

On the occasion of the Ninth Assembly of the EULEX Judges, held
in Peje/Pec on 11 March 2010

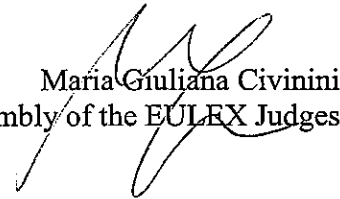
The Assembly composed of the following Judges:

Maria Giuliana Civinini, President of the Assembly of EULEX Judges; Gerrit-Marc Sprenger, Anna Bednarek, Arkadiusz Sedek, Charles Smith, Gabriele Gaube, Emilio Gatti, Esma Erterzi, Francesco Florit, Guy Van Craen, Harri Katara, Klaus Jung, Klaus Huner, Johanna Schokkenbroek, Laura Plesa, Nikolay Entchev, Piero Leanza, Richard Winkelhofer, Rositza Buzova, Torsten Koschinka, Verginia Micheva-Ruseva, Vitor Pardal, Vladimir Kanev.

Adopts the DECISION

Unanimously, to approve the present Recommendation on the jurisdiction and composition of Panels at Supreme Court level in Civil Law cases.

Maria Giuliana Civinini
President of the Assembly of the EULEX Judges



RECOMMENDATION

Based on Art. 4.10 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo – LoJ – and Art. 8 of the Rules of the Assembly of the EULEX Judges, the Assembly

Is recommended

That panels established pursuant to Art. 5.2 2nd sentence and Art. 5.5 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and

Prosecutors in Kosovo (LoJ) to adjudicate cases in the sense of Art. 5.1 c) of the LoJ at Supreme Court level to be composed as follows:

1) THREE PROFESSIONAL JUDGES

- Appeals filed against district court and economic district court decisions, regardless of whether the Code of Civil Procedure of the SFRY (CCP) or the Law on Contested Procedure (LCP) is applicable and regardless of whether an oral hearing is held.
- Repeating Procedures filed under the regime of the LCP if the request refers to first instance district court decisions.
- Request for the Protection of Legality if the request refers to final municipal, district and economic district court decisions and the LCP is applicable.
- Revisions filed under the regime of the LCP against appellate district court decisions.
- Decisions taken to solve Conflicts of Jurisdiction, regardless of whether the CCP or the LCP is applicable.

2) FIVE PROFESSIONAL JUDGES

- Appeals filed pursuant to Art. 240.4 of the LCP in Repeating Procedures if the request refers to first instance district court decisions.
- (if "possible") Requests for Retrial/Repeating Procedures referring to Supreme Court decisions regardless of whether the CCP or the LCP is applicable.
- Requests for an order of Certiorari filed under the regime of the CCP
- Requests for the Protection of Legality filed under the regime of the LCP if the request refers to Supreme Court decisions.
- Reviews filed under the regime of the CCP.
- Revisions filed under the regime of the LCP and referring to Supreme Court appellate decisions.

ANNEX 3.2 to the 9th Assembly Agenda, is an interpretative document part of this Recommendation.

9th Assembly of the EULEX Judges

Peje/Pec, 11th March 2010

SUPREME COURT CIVIL LAW CASES Jurisdiction and Composition of Panels

This assessment serves as a discussion paper for the case allocation if a civil law case has to be decided by a mixed panel on Supreme Court level (except KTA SC and KPA Appeals Panel cases). To this end, the jurisdiction (below A, p. 2) and composition of the panels (below B, p. 7) is analyzed, the findings are evaluated (below C, p. 12) and a conclusion is drawn (below D, p. 17)

It is based on

-the **Law on Regular Courts** (Off. Gaz. of the SAP Kosovo No. 21/78, as amended in No. 2/89) in the version published in the UNMIK database (hereafter: **LRC**);

-the **Code of Civil Procedure of the SFRY** [Off. Gaz. 4/77-1478, as amended by 69/82-1596) in the version published in the KLC Compilation VI, Applicable Civil Law in Kosovo (hereafter **CCP**). This law is applicable in the (somewhat unclear) cases regulated in Art. 533 of the **Law No. 03/L-006 on Contested Procedure** (Off.Gaz. of the Republic of Kosova No. 38, p. 1 – hereafter **LCP**). Please note that according to Art. 537 of the LCP the amendment 69-82-1596 to the CCP is not the last one. EULEX Legal Advisor Edita Kusari has contacted Supreme Court Judge Meleqe Bexheti to this end and was handed out the

amendments 20/90, 27/92, 31/93, 24/94 and 12/98 in Serbian. Edita confirmed that none of these amendments affects this assessment.

-the aforementioned LCP;

-the **Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo** (Off. Gaz. of the Republic of Kosova No. 27, p. 59 – hereafter **LoJ**).

The assessment has been checked by Edita (see her e-mails dated 9 and 30 November 2009) in co-operation with local Supreme Court Judges. Despite this, various uncertainties remain, as outlined below.

A) JURISDICTION

Pursuant to Art. 31 of the LRC the Supreme Court of Kosovo has jurisdiction over:

1) "APPEALS"

against verdicts and other decisions of the courts in the territory of the SAP of Kosovo "in the frames of the competence prescribed by the law";

According to Art. 348 of the CCP / Art. 176 of the LCP appeals may be filed against judgments of the court of first instance and are decided by the court of second instance. In the cases foreseen by Art. 29 no. 2 and 30 no. 1 of the LRC the district courts and the economic district courts, respectively, decide as courts of first instance. Thus the Supreme Court is the second instance court to decide appeals filed against those judgments.

2) "REGULAR LEGAL REMEDIES"

against decisions of district courts (see Art. 29 LRC) and economic district courts (see Art. 30 LRC) as a court of **third instance** - "when it is prescribed by the law";

According to the structure and heading of the CCP and LCP "regular legal remedies" are confined to appeals (see, on the one hand, Art. 348 subs. of the

CCP / Art. 176 subs. of the LCP referring – under the heading “ordinary legal remedies” / “usual means of attack” - to appeals and, on the other hand, Art. 382 subs. of the CCP / Art. 211 subs. of the LCP referring - under the heading “extraordinary legal remedies” / “extraordinary means of strike” - to “review” / “revision”, “retrial” / “repeating procedures” and “order of certiorari” / “request for the protection of legality”). I have not found any provision in the above three codes which stipulates a decision of the Supreme Court as a court of third instance on regular legal remedies, i.e. appeals against district and economic district courts. According to Edita’s findings there is no jurisdiction of the Supreme Court on regular legal remedies as a court of third instance in civil cases.

3) “EMERGENCY LEGAL REMEDIES”

” against “valid decisions” of the court (sic: courts) in the SAP of Kosovo - “when it is prescribed by the law”;

a) The meaning of “emergency legal remedies”

The meaning of “emergency legal remedies” is somewhat unclear. Due to the following reasons it is most likely that they refer to the remedies of “retrial” / “repeating procedures” and “order of certiorari” / “request for the protection of legality”. The term “emergency” should be understood in the sense of “extraordinary” because, as already outlined in paragraph 2) above, there are only two sorts of legal remedies regulated in the CCP / LPC: “ordinary” / “usual” ones and “extraordinary” ones. Since the revision as an extraordinary legal remedy is covered by Art. 31, para. 1, no. 4 of the LRC, no. 3 of this article can refer to the “retrial” / “repeating procedures” and the “order of certiorari” / “request for the protection of legality” only. This understanding is confirmed by the requirement that the legal remedy in the sense of Art. 31 para. 1, no. 3, concerns “valid” court decisions. Since each court decision is valid the requirement seems to refer to final court decisions. The decision being final is a requirement laid down for both, “retrial” / “repeating procedures” (Art. 421 of the

CCP, “duly completed” / Art. 232 LCP, “finalized procedure with an absolute decree” – cf. Art. 166 subs. of the LCP as to the “decision of the absolute decree”. As per the translation by the EULEX OPEJ/Supreme Court Translator Naser Sylja the heading should read “Final Judgment”. Art. 166.1 of the LCP should read: “The judgment that cannot be challenged with an appeal shall become final ...”) and the “order of certiorari” / “request for the protection of legality” (Art. 401 of the CCP, “a final court’s decision” / Art. 245 of the LCP, “verdict of absolute decree”).

This understanding – i.e. that the term “emergency legal remedies” refers to the extraordinary legal remedies of retrial/repeating procedure and order of certiorari/request for the protection of legality - has been confirmed by Edita.

b) Decisions subject to “emergency legal remedies”

Art. 31 para. 1, No. 3 of the LRC does not specify the courts the decisions of which may be the subject-matter of a retrial / repeating procedures or of the request for an order of certiorari / request for the protection of legality.

aa) retrial / repeating procedures

(1) It derives from Art. 427 para. 1 and Art. 428 of the CCP that the retrial may refer to the decision of a court of first instance or a decision of a “higher court”. In the latter case the “higher court” – i.e. the court which has taken the decision against which the remedy is filed - decides the request for retrial (Art. 428 para. 2 of the CCP). Hence, under the regime of the CCP, the Supreme Court could be competent only if the request for retrial may also refer to Supreme Court decisions. In view of Art. 429 subs. of the CCP, which are rules to solve the conflict in case a request for retrial and a request for review (= revision) are pending, the legislator of the CCP might have intended to exempt Supreme Court decisions from retrial procedures. However, Art. 5 of the first Law on Amendments to the Law on Regular Courts (Off. Gaz. of the SAP Kosovo no. 49/79 – hereafter: first amendment) provides that the Supreme Court decides through a special panel when it comes to appeals and extraordinary legal

remedies "of its panel". Although the wording is unclear and the translation should be checked, this provision seems to amend not only Art. 31 para. 2 of the LRC but also Art. 46, second hyphen of the LRC. In particular the latter provision seems to indicate that a request for retrial filed against a Supreme Court decision is admissible. In addition, the retrial proceedings aim at healing grievous violations of fundamental rights (see Art. 421 of the CCP). In the light of Art. 54 of the Constitution of the Republic of Kosovo as well as Art. 22 No. 2 thereof and Art. 6, 13 of the ECHR, Art. 421 subs. of the CCP could therefore be construed as to comprise Supreme Court appellate decisions.

(2) According to Art. 237 of the LCP it is the court of first instance that decides the request to repeat the procedure if the request is inadmissible. Otherwise it passes on the request together with the files to the court of second instance for decision (Art. 235, 238, 239.1 of the LCP). This means that under the regime of the LCP the Supreme Court decides on – admissible - requests to repeat the procedure if it relates to a decision of the district court as a court of first instance (Art. 29 no. 2 of the LRC). There seems to be a loophole if the request is filed against a decision taken by the Supreme Court as a court of second instance, i.e. as an appellate court (Art. 31 para. 1, no. 1 of the LRC). Due to the reasons laid down in no. (1) above (see Art. 232 of the LCP as to the fundamental rights protected by the remedy) and despite of Art. 242 subs. of the LCP (which equal Art. 429 subs. of the CCP) the LCP could be construed as to comprise appellate Supreme Court decisions. These findings are confirmed by the new translation of Art. 166 subs. of the LCP, in particular Art. 166.1. The wording of the English version published in the Official Gazette ("The decision that can be attacked through a complaint becomes an absolute decree...") is completely wrong. Art. 166.1 of the LCP should read in English as follows: "The judgement that cannot be challenged with an appeal shall become final..." On the basis of this new translation Art. 232 of the LCP, which defines the admissibility of "repeating procedures" refers to final decisions that cannot be appealed. Hence, the legal remedy of "repeating procedures" can also refer to appellate decisions taken by the Supreme Court as a court of second instance.

These legal findings have been confirmed by Edita. Yet, she has informed me that, according to the Supreme Court's practice, a retrial/repeating procedures are not "possible" if the reasoning of the request refers to a Supreme Court appellate decision

bb) request for an order of certiorari / for the protection of legality

(1) Since the SFRY no longer exists Art. 409 – 420 of the CCP referring to federal bodies have become obsolete so that Art. 401 – 408 of the CCP are the provisions to be looked at. This remedy may be filed against final municipal and economic district court decisions (Art. 401 para. 2 no. 1 CCP) and district court decisions taken as a court of second instance (Art. 401, para. 2 no. 2 of the CCP). According to Art. 401 para. 4 of the CCP a request for an order of certiorari is inadmissible if it is filed against a Supreme Court decision taken as a court of revision or on a request for an order of certiorari. It seems to derive from Art. 44 para. 3, 2nd sentence of the CCP that the request for an order of certiorari is admissible against appellate decisions of the Supreme Court.

(2) The provisions of the LCP on the request for the protection of legality (Art. 245 to 251) are almost identical to Art. 401 – 408 of the CCP. I therefore think that a request for the protection of legality is admissible if it relates to final municipal and economic district court decisions (Art. 251.1 a) of the LCP), district court decisions taken as a court of second instance (Art. 251.1 b) of the LCP) and – argumentum e contrario from Art. 245.3 of the LCP - most likely to appellate decisions of the Supreme Court.

These findings -i.e. that a request for an order of certiorari/for the protection of legality may also refer to Supreme Court appellate decisions – have been confirmed by Edita.

4) "revisions" against second instance decisions of the courts "in the lawsuit issues" - "when it is prescribed by the law";

According to Art. 382, para. 1 of the CCP / Art. 211.1 of the LCP a request for review (= revision) may be filed against judgments of the court of second instance. If the requirements of Art. 400 of the CCP / Art. 228 – 231 of the LCP are met a request for a revision is also admissible against court orders issued by a court of second instance. As outlined, it is the district courts which act as courts of second instance according to Art. 29 no. 1 of the LRC. Since there does not seem to be any provision that the decisions of the Supreme Court in its capacity as an appellate court (Art. 31 para. 1 no. 1 of the LRC) are not subject to revision and in view of Art. 46, second hyphen of the LRC as well as Art. 5 of the first amendment to the LRC this legal remedy is probably also admissible against decisions on appeals made by the Supreme Court. This has been confirmed by Edita.

5) “**conflicts of jurisdiction**” between i.a. regular courts (Art. 22 LRC: municipal courts, see Art. 26; district courts; economic district courts; Supreme Court of Kosovo).

B) COMPOSITION OF PANELS

Pursuant to Art. 8 of the LRC any court decision is taken by a panel of judges, unless it is otherwise provided by the law. With regard to the composition of the panels Art. 8 of the LRC refers to special provisions.

I UNDER THE REGIME OF THE CCP

Art. 41 of the CCP stipulates that, unless otherwise provided by the law, in “civil proceedings the courts sits in form of Panel, while certain courts sit in general session.” A general session is requested by Art. 46 – 53 of the LRC for certain Supreme Court matters. Art. 44 of the CCP is the general provision which lays down the composition of the panels, including the Supreme Court panels.

1) Appeals

According to Art. 44 para. 1 and 2 of the CCP the Supreme Court decides as a panel consisting of two professional and three lay judges if an oral hearing is held. Otherwise the decision is taken by three (argumentum e contrario derived from Art. 44 para. 2 of the CCP:) professional judges.

2) Retrial

As outlined above [A 3)b)aa)] it is the court which has taken the decision against which the remedy is filed which decides the request for retrial. In addition, Art. 421 subs. of the CCP could be construed as to comprise Supreme Court decisions [although the Supreme Court's practice is different, see above A) 3) b) aa), last paragraph]. Finally, it seems that according to Art. 46 of the LRC and Art. 5 of the first amendment thereto the Supreme Court decides through a panel of five judges with regard to regular and extraordinary legal remedies "against decisions of its panel, unless otherwise prescribed by the law". If these provisions refer to legal remedies filed against Supreme Court decisions it is a panel consisting of five (most likely) professional judges which decides requests for retrial.

Edita has confirmed that it is a panel of five professional Supreme Court judges that decides.

3) Request for an order of certiorari

With regard to final municipal and economic district court decisions as well as district court decisions taken as a court of second instance the Supreme Court decides through a panel of five professional judges (Art. 44 para. 3, 1st sentence of the CCP). According to Art. 44 para. 3, 2nd sentence, the same applies if the request is filed against an appellate decision of the Supreme Court. In this respect, it is not necessary to recur to Art. 46 of the LRC and Art. 5 of the first amendment thereto.

These findings coincide with the Supreme Court decision dated 21 July 2009 in the case MLC 43/2007 (see the complaint JC/EJU/OPEJ/0318/acb/09).

4) Review (= revision)

Revisions of district court decisions as well as of appellate decisions of the Supreme Court [which are probably admissible, see A) 4) above] are decided by a panel of five professional judges (Art. 44 para. 3, 1st and 2nd sentence of the CCP). As far as revisions of district court decisions are concerned, this is confirmed by the Supreme Court judgments I have seen so far (see the Themis folder).

5) Conflicts of Jurisdiction

There is a special provision relating to conflicts of jurisdiction between regular courts and courts of associated labour (Art. 32 a of the second amendment to the LRC). Yet, as far as I know, courts of associated labour no longer exist. It therefore seems that, at least in case of a conflict of jurisdiction between regular courts, the general provision of Art. 44 para. 1, 2nd sentence is applicable. This means that the Supreme Court panel has to consist of three professional judges.

II UNDER THE REGIME OF THE LCP

After having Art. 15 of the LCP translated anew by the SC Translators it turned out that this article is the general provision regulating the composition of the panels. Yet, there are also provisions in the LCP which derogate Art. 15 thereof as *lex specialis*.

1) Appeals

According to Art. 189.1 of the LCP appeals (misleading official translation "complaints") are decided by a panel consisting of three professional judges. Art. 15.2 of the LCP (which provides that a trial panel composed of three judges shall act in the second instance proceedings, i.e. stipulates the same composition of the panel) is derogated by Art. 189.1 of the LCP as *lex specialis*.

2) Repeating Procedures

If the remedy is filed against a decision of the district court as a court of first instance, it is a single judge at Supreme Court level who decides on the merits (Art. 235 of the LCP; the derogated provision in Art. 15.1 of the LCP coincides) - if the remedy was not previously rejected as inadmissible by the court of first instance (through a single judge, Art. 15.1 of the LCP) in accordance with Art. 237.1 of the LCP. In case the single judge at Supreme Court level rejects the request, it is a panel of three (most likely) professional Supreme Court judges which decides as an appellate panel (Art. 240.4 of the LCP; the derogated provision in Art. 15.2 of the LCP coincides). Edita has confirmed that a panel of three professional Supreme Court judges decides. The LCP has abolished the participation of lay judges in civil proceedings.

If the request refers to a Supreme Court appellate decision [and if this is "possible", see above A) 3) b) aa), last paragraph] it is questionable whether Art. 237.1 of the LCP is applicable, i.e. if the court of first instance (through a single judge, Art. 15.1 of the LCP) decides on the admissibility. Art. 237.1 of the LCP could be considered as applicable because, as confirmed by Edita, the first instance decision and the second instance appellate decision legally constitute one single decision. In this case, the request would have to be looked upon as to confine –only – its reasoning to the Supreme Court decision. Otherwise, recurrence has to be made to Art. 46 of the LRC and Art. 5 of the first amendment thereto.

This means that there are the following alternatives:

-Either the competence is the same as in case the request is filed against / its reasoning is referring to a district court decision, i.e.: A District Court Judge decides as a single judge whether the request is admissible. If so, a Supreme Court Judge decides as a single judge whether the request is founded. If she/he rejects the request, it is a panel of three professional Supreme court judges which decides as an appellate panel.

-Or a special panel of five professional Supreme Court judges decide. In this case, i.e. if Art. 46 of the LRC and Art. 5 of the first amendment thereto are applicable, it seems that an appeal is not admissible.

According to Edita it is most probably a panel of five professional Supreme Court judges which decides. Yet, the question has not yet been decided.

3) Request for the protection of legality

Since Art. 245 subs. of the LCP do not provide for the composition of the panel competent to decide requests for the protection of legality, recurrence has to be made to Art. 15 of the LCP as *lex generalis*. Yet Art. 15 of the LCP does not deal with the request for the protection of legality. In particular, Art. 15.2 of the LCP, which refers to "second instance proceedings", is not (directly) applicable because the request for the protection of legality is an extraordinary legal remedy, which may be filed by the Public Prosecutor only (Art. 245.1 of the LCP) and allows for a limited review of the litigated decision only (Art. 247 of the LCP). The scope of Art. 31, para. 2 of the LRC in the version of Art. 5 of the first amendment thereto and Art. 46 of the LRC is restricted to appeals and extraordinary legal remedies filed against Supreme Court decisions. This means that the composition of the panel provided therein – five professional Supreme Court judges – refers only to requests for the protection of legality concerning appellate decisions of the Supreme Court.

As per the above, (at least in the English versions of the LCP and LRC available) there is no provision on the composition of the Supreme Court Panel as far as final municipal and economic district court decisions as well as appellate district court decisions are concerned. In order to fill this loophole it seems that

- either the provisions on the repeating procedure (admissibility to be decided by the municipal, economic district or district court; merits to be decided by a Supreme Court judge sitting as a single judge; appeal against the latter decision to be decided by a panel of three professional Supreme Court judges)
- or Art. 15.2 (panel of three professional Supreme Court judges)

-or the provisions on requests for the protection of legality against Supreme Court appellate decisions (panel of five professional Supreme Court judges) could be applied by way of analogy.

Edita confirmed that this is an open legal question. She looks upon Art. 15 of the LCP as to express the general principle that usually a panel of three professional judges decides. I agree with Edita's findings. Art. 15 of the LCP constitutes a general principle. Deviating therefrom seems to be admissible only in case there is a concurring principle. Yet, the principle laid down in Art. 31, para. 2 of the LRC in the version of Art. 5 of the first amendment thereto is not applicable in the present context. The ratio behind the LRC provisions is to have a panel of five Supreme Court judges decide on remedies against Supreme Court decisions. However, the present issue refers to municipal, economic district and district court decisions.

4) Revision

Pursuant to Art. 15.2 of the LCP a panel of three professional Supreme Court judges decides revisions filed against appellate district court decisions.

As far as revisions filed against Supreme Court appellate decisions are concerned, the situation is unclear. According to Art. 15.2 of the LCP – the wording of which refers to any revision, regardless of whether the challenged decision was made by a lower court or by the Supreme Court – a panel of three professional judges decides. However, Art. 31, para. 2 of the LRC in the version of Art. 5 of the first amendment thereto and Art. 46 of the LRC reflect the general principle that a panel of five professional Supreme Court judges decides legal remedies filed against Supreme Court decisions.

Edita confirmed this uncertainty and informed me that according to the practice of the Supreme Court revisions filed against Supreme Court appellate decisions are decided by a panel of five professional Supreme Court Judges.

5) Conflicts of jurisdiction

The decision is taken by a panel consisting of three professional Supreme court judges, Art. 15.3 of the LCP.

C) EVALUATION

The uncertainties outlined above (in particular if it is a panel of three or five judges that decides) could be overcome by a **pragmatic approach**. This means that, if the composition of the panel is unclear, it could be advisable to have the Supreme Court decision taken by the highest possible number of judges. The **lack of EULEX judges** does not necessarily seem to pose a problem anymore. Apart from the President of the Assembly of EULEX Judges (whose appointment comprises the position of a civil judge at Supreme Court level) and the undersigned (who was appointed a general civil judge at Supreme Court level in September 2009) EULEX civil judges at district court level now seem to be in a position to sit as Supreme Court judges. The job description for EULEX civil judges at district court level (EK 0528) was extended in the 10th call for contributions. According to this job description the tasks of EULEX judges at district court level comprise property case proceedings at the Supreme Court.

On these preconditions the composition of the Supreme Court panels as provided for by the **CCP, LCP** and **LRC** is as follows:

1) SINGLE JUDGE

-Repeating Procedures filed under the regime of the LCP if the request refers to first instance district court decisions.

2) THREE PROFESSIONAL JUDGES

-Appeals filed against district court and economic district court decisions, regardless of whether the CCP or the LCP is applicable, with the following **exception**: If the CCP is applicable and an oral hearing is held, the panel has to consist of two professional and three lay judges.

- Appeals filed under the regime of the LCP in Repeating Procedures if the request refers to first instance district court decisions.
- Request for the Protection of Legality if the request refers to final municipal, district and economic district court decisions and the LCP is applicable.
- Revisions filed under the regime of the LCP against appellate district court decisions.
- Decisions taken to solve Conflicts of Jurisdiction, regardless of whether the CCP or the LCP is applicable.

3) TWO PROFESSIONAL AND THREE LAY JUDGES

- Appeals filed under the regime of the CCP against district and economic district court decisions if an oral hearing is held.

4) FIVE PROFESSIONAL JUDGES

- (if "possible") requests for Retrial/Repeating Procedures referring to Supreme Court decisions regardless of whether the CCP or the LCP is applicable.
- Requests for an order of Certiorari filed under the regime of the CCP
- Requests for the Protection of Legality filed under the regime of the LCP if the request refers to Supreme Court decisions.
- Reviews filed under the regime of the CCP.
- Revisions filed under the regime of the LCP and referring to Supreme Court appellate decisions.

However, pursuant to Art. 5.2, sentence 2 of the LoJ mixed panels "will be composed of three judges ..." (Art. 5.5. of the LoJ does not allow for changes in that number). If this provision is strictly applied it is always a panel of three professional judges that decides, regardless of the legal remedy filed.

Despite the clear wording of Art. 5.2, sentence 2 of the LoJ, I think that this provision is subject to being construed differently with the following results: In the cases outlined in number 4) above, the composition of the panel remains

unchanged, i.e. the panel is composed of five professional judges. In contrast thereto, in case of number 1) and 3) above the composition of the panels should be changed and the decision taken by a three-judges panel if EULEX judges take part. The following reasons suggest this conclusion:

The present assessment is mainly based on the LCP. The **LCP** is governed by the **general principle** that a panel decision is taken by **three professional judges**, i.e. a principle which coincides with Art. 5.2, sentence 2 of the LoJ.

Deviations from a three judges panel are due to the reason that

- a) there is an explicit provision making an exception from this principle (Art. 235 of the LCP, repeating procedures, single judge, no. 1 above);
- b) the transitional provisions of the LCP refer to the CCP as being still applicable [Art. 532 subs. of the LCP which may concern: appeals (two professional and three lay judges, no. 3 above) as well as requests for an order of certiorari and reviews (five professional judges, see no. 4 above)];
- c) the **LRC** is still in force and expresses in Art. 31, para 2 in the version of Art. 5 of the first amendment thereto i.c.w. Art. 46 the **general principle** that a panel of **five professional Supreme Court judges** decides on **legal remedies filed against Supreme Court decisions** (see no. 4 above re: retrial/repeating procedures, requests for the protection of legality, revisions – five professional judges).

Deviation c) above is based on a general principle laid down in the LRC, which law governs all court proceedings, be they criminal, civil or administrative. It is thus recognized that in criminal law proceedings e.g. requests for the protection of legality are decided by a panel of five professional judges – even if the panel consists of local and/or EULEX judges. The reason for having the decision in criminal proceedings taken by a five-judges panel does, to my mind, not only lie with Art. 3.7 of the LoJ, which provision – other than Art. 5.2, sentence 2 of the LoJ – does not foresee a specific number of judges to sit in a panel. It is rather

the telos of the underlying general principle which requires the decision being taken by five professional Supreme Court judges: A decision taken by three professional Supreme Court judges should be overturned only by an even higher ranking panel. Since the Supreme Court is the regular court of last instance, this goal can be achieved only by increasing the number of the panel members. Applying this general Kosovar principle also reflects the principle ruling the EULEX mandate, the principle of **local ownership**.

Deviations a) and b) above are based on the LCP, which law has come into force at a later stage than the LoJ. This means that, in principle, the **lex posterior** rule derogates Art. 5.2, sentence 2 of the LoJ. On the other hand, the LoJ is **lex specialis** and, as such, prevails over the LCP. In order to overcome this “jam” of concurring rules reference should be made to the principle of **local ownership**.

-In particular, if it comes to requests for an order of certiorari and reviews filed under the regime of the CCP (see no. 4 above) there are further good reasons to have them decided by a panel of five professional judges. Both remedies are extraordinary legal remedies and thus imply to have an extraordinary panel to decide. In this respect, a mixed panel should not be considered as being extraordinary— just because there are EULEX judges involved. Under the regime of local ownership **EULEX judges are not per se the “better” judges**, but equal to their local counterparts. Apart from that, the **general principle** laid down in Art. 31, para 2 in the version of Art. 5 of the first amendment thereto i.c.w. Art. 46 of the **LRC** requires a panel of five professional judges if the request for an order of Certiorari or for review refers to a Supreme Court decision. Finally, you are always **on the “safe side”** if the decision is taken by five – instead of three – judges.

-Due to the last reason it could be advisable not to have a single EULEX judge decide on the merits of a request for repeating procedures concerning first instance district court decisions filed under the regime of the LCP (see no. 1 above) – but rather a mixed three-judges Supreme Court panel. *If so, one has,*

however, to recur to the general principle of a five-judges panel with regard to appeals filed thereto.

-When it comes to oral hearings in appeals cases filed under the regime of the CCP against district and economic district court decisions (see no. 3 above) the panel should - despite Art. 44, para. 2 of the CCP - not comprise lay judges. The **lay judges system** has been **abolished** by the **LCP**; the LoJ does not provide for the participation of lay judges either. The **ratio of the former socialist lay judges system** – to have representatives of the people/working class take part in decisions – is **less important** in a democratic state whose professional judges are recruited by an independent body (the KJC, Art. 108 par. 3 of the Constitution of the Republic of Kosovo) and appointed by the President of the Republic (Art. 84 par. 16, 104 par. 1). To have these appeals decided by professional judges only does not contravene the principle of **local ownership** because it is the LCP – a law passed by the Kosovo Assembly – that has abolished the lay judges systems. Therefore, in compliance with Art. 189.1 of the LCP, the general principle laid down in Art. 15.2 of the LCP and Art. 5.2, sentence 2 of the LoJ the panel should consist of three professional judges.

D) CONCLUSION

In case EULEX judges participate in a Supreme Court decision according to Art. 5 of the LoJ the panels should be composed as follows:

1) THREE PROFESSIONAL JUDGES

- Appeals filed against district court and economic district court decisions, regardless of whether the CCP or the LCP is applicable and regardless of whether an oral hearing is held.
- Repeating Procedures filed under the regime of the LCP if the request refers to first instance district court decisions.
- Request for the Protection of Legality if the request refers to final municipal, district and economic district court decisions and the LCP is applicable.

-Revisions filed under the regime of the LCP against appellate district court decisions.

-Decisions taken to solve Conflicts of Jurisdiction, regardless of whether the CCP or the LCP is applicable.

2) FIVE PROFESSIONAL JUDGES

-Appeals filed pursuant to Art. 240.4 of the LCP in Repeating Procedures if the request refers to first instance district court decisions.

-(if "possible") Requests for Retrial/Repeating Procedures referring to Supreme Court decisions regardless of whether the CCP or the LCP is applicable.

-Requests for an order of Certiorari filed under the regime of the CCP

-Requests for the Protection of Legality filed under the regime of the LCP if the request refers to Supreme Court decisions.

-Reviews filed under the regime of the CCP.

-Revisions filed under the regime of the LCP and referring to Supreme Court appellate decisions.

11 January 2010

Gabriele Gaube

International Judge to the
KPA Appeals Panel of the
Supreme Court of Kosovo