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Does the State Fail to Protect Defendant Rights in the Criminal Justice Process? A Case in Kosovo

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Article	Abstract
<p>Keywords: Criminal Justice System; ECHR; ECtHR; Rights of Defendants, People's Advocate; The Constitution of Kosovo.</p> <p>Article History Received: Apr 27, 2020; Reviewed: Jul 7, 2020; Accepted: Jul 19, 2020; Published: Jul 31, 2020.</p> <p>DOI: 10.28946/slrev.Vol4.Iss2.595.pp172-186</p>	<p>The Republic of Kosovo is a new state that declared independence in 2008 and adopted its modern constitution also in 2008, where during twelve years the state has created a very advanced constitutional and legal system in terms of protection of freedoms and human rights in general. Also, in its legal system, Kosovo has built important mechanisms aimed at protecting the position of the defendant during criminal proceedings. Although Kosovo has established constitutional and legal guarantees for the protection of the rights of the defendant in the criminal process, the situation in practice is not satisfactory. The various data and reports reflected in this paper show that Kosovo has failed to meet the rights of the defendant and failed to protect these rights. Even this situation has continued continuously. What is disappointing about the defence of the defendant's rights is the fact that the regular courts have been careless, in enforcing the constitutional standards for the protection of the defendant's rights. In several cases, the courts have even failed to protect these rights. Kosovo's Constitutional Court is the only subject that has compensated, to some extent, the protection of the rights of the defendant. The paper reflects the practical situation in how much Kosovo has managed to apply and protect in practice the constitutional and legal guarantees offered by its legal system.</p>

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INTRODUCTION

Kosovo's constitutional system, established based on the 2008 Constitution, has some basic features.¹ One of the features of the constitutional system is the constitutional position of freedoms and human rights, defined in Chapter II.² Even the freedoms and human rights in the

¹ Enver Hasani and Ivan Cukalovic, *Commentary: Constitution of the Republic of Kosovo*, First Edit (Pristina: Deutsche Gesellschaft für Internationale Zusammenarbeit -GIZ- GmbH, 2013).

² The Law K-09042008, The Constitution of the Republic of Kosovo, 2008, Chapter II. <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf> accessed on 14 April 2020.

Constitution of Kosovo include not only those of Chapter II but also those of Chapter III, relating to the rights of non-majority communities in Kosovo, including the Serb Community.

According to the Constitution of Kosovo, the main rights of the defendant are, such as, the right to liberty and security, the rights of the accused, the right to a fair and impartial trial, the right to legal remedies, etc.³

The Constitution of Kosovo has given a significant advantage to Chapter II concerning human rights and freedoms. When we talk about the constitutional context of human rights and freedoms in the constitution of Kosovo, there are three issues that we need to single out. First, the provisions on human rights and freedoms in the Constitution of Kosovo constitute the most significant number of provisions in the Constitution of Kosovo, including two chapters and a large number of articles⁴ The second is the direct application of nine international instruments which have an advantage over laws and other acts that are applied in the legal system of the Republic of Kosovo.⁵ The third has to do with the fact that the Republic of Kosovo, although not a party to the European Court of Human Rights (ECtHR), has taken on the obligation of the constitution to implement in its legal system all ECtHR decisions directly.⁶

Even such an approach of the Constitution of Kosovo to international law, in terms of the space provided, is considered a "friendly" relationship between the constitution and international law.⁷ The vast space created for international law in the constitution of Kosovo includes freedoms and human rights. The totality of the provisions dedicated to human rights in the Constitution of the Republic of Kosovo, due to the large space in terms of quantity, are even evaluated with the name as "Kosovo charter of freedoms and human rights".⁸ The Kosovo Charter of Human Rights is stated that it includes all the provisions of Chapters II and III of the Constitution as well as all international instruments that are directly applicable in the legal system of Kosovo. Moreover, it represents an essential guarantee for the protection of natural and legal persons from violations of freedoms and rights by public authorities in Kosovo and this case also the defendants.

Another important feature regarding the guarantees offered by the Constitution of Kosovo in terms of human rights, in general, is Article 53 thereof. Article 53 of the Constitution of the Republic of Kosovo defines "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights." This article has given the ECtHR decisions constitutional status and direct application in the legal system of Kosovo. It means that all ECtHR decisions are binding on all public authorities in Kosovo. Interpretation of human rights and freedoms, given Article 53 of the Constitution of Kosovo and the direct application of ECtHR decisions, come to the fore primarily when individuals address cases to the Constitutional Court but also during the issuance of

³ The Constitution of the Republic of Kosovo, Articles 29, 30, 31, 32.

⁴ The Constitution of the Republic of Kosovo, Articles 21-56.

⁵ The Constitution of the Republic of Kosovo, Article 22 Paragraph 1.

⁶ The Constitution of the Republic of Kosovo, Article 53.

⁷ Morina Visar et al., "The Relationship between International Law and National Law in the Case of Kosovo: A Constitutional Perspective," *International Journal of Constitutional Law* 9, no. 1 (2011): 275.

⁸ Enver Hasani, "Basic Characteristics of the Constitutional System in Kosovo," *Journal Law* 1, no. 4 (2014): 7.

decisions and judgments in regular court instances.⁹ It means that all institutions of Kosovo, including the Courts, must protect the rights of the defendant in criminal proceedings, always taking into account the provisions of the Constitution of Kosovo, international instruments set out in Article 22, especially the ECtHR as well as the ECHR decisions, which the Constitution of Kosovo¹⁰, as mentioned above, obliges everyone to apply directly when human rights are expressed.

Through the force of the constitutional norm, Article 53, the Constitution of Kosovo makes valid the decisions of the ECHR, in the legal order of the Republic of Kosovo. Even though this article presents features in terms of guaranteeing of defendant's rights, the implementation of this article in practice remains a matter of concern. From the case law, there is no accurate data for any case when the courts as the last mechanism for implementing the standards for the protection of the rights of the defendant, have directly applied the provisions of the ECHR or the cases of the ECHR. The Constitutional Court of the Republic of Kosovo makes an exception because its decisions are constantly based on the ECHR and the practice of the ECtHR.

Although the inadequate implementation in practice of Article 53 of the Constitution of Kosovo has been addressed before by the authors,¹¹ this paper covers in detail violations found by the European Commission, which are identified in Annual Progress Reports for Kosovo. The identification of these violations reflects the state of Kosovo's case law for years, identifying violations that are directly related to the violation of guarantees arising from the Constitution of Kosovo and the Criminal Procedure Code of Kosovo. Also, this paper covers violations identified by the reports of organizations (NGOs) that deal with the monitoring of court hearings.

ANALYSIS AND DISCUSSION

The Rights of the Defendant in Criminal Proceedings as Constitutional Obligation

Respecting the guarantees related to the rights of the defendant, defined in international acts, the Constitution and the Criminal Procedure Code of the Republic of Kosovo (CPCCK) is one of the most critical challenges of the Kosovo legal system. As mentioned above, the Constitution of Kosovo stipulates that international instruments for human rights, and consequently for the rights of the defendant, are directly applied in Kosovo, also, the Constitution of Kosovo defines in taxative manner rights¹² that belong to the defendant in the criminal proceedings.

Thus, specifically, Article 30 is dedicated to the rights of the defendant or the accused as referred to the constitution. These rights determine that: "Everyone charged with a criminal offence shall enjoy the following minimum rights: (1) to be promptly informed, in a language that she/he understands, of the nature and cause of the accusation against him/her; (2) to be promptly informed of her/his rights according to law; (3) to have adequate time, facilities and remedies

⁹ Bajrami Arsin et al., *Introduction to the Legal System in Kosovo* (Academy of Justice, Prishtina, 2019).

¹⁰ Podvorica, Armend., Rakaj, Adelina. The Guarantees of the Human Rights of the Defendant in the Law System in Kosovo. *International Journal of Social Science Studies*, [S.l.], v. 5, n. 11, p. 7-14, oct. 2017. ISSN 2324-8041. p 9 <<http://redfame.com/journal/index.php/ijsss/article/view/2698>>. Accessed on 17.07. 2020. doi:<http://dx.doi.org/10.11114/ijsss.v5i11.2698>

¹¹ Podvorica.

¹² Arbnor Ajeti, "The Right to Use Legal Remedies Against Court Decisions in Contested Procedure," *Sriwijaya Law Review* 4, no. 1 (2020): 9–22, <https://doi.org/10.28946/slrev.Vol4.Iss2.428.pp9-22>.

for the preparation of his/her defence; (4) to have the free assistance of an interpreter if she/he cannot understand or speak the language used in court; (5) to have the assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel; (6) not to be forced to testify against oneself or admit one's guilt"¹³ Also, other articles, exactly articles 29, 31, 32, 33 and 34 of the Constitution of the Republic of Kosovo, have defined the list of rights that are guaranteed to the defendant for a fair trial. Undoubtedly, a fair trial depends on the interconnected implementation of these guarantees, especially on the publicity of the main trial which in principle, on the one hand, makes the judiciary controllable, and on the other hand, enables the defendant to have a well-controlled trial.¹⁴ The principle of impartiality of the court also contributes to a fair trial. The request for impartiality imposes on the court the duty to act based on reason regarding the criminal case and to set aside the prejudices and interests which are related to the object of the criminal case, even if necessary by giving up the trial.¹⁵

The most efficient and effective implementation of these rights enjoyed by the defendant during a criminal proceeding would certainly not be possible without the issuance of a law which would be under the constitution and international instruments and concretization of their articles.

Criminal procedure codes represent guarantees against the arbitrary application of criminal law. They are designed to enforce the right of suspects and defendants in criminal cases to a fair trial, starting with the initial contact with the police and continuing during the arrest, investigation, sentencing and appeals phase.¹⁶ In the CPCK, the position of the defendant in criminal proceedings is regulated in two ways, namely through the principles of criminal procedure such as: Criminal Sanctions are Imposed by Independent and Impartial Court (Article 2), Presumption of Innocence of Defendant and *In Dubio Pro Reo* (Article 3), Principle *Ne bis in idem* (Article 4), Right to Fair and Impartial Trial within a Reasonable Time (Article 5), Principle of Judicial Independence (Article 8) Equality of Parties (Article 9), Publicity of the main trial (Article 293), The Restriction *Reformatio in Peius* (Article 395), *Beneficium Cohesionis* (Article 397), and through the tax enumeration of the rights of the defendant, such as: Notification on the Reasons for the Charges, Prohibition against Self-incrimination and Prohibition against Forced Confession (Article 10), Adequacy of Defense (Article 11), Languages and Writing (Article 14), the right to use legal remedies, which as discussed above, these rights are defined in international acts as well as in the Constitution of the Republic of Kosovo.

Undoubtedly, each of these principles and procedural rights that belong to the defendants in a criminal proceeding is built under international standards; moreover, at the same time represents a guarantee to ensure a fair criminal trial. If we refer to the constitutional and legal

¹³ The Law K-09042008, Constitution of the Republic of Kosovo, Article 30.

¹⁴ Tamas Hager, "Publicity as One of the Safeguards of Fair Trial in Criminal Procedure," *Curentul Juridic* 60 (2015): 200.

¹⁵ Dieogo M Papayannis, "Independence, Impartiality and Neutrality in Legal Adjudication," *Revus* 28 (2016): 52.

¹⁶ Based on the Report of the Organization for Security and Co-operation in Europe Mission in Kosovo, 2016. *Review of the implementation of the new Code of Criminal Procedure in Kosovo*. pp.7. <https://www.osce.org/sq/kosovo/243981?download=true> accessed on 10 July 2020.

framework, it is clear that the Republic of Kosovo stands quite well in terms of regulating the status of the defendant in a criminal process, but it remains to assess the aspect of practical implementation of these guarantees.

The Implementation of Defendant's Rights

When addressing the dimension of the practical implementation of standards for the protection of the rights of the defendant, one must always take into account the implementation of these rights in practice, provided by the constitution and international acts, which are part of Kosovo's legal system and the Code of Criminal Procedure-CPCCK. The mechanisms that implement these rights are the criminal prosecution bodies and the courts in the Republic of Kosovo. We say this because according to the CPCCK, this procedure takes place in individual criminal prosecution bodies, and the same ends up in court for placement. We have stated above that the greatest asset in this respect is Article 53 of the Constitution, namely the possibility for the bodies affecting the rights of the defendant to implement ECtHR decisions directly. These decisions are considered, among other things, as the last standard in terms of human rights, respectively, the rights of the defendant in the criminal process in Kosovo.

Although there is a clear legal regulation regarding the rights of the defendant, in terms of practical implementation, a large number of violations of the defendant's rights in criminal proceedings have been identified. Thus, in a report of the People's Advocate, dated 17 June 2011, a concrete case was evidenced where the People's Advocate addressed the Kosovo Judicial Council, regarding the case P. No. 47/2009 of the defendant A.K., who was found guilty.¹⁷ In the framework of this report, the People's Advocate had given the following recommendation: "Immediate measures be taken by the Supreme Court Kosovo to draft a court decision regarding the criminal case P. No. 47/2009 of A.K., under Article 395 of the Provisional Code of Criminal Procedure (KCCPK) UNMIK/REG/2003/26 and all courts are required to comply with this legal provision".¹⁸

In 2017, the People's Advocate, ex officio had published a report, which addressed the practical defence of the defendant in criminal proceedings.¹⁹ In the framework of this report, the People's Advocate had noted the provisions of the constitution, international conventions, especially ECHR and the practice of ECtHR, as well as their application in criminal proceedings, in terms of the rights of the defendant.²⁰

¹⁷ Institution of the People's Advocate of the Republic of Kosovo. 2011. *Recommended Report of the People's Advocate, for taking immediate measures in order to implement Article 395 of the UNMIK/RREG/REG/2003/26K of the Provisional Criminal Procedure Code (CPCCK), respectively the drafting and submission of a judgment by Supreme Court of Kosovo. Addressed to Mr Enver Peci, Chairman of the Kosovo Judicial Council, June 17, 2011*, p.2 <https://www.oik-rks.org/2013/01/14/raport-me-rekomandim-a-nr-2712010-lidhur-me-zbatimin-e-nenit-395-te-kodit-te-perkohshem-te-procedures-penale-kppk-unmik-reg200326k/> accessed on 26 January 2020.

¹⁸ Institution of the People's Advocate of the Republic of Kosovo, Recommendation No.1.

¹⁹ Institution of the People's Advocate of the Republic of Kosovo. 2017. *Report, no. 594/2017, Report with Recommendations of the People's Advocate regarding adequate protection in criminal proceedings and guaranteeing the equality of the parties - the appointment of the defence counsel at public expense.* <https://www.oik-rks.org/2017/09/19/report-in-relation-to-protect-effective-in-criminal-procedure-and-guarantee-of-equality-the-parties-allocation-of-defense-with-public-spending> accessed on 26 January 2020.

²⁰ Institution of the People's Advocate of the Republic of Kosovo, Paragraph 2.

This report identified that in many cases, the defendants were not guaranteed the right to professional protection, even in cases of compulsory protection.²¹ Also, in many other cases during the court hearings, the judges did not notify the defendants about the right to professional protection.²² This fact resulted in a violation of the defendant's right to professional protection.

From the monitoring regarding the implementation of the CPCCK and other guarantees, regarding the right of the defendant for free defence, in the Republic of Kosovo has also emerged another defect, which has to do with the decisions of the courts for the appointment of a defence counsel at public expense. Therefore, even though the courts have issued a decision to appoint a defence counsel free of charge for the defendant, they have not correctly argued the conditions for the defendant to have sufficient means or is the decision in the interest of justice. In general, these conditions have been not sufficiently verified.²³ Regarding the report we are talking about, the People's Advocate, in the framework of the protection of the rights of the defendant in criminal proceedings in the Republic of Kosovo, considers very important the equality of arms, respectively the effective equality between the defendant and the prosecutor in terms of effective protection. Also, the defence of the defendant in criminal proceedings is a right of an absolute character and at the same time, an obligation of the state.²⁴

In the framework of the right to an effective defence, the People's Advocate also points out a fundamental problem, which according to the report is related to the corrupt judicial practice, especially in cases when protection is not mandatory.²⁵ Moreover, the People's Advocate considers very important the application of the principle of equality of arms and here in connection with the practice of ECtHR, recalls that in criminal proceedings no party should provide advantages, but must have equal means of protection.²⁶ One of the findings of the report was that the courts of the Republic of Kosovo, in most of the monitored cases, did not appoint a defence counsel, even though the defence was mandatory.²⁷

Inadequate implementation of the right to defence directly violates the principle of equality of arms, and consequently the right to a fair trial. The importance of implementing the principle of equality of arms as a guarantee of a fair trial lies in the fact that it gives accused persons sufficient opportunity to defend themselves.²⁸

Seeing the setbacks in the mandatory defence for the defendants, within the framework of the report of the People's Advocate, some recommendations have been given to the responsible institutions. These recommendations include: for the Ministry of Justice- to amend the Code of

²¹ The report of the Organization for Security and Cooperation in Europe Mission in Kosovo, 2016, Review of the implementation of the New Code of Criminal Procedure in Kosovo, pp. 8-9. <https://www.osce.org/sq/kosovo/243981?download=true> accessed on 26 January 2020.

²² The New Code of Criminal Procedure in Kosovo, paragraph 11.

²³ The New Code of Criminal Procedure in Kosovo.

²⁴ The New Code of Criminal Procedure in Kosovo, Paragraph 13 and 15.

²⁵ The New Code of Criminal Procedure in Kosovo, Paragraph 26.

²⁶ The New Code of Criminal Procedure in Kosovo.

²⁷ The New Code of Criminal Procedure in Kosovo, Paragraph 69.

²⁸ Akther, Shajeda., & Nordin, Rohaida. 2014." Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments", *Legal Network Series, 1 LNS(A)lii*, pp.2, https://www.researchgate.net/publication/285591791_Equality_of_Arms_A_Fundamental_Principle_ofFair_Trial_Guarantee_Developed_by_International_and_Regional_Human_Rights_Instruments accessed on 13 July 2020.

Criminal Procedure; for the Supreme Court- to issue a decision and oblige the lower courts to implement ECtHR decisions; for the Judicial Council- to allocate the budget to the courts so that they can provide compulsory protection; for the Prosecutorial Council- to carefully handle cases involving emergency protection. Whereas for the Academy of Justice had given recommendations to organize training, regarding the implementation of ECHR decisions, applicable in the Republic of Kosovo.²⁹

Also, the report identified violations of the rights of the defendant in the investigation and indictment phase, which was compiled after the complaint of some citizens.³⁰ According to this report, the complainants complain that on 16 September 2016, at 14:30, the electronic newspapers "Telegraph", "Express" later on KTV provided information about an indictment of the Special Prosecution of the Republic of Kosovo. The complainants were among the accused. Regarding this, the complainants addressed their issue to the People's Advocate, saying that they had never received an official notification from the special prosecutor's office and had not been informed of the indictment. Moreover, according to them, this constituted a violation of the defendant's rights under Article 30, 21 and 23 of the Constitution.³¹ Undoubtedly, their claim also violates the provisions of the ECHR and the CPCCK. Regarding the violation of the defendants' rights in the criminal proceedings, the complainants claimed that their dignity had been violated since their names had been published on media.

According to the above analysis, Kosovo's Special Prosecution failed to implement the guarantees for the defendant, respectively to inform them about the filing of the indictment, because they were informed about the indictment through the media. It should be noted that timely information of the indictment is not only a formal obligation but an obligation that must be met as this can affect other issues, especially the adequate protection of the defendant. Therefore, the effective defence of the defendant plays an important role in the equality of the parties in the proceedings.

Article 244 of the CPCCK stipulates the obligation of the prosecutor to notify the parties in time regarding the documents after the filing of the indictment, thus to prepare the defence effectively. This article determines:

"No later than at the filing of the indictment the state prosecutor shall provide the defence counsel or lead counsel with one (1) copy of the following materials or copies thereof which are in his or her possession, control or custody, including those in the possession, control or custody of the police, if these materials have not already been given to the defence counsel during the investigation: 1.1. records of statements or confessions, signed or unsigned, by the defendant; 1.2. names of witnesses whom the state prosecutor intends to call to testify and any prior statements made by those witnesses; 1.3. information identifying any persons whom the state prosecutor knows to have admissible and exculpatory evidence or information about the case and any records of statements, signed or unsigned, by such persons about the case; 1.4. results of physical or mental examinations, scientific tests or experiments made in connection

²⁹ Institution of the People's Advocate of the Republic of Kosovo. 2017. *Report, no. 594/2017, Report with Recommendations of the People's Advocate regarding effective protection in criminal proceedings and guaranteeing the equality of the parties - the appointment of the defence counsel at public expense.* Recommendations, p. 17.

³⁰ Institution of the People's Advocate of the Republic of Kosovo. 2016. *Report on the recommendations of the People's Advocate of the Republic of Kosovo, Case no. 564/2016 Halili and others, regarding the rights of the defendant in the investigation phase and the filing of an indictment*, <https://dokumen.tips/documents/20-tetor-2016-raport-me-rekomandime-lidhur-me-te-drejtat-e-te.html> accessed on 26 January 2020.

³¹ Institution of the People's Advocate of the Republic of Kosovo, Paragraph 6.

with the case; 1.5. criminal reports and police reports; and 1.6. a summary of, or reference to, tangible evidence obtained in the investigation.”³²

It implies that in this case, the prosecutor of Kosovo's Special Prosecution has not fulfilled its constitutional and legal obligation to inform the defendant.

Regarding the concrete case, in his recommendations, the People's Advocate of the Republic of Kosovo had proved that there was a violation of the defendant's right to be notified in time for the filing of the indictment; there have been violations of the principle of equality in proceedings as well as violations of human dignity because the notification of the indictment was made through the media.

Regarding the observance of human rights and dignity in the investigation and arrest phases, as mentioned indirectly above, in addition to the courts, the People's Advocate had also given recommendations to the Prosecutorial Council and the Chief State Prosecutor. These recommendations were given by the People's Advocate in 2016, as it turned out that the parties in the criminal proceedings were not effectively notified of the indictment filed or that such a thing was done through the media.³³

The People's Advocate had also drafted an ex officio report on the sufficient resolution of the delay in the court proceedings - the violation of the right to a trial within a reasonable time. The purpose of this report was to create a mechanism to provide citizens with judicial protection within a reasonable time.³⁴ This report referred to the right to a fair trial at a reasonable time as an important issue and at the same time an international standard, which has been elaborated by the ECHR, in certain cases. In this sense, the report cites several measures taken by the Committee of Ministers, a body of the Council of Europe, for the measures taken by this Council in 2004 regarding the recommendations for setting a maximum deadline for the completion of the procedure, as it turned out that different states did not respect the deadlines, especially in criminal proceedings.³⁵ In 2010, the Committee of Ministers of the Council of Europe issued another recommendation regarding effective solutions to the unreasonable delaying of the procedure. This recommendation had a specific content, which ordered national states to find mechanisms that identify the causes that risk delaying the procedure. It was also recommended that each state should find out if delaying is a systematic problem.³⁶

In the report of the People's Advocate, the right to a trial within a reasonable time is considered a state obligation and that the same cannot be realized if there is no adequate judicial

³² The Code no. 04 / L-123 of the Criminal Procedure of the Republic of Kosovo. *Official Gazette Of The Republic Of Kosova / No. 37 / 28 December 2012*, Pristina, Article 244.

³³ Institution of the People's Advocate of the Republic of Kosovo. 2017. *Annual Report of the People's Advocate, no. 16, 2016, pp.146-147.*

³⁴ Institution of the People's Advocate of the Republic of Kosovo. 2018. *Ex officio report of the People's Advocate, no. 129/2018 regarding the practical solution of the procrastination of the court procedure - the violation of the right within a reasonable time.* <https://www.oik-rks.org/2018/03/29/raport-me-rekomandime-ex-officio-nr-1292018/> accessed on 26 January 2020.

³⁵ Institution of the People's Advocate of the Republic of Kosovo, Paragraph 15-17.

³⁶ Council of Europe. 2010. Recommendation CM / Rec (2010) 3 of the Committee of Ministers to member states on effective remedies for the excessive length of proceedings. https://vm.ee/sites/default/files/content-editors/Rec_2010_3%20_2_eng.pdf accessed on 26 January 2020.

protection.³⁷ To realize the right to a trial within a reasonable time in the legal order of Kosovo, the People's Advocate recommends that an initiative should be taken to issue a law to protect the right to a trial within a reasonable time, which would determine the effective remedies for cases that have delays in court proceedings.³⁸

In addition to the reports of the People's Advocate, as one of the constitutional mechanisms for the protection of human rights, respectively the rights of the defendant, concrete remarks regarding the rights of the defendant in Kosovo's legal system were also presented in the reports of progress, drafted by the European Commission. Based on the years of the drafting of these reports, these remarks are as follow:

Thus, in the 2015 Progress Report, regarding the procedural rights of the defendants, is stated that:

"Regarding procedural rights, suspects, accused and victims of crime in Kosovo enjoy good protection by legislation (Criminal Procedure Code, Law on Police, Law on Kosovo Police Inspectorate, Law on Compensation of Victims of Crime as and the Law on Free Legal Aid). They have the right to interpretation and translation, the right to be informed of their rights, the right to legal advice before and during the trial, and the right to legal aid; arrested persons have the right to communicate with family members, with employers and consular authorities. There is a strong political will for the appropriate application of these rules, but more training is needed to ensure the procedural rights of the citizens of Kosovo in practice".³⁹

From this report, it is clear the need for training, to ensure procedural rights, which in this case means that it is about the rights of the defendant.

The 2016 Progress Report for Kosovo, regarding the procedural rights of the defendant, is as follows:

"Regarding procedural rights, suspects or accused persons or victims of crime have the right to solid protection under the Criminal Procedure Code, the Law on Police, the law on the Kosovo Police Inspectorate, the Law on Compensation of Victims of Crime and the Law on Free Legal Aid. They have the right to interpretation and translation, the right to information about their rights, the right to legal advice before and during trials and to legal aid, as well as the right to communicate with family members, employers and consular authority. There is a strong political will to enforce these rules, but financial resources and greater training are needed. In April, the Kosovo Police, the Prosecutorial and Judicial Council and the Kosovo Chamber of Advocates signed a memorandum of understanding to establish a free defence coordination mechanism".⁴⁰

Thus, regarding the protection of the rights of the defendant, according to the progress report, a common mechanism was established by the main mechanisms that apply the rights of the defendant, a mechanism which aimed to ensure free defence and which constitutes an important dimension of the defendant's procedural rights.

The 2018 Progress Report was even more concrete, regarding the delays and legal weaknesses, or the lack of mechanisms that affect the rights of the defendant. Among other things, the progress report for Kosovo in 2018 states:

³⁷ Institution of the People's Advocate of the Republic of Kosovo. 2018. *Ex officio report of the People's Advocate, no. 129/2018 regarding the effective solution of the procrastination of the court procedure - the violation of the right within a reasonable time*, pp.5.

³⁸ Institution of the People's Advocate of the Republic of Kosovo, Paragraph .6.

³⁹ European Commission, Progress Report for Kosovo, 2015, pp.26. https://www.mei-ks.net/repository/docs/20170717114838_20151210112206_151123_kosovo_report_alb.pdf accessed on 26 January 2020.

⁴⁰ European Commission, Progress Report for Kosovo, 2016, pp.28. https://www.mei-ks.net/repository/docs/20170717114956_raporti_i_progresit_2016_shqip.pdf accessed on 26 January 2020.

"The efficiency of the judiciary is greatly hampered by shortcomings in criminal legislation. Many provisions in the Criminal Procedure Code are incredibly complicated and formalistic, not allowing robust and successful investigation and prosecution. They need to be changed and supplemented (for example, the deadline provided by law for the investigation of cases). Also, the inadequate capacity and weak commitment of some judges to manage court proceedings, sanction delayed parties, and ensure the presence of all parties in hearings lead to numerous adjournments and lengthy criminal proceedings with no reason. These aspects, as well as the tendency of the Court of Appeals to return cases to retrial to the basic courts, contribute towards a medium-term solution (thus the average time from the filing of the indictment to the verdict). These delays in the proceedings, combined with the pre-trial detention preference over other precautionary measures have led to cases with extremely long periods of detention.⁴¹

In this report, several relevant factors have been identified that lead to the violation of the rights of the defendant and consequently to the violation of the right to a fair trial, namely: weaknesses in the legislation; inadequate capacity and commitment of some judges to manage procedures; the tendency of the appellate court to return cases to retrial to the primary courts; extremely long detention procedures.

As in previous years, the latest progress report on Kosovo was quite concrete and focused explicitly on delaying criminal proceedings and consequently on the violation of the rights of the defendant. Among other things, the 2019 Progress Report states:

"The efficiency of the judiciary is greatly hampered by shortcomings in criminal legislation... the tendency of the Court of Appeals to return cases to retrial to the basic courts contributes to a medium-term solution (the average time from the filing of the indictment to the verdict). These delays in procedures, combined with the preference for detention over other security measures, have led to cases with extremely long periods of detention. So far, the most significant number of complaints received by the Ombudsman Institution in the reporting period have been related to delays in court proceedings. Kosovo must consider applying a sufficient remedy to address delays in court proceedings, including compensation.⁴² However, specific changes need to be made to the Code of Criminal Procedure to include additional rights and guarantees for suspects, accused persons and victims of crime in order to consistent with relevant EU Directives."⁴³

So, as can be seen, in the last two years, real complaints have emerged, regarding the issue of changing the legislation, an issue addressed with full right. Also, concerning is the lack of attention of judges in managing procedures regarding the protection of the rights of the defendant.

In the context of the practical aspect of the protection of the rights of the defendant in the criminal procedure, very concerning, are the reports of the monitoring of the hearings by the civil society. Thus, in the period February-May 2017, out of 667 defendants who underwent criminal proceedings, 457 of them did not have legal representation.⁴⁴ One of the concerns raised in the case law, regarding the mandatory defence is the financial situation of the defend-

⁴¹ European Commission, Progress Report for Kosovo, 2018, pp.17-18. https://www.mei-ks.net/repository/docs/kosovo_report_2018_shqip.pdf accessed on 26 January 2020.

⁴² European Commission, Progress Report for Kosovo, 2019, p 19 <https://www.mei-ks.net/sq/raporti-i-progresit-585> accessed on 26 January 2020.

⁴³ European Commission, 2019, p 32.

⁴⁴ Miftaraj, Ehat and Musliu, Betim. 2017. "Free Legal Assistance in Criminal Matters and the Implementation of the European Court of Human Rights Standards by the Courts of Kosovo." p 16. <https://kli-ks.org/ndihma-juridike-falas-ne-ceshtjet-penale-dhe-zbatimi-i-standardeve-te-gjykates-evropiane-per-te-drejtat-e-njeriut-nga-gjykatat-e-kosoves/> accessed on 26.01. 2020.

ants.⁴⁵ In practice, there have been cases where the defendants have been on social assistance, and the state authorities have not been able to provide them with protection. There have even been cases where the authorities have not informed them that they have the right to counsel defence.⁴⁶

In addition to the violation of these rights of the defendant by the courts or prosecutors, in Kosovo, there have been cases where the courts have violated the right to a fair trial, according to Article 6.1 of the ECHR, the Constitution and the CPOK.

The Role of Courts to Protect the Rights of Defendant

Although the Republic of Kosovo has extremely advanced mechanisms for the protection of human rights and freedoms, respectively the rights of the defendants, it should be noted that the case law shows a great discrepancy in how the constitutional and international guarantees are implemented for the protection of the rights of the defendant, by the Constitutional Court of the Republic of Kosovo and by the regular judicial chain, including the Basic Court, the Appellate Court and the Supreme Court.⁴⁷

From the analysis made above in this section, we see that the legal system of the Republic of Kosovo has a great advantage in terms of freedoms and rights of the defendant due to the large number of provisions relating to human rights and defendants and which are in force and are directly implemented in the Republic of Kosovo.

However, although the relevant institutions and with special emphasis the courts have at their disposal these guarantees, in practice they have not proved that they have made a genuine implementation of these guarantees for the protection of the rights of the defendant. In this context, the Constitutional Court of Kosovo, concerning the regular courts, remains the institution that has most effectively defended the rights of the defendant and thus has implemented in practice the standards created by the practice of ECtHR decisions.

In this regard, however, we should mention Article 54 of the Constitution of Kosovo, which addresses the obligation to protect human rights, respectively, the defendant by the courts of the regular chain in Kosovo. Thus, Article 54 of the Constitution stipulates: "Everyone enjoys the right to judicial protection in case of violation or denial of any right guaranteed by this Constitution or by law, as well as the right to effective legal remedies if it is found that such a right has been violated". This article addresses two critical issues: first, the obligation for the courts to protect the rights guaranteed by the Constitution of Kosovo, including those in Chapter II of the Constitution, but also all acts of Article 22, while the second issue addresses Article 54, which is the effective legal remedy that the defendant must have at his disposal, in this case, to protect himself/herself from the violation of his/her rights, in the criminal procedure.

⁴⁵ Miftaraj, pp.18-19.

⁴⁶ Miftaraj, p 19.

⁴⁷ Law no. 06 / L - 054 On Courts. *Official Gazette of the Republic of Kosovo / No. 22/18 December 2018, Prishtina.*

Also, the regular courts must protect these rights based on an effective legal remedy, without prejudice to other rights guaranteed by the constitution. What an effective legal remedy means here is very clear, because this issue is related to the principle of efficiency of the courts for the protection of human rights, in this case, the defendant. However, another issue remains the extent to which the legal order of the Republic of Kosovo provides legal mechanisms for the implementation of this article.

As discussed above, what is contained in criminal procedure legislation is not applied in judicial protection in practice, through effective means, because court proceedings, in addition to being lengthy, they also end up with court failures and negligence for the protection of the rights of the defendant. Therefore, a reasonable question arises regarding the fact of how much the regular courts, in their practice, have been able to incorporate international standards, respectively the spirit of ECtHR decisions.

From the cases investigated in the case law, it does not appear that there is any judgment of the regular courts, which indicate that any decision or standard established by the ECtHR has been cited or mentioned in the reasoning of the judgment. The only exception is a decision of the Supreme Court, which, among other things, very briefly mentions the violation of Article 6 of the ECHR and in the reasoning mentions a standard and two cases of ECtHR.⁴⁸

This argument is an indicator that the regular courts in Kosovo, although obliged to do so, have not been able to protect the rights of the defendant and persons in general, and have not been able to ensure the implementation of ECtHR standards within the criminal procedure. Such an impossibility, of addressing and implementing the constitutional standards, has necessitated that such a thing be done by the Constitutional Court of the Republic of Kosovo, which has incorporated and treated in detail the standards set by the ECHR and ECtHR.

Undoubtedly, in terms of enforcing the rights of the defendant arising from international acts and national acts, Kosovo's Constitutional Court has been very active. Regarding its activity, the court has taken several decisions, such as returning for criminal retrial cases in which are found a violation of the rights of the defendant.

The Constitutional Court, in the context of cases decided by a judgment, regarding the protection of freedoms and human rights in criminal proceedings, has established several essential standards. These standards are mainly based on the practice of the ECHR, where these violations have been addressed within the right to a fair trial. Among the cases decided by the Constitutional Court of Kosovo, we selected cases such as the case when the court ruled that the right to a fair criminal trial was violated, namely the principle of equality of arms because the regular courts had repeatedly rejected defendants request for super expertise.⁴⁹

Also, there is another case when the court ruled that there was a violation of the right to a fair criminal proceeding because the principle of objectivity was violated since the same judge who had decided in the first instance, later participated in the decision for the legal remedies of

⁴⁸ Supreme Court of Kosovo, Prishtina, Judgment no. Pk1-Kzz 62/10.

⁴⁹ Case no. KI06 / 12 Applicant Bajrush Gashi, Judgment- Constitutional Court of the Republic of Kosovo, June 27, 2012. http://gjk-ks.org/wp-content/uploads/vendimet/gjk_ki_06_12_shq.pdf accessed on 9 July 2020.

the strike, although the conditions for the exclusion of the judge had been created⁵⁰. Other cases decided by the Constitutional Court are related to the failure of the courts to inform the party⁵¹, thus violating the right to sufficient access to the court.⁵²

CONCLUSION

As stated above, Kosovo's legal system provides sufficient constitutional and legal guarantees for the effective protection of the defendant's rights in criminal proceedings. At the same time, an essential dimension for the protection of the rights of the defendant is the ECtHR decisions which are directly implemented in Kosovo.

What remains worrying is the level of practical implementation of the rights of the defendant in Kosovo. This fact is evidenced by many reports of independent organizations and those of the People's Advocate. The practical implementation of the rights of the defendant regarding the legal guarantees that Kosovo offers in terms of these rights is not a good indicator, given the failure of the responsible bodies to fulfil these legal obligations.

To have greater efficiency in the protection of the rights of the defendant within the criminal process, the justice institutions in Kosovo must take concrete measures, especially measures which lead to changes in legislation. The amendment of the laws, including the Code of Criminal Procedure, would help clarify the issues that oblige the courts and other institutions to take maximum care in protecting the rights of the defendant.

Also, the justice institutions in the Republic of Kosovo should take maximum care that the actors of law enforcement pay more attention to the direct implementation of ECHR and ECtHR, when it comes to the protection of the rights of the defendant. Advanced training that would prepare Kosovo judges and prosecutors on how to implement the highest standards of protection of the rights of defendants is more than necessary, to avoid violations of the rights of defendants in criminal proceedings. It is necessary not only for prosecutors and judges but also for the Kosovo Police.

Also, the justice institutions in the Republic of Kosovo should take maximum care that the subjects of law enforcement pay more attention to the direct implementation of ECHR and ECtHR when it comes to the protection of the rights of the defendant. Advanced training that would prepare Kosovo judges and prosecutors on how to implement the highest standards of protection of the rights of defendants is more than necessary, to avoid violations of the rights of defendants in criminal proceedings. It is necessary not only for prosecutors and judges but also for the Kosovo Police.

⁵⁰ Case no. KI178 / 12 Applicant Bajrush Xhemajli, Judgment- Constitutional Court of the Republic of Kosovo, on 22 June 2012, https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ki_78_12_v_shq.pdf, accessed on 9 July 2020.

⁵¹ Case no. KI104 / 16 Applicant Miodrag Pavić, Constitutional Review of the Judgment of the Supreme Court of Kosovo, PML-ZEC. no. 110/2016, dated 16 May 2016, Constitutional Court of the Republic of Kosovo on 04 August 2017. <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=14973>, accessed on 9 July 2020.

⁵² Case no. KI62 / 17 Applicant Emine Simnica, Judgment of the Constitutional Court of the Republic of Kosovo, June 11, 2018. Parag. 17-26. <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=16578>, accessed on 9 July 2020.

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