

## **KJI NEWSLETTER**

### **June/July 2005**

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

#### **JUDICIAL TRIAL IN THE CRIMINAL PROCEDURE INVOLVING JUVENILES\***

*Judge Nesrin Lushta, District Court in Mitrovicë/Kosovska Mitrovica*

The criminal procedure involving the juvenile perpetrators gives a possibility of not conducting the judicial trial at all. Even if there are sufficient grounds for initiation of such a procedure the public prosecutor may decide not to conduct the procedure at all, or it may be decided that the procedure that was initiated to be terminated. Besides this a diversity measure may be imposed on the minor, either by public prosecutor or judge, by doing so the judicial trial will not be conducted at all.

However, before each judicial trial, preparatory procedure should be conducted. There is no imperative norm for confirming this rule, however, there is no rule either that suggests that the proposal made by the public prosecutor as an accusation act may be directly conducted by the court without heaving the preparatory procedure. If we would interpret the other provisions of the Juvenile Code, it becomes clear that before the judicial trial the following facts need to be verified: age of the juvenile, the facts on his personality, and his or her living conditions as they are of fundamental importance for choosing the measure or punishment which will be imposed on the juvenile at judicial trial. This indicates that

the judicial trial may not be held without the preparatory procedure.

The accusation act in the procedure involving a juvenile is a proposal of the public prosecutor on imposing certain measure or punishment. This is not an indictment so there is no procedure for confirmation of indictment either. This means that the stage of the procedure in which the juvenile would enter a guilty plea is missing, nevertheless the flow of the procedure at the judicial trial should be the same as in procedures involving adults (meaning the juvenile should enter guilty plea at the judicial trial), because of a lack of any legal provision which would determine this issue otherwise.

Pursuant to Article 67, of Juvenile Justice Code of Kosovo, upon receiving the proposal by the public prosecutor on imposition of the measure or punishment, the juvenile judge may transfer the case at another court or decide on rejecting the proposal, because there is no confirmation stage of the proposal nor is the proposal served on the juvenile or his or her defense attorney for eventually challenging it. The grounds for rejection of the proposal are:

- If the offence with which the minor is charged does not constitute criminal offence,
- If there are grounds that exclude him or her from the criminal liability
- If the Criminal prosecution is matured, if this offence has been included in the act of amnesty or remission, or other reasons that prohibit criminal prosecution.

It is evident also that the proposal may not be rejected due to the lack of evidence, what makes this procedure different from the procedures involving adults.

If the juvenile judge (who is also a presiding judge of juvenile trial panel) does not undertake any of the decisions listed above he or she is obliged to appoint a judicial trial within 8 days from the day of reception of the proposal at the court.

This provision opens some issues for discussion and assertion in the following issues:

1. With respect to the issue of when the public prosecutor's proposal becomes final. I consider that this occurs when a judge undertakes any action on appointment of the main trial (like serving the summons).

2. The deadline for appointing the judicial trial is very short 'only 8 days'. Within these 8 days the preparation for the judicial trial should be completed, and it should ensure that the minor and his or her defense attorney receives the summons on due time, nevertheless the time in disposal of the defense attorney is only 1 or 2 days and in my opinion it is not sufficient for the

preparation of defense, especially on the more complicated cases, this for sure must have support on the principle of urgency of the juvenile procedure.

3. It is clear that it is no longer possible to decide on the session of the panel, though this possibility used to exist on the previously applicable law, now it is legally imperative that the judicial trial should be appointed.

The summary procedure provisions do not apply in the juvenile procedure.

The preparatory stage for the main trial is no different than the one in the procedure involving adults. In this stage same as in the one involving adults the composition of the trial panel is characteristic. The juvenile judge is also a presiding judge, and two lay juvenile judges, who should have certain professions required by the law (Article 49), it is also requirement for the composition of lay judges to be in both genders; the date and time of the judicial hearing is then set, the summons are served through respecting the provision which provide that juvenile is summoned personally and through his or her parent, adoptive parent or guardian (Article 46); the reserve members of the panel may be appointed and the proposals of the parties may be taken with respect to the evidence to be collected at the stage of judicial trial.

The thing that could happen at this stage is that the presiding judge may decide not to initiate the judicial trial but to impose a diversity measure on the juvenile. This opinion is based on the provisions of Article 50.2 according to which the juvenile judge may impose this measure if the legal

conditions are met. The only case when the juvenile judge is entitled to do this is after receiving the proposal by the public prosecutor, this may also be decided by the trial panel (Article 67.3) at the judicial trial.

What is the procedure of initiation and the flow of the judicial trial in the procedure involving a juveniles?

For the whole stage of this procedure Juvenile Justice Law contains only 8 Articles. This means that the general provisions of the Criminal Procedure Code should be applied together with these 8 Articles which regulate only the changes and specifics of the trials involving juveniles.

First of all I want to mention that the judicial trial involving juveniles is not public. Pursuant to Article 69 it is permissible to allow only the experts and persons who professionally treat the wellbeing and the education of juveniles or who combat the criminal conduct in juveniles to remain in the courtroom. The trial panel may as well however exclude these persons from the courtroom if necessary.

The trial can not be conducted in absence of the juvenile (Article 39).

In majority of cases it can not be conducted without the defense attorney either, because pursuant to the new Juvenile Justice Code the defense attorney is obligatory in majority of cases (Article 40).

The preconditions for provisions on holding the minutes of the judicial trial are the same as provisions for holding the minutes at the main trial in the procedure involving adults.

The most important issue in my view is the issue of guilty plea of the juvenile, more precisely with respect to his or her declaration on guilt.

The law does not contain any provision with respect to the issue whether the juvenile has to declare him or herself on the guilty plea, and it appears that we strictly have to apply the adult provisions, because of lack of such a special provision in the Juvenile Justice Code. I am however skeptical with respect to this point of view, and I think that Juvenile Justice Code should undergo precise amendments in this respect. I consider that guilty plea in the adult procedure does not have the same importance as the guilty plea in the juvenile procedure. It is very rarely when the juvenile is found guilty. If certain measure is imposed on juvenile, the ruling of the decision does not state that he or she is guilty and the factual description is not given either, only the legal provision and the time length of the measure are mentioned there. If we would apply the provisions for adults from PCPCK, and if the juvenile would plead guilty on all the charges against him we would lack the stage of collection of evidence procedure, what means that we would not have evidence on his or her age, personality and other important evidence needed to render just decision on sanction which would eventually be imposed. I consider that this is totally in contradiction to the Juvenile Justice Code.

At the judicial trial the facts dealing with criminal offence and criminal liability of the juvenile need to be properly assessed, same as the facts dealing with his personality. In this respect the reports and statements made by the parents, guardians, and representatives of the probation service, and guardianship authority are of special

importance however their absence shall not stop or make obstacles in the flow of the judicial trial, because the written reports and documents have been previously submitted.

With respect to adjournment or recess of the judicial trial, the provision of Article 70 provides that juvenile judge is obliged to notify the president of the court on the reasons of any adjournment or recess of the main trial and shall state the reasons thereof.

There are no specific provisions with respect to changing or broadening of the accusation act, respectfully the proposal on measure and punishment, there is a provision that is very important because the trial panel is not bound by the proposal of the public prosecutor on the measure or punishment (Article 68). According to this article the juvenile trial panel is authorized to render a decision even if the prosecutor did not modify or extend its proposal, based on the evidence presented at the main trial, which evidence indicates the factual state which is different from the one presented in the proposal of the prosecutor. This is a very important exclusion on the principle of identity between the accusation act and judgment (decision).

The diversity measure may be imposed at any given time, before or during the judicial trial if the legal conditions are met, after the trial panel cross-examines the juvenile, his or her parent and the defense council.

#### Decisions taken by means of judicial decision and judgment

Through a judicial decision it is decided:

- When the procedure is suspended (when there are reasons foreseen in Article 389, and 390. of PCPCK, analogically through judgment on rejection and acquittal).
- When the diversity measures are imposed,
- When the educational measures are imposed.

By means of judgment it is decided when the punishment or measures are imposed from Chapter IX of PCPCK (the mandatory treatment measures and accessory punishments).

I have to also mention a great novelty which is that, juvenile trial panel has no longer a power to suspend the procedure against a juvenile because of the principle of non-opportunism.

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**\* The material was presented at the seminar on Juvenile Justice held by KJI on 12 July 2005**

## **Project activities June 2005**

### Initial Legal Education Program

The Initial Legal Education Program (ILEP) started as a Pilot Project on 15 April 2005 with duration of three months. After the candidates completed the last modules and the entire course of the ILEP, the Kosovo

judicial and Prosecutorial Council will make the final selection for appointment.

On 1 July 2005 at the premises of Villa Germija KJI handed out Certificates for Attendance and Completion of ILEP to

57 candidates who successfully completed the Pilot ILEP between April and June 2005.

#### Seminar: War crimes

On 7 and 8 June 2005 KJI organized a seminar focusing on war crimes as a phenomenon and on the role of the international community and ICTY in the prosecution of such cases. The seminar was planned as a training session aiming to enhance the judges'/prosecutors' understanding on the active role they shall play to gradually overtake these kinds of cases in the future.

#### Induction Training for Lay-Judges

On 16 June 2005 KJI organized the training session for the lay-judges in Gijlan/Gnjilane. The Induction training program gives a basic overview on the functions and responsibilities of the lay-judges in both criminal and civil procedure as well as main ethics related aspects of the position of lay-judge.

#### Seminar on Judicial Ethics

KJI in collaboration with the National Centre for State Courts (NCSC) organized series of training sessions in all the five regions in Kosovo focused on the practical aspects of judicial ethics. The training aims to give a deeper look into the position of the judge as a single decision maker or as a decision maker in the panel. The seminars highlight the specific responsibilities of the judges and prosecutors in regard to the Rule of Law

and social order in the context of the newest amendments of the Codes of Ethics and Professional Conduct.

During the reported period eight training sessions have been conducted – two per day for different group of judges and prosecutors from each region. The seminars took place as follows: 14 June 2005 - Prishtinë/Pristina, 15 June 2005 - Gijlan/Gnjilane, 17 June 2005 – Prizren and 20 June 2005 - Peje/Pec and on 22 June in Mitrovicë/Kosovska Mitrovica. Around two hundred judges and prosecutors are expected to complete the training program in all five regions of Kosovo.

#### Workshop on the Criminal Procedure Code

On 28 June the KJI organized a Workshop on the abovementioned topic for the Judges trying Criminal Law cases and prosecutors from Prishtinë/Pristina region. The subjects discussed at the Workshop were focused on criminal proceedings concerning Detention on Remand, Main trial and Appeal procedure. The training offered an interactive discussion on the disputable issues in the aforementioned proceedings.

## **Project activities July 2005**

Round Table Discussion on the Implementation of UNMIK Regulation

2005/16 on the Movement of Persons into and out of Kosovo

On 5, 11 and 13 July 2005 Kosovo Judicial Institute (KJI) and the UNMIK Department of Justice (DOJ) co-organized the aforementioned round table discussion aiming to present the provisions of the Regulation before the Municipal, District and Supreme Court Presidents. As the Regulation had recently entered into force, the subjects that were discussed focused on the responsibility of the courts under the Regulation and on the practical aspects of trying cases arising from the application of the Regulation. All the aforementioned sessions, were held at the KJI premises in Prishtinë/Pristina.

#### Workshop on Property Rights

On 6 July 2005 KJI organized a training session for the civil law judges from the region of Mitrovicë/ Kosovska Mitrovica. The workshop was the forth one after the training organized in Prizren, Gijlan/Gnjilane and Pejë/Pec. The participants discussed the competences of the regular courts and the Kosovo Trust Agency (KTA) and the legal aspects of ownership right. The training session was held in Mitrovicë/Kosovska Mitrovica.

#### Induction Training for Lay-Judges

On 7 July 2005 KJI conducted the last session of the induction training programs for lay-judges in Mitrovicë/Kosovska

Mitrovica. The first one-day session was held in Prishtinë/Pristina in March 2005. After the completion of the session in July KJI had completed the entire cycle of 5 induction seminars attended by over 150 lay-judges throughout Kosovo. The Induction training program gives a basic overview on the functions and responsibilities of the lay-judges in both criminal and civil procedure as well as main ethics related aspects of the position of lay-judge.

#### Workshop on the Juvenile Justice Code

On 12 July 2005 KJI in collaboration with the UNICEF Office in Kosovo organized the third training session on the new Juvenile Justice Code of Kosovo for the year 2005. Distinguished Kosovar Judges as well as an International Trainer from UNICEF Office in Kosovo presented the relevant legal instruments applicable in the proceedings involving juveniles. The objectives of the workshop aimed to present an analysis of the recent implementation of the new Code and to improve the coordination and interaction of all stakeholders involved in the proceedings of this Code. The Workshop took place at the premises of the KJI in Prishtinë/Pristina.

### **Forthcoming events**

#### Workshop on Minor Offences

*Target Group: Minor Offences Judges*

The Workshop is a continuation of a series of Workshops with the same title offered by KJI to the Minor Offences Judges. Participants will look at possibilities to

reduce the workload at the Minor Offences Courts by developing proposals supported by their practical experience for handling specific cases. The training session will be held at the KJI premises in Prishtinë/Pristina.

*Planned date: 13 September 2005*

#### Seminar: Labour law

*Target group: judges hearing labour cases*

The seminar will provide information about recent developments regarding labour legislation in Kosovo and in EU countries including anti-discrimination issues in relation to the employment and labour.

*Planned date: 15 September 2005*

#### Round Table Discussion on the Criminal Procedure Code

*Target group: Judges handling criminal cases and prosecutors*

The subjects that will be discussed at the RTD will focus on criminal proceedings under the provisions of the Criminal Procedure Code of Kosovo. The training will offer an interactive discussion to the participants on the disputable issues in the aforementioned proceedings. The discussion will focus mainly on examining the casework and specific procedure for court hearings on criminal cases. The RTD will take place in Pejë/Pec.

*Planned date: 20 September 2005*

#### Seminar on International Judicial Assistance

*Target group: Judges trying criminal cases and prosecutors*

KJI is planning to organize a Seminar on the abovementioned topic for the judges and prosecutors from all the regions in Kosovo. The KJI will be looking for cooperation with UNMIK DOJ, Office of returns and communities and other partners possibly

involved in the procedure. The seminar will aim to survey through presentations and discussions the new provisions related to International Judicial Assistance and application of the respective legal instruments such as: Requests for extradition, repatriation of immigrants, requests for International Legal Assistance to Foreign Authorities (service of documents, rogatory requests), Execution of Judgments and the Transfer of Sentenced Persons, the principal features of the European Arrest Warrant (legal and practical aspects regarding its implementation), the International Arrest Warrant

*Planned date: 22 September 2005*

#### Workshop on the Criminal Procedure Code

*Target group: Judges handling criminal cases and prosecutors*

The subjects that will be discussed at the Workshop will focus on criminal proceedings and on measures for protection of witnesses and victims. The training will offer an interactive discussion to the participants on the disputable issues in the aforementioned proceedings. The discussion will focus mainly on examining the casework and specific procedure for court hearings on criminal cases when special protection to the witnesses and victims is needed. The Workshop will take place at the premises of KJI in Prishtinë/Pristina.

*Planned date: 27 September 2005*