

KJI NEWSLETTER

July - August 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.

DRAFT CRIMINAL LAWS AND JUVENILES

Juveniles are a special category of criminal offence perpetrators.

All criminal laws applicable in Kosovo, contain special provisions for minor offenders, who commit criminal acts. The Yugoslav criminal law, besides everything else, contains special provisions considering age limits, by imposing criminal sanctions against juveniles, (exemption of children from criminal sanctions), special types of criminal sanctions against juveniles, provisions of possible criminal procedure and criminal sanctions against juveniles depending on the juvenile's age at the time of the trial, and imposing educational measures on young adults. Provisions that deal with educational measures, changing the decision on the pronounced measure, it's suspension and assigning educational measures, execution of the punishment with imprisonment for juveniles and others, are all found in the Criminal Law of Kosovo and in the Criminal Law of Serbia. Regarding the criminal procedure against this category of criminal action offenders, the Law on Criminal Procedure contains many specific provisions that are found in a special chapter. This procedure which is in the so called group of special procedures, among others, also contains provisions for execution of criminal sanctions against juveniles.

A special working group has worked on a compilation of the special law for juveniles which would contain all the mentioned provisions. Therefore, first of all, this law would be a codification because it would contain, in one place, all the criminal provisions for juveniles. On the other hand, it would contain some new or modified provisions as well aiming at modernisation of the law.

The public is informed that drafts of the provisional Criminal Code of Kosovo and provisional Criminal Procedure Code of Kosovo have been compiled. The first one contains provisions that were previously in the general part and the special part of the Criminal Law of Yugoslavia, which are now changed and even contain clarifications, as well as provisions contained previously in the Criminal Law of Kosovo and in the Criminal Law of Serbia. The provisional Criminal Procedure Code of Kosovo, in the compiled draft, differs in a high degree from the Criminal Procedure Law that is applied now, especially in the part which has to do with the competencies of the police, the public prosecutor and the investigative judge. What is very important is that these drafts do not contain provisions for juveniles. These provisions are separate and are included in the draft of Law on Juveniles.



Parallel entrance into power of mentioned laws is very important. If the Provisional Criminal Law of Kosovo and the Provisional Criminal Procedure Law of Kosovo are to be signed and to enter into force, and meanwhile the same does not happen with the Law on Juveniles, we will be in a situation where there will be no criminal-judicial provisions for the procedure against juveniles and against minor offenders and there will be no chance to develop the criminal procedure. This is because the provisional Law of Criminal Procedure of Kosovo will abrogate the previous law and provisions for juveniles will no longer exist.

For the purpose of a more detailed explanation, I would like to cite some parts of the provisional and final provisions of both drafts.

In the transitional and final provisions of the drafts of the provisional Criminal Code of Kosovo (art.354.), it is mentioned that the provisions of the applicable criminal legislation applicable to perpetrators of criminal offences who are minors, who are mentally incompetent or who have diminished capacity perpetrators or who are addicted to drugs or alcohol shall continue to be applied also after the present code enters into force, until special laws for these categories of persons are passed. Furthermore it is mentioned in transitional

and final provisions of the same law, in art.359, that on the date of entry into force of the present code, the application of provisions **of criminal law regulating matters from the present code** (Article.342.343,344 and 345).

The conclusion is that all these provisions relate to the **substantive criminal law**. Therefore it is clear that “old” law provisions shall be applied until the moment when the new law in this field is enacted.

The situation is not the same with the procedural law. In the provisional and last provisions of the provisional Law on Criminal Procedure in Kosovo, such a provision does not exist. More precisely, in article 554 of the provisional and last provisions it is decisively stated as it follows ***“Upon the entry into force of the present Code, the provisions of the applicable law which have regulated matters under the present Code shall cease to be applied, unless otherwise provided for the present Code”***. It is a fact that the juvenile area is not predicted otherwise but is removed. In my opinion there is a legal gap and will be until the draft Juvenile Code is passed.

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16 June, 2003



The Independence Of Judges And Prosecutors In Kosovo

An Important Topic – Not Only In The KJI

By Dr. Horst Proetel

Paragraph 9.4.4 of UNMIK/ Reg/ 2001/9 relating “ On Constitutional Framework for Provisional Self- Government in Kosovo states apodictically: **Judges shall be independent and impartial.**

What does it mean and how it is to realize and to grant is one of the difficult questions which are discussed in the seminar of the KJI on the topic “ Code of Ethics and professional Conduct of Judges and Prosecutors.” This seminar is repeatedly offered to all colleagues in the country and tries to deal with fundamental matters of our professional position and the corresponding rights and duties.

What independence and impartiality means is as well one of the questions candidates applying for vacant positions as a judge or prosecutor in interviews of the Kosovo Judicial and Prosecutorial Council (KJPC) have to answer. My impression as a member of this council is that there is some uncertainty and confusion, especially in definition of both terms and the practical consequences.

Independence Of Whom And Of What

The Judicial system as a whole needs to be organized specially and must be provided by the government to fulfill the tasks it is assigned to do. But the independence is an attribute, each judge personally profits by, even it is no privilege. He or she is the acting organ who has to realize justice.

The judge is independent in his/her professional doing and related to the decisions he /she has to give. That is named ” the independence in rem “.

In this regard he/she is not totally independent of the first power of a state, the legislative. In contrary he/she has to apply the law correctly, finding out if it meets the concrete case and how it is to be interpreted. He/ she must work accurately, with professionalism and” highest moral character”(9.4.7 of Constitutional Framework). Independence of a judge therefore only can be given correlating to the second power of a state, the executive, the governmental power. Here lies in wait the concrete danger for independence, even in old democracies ruled by law. Typical doors for influence of the executive power are the way of recruitment, assessments and promotion of judges, allocation of duties, supervisory authority and disciplinary sanctions. Organ of possible infringement of independence very often will be the president of a court, who usually is as well representative of the executive power in the court and in his/her district.

Measures To Strengthen Independence Of Judges

In the developed legal systems all is done to strengthen the judicial self-government transfers the disciplinary power to independent courts, which have as well the task to state, if the independence of a judge is tackled. The judges and prosecutors form associations being critical observer of the



judiciary and offer assistance in defending the independence of colleagues. The development of stable and courageous judge- personalities is needed. It probably takes time and will only succeed when judges are well respected especially by the government, restraining from taking influence of the judicial actions and decisions. There is no question that we need a supervisory authority, because the claim of the citizens to find access to the court must be respected and **“a fair and public hearing within reasonable time by an independent and impartial tribunal established by law”**(Article 6 European Convention on Human Rights) has to be offered.

That the consciousness of applicants for a judge position concerning the independence of judges sometimes is deficient may demonstrate an example. Being asked if they have concerns that a president of a court issues an order to standardize the jurisdiction in his court, calling for a special interpretation of an unclear provision, this question is denied. It seems that some candidates are not aware of the addressed problematic.

Independence In Personal Regard

One crucial precondition for independence of judges is that they have reasonable conditions for working and life. They must be appointed at least for a long, certain period, excluding the might of government to move them – besides the law allows such change-and to remove them from their office- besides a correct disciplinary trial is performed. The actual judicial situation is quite sufficient though there are some concerns regarding lacking remedies against

removal from office, decided by SRSJ according a decision of the KJPC.

More problematic is the low salary of judges and prosecutors. Even we have to take into account the general insufficient social conditions, especially the high rate of unemployment and the low income in general, the salary of the national judges and prosecutors does not correspond to the responsible challenging tasks of the developing judiciary based on rule of law. It is supposed to be the lowest or nearly the lowest in the Balkans, making these professions economically not attractive. The judiciary is presumed to miss the most qualified persons and is endangered to loose such colleagues to the advocacy and other prosperous professions. An appropriate salary helps to prevent corruption. Mostly it expresses the value and esteem a society ranks the legal system, the third power. This must be strengthened to solve the dominating problems in this region.

Impartiality of judges and prosecutors

The Code of Ethics and Professional Conduct for judges, referring to UNMIK Regulation NO 2001/8, describes in particular the responsibilities of a judge **“to act impartially ... in all cases and free from any outside influence, and perform judicial duties based on facts and the law applicable in each case, without any restriction, improper influence, inducements, pressures, threats of interferences, direct or indirect, from any quarter.”** Similar duties are named in the Code of Ethics and professional conduct of prosecutors.



As independence means judicial acting without interference of the government, Impartiality is fulfillment of duties without mentioning the influence of interested persons and pressure groups, the decision without any irrelevant motives and illegitimate interests.

In this regard we have to realize that the practice and expectations of the society to the decisions of judges and other authorities may be different in the region. In any case judges and prosecutors must be trained in internalization of these virtues and preconditions for a functioning and accepted judiciary ruled by law, which will gain trust. We have to encourage our colleagues to

practice, as the Code of Ethics requires,” **at all times and in a manner that promotes public confidence in the dignity, integrity and independence of the judiciary.”**

We all can help to ameliorate the conditions of work as mentioned. One of the suitable measures is as well the better protection of national judges and prosecutors, who are obliged to make themselves unpopular.

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Project Activities for July-August 2003

- Professional Skills Training
- Seminar on Civil Law
- Seminar for Minor Offences Court Judges
- Study Visits Abroad

Professional Skills Training

30 June – 02 July, and 16 – 18, 21 – 23 July, 2003

KJI, in conjunction with the International Development Law Organisation (IDLO), 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 courses will focus on development of essential skills necessary in the work of judges and prosecutors. This is the second phase of the overall programme. The topics covered in this phase 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, 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 and drafting, a 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 discussions on how to improve the co-operation between responsible parties in the execution process.

From 30 June – 02 July, the session will be offered for Criminal Law Judges and Public Prosecutors. Then from 16 – 18 and 21 – 23 July sessions will be held for Civil Law Judges. Invitations have been sent out to notify participants which session they are scheduled to attend. All Kosovo Magistrates will be invited to the second phase of training, as they were for the first phase.

Seminar on Civil Law–Possession and Restraint of Possession 03 July 2003

A seminar on civil law will be held on 03 July, 2003. The topics that are schedule to be covered are Possession and Restraint of Possession. Civil Law Judges from across Kosovo have been invited to attend this event.

Seminar for Minor Offences Court Judges 09 July 2003

A seminar for Minor Offences Court Judges is scheduled for 9 July. The topics planned are the Principles and Institutions of the Minor Offences Procedure, the Initiation and Course of the Minor Offences Procedure and the Special Juvenile Procedure. This training is scheduled for each quarter of the year. Each time, different groups of Minor Offences Court Judges are invited, in order to train all of them throughout the course of the year. Two judges from the High Court of Minor Offences are scheduled to give lectures.

OTHER EVENTS

Study Visits Abroad

KJI is continuing preparations for the next study-trip offered in our yearly programme, to Switzerland. This study visit will take place from 23 – 29 August. KJI plans to send ten (10) magistrates and one judicial trainer to this training event. Applications have been accepted and the final selection will be made in June. Preparation for the study visit to Bulgaria is also underway. As well, preliminary steps are being made in order to prepare for the study visit to Germany, which is tentatively scheduled for 09-15 November. These events will both take place in the third and fourth quarters of 2003.

