

KJI NEWSLETTER ***April 2004***

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.

MINUTES FROM THE ROUND TABLE DISCUSSIONS ON THE PROVISIONAL CRIMINAL PROCEDURE CODE OF KOSOVO

The Kosovo Judicial Institute, in cooperation with the Presidents and the Chief Prosecutors of the District Courts, decided to initiate in 2004 some field training programmes in each region of the country. Due to the entry into force of the new Provisional Criminal and Criminal Procedure Codes on 6 April 2004, some round table discussions on the implementation of the new criminal procedure felt necessary to organize. Indeed, the judges and prosecutors from Kosovo, giving the new roles they will have to endorse, requested the Kosovo Judicial Institute to provide them, within the framework of the continuous legal education programme, with specific explanations on innovative provisions of the new Criminal Procedure Code.

The Round Table discussions organized so far in Peje/Pec, Gjilan/Gnjilane and Prizren/Prizren, gave the opportunity for each regional Judiciary and Prosecutorial system to gather and discuss on the new challenges that they will have to face. A special agenda was

proposed to the criminal law judges and prosecutors coming from the district and municipal courts. Presentations given by three Supreme Courts Judges and a judicial trainer from the KJI were followed by their opinions on the dilemmas and concerns withdrawn from unclear provisions of the codes, and that led to an exchange of opinions on the interpretation of these provisions.

The minutes that were draft during these sessions have been summarized and compiled into different chapters, following the subjects that were prepared for this session. Besides these specific points, other issues were pointed out. As a matter of fact, through these discussions, the Judiciary and the Prosecution not only tried to receive some clarifications on the innovations of the new criminal procedure, but also draw attention to some disputable points of the new code that could give rise to some dilemmas in their daily practice.

Despite the novelties inserted in the new Provisional Criminal Procedure Code of Kosovo (PCPCK), the participants agreed on the positive prospects of its implementation, but in certain cases, will encourage the legislator to clarify or change unclear provisions.

I. The competencies and the decisions of the pre-trial judge and his relationship with the prosecutor during the pre-trial phase pursuant to the new Code.

- In the pre-trial proceeding, is there a violation of the proceeding if the prosecutor fails to inform the pre-trial judge and how is it sanctioned? The pre-trial judge and the prosecutor have the obligation to mutually inform each other and another practice should not be allowed, even though no sanction has been set out in the code. Police, Prosecutor and Pre-trial judge should have a good cooperation and they should implement the Code as such. All actors have the responsibility to mutually inform each other and perform their duties accordingly. If any deficiency is noticed some disciplinary sanctions could be imposed.

- If the pre-trial judge rejects the request of the public prosecutor for detention on remand, what should be done as the prosecutor does not have the right to appeal? In the applicable law, it was the same situation as the decision of the investigative judge was the final one and the prosecutor had no possibility to appeal this decision during pre-trial proceedings. However,

according to the new Code, in such a case, other measures can always be imposed on the perpetrator.

- Nevertheless there is a difference in the new Criminal Procedure Code regarding the ordering of a detention on remand, as the pre-trial judge cannot order the detention on remand without a request (written application) from the public prosecutor – Article 282 (1) PCPCK (in the applicable law, the investigative judge could do it without request from the prosecutor).

- Article 220 (1) PCPCK: when the public prosecutor receives a criminal report, should he initiate immediately the investigation or postpone it?

The Public Prosecutor, when he finds out that a criminal offence has been committed and when he assesses that they are sufficient grounds, should take the decision to initiate the investigation and inform the pre-trial judge. This is different in the new Code as previously; the decision to initiate the investigation was taken after hearing the defendant, now it can be initiated if there is reasonable suspicion that the person has committed a criminal offence which is prosecuted ex-officio.

- During the phase of provisional arrest and detention by the police: the new Code foresees that the police has the right to detain a person for maximum 72 hours, with the authorization of the public prosecutor (prior or after the arrest) who is the only to decide upon this provisional detention. Indeed the new Code sets

him as the dominis litis of the investigation who coordinates the arrest by the police.

- Regarding the defense, is it mandatory while the defendant is arrested and placed in police custody during 72 hours? The right to an effective counsel does not seem mandatory but only facultative during this period of time (Article 69 PCPCK). The defense is only mandatory in cases foreseen by Article 73 of PCPCK. During the police detention, it is up to the suspect to engage or not a defense counsel. The decision to engage a defense counsel should be brought within six hours as mentioned in UNMIK Administrative Direction 2001/15 of 13 October 2001 implementing Regulation 2001/28 on the Rights of Persons Arrested by Law Enforcement Authorities.

- In order to clarify Article 254 of the PCPCK on the site inspection and reconstruction, the issue was raised on the obligatory presence of a pre-trial judge or the presiding judge on the site in order to render valid the evidence collected. In other terms, would the only presence of the prosecutor (and the parties) on the site be sufficient to support the validity of the evidence collected?

The prosecutor is normally the authority in charge of collecting evidence, and as foreseen by this provision and other Articles (Articles 200 par. 3 and Article 221), he is the one to initiate the investigation, to undertake investigative actions or authorize the judicial police to do so, to conduct and supervise the

work of the police in the pre-trial phase of the criminal proceedings in order to find the proofs. He can be requested by the Court to draft the minutes from this inspection (according to Article 86 of PCPCK, the record may be written by the person undertaking the action, only when a search is made of premises of a person or when an action is undertaken outside the offices of the relevant official body or competent authority and the recording clerk is not available).

The provision of 254 PCPCK means however that if the pre-trial judge or presiding judge is absent during the site inspection, the evidence is presumed as inadmissible in court. According to the new Code, the Public Prosecutor is dominis litis in the pre-trial phase, but during a site inspection or a reconstruction, the pre-trial judge should be present in order to give legitimacy to the proofs collected.

II. The indictment and its compilation pursuant to the new Code. The legal possibility of filing the bill of indictment without initiating the investigations. The confirmation of the indictment. The decisions which can be taken on the confirmation hearing of the indictment and the minutes of indictment.

- There is a radical amendment regarding the filing of the indictment within the new Code, as now if the prosecutor deems that the information he has gathered in relation to the criminal offender and the offender provide sufficient grounds, he can decide to file the indictment without

initiating the investigation. As a result, the perpetrator can be conducted before the court, that will proceed and deal with the criminal liability (Article 304 PCPCK).

- The situation is different for the subsidiary prosecutor who can take the indictment once the confirmation is done.

- One of the subjects to clarify is the possibility for a pre-trial judge to confirm or not the indictment?

The judges from the Supreme Court came to the conclusion that the pre-trial judge could not confirm the indictment as it is foreseen in Article 40 of the PCPCK. The pre-trial judge according to this same article should not be involved in the trial panel. The pre-trial judge can not participate neither in the confirmation hearing of the indictment nor in the main hearing. This situation is similar to the one of the investigative judge in the applicable law, as he or she could not be part of the trial panel.

The judge who orders the detention on remand should also not been involved in the trial panel.

What is the situation then regarding the extension of the detention on remand? Should a judge who ordered the detention on remand can also be part of the three-judge panel that decides upon the extension of the detention on remand?

According to Articles 285 and 287 of the PCPCK, there is nothing that prohibits the judge who ordered the detention to state or decide on the extension of the detention.

Consequently, the courts that are composed of 1 or 2 judges will face some practical problems in their practice as they will have to divide the roles according to the code and therefore will not have enough capacity to cope with the new system in place. In this case, when a lack of judges is occurring, the case can be sent to the higher court or other courts.

- The judge can reject the indictment when he assesses that there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment (Article 316 PCPCK), but how can he assess that there are sufficient proofs?

In the previous applicable law, there were few cases in which the judge could say that there was no sufficient evidence, and the situation will not change now as the grounds for rejecting the indictment are the same than before.

The prosecutor has the right to file an appeal against this ruling, but the procedure would take a long time.

However, if the indictment was dismissed by the judge at the proceeding on the confirmation hearing of the indictment for the above mentioned reasons and if new facts and evidence are discovered and obtained, a new indictment can be filed if the three-judge panel determines that new evidence and facts justify this (Article 441 PCPCK).

- Article 311§ 3 and 4 PCPCK: What is happening with the objections that can be presented by the injured party and the prosecutor during the confirmation hearing of the indictment? The Code refers to Article 316 but nothing is mentioned in this provision regarding the way the judge should proceed with these objections and if he should notify or inform the defendant about these objections. A special ruling should be rendered in order to reject or accept the objections of the prosecutor and injured party.

- Article 316 PCPCK raises some confusion as this provision is quite innovative for the Judiciary and Prosecution of Kosovo, who were used to apply the legal continental system. Indeed this provision is mixing both the inquisitorial and accusatorial systems.

The confirmation hearing is not obligatory, in principle it should be held but does not have to be held if the defendant withdraws from the procedure, either way the judge should act in accordance with Article 316 and should render a ruling to confirm or dismiss the indictment.

III. Discussions regarding the main hearing. The conduct of the main hearing when the defendant has pleaded guilty during the confirmation hearing of the indictment, and when the defendant has not pleaded guilty during the confirmation hearing.

- After confirmation of indictment is done, the only documents that can be

taken by the prosecutor before the court at the main hearing are the indictment and the materials that have been provided to the defense counsel, in order to legally proceed with the cross-examination.

- Other novelty: one member of the panel can give a different opinion than the majority and this should be attached to the decision. Parties can be informed on these controversial opinions.

- Other disputable issue: Article 347 PCPCK: the legislator should clarify the fact that a panel of five judges can adjudicate a case during the first instance hearing. According to the previous applicable law, in such case, the proceeding was stopped and the case was transferred to the 2nd instance court. Here the provision is not clear as whether or not it is the district court or the municipal court which should be competent in such case. Moreover, it will be impossible to find a panel of five judges in most of the municipal courts. The practice always shows that if a municipal court does not have enough judges to hold a hearing, the prosecutor has to file another indictment addressed to the District Court.

It is of the opinion of the experts and the participants that a municipal court should not try such a case.

The case should be restarted by the same court or all over by another court. There is therefore a confusion on who is competent for searching the evidence in this case: the judge or the prosecutor?

- Regarding the competencies of the private and subsidiary prosecutors during the main trial:

The subsidiary prosecutor, as foreseen in Article 65 PCPK shall have the same rights as the public prosecutor except those belonging to the public prosecutor as a public official. The private prosecutor has less competencies than the Public Prosecutor. In practice how can they present the evidence and how can they proceed with the cross examination?

In practice, all evidence that should be presented at the main trial is contained in the bill of indictment as well as the names of witnesses and expert witnesses who should appear before the courts, so if the judge has accepted the indictment and that it contains sufficient evidence, the private prosecutor can rely on the indictment.

In the case of the subsidiary prosecutor, would the police act on his behalf or should he engage a lawyer to play the role of the public prosecutor?

The judicial police can provide the evidence on request of the subsidiary prosecutor on the grounds which already exist in the file and then can file the indictment. The subsidiary prosecutor is protected by law and should have the information on the criminal evidence.

The Public Prosecutor should do the necessary investigation, and then if he/she withdraws from the procedure, the subsidiary prosecutor takes the completed file and can continue on the

grounds of the present file. There is no mechanism for the subsidiary prosecutor to gather and secure evidence. The Code does not provide that he can conduct the investigation. The private prosecutor can do some investigations only.

The public prosecutor should take action and then assess when he can send the file.

The injured party has the same rights as the other parties on the motion of the prosecutor.

Regarding the questions asked by the injured party during the cross-examination, they should also be addressed through the presiding judge with his permission and not directly to the accused (Article 372 (1) PCPK). The same procedure should take place with the legal and authorized representative and co-accused.

- When a person pleads guilty, what about the punishment to impose? Should the mitigating circumstances be applied (Article 64 and 65 PCCK)? No bargain has been foreseen between the prosecutor and the defendant in the new Code. The prosecutor should normally give his opinion on the length of the punishment, but not according to the new Code.

The prosecutor could propose mitigation but the judge will anyway decide on the length of the punishment.

It would be absurd to foresee a bargain because that would be against the interest of the injured party who has to be protected.

- Regarding the persons who should be present during the main hearing, is it a violation of the procedure if the injured party called as a witness is not present during the main hearing?

Another novelty of the new code is that the presiding judge shall not summon the witnesses and expert witnesses to the main trial, if the guilty plea of the accused is confirmed at the confirmation hearing (Article 327 PCPCK).

- During the main hearing, who should be examined first? It all depends from which witnesses are present, but normally the accused is first examined by the prosecutor, then by the defense counsel, parties and the expert witness may examine the defendant only upon granting permission from the presiding judge (Article 372 PCPCK).

- Article 373 PCPCK: Every other accused (if there is more than one) shall be examined in turn and be informed of the testimony of the co-accused examined previously. There were cases when the international judges in Kosovo cross-examined the accused in the same courtroom with the rest of the accused persons, does that set a precedent and is it in accordance with the Code?

- When the main hearing is finished and a sentence is rendered which punishes the accused by imprisonment, who will decide for the extension of the detention on remand? Article 383 of PCPK foresees that the panel should extend detention on remand under a

separate ruling (same if a detention on remand is ordered or cancelled).

IV. Other novelties and issues

- Cooperative witness: this innovation has been inserted in the new Criminal Procedure Code in order to create an additional guarantee countering any abuse committed by the police. However, according to Article 157 PCPCK, the court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness, as this evidence would not be considered sufficient in order to support a well-grounded suspicion. The same situation arises if the testimony is given by a single witness whose identity is anonymous to the defense counsel and to the accused.

The institution of the cooperative witness also provides a solution for trafficking cases, because in practice, there is a problem when a victim has provided a statement during the pre-trial proceedings and has to go back to his/her country of origin before the main hearing takes place. Now, his/her statement can be used at the main hearing without hearing him or her again during the main trial.

- Issue regarding the fact that some UNMIK regulations have not been integrated in the new Codes, although they are covering matters addressed in the new Codes: these regulations shall cease to have effect upon the entry into force of the present codes according to Article 554 PCPCK and 354 PCCK.

- Problems of terminologies in the Albanian version: the terms of “may” and “shall” in Articles 93 (1), 223, 281 and 348 of the PCPCK, have not the same meaning in Albanian, it is unclear if these duties are facultative or obligatory. The English version shall in any case prevail.

- Another novelty is that according to Article 420 and 430 PCPK, all the members of the panel should sign a decision of the court of second instance or a judgment of the Supreme Court. The procedure of the European Court of Human Rights has influenced Article 423 PCPCK as a member of the panel may submit a dissenting or concurring opinion and such decision should be attached to the decision.

The KJI is aware that these new codes entail a new mind-set and strategy that the Judiciary and the Prosecution of Kosovo will have to embark upon during the pre-trial, trial and post trial phases. In this regard, the KJI hopes these sessions have contributed to support the criminal judges and prosecutors of Kosovo in their future judicial practice and will continue to support them through other training on the new criminal and criminal procedure codes.

Other Round Table Discussions will take place in other regions and will also be compiled and published in the same newsletter. The Kosovo Judicial Institute is thanking the Judges from the Supreme Court of Kosovo for their expertise, the Presidents and Chief Prosecutors of the District Courts who assisted the KJI in the organization of

these sessions as all judges and prosecutors from Peje/Pec, Gjilan/Gnjilane and Prizren/Prizren for their cooperation.

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Project activities April 2004

- Seminar on Combating Crime under the New Criminal Code of Kosovo
- Seminar on Trafficking in Human Beings under Domestic Law and International Standards
- Seminar on Civil Law: Inheritance Law
- Seminar on Wire Taping
- Round Table Discussion on Property Rights
- Round Table Discussion on the New Criminal Procedure Code

Seminar on Combating Crime under the New Criminal Code of Kosovo

The Kosovo Judicial Institute will organize with the Supreme Court of Kosovo, under the initiative of its President, a seminar on Combating Crime under the provisional criminal code. Judges from the Supreme Court will discuss the significant main reforms and the innovations that have been introduced by the new criminal code in order to enhance the fight against crime in Kosovo, mostly in the field of organized crime and offences against life and body. The objective of this session is to raise awareness among the Judiciary on the new challenges that judges and prosecutors of Kosovo will have to embark upon as the new codes will enter into force the following day.

Seminar on trafficking in Human Beings

The KJI will offer on 14 and 15 April a training session for criminal law judges and prosecutors, focusing on Trafficking in Human Beings under Domestic Law and International Standards. This seminar is organized within the framework of the Comprehensive Programme for training, exchange and co-operation of the Stability Pact Force on Trafficking in Human Beings, based on an anti-trafficking training manual developed for judges and prosecutors.

This two-day session will focus on the importance of the phenomenon of Trafficking in Human Beings, the development and progress of international law related to this matter, the applicable legislation in Kosovo and its implementation, the investigative techniques and specific aspects of criminal proceedings in trafficking cases, as well as the protection and assistance of victims. The experts contributing to this seminar will come from various international and local agencies and institutions.

Seminar on Civil Law: Inheritance Law

The KJI will hold on 20 April a seminar on Inheritance Law, addressed to civil law judges from all over Kosovo. The topics presented will focus on legal practical issues related to this legal matter such as: the right to an inheritance and a compulsory portion - the reasons for disinheritance and exclusion of a compulsory portion, the position of the spouse as an heir or a person entitled to a compulsory portion, the calculation of the share of an inheritance and a compulsory portion – the right of the testator for disposition; the duty of the heir to return the donations. Case studies on these issues will also be prepared and discussed.

Seminar on Wiretapping

The United States Department of Justice will organize with the Kosovo Judicial Institute a training session on wire taping. This seminar will take place in KJI's premises on 21 April, repeated on 22 April for judges and prosecutors coming from all over Kosovo. This legal education program will emphasize the grounds and consequences for utilizing wire taping, as well as the methods to implement and perform this new technique foreseen by the new procedure criminal code.

Round table Discussion on Property Rights

The KJI, together with the Special Chamber of the Kosovo Supreme Court will offer a seminar on 27 April, on the jurisdiction and the functions of the Special Chamber on Kosovo Trust Agency related matters. This seminar, opened to civil law and commercial law judges, will intend to explain the exact competencies of the Special Chamber and to discuss the problems the regular courts are currently facing with pending cases.

Round Table Discussion on the New Procedure Criminal Code – Mitrovicë/Mitrovica Region

The KJI will continue its field training programmes in the regions and plans to hold on 28 and 29 April in Mitrovicë/Mitrovica, if circumstances afford it, a Round Table Discussion on the New Criminal Procedure Code. This specific legal education programme will be organised with the collaboration of the President and Chief Prosecutor of the 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 competencies and decisions of the pre-trial judge, his interaction with the prosecutor, the indictment and its confirmation, the main hearing according to the new criminal procedure code. The second day of this RTD will only consist of discussions related to practical and specific procedural details.