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KJI NEWSLETTER
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This newsletter is published to fully inform the magistrates of 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. KJI will invite this year magistrates to contribute to this Newsletter and to publish their own articles or reports.

THE AMENDMENTS OF THE PROVISIONS ON JUSTIFICATIONS IN THE NEW CRIMINAL CODE

SECOND PART

THE PROVISIONS ON NECESSITY (ARTICLE 9)

1. Article 9 CC envisages necessity. It reads in pertinent part:

"(1) An act committed in extreme necessity shall not be considered to be a criminal offence.

(2) An act committed in extreme necessity when a person commits the act to avert from himself, herself or another person an imminent and unprovoked danger which could not have been averted otherwise, provided that the harm created thereby does not exceed the harm threatened…".

If the text Article 9 (2) CC (having, by the way, the same wrong construction as Art. 8, Para. 2 CC) is compared to the text of the preceding Article 10 (2) of the Yugoslavian Criminal Code, it can be seen that the word "unprovoked" is inserted in the new text as a requirement for the unavoidable danger which constitutes the state of necessity. This new word revives the old and already finalized discussion of whether a prior fault of the actor is a bar to justification. Thus, if s/he has caused the danger for the saved interest, being negligent to the harm of the necessarily sacrificed interest or to intentionally harm the necessarily sacrificed interest, shall the conduct of this actor be justified?

- **S**uppose someone is negligent in using a defective stove on his camper, and sparks from the stove start a forest fire, which may spread and reach the near town. The question is: does this person (like everybody else) have the right to burn the field between his camper and the town in order to stop the fire, or he is not allowed?
- **A**nother example; someone starts such a forest fire on purpose, in order to create a justifying circumstance, which will permit him to burn the field because it belongs to his enemy.

The question is: does this person (like everybody else) have the right to burn the field or s/he has not that right; s/he acts unlawfully and may be stopped by means of necessary defense?

The answer is always the following: the person (like everybody else) has the right to burn the field; he acts lawfully while saving the town and may not be stopped by means of necessary defense[1]. The act itself of saving the town is lawful but this, obviously, does not mean that the whole conduct of the person shall be justified. Needless to say, s/he commits arson wanting, foreseeing or at least being able to foresee that the final result will be destroyed grass in the field by fire.

Therefore, any act of a person committed in necessity shall be justified (unless the limits are exceeded). There is no justification only for his/her previous act, which creating the unavoidable danger for the saved interest, has been committed with intent or negligence to the harm of the necessarily sacrificed interest. The actor is responsible for this act because the harm, which has finally occurred, is in causal connection with the act, and while committing it, s/he had intent or negligence for the final harm. Thus, even when the actor has created the unavoidable danger with intent to harm the necessarily sacrificed interest, which actually means that the danger has been provoked by the actor, s/he might though remove it, causing harm, which must only not "exceed the harm threatened". For that reason it is not required that the unavoidable danger which constitutes the state of necessity, shall be "unprovoked". To avoid confusion and misunderstanding, legislation usually does not insert in the legal text for necessity such words like "unprovoked danger". Such words do not relate to the prerequisites for necessity but only to the legal consequences of the act. Under CC there is a clear differentiation in that regard. Thus, if the prior fault of the actor consists of such a "provoked dander" that is to say, caused through intent, then the punishment for his/her first act shall never be reduced. But if the prior fault of the actor consists of a danger caused through negligence only, then under Art. 9 (3) CC the punishment for his/her first act "may be reduced".

Actually, the discussed requirement of being "unprovoked" fits necessary defense better, for which it has not been foreseen[2], than necessity for which it is foreseen. Thus, if the actor has provoked the assailant to unlawfully attack in order to artificially and with bad motive simulate grounds to harm him/her, this actor is not allowed to save the attacked interest by means of necessary defense – inflicting harm on the provoked (entrapped) assailant who is not expected to be later compensated for the harm caused to him/her. But in this case the actor is allowed to save the attacked interest by means of necessity – inflicting harm on a non-provoked third person who shall always be later compensated for the necessary harm caused to him/her (at

1 See also Robinson, P.: A theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, UCLA Law Review, Vol. 23, 1975, p. 280 – 283.

2 It has been foreseen for necessary defense, for example, in Article 20.4.3 of the Spanish Criminal Code.

least, under the rules for unjust enrichment). Therefore, if the word "unprovoked" was to be used, it must have been inserted in the text for the necessary defense (Article 8 CC) and not in the text for the necessity (Article 9 CC). Obviously, the history of criminal law has again been disregarded[3].

2. There is another amendment of the discussed Article 9 (2) CC as compared to the preceding Article 10 (2) of the Yugoslavian Criminal Code. It is again related to the state of necessity. The words "danger, which could not have been averted in any other way", used in the Yugoslavian Code, are replaced by the words "danger, which could not have been averted otherwise".

The replacement is neither essential nor particularly helpful. First of all, it does not change any thing; the new legal text means again that the act committed shall be the only possible way to save the endangered interest. Besides, the new legal text may not be called successful, because it continues to reflect an old-fashioned and mistaken understanding of necessity. Today it is not necessary that the act committed shall be the only possible way to protect the threatened interest; it is completely sufficient that there is no harmless (or "lawful") alternative to protect the threatened interest. If there are two or more harmful ways out, they do not block one another; it is only required that the final harm caused is smaller than the one avoided. That is why it would have been much better if the up-to-date understanding were expressly written in Article 9 (2) CC with such words as "danger, which could not have been averted in any harmless way".

3. It is just the same problem of disregarding the development of criminal law with the limits of necessity under the same Article 9 (2) CC, which reads: "that the harm created thereby does not exceed the harm threatened". Any such article, which envisages the so-called OFFENSIVE NECESSITY (not damaging the source of danger), requires that the damages caused are smaller than the damages avoided. There is no justification if the two damages are equal as it is set forth in Article 9 (2) CC. This is allowed only for the so-called DEFENSIVE NECESSITY (damaging the source of danger)[4].

3 The fundamental Article 6 (Criminal Offence) is probably the best example of such disregard. It reads: "A criminal offence is an unlawful act which is defined by law as a criminal offence, the characteristics of which are defined by law…". The newly inserted word is "unlawful", replacing "socially dangerous". But if along with being envisaged by law (actually, by the Criminal code) the act must be unlawful, necessarily being in violation of a legal provision outside the Criminal code, this will inevitably mean the revival of the old German Normative theory which has been overcome in the 19-th century. Under this theory for the unlawfulness of an act (as an attributive element of any criminal offence) it is not sufficient that the act has been envisaged by the Criminal Code; it is also needed that the act violates a non-criminal provision. Such understanding, which obviously favours accused persons, seems quite possible when Article 6 is interpreted in conjunction with the Second Sentence of Article 1 (3) CC: "In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted".

4 One can see it in Para. 228 of the German Civil Code. Unlike ordinary (or offensive) necessity, the defensive necessity means to eliminate a danger emanating from an object that has been destroyed or damaged for that purpose. The danger has emanated from the object, which was out of the control of its owner or possessor (a lost pet, a robot whose program went wrong). Therefore, the object, which is destroyed or damaged, has been the source of the danger; it has been an "intruding object". Thus

Lastly, the text of Article 9 (2) CC uses the same construction as Article 8 (2) CC on necessary defense to determine the destination of the act committed in necessity. Under the said Article it is sufficient to be committed "to avert" the danger (for the purpose of removing the danger); therefore, it is not mandatory to successfully avert (remove) the danger. But it is just the opposite: the act shall successfully remove the danger and thus, save the endangered interest. Otherwise, there might be no necessity and the act cannot be justified even as a *reasonable risk* because that justification has not been foreseen in CC. Obviously, the text in question does not take into account the one of the essential differences between the necessary defense and the act in necessity namely, that the former may not be, while the latter shall be successful in saving the endangered interest.

Even though there are some defects the discussed text makes it possible to reach the right conclusions about the act committed in necessity. The so-called quantitative standard of necessity is clearly reflected in Article 9 (2) CC. Under it the harm caused shall not be greater (in stead of being lesser) than the harm avoided. The act in necessity has also another standard, a qualitative one, which has not been reflected expressly there but it cannot be drawn out even of the requirement for the objective purpose of the act – to serve for the removal of the harm endangered. This qualitative standard of necessity is even logically first with regard to the act. In accordance with that standard the harm caused must objectively be in causal connection with the harm avoided; the causing of the former harm is to actually bring about the elimination of the latter harm (the harm threatened). Otherwise, the harm caused shall not be taken into account and justified as necessity (outside Kosovo it might be justified as *reasonable risk*[5] only). For example, a man has suffered a heart attack. To save his life the actor must transport him to the hospital. But the actor has no car and has no other choice but to take another person's car without his/her consent. No doubt, such an act shall be justified as necessity. At the same time, on the way to the hospital, the actor commits a road traffic offence damaging

destroying or damaging the object, the actor annihilates as an emanation of danger. The harm caused does not need to be smaller than the harm avoided; it is sufficient that the harm caused does not obviously outweigh the harm avoided. It is not clear for some lawyers why the balancing should be tipped in favor of destroying objects that are the source of the danger, and against destroying objects that are not the source of the danger; why if the destroyed object has been the source of the danger the defense against it shall be like self-defense in limits. The explanation must be that the defense against such "intruding objects" might be represented as a specific case of self-defense. It is such a specific case of self-defense where the assailant is of the owner or possessor of the object; the attack constitutes an omission and not an act, the assailant has no guilty mind (intent or negligence), and s/he has carried out his/her assault using the object and not barehanded. That combination is not impossible for self-defense and can be found with the discussed defense against "intruding objects" only.

5 Unlike necessity, reasonable (or justified) risk is always an unsuccessful enterprise. It is mainly a subsidiary justification, which reflects the idea that persons shall not be passive if failure is not ruled out but try their best to save endangered interests or to achieve a serious positive result when possible.

the car and a nearby house as well. Obviously, these two damages are never subject to justification under the Article on necessity because they do not help in any way the transported man, regardless of the fact that the total sum of all damages is always lesser than his avoided death.

CONCLUSION

The present author contends that only one of the amendments of Articles 8 and 9 CC seems undoubtedly positive, being in conformity with the development of substantive criminal law. This is the amendment that it is no longer required for necessary defense to be “absolutely necessary” in order to avert the unlawful attack. Thus, the old RETREAT DOCTRINE has been replaced by the modern TRUE MAN DOCTRINE.

So far the CASTLE DOCTRINE has not been applied, fully or partially. It is based on the differentiation of necessary defense into lethal (when the use of lethal force is allowed) and non-lethal, and incarnates the idea that when attacked in his/her home, the inhabitant (owner or lessee) should always hold his/her ground. S/he is never required to retreat, and if necessary, may kill the assailant (e. g. Art. 12.3.3 of the Bulgarian Criminal Code and Art. 122-7.1 of the French Criminal Code).

As far as necessity is concerned, it is foreseen as a justification only. Currently, there is no provision on necessity as excuse or duress (e. g. Art. 35 of the German Criminal Code and Art. 54.3 of the Italian Criminal Code). This remains a problem for the legislator in Kosovo.

Finally, both justifications and excuses are defenses to crime. But while the former rule out the unlawfulness of the conduct (act or omission), deeming it legal, the latter rule out only the guilt (guilty mind) within it. If there are no such defenses, it is still possible that the conduct, though unlawful and committed with guilt (having all objective and mental characteristics of a specific offence), does not constitute a criminal offence. This possibility is provided for in Article 7 CC (Act of Minor Significance) which is only for such conducts where no justification or excuse is applicable. Therefore, the insignificance of the conduct as a defense to crime is a subsidiary ground to rule out criminality and it shall systematically be placed not before but after all justifications and excuses in the text of CC, regardless of the contrary legislative tradition so far.

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Project activities February 2004

Seminar on the provisional criminal procedure code of Kosovo

Seminar on Civil Law – Family Relationships

Seminar on the provisional criminal procedure code of Kosovo

Seminar for the judges of Minor Offence Courts

Seminar on the provisional criminal code of Kosovo

Round Table Discussion in Peja/Pec on the provisional criminal procedure code

Seminar on the PCPCK – Plea Bargaining and Cooperative Witnesses

The United States Department of Justice will organise with the Kosovo Judicial Institute a training session on two new legal features of the Provisional Criminal Procedure Code : plea or charge bargaining and cooperative witnesses. This seminar will take place in KJI's premises on 3 February and will be repeated on 5 February for criminal law judges and prosecutors coming from all over Kosovo. This legal education program will emphasize the practical aspects of utilizing plea bargaining and interrogating cooperative witnesses.

Seminar on Civil Law – Child Custody

The KJI will offer on 4 February a training session for civil law judges, focussing on Child Custody. The topics will deal with the general aspects of the exercise of parents rights, child custody in case of divorce, a legal comparative overview on the reasons for assignment of custody to one parent, both parents or a third person and the alteration of a court decision in case of changes of circumstances. One judicial trainer from the KJI, one professor of the Law Faculty of Prishtine/Pristina and two judges respectively from the District Court and the Municipal Court of Phrishtine/Pristina will contribute to this one day seminar.

Seminar on the PCPCK – The role of the pre-trial judge, public prosecutor and judicial police

The Council of Europe will organise with the KJI on 10 and 11 February a two-day seminar on the pre-trial phase under the provisional criminal procedure code and its compatibility with the European Convention of Human Rights. Some experts from the Office of Legal Adviser (UNMIK), the Council of Europe, the European Court and the Ombudsman Institution in Kosovo, as well as a Judge from the Supreme Court of Kosovo will explain this compatibility for every step of the pre-trial phase : investigation, provisional arrest, police detention, right to a defence counsel, examination of the

defendant. A practical case-study on the pre-trial phase will be presented and discussed by the participants on the second day.

Seminar for judges of Minor Offence Courts

The KJI will organize on 19 February a specific legal education programme for judges working in Minor Offence Courts in Kosovo. This seminar will focus on the legal and procedural matters for which Minor Offence Courts are competent: traffic matters, public peace and order. Three judges coming from the High Court of Minor Offences in Kosovo will be speakers and trainers during that day.

Seminar on the PCCK – Probation

The KJI, together with the Council of Europe will offer a one day seminar on 23 February, to be repeated on the 24th, on the new mechanism of probation in Kosovo. This seminar, opened to criminal law judges, will intend to explain the reasons of the creation of a probation system in Kosovo, the legal framework of the alternative sanctions set by the new criminal code, and to introduce the probation's experience in Europe and the first steps of the pilot project done in Kosovo. This seminar aims to set out the advantages of the probation system and the challenge it represents to all the judges and prosecutors of Kosovo.

Round Table Discussion on the PCPCK – Peja/Pec Region

The KJI will initiate its field training programmes in Peja/Pec on 26 and 27 February with a Round Table Discussion on the new criminal procedure Code. This specific legal education programme will be organised with the collaboration of Mr the President of Peja/pec District Court. All criminal law judges and prosecutors from the region who will be willing to attend this session will gather in order to discuss about new procedural aspects of the criminal procedure: the pre-trial judge, the indictment and its confirmation, the manner to conduct the main hearing pursuant to the new code.

Vacancy announcement

Kosovo Judicial Institute is seeking for three National Judicial Trainers and one National Program Coordinator

National Training Officer of the Kosovo Judicial Institute

In complying with its mandate of institution building, the OSCE's Department of Rule of Law has established the Kosovo Judicial Institute, which is in charge of the training of the judges and prosecutors in Kosovo. The institute is looking for an exceptional individual with substantial judicial experience (as judge or prosecutor) to serve as a national training officer. The successful candidate will be an employee of the Kosovo

Judicial Institute.

The Institute has a non-discriminatory employment policy. Minorities and women are encouraged to apply for the position.

Tasks and Responsibilities

The National Training Officer will:
· Organise and provide training courses for members of the judiciary
· Co-teach with local and international trainers
· Identify and evaluate training needs in conjunction with local legal community and judiciary
· Maintain and further develop the relations with the local judiciary
· Draft manuals on legal training to be later used as basis for training
· Evaluate training programs
· Conduct legal analysis

Qualifications

Education:
· Law degree is required
· Knowledge of international legal standards and instruments, especially the European Convention on Human Rights

Work experience:
· Substantial work experience as judge or prosecutor is required
· Experience in the field of training is strongly preferred

The National Program coordination

The National Program Coordinator, in cooperation with the International Program Coordinator will coordinate the projects of the Kosovo Judicial Institute, set up and coordinate training issues and schedules; identify and evaluate training needs in conjunction with local community and judiciary; assess needs of training; evaluate training programs; draft legal text and manuals; conduct legal analysis, cooperate with local and international partners in regards of training maters.

Qualifications:

- Law Degree
- Good knowledge of the International legal standards and instruments
- Working experience in the field of training, at least three years
- Good working knowledge of English
- Good knowledge of Albanian/ Serbian
- Excellent organisational skills

- Ability to work in a multiethnic environment
- Knowledge of IT to include Win 98, Word 97/2000 and Excel

Please address your CV (with your contact number) to the Kosovo Judicial Institute, located in 99, Ramiz Sadiku St. Prishtina, or by e-mail to: anton.nrecaj@kjijudicial.org
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