re-offend, to re-attempt or even commit the threatened criminal offence.

As soon as possible after the arrest and no later than six hours from the time of the arrest, the public prosecutor or an senior police officer shall issue to the arrested person a written decision on detention which shall include the first and last of the arrested person, the place, date, and exact time of the arrest, the criminal offence of which he is suspected for, the legal basis for the arrest and an instructions on the right to appeal, pursuant to the Art, 212, paragraph 5 of PCPCK.

The arrested person has the right to appeal a decision to the pre-trial judge. The police and the public prosecutor have a duty to ensure that the appeal is delivered to the pre-trial judge. Is important to ensure that the appeal shall not stay execution of the decision, while the pre-trial judge shall decide on the appeal within forty-eight hours from the moment of the arrest (the text of the Albanian version provides for that this term is twenty-two hours, but according to the Art, 556 prevails the English version, therefore, this term shall be forty-eight hours of the arrest).

Upon the arrest, the arrested person shall be informed - orally of his rights as set forth by Art. 214 of PCPCK or in written of other rights to which the arrested person enjoys under this Code, in particular has the right:

1. to be informed about the reasons for the arrest, in a language the arrested person understands;
2. to remain silent and not to answer any question, except to give information about his identity;
3. to be given a free assistance of an interpreter, if the arrested person cannot

- understand or speak the language of the police;
4. to receive the assistance of defense counsel and to have defense counsel provided if the arrested person cannot afford to pay for legal assistance himself;
 5. to notify or require the police to notify the family member or another appropriate person of choice of the arrested person about the arrest and;
 6. to receive a medical examination and medical treatment, including psychiatric treatment

When the arrested person is a foreign national, he or she has the right to notify or to communicate orally or in written with liaison office or diplomatic mission of the state of which the arrested person is national, or with the respective competent international organization if the arrested person is refugee or is otherwise under the protection of an international organization.

The arrested person has the right for assistance of the defense counsel immediately after the arrest, of a personal choice. This rule provides for exceptions as well. Therefore Art. 213 paragraph 5 sets for that is the arrested person is suspected of terrorism or organized crime and there are grounds to believe that the defense counsel chosen by the arrested person is involved in the commission of the criminal offence or will obstruct conduct of the investigation, the pre-trial judge may, upon the application of the public prosecutor, order that alternative defense counsel be appointed to represent the arrested person for maximum period of seventy-two hours from the time of arrest.

If the arrested person does not engage the defense counsel on his own, his legal representative, spouse, extramarital partner, blood relation in a direct line, adoptive parent, adopted child, brother, sister or foster parent may engage defense counsel for the arrested person, having in mind the fact that all the specified persons cannot engage the defense counsel against the will of the arrested person as set forth in Art, 69, paragraph, 6 of PCPCK.

The right to defense counsel may be waived, except in cases of mandatory defense. If the arrested person renounces from the right to engage the defense counsel, it shall be clear that after the notification from the police or public prosecutor upon the right to engage a defense counsel, and that the defense counsel may participate during the cross-examination of the arrested person and the waiver is done explicitly and in voluntary manner. However, the waiver may be done in written and shall be signed by the arrested person and competent authority conducting the criminal proceedings or made orally on video or audio tape, which is determined to be authentic by the court.

If the arrested person who has made a waiver subsequently reasserts the right to the assistance of defense counsel, the arrested person may immediately exercise the right.

The persons under the age of eighteen may waive the right to the assistance of defense counsel with the consent of a parent, guardian or a representative from the Center for Social Work, except in cases of domestic violence involving the parent or guardian, such parent or guardian may not consent to the waiver of such right.

It's very important to specify that the waiver to defense counsel is not acceptable in cases when the arrested person is with mental disorder or disability and is incapable of effectively defend himself.

The theory and practice provide different opinions in relation to the mandatory defense at the stage when the suspected is under arrest. According to the opinion of the District Court in Prishtina, the arrested person shall enjoy the same rights as the detained person; respectively the defendant in police station can enjoy less right than during the judicial proceedings. According to the assessment of this Court, the defense shall be mandatory also during the arrest and police detention. Therefore, on its ruling Ap.no.424/2005 on 05.08.2005, abrogating the decision of the Municipal Court in Prishtina, P.no.110/2005 on 07.04.2005, amongst other issues, and the fact that the defendant while being under provisional arrest had no defense counsel, therefore, according to the assessment of this court, is inadmissible evidence. According to my opinion the Assessment of the District Court in Prishtina, was not just based on the following reasons:

Pursuant to the Art. 73, paragraph 1 the defendant shall have a defense counsel:

1. from the first examination, when the defendant is mute, deaf, or displays signs of mental disorder or disability and incapable of effectively defending himself;
2. at hearings on detention on remand and throughout the time when the defendant is in detention on remand;
3. from the filing of the indictment, if the indictment has been brought against the defendant for criminal offence punishable by imprisonment of at least eight years and;

4. for proceedings under extraordinary legal remedies when the defendant is mute, deaf, or displays signs of mental disorder or disability or a punishment of long-term imprisonment has been imposed.

Understanding the respective provision right results that during the arrest and at later stage of the investigations, the defense is not always mandatory, respectively the defense is mandatory only in cases when the arrested person is mute, deaf or displays signs of mental disorder or disability, while during the investigative procedure the defense is mandatory for the defendant only at the hearings on detention on remand and throughout the time on detention on remand. In favor to this opinion is applicable the provision of Art, 69, paragraph, 3 providing that the right to the assistance of a defense counsel may be waived, under the conditions determined by the law, and the provision of Art. 218, paragraph. 1 providing that: During all examinations by the police, an arrested person has the right to the presence of defense counsel. If defense counsel does not appear within two hours of being informed of the arrest, the police shall arrange alternative defense counsel for the arrested person. Thereafter, if the alternative defense counsel does not appear within one hour of being contacted by the police, the arrested person may be examined only if the public prosecutor or the police determine that further delay would seriously impair the conduct of the investigation.

According to the provisions aforementioned, it is clear that the provisions of the previous Articles are transparent and not imperative, because in cases foreseen by Art. 73, paragraph 1, subparagraphs 1 up to 4 provide that the defense is mandatory. The expression “may waive the right” pursuant to the Art. 63, paragraph 3 and the one “has the

right in presence of the defense counsel” pursuant to the Art. 218, paragraph 1 of PCPCK, are transparency provisions, meaning that it is defendant’s choice to engage a defense counsel, therefore, in all cases when the defendant wives the right to have the assistance of the defense counsel, the statements and other evidence presented by the defendant are admissible according to the provision of Art.156, paragraph 1 if the statements were taken in compliance with the provision of Art. 229 up to 236 of PCPCK, and in addition the statements of the defendant may be used for challenging the statements of the defendant at the Court, pursuant to the Art. 372, paragraph 2 of PCPCK.

It’s important to consider the fact that the detention and arrest, according to the Criminal Procedure Code, are two separate institutions, therefore, the rights of the arrested person, based on the reasonable suspicion that he has committed a criminal offence prosecuted *ex officio*, against whom the procedure has not initiated yet, are not the same rights as the rights of detained person, who is deprived of liberty, upon the Court ruling, and that during the pre-trial procedure, during the flow of judicial proceedings, or before the judgment becomes final.

The arrested person enjoys the right for confidential communication with his defense counsel, orally or in written. The communication between the arrested person and his defense counsel may be observed from the distance, but in not to be heard by the police.

The arrested person immediately after the arrest has the right to inform of require from the police to notify the family members or any other appropriate person of his personal choice about the arrest, place of

the arrest, place of the detention immediately after the arrest, and about any subsequent change in place of detention, immediately after such change.

When an arrested person has not reached the age of eighteen years, the police shall notify the legal representative of the arrested person about the arrest and place of the detention immediately after the arrest, and about any subsequent change in place of detention, immediately after such change. If such notification is impossible, would be detrimental to the interests of the arrested person or is expressly refused by the arrested person, the police shall notify the Centre for Social Work.

When the arrested person displays signs of mental disorder or disability, the police shall notify a nominated person by the arrested person and the Centre for Social Work about the arrest and the place of detention immediately after the arrest, and about any subsequent change in place of detention, immediately after such change.

Notification, for such cases as above mentioned may be delayed for up to twenty-four hours where the public prosecutor determines that the delay is required by the exceptional needs of the investigation of the case.

However, is important to not have such delays when the arrested person in under the age of eighteen or displays signs of mental disorder or disability.

The arrested person has the right, upon request, to be examined by doctor or dentist of his choice as promptly as possible after the arrest and at any time during the detention. If such doctor or dentist is not available, a doctor or dentist shall be designated by the police.

The arrested person has the right to medical treatment, including the psychiatric treatment, whenever necessary, upon the

request of the arrested person or family members.

The police may also appoint a doctor to conduct a medical examination or to provide a medical treatment at any time in the case of physical injury or other apparent medical necessity. In case the arrested person refuses to undergo a medical examination or to accept medical treatment, the doctor shall render a final decision on the necessity of such examination or treatment, after due to consideration of the rights of the arrested person.

When the arrested person displays signs of mental illness, the police in such case may immediately order an examination by a psychiatrist. The results of any medical examination or any medical treatment undertaken pursuant to the present rules shall be duly recorded, and such records shall be made available to the arrested person and his defense counsel.

The arrested person shall be detained separately from the sentenced persons or persons in detention on remand. The persons of different gender shall not be detained in the same room.

A person detained for more than twelve hours shall be provided with three meals a day. Within the period of twenty-four hours, an arrested person shall have the right to at least eight hours of uninterrupted rest, during which period shall not be examined and shall not be disturbed by the police in connection with the investigation.

Before any examination of the arrested person, the arrested person besides the rights set forth in Art. 214, as aforementioned, the arrested person shall be informed also on the following rights:

1. for the criminal offence of which the arrested person is suspected;

2. the fact that his statements can be used as an evidence at the court and;
3. the fact that the arrested person may require gathering of evidence for his defense.

During the examination the arrested person shall have short breaks at intervals of approximately two hours. A break may be delayed if there are reasonable grounds to believe that the delay would:

1. cause a risk of harm to persons or serious loss of, or damage to, property;
2. unnecessarily prolong the person's detention or the conclusion of the examination; or
3. prejudices the outcome of the investigation.

The examination of the arrested person shall be done by respecting the dignity of the defendant. During the examination an arrested person shall not be required to stand not be denied food, water or any necessary medical attention.

The questions made to the arrested person shall be clear, understandable and prompt. The questions made to the arrested person shall not be done based on assumption that the arrested person has pleaded something that he has not pleaded. Such legal prohibition shall be applied regardless of the consent of arrested person.

The examination of the arrested person shall be conducted orally, but, during the examination the arrested person shall be allowed to take notes. The examination of the arrested person shall offer the possibility for objection on reasons against him and present fact on his favor.

The items which are related to the criminal offence or the ones that serve as evidence, after the description of arrested person, the arrested person shall be informed, if those items cannot be brought, in such case the

arrested person will be send to the location of those items.

During the examination the arrested person is prohibited to:

1. impair the defendant's freedom to form an opinion and to express what the defendant wants by ill-treatment, induced fatigue, physical interference, administration of drugs, torture, coercion or hypnosis;
2. threaten the defendant with measure not permitted under the law;
3. hold out the prospect of an advantage not envisaged by the law; and
4. impair the defendant's memory on the ability to understand

The prohibitions aforementioned shall apply irrespective of the consent of the subject of questioning or examination.

It shall be considered when the examination of the defendant is conducted in violation of Art. 155, paragraph 1 and the provisions of Art. 231, paragraph 2 and 3, or Art. 234, paragraph 2 of the PCPCK, the statements of the defendant shall be inadmissible as set forth in Art. 235 paragraph 1.

The statements by the defendant given to the police or the public prosecutor shall be admissible evidence in court only when taken in accordance with the provisions Criminal Procedure Code, such statements can be used to challenge the testimony of the defendant in court pursuant to the Art. 156, paragraph 1.

The police shall keep a single written record of all actions undertaken with respect to an arrested person, including:

1. the personal data of the arrested person;
2. the reasons for the arrest;

3. the criminal offence of which the arrested person is suspected;
4. the authorization or notification of the public prosecutor;
5. the place, date, and exact time of the arrest;
6. the circumstances of the arrest;
7. any decision of the public prosecutor or an authorized senior police officer regarding the detention;
8. the place of detention;
9. the identity of the police officers and the public prosecutors concerned;
10. oral and written notification to the arrested person's rights, as provided for in Art. 212, paragraph 3 of the present Code;
11. information about the exercise of the rights, as provided for in Art, 214 of the present Code, especially the right to defense counsel and to notification of family members or other appropriate persons;
12. visible injuries or other signs which suggest the need for medical help
13. the conduct of a medical examination or the provision of medical treatment; and
14. information about the provisional security search of the person and a description of objects taken from the person at the time of the arrest or during the detention

The police shall keep a written record of any examination of the arrested person, including the starting time of concluding of the examination and the identity of the police officers who conducted the examination and any other present persons, when the defense counsel was not present during the examination this shall be duly noted in the records.

The written records shall be signed by the appropriate police officer and countersigned

by the arrested person. In case the arrested person refuses to sign the written record, the police authorities shall record such refusal and any explanation and append any comments

offered by the arrested person orally or in written.

Upon the request of the arrested person or defense counsel the written records shall be made available to them.

FINAL CONCLUSIONS

When the person is caught in the act committing the criminal offence prosecuted *ex officio* or is being pursued, the police or any other person is authorized to provisionally arrest him.

An arrested person during the time in arrest shall enjoy all the rights granted by the law.

An arrested person has the right to immediate assistance of defense counsel of free choice upon the arrest.

The legal defense, in exceptional cases shall be mandatory with no possibility to waive this right; while in other circumstances deciding to exercise this right or not, the right to defense counsel may be waived explicitly and in an informed and voluntary manner.

Besides the mandatory defense, the right of the arrested person to engage a defense counsel may be waived. These rights under the conditions determined by the law enjoy the persons under the age of eighteen.

Therefore, the theory and practice provide different opinions in relation to whether the defense shall be mandatory

during the time the person is under arrest or police detention.

According to some opinions the arrested person, during the provisional arrest and police detention shall have a defense counsel. According to those opinions the defense shall be mandatory and each statement taken without the presence of the defense counsel shall be inadmissible.

Whereas, based on some other opinions that I think is more appropriate is that the defense for the arrested or detained person, shall be mandatory only under exceptional circumstances: when the arrested person is mute, deaf, or displays signs of mental disorder or disability, otherwise the defense shall not be mandatory for the arrested person, while the statements of defendant taken by the police or the public prosecutor, even without the presence of the defense counsel shall be admissible, under condition that the arrested person upon his free will waived this right.

Therefore, for the Supreme Court remains to conduct a general hearing, or upon the requirement for protection of legality to render a final judgment on these matters.

KJI Training Activities May 2006

Practical Skills Training: Simulation of a trial – Juvenile Justice field

On 03 May 2006 KJI organised this practical training for judges and prosecutors from Pristina Region who deal with juvenile cases.

Although the juvenile delinquency is an integral part of criminality in general they are characterised with special characteristics. This simulation of a trial which was held in the premises of District Court of Pristina aimed to clarify a lot of dilemmas from this field and also aimed to serve as guidance for the protection of the rights of juveniles during the judicial proceedings.

Practical Skills Training: Simulation of a trial

On 11 May 2006 KJI held a practical simulation of a trial for the judges of the civil field from Mitrovica region. A problematic case from the court practice for compensation of damages was selected for the purpose of this seminar. The participants discussed the problems related to the civil procedure in similar cases.

Training for Minor Offences Judges

Throughout 2006 KJI continues to organise special training sessions for Minor Offences

judges. The second training session for this year focused on the Minor Offence Procedure with special emphasis on the Minor Offence Liability, co-liability of natural and legal persons and collection of evidence during the procedure. This training session was held at KJI premises on 16 May 2006.

Seminar – Criminal offences against life and body

On 18 May 2006 KJI organised training with the above mentioned topic. This training aimed to give a detailed overview on the criminal offences against life and body, their elements and the manner of their manifestation in practice pursuant to the Criminal Code. Cases from the court practice were also presented.

Simulation of a trial – Indictment, Confirmation of Indictment

Within the scope of different simulations of trials from the criminal field on 24 May KJI organised simulation of the Hearing for the Confirmation of Indictment in the region of Peja. A concrete case from the practice which is related to the issue of Indictment and the Confirmation Hearing was selected for this purpose.

Forthcoming events June 2006

Seminar – Cooperation between the Prosecution and Police in Riot Cases

Target group: pre-trial judges, public prosecutors and police officers

Taking into consideration that riot cases require instant and well coordinated actions

between the different bodies and institutions, KJI has deemed as necessary to organise a seminar on this topic with the purpose of increasing the level of cooperation between them in riot cases. The report of the OSCE Mission in Kosovo/

Legal System Monitoring Section on “The Response of the Justice System to the March 2004 Riots” will be also presented and the findings of this report will serve as a basis for discussion.

Planned date: 01 June 2006

Workshop – Practical Aspects of Inheriting the Inheritable Property

Target group: judges of the civil field

This workshop will treat topics which are related to the testimonial witnesses, inheritance based on the testament, inheritance based on the law, and other related inheritance issues from the court practice.

Planned date: 06 June 2006

Workshop – New Types of Investigations, Covert and Technical Measures of Surveillance and Investigation

Target group: judges, prosecutors and police officers

This workshop shall tackle the issues of covert and technical measures that are undertaken by the public prosecutor, the ones that are ordered by the judge in the pre-trial procedure, their importance and effect in the investigative procedure.

Planned date: 08 June 2006

Seminar for lay judges from Prizren Region

In accordance with its mandate KJI trains lay judges in the regions all over Kosovo. Training for lay judges is foreseen to be held in Prizren Region. The training will focus on the practical aspects of development of criminal and civil procedure and on the Code of Ethics and Professional Conduct for lay judges.

Planned date: 13 June 2006

Seminar on European Convention on Human Rights

Target group: judges and prosecutors

This training will give a detailed overview on practical implementation of the provisions of Articles 5 and 6 of the European Convention on Human Rights and will increase the knowledge of Kosovar judges and prosecutors towards the case law of European Court of Human Rights.

Planned Date: 15 and 16 June 2006

Seminar – The role of the witnesses in the Criminal Procedure

Target group: criminal field judges and public prosecutors

This seminar shall treat the issue of witnesses in the criminal procedure, protection of cooperative witnesses and injured parties in accordance with the Criminal Procedure Code. This seminar will also treat the issue of implementing the examination of witnesses by the public prosecutor and the court.

Planned date: 21 June 2006

Workshop on Code of Ethics

During 2006 KJI has continued with the organisation of workshops on Code of Ethics in all the regions of Kosovo. This time target group of this training are judges and prosecutors from Prizren Region. The training aims to give more detailed overview on the practice and experience in which the judicial independence may be worrying. The seminar will focus on the position of the judge as individual decision-maker and decision-maker in a panel.

Planned date: 27 June 2006

Seminar – Contractual Relationship and their Specifics

Target group: judges of the civil field

This seminar will provoke discussions on issues such as contractual relationships, rights and obligations of contractual parties,

annulment of contract, business contracts and other issues related to the court practice.

Planned date: 29 June 2006