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James E. Moliterno  
*Washington & Lee University*

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## Some Lessons from the International Judicial Education Front

James E. Moliterno\*

Imagine teaching judicial ethics in Kosovo. Both the law and lawyer culture in Kosovo are a remarkably complex mix. Until 2008, Kosovo was a province of Serbia. More than 100 countries say it still is.<sup>1</sup> As a disputed state, recognized by the United States (U.S.) and about 60 other countries, the effect of Kosovo's own legal pronouncements are subject to dispute.<sup>2</sup> From 1918 until 1992, at which point Yugoslavia began to disintegrate, Kosovo was indisputably a province of the Republic of Serbia within Yugoslavia.<sup>3</sup> From the end of World War II, Yugoslavia was a communist state. In 1974, the Yugoslav Constitution granted Kosovo substantial autonomy from Serbia while maintaining Kosovo's status as a province. Following Tito's death in the early 1980s, Serbian domination of Yugoslavia increased. The autonomy granted to Kosovo in 1974 was revoked by Serbia in 1989. The 1990s was a decade of conflict in former Yugoslavia—briefly in Slovenia, more intensely in Croatia, and far more intensely still in Bosnia. The conflict in Kosovo simmered as the majority Albanian Muslim population suffered under the repressive Serbian authority. The conflict peaked in the late 1990s, with untold numbers of Albanian Muslim Kosovars killed or sent fleeing. The pictures of the dead line a government building in Pristina, and while driving through the countryside, one passes grave monument after grave monument, marking war deaths, martyrs, and heroes. After NATO bombing effectively removed Serbian troops in 1999, Kosove<sup>4</sup> came under United Nation (UN) control and administration. Now the EU is taking the reins from the UN, even while Kosove has some of the attributes of an independent state. The northern part of Kosove, across the river that divides the city of Mitrovica, remains under de facto Serbian control. A shadow government exists, elected by Serbs in northern Kosove, and its members are paid a salary by the Serbian government, although it has no official authority. Crossing the bridge in Mitrovica, one encounters uniformed Kosovar police on either side. While the

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\* Vincent Bradford Professor of Law, Washington & Lee University.

1. KosovoThanksYou, <http://www.kosovothanksyou.com/> (last visited Sept. 24, 2010) (on file with the *McGeorge Law Review*) (noting Kosovo's independence is recognized by 70 out of 192 United Nations members).

2. *Id.*; see also John R. Cook, *United States Recognizes Kosovo as an Independent State*, 102 AM. J. INT'L L. 638, 638-39 (2008); Steven Bos, *US, Russia Clash over Kosovo's Independence Move*, VOICE OF AMERICA (Dec. 10, 2009), available at <http://www1.voanews.com/english/news/europe/US-Russia-Clash-Over-Kosovos-Independence-Move-78986552.html> (on file with the *McGeorge Law Review*).

3. See John B. Allcock, *Kosovo*, ENCYCLOPEDIA BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/322726/Kosovo> (last visited Sept. 24, 2010).

4. The change in spelling is advertant. While a part of Yugoslavia and Serbia, the name was Kosovo. Now it is Kosove, or always was so according to the Albanian Muslim population. During different parts of the same speech in the late 1990s, seeking to offend either everyone or no one, then President Bill Clinton, pronounced the name one way and then the other.

bridge is not a border, it effectively acts as one. On the south side, the people in the uniforms are Albanian Muslims who take their orders from Pristina. On the north side, the people in the uniforms, the same uniforms, are Serbs who take their cues, if not their official orders, from Belgrade. Both sides of the river are in Kosove (or Serbia, depending on whether one recognizes the Kosovar independence).

Kosove's law and court system are complicated. Old Napoleonic Codes exist, but slept during the communist half-century. Yugoslav laws remain. The laws of the 1990s exist but Kosovars hold them in low repute, having been adopted by the Serb-controlled government that revoked Kosovar autonomy formerly granted by Yugoslavia. The law in force from 1999 to 2008 was adopted by UN directive and administered by the UN High Representative. Now, the fledgling Kosovar Parliament adopts laws, many of which are proposed by international NGOs based in the U.S. and Western Europe. Under all the wrappings, Kosove's legal system is based on civil law, but has a slightly more adversarial dispute resolution system than is usual in civil law systems. Encouraged to adopt the U.S. model of plea-bargaining, local parliamentarians fear that this will fuel judicial corruption.

Older judges and lawyers were educated in communist times. New judges and lawyers are educated by an uncoordinated conglomeration of NGOs in concert with the newly-formed Kosovo Bar Association and Kosovo Judicial Counsel. These judges and lawyers do not live in a U.S. culture or legal culture. They are not common law lawyers. However, the adopted lawyer and judicial ethics rules are loosely modeled on the ABA codes. In a tussle between U.S. and European NGOs and their relative influence, the U.S. style codes stand alongside the recent adoption of the French notary system, creating the common, Western European branch of the legal profession that generates official documents, especially regarding property transfers. The U.S. lawyer code, of course, does not contemplate such a lawyer.

It's a bit of a challenge.

## I. THE JUDICIAL ETHICS TRAINING PROJECT

Since early 2008, I have been involved in judicial ethics training in Kosove.<sup>5</sup> This project is managed by the National Center for State Courts (NCSC), recipient of a USAID grant to accomplish various legal institution-building tasks in Kosove.

The NCSC designed the broad strokes of the training plan in conjunction with the Kosovo Judicial Institute (KJI). The plan called for regional training sessions so that all judges would have an opportunity to attend. The training

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5. I have had the good fortune to be involved in lawyer, judge or law school projects in China, Japan, Thailand, (former Soviet) Georgia, Armenia, Serbia, Czech Republic, and Spain. Some of these projects are locally funded. Others are ABA Rule of Law projects and NCSC projects.

would be in two phases, basic and advanced, with a “training of trainers” component to lay groundwork for local trainers to carry on the training in the future, after the project’s funding expires. Gent Ibrahim, an Albanian professor, was asked to do the basic training sessions. Gent’s training would rely primarily on a PowerPoint presentation that exposes the judges to the language and some nuances of the judicial conduct code in Kosove. I did the advanced training, which proceeded through regional sessions in Prizren, Prishtina, Peja, Mitrovica (Vushtrri), Therande, and Ferazaj.

## II. THE ADVANCED TRAINING COMPONENT

My job was to provide what NCSC and KJI call “advanced training.” I was to assume that the judges in my sessions would already have had the “basic training.” However, this sequencing turned out to be true only some of the time. Many of the judges in my sessions, it turned out, had not had the basic training. Some attended my sessions multiple times, cheerfully discussing the same hypotheticals. The planned-for pace and sequencing of training seems rarely to play out in these projects.

Prior to my first of now seven arrivals,<sup>6</sup> I studied materials from former training for judges and prosecutors, ethics codes and law, and various United Nations Mission in Kosovo (UNMIK) regulations for courts and judges and prosecutors. I also studied materials relating to the independence of Kosovar courts, reviewed and commented on the current basic training curriculum, prepared materials for my first advanced training module, and sent them out for comment.

I was expected to do a more detailed PowerPoint presentation, perhaps focusing on a few topics rather than the entire code. But given the complexities of Kosove itself—the judges’ backgrounds, the tangle of laws that I read but confess at times had my head spinning<sup>7</sup>—I decided I could best spend my time in a way it could be spent in judicial ethics training anywhere. I decided to spend all or nearly all of the day-long trainings on the core attribute of judges everywhere: impartiality. Given this single, central focus, and freed from covering the breadth of Kosove’s code, I created a day that would engage the judges (I hoped), challenge their intuitions, and leave them with lasting impressions. “Tell me and I will forget. Show me and I will remember. Involve me and I will understand.”<sup>8</sup> I wanted a day with all three modes, with most of the attention on the last.

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6. Even cell phones are confused about Kosove. Upon landing in most countries, a text message arrives saying, “Welcome to Slovakia,” or “Austria.” When landing in Kosove, the text says, “Welcome to Monaco.” It seems that the country code gods have not yet provided Kosove with a country code for international calling, and Monaco, possessed of excess phone capacity, has loaned Kosove phone numbers.

7. Much of my confusion was genuinely my incapacity to piece it all together, but some, as I learned randomly from time to time, resulted from badly flawed and imprecise translation from Albanian to English, rendering my efforts to understand futile.

8. Oft-quoted Chinese proverb.

I fashioned a training day that would begin with a brief (thirty minutes maximum) lecture on the notion of impartiality, its centrality for judges everywhere, and its distinctions from and connections with the concept of judicial independence. Following the lecture, and the first of the frequent coffee breaks built into the schedule in deference to local culture, the day turned to a series of hypotheticals, very simple in surface appearance but with specific teaching goals in mind. There were seven hypos, but I rarely made it to the third or fourth in a two-and-a-half hour, coffee-punctuated discussion block. Following exhaustive group discussion of the hypotheticals, the day moved to role-play activities. At my first training, I had elaborate role-plays designed for step-by-step unfolding within small groups of three or four judges. Within each group, each judge was assigned a particular role, given background material, and asked to play out the scenario as he or she saw fit. I found the arrangements, the translations, the instructions, and the need for monitoring each group with my lack of Albanian to be too complex and distracting from the lessons to be learned by the activity. At subsequent sessions, I abandoned the small group role-plays in favor of fishbowl role-plays followed by discussion with the group and achieved much more effective results.

My theory of the advanced training was this: the basic training was meant to provide a broad, surface exposure to the codes that govern Kosovar judges and lawyers. The basic training was meant to familiarize the participants with the essential background and text of rules. The advanced training focused on a single, central topic and developed the participants' understanding with more interactive and more engaging teaching methods. The advanced training should use extensive hypotheticals and role-plays, providing the participants with more than mere knowledge of the language of the rules. Rather, the participants should leave the advanced training with mental experience at identifying and solving daily issues that pose ethical difficulty.

More specifically, the standard day of advanced training itself proceeded as follows: I described the agenda and explained how the day would proceed, and that it would be somewhat different from *ex cathedra* training that they might be more accustomed to. I said that contrary to their customary expectations, I would not talk at them for more than thirty minutes. (That notion and phrasing always produced a curious look and then smiles as the translation made its way through the system and into their headphones.)

I gave a brief lecture on impartiality. Then, together with the participants and my co-trainers, we discussed two of the seven prepared hypotheticals. The discussion was lively and induced many comments by nearly every participant. The first hypothetical was deceptively simple and designed to not raise a disqualifying impartiality concern. "Judge regularly hears cases involving Bank. Judge's son currently has a loan application pending at Bank." My impression is that participants are accustomed to outsiders always presenting unethical conduct through hypotheticals and I believe that this undermines the credibility of some trainers. The participants come to view the trainers as overly-sensitive people for

whom every scenario is grave. Instead, my first hypothetical does not pose disqualifying conduct, and the participants on most training days expressed just such a view, sometimes in challenging voices as if they were disagreeing with me, when I had not yet commented on the hypo. (“How can our families live? Must they not buy groceries at the market if the market has cases in my court? Must my children not trade with a bank? Some judge must hear the bank’s cases. What of her children?”) I agreed with them, and I think some of them expected me to say otherwise. My agreement was disarming to some of them who seemed not to contemplate that I would have given them a hypothetical that I did not think presented a serious ethical difficulty. From this place of agreement, I then asked what facts might be added to the first hypothetical that would change it to a situation presenting disqualifying or more ethically-problematic circumstances. The participants proposed several such additions (“Perhaps if the bank gives the loan to my son on too favorable terms, hoping to gain my favor. Perhaps if I called the bank to pressure them to give the loan. Perhaps if the pending case involves my son’s loan. Perhaps . . .”) and then discussed when and why these additions would be problematic. I believe that this technique does more than merely giving an example of what is problematic. It allows the participants to see the differences between problematic and non-problematic scenarios they might encounter. The lines can be seen rather than merely seeing conduct that is on the problematic side of the line.

The second hypothetical was also deceptively simple, and some participants said it was too simple to warrant their time discussing it. “A breach of contract case is pending in Judge’s court. A buyer of paint claims that the paint was of poor quality and damaged the wood surface to which it was applied. Judge had had the same thing happen to him with the same brand of paint.” But in reality, the participants disagreed about its disqualifying implications and the reasons supporting their opinions. By pointing out their disagreement as the discussion proceeded, I was able to demonstrate that even seemingly simple, everyday situations might produce differing opinions from the most experienced and wise judges in the country. That observation allowed me to then highlight and summarize the various points of view and to articulate why the better views were better suited to a fair and impartial judiciary. I forced some discussion underneath the opinions about the problematic nature of this hypo. In particular, I got the group to identify the underlying threats to impartiality.

In this hypo, there are at least three:

1. We want judges to come to disputes without prior factual knowledge, and here, the judge has used the same paint with the same result as the plaintiff claims;
2. We want judges to be free of prior bias against a party, and here, the judge may harbor some ill feelings toward the paint company which has already harmed her; and

3. We want judges who have no personal stake in the outcome, and this judge may be setting some precedent for purposes of his or her own later litigation, or pressuring the paint company to pay damages to the judge for her loss.

This focus on the sources of impartiality threats should help the judges to see and sense threats to impartiality more thoughtfully.<sup>9</sup>

In the time remaining before lunch, I asked participants if they could identify any situations that had arisen in their courts on which they might like to seek the opinions of their colleagues.

We adjourned for lunch and following a usually too-large meal and some conversation through translators, we returned to complete the day.

After lunch, with the assistance of the excellent role-playing of Drita Hajdari-Peci and my co-trainer Besim Kelmendi, we staged a role-play regarding *ex parte* contact and corruption. In the role-play, a judge (Besim) is sitting at a café on a lovely spring day. As he sits alone, he is approached by Drita, who greets him. Initially, he is not sure who she is, so she explains that she owns a travel company and reminds him of the group tour to the Adriatic coast he took with her company. He remembers the trip, of course, and then her. He invites her to join him. They have a nice conversation about the trip and she flatters him with talk of her other clients' pleasure at having him in their group. They seem to be enjoying each other's company when she tells him that her son has been arrested and his case is pending in the judge's court. He is not sure he knows the case, and she continues without pause to explain that her son is innocent and being manipulated by other young men. She carries on like this as long as he will let her, and then asks if he can help her son. She gets an ambivalent, ambiguous answer, and then turns the subject to the judge's daughter, who has applied for a job at her company. She asks if he will be "grateful" if she hires his daughter to this good job.

The participants, who had been whispering to one another, laughing, and smiling during the role-play, commented on what the judge had done and disagreed with each other over what he should have done differently. Besim explained what he had done as the judge in the role-play and why. A very productive discussion ensued.

On some occasions, another judge in the audience would ask if he could play Besim's role and show how he or she would have responded to Drita's entreaties.

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9. The remaining hypos are these, although it was rare to get to even the third or fourth: (4) Judge is presiding over a traffic offense matter against a neighbor. Judge and the neighbor have recently had disputes because the neighbor plays loud music and hosts noisy parties; (5) Judge's son was killed during violence in the 1990's. Judge is now presiding over a criminal matter against a brother of the man who killed Judge's son; (6) Judge's father lost his property during the 1990's. Judge is now presiding over property restoration matters similar to his father's case; (6) Judge is presiding over an employment contract dispute. The employer is also the employer of Judge's daughter; (7) Judge is presiding over a traffic offense matter. The defendant is a social friend of Judge. They frequent the same café and see one another there almost daily.

On other occasions, I would play Besim's role for a second run through the role-play. When I did this, the moment Drita turned attention to a case in my court, I would gently stop her and say, "I am sorry, but one thing I cannot do as a judge is have any discussion of cases in my court, outside of my court. I must excuse myself, and hope you will enjoy the coffee and the lovely weather." I would stand and depart with Drita protesting as I walked away. At one training, the group cheered my response. At another, they explained that they could not do such a thing because they would be labeled as rude in their community. I asked Drita what she would do if the judge had done as I did. She said she would tell her friends and neighbors that the judge was rude to her, despite my gentle way of ending the conversation. I asked the judges what would happen if all the judges behaved in this way, and they acknowledged that in their relatively small communities, it would not be long before people understood that this was simply what a judge must do. On some occasions, I would turn to Drita after the participants had exhausted their discussion and ask her why her character approached the judge at his café. She said she hoped to gain some advantage for her son. I asked if she would think she had as much influence if she had made the same arguments to the judge in court with the other side's lawyer present. "No, of course not," she said. So that is why we look askance at *ex parte* contact. That is why *ex parte* contact threatens impartiality. At every turn during the day, the lessons sunk deeper by the use of experiential, role-based methods.

Some of the training days ended with a shot of rakia, the local hard liquor.

### III. STORIES OF DENOUNCEMENT

At times, my sessions presented personal challenges by one judge against others, open accusations of misconduct by one member of the training audience of another. These times were highly charged events; careers and futures were exposed to ruin.

In the December 2009 training session, during our discussion of an impartiality role-play, the discussion struck too close to home for a judge in the audience. We were discussing *ex parte* contact by litigants. Remember that most of the current judges face a difficult transition from a dispute resolution in the purely European-style-modified-by-Yugoslavia's-form-of-communism system, to a more US-style adversarial one. In their training and experience, until the last few years, *ex parte* contact was a muted concern, and reasonably so. Judges, as the primary fact-gatherers, had to engage in some contact with representatives of one side or the other in order to collect evidence. One judge in the group, after listening to the discussion of the *ex parte* contact role-play, began a defensive-sounding comment. He said that judges in this very room had disingenuously reported him to the judicial conduct authorities for *ex parte* contact, which in his view was not prohibited, but was simply part of his judicial investigative duties. Several in the room took offense, knowing as I could not, that he was denouncing them for reporting him. He paraphrased the affidavits they had submitted in their



reports of his conduct, and he made clear that they were simply trying to sully his reputation for the currently ongoing reappointment process. Reports of misconduct were taken very seriously during this time of rooting out sitting judges to be replaced by the newly trained recruits. On this occasion, I simply allowed him to vent, but before others could engage in open disagreement with him, I moved the topic of the discussion along as if nothing had happened. In this instance, I saw no value in open hostilities.

During my very first training, the situation and denunciations struck even closer to our project and nearly scuttled the day's work. I had two partners, a judge and a prosecutor. Both were quite prominent. Midway or so through the morning session, I invited the participants to raise any impartiality-threatening situations they had encountered as judges. One responder said he wanted my expert opinion about the conduct of some other, unnamed judge. He described a situation in which a criminal charge was pending in one district and the judge of another district, a relative of the defendant, called the presiding judge to ask him to reduce the charges against the defendant. On its face, it sounded like an obvious instance of misconduct, but I was hesitant, why I am not sure. I answered that at this early stage in my work in Kosovo I might not be entitled to give an "expert" opinion, and that inevitably there could be more facets to the story than I was aware of. As I was giving my caveats and hedging my response, my judge partner began to speak. Through my headphones the translation came. He was defending his conduct. He was the judge in the questioner's fact pattern. The two became heated in their exchange. Others joined in, some accusing and some defending my training partner. Tempers flared and the session was in jeopardy. I spoke, but without addressing the merits. Nothing I could have said on the merits at that point would have been apt, nor helpful, in bringing the training back on a useful track. Instead, I suggested that there were other fora in which this dispute should be aired. It was already pending in the disciplinary process, I learned during their exchanges. I also objected to being used as a tool of the accusation. I had been asked to condemn the conduct (which, in the end, may have been condemnable) of the training partner I had been provided, and I had been asked to do so without warning and without context. I suggested that this was no way to treat a trainer.

By now it was nearly the lunch break, and one of the judges in the room spoke. He suggested that we not come back after lunch, as the possibility of being productive had been dashed. As far as I knew, he was not on one side or the other of the dispute, but instead, saw no value in continuing as a group. But another judge disagreed and said that surely we could put this aside and continue after the calming effects of a good meal (and for the participants, a few cigarettes). We did return after lunch but the questioner did not. He did, however, attend other training sessions months later without incident. The afternoon proceeded in good fashion and those who remained for the rest of the day were gracious and grateful for the session. My controversial partner was not asked to continue his work as a trainer in subsequent sessions.

The judicial discipline process was quite new when my training sessions began in 2008. I took the judges' willingness to expose wrongdoing and challenge one another in the sessions as an indication that they lacked confidence in the recently-adopted systems for the resolution of such disputes. This was a gathering of judges at which complaints could be made, and they were. But just as obviously, these sessions were a very poor vehicle for dispute resolution. There was no notice, no genuine or organized opportunity to be heard or present evidence, and no empowered decision-maker.

#### IV. ERRORS OF THE REAPPOINTMENT PROCESS: THE EXAM, ITS FORMAT, ITS LACK OF NOTICE, AND LACK OF COORDINATION

The government, again led by UNMIK and various international NGOs, determined that there should be a process of reappointment for judges. This seemed perfectly natural as a transition from a time when little formal qualification to become a judge existed. The process was designed in part by the Kosovo Judicial Counsel and in part by an international NGO. The process included an application aspect, each judge essentially applying for his or her current job. The application process included a background check and somewhat searching personal investigation, all designed to root out of the judiciary those most associated with corrupt methods.

There was also an ethics exam, although I did not know the nature of the exam until after its administration. The exam was a one-time event, with those "failing" being denied reappointment. This timing and plan alone were certain to create problems in the short term. A judge who failed the exam would not immediately cease to be a judge, but would leave his or her position when the current term of the judge's appointment ended. Further, because there was no re-test, such a judge had no hope of redemption. This, as a result, created an incentive for the laziest judges to be lazier, and the ones willing to engage in corrupt practices to enrich themselves to the greatest possible extent before their power was terminated.

The exam itself was fairly standard by U.S. standards and norms. It was a series of scenarios with multiple choice answers chosen by the test-taker. Nothing unusual for the U.S. based exam writer. But it was dramatically different in format and substance from the tests these judges had grown up taking in school and at university. In much of Europe, and certainly the Balkans, exams are about regurgitating information; reciting the correct code section and responding to requests for raw information about governing legal rules. The questions are not fact patterns calling for synthesis and judgment and application of law to fact. Instead, they are simply questions about the content of code provisions. ("What color must fire-fighters' suspenders be in Serbia? How many days does a Defendant have to file an appeal? What courtroom dress is proper for a judge?")

The test as given was demoralizing for many takers. Many reported staring at the first question for an inordinate time, simply trying to adjust to this new style of question and answer.

Understandably, there was a need to trim the judicial corps and replace some of its members with freshly-trained recruits from the newly-established magistrate school. But one must wonder whether the judges who needed to be replaced were the poorest test takers. It may well be that the judges who failed the test were among the best, most talented, and least corrupt judges. The mere fact that they “failed” an ethics exam under these circumstances is a very poor indicator of a lack of ethical sensibility. The U.S.-style test is probably better than the information-regurgitation format, but its administration to a group that had never seen such a thing leaves serious doubts about its efficacy in these circumstances.

My first training session after the exam results were announced was quite interesting. The staff expected we might have a nearly-zero turnout, since those who failed could not redeem themselves, and those who passed might perceive little reason now for the training. But to our surprise, we had a quite normal turnout of about twenty-five participants. Additional chairs were needed because the attendance substantially outstripped the predictions. Some in the group were angry, lumping me as an international with those responsible for the exam. But slowly, we generated energy in the group, and before lunch everyone was participating and engaged. Because the format of my days centered on hypotheticals and role-plays, several people suggested that they needed this kind of session, perhaps many such, to adjust their mindset to the type of fact-pattern-based questions that had been on the exam. A little better coordination among NGOs would have allowed that to happen.

## V. CONCLUSION

Doing judicial ethics training in a place like Kosove is as complicated and simple as can be. The law, culture, and judicial system are like a neglected set of Christmas lights. They take a long time to untangle and some lights won't work by the time you finish. But at the same time, the training is also as simple as getting back to core principles. Teaching about what it means to judge, with due respect for the cultural norms of the setting, cuts across all lines and sends a clear message. At his or her core, a judge is an impartial resolver of disputes. Teach that, and teach it in an engaging way that captures the judges' mental processes, and the way is clear for the rest of the details to flow.