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Kosovo Law Institute
Kosovski Institut Pravde

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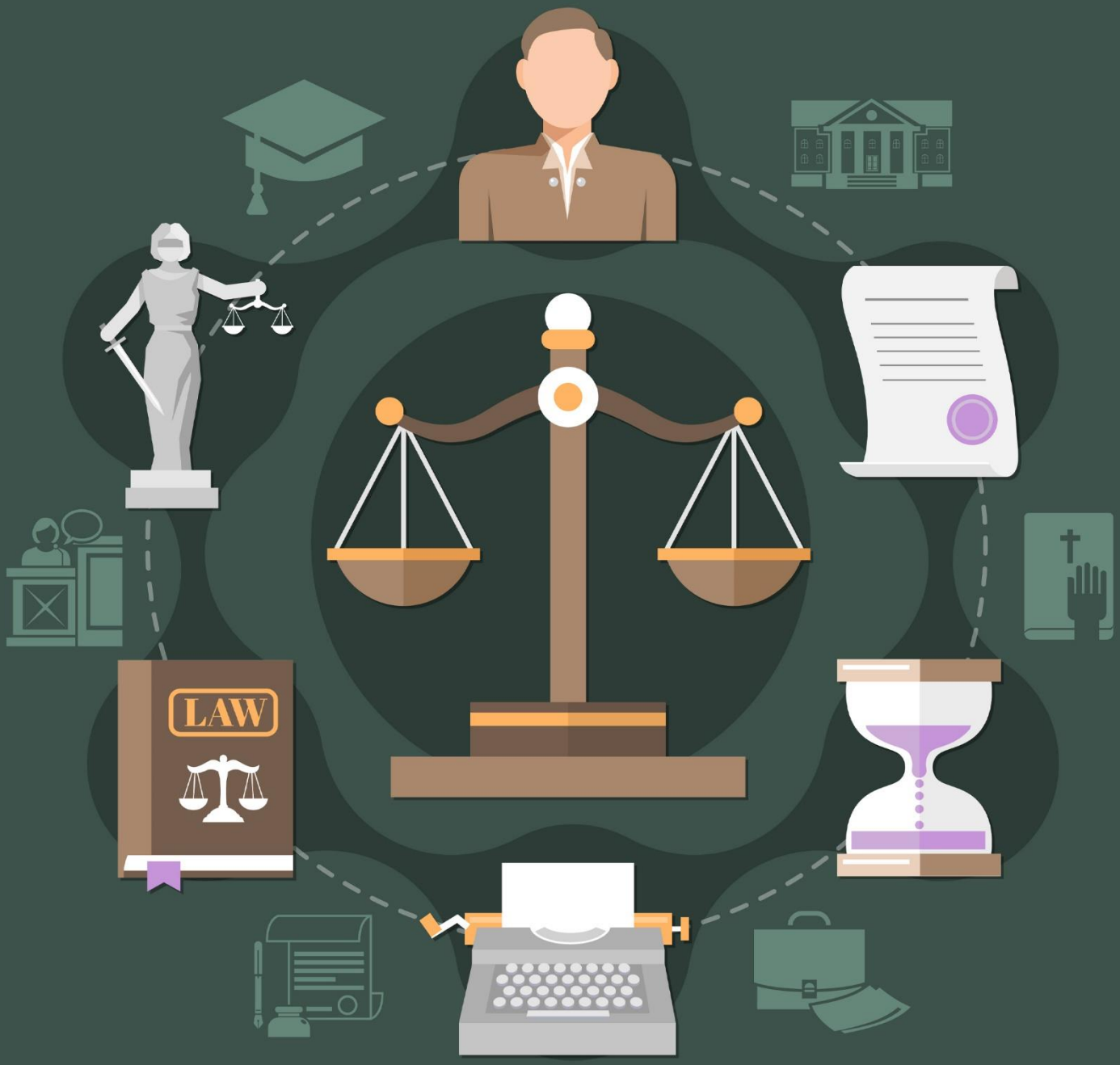
ADVANCING CRIMINAL PROCEDURAL RIGHTS IN KOSOVO



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Contents

About the Project 4

Background 5

a. Roadmap Directives 5

b. Roadmap Directives in the Kosovar Context 5

c. About this Report 6

c. Methodology 7

PART 1: RIGHT TO INTERPRETATION AND TRANSLATION 8

Overview of EU Laws on the Right to Interpretation and Translation 8

Overview of Kosovar Laws on the Right to Interpretation and Translation 9

Key issues and practical challenges 12

Recommendations 13

PART 2: THE RIGHT TO INFORMATION DIRECTIVE 15

Overview of the Directive on the Right to Information about Rights 15

Overview of Kosovar Laws on the Right to Information 16

Key issues and practical challenges 23

Recommendations 25

PART 3: RIGHT OF ACCESS TO A LAWYER DIRECTIVE 26

Overview of EU Laws on the Right of Access to a Lawyer 26

Overview of Kosovar Laws on the Right of Access to a Lawyer 27

Key issues and practical challenges 31

Recommendations 32

PART 4: LEGAL AID DIRECTIVE 34

Overview of EU Laws on the Right to Legal Aid 34

Overview of Kosovar Laws on the Right to Legal Aid 35

Key issues and practical challenges 36

Recommendation 38

PART 5: THE PRESUMPTION OF INNOCENCE DIRECTIVE 39

Overview of the Directive on Public references to guilt 39

Overview of Kosovar Laws on Public references to guilt 40

Overview of the Directive on the Presentation of suspects and accused persons 40

Overview of Kosovar Laws on the Presentation of suspects and accused persons 40

Overview of the Directive on the burden of proof 41

Overview of Kosovar Laws on the burden of proof 41

Overview of the Directive on the not to incriminate oneself 42
Overview of Kosovar Laws on the right not to incriminate oneself 42
Key issues and practical challenges 43
Recommendations 44
PART 6: THE CHILDREN DIRECTIVE 45
Overview of the Directive on the right to information 46
Overview of Kosovar Laws on the right to information 47
Overview of the Directive on the right to parental support 47
Overview of Kosovar Laws on the right to parental support 48
Overview of the Directive on the right to assistance by a lawyer 48
Overview of Kosovar Laws regarding assistance by a lawyer 49
Overview of the Directive on assessment of needs 50
Overview of Kosovar Laws on assessment of needs 51
Overview of the Directive on medical examination 51
Overview of Kosovar Laws on medical examination 52
Overview of the Directive on deprivation of liberty 52
Overview of Kosovar Laws on deprivation of liberty 53
Overview of the Directive on privacy 54
Overview of Kosovar Laws on privacy 54
Overview of the Directive on the right of children to appear in person at, and participate in, their trial 55
Overview of Kosovar Laws on the right of children to appear in person at, and participate in, their trial 56
Key issues and practical challenges 56
Recommendations 57

About the Project

Kosovo Law Institute in cooperation with CLARD, Fair Trials, and the Netherlands Helsinki Committee, are working on "Advancing Criminal Procedural Rights in Kosovo". This is a project that is supported by the Kingdom of Netherlands Embassy in Pristina through the MATRA Programme.

The objective of the project is to improve human rights compliance in the Kosovar criminal justice system through the promotion of standards adopted by the EU on the right to a fair trial and access to justice. This will contribute to the strengthening of respect for the rule of law in Kosovo, and play a positive role for the country, as it looks towards EU integration. Moreover, the right to a fair trial is not just about protecting suspects and defendants – it also makes societies safer and stronger to the benefit of everyone. Fair trials are the cornerstone of any just society that is stable, secure and peaceful. Without them innocent people are convicted, and rule of law and public faith in the justice system collapse.

Since 2012, the EU has promulgated a number of laws aimed at improving the right to a fair trial in the EU. Six 'Procedural Rights Directives' have so far been adopted under the EU Roadmap for strengthening procedural rights suspected or accused persons in criminal proceedings. These Directives set minimum standards on various aspects of the right to a fair trial, and they form the basis of a framework of rights protections that ensure EU Member States respect the rule of law and citizens' fundamental rights. These Directives have had a marked effect on improving the right to a fair trial within the EU and they also form part of the *acquis communitaire* that pre-accession countries such as Kosovo will need to approximate. As such, they provide an opportunity to improve respect for human rights in criminal justice in the EU accession process in a manner that has not been previously available.

Through this project KLI and its partners have establishing a Working Group of the Legal Expert Advisory Panel ('LEAP') in Kosovo consisting of local criminal justice experts that will be members of a wider network of lawyers, NGOs, and academics that spans across the Europe to promote the right to a fair trial in the EU and its accession countries. LEAP Kosovo will focus on Kosovo law, sharing its challenges and experiences, whilst also promoting the use of EU laws in Kosovo as a way of informing developments in its criminal justice system through various activities and policy changes.

Background

a. Roadmap Directives

For more than a decade, EU Member States have been cooperating increasingly closely to tackle cross-border crime and other threats to security. This has been done mainly through mutual recognition mechanisms such as the European Arrest Warrant ('hereinafter: 'EAW') – the fast-track extradition system that allows for the surrender of wanted persons between Member States with minimum procedural requirements.

The effectiveness of such mechanisms depends upon mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular, those that are guaranteed by the European Convention on Human Rights (hereinafter: 'ECHR'). The ECHR constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings. The Convention, as interpreted by the European Court of Human Rights (ECtHR), is an important foundation for Member States to have trust in each other's criminal justice systems, and to strengthen such trust.

In practice, however, judicial authorities called upon to cooperate with each other have often not done so because of a lack of confidence that criminal justice systems of other Member States comply with the Convention's standards. In response, the EU adopted six Directives to regulate certain aspects of criminal procedure under the "Procedural Rights Roadmap"[1]. These Directives set minimum standards regarding the right to **interpretation** and **translation**; the right to **information**; the right of **access to a lawyer**; the right to **legal aid**; the right to **presumption of innocence**; and the rights of **children** in criminal proceedings.

The Directives are legally-binding across the EU and Member States are required under EU law to ensure that individuals are able to assert their rights under the Directives in domestic proceedings. Although the Directives adopted under the Roadmap were primarily intended to promote the effectiveness of mutual recognition instruments like the EAW, they apply regardless of whether there is a cross-border element to criminal proceedings.

b. Roadmap Directives in the Kosovar Context

Although, Kosovo is not a Member State of the Council of Europe (CoE) it is not a contracting party to the European Convention of Human Rights (ECHR), however it has a status of potential candidacy to the European Union (EU) membership. In October 2015, Kosovo signed a Stabilisation and Association Agreement[2] (SAA) with EU and has since been working towards this aspiration.

[1] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0064&from=EN

[2] Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo* of the other part, signed on 27 October 2015

Moreover, Kosovo through its Constitutional provisions has stipulated that human rights and fundamental freedoms guaranteed by international agreements and instruments, which include the ECHR, are guaranteed by the Constitution and are directly applicable[3]. More so, fundamental rights and freedoms guaranteed by the Constitution shall be interpreted consistently with the court decision of the European Court of Human Rights[4]. This also includes the right to legal remedies against judicial and administrative decisions that violate the rights or interest of its citizens[5].

Despite the fact that Kosovo laws require laws to be interpreted consistently with ECHR and other international standards, the effective protection of basic fair trial rights has proven to be a serious challenge. For example the right and entitlement to legal aid is a major concern in practice, the consequences of waivers are not explained, inadequate quality control mechanisms for interpretation and translation, inadequate letter of rights informing the suspect or accused of their rights basic rights (rights to legal aid and charges/accusations), lack of legal provisions that place restrictions on public authorities making statements regarding the guilt of a suspect or accused, ill treatment of defendants etc.

By comparing Kosovo's laws to the standards set out in the EU Directives gives the opportunity to identify the areas where improvement is needed and how they can be implemented effectively in practice. The Directives are intended to ensure implementation of ECHR standards and as such, they often provide guidance as to how those standards can be implemented in practice. Furthermore, the Directives have begun to shape ECtHR case law itself, so aligning Kosovo's laws with the Directives could help to ensure that its standards comply with the ECHR.

c. About this Report

This report aims to briefly explain where Kosovo lacks in providing the fundamental rights set by the directives. Although the report will not exclusively compare every provision, it will however compare where the national law lacks to provide these rights and where in practice it fails to provide the necessary rights afforded to suspects and accused. The report will also provide recommendations where there is a need for improvements and how these improvements can benefit persons suspected and accused of criminal offences as well as Kosovo.

Moreover, through this report, the Kosovo LEAP working group will advocate for improvements based on the recommendations as well as expertise and knowledge of problems in practice. The toolkits provided by Fair Trials based on the Directives will

[3] Constitution of the Republic of Kosovo, Article 19 (2) – "Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo".

[4] Ibid, Article 53- "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

[5] Ibid, Article 32 – "Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law".

provide the bridge to improvements and raising awareness for suspects, accused, law enforcement and rule of law actors.

This report serves law practitioners, judges', prosecutors, lawyers and other justice professionals to improve, implement and advocate for change in respect to compliance with EU standards and best practices.

c. Methodology

In this report, Kosovo Law Institute (KLI) utilised empirical and doctrinal methods of analysing Kosovo's implementation of the legal obligations placed by the Constitution of the Republic of Kosovo in implementing international instruments on human rights and fundamental freedoms, rights that are further provided by the Roadmap directives.

Desk research
During January 2019, KLI in cooperation with Centre for Legal Aid and Regional Development (CLARD) conducted desk research based on the Fair Trials methodology to analyse the approximation of Kosovo national laws vis-à-vis the Directives discussed in this paper.

Workshops
During March 2019, KLI in cooperation with CLARD and Fair Trials, held regional workshops involving, judges, prosecutors, lawyers and NGO's for the purpose of practitioner feedback on the implementation of directives so far in Kosovo, the challenges they face and recommendations to remedy the problems.

PART 1: RIGHT TO INTERPRETATION AND TRANSLATION

Overview of EU Laws on the Right to Interpretation and Translation

Directive 2010/64/EU on the Right to interpretation and translation in criminal proceedings (the 'Interpretation and Translation Directive') sets out minimum standards for Member States regarding the right to interpretation and translations for suspects and accused persons. As is the case with other Roadmap Directives, this Directive aims to facilitate the practical application of rights under Article 6 ECHR, as interpreted by the ECtHR.[6]

The Interpretation and Translation Directive recognises that the right to interpretation and translation applies throughout pre-trial proceedings as well as the trial itself. More specifically, the right applies to persons from the moment they are "*notified by an official notification or otherwise that they are suspects of accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal."* This includes police interviews and communication between the suspect/accused person and their lawyer[7]. Member States also should ensure that there is a mechanism of procedure to ascertain the interpretation needs of the suspect/accused. However the rights to translation if more limited in scope, where written translations of all "*essential*" documents should be made available to suspected and accused persons. A few examples of 'essential documents' are set out in the Directive,[8] but otherwise, it leaves it up to states to determine what should be regarded as 'essential'.

Member States also need to take "*concrete measures*" to ensure that the interpretation and translation meets the quality sufficient to safeguard the fairness of proceedings.[9] To this end, the Directive encourages Member States to set up registers of qualified interpreters and translators.[10] Additionally, Member States have to "*ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation*" by also allowing the quality of interpretation to be challenged and the opportunity to decide against interpretation[11],)

It is also made explicit in the Directive that there need to be ways for suspects and accused persons to challenge both decisions to not provide interpretation and translations, and the quality of interpretation and translation, where this has been provided.[12]

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[6] Interpretation and Translation Directive, Recitals 14 and 33
[7] Ibid., Article 2(2)
[8] Ibid., Article 3(2). These include decisions regarding the deprivation or liberty, charges, indictments, and judgments.
[9] Ibid., Articles 2(8), 3(9), and 5(1).
[10] Ibid., Article 5(2), Recital 31
[11] Ibid, Article 2 (5)
[12] Ibid., Articles 2(5) and 3(5)

The Directive is clear that irrespective of the outcome of the criminal proceedings, the cost of interpretation and translation must be free of charge.

Overview of Kosovar Laws on the Right to Interpretation and Translation

The Republic of Kosovo is a multi-ethnic country consisting of citizens with Albanian, Serbian, Bosnian, Romani, Ashkali and Turkish ethnic backgrounds, and with two official languages -Albanian and Serbian. Kosovo's linguistic and ethnic diversity heightens the need to ensure that suspects and defendants are not disadvantaged by their inability to communicate in the language of the legal proceedings.

The Criminal Procedure Code of the Republic of Kosovo (hereinafter: "CPCRK") has a significant number of articles dedicated to interpretation and translation for persons accused and suspected of criminal offences. These articles are broadly in line with the Interpretation and Translation Directive and also the ECHR.

The CPRCK makes it clear that any persons participating in criminal proceedings who do not speak the language of the proceedings have the right to interpretation in their preferred language without financial cost (i.e. free of charge) (Article 14(2)-(6)). This is further reiterated in Article 450 (5) (6)[13] that the cost of interpretation and translations is free and shall not be incurred on the defendant to pay for such services but rather it is up to the police, prosecution and courts to pay for such a service.

Yet, unlike Member States, there are no specific procedures or mechanisms in Kosovo to determine whether the suspect/accused needs interpretation, but rather states that "*any person who does not speak the language of the proceedings shall have right to speak his or her own language*"[14]. There are no specifications as to how the language assistance needs of the individual are assessed. The procedure for determining the need for an interpreter could be assumed flexible, giving considerable discretion to the police or the court to determine whether someone has a sufficient grasp on the *spoken* language of the proceedings.

Although the defendant has the right to be examined through an interpreter[15] and that interpretation are needed during police questioning (Article 73 (4)), there are no specific provisions regarding the right to interpretation during pre-trial examinations at other stages, but it can be assumed that Article 153 covers examinations throughout pre-trial proceedings.

[13] CPCRK, Article 450 paragraphs 5 and 6
[14] CPCRK, Article 14 (2)
[15] This also applies to defendants that are deaf or mute, where "*the examination shall be conducted through a qualified sign language interpreter or in writing. If the examination cannot be carried out in that way, a person who knows how to communicate with the defendant shall be invited to act as interpreter, unless there is a conflict of interest*" (Article 153 (1)-(4))

Additionally, CPCRK stipulates that the defendant is "*to be informed about the reasons for the arrest in a language he or she understands*" from the moment of arrest[16].

There is no clarity in the CPCRK on whether the defendants' right to interpretation also applies to communications between them and their lawyers. The provisions only make references to the right to interpretation in the context of communication with the police, prosecutors, and the courts.

Based on research and systematic monitoring of court hearings and cases, KLI has found that in most cases, defendants are read his or her rights in a language that they understand,[17] in accordance with what is prescribed in the law[18] However, there have been some cases where foreign national defendants have not been provided with either interpretation or translation during court proceedings. In one case, two Nepalese citizens that were accused of "smuggling of migrants" were not given interpretation or translation during their initial hearing; in clear violation of the CPCRK[19] (the case is on-going).

With regards to translation Article14 (5) of CPCRK provides that an *arrested person, a defendant who is in detention on remand and a person serving a sentence shall be provided a translation of the summonses, decisions and submissions in the language which he or she uses in the proceedings*, however it does not state what other documents can be translated that may be relevant for the proceedings. In this regard, it would be adequate if Kosovo law used the EU language of 'essential documents' to provide that all documents that are essential for the proceedings are translated. Consequently, Article 73 (4) stipulates that during police interviews the suspect has the right to interpretation or translation of *relevant documents* without payment, yet it does not explain further what those *relevant documents'* entail, therefore Kosovo needs to include an explanation similar to the Directive of what 'essential' or 'relevant' documents include apart from what is stated in Article 14 (5)[20].

It is not specified whether accused persons are entitled to oral translations or summaries in lieu of written translations, Article 172 on record of arrest and actions by police provides that a single written record of all actions undertaken with respect to an arrested person shall include "oral and written notification to the arrested person of his or her rights", as provided for in Article 164 and Article 167, although there are other articles that deal with oral announcement of judgement and communication of decisions, these articles do not specifically apply to translation.

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[16] CPRCK, Article 167(1.1)

[17] Kosovo Law Institute (2017), *Criminal Justice in Kosovo*, page 99, available at: https://kli-ks.org/sistemi-i-drejtesise-ne-kosove-2/,

[18] CPCRK, Article 167(1.1).

[19] Betimi per Drejtesi, *Two out of five accused of smuggling with migrants plead guilty, Nepalese citizens are not provided with translation*, available at: https://betimiperdrejtesi.com/dy-nga-pese-te-akuzuarit-per-kontrabandim-me-migrante-e-pranojne-fajesine-nepalezit-nuk-i-sigurohet-perkthimi/

[20] CPCRK Article 14 (5) – "*An arrested person, a defendant who is in detention on remand and a person serving a sentence shall be provided a translation of the* ***summonses, decisions and submissions*** *in the language which he or she uses in the proceedings".*

The Law on the Use of Languages in general is implemented in all courts in Kosovo[21] with regards to access to courts. Yet with regards to the quality of translation and interpretation one article is dedicated to this in the CRPCK; Article 215. This article sets out the criteria for appointment of interpreters and translators, however nothing more is regulated pursuant to this[22]. the Kosovo Judicial Council in 2015 sought to regulate this by establishing a Regulation on the Appointment of Judicial Interpreters and Translators and later amended the same regulation in 2016[23]. The Regulation provides that court interpreters and translators are appointed through a selection procedure, which involves a written exam for each pair of languages. Candidates who want to become court interpreters/translators must fulfil several conditions such as: be citizens of Kosovo, to have full acting capacity, to have a higher education degree in one of the languages or to have at least two years of working experience as an interpreter/translator, to not have been convicted for a criminal offence, except for minor offences which are caused by negligence. Candidates must also fulfil one of the criteria such as to have at least three years of working experience, to be certified as interpreters/translators in another country, or to have a diploma or certificate from an institute or programme, national or international, for training of interpreters/translators[24]. The exam is taken before the Examination Commission appointed by KJC, which is composed of three members, possibly from the rank of professors from the Philological Faculty and is steered by the Head of the Office for Interpretations of KJC[25].

Yet there are some issues with this Regulation in regards to court interpreters/translators, namely because no certification or accreditation of court interpreters and translators took place because of overlapping provision that existed in the Law on Courts and the Criminal Procedure Code. The competency for certification of court interpreters/translators was vested with KJC by the Law on Courts. On the other hand, the CPC also contained provisions on certification of court interpreters, saying that Ministry of Justice (MoJ) shall issue a regulation or certification of interpreters. With the adoption of the new Law on Courts this overlapping was removed and it is now the KJC who has sole responsibility for certification

[21] Humanitarian Law Centre Kosovo, Assessment of Minorities' Access to Justice in Kosovo Report, July 2018

[22] CPRCK Article 215 par.1.1 If available, an interpreter or translator should be certified as interpreter or translator in relevant languages in compliance with regulations issued under par; par.1.2 If interpreter or translator under 1.1 is unavailable the interpreter or translator should have a degree in language or languages involved and at least (2) years of experience as an interpreter or translator; par.1.3 If interpreter or translator under par.1.1 and par.1.2 is unavailable, the interpreter or translator should have at least (4) years experience as interpreter or translator in languages involved; par.1.4 if interpreter or translator under par.1.1, 1.2, and 1.3 is unavailable, the interpreter or translator should have demonstrated sufficient proficiency in relevant languages to interpret or translate accurately and without bias; par. 2 "Ministry of Justice is empowered to issue regulations on certification of translators and interpreters as competent to interpret and translate professionally in criminal proceedings in those languages commonly used in criminal proceedings.

[23] Kosovo Judicial Council, 2015, Regulation no. 16/2015 on Appointment of Judicial interpreters and translators, available at: http://www.gjyqesori-rks.org/wp-content/uploads/lgsl/Rregullore%2016%20-%202015%20p%C3%ABr%20Em%C3%ABrimin%20e%20interpret%C3%ABve%20dhe%20p%C3%ABrkthyesve%20gjyqesor%C3%AB.pdf

[24] Ibid

[25] Ibid

of court interpreters/translators. KJC is supposed to adopt a Regulation on certification of court interpreters/translators[26].

As of May 2019 the KJC drafted a new "Regulation *on the Certification of Judicial Interpreters and Translators*", along with draft "*Code of Ethics for Judicial Translators and Interpreters*", with similar criteria from the abovementioned Regulation, yet provides for a different composition of the Committee for testing and evaluation of candidates. The draft Regulation and Code of Ethics have yet to be adopted and implemented. Until such time, there currently is no registry of certified interpreters nor is there a proper mechanism of quality control for the current interpreters and translators provided by the courts, prosecution offices and police.

Currently the quality of translation and interpretation services in Kosovo is not at a satisfactory level as the majority of interpreters and translator in courts have not undergone formal training and have very little knowledge and understanding of legal concepts.

Unlike the Directive that foresees the possibility to challenge a decision finding that there is no need for interpretation (Article 2 (5)) and complain about the quality of the translation (Article 3 (5)), there is nothing in the CPCRK or Criminal Code that allows for suspects and accused persons to challenge the refusal to provide interpretations and translations.

During the workshops conducted in March 2019 with judges, prosecutors and lawyers, there were complaints regarding the quality of interpretation or translation, citing problems with translation and interpretation during court hearings. According to a survey conducted by OSCE and the cases monitored involving non-Albanians, 61% of cases where translation was required, found that translation was either not provided or was of poor quality[27]. Moreover, while the Serbian language is an official language in Kosovo, it is rarely used as a language of proceedings[28]. Complaints related mostly to incomplete or partial interpretation, improper interpretation or textual interpretation without adjusting it to the context of the discussion[29]. In some instances, judges, lawyers, parties or court clerks took up the role of the interpreter in the absence of a sworn court certified interpreter[30].

Key issues and practical challenges

The Kosovo Academy for Public Safety is responsible for providing training and higher education, implementation of policies and strategies of training, higher education, and the

[26] OSCE comments to the Draft Law on Courts, July 2018
[27] OSCE, Community Rights Assessment Report, fourth edition, November 2015, page 12, available at https://www.osce.org/kosovo/209956?download=true
[28] USAID, "Assessment of the quality of services in the Basic Courts of Kosovo: Court users' survey", June 2018
[29] Balkan Investigative Reporting Network, "Court Monitoring Annual Report", June 2012
[30] Ibid

development of capacities in the field of public safety[31]. However, it is unclear if there is any training for judges, prosecutors, police, and judicial staff with respect to communicating via an interpreter is provided.

The lack of training for criminal justice professionals on how to work with interpreters is potentially a very serious challenge. Currently, there is no regulation of professional interpreters and translators in Kosovo, no official register of trustworthy, impartial court interpreters, no system for determining language assistance needs of individuals, and no formal process of challenging the quality of interpretation. This means that there is a significant burden on criminal justice professionals, like judges, prosecutors, and police officers, to make the right decisions regarding both the provision of interpretation and translation, and the quality of services. Without effective training, it is difficult to imagine how these responsibilities could be fulfilled. It is crucial that training is provided to help make decisions about the need for interpretation, and to detect situations where the quality of language assistance falls below what is acceptable.

This means that lawyers too, have an important role to play. It would be difficult for lawyers to challenge decisions regarding interpretation and translation if they themselves are unable to identify the problems. Furthermore, training could also help to ensure that lawyers and other criminal professionals do not take over the role of interpreters and translators when it would be clearly inappropriate for them to do so.

Until the draft Regulation on Certification of Judicial Interpreters and Translators and the Code of Ethics for Translators and Interpreters is adopted and implemented, there is no guarantee that the translation and interpretation that already is provided by the courts, prosecutions offices and police is of good quality and without proper training who is to say that the interpretation and translation is delivering the correct exchange/information. Based on research it was found that complaints related mostly to incomplete or partial interpretation, improper interpretation or textual interpretation without adjusting it to the context of the discussion[32], therefore the current situation continues to impact the quality of interpretation and translation in court hearings especially.

Recommendations

- Kosovo Judicial Council (KJC) to adopt and implement the Regulation on Certification of Judicial Interpreters and Translators
- KJC to adopt and implement the Code of Ethics for Judicial Translators and Interpreters.
- Kosovo respectively the KJC needs to publish a register and list of qualified interpreters and translators.

[31] Kosovo Law Institute (2017), *Criminal Justice in Kosovo*, page 63, available at: https://kli-ks.org/sistemi-i-drejtesise-ne-kosove-2/,
[32] Balkan Investigative Reporting Network, "Court Monitoring Annual Report", June 2012

- Specific guidelines should be drafted for the police, prosecution and judges (and other competent authorities that make decisions to provide interpretation/translation) on how to assess the language assistance needs of the individual
- Clear legal mechanisms for challenging both the refusal to provide interpretation/translation and the quality of interpretation/translation need to be available.
- Special training for judges, prosecutors and lawyers on the particularities of communicating through an interpreter should be provided

PART 2: THE RIGHT TO INFORMATION DIRECTIVE

Directive 2012/13/EU on the Right to information in criminal proceedings ('Right to Information Directive') lays down minimum standards to be applied across the EU regarding the information about rights and about the accusations to be given to persons suspected or accused of having committed a criminal offence.

The Right to Information Directive covers three main aspects regarding the right to information:

a) Information about rights;
b) Information about the accusation; and
c) Access to case materials.

Overview of the Directive on the Right to Information about Rights

The Right to Information Directive requires Member States to have laws that guarantee that suspects and accused persons are given information about their rights from the moment that they are made aware that they are suspected or accused having committed a criminal offence.[33] It also recognises that there need to be additional safeguards for individuals who have been deprived of their liberty.

All suspects or accused persons should be provided promptly with information about their rights orally, or in writing, in simple or accessible language. The information has to include information about at least the following rights:

a) the right of access to a lawyer;
b) entitlement to free legal advice;
c) the right to be informed of the accusation;
d) the right to interpretation and translation; and
e) the right to remain silent.[34]

Additionally, if a person is arrested or detained, the Directive requires that they should be provided promptly with a 'Letter of Rights' – a written document containing information about their rights, that they can keep throughout the time that they are deprived of liberty.[35] The letter of rights has to include information about rights that are specific to detainees, such as the right to access urgent medical assistance, as well as information that they would need in order to challenge their detention, including, the maximum period of detention before being brought before a judicial authority, and basic information about the procedures for challenging their detention.[36]

[33] Right to Information Directive, Article 2(1)
[34] Ibid. Article 3(1)
[35] Ibid. Article 4(1)
[36] Ibid. Article 4(2),(3), and (4)

Overview of Kosovar Laws on the Right to Information

Kosovar laws state that the police have to inform the suspect on the offences that he/she is suspected of having committed and of their rights before they interview them. The Police have to prepare a report of the interview that summarizes the questions and answers during the interview, and identifies the police officer interviewing the suspect, the time, date and location of the interview[37], this serves as a record for the police that information was given and understood by the suspect or accused and is kept on file with the individuals signature.

Police officers or prosecutors (depending on the stage of the proceedings) are required by law to read to the defendant a warning that provides information about their rights. This warning has to be given prior to a police interrogation, or at the beginning of the pre-trial interview, pre-trial testimony session[38], or Special Investigative Opportunity[39]. This warning includes information about the following rights:

- The right to provide a statement and the right to remain silent;
- The right not to incriminate oneself;
- The right of access to a lawyer; and
- The right to have an interpreter, free of charge.

The text of the warning is provided within the CPCRK, which is as follows:

> *"This is a criminal investigation of acts you may have committed. You have the right to give a statement, but you also have the right to remain silent and not answer any questions, except to give information about your identity. You have the right not to incriminate yourself. If you choose to give a statement or answer questions, you will not be under oath. The information you provide may be used as evidence before the court. If you need an interpreter, one will be provided at no cost to you. If you believe that you may incriminate yourself or a close relative as a result of answering a question, you may refuse to answer. You have a right to a defence attorney and to consult with him/her prior to and during the examination. If you do not understand the question being asked, you should request that the question be asked differently. If you require assistance, translation, or a reasonable brief break from this session, you should ask. If you do not understand these rights, you should consult with your attorney."*

The CPCRK's provisions regarding the right to information about the rights of suspects and accused persons are broadly in line with Article 3(1) of the Right to Information Directive, but a notable difference is the content of the information to be given to the individual. In addition to the right of access to a lawyer, the right to remain silent, and the right to

[37] CPCRK, Article 73
[38] CPCRK, Article 125
[39] CPCRK, Article 149

interpretation and translation, the Directive requires Member States to inform the individual about their entitlement to legal aid, and the right to be informed about the accusations against them.

The CPCRK's warning does not contain information about either of these rights, and these are not insignificant omissions. Many individuals who are unaware of their entitlement to legal aid will understandably be dissuaded from exercising their right of access to a lawyer, depriving them of legal advice, and effective assistance during the crucial initial stages of their criminal proceedings. Individuals not informed about their right to be given information about the accusations against them might be deprived of the knowledge about their alleged conduct that could enable them to put forward an effective defence.

With regard to individuals who have been deprived of their liberty the CPCRK Article 164 (4) stipulates that the arrested person shall be informed orally and in writing of their rights, the same rights that are outlined in Article 167:

a) to be informed about the reasons for the arrest, in a language that he or she understands;
b) to remain silent and not to answer any questions, except to give information about his or her identity;
c) to be given the free assistance of an interpreter, if he or she cannot understand or speak the language of the police;
d) to receive the assistance of defence counsel and to have defence counsel provided if he or she cannot afford to pay for legal assistance;
e) to notify or require the police to notify a family member or another appropriate person of his or her choice about the arrest; and
f) to receive a medical examination and medical treatment, including psychiatric treatment.[40]

If the arrested person is a foreign national, he or she has the right to notify or to have notified and to communicate orally or in writing with the embassy, liaison office or the diplomatic mission of the state of which he or she is a national or with the representative of a competent international organization, if he or she is a refugee or is otherwise under the protection of an international organization.

However, although CPCRK is in line with article 2 of the Directive, it ignores the key elements of Article 4 that the Letter of Rights must contain. As mentioned above, although article167 outlines the rights of the defendant, the same are not written or orally depicted to the defendant.

[40] CPCRK, Article 167

Overview of the Directive on the Right to Information about the accusation

The Right to Information Directive requires suspects or accused persons to be informed promptly about the criminal act that they are suspected or accused of having committed. The Directive is not clear about the amount or the type of information that has to be given, other than to stipulate that the information has to be in such detail as necessary to safeguard the fairness of proceedings.[41] The latest point at which the suspect/accused person has to be given the 'detailed information', including of the legal classification of the offence, and the nature of their alleged participation in that offence, is at the point at which submissions are made to the court regarding the merits of the case.[42] In addition, individuals deprived of their liberty should be given the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.[43]

Overview of Kosovar Laws on the Right to Information about the accusation

According to the law in Kosovo, the defendant has the right to be informed about the nature of and the reasons for the charge against him/her promptly 'at his/her arrest' and during the first examination, in a language that he/she understands, and in detail.[44] Arrested persons also need to be informed about the reasons for the arrest, in a language that they understand.[45] This information is provided orally and/or in a written form (Article 164 (4)).

There are more specific legal requirements under the CRCPK if the arrest takes place at the investigative stage. In such cases, the law requires the state prosecutor to issue a written decision on detention, which includes the full name of the arrested person, the time and place of the arrest, the criminal offence that he/she is suspected of having committed, and the legal basis of the arrest.[46] This decision has to be issued as soon as possible after the arrest and no later than six hours from the time of the arrest.

Based on all this, it means that according to national law, the latest when a suspect/accused person can be notified about the accusation is at his/her arrest and during the first examination. On the other hand, there is no provision that explicitly provides the obligation of the state authorities to inform the suspect or accused person about any changes to the information given regarding the accusation.

[41] Right to Information Directive, Article 6(1)
[42] Ibid. Article 6(3)
[43] Ibid. Article 6(2)
[44] CPCRK, Article 10
[45] Ibid. Article 167
[46] Ibid. Article 164

Although there are safeguards provided in the CPCRK in relation to the information of the charged persons, in practice it is a frequent occurrence that accused persons are informed by media outlets that an indictment has been filed against them[47].

Moreover, prosecution in Kosovo established a practice of indicting individuals without interrogating them in the first place. A report published by KLI found that prosecution in Kosovo filed indictments against individuals who passed away[48]. Although the CPRCK foresees that when the police or another person files criminal charges to the state prosecutor for a reasonable doubt for one or some criminal offences, where a sentence of imprisonment of no more than three years is given and the prosecutor assess that the doubt is grounded in support of the charges, they can file an indictment. However in principle thorough investigation of the charges should be carried out prior to filing an indictment, where reasonable doubt understands to be possession of admissible evidence that would convince an objective observer that a criminal offense occurred and was committed by the defendant[49]; something which has proven difficult for prosecutors to adhere to in Kosovo.

Overview of the Directive on Access to case file

The right to Information Directive provides that Member States should enable the defence to access all material evidence in the possession of the state. The Directive lacks clarity about how much access should be granted, and at what stage, but that provides that it should be granted to '*safeguard the fairness of the proceedings and to prepare the defence*.'[50] In any event, all material evidence has to be made accessible at the latest before the submission of merits of the accusation to the court.[51]

However, there are exceptions to this rule. Access to the case file could be limited if it may lead to a serious threat to the life or the fundamental rights of another person or to safeguard public interest (for example, if it would prejudice ongoing investigations, or be a threat to national security). Such refusals have to be subject to judicial review.[52]

On the other hand, there are no exceptions to the grant of access to materials that are necessary for challenging the lawfulness of detention.[53]

[47] Zeka and Krasniqi do not know that from 2017 an indictment was filed against them for their argument on Klan Kosova - https://betimiperdrejtesi.com/zeka-dhe-krasniqi-nuk-kane-njohuri-se-nga-viti-2017-eshte-ngritur-aktakuze-ndaj-tyre-per-perleshjen-ne-klan-kosova/, 19 July 2019

[48] *Prosecutors in Kosovo file indictments against the dead* – Kosovo Law Institute, November 2019.

[49] CPRCK, Article 19 paragraph 1 item 13.

[50] Right to Information Directive, Article 7(2)

[51] Ibid. Article 7(3)

[52] Ibid, Article 7(4)

[53] Ibid. Article 7(1)

Overview of Kosovar Laws on Access to case file

According to the CPCRK, at no time during the investigative stage may the defence be refused access to records of the examination of the defendant, materials obtained from or belonging to the defendant, materials concerning such investigative actions to which defence counsel has been or should have been admitted, or expert analyses.[54]

This same article provides that this access shall be granted during initial steps by the police, at the initiation of the investigative stage, during the investigative stage, upon completion of the investigation and upon the filing of an indictment.

In addition to these, the defence shall be permitted by the state prosecutor to inspect, copy or photograph any records, books, documents, photographs and other tangible objects in the possession, custody or control of the state prosecutor which are material to the preparation of the defence or are intended for use by the state prosecutor as evidence for the purposes of the main trial, as the case may be, or were obtained from or belonged to the defendant.[55]

CPRCK has provided when this access may be restricted. So, the state prosecutor may refuse to allow the defence to inspect, copy or photograph specific records, books, documents, photographs and other tangible objects in his or her possession, custody or control if there is a sound probability that the inspection, copying or photographing may endanger the purpose of the investigation or the lives or health of people. In such case, the defence can apply to the pre-trial judge, single trial judge or presiding trial judge to grant the inspection, copying or photocopying. The decision of the judge is final.[56]

Besides the restriction, information in the case file can be redacted or marked out by a thick black line to obscure specific information by the state prosecutor on copies of documents that contain sensitive information. Like restriction, in case of reduction, the defendant may challenge the redaction with the pre-trial judge, single trial judge or presiding trial judge within three (3) days of receiving the redacted copy[57].

Prohibition of torture and ill-treatment

The prohibition of torture and related ill-treatment is absolute under international and European human rights law. First and foremost, there is an absolute obligation (often referred to as the **negative obligation**) on all of the State's agents not to torture or inflict related ill-treatment. The negative obligation to refrain from ill-treatment goes hand in hand with positive obligations to protect persons from ill-treatment and hold perpetrators accountable[58].

[54] CPCRK, Article 213.3
[55] Ibid, par. 6
[56] CPCRK, Article 213
[57] Ibid
[58] Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019

ECtHR established principles that if an individual is taken into State custody in good health and later found to be injured at the time of release, there is a presumption that ill-treatment has taken place and it falls on the State to provide explanations of how those injuries occurred and thus can be constituted that there was a violation of Article 3 of the ECHR[59]. A States duty to account for the injury of other harm is intensified if a person dies in the State's custody[60].

Furthermore, States are required to criminalise torture and ill-treatment and provide proportionate sanctions reflecting the wrongfulness of torture or ill-treatment "do not provide for limitation periods which time-bar redr**ess** and do not accommodate amnesties or other forms of immunity where a State agent is accused of torture or wilful ill-treatment[61]. In addition, it is necessary for compensation to be provided for pecuniary and non-pecuniary harm sustained as a result of torture or related ill-treatment[62]. The requirements are aimed at ensuring that the legal system effectively proscribed and deters torture and related and related ill-treatment that the person ill-treated receives adequate redress and reparation. To ensure full respect for human rights in law enforcement, it is necessary to put in place not just legal frameworks but also to develop the right training, cultures, attitudes and enforcement practices"[63].

Pursuant to the requirements, there is also a procedural duty to investigate allegations of torture or ill-treatment under article 3 ECHR. Within the set of minimum requirements that must be fulfilled by the investigation, is the need to afford to the complainant effective to the investigatory procedure. The states duties must ensure that the judicial proceedings are also adequate, inadequacy of sanctions can lead to impunity and portrays the message that law enforcement officials who ill-treat those within their control may not be held accountable or face sanctions reflecting the gravity of the acts, if there is no effective redress or deterrence the victims are discouraged from coming forward. "Recorded incidents of ill-treatment by police officers, and relevant case law, reflect only a fraction of the problem, with strong indication that many incidents go unreported, not least due to victims' insecurity vis-à-vis law enforcement, their lack of faith in law enforcement, lack of information and obstacles to contacting institutions able to provide them with support, as well as their belief that they have no prospect of finding justice or other barriers, including language barriers".[64]

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[59] *Selmouni v France*, App no 25803/94, ECtHR judgment of 28 July 1999; *Ribitsch v Austria,* App no 18896/91, ECtHR judgment of 4 December 1995

[60] *Edwards v UK,* App no 46477/99, ECtHR judgment of 14 March 2002), para 56; *Salman v Turkey,* App no 21986/93, ECtHR judgment of 27 June 2000

[61] Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019. Cited from *Cirino and Renne v Italy*, App nos 2539/13 and 4705/13, ECtHR judgment of 26 October 2017; *Azzolina and others v Italy*, App nos 28923/09 and 67599/10, ECtHR judgment of 26 October 2017; *Yeter v Turkey*, App no 33750/03, ECtHR judgment of 13 January 2009; *Zontul v Greece*, App no 12294/07, ECtHR judgment of 17 January 2012; *Gäfgen v Germany,* App no 22978/05, ECtHR judgment of 1 June 2010

[62] Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019. Cited from *Aleksakhin v Ukraine,* App no 31939/06, ECtHR judgment of 19 July 2012

[63] Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019. Citedfrom *MC v Bulgaria,* App no 39272/98, ECtHR judgment of 4 December 2003

[64] Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, page 2, July 2019

In Kosovo, the Criminal Code stipulates that during the execution of a punishment, the convicted persons shall not subjected to inhuman or degrading treatment or punishment, including unnecessary mental and physical exertion or deprivation of adequate medical treatment or other basic necessities. [65]

The Law on the Execution of Penal Sanctions (LEPS) gives detailed procedure by which prisoners may address complaints confidentially to the director of the Kosovo Correctional Service (KCS). The procedure includes deadlines for responses by the Director, and the possibility to refer a complaint under certain circumstances to a higher authority, in particular the General Director of the KCS and the Minister of Justice. As regards remand prisoners, CPCRK also provide for court oversight of conditions of detention, including with regard to petitions by inmates. Although LEPS provides that complaints and measures to address them are recorded, observations from the Committee for the Prevention of Torture in 2016 found that none of the establishment's visited had a register for internal complaints. CPT in its report recommended that steps be taken by the relevant authorities to ensure that the procedures stipulated by the relevant legal provisions relating to complaints by prisoners – including the maintaining of a dedicated register – are fully implemented in practice in all KCS establishments[66]

NGO's in Kosovo have reported incidents where the Kosovo Police have abused detainees. In 2018, the Kosovo Rehabilitation Centre for Torture (KRCT) received complaints from prisoners of alleged verbal harassment, prisoner on prisoner violence and some cases of physical mistreatment by correctional officers, mainly at the Dubrava Prison and the detention centre in Lipjan. Verbal and physical abuse was also reported by prisoners about the correctional staff at the High Security Prison. Further in 2018, with the arrest of six people from a student protest, the same reported physical abuse in the form of beating at the police station once they were detained. [67]

The KSC in 2017 adopted Standard Operating Procedures (SOP) on reporting cases of torture, ill-treatment and bodily injuries, where it obligated health services to report such incidents to the Ombudsperson. Yet, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment[68], found that although fundamental safeguard for the prevention of torture and ill-treatment are in place, including the right to notify one's

[65] Criminal Code of the Republic of Kosovo, Article 92 paragraph 3

[66] Report to the United Nations Interim Administration Mission in Kosovo (UNMIK) on the visit to Kosovo carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 April 2015, Strasbourg, 8 September 2016

[67] Kosovo - Country Reports on Human Rights Practices for 2018, United States Department of State • Bureau of Democracy, Human Rights and Labour Victims. See also, Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019.

[68] In November 2017, the UN Special Rapporteur visited Serbia and Kosovo to assess the prevailing situation, developments and challenges concerning torture and other cruel, inhuman or degrading treatment or punishment

detention to a relative or have access to legal counsel and medical doctor, a number of detainees claimed that they did not have access to their ex-officio lawyer until after they had been taken for questioning by a police officer. "From the time of their arrest until the official start of their interrogation, they were allegedly left in a legal limbo which, in some instances, facilitated the perpetration of police torture and ill-treatment[69].

Moreover, in 2018, the Police Inspectorate of Kosovo (PIK) investigated cases against alleged various criminal offences committed by police officers. The most frequent offences that were investigated were 46 cases of "Endangering public traffic", 27 cases of "Abuse of official position or authority", 23 cases of "Light body injury"; 19 cases of "Ill-treatment during the official duty", and 5 cases of "Manipulation of evidence"[70]. Furthermore, between 2016 and 2018 almost the same above criminal offences were listed as the five most common offences committed by police officers. According to PIK, concern remains in the increase of the number of cases for the offence "Ill-treatment during the official duty", "Light bodily injury" and "Manipulation with Evidences"[71].

Key issues and practical challenges

Provisions in the CPCRK regarding the right to information about rights are broadly consistent with those found in the Right to Information Directive, but there are notable aspects of Kosovo's laws that will need to be changed in order to bring its standards in line with the EU's. In particular, as highlighted above, the information provided to individuals at the initial stages of the proceedings have to include their entitlement to legal aid, and the right to be informed about the accusations. Information about both of these rights are crucial for safeguarding the rights of the defence during these very crucial stages.

A more noticeable absence in the CPCRK is the lack of provisions that relate to the right to information about rights that is specific to individuals who have been deprived of their liberty. Currently, there are no provisions in the CPCRK that require the competent authorities to give information to the suspect or accused person in detention about *inter alia* their right of access to the case materials, their right to medical assistance, and information about the legal maximum period of detention before being brought to a judicial authority.

A lack of knowledge about these rights leaves detainees in a particularly vulnerable position. They might not be in a position to demand the treatment they deserve whilst being detained, and they might be deprived of the possibility to challenge their detention effectively, particularly if they are not being assisted by a lawyer.

[69] UN General Assembly, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for Kosovo, 25 January 2019. See also, Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019.

[70] Annual Report of the Police Inspectorate of Kosovo for 2018. See also, Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019.

[71] Annual Report of the Police Inspectorate of Kosovo for 2018. See also, Functional Review of the Rule: "*Improving the effectiveness of Legal Remedies*", Policy Note, July 2019.

Furthermore, there are no laws requiring the provision of written information about rights to detained individuals, as required by the Right to Information Directive. Given that individuals can be detained for an initial period of up to 48 hours, and pre-trial detention can last up to 12-18 months in Kosovo, it is unreasonable to expect detainees to retain information about their rights orally, and at the time of their initial arrest. A letter of rights, written in simple and clear language, that a detainee can keep for the duration of their detention is helpful procedural safeguard that can enable the defendant to exercise their rights effectively, and on an on-going basis.

However, the main issue regarding the right to information in Kosovo is the implementation of existing laws in practice. There are serious doubts about the extent to which suspects and accused persons do, in fact, understand the rights that are explained to them, and they are able to make informed decisions based on the information they have been given. In particular, the language used to provide information rights is drafted in complex legal terminology, which makes it difficult for many suspects to understand. Given that information about rights is not provided in written form in Kosovo, this often results in a failure to notify individuals of their rights effectively. The implications can be very serious. For example, suspects may 'waive' their rights to silence and to a lawyer without sufficient understanding of what those rights are, leading to doubt as to whether these 'waivers' are granted in knowing and unequivocal manner.

There are no obvious inconsistencies between the laws in Kosovo and provisions in the Right to Information Directive regarding the right to information about the accusations. During workshops and meetings with key stakeholders throughout Kosovo in March 2019, there were no concerns raised regarding the effective implementation of this right. There could however, be more clarity in Kosovo's laws about the amount of detail the defendant is entitled to receive

Finally, Kosovo's laws on the right of access to the case file appears to be partially compatible with EU laws. The CPCRK, as it stands currently, fails to recognise that the access to the case file is not only necessary for an effective defence, but also for challenging arrests and detentions. The CPCRK's provisions on access to the case file may otherwise look compatible with the Directive, but based on the discussions conducted with lawyers of all regions in Kosovo, access to the case file for the defence is much more limited in practice.

Lawyers that were consulted by KLI have complained that, in reality, they are unlikely to get access to the case file until after the indictment has been filed, and that they have difficulties getting access to even the most basic materials, like the report from the questioning by the police.

Another pressing concern is that torture and ill-treatment is not criminalised adequately enough and although there are some legal safeguards there are a large number of incidents of ill-treatment. Apart from the abovementioned offences, the transfer of convicts has also been

used as a form of punishment measures. The 2018 Ombudsman annual report received 36 complaints of ill-treatment committed by Kosovo Police officers, where after preliminary assessments, 22 cases were open for investigation. [72]

Recommendations

- Kosovo Police to redraft and complete the letter of rights with relevant information for suspects and accused;
- Kosovo Police to give written letter of right to defendants so that it is in their possession at all times as is required by EU law and Directive;
- Kosovo needs to implement laws on access to case files.
  An independent, accessible and effective complaint and investigation mechanism for allegations of torture and ill-treatment
- Increased adequacy of response by prosecution and courts in cases of allegations of torture and ill-treatment of accused or detained persons

[72] Ombudsperson Annual report for 2018, No. 18, 2019

PART 3: RIGHT OF ACCESS TO A LAWYER DIRECTIVE

Overview of EU Laws on the Right of Access to a Lawyer

The Directive 2013/48 on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest ('Access to a Lawyer Directive) has a broad remit and covers three distinct aspects of the rights of suspects and accused persons: the right of access to a lawyer; the right to have a third party informed upon deprivation of liberty; and the right to communicate with consular officials whilst deprived of liberty.

Access to a lawyer is vital when in criminal proceedings, this starts from the moment of arrest to the trial itself. The need for legal advice is crucial to people in criminal proceedings so that they have a fair chance to present their defence. If they can afford a lawyer, they can choose their own lawyer, however if they cannot afford a lawyer (where the interest of justice require), the State should provide free legal assistance.[73] The key principle in the Access to a Lawyer Directive is derived from ECtHR jurisprudence in the case of *Salduz v. Turkey* where it was recognised that "*Access to a lawyer should be provided as from the first interrogation by police (…) the rights of the defence will in principle be irretrievably prejudiced when statements obtained in absence of a lawyer are used for a conviction*.[74]

The Directive provides that the suspects and accused persons should have access to a lawyer without undue delay, prior to being questioned by the police, another law enforcement or judicial authority, after the deprivation of liberty, and when summoned to appear before the court (whichever of these events takes place at the earliest stage).[75] It also specifies the types of assistance that lawyers should be able to provide to their clients. This includes private communications prior to questioning by the police, as well as presence and effective participation during police interviews.[76]

Member States are required to also ensure that the right to access to a lawyer can be exercised in reality. They must 'endeavour' to make general information available to facilitate the obtaining of a lawyer, and ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer.[77]

In this context, suspects and accused also have the right to communicate with consular authorities[78] when they are non-nationals and third parties[79] about the deprivation of liberty. However, where suspects or accused persons have two or more nationalities, they may

[73] https://www.fairtrials.org/right-fair-trial?a-fair-chance-to-present-a-defence
[74] ECtHR, *Salduz v. Turkey*, paragraph 55, App No 36391/02,
[75] Access to a Lawyer Directive, Article 3(2)
[76] Ibid. Articles 3(3) and 4
[77] Ibid. Article 3(4)
[78] Ibid. Article 7
[79] Ibid. Article 6

choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.

The right of access to a lawyer, however, is not absolute, and the Access to a Lawyer Directive provides for derogations, but only during the pre-trial stages. Derogations are permitted if there is an urgent need to avert serious adverse consequences to the life, liberty, or physical integrity of another person, and where immediate action is needed to prevent substantial jeopardy to investigations.[80] Additionally, geographic remoteness could be the basis of derogation, in exceptional circumstances.[81] The Directive makes it clear that derogations need to be proportionate, strictly limited in time, that they should not prejudice the overall fairness of the proceedings, and that they should be subject to judicial review.[82]

The Access to a Lawyer Directive also includes provisions relating to waivers of the right of access to a lawyer. Waivers should only be accepted, if given unequivocally and voluntarily, and after the suspect/accused person has been given information about their rights, and the consequences of waiving them.[83]

Overview of Kosovar Laws on the Right of Access to a Lawyer

In Kosovo, both the Constitution of the Republic of Kosovo[84] and the CPCRK[85] ensure that access to a lawyer/legal counsel is given from the moment there is a 'risk' of deprivation of liberty and *at all stages of proceedings*[86]. This corresponds with Article 2 of the Directive under which the right of access to a lawyer applies "*irrespective of whether they are deprived of liberty*", however unlike the Directive, Kosovo law does not enable legal representation in cases where there is no risk of deprivation of liberty.

There is no doubt that a significant proportion of individuals who are accused of crimes will either be detained or arrested, or at least be at risk of deprivation of liberty. However, it cannot be assumed that only those who face the risk of arrest or detention require legal assistance. The role of a lawyer in criminal proceedings is not limited to protecting the rights of detained individuals. The right of access to a lawyer is crucial procedural safeguard that helps to ensure the fairness of criminal proceedings more broadly, and to protect individuals from wrongful convictions.

The CPCRK does not specify, besides informing the suspect or accused person of their rights, any other actions that the police or the prosecutor should undertake, in order to help the

[80] Ibid. Article 3(6)
[81] Ibid. Article 3(5), Recital 30
[82] Ibid. Article 8
[83] ibid. Article 9
[84] Constitution of the Republic of Kosovo, Articles 29 (3) and 30 (5), available at: https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702
[85] CPCRK, Articles 11, 53, 57, 58, 166
[86] CPCRK, Article 53 paragraph 1

defendant to exercise their right of access to a lawyer, and this is only done in circumstances where there is a positive obligation for the State to provide a defence lawyer in ex-officio legal representation.

Moreover, the CPCRK also does not provide concrete actions that lawyers can undertake during police questioning and therefore is it very limiting to the scope of assistance that lawyers can provide. Apart from the fact that it provides that during all police examinations the arrested person has a right to the presence of a defence counsel and that the defence counsel may request from the state prosecutor to take or preserve pre-trial testimony that may or could reasonably be expected to be exculpatory, there is nothing specific or detailed in this regard.

Yet, the CPCRK allows for private communication between the suspect or accused with their lawyer prior to police investigation and questioning[87] and that theses Communications "*may be within sight but not within the hearing of a police officer*"[88]. The suspect or accused whom is a foreigner also has the right to notify and to *communicate orally or in writing with the embassy, liaison office or the diplomatic mission of the state of which he or she is a national or with the representative of a competent international organization*[89], they also have the right to inform family members or appropriate persons of their choice *about the arrest and the place of detention, immediately after the arrest, and about any subsequent change in the place of detention, immediately after such change*[90].

Consequently, the Law on the Police does not provide for the right to have access to a lawyer for persons who are held in "temporary police custody" for identification purposes or for their own protection or the protection of others (for a maximum of up to 12 and 24 hours, respectively). Respective to this, the UN Special Rapporteur recommended that steps should be taken to ensure that persons placed in the custody of the police are granted access to a lawyer from the outset of their deprivation of liberty, promptly after arrest[91]. The same was noted by CPT and they also recommended that appropriate steps need to be taken by the relevant authorities to ensure that persons deprived of their liberty by the police-irrespective of the reason- are to be granted the right of access to a lawyer from the very outset of their deprivation of liberty and that the relevant legal provisions need to be amended[92]. However, the KRCT reported that detainees occasionally faced delays when attorneys were temporarily not available. NGOs reported that authorities did not always allow detained persons to contact attorneys when initially arrested and in some cases permitted consultation with an attorney only when police investigators began formal questioning. In several cases detainees were allowed access to an attorney only after their formal questioning. Some detained

[87] CPRCK Article 61 (2)
[88] CPRCK Article 166 (3)
[89] CPRCK Article 167 (2)
[90] CPRCK Article 168 (1)
[91] UN General Assembly, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for Kosovo, 25 January 2019
[92] Report to the United Nations Interim Administration Mission in Kosovo (UNMIK) on the visit to Kosovo carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 April 2015, Strasbourg, 8 September 2016

persons complained that, despite requests for lawyers, their first contact with an attorney took place at their initial court appearance.[93]

Based on consultation of relevant documentation and interviews conducted with Kosovo Police officers in several of the police establishments visited, it transpired that the existing legal provisions were being interpreted in such a way that the right of access to a lawyer usually only applied as from the moment a criminal investigation had been formally opened against an apprehended person. Moreover, the view was expressed that the right of access to a lawyer did not apply to persons who were deprived of their liberty (for up to six hours) as a witness[94].

Waivers

The CPCRK recognises that persons deprived of liberty can waive their right to legal assistance. The waiver has to be made in writing, and it is valid only if given after being informed about their rights, and if given in a voluntary manner (Article 13(3)). There is a number of procedural requirements under Articles 13 and 53 CPCRK aimed at ensuring that suspects or accused persons understand the content of their right to a waiver. In particular, there needs to be a written notification that is "clear and complete", and in a language understandable to the defendant. Unfortunately, in practice, the suspect or accused is given a box to tick/sign that states whether they want a lawyer or not, apart from this there is no further explanation as to why they do not want a lawyer. This then raises the questions to whether the suspect or accused actually understand the consequences of waiving their rights to legal assistance. The written notification is a simple record of the names of the police officer, prosecutor and defendant; it also includes a box to sign on whether they want a lawyer and a written list of their rights with no mention of legal aid or consequences of waiving their rights to legal assistance. It also does not make it clear to the defendant that they can reassert their right to a lawyer.

There is however additional safeguards under Kosovar law for vulnerable suspects and accused to waive their rights to in Article 53 CPCRK:

- par. 5 - persons under 18 years of age may waive right to assistance of defence counsel only with the consent of a parent, guardian, or representative of Centre for social work *except in domestic violence cases that involve parent or guardian;*
- par. 6 - persons who display signs of mental disorder or disability *may not waive their right to the assistance of defence counsel;*

[93] Kosovo - Country Reports on Human Rights Practices for 2018, United States Department of State • Bureau of Democracy, Human Rights and Labour Victims, page 6.

[94] Report to the United Nations Interim Administration Mission in Kosovo (UNMIK) on the visit to Kosovo carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 April 2015, Strasbourg, 8 September 2016

- par. 7 provides that if a suspect who has made a waiver subsequently reasserts the right to the assistance of defence counsel, he or she may immediately exercise the right.

The CPCRK provides that the right to legal assistance cannot be waived in cases of mandatory defence. Nevertheless, the right to mandatory defence can be 'waived' if the defence counsel is retained to act as "standby attorney"[95] in order to advise the defendant during the criminal proceedings (Article 53(4)).

Even though the laws are intended to make sure that waivers are given knowingly and voluntarily, a large number of defendants in Kosovo refuse their right to legal assistance [96]. This was particularly seen by the research conducted by KLI on interviews with defendants whom have been charged with offences from the general department – criminal division in Basic Courts in Kosovo, where the majority of interviewed defendants - believing in their innocence – declared that they do not need a lawyer because either they believed in their innocence or because they believed they could better defend themselves[97].

All waivers at all stages of criminal proceedings have to be recorded, since the waivers are given in writing, this is provided through Article 172 on Record of Arrest and Actions by Police that requires the Police to record "oral and written notification", additionally, police must record information about the exercise of the rights; especially the right to defence counsel (Article 167 (1.10)). As stated above in par 7 of Article 7, the suspect or accused can at any time reassert their right to legal assistance at any time of criminal proceedings.

Derogations

Kosovo laws recognise two scenarios in which there might be derogation from the right of access to a lawyer. Firstly, suspects may be questioned by the police in the absence of a lawyer, if one does not appear within a specified period of time following their arrest. Under Article 171 CPCRK, the police may arrange an alternative defence counsel, if the one appointed by the suspect does not appear within two hours of being informed of the arrest. However, if that alternative counsel does not appear within one hour of being contacted by police, "*the arrested person may be examined only if the state prosecutor or the police determine that further delay would seriously impair the conduct of the investigation"*. While to a large extent CPRCK has key elements of when derogations can occur, it is not compatible with the Directive in particular when the immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused, in such instances

[95] Standby attorney is there to advise the defendant during proceedings, for those defendants whom initially waived their rights to a defence but changes their mind in the process, the standby attorney then becomes the defence. (see commentary on the CPCRK, page 198: http://jus.igjk.rks-gov.net/486/1/Komentari_Kodi%20i%20Procedures%20Penal.pdf)

[96] Kosovo Law Institute, 2017, *Legal Aid in criminal cases and applying European Court of Human Rights standards in Kosovo Courts*, 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/, page 16

[97] Ibid page 16

Member States should arrange for communication via telephone or video conference unless impossible (Recital 30). Although lawyers working pro-bono in every city throughout Kosovo are meant to be available 24 hours, this does not provide legal remedy to instances where being late breaches the fundamental rights of the suspect or accused.

Secondly, Article 166(5)[98] CPCRK makes it possible for a pre-trial judge to replace the defence counsel for a maximum period of 72 hours from arrest, if the arrested person is suspected of terrorism or an organised crime, and there are grounds to believe that counsel might be involved in the commission of that offence. This provision does not explicitly allow the police to completely refuse the right of access to a lawyer, but it does potentially deprive the suspect from accessing legal assistance from a lawyer of their own choosing, and also highlights the need for an impartial, effective system of appointing lawyers.

Key issues and practical challenges

In December 2016, the OSCE Mission in Kosovo published their annual Justice Monitor[99] flagging - among other issues - the lack of legal representation of criminal defendants in criminal proceedings at the General Departments of Basic Courts of Kosovo. Based on this, and systematic monitoring of the courts by KLI, it is evident that even in cases where deprivation of liberty is at stake, a significant proportion of defendants waive their right to legal representation, or are unrepresented in their criminal proceedings for other reasons. According to recent research conducted by KLI in 2017 into legal representation of defendants, out 524 court hearings monitored within the Basic Courts of Pristina, Prizren and Peja with 667 defendants, only 163 (31.49%) of them had legal representation at the hearing, whilst 457 (68.51%) did not have any legal representation at any stage of the proceedings[100].

A main reason for this challenge appears to be a lack of trust from the public, and especially defendants in criminal proceedings in the adequacy of legal representation. This was seen from interviews conducted by KLI field researchers when asked defendants in criminal proceedings why they waived their rights to legal representation with some quoting "I can defend myself better than a lawyer can"[101]. However, some also said that they were not

[98] CPCRK Article 166 (5) - "If the arrested person is suspected of terrorism or organized crime and there are grounds to believe that the defence counsel chosen by the arrested person is involved in the commission of the criminal offence or will obstruct the conduct of the investigation, the pretrial judge may, upon the application of the state prosecutor, order that alternative defence counsel be appointed to represent the arrested person for a maximum period of seventy-two (72) hours from the time of arrest", available at: https://www.kuvendikosoves.org/common/docs/ligjet/Criminal%20Procedure%20Code.pdf

[99] OSCE Justice Monitor, July 2014- November 2015, available at: http://www.osce.org/kosovo/208771?download=true.

[100] Kosovo Law Institute, 2017, *Legal Aid in criminal cases and applying European Court of Human Rights standards in Kosovo Courts*, 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/, page 14

[101] Kosovo Law Institute, 2017, *Legal Aid in criminal cases and applying European Court of Human Rights standards in Kosovo Courts*, 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/, page 16

aware that they had a right to a lawyer, whilst others stated they did not have the financial means to pay for a lawyer. This shows the failure of law enforcement and judicial bodies on informing the suspect and accused of their rights pertaining to the Criminal Procedure Code and their entitlement to free legal aid. It also illustrates that there is a serious challenge regarding the use of waivers, and the ineffectiveness, in practice, to ensure that waivers are only made knowingly.

Also in 2017, the Ombudsperson published a report[102] with recommendations on the lack of effective legal representation in criminal proceedings and application of the equality of arms in criminal proceedings, through assignment of the defence lawyers at public expenses. According to the report, the main problem that occurs in Kosovo courts deals with assignment of defence counsels at public expense in cases where the defence is not compulsory according to the law, therefore it is optional. According to the CPCRK, it has been left at court's discretion that, upon defendant's request and the declaration that he has no financial means to pay the expenses of the defence, to decide whether the interests of justice require to assign the legal representation. Based on the findings of the Ombudsperson, courts in Kosovo, in the absolute majority of criminal cases, where according to the CPCRK the defence is not mandatory, have not appointed defence counsel at public expense. Even in cases where the imprisonment sentence was imposed, the defendants were tried without a defence counsel. This practice represents violation of legal and constitutional obligations that courts have regarding provision of guarantees on the right to effective protection of the defendant in criminal proceedings. As such, this practice of the courts is in contradiction with the principle of equality of arms in criminal proceedings.

The right of access to a lawyer is, of course, an essential human right for the accused, but the benefits of legal assistance to legal proceedings more broadly cannot be understated. Based on practitioner feedback from the workshops conducted in March 2019 and previous research, judges in Kosovo have reiterated that the presence of legal counsel makes the criminal proceedings better for everyone.[103]

Recommendations

- CPCRK needs to be amended to ensure that the right to access to a lawyer is available at all stages of criminal proceedings, irrespective of deprivation of liberty;
- Information must be provided about the entitlement to legal aid;
- Information must be given to individuals about the benefits of legal assistance and consequences of waivers;
- CPRK needs to be amended to provide specific articles on defendants' rights to consular and third party communication as is foreseen by the Directive.

[102] Institution of Ombudsperson, Ex-Officio Report with recommendations on the lack of effective legal representation in criminal proceedings, 2017

[103] Kosovo Law Institute, 2017, *Legal Aid in criminal cases and applying European Court of Human Rights standards in Kosovo Courts*, 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/, page 18

- The Law on Police needs to be amended in order to apply the recommendations given by the UN that all persons who are deprived of their liberty by the police – for whatever reason – are granted the right of access to a lawyer from the very outset of their deprivation of liberty.

PART 4: LEGAL AID DIRECTIVE

Overview of EU Laws on the Right to Legal Aid

The Legal Aid Directive encapsulates to a greater extent the ECtHR case law and grants legal aid under conditions set in article 4 and recitals 17-19. It is up to member states to ensure that those who lack sufficient means to pay for legal assistance have the right to legal aid when required in the interest of justice. In order to decide whether to grant legal aid, the means test must be applied by Member states that take into account the financial situation of the defendant. The ECtHR examines three criterion on deciding whether in the interest of justice free legal representation is required: 1) the seriousness of the offence and the severity of the penalty; 2) the complexity of the case; and 3) the capacity for self-representation by the accused[104]. The ECtHR built a standard that the right in determining whether the interest of justice require an accused to be provided with free legal representation the Court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake. In principle, where the deprivation of liberty is at stake, the interest of justice calls for legal representation.[105] Article 6 (3) (c) states that every person has the right to 'defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires'[106]. Meanwhile, Article 14 (3) (d) of International Covenant on Civil and Political Rights provides a similar right to free legal assistance in the determination of criminal charges[107].

Furthermore legal aid must be granted without undue delay and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering acts[108]. Legal aid is also provided for EAW proceeding under Article 5 of the Directive that grant legal aid upon arrest until they are (a) surrendered, or (b) until the decision not to surrender them becomes final. Also the Issuing Member state: ensures that requested persons, subject of EAW proceedings and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the

[104] *Quaranta v. Switzerland*, Application no. 12744/87, ECtHR judgment, 24 May 1991. The court set these conditions in a case where the applicant was accused of drug use and trafficking and was liable to imprisonment (not exceeding three years) or a fine.
[105] ECHR Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb)
[106] Article 6 of European Convention for Human Rights, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[107] International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations, available at: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.
[108] DIRECTIVE (EU) 2016/1919 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, 26 October 2016, on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&from=EN

executing Member State, have the right to legal aid necessary to ensure effective access to justice[109] (Article 5 (1) and (2)).

Through Article 7 the Directive requires that Member States to ensure the following:

- An effective legal aid system with an adequate quality; and
- Legal aid service of an adequate quality to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession;
- Adequate training to staff involved in the decision-making on legal aid in criminal proceedings and in EAW proceedings;
- Adequate training to lawyers providing legal aid service;
- Suspect, accused persons and requested persons have the right to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify[110].

Overview of Kosovar Laws on the Right to Legal Aid

Free legal aid in Kosovo is enshrined in the Kosovo Constitution as a fundamental right. The CPRCK also contains provisions dedicated to the protection of human rights of the defendants before the Police, Prosecution and Court[111]. The CPRCK stipulates that if a defendant does not have the sufficient means to pay for legal assistance, an independent defence counsel having the experience and competence with the nature of the offence shall be appointed for the defendant and paid from the budgetary resources if required by the interest of justice[112]. However, the CPRCK does not provide further clarification on the "interest of justice" criteria, yet it uses the same standards and some of the criteria in its jurisprudence as ECHR. The CPCRK does however, require that a lawyer free of charge be appointed ex-officio by the court to assist the defendant in cases of mandatory offence if the defendant remains without e defence or fails to obtain such assistance. The same applies with cases of non-mandatory defence if certain legal requirements are met, however, the lawyer must be a members of the Kosovo Bar Association (KBA)[113].

[109] Fair Trials and LEAP Toolkit, EU Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings, page 8, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Legal%20Aid%20Directive%20Toolkit.pdf

[110] Fair Trials and LEAP Toolkit, EU Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, page 9, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Legal%20Aid%20Directive%20Toolkit.pdf

[111] CPRCK, Article 11: that "the defendant shall have the right to have adequate time and facilities for the preparation of his or her defence, including the right to defend himself or herself in person or through legal assistance by a member of the Kosovo Chamber of Advocates of his or her own choice. Subject to the provisions of the present Code, if the defendant does not engage a defence counsel in order to provide for his or her defence and if defence is mandatory, an independent defence counsel having the experience and competence commensurate with the nature of the offence shall be appointed for the defendant".

[112] CPRCK, Article 58

[113] Criminal Procedure Code No.04/L-123

Besides the CPCRK, Kosovo has the Law on Free Legal Aid that regulates, among others, the types of legal aid available, the eligibility criteria, the providers and the financing of free legal aid. Pursuant to this law, the Agency for Free Legal Aid was established and financed by the state budget.

Therefore, there are two schemes for the provision of free legal aid in Kosovo: one provides legal aid by a lawyer from KBA appointed ex-officio by the court for mainly criminal cases, whilst the other consists of legal aid provided by the Agency for Free Legal Aid for civil, administrative, minor offences and a few criminal cases[114].

However, in practice there are serious problems. First of all, the Agency for Free Legal Aid does not have the sufficient budgetary resources available. Another concern with the AFLA relates to the provisions of offering free legal aid. For example the legal criteria provided in the law raises some concern in regards to arbitrariness and subjectivity of the legal aid officers who shall decide whether a case is suitable or not for free legal aid by assessing the merits of the case, before they are evaluated by the court in a due process.

The Law on Free Legal Aid provides that the legal aid shall be provided by assessing the validity of the case as a) real value of the request; b) argumentative power of the evidences presented by the applicant and 3) probability for the success of the request. Refusing provision of legal aid on the merits - because of insufficient prospects of success, or because of a claim's frivolous or vexatious nature (for example the claim is brought merely to cause annoyance) - may also be legitimate according to ECtHR. However, to avoid arbitrariness, a legal aid system should establish a fair mechanism for selecting cases likely to benefit and therefore it is for the State to establish systems that comply with ECHR. Failing to make a formal decision on a legal aid request may violate Article 6 of ECHR[115].

Secondly, there are concerns with assigning defence counsels at public expense in cases of non-mandatory defence because a very high number of defendants are not represented by a defence counsel[116]. This is because the appointment of defence counsel at public expense is made only in cases of mandatory defence as foreseen by the CPRCK, when the judge is required to appoint ex-officio a defence council for the defendant, if the latter one fails or refuses to do so[117]. In cases of non-mandatory defence, the judge barely appoints a defence council at public expense, despite having a legal obligation to appoint one even in non-mandatory cases if it is in the interest of the state.

Key issues and practical challenges

[114] Joint EU and CoE funded Project 'Horizontal Facility for Western Balkans and Turkey', "In-depth assessment report of the judicial system", January 2018

[115] A.B. v. Slovakia, App No. 41784/98, ECtHR judgment of 4 March 2003

[116] TAIEX Peer Review Assessment mission to Kosovo on Legal Aid, TAIEX JHA IND/EXP 68398, Mission Time-Frame: 03 to 08 March 2019 (draft version)

[117] Criminal Procedure Code, No. 03/L-123 as published in the Official Gazette of the Republic of Kosovo No. 37/2012 on 28.12.2012

The ombudsman published a report in 2017 with recommendations on the lack of effective legal representation in criminal proceedings[118] and the application of the equality of arms in criminal proceedings, through assignment of the defence lawyers at public expenses. According to the report, the main problem in Kosovo Courts is the assignment of defence counsels at public expense in cases where the defence is not mandatory according to the law, thus making it optional. According to the CPCRK, it has been left at court's discretion that, upon defendant's request and the declaration that he has no financial means to pay the expenses of the defence, to decide whether the interests of justice require assigning legal representation. Based on the findings of the Ombudsperson, courts in Kosovo, in the absolute majority of criminal cases, where according to the CPCRK the defence is not mandatory, have not appointed defence counsel at public expense. Even in cases where the imprisonment sentence was imposed, the defendants were tried without a defence counsel. The OSCE[119] report also found that a high number of defendants are not represented by defence counsels in criminal proceedings because the appointment of defence counsel at public expense is rarely made by judges other than in cases where it is compulsory[120].

The Kosovo Law Institute (KLI) conducted research and monitored a total of 524 court hearings within the Criminal Divisions of the General Departments in Basic Courts of Pristina, Peja and Prizren. In total, 667 defendants were subjects in these criminal proceedings. Out of 667 defendants, 457 **(**68.51%) of them did not have any legal representation, while 163 (31.49%) defendants had legal representation.[121] The report found that despite Kosovo's well-established hierarchy of ECHR based constitutional provisions and subsidiary legislation and delivery mechanism (Agency for Free Legal Aid), the system does not work function for defendants accused of crimes below eight years of imprisonment who do not have the financial means to pay for legal assistance. While it is obvious that the State lacks commitment in protecting fundamental rights via funding, data collected also reveals that judges, prosecutors and police no not fully understand their constitutional mandate to provide a lawyer to in indigent defendant when the interest of justice so requires[122].

Moreover, the data collected through desk research, trial monitoring and interviews conducted with defendants, judges and lawyers show that although free legal aid is a right guaranteed by the Kosovo Constitution and directly applicable international instruments, the police, prosecutors and courts frequently fail to properly identify and inform indigent

[118] Institution of Ombudsperson, Ex-Officio Report with recommendations on the lack of effective legal representation in criminal proceedings, 2017

[119] OSCE, Report of the Review of the Implementation of the Criminal Procedure Code of Kosovo, June 2016

[120] See Article 57 CPCRK (Defence Counsel in Cases of Mandatory Defence). Defence is mandatory, for instance, when the defendant is mute, deaf, or displays signs of mental disorder or disability; at hearings on detention on remand and throughout the time when the defendant is in detention on remand; and from the filing of an indictment if the indictment has been brought against the defendant for a criminal offence punishable by imprisonment of at least 10 years.

[121] Kosovo Law Institute Report: "Legal Aid in criminal cases and applying European Court of Human Rights Standards in Kosovo Courts", September 2017

[122] Kosovo Law Institute Report „Legal Aid in criminal cases and applying European Court of Human Rights Standards in Kosovo Courts", September 2017

criminal defendants of their right to free legal representation in criminal cases. As a result, these accused citizens remain unaware of this vital right, and consequently, advocates of Kosovo are not properly called upon to defend these indigent citizens[123].

Finally, the Constitution of the Republic of Kosovo guarantees the right to free legal aid, but international observers reported that the "Agency for Free Legal Aid, mandated to provide free legal assistance to low-income individuals, was not adequately funded and not functioning as envisioned. The agency offers legal advice but does not represent cases before the court"[124]

Recommendation

- Government to increase the budget for the Free Legal Aid Agency;
- Institutions and bodies in the Kosovo Legal System including the Kosovo Bar Association (KBA), the Free Legal Aid Agency, the wider lawyers community and the government should organize efforts to provide free legal services for indigent citizens;
- Parliament should amend Article 58 of the CPC in order for the "interest of justice" principle to be clarified so that it explicitly states criteria set by the ECtHR
- The KBA, due to its Constitutional obligation to deliver FLA, should demonstrate leadership by advocating for State funds for FLA, but also to expand on their existing KBA pro bono obligations by establishing mechanisms (ie. Legal Clinics or Pro-bono Centre) that enable KBA members to offer indigent citizens free representation in criminal cases;

[123] Legal Aid in criminal cases and applying the ECHR standards in Kosovo courts, Kosovo Law Institute, September 2017. For instance, of the total number of 30 defendants, eight were arrested and only two had legal representation during police questioning/interviews. Out of the 30 defendants only three had legal representation during the interview/questioning at the prosecution stage.

[124] Kosovo - Country Reports on Human Rights Practices for 2018, United States Department of State • Bureau of Democracy, Human Rights and Labour Victims,, page 8.

PART 5: THE PRESUMPTION OF INNOCENCE DIRECTIVE

Presumption of innocence is one of the main legal principles. The Presumption of Innocence Directive applies to natural persons who are suspects or accused persons in criminal proceedings.

It applies at all stages of the criminal proceedings, from the moment person is suspected or accused of having committed a criminal offence until the final decision on the determination of guilt has been reached.

The same thing is provided also by CPCRK, Article 3 of which states "any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court".

The general principle of the Presumption of Innocence Directive requires Member States to ensure that suspects and accused persons are presumed innocent until proved guilty according to law. Whereas, later it also provides with the remedies. According to the Directive, Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.

This Directive covers four distinct aspects:

a) Public references to guilt;
b) Presentation of suspects and accused persons;
c) The burden of proof;
d) Right to remain silent and right not to incriminate oneself.

Overview of the Directive on Public references to guilt

According to the paragraph 1 of Article 4 of the Directive, public authorities shall refrain from making public statements referring to the suspect or accused person as being guilty until guilt has been proved according to the law. This obligation is without prejudice to the acts of the prosecution which aim to prove the guilt of the suspect or the accused person, and to preliminary procedural decisions taken by competent authorities on the basis of incriminating evidence.[125]

However, there is an exception, where the Directive provides that authorities shall be able to disseminate information on the criminal proceedings to the public only where strictly necessary for the purpose of the criminal investigation or in the public interest. But this information has to be objective and used in a context that is reasonable and proportionate and must not create the impression that the individual is guilty.[126]

[125] Toolkit
[126] Toolkit

In case of breaches of the obligation not to refer to suspects or accused persons as being guilty, remedies shall be available.[127]

Overview of Kosovar Laws on Public references to guilt

The presumption of innocence is recognised as a general principle of criminal procedure law in Kosovo, but there are no specific legal provisions that place restrictions on public authorities making statements regarding the guilt of a suspect or accused person.

If an individual is wrongly labelled as a 'criminal' before a final decision has been made by a court in their criminal case, they may have recourse to civil remedies. The Civil Law against Defamation and Insult enables an individual *inter alia* to seek a court order to stop the defamation and insult and seek compensation for moral and material damage caused by the defamation and insult, unless one of the exemptions to liability is established in accordance with this Law.[128]

Overview of the Directive on the Presentation of suspects and accused persons

The Directive provides that Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint. These measures of physical restraint include, but are not limited to handcuffs, glass boxes, cages and leg irons. Simultaneously, the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes.[129]

These measures could be applied when so required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons.[130]

Overview of Kosovar Laws on the Presentation of suspects and accused persons

The CPCRK has no explicit provision regarding the presentation of suspects and accused persons, but it provides that the personality and dignity of a person held in detention on

[127] Directive
[128] Civil law against Defamation and Insult
[129] Directive
[130] Toolkit

remand must not be abused. The detainee on remand must be treated in a humane manner and his or her physical and mental health must be protected.[131]

However, the CPCRK does recognise that 'restrictions' may be used where necessary to prevent escape communications that might be harmful to the effective conduct of proceedings.[132] It is unclear here what types of restrictions are permitted, but it can be assumed that this provision can be relied upon to justify the use certain types of physical restraints.

Overview of the Directive on the burden of proof

Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.

The Directive provides the principle *in dubio pro reo,* according to which any doubts as to the question of guilt is to benefit the suspect or accused person.

Overview of Kosovar Laws on the burden of proof

According to the CPRCK, the defendant and the state prosecutor are equal parties in criminal proceedings. However, if the state prosecutor determines during the investigation that there is sufficient evidence to proceed to the main trial, he/she shall draft the indictment and shall present the facts on which he or she bases the indictment and shall provide evidence of these facts.[133]

This means that the prosecutor prior to filling the indictment has to analyse the evidence that incriminate the suspect, as well as those that go in his/her favour. The prosecutor can propose evidence also during the main trial, when the trial panel too shall proceed all the evidence that considers necessary for correct and complete determination of the factual situation.
Based on what is said above, it results that the burden of proof is on the prosecution, and subsidiarity also on the court. If the prosecution and the court are unable to prove the guilt of a suspect, following the presumption of innocence, the suspect shall be acquitted, because the law does not require him/her to prove his/her innocence.[134]

[131] CPCRK, Article 194
[132] Ibid
[133] CPRCK, Article 9
[134] Commentary of the CPCRK, pg. 93, 94

Overview of the Directive on the not to incriminate oneself

The right to remain silent and not to incriminate oneself are very important aspects of the presumption of innocence. Suspects and accused persons should not be forced, when asked to make statements or answer questions, to produce evidence or documents or to provide information which may lead to self-incrimination.[135]

Article 7 of the Directive provides that Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed. They also have the right not to incriminate themselves.[136]

However, this shall not prevent the authorities from gathering, through legal powers of compulsion, evidence which has an existence independent of the will of the suspects or accused persons.[137]

Another important thing covered by this same article is the fact that Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons. But this does not mean that exercising the right to remain silent and to no incriminate oneself shall be used against the suspects or accused persons, as well as it shall not be considered as evidence that they have committed the criminal offence concerned.[138]

Besides this, it should be further mentioned that Member States may decide that the conduct of the proceedings, regarding minor offences, may take place in writing or without questioning of the suspect or accused person, providing that this complies with the right to a fair trial.[139]

Overview of Kosovar Laws on the right not to incriminate oneself

The CPCRK in Article 10 provides that the defendant shall not be obliged to plead his/her case or to answer any questions and if he/she pleads his/her case, he/she shall not be obliged to incriminate himself/herself or his/her next of kin nor to confess guilt. Further it provides that this right is not implicated when a defendant has voluntarily entered into an agreement to cooperate with the state prosecutor.[140]

[135] Directive, recital 25
[136] Directive, Article 7
[137] Toolkit
[138] Directive
[139] Ibid
[140] CPCRK, Article 10

The Criminal Procedure Code of the Republic of Kosovo in the article where it provides the Warnings Required to be Read to Witnesses, Expert Witnesses, Defendants and Cooperative Witnesses, in the third paragraph, amongst others it provides "[…]You have the right to give a statement, but you also have the right to remain silent and not answer any questions, except to give information about your identity. You have the right not to incriminate yourself. […]" […] The right to remain silent and not to answer any questions, except to give information about his/her identity […], is one of the rights listed on article 167 of the CPCRK which provides the rights of an arrested person.

Kosovar legislation has explicitly provided the right not to incriminate oneself, where amidst others it is provided that at the beginning of the initial hearing the single trial judge or presiding trial judge shall instruct the defendant of the rights not to plead his or her case or to answer any questions and, if he or she pleads his or her case, not to incriminate himself or herself or his or her close relative, nor to confess guilt […].[141]

As for the cooperative behaviour, similar to the Directive, the Criminal Code of the Republic of Kosovo provides with mitigating circumstances that shall be considered (but not limited to) by the court, when determining the punishment. Amongst others it is provided "general cooperation by the convicted person with the court, including voluntary surrender" and "voluntary cooperation of the convicted person in a criminal investigation or prosecution".[142] Also, the CPRCK provides with the possibility of a defendant to be declared a "cooperative witness", which later will be taken into consideration by the court for sentencing purposes.

But, the CPCRK provides that in all cases when a defendant seeks to enter an agreement to plead guilty to a crime that carries a punishment of one (1) year or more of long period imprisonment or lifelong imprisonment, the defendant must be represented by counsel.[143]

Key issues and practical challenges

In general Kosovo's legislation is well harmonised in regards to the presumption of innocence Directive. Although there are no specific provisions in the CPCRK regarding public reference to guilt or a regulation that prohibits media and/or state officials from making public statements on high ranking cases, referring to an individual's reference to guilt before trial; the only way to react against such a reference is by suing for defamation via civil proceedings provided by Civil Law in Kosovo. Although this is not the best solution, taking into account the lengthy proceedings in the civil field in Kosovo, it's the only protection provided taking into account the freedom of press and other media.

Even though the CPRCK does not explicitly provide a specific provision that regulates the presentation of suspect and accused, it still provides that the personality and dignity of such a

[141] CPCRK, Article 246
[142] CCRK, Article 74.3
[143] CPCRK, Article 57, par. 1.5

person must be respected. Based on the discussions conducted as a result of the workshops organized by KLI in all regions in Kosovo, results that in practice there are no problems in regards to the presentation of a suspect or accused whom are brought before the court. In fact suspects or accused wear their own choice of clothing and all restraints are removed prior to the commencement of the trial.

National legislation in regards to presumption of innocence is well harmonised with the Directive, thus not broadly allowing for challenges in practice in regards to the burden of proof. Further illustrating that in cases where there is not enough evidence to prove the guilt of the suspect by the prosecution, the suspect will be found not guilty, without being forced to prove their innocence.

Recommendations

- Courts to treat defamation and insult cases with priority
- Media should always take into account the presumption of innocence when reporting about cases

PART 6: THE CHILDREN DIRECTIVE

The EU Commission recognized that despite the existence of numerous international and European standards in the field of juvenile justice, the level of procedural safeguards for children in conflict with the law was insufficient to guarantee children's effective participation in criminal proceedings, and that improvements needed to be made to foster mutual trust between Member States.[144]

The Children Directive establishes common minimum standards on procedural safeguards for children that are binding across the EU, and it is designed to make the effective assertion of child suspects' rights more straightforward by giving them binding force under EU Law.[145] This Directive applies to children who are suspects or accused persons in criminal proceedings. It applies until the final determination of the question whether the suspect or accused person has committed a criminal offence, including, where applicable, sentencing and the resolution of any appeal.[146] This Directive does not affect national rules determining the age of criminal responsibility.[147]

The main purpose of the juvenile justice system in Kosovo is to emphasize the well-being of the juvenile and to ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the criminal offence.[148] By incorporating the UN Convention on the Rights of the Child within its Constitution, Kosovo has made all the provisions of this convention directly applicable having supremacy over primary and secondary legislation in force. The positive law in Kosovo, states that when the perpetrators are minors, or when minors are victims or witnesses, proceedings are governed by the Juvenile Justice Code (JJC) or the relevant law.[149]

The JJC is adamant in providing what is in the best interest of the juvenile as well as adhere to the Directive. Measures imposed on juveniles include diversion and educational measures and punishment that may be imposed include fines, orders for community service work and juvenile imprisonment. The duration of imposed measures or punishments is at the discretion of the court in accordance with the present Code[150]. Moreover, the court shall also consider certain factors that play into the selection of applicable measures and punishments such as: the type and gravity of the criminal offence, the age of the juvenile, the degree of psychological development, his character and aptitudes, the motives that induced him or her to commit the criminal offence, his education at that stage, the environment and the

[144] EU Directive on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings, page. 7
[145] Ibid
[146] Directive, Article 2.1
[147] Ibid, Article 2, par. 5
[148] JJC, Article 4, par. 2
[149] CPCRK, Article 27
[150] JJC, Article 12

circumstances of his life, whether any measure or punishment has been previously imposed and other circumstances that may affect the imposition of a measure or punishment.[151]

Based on the JJC a special procedure and treatment of juveniles involved in criminal activity is required. Therefore, Kosovo has established the Juveniles Department within each Basic Protection Office, Appellate prosecution Office, Basic Court, and Court of Appeals.

Overview of the Directive on the right to information

The Children Directive requires Member States to ensure that children are informed promptly about their rights when they are made aware that they are suspects or accused persons in criminal proceedings.[152]

The information should be given in writing, orally, or both, in simple and accessible language.[153] Some particular rights children have under the Children Directive include[154]:

- Right to have the holder of parental responsibility informed;
- Right to assistance by a lawyer;
- Right to privacy;
- Right to be accompanied by the holder of parental responsibility; and
- Right to legal aid.

At the earliest possible stage of their proceedings, children should be informed of additional rights, including the[155]:

- Right to an individual assessment;
- Right to a medical examination;
- Right to limitation of deprivation of liberty and use of alternative measures;
- Right to be accompanied by the holder of parental responsibility during court hearings;
- Right to appear in person at trial; and
- Right to effective remedies.

Upon deprivation of liberty, information shall be provided of the[156]:

- Right to specific treatment during deprivation of liberty.

[151] JJC, Article 13 par.1
[152] Directive, Article 4
[153] Directive, Article 2
[154] Toolkit, Pg. 9
[155] Ibid
[156] Ibid

Overview of Kosovar Laws on the right to information

The JJC is in complete compliance with the Directive when it comes to informing the juvenile of their rights to information. Like the Directive, the JCC affords the same rights to information such as; the right to inform the hearer of the parental responsibility, the right to be assisted by a defence counsel, right to privacy, with to be accompanied by the bearer of parental responsibility during the stages of proceedings, right to legal aid, right to individual assessment, right to medical examination etc.[157] Based on the law itself there is nothing that prohibits the juvenile from asserting their rights to information. Although these rights are meant to be given both verbally and in written forms in a simple and understandable language, in practice, like with adult defendants, these rights are not provided for in writing.

According to law practitioner feedback from workshops conducted by KLI, CLARD and Fair Trials in March 2019, there have been cases where the language used in such proceedings were not understandable and simple to the juvenile defendant; therefore Courts in particular need to implement this right afforded to juveniles so that they are able to understand the proceedings against them.

Overview of the Directive on the right to parental support

The Directive requires Member States to ensure the holder of parental responsibility is informed of the child's rights. According to Recital 22, this should be done as soon as possible and, in such detail, necessary to safeguard the fairness of proceedings and the effective exercise of the rights of the child.[158]

The Directive requires that another appropriate adult, nominated by the child and accepted by the competent authorities, should be informed if that information to the holder of parental responsibility:

- would be contrary to the child's best interests;
- is not possible because, after reasonable efforts have been made, no holder of parental responsibility can be reached or his or her identity is unknown;
- could, on the basis of objective and factual circumstances, substantially jeopardise the criminal proceedings.[159]

If the child does not appoint an appropriate adult, or the designated adult is not acceptable to the competent authorities, the competent authorities should designate another person, taking into account the best interests of the child.[160]

[157] JJC, Article 40 (7)
[158] Toolkit, pg. 9
[159] Directive, A5
[160] Toolkit, pg. 9

When discussing Parental support, besides the right to have the holder of parental responsibility informed, the Directive provides also with the right to be accompanied by the holder of parental responsibility during proceedings, requiring Member States to ensure that children are accompanied by the holder of parental responsibility during court proceedings.

Furthermore, Member States should ensure the holder of parental responsibility or another appropriate adult is present at proceedings, other than at court hearings, if it is in the child's best interest and the presence of that person does not prejudice criminal proceedings.[161]

Overview of Kosovar Laws on the right to parental support

The JJC provides that the parent, adoptive parent or guardian of the minor may attend actions undertaken in preparatory proceedings.[162] Parents, adoptive parents or guardian are entitled to accompany the minor in all proceedings, and may even be required to participate if it is in the best interest of the minor.[163]

The juvenile judge may exclude a parent, adoptive parent or guardian from participation in proceedings if such exclusion is in the best interest of the minor. In such cases, the court may nominate a temporary guardian for the minor, from a record prepared by the Centre for Social Work, holding names of social workers, teachers, pedagogues, or volunteer specialists.[164]

Overview of the Directive on the right to assistance by a lawyer

Child suspects and accused persons have the right of access to a lawyer in accordance with the Access to a Lawyer Directive (2013/48/EU). Member States must ensure children are assisted by a lawyer to allow them to exercise their rights effectively.

Children shall be assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons:

- Before they are questioned by the police or other law enforcement or judicial authority;
- At the commencement of investigative or evidence-gathering acts (these include, at least, identity parades; confrontations and reconstructions of the scene of a crime);
- After deprivation of liberty;
- Where they have been summoned to appear before a court, in due time before they appear before that court.

[161] Toolkit, pg. 12
[162] JJC, Article 55, par. 2
[163] JCC, Article 42, par. 1
[164] JCC, Article 42

Such assistance includes:

- The right to meet and communicate in private, including prior to questioning;
- To be assisted by a lawyer during questioning; and
- To be assisted during investigative acts.

Member States may derogate from some of the above provisions, but in any event, children have a right to the assistance of a lawyer:

- When they are brought before a court or judge to decide on detention; and/or
- During detention.

Member States must respect the right to confidentiality between the lawyer and child, and the right to confidentiality is non – derogative.

Also, it is important to know that legal aid must be made available where necessary to guarantee the effective exercise of the right to be assisted by a lawyer.[165]

Overview of Kosovar Laws regarding assistance by a lawyer

In Kosovo, every minor deprived of his or her liberty has the right to 'prompt' access to legal and other appropriate assistance[166]. The law also provides that the state has an obligation to make sure that the child is assisted by a lawyer at all times. According to the JJC the minor must have a defence counsel from the beginning till the end of the proceedings. If the minor, the legal representative or his/her family member does not engage a defence counsel of their own, or if the minor is not assisted by a defence counsel in the course of the proceedings, the juvenile judge or the competent authority conducting the proceedings shall appoint *ex officio* a defence counsel at public expense.[167] The children should be informed on the right to defence counsel at public expense before the first examination.[168]

Since the right to legal aid is a constitutional right its especially important when persons who need legal aid are children. The JJC stipulates that a defence counsel shall be appointed at public expense at the request of the minor, the legal representative or his/her family member, if he/she is unable to pay for the cost of his or her defence.[169] Furthermore, the quality of defence is vital in juvenile proceedings, and the JJC provides that the defence lawyer of the accused minor can be only a professional registered at the Kosovo Bar Association[170].

[165] Toolkit, pg. 12
[166] JJC, Article 4 (7)
[167] JJC, Article 41
[168] Ibid
[169] Ibid
[170] Ibid, par 2

Over the last ten years, considerable training has been offered for all legal professionals involved in juvenile justice, since lawyers had the need for specialization in dealing with minors/children. This then led to the establishment of the Committee for Children within the Kosovo Bar association, where the need for coordination among KBA and other institutions was more than welcomed. A training manual was also established in 2013 for lawyers in the field of justice for children and followed by an appendix for capacity building for lawyers in 2015[171].

Based on practitioner feedback, lawyers raised concerns that unlike judges and prosecutors whom are specialised in dealing with minors/children, there are no specialised lawyers in this regard and find that this would be a positive change and aspect for minors/children in conflict with the law. Furthermore, specialised training for all justice professionals was also recommended by UNICEF[172]

Overview of the Directive on assessment of needs

Member States must ensure that specific needs of the child, such as protection, education, training, and social integration, are taken into account. To do so, an individual assessment must be carried out by qualified personnel, following, as far as possible, a multidisciplinary approach to assess the child's personality, maturity and their economic, social and family background, as well as any vulnerabilities (such as intellectual disabilities and communication difficulties). Assessments should be carried out at the earliest possible stage and with close involvement of the child.

The assessment can establish and note relevant information that could be helpful in the determination of:

- Whether any specific measures are of benefit to the child;
- The appropriateness and effectiveness of precautionary measures; and
- Decisions in the criminal proceedings, including sentencing.

There can be cases when no individual assessment is conducted. In such cases, when individual assessment is absent, an indictment may nevertheless be presented provided that this is in the child's best interests and that the individual assessment is in any event available at the beginning of the trial hearings before a court.[173]

[171] Unicef, Kosovo Programme - "Reform in Justice for Children Booklet", available at: https://www.unicef.org/kosovoprogramme/sites/unicef.org.kosovoprogramme/files/2019-05/Justice%20for%20Children%20Booklet.pdf

[172] Ibid

[173] Directive, Article 7

Member States may derogate from the obligation to carry out an individual assessment where such derogation is warranted in the circumstances of the case, provided that it is compatible with the child's best interests.[174]

Overview of Kosovar Laws on assessment of needs

In Kosovo, both the JJC[175] and CPCRK[176] provide that 'individual assessment' of a child can be conducted and that mental health examinations can only be mandated by juvenile judges or juvenile panel. However, unlike the Directive, the JCC does not go into detail about the specifics of what an individual assessment encompasses, rather it just states that juveniles have the right to individual assessment.

The JJC enables juvenile judges to appoint an appropriate mental health expert when it is necessary to establish the state of the minor's mental health either at the time of the commission of the criminal offence or the competency of the minor to stand trial, or both. The juvenile judge may make such appointment *ex officio* or on the request of the public prosecutor, defence counsel, parents, adoptive parents or guardian. The examination is carried out in an appropriate and confidential environment, and the opinion of the mental health expert is confidential, and shall only be disclosed to the court and the parties.[177]

Identifying any mental health conditions and psychosocial disabilities that a child might have is no doubt crucial for assessing their needs. However, the individual assessment envisaged in the Directive is far broader than an examination carried out solely by a mental health professional. It is a more holistic process that is aimed at assessing a child's needs in relation to their protection, education, training, and social integration.

Overview of the Directive on medical examination

Children deprived of liberty have the right to a medical examination without undue delay with a view to assessing their mental and physical condition. A request for a medical examination can be made by the child, the holder of parental responsibility, or the child's lawyer. This examination should be carried out by a professional and should be as non-invasive as possible.[178]

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[174] ibid

[175] JJC, Article 40 par. 4.6

[176] CPRCK, Article 130 par 5 states that "A person who has not reached the age of eighteen (18) years, especially if that person has suffered damage from the criminal offence, ***shall be examined considerately*** to avoid producing a harmful effect on his or her state of mind. If necessary, a child psychologist or child counsellor or some other expert should be called to assist in the examination of such person"

[177] JJC, Article 54

[178] Toolkit, pg. 11

The conclusion of the medical examination shall be recorded in writing and should be taken into account when determining the capacity of child to be subject to questioning and other investigative acts or measures to be taken towards the child.[179]

The Directive also provides that Member States shall ensure that another medical examination is carried out where the circumstances so require.

Overview of Kosovar Laws on medical examination

The law in Kosovo provides that children shall undergo a general medical examination prior to the commencement of any period of detention on remand to ensure that his/her health is consistent with detention on remand.[180] It also provides that children undergo a medical examination within twenty-four hours of being admitted to an educational-correctional institution.[181]

Kosovar laws also stipulate that children should also benefit from continuing medical assistance while deprived of liberty. The JJC provides that during the time of deprivation from liberty imposed as a penalty, a minor offender shall receive […] if necessary, medical assistance to facilitate his/her rehabilitation.[182]

Overview of the Directive on deprivation of liberty

The Directive requires special attention when it comes to the deprivation of liberty of children. According to the Directive Member States shall ensure that deprivation of liberty of a child at any stage of the proceedings is limited to the shortest appropriate period of time.[183]

Deprivation of liberty should be used only as a measure of last resort. The decision to deprive a child of liberty must be reasoned and subject to judicial review, at regular intervals, at the request of the child, the child's lawyer, or of a judicial authority which is not a court. Decisions should be made without undue delay.[184]

Even though deprivation of liberty shall be used only as a measure of last resort, the Directive has provided with specific treatment required in such cases. It requires that children should be held separately from adults unless it is not in the child's best interest to do so. In the case of police custody, member states may deviate from this when exceptional circumstances make separation impossible, or when it is in the best interest of the child.[185]

[179] Directive, Article 8
[180] JJC, Article 60
[181] JJC, Article 85 par. 1
[182] JJC, Article 4 par.4
[183] Directive, Article 10
[184] Toolkit, pg. 11
[185] Ibid

When children are detained, appropriate measures should be taken to[186]:

- Ensure and preserve health, and mental and physical development;
- Ensure the right to education and training, including where they have disabilities;
- Ensure effective and regular exercise of the right to family life;
- Ensure access to programmes that foster development and reintegration into society;
- Ensure respect for their freedom of religion or belief.

Except all these mentioned above, in case of such measure, Member States shall endeavour to ensure that children who are deprived of liberty can meet with the holder of parental responsibility as soon as possible, where such a meeting is compatible with investigative and operational requirements.[187]

Overview of Kosovar Laws on deprivation of liberty

Kosovar laws allow the police to arrest and detain a minor for an initial period that does not exceed twenty-four hours.[188] A minor may then be held in detention on remand on the initial ruling for a maximum of thirty days from the day he/she was arrested, and this period may be extended by a juvenile panel of the competent court for an additional period of up to sixty days.[189]

The law states that the provisional arrest, police detention or detention on remand of a minor shall be ordered only as a measure of last resort,[190] and where appropriate, diversionary and educational measures should be considered.[191] According to a monitoring report conducted by civil society on the execution of measures and sanctions for minors at the Correctional Centre in Lipjan (CCL) conducted in 2016, found that during the first six months of the year (January-June 2016) the number of minors at the CCL was 95, where 92 were male and 3 were female. From this general number of minors, 11 were sentenced with imprisonment, 40 with educational measures and 41 were in detention[192]. They also raised grave concerns in in the extension of detention in remand for minors, use of abuse as means of discipline, lack of educational facilities etc. Yet improvements have been made since, according to the Kosovo Report 2019[193], Kosovo has continued to make progress on juvenile justice, the amendments to the Juvenile Justice Code in October 2018, and reduced pre-trial detentions for juveniles in

[186] Ibid
[187] Directive, Article 12.6
[188] JCC, Article 60 par. 1
[189] JCC, Article 61 par. 2
[190] JCC, Article 61
[191] JCC, Article 4, par. 3
[192] KOMF - "Six months Monitoring Report on execution of measures and sanctions for minors at the Correctional Center in Lipjan, 2016", available at: http://www.komfkosova.org/wp-content/uploads/2016/11/Raporti-i-monitorimit-te-QKL_KOMF1.pdf
[193] Kosovo 2019 Report, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-kosovo-report.pdf

conflict with the law from 12 to a maximum of six months. The new Code has increased the number of available diversity measures for juveniles.

Moreover, if children are held in detention on remand in a detention facility, they must be separated from adult detainees, and while there, have access to social, educational, vocational, psychological, medical and physical assistance, as appropriate for his/her age, gender and personality.[194] The Kosovo Correctional Service in Lipjan is the result of such detention where categories of persons are separated into pavilions based on their sentence.

There are also provisions relating to the timely and diligent treatment of the cases involving child suspects and accused persons. The JCC provides that in cases when a minor has been detained on remand, he/she shall be brought as speedily as possible for adjudication.[195]

Once the court imposes an alternative measure to detention (for example, an educational measure), it cannot later impose a more severe measure against the minor even if additional circumstances or new evidence comes to light. Article 94 (1) JCC provides that "If, after a final ruling on imposing an educational measure has been rendered, additional circumstances, new evidence or evidence which existed but which was not known at the time the decision was rendered comes to light which would clearly have affected the selection of the measure, the court shall review the ruling and may terminate the execution of the measure or may substitute it with another educational measure. The competent judge may not impose a more severe measure on the basis of newly-considered evidence".[196]

Overview of the Directive on privacy

The Directive explicitly requires from Member States to ensure that the privacy of children during criminal proceedings is protected.[197] Therefore, court hearings involving children should either be held in the absence of the public, or courts and judges may decide to hold such hearings in the absence of the public.

It is also required that Member States encourage the media to implement self-regulatory measures to achieve this objective.[198]

Overview of Kosovar Laws on privacy

According to the JCC, the child's right to privacy shall be respected at all stages in order to avoid harm being caused to him/her by undue publicity or by the process of labelling. In

[194] JCC, Article 4 par. 6 and Article 62 par. 1
[195] JCC, Article 40, par. 1
[196] JCC, Article 94 par. 1
[197] Directive, Article 14
[198] Toolkit, pg. 12

principle, no information that may lead to the identification of a minor offender can be published.[199]

Furthermore, the JCC provides that all proceedings involving minors shall be confidential. No recording of the proceedings, including audio-visual recording, may be made public without the written authorization of the court.[200] The same rule applies to proceeding involving adults tried for criminal offences committed as minors.

During the main trial, the juvenile panel may also exclude all or certain persons be removed from the session with the exception of the minor, the public prosecutor, the defence counsel, the representative of the Guardianship Authority and the representative of the Probation Service. Additionally, in exceptional circumstances, the juvenile panel may order that the parent, adoptive parent or guardian be removed from the session, if there are reasons to believe that such exclusion is in the best interest of the minor.[201]

Besides the fact that all case files and proceedings involving minors must be kept confidential, an interesting and important element provided by the JCC is the fact that the criminal record of a child is expunged as soon as he/she turns 21.

The court shall keep a record of the measures and punishments imposed on a minor. The Probation Service must have a copy of this record. But all this shall be expunged when the person has reached the age of twenty-one (21) years. Prior to being expunged, data on the measures and punishments imposed on a minor is required to be confidential and only the court and the public prosecutor's office may obtain such data when it is necessary for conducting proceedings against the same individual while he or she is still a minor.[202]

Overview of the Directive on the right of children to appear in person at, and participate in, their trial

Article 16 of the Directive provides that Member States shall ensure that children have the right to be present at their trial and take all necessary measures to enable them to participate effectively in the trial, including by giving them the opportunity to be heard and to express their views.[203] Also, under Recital 60 of the Directive, it is required by Member States to take appropriate measures to secure the child's attendance at trial, including sending summons to the holder of parental responsibility.[204]

[199] JCC, Article 4 par. 8
[200] JCC, Article 47, par. 1
[201] JCC, Article 66, par. 3
[202] JCC, Article 18, par. 1, 2 & 3
[203] Directive, Article 16
[204] Toolkit, pg. 12

If in any case, a minor is not present at his/her own trial, then he/she has the right to a new trial or another legal remedy.[205]

Overview of Kosovar Laws on the right of children to appear in person at, and participate in, their trial

The JJC provides that minors shall be present at the main trial[206]. In addition the JJC also stipulates that "a minor shall not be adjudicated in absentia".[207]

Besides being present, minors have also the right to be heard. Therefore, the JJC provides that a child participating in criminal proceedings shall be given an opportunity to express himself or herself freely.[208]

Key issues and practical challenges

Over the past ten years, Kosovo has developed a solid juvenile justice system that aims to treat children aged between 14 and 18 who are in contact with the law in a way that respects their human rights. The necessary laws, procedures, institutions, and capacities are mostly in place to treat children in accordance with the relevant legal international standards. With the adoption of the amended Juvenile Justice Code and its entering into force as of 2019, there have been improvements to the protection of the rights of children in contact with the law, in line with the recommendations of the United Nations Committee on the Rights of the Child. Furthermore, according to UNICEF, the JJC and other related criminal primary and secondary legislation is up to date and in full compliance with EU, International standards and best practices, guarantying a specialised system for children in contact with the law and protection of their rights during legal proceedings and execution.[209]

One of the main things to bear in mind is the fact that in these kinds of proceedings children are the key element, thus they shall be treated carefully and delicately. In order to exactly know how to provide the best care for them, continuous training is necessary. All judges and prosecutors dealing with minors undergo advanced training organized by KJC, however, the same cannot be said for defence counsel or other stakeholders within the juvenile court system.

[205] Ibid
[206] JJC, Article 54 par. 1
[207] JJC, Article 40, par. 2
[208] JJC, Article 4, par 5
[209] Unicef, Kosovo Programme - "Reform in Justice for Children Booklet", available at: https://www.unicef.org/kosovoprogramme/sites/unicef.org.kosovoprogramme/files/2019-05/Justice%20for%20Children%20Booklet.pdf, page 61

It is worth mentioning that there is a distinction in the Children directive between the right of access to a lawyer, and the obligation on member states to ensure that a child is assisted by a lawyer.

Recommendations

- Continuous specialised training for lawyers, judges, prosecutors, police and other justice professionals
- Proper implementation of ensuring impositions of detention for the shortest appropriate period of time, by not exceeding six months
- All stakeholders within the juvenile system to use child friendly language throughout criminal proceedings all the time.
- Implementation of alternatives to detention