

## ***KJI NEWSLETTER***

*May 2003*

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

### **INFANTICIDE AT BIRTH - article 35 CLK**

Infanticide at birth is regulated by article 35 of CLK, where it is stated: “ A mother who takes the life on her new born at birth or immediately after the delivery, during her disorder caused by the delivery, shall be punished with imprisonment from 3 month to 3 years.

The issue of priving the infant of its life is treated and sanctioned in different manners in different stages of social development. During a certain time period this offence was not punished at all. Criminal Code of Carl V of 1532 foresees more drastic punishments for the mother that has prived the infant of its life during birth, as entombment or cremation in the flesh, inculcation in pickets etc. With the beginning of 18<sup>th</sup> century the concept of treating and punishing for this offence changes, and from than different punishments are foreseen, but softer with the explanation that the mother during birth is found in a specific condition and specific circumstances which should be taken into consideration in the occasion of giving the sentence. Meanwhile, even today, many countries have not accepted this concept, thus the height of the punishment for this criminal offence, in different countries, goes

along from conditional trial until punishment with 20 years of imprisonment.

In some countries murder of infant during birth does not present any criminological problem, especially in those countries where social-economical problems are resolved to a considerable degree and where cultural emancipation of people is realised to a high degree. In our country, in our society, because of deplorable social-economical conditions, because of the understanding for social moral as well, tendencies are seen that murder of infant during birth will manifest as a serious criminological problem.

Subject of the criminal offence of murdering the infant in our country is foreseen by article 35 of CLK. It is the mother, that mother that is found in a situation of disorder as a consequence of giving birth. Definition of this criminal offence, from the contentual point of view point of view, but also from the formal side, for the judicial practice and theory presents an issue full of surmises. The surmises refer to the term “disorder” and the expression “immediately after birth”, which terms are used in the text of this article. And this exactly has as a consequence not to place unique criterias and thus the issue becomes unclear for jurists, as well as for forensic experts. Surmises are related to important issues, such as:



1. What is implicated by the term disorder in observation of art. 35 CLK,
2. Which are those elements that influence the creation of the disorder,
3. If the disorder in understanding of art. 35 CLK appears in every birth,
4. For how long after birth the disorder continues to exist, and
5. Who is competent to do the expertise relating to the fact if the disorder exists or not, everywhere according to art. 35 CLK.

It must be stressed that in some countries, in their criminal codes, as Hungary, Japan and former Sovietic Union,- the disorder as a consequence of giving birth is not mentioned at all, and thus, this offence is not considered as privileged. Criminal Law of Switzerland dated in 1937 consists the formulation “condition created on the occasion of giving birth”. Whereas, the Criminal Law of Kosovo with the notion disorder considers that by this it should be implicated the disorder caused by the act of giving birth itself, and that it is a consequence of pain, loss of blood, indolence, and generally of physical and psychical exhaustion, and all these in conjunction with external factors which influence the incorporeal condition decreasing the ability to judge. From hitherto it is considered that these factors weaken the resistance against criminal offences, and for this reason murder of own infant in this condition privileges the offence. What is important to be mentioned, the article cited with the term disorder does not implicate the disorder which has as

a consequence the decrease of responsibility in the meaning of art. 12 of CLY.

Science of psychiatry, observing the disorder from the corresponding medicinal aspect in the meaning of art. 35 CLK, considers that the base on which the privilege of this criminal offence would rely, since this “disorder”, is not treated on the base of art. 12 CLY. The studies of this phenomenon in support of statistical data has shown that no mother which wanted the child, because of the act of giving birth was not brought into a disorder in the meaning of art. 25 CLK, in which condition she could kill her own child. From hitherto act of giving birth itself does not cause the disorder during which murder of the infant could occur, and neither it is a necessary condition for the act of murder of the infant, if infanticidogenous factors exist. Because, in the creation of the infanticidogenous factors in the mother to raise a hand on her baby influence exclusively external factors, which create: the sense of shame that is imposed to the mother and the infant from the surrounding with its point of views about the social moral, sense of loss, sense of being isolated from the surrounding where she lives, and apart from this, economical dependency and social-economical conditions. These are factors that exclusively exercise influence in the formation of a wrong manner of judgement, deriving thus the evaluation of the situation as impassable. From hitherto, these are the only causes of psychological deviation and of creating the infanticidogenous psyche. Therefore, only external factors are sufficient to take the decision for murdering the infant, but under the condition for them to be so strong so they can influence the mother, which is found under their pressure, to psychologically deviate. Depending on the fact when this psychological deviation was



created, the decision for murdering the infant may be taken during pregnancy, immediately before the act of giving birth, during the time of giving birth or after giving birth. It is clear that the woman that lives in a lagger ambient, with conservative concepts about social moral, exactly the woman that will give birth or that has given birth to an extramarital infant, day after day, creates complexes, from which, ofcourse she wants to dispose of. And this wish dominates the psyche of the delinquent to be, as well as manefesting another quality of egoism, the woman mistakes that all the problems will be resolved with the destruction of her own fruit. The mother does not murder her infant because she hates it, or because of disorders caused by the act of giving birth, she commits this criminal act with intent and wish to find psychological rest, but thus, to create conditions for a normal life in her own sorrounding from which she is also dependent economically.

As it was said, the disorder in observance of art. 35 CLK, from the medicinal aspect can not be explained and justified, therefor the medicinal answer to the question if this disorder which appears while giving birth is senseless. Whereas, from the legal aspect, in support of legal definition, it is accounted that the disorder appears in every case of giving birth, thus, it is not necessary to be individually verified. In practice, even

though rarely, some judges only gramatically interpret the formulation "... as long as the disorder caused from giving birth lasts...", in which case it can be understood that the law does not foresee the disorder caused by giving birth...", in which case it can be understood that the law does not foresee the disorder for every case of giving birth, because, otherwise, it should be defined like this" as long as the disorder caused by giving birth is to last.

While relying on this concepts, forensic medicine examinations may be organised to verify if there were disorders in each concrete case of giving birth. But if this juridical point of view is taken as rightfull and reasonable, then for the verification existence of the disorders social workers and psychologists should be assigned, and nohow doctors, because from the medicinal point of view there are no elements based on which an peremptory answer would be given. Experts from the medicinal field may be assigned only to verify the cause and the manner of death.

24<sup>th</sup> of April 2003    Shefqet    I.Deçani  
Judicial Trainer at the KJI

### **Project Activities for May 2003**

A Seminar on Criminal Law

B Professional Skills Training



C Seminar for Minor Offences Court Judges

D Training for the Bar Exam

**Seminar on Criminal Law – Legal Defences  
06 May 2003**

**A.** A seminar in the area of substantive Criminal Law is scheduled to take place in May for criminal law judges and prosecutors. The topics planned for this event include an examination of legal defences under the law, including Defence of Necessity, Preconditions for Legal Defence, Limits of Legal Defence, and Mistake of Fact and Law.

**Professional Skills Training  
14 – 16 and 19 – 21 May, 2003**

**B.** KJI, in conjunction with the International Development Law Organisation (IDLO), and funded by USAID, has organised a series of Professional Skills Training Courses entitled “From Case Assignment to Final Decision: Building Effective Decision Making Skills.” This series of training will focus on development of essential skills necessary in the work of judges and prosecutors. April marks the beginning of the second phase of this training programme. The new topics we plan to cover are as follows:

- The topics covered the first day of training include the importance of practical skills, the relationship between the quality of a decision and court delays, execution of judgements, human rights, preparation of the decision making process will start with a presentation on “Drafting and Presentation Skills”, legislation on content of judgements, indictments and other decisions.
- The second day continues with exercises on formulation of issues, on drafting and with discussion of the outcome of the exercises and a presentation on “Research in Decision Making”.
- The third day concludes the training with exercises related to an analysis of court decisions, a presentation on “Transparency of Judicial Decisions”, an examination of issues related to the execution of judgements with a special focus on monitoring the execution of judgements and a discussions on how to improve the co-operation between responsible parties in the execution process.

From 14-16 and 19-21 May, sessions will be offered for Civil Law Judges. Invitations are being sent out to notify participants which session they are scheduled to attend. All Kosovo Judges and Prosecutors will be invited to the second phase of training, as they were for the first phase.



**Seminar for Minor Offences Court Judges  
29 May 2003**

E. A seminar for Minor Offences Court Judges is scheduled for 29 May. The topics to be covered are the principles and institutions of the minor offences procedure as well as the initiation and course of the offence procedure and the special juvenile procedure.

**OTHER EVENTS**

**Training for the Bar Exam  
11 April – 31 May 2003**

F. Judicial Training Officers of the KJI are providing ongoing support to the Legal Community Support Section of OSCE, giving lectures in the training for the bar exam review course held each Friday and Saturday at the KJI. The next session begins on 11 April and will continue until 07 June. The next Bar Exam will be held in June 2003.

