Kosovo Judicial Institute
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KJI NEWSLETTER

November 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.

Dr. Anton Girginov

THE PUBLUC PROSECUTOR AS *DOMINUS LITIS* IN THE PRE-TRIAL PHASE OF CRIMINAL PROCEEDINGS UNDER THE NEW PROVISIONAL CRIMINAL PROCEDURE CODE OF KOSOVO

1. On October 3 and 4, 2003 the Kosovo Judicial Institute and some other interested institutions organized a seminar for introduction to the reforms contained in the new Provisional Criminal and Criminal Procedure Codes. Prof. Goran Clemencic (University of Ljubljana), who has taken an active role in the preparation of the new Criminal Procedure Code, presented the new Investigative Stage of the Pre-trial Phase.

Prof. Clemencic pointed out that in contrast to former Yugoslavia, where the public prosecutor served more or less as a mailbox between police and investigating judges s/he has now, under the new Code, the full responsibility for the preliminary investigation. The public prosecutor has obtained the position of dominus litis (Latin: master of the suit) in preliminary investigation. S/he is empowered to open it, to supervise the investigative work of the judiciary police, to undertake in person investigative actions, to decide what to do with the concluded investigation.

Thus, a very powerful public prosecutor is in full charge of the preliminary investigation; s/he is responsible for its success, which usually means that s/he has to prove the offence of the defendant. This made Prof. Clemencic (for whom the non-Yugoslavian model of investigation, that he and other experts introduced in Kosovo, is new too) state that under the new law it will be a very difficult problem to make the public prosecutor, a fully responsible for the investigation figure, impartial too and not biased against the defendant. That is why Prof. Clemencic called for training of public prosecutors, for adoption of a Code of ethics for them and for other possible measures to make public prosecutors consider not only inculpatory but exculpatory evidence too as stipulated in Art. 46 (2) of the Code.

2. There is, of course, such a conflict between the two functions – to fully investigate and to impartially decide, but usually, it does not occur within the

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public prosecutor's work under the model of preliminary investigation, which has been introduced in Kosovo. This new model means a specific technological necessity. Under it the public prosecutor is really against the defendant, but not in the pre-trial phase. S/he is against the defendant during the main trial only, supporting the accusation there; the accusation presented in the bill of indictment, which s/he or his/her colleague has written. The reason for this difference is simple. For the last 150 years the basic criterion for the evaluation of public prosecutors - at least under the civil law systems of Central and Eastern Europe - has always been *the number of non-guilty verdicts and acquitted defendants*. A large number of unsuccessful attempts to replace this classical criterion or at least to modify it. Taking them into account, it can be predicted that there will be no change in the significance of this criterion in the near future. Thus, the public prosecutor seems to be unprofessional, if s/he has intimidated, harmed a person found innocent later. To avoid such a shameful evaluation, public prosecutors, working under the model, introduced in Kosovo, have the interest and do their best to avoid any non-guilty verdicts and acquitted defendants. For this reason, in the pre-trial phase the public prosecutor is not dangerous with regard to the defendant, but a person who is quite reluctant to risk with regard to the possible main trial. A behavior which is much more likely to harm the interests of the injured party and not of the defendant in the pre-trial phase.

Actually, public prosecutors in the pre-trial phase suffer from the syndrome of "why should I risk to get my defendant acquitted and care too much about the injured party instead of my professional career". Regretfully, this syndrome has no balance in the new Code. Pursuant to its Articles 62 (1) and 224 (2) "The public prosecutor shall within eight days of the termination of the investigation notify the injured party of this fact and the reasons for this" and "instruct him or her that he or she may undertake prosecution as a subsidiary prosecutor". Thus, if the case is difficult, leave it to the injured party although it has much less capacity to successfully conduct investigations. This way of thinking may take place, because the role and interests of the public prosecutor in pre-trial phase were not fully understood and s/he was left beyond procedural control as it was under former Yugoslavian law. In general, the prosecution office remained non-hierarchical and the injured party remained without the right to file a complaint against the ruling of the public prosecutor for his/her unsubstantiated refusal to institute criminal proceedings or for his/her unsubstantiated termination of the investigation. No superior prosecutor has the powers to overturn such rulings and order institution of criminal proceedings or respectively, continuation of the investigation or filing a bill of indictment with the competent court. Therefore, it is necessary and much more important to find a way *to neutralize not a public prosecutor who offends the defendant but a public prosecutor who defends him/her to the detriment of the injured*

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party in the pre-trial phase of criminal proceedings.

It is symptomatic that even the prosecutor's ruling to terminate the investigation and thus, the criminal case as a whole, is not subject to any examination and confirmation by the court. Hence, in the pre-trial phase the public prosecutor is a "judge" for the work of the judicial police officers who are, generally the immediate investigators now; only as an exception the public prosecutor may physically have the time to investigate in person that is to say, to collect evidence too (the pre-trial judge is only for a limited number of specific issues, mainly related to human rights, and not a "replacement" of the investigating judge).

Bearing in mind this allocation of duties, it can be argued that the conflict between the function to fully investigate and the function to impartially decide in the Pre-trial phase of criminal proceedings really comes up but not within the public prosecutor. The conflict is most likely to appear as a specific contradiction between the judicial police officers and the public prosecutor who supervises them.

The judicial police officers take directly information from police for the offence investigated and turn (convert) this information into evidence until they find it of sufficient quantity to establish and proof what has really happened, and that the investigation file is ready be presented to the prosecutor. But often the police information is not fully turned into evidence. Nevertheless, the judicial police officers, when building up their inner conviction on the sufficiency of evidence, more or less take into account also that information, which has not been covered by evidence. But the public prosecutor who, being in touch with the court (facing the defense there), excludes punctually this information and often, to the disappointment and even resistance of judicial officers, requires the gathering of some more evidence.

Besides, being under the pressure of police (to successfully finalize their work and in particular, to support their statement that an offence has been committed), these officers sometimes prefer to find more inculpatory evidence and are reluctant to look for all exculpatory evidence, especially in cases when they had already done a lot of investigative work to expose the defendant. Unlike public prosecutors, they do not bear the final responsibility for the case and do not have a clearly expressed interest to find the truth; their prevailing interest is to conclude their investigative work with less effort and make the public prosecutor bear the risk in court. And here comes the second contradiction with the public prosecutor whose assignment is to find the truth through relevant, sufficient and valid evidence selected. To manage the two contradictions in the interest of society, it is also necessary *to effectively regulate the sensitive relations between the public prosecutor and the police*.

Obviously, there is always some counterproductive discrepancy between the objective technological capacities of a given procedural model to effectively operate, and the legal construction made to regulate it. Sometimes it is difficult to imagine the whole picture,

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especially when the model is not well known and has not been practised yet. That is why the new, non-Yugoslavian model of pre-trial investigation creates such a different factual balance of powers and interests, which can't be fully foreseen. Nevertheless, it is predictable that the main contradiction in the pre-trial phase will not be within the public prosecutor (in spite of his/her new role there) but between him/her and the judicial police officer, who is assigned to immediately conduct the preliminary investigation. These relations shall be thoroughly studied and carefully regulated. Otherwise, they will produce disappointing results.

Project Activities November 2003

- Training on the UNMIK Regulation 2003/12 on the Protection against Domestic Violence
- Seminar on Civil Law
- Training for Minor Offences Court Judges
- Study Abroad program

Training on the UNMIK Regulation 2003/12 on the Protection against Domestic Violence

4 and 5 November, 2003

The KJI is planing a multi-disciplinary training session on 4 November that will be repeated on 5 November 2003 on the UNMIK Regulation 2003/12 on the Protection against Domestic Violence. This Regulation was signed and become operative on May 2003. The program will address the responsibilities of the courts that have jurisdiction over the cases. The agenda will include the content and the practical application of the Regulation as well as the presentation of the USA experience and the similarities with this domestic legislation. Apart of judges, public prosecutors and some judges working in criminal matters are also invited, since they also have new mandate in accordance with this Regulation.

Training for Minor Offences Court Judges

18 November, 2003

During the year 2003, the KJI set up this training for Minor Offences Court judges quarterly. This will be the last one offering to the last of judges. Two High Court of Minor Offences judges will give presentations on the various aspects of the minor offences procedure, including provisions of both substantive and procedural law (notion of the minor offence, principles and methods of the minor offence procedure, initiation

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and course of the procedure, procedure of taking evidences, the main trial, decision making, the juvenile procedure).

Seminar on Civil Law
20 November, 2003
For these training event judges working in civil matters as well as a few Commercial Court judges as invited. The topics are some material civil rights and the presentations on the transaction contract with a comparison overview and the right on purchasing Presentations will be given by KJI judicial trainers.

OTHER – FUTURE EVENTS
Study Abroad Program
After finalizing the internship in Germany, that started at 5 October and lasted until 25 October 2003, the KJI is doing preparations for the study visit to Germany. The study visit is planning for 9 – 15 November for 10 magistrates.