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Unlawful and arbitrary closure of court hearings to the public regarding criminal cases

Analysis of legislation and ECHR practice on public nature of court hearings and wrong practice created by the Justice System in Kosovo

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ABOUT KLI

KLI, Kosovo Law Institute, is a non-governmental and non-profit organization of public policy, a think tank specialized in the justice sector.

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1. Executive summary

The justice system has constantly been subject of criticism for non-transparency and public accountability, despite the fact that stakeholders within the justice system constantly proclaimed that their work is based on these principles. In this regard, besides other points in which the justice system fails in implementation of the principle of transparency, KLI during systematic monitoring process of court hearings in the criminal field, has found cases of unlawful and arbitrary closure of scheduled court hearings, information that is important to the public, media and civil society.

In legislative aspect Kosovo has reached approximation of legal framework regarding transparency and publicity of court's work, in accordance with international practices and standards applicable in Kosovo or on which Kosovo aspires to be member in the future, as that of the states of the European Union. In this direction, practice of the European Court for Human Rights (ECHR), whose jurisprudence is mandatory in the constitutional system of the Republic of Kosovo, has set standards in this field.

In the case *Malhous against Czech Republic*, ECtHR has stressed the importance of public court hearings: *“Court re-stressed that public holding of court hearings constitutes a fundamental principle sanctioned in paragraph 1 of article 6 of the ECHR. This public character protects litigants against administration of justice in secret way without public review. Also, is one of the ways by which confidence in the courts can be kept. By making the administration of justice transparently, publicity contributes in achieving purpose of paragraph 1 of article 6 of the ECHR, that means a fair trial, guarantee, which is one the fundamental principles of every democratic society, within the meaning of the ECHR”*. Numerous other cases of the ECHR have set very specific standards that a judge should apply when deciding whether the hearing will be open or closed to the public. Based on article 53 of the Constitution of the Republic of Kosovo, these standards of the ECHR are mandatory for the justice system in the Republic of Kosovo.

Apart from ECtHR, also the European Charter for Fundamental Rights (ECFHR) expressly stipulates that the trial should be public. One of the main paths of the Republic of Kosovo for membership in the European Union is also the Stabilization Association Agreement. In this agreement, approximation of legislation of Kosovo with the legislation of European Union (EU) is one of the fundamental categories of this agreement. Among other things, this agreement stipulates that “Parties know the importance of approximation of existing legislation of Kosovo with that of EU and its effective implementation. Kosovo will try to ensure that its existing laws and future legislation to gradually move towards compliance with the EU Acquis. Kosovo will ensure that existing laws and future legislation will be implemented and applied properly”¹. For this reason, approximation of legislation of the Republic of Kosovo and its implementation with

¹ *Stabilization Association agreement between Kosovo*, on the one side and the European Union and the European Community of Atomic Energy, on the other side. Article 74. (see the link https://www.mei-ks.net/repository/docs/kosovo-eu_saa_final_sq.pdf). (Accessed for the last time on July 22 2019).*

that of the EU, is a necessary condition of the Republic of Kosovo for further advancement on the path towards EU.

Although, as we have seen above, local and international legal provisions and also ECtHR practice give vital importance to open court processes for public and interested parties, to ensure a fair process, that has final purpose to gain public confidence on the independence and impartiality of the courts, judges of the judicial system of the Republic of Kosovo results that they are not yet prepared and do not understand their obligations and responsibilities in this field. This is because a certain number of hearings of criminal nature in the judicial system that KLI systematically monitors, are closed to the public by judges, and in such cases, the public, media and civil society are not given the decision for the closure of court hearings, while often the reasoning in the decision is in violation with the principles stipulated in the Constitution and CPCRK. As for hearings for the review of requests for the assignment of security measures, some courts have created an unlawful practice, by qualifying these hearings as closed in principle, and by creating diversion in treating this issue within the courts of the Republic of Kosovo.

Although media and civil society reports for the closure of scheduled hearings in unlawful and arbitrary way, for which public is interested to be informed, all stakeholders within the justice system are silent concerning these cases.

KLI suggests that the fact that a assigned judge has independence to decide, doesn't make him immune to unlawful decisions for the closure of hearings that by the law are public, and so on to the cases when the same exclude the public and media in completely arbitrary way, without taking any formal decision.

KLI estimates that publicity of the court hearings should be understood in that form that in any circumstance does not damage the administration of justice. On the contrary, as the ECtHR's practice stipulates, it protects litigants against the administration of justice in a confidential manner and is one of the ways in asserting confidence in the courts. Judges should be aware that publicity of the court hearings, according to the ECHR, is one of the elements that forms the right for a regular process.

Also, transparency of the justice system is not taken for granted, which can be proclaimed in a general way. There are specific metrics for assessing transparency. Regarding the judicial system, greater non-transparency is presented in cases when the public is excluded from the attendance of court hearings, which are open by the law, and for which the public has interest to be informed.

2. Public nature of court hearings in the legal system of the Republic of Kosovo

One of the main attributes of a trial is that the same in principle should be public. This attribute of trial is stipulated alongside other small attributes by which is also specified the fair trial. An example of this is the European Convention for Human Rights (ECHR) that stipulates that

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”. . So, “**public**” in this case is one of the three main attributes of the right for a regular process.

On the other side, best international practices and standards, as well as legislation of the Republic of Kosovo stipulate the obligation that hearings in principle to be open to the public. In this regard, the European Court for Human Rights (ECHR) has a keyrole with its jurisprudence , which is mandarory in the consitutional system of the Republic of Kosovo, has set standards in this field.

The following will address the obligations of the justice system in the Republic of Kosovo for the hearings to be public, also addressing the ECtHR jurisprudence.

2.1. Internal legislation

2.1.1. Constitution of the Republic of Kosovo

Constitution of the Republic of Kosovo, guarantees *the right for a Fair and Impartial Trial*”. Moreover, the Constitution stipulates legal guarantees that courts have an obligation to ensure public trials. . “*Trial is public, except that when the court, in special circumstances, considers that, for the good of justice, it is necessary exluding the public, or media representatives, because their presence is considered to cause danger to public order or national security, interests of minors, or for the protection of private life of parties in the process, determined by the law*”².

For this reason, publicity of court hearings is a constitutional principle, disrespect of that principle automatically implies violation of the Constitution of the Republic of Kosovo.

2.1.2. Criminal Procedure Code

On the other hand, the Criminal Procedure Code of the Republic of Kosovo (CPCRK) is in the same line with the Constitution of the Republic of Kosovo, that builds the principle that “*The court review is open*”.

Exeptionally, CPCRK, has foreseen situations, when judges can exclude the public throughout court review or from a part of it, when this is necessary for:

- 1.1. Keeping official secrets;
- 1.2. Keeping secret information that will be in danger by the open review;
- 1.3. Keeping order and respecting the law;
- 1.4. Protection of personal life or family members of the accused, the injured party or other participants in procedure;

² *Constitution of the Republic of Kosovo*. Article 31

- 1.5. Protection of children's interest; or
- 1.6. Protection of the injured party, cooperative witnesses or witnesses, as foreseen in Chapter XIII of this Code".

CPCRK in accordance with the constitutional provision regarding publicity of court hearings, has built the standard that in principle a trial is public, while exceptions from this principle are defined by positive enumeration, as the trial can be closed exclusively only in determined circumstances foreseen by article 294, and not for other reasons.

Further, the CPCRK regards the exclusion of the public from judicial review in violation of the law as a substantial violation of criminal procedure provisions. Article 384 of the CPCRK stipulates that "a substantial violation of the provisions of criminal procedure shall be considered if: ... 1.4 the public is excluded from judicial review in violation of the law". Whereas, pursuant to Article 402, paragraph 1.1 of the CPCRK, the Court of Appeal annuls the judgment of the Basic Court and removes the case for re-consideration if it finds that there are substantial violations of the provisions of criminal procedure. It is understood that this violation is a high level violation, for which the Court should pay close attention throughout the proceedings, and not treat it as a secondary issue, as it may also affect the annulment of the judicial procedure.

2.2. International Instruments

Monitoring and publication of court proceedings by the media and public is a right, which enters within the right of freedom of opinion and expression.

Article 19 of the Universal Declaration of Human Rights sanctions the right of freedom of opinion and expression, according to which, *"his right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"*.

Also the European Convention for Human Rights (ECHR) expressly stipulates that trial should be public. In article 6 of the ECHR stipulated that *"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."*.

The ECHR specifically stipulates when court hearings can be closed. In this sense, article 6 of the ECHR stipulates that *"Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

Apart the ECHR, also the EUCFR expressly sanctions public trials. According to this charter, *“Everyone has the right to a fair and public hearing within the reasonable deadline by a independent and impartial court, established by the law”*³.

On the other hand, Freedom of expression is guaranteed also by article 10 of the ECHR, according to which *“this right includes freedom of opinion and freedom to receive and to give information and idea without the interference of public authorities and regardless limits”*.

Also the ECHR stipulates that this right can be limited only in specific circumstances which based on the explicit enumeration power are mentioned in paragraph 2 of article 10 of the Convention. This paragraph defines that **“Exercising these freedoms containing obligations and responsibility, may be subject to those formalities, conditions, limitations or sanctions foreseen by law and that are necessary in a democratic society, in the interest of national security, territorial integrity or public security, for the protection of order and preventing crime, for the protection of health or moral, for the protection of dignity or the rights of others, to prohibit dissemination of confidential data or to guarantee authority or impartiality of judicial power”**.

There are also a large number of international instruments that speak about this issue, but the essence of the Universal Declaration for Human Rights and the ECHR is that based on article 22 of the Constitution of the Republic of Kosovo, the same are implemented directly in the Republic of Kosovo and have priority, in case of conflict, against provisions and laws and other acts of public institutions.

2.3. ECtHR practice

The Constitution of the Republic of Kosovo for the interpretation of human rights and fundamental freedoms has defined and referenced European Court for Human Rights (ECtHR) practice. Article 53 of the Constitution of the Republic of Kosovo stipulates that *“human rights and fundamental freedoms guaranteed by this Constitution, are interpreted in accordance with the judgments decisions of the European Court for Human Rights”*.

In its jurisprudence the ECtHR has a number of cases in which also has set standards regarding publicity of court hearings, standards which based on article 53 of the Constitution of the Republic of Kosovo should be implemented by all Courts of the Republic of Kosovo.

In the case Malhous against Czech Republic, the ECtHR has emphasized the importance public court hearings:

“Court re-emphasizes that public holding of court hearings is a basic principle sanctioned in paragraph 1 of article 6 of the ECHR. This public character protect litigants against the

³ *Charter of Fundamental Rights of the European Union*. 18.12.2000. Article 47. (See the link https://www.europarl.europa.eu/charter/pdf/text_en.pdf). (Accessed for the last time on July 22 2019).

administration of justice in a confidential way without public review. Also, is one of the ways by which asserts confidence in courts. By administrating justice in a transparent manner, publicity contributes in achieving of purpose of paragraph 1 of article 6 of the ECHR, that means a fair trial, guarantee, which is one of the basic principle of any democratic society, within the meaning of the ECHR⁴.”

In the case Allan Jacobsson against Sweden, the ECtHR detremined that in order to avooid holding a public hearing, extraordinary circumstances must exist.

“The Court recalls that, according to its case-law, in proceedings, as here, before a court of first and only instance the right to a “public hearing” under Article 6 § 1 entails an entitlement to an “oral hearing” unless there are exceptional circumstances that justify dispensing with such a hearing”⁵.

The same stand was taken for cases GOC against Turkey⁶ and Fredin against Sweden⁷.

Whereas, regarding the procedure before second or third instance court, the ECtHR in the case Helmers against Sweden has defined that from special features of procedure in question and with condition that public hearing has been held in the first instance court, the lack of public hearing can be justified⁸.

Regarding the exclusion or non-exclusion of the media and public from a court hearing, the ECtHR has stipulated that for this circumstance the Court will determine by analyzing the circumstances of each case separately⁹.

According to ECtHR, limiting the for the public and media, in the certain cases, should be limited to the extent that is strictly needed to achieve the required goal. This Court, in the case Nikolova and Vandova against Bulgaria has emphasized that:

“However, the Court has previously held that the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without assessing the

⁴European Court for Human Rights. Case Malhous against Czech Republic. Judgment. Strasbourg. July 12 2001. Paragraph 55-56. (See the link <https://hudoc.echr.coe.int/eng?i=001-59590>). (accessed for the last time on May 16 2019)

⁵European Court for Human Rights. Case Allan Jacobsson against Sweden. Judgment. Strasbourg. February 19 1998. paragraph 46. (See the link <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-58133%22>). (accessed for the last time on May 16 2019).

⁶ European Court for Human Rights. Case GÖÇ against Turkey. Judgment. Strasbourg. July 11 2002. paragraph 47. (See the link <http://hudoc.echr.coe.int/eng?i=001-60597>). (accessed for the last time on May 16 2019).

⁷ European Court for Human Rights. Case Fredin against Sweden. Judgment. Strasbourg. February 23 1994. paragraph 21-22. (See the link <http://hudoc.echr.coe.int/eng?i=001-57867>). (last time accessed on May 16 2019).

⁸ European Court for Human Rights. Case Helmers against Sweden. Judgment. Strasbourg. October 29 1991. Paragraph 36. (See the link <http://hudoc.echr.coe.int/eng?i=001-57701>). (accessed for the last time on May 16 2019).

⁹ European Court for Human Rights. Case Martinie against France. Judgment. Strasbourg. April 12 2006. Paragraph 40. (See the link <http://hudoc.echr.coe.int/eng?i=001-73196>). (accessed for the last time on May 16 2019).

necessity of closure by weighing the principle that court hearings should be held in public against the need to protect public order and national security. Accordingly, before excluding the public from a particular set of proceedings, courts must consider whether such exclusion is necessary in the specific circumstances in order to protect a public interest, and must confine the measure to what is strictly necessary in order to attain the objective pursued”¹⁰.

By this it is understood that based on standards that the ECtHR has set, courts should be careful when they decide if the public should be excluded or not. Despite the fact that circumstances in which this is possible are preremptory defined, standards of the ECtHR stipulate that these circumstances should be assessed fairly depending from circumstances of each case. That means, not every claim or presence of a such element in a case justifies also the exclusion of the public from a court hearing. Also, the exclusion of public should be limited until to the extent that is necessary to achieve the required goal. This shows that the ECtHR’s standards for this issue are very high, giving big importance to this issue.

3. Bad practices of judges of the judicial system in the Republic of Kosovo

Although both domestic and international legal provisions as well as ECtHR practice set high standards of application when a court session is closed, some judges of the judicial system of the Republic of Kosovo appear to still disregard the importance and manner how this field works.

This for the reason that a certain number of hearings of the judicial system that Kosovo Law Institute (KLI) monitors, are closed using a ‘template’ without justifying any circumstance. It is worth mentioning that large number of hearings in the criminal field are public and the public, media and civil society have unhindered access. Nevertheless, KLI has encountered cases when judges close the hearings without written decision and do not allow the presence of media and civil society especially in scheduled court hearings, involving high profile persons, for which the public has huge interest to be informed. In this part of this report we will treat concrete cases for both types of bad practices of the judicial system in the Republic of Kosovo.

Regarding the hearings for the review of requests for scheduling security measures, some of the courts have established a unlawful practice, qualifying these hearings as closed in principle, and creating diversity in treating this issue within the courts of the Republic of Kosovo.

Unfortunately, this phenomenon has been present in the judicial system for years, and as such, it is still not dealt with by the actors within the judicial system, and therefore, only grows to greater proportions every day.

¹⁰European Court for Human Rights. Case Nikolova and Vandova against Bulgaria. Judgment. Strasbourg. March 17 2014. paragraph 74. (See the link <https://hudoc.echr.coe.int/fre?i=001-139270>). (last time accessed on May 16 2019).

3.1. Unlawful closure of public hearings

On April 24 2019 in the Basic court of Pristina held initial hearing against 6 persons. The indictment of the Basic Prosecution in Pristina charged the accused for committing criminal offenses “*unlawful deprivation of freedom*”, “*blackmail*”, “*abusing official position or authority*”, “*unauthorized possession, control or possession of weapons*” and *assistance in committing criminal offense*”. While holding the initial hearing, one of the defendants requested that the trial to be closed and exclude the public and media from the hearing, by reasoning that presence of media and publication of personal data can affect badly in his relations or position in private life. Some of the others accused in this case, joined this proposal. Regarding this proposal, the State Prosecutor did not give his opinion, but only stated that “*I leave this case to the court’s competence*”.

The judge of the case, regarding this proposal took a decision, which does not coincide with the proper application of legal provisions, and less ECtHR practice, mandatory practice according to article 53 of the Constitution of the Republic of Kosovo.

By this ruling, the Basic Court in Pristina rejected the request that trial to be closed for media and public, while obligating the media to use the accused initials when reporting and not to photograph their face during the hearing, that the ruling referred as “court review”, although the initial hearing was being held.

In the reasoning of this ruling, this Court said that it has issued this ruling based on article 294, paragraph, 1, point 4 of the CPCRK. This article defines that “At any time from the beginning until the end of the main trial, the single trial judge or trial panel may exclude on the motion of the parties or *ex officio*, but always after it has heard the parties, the public from the whole or part of the main trial if this is necessary for: ... protecting the personal or family life of the accused, the injured party or of other participants in the proceedings”. Based on this article, in the ruling it is said that the request is rejected for the exclusion of public and media, while was required from the media that reports to be with initials as well as not to make photos of faces of the defendants, because reporting for media will affect the private life of the defendant. In this ruling two (2) pages, the Court admits that party did not provide sufficient reasons that trial to be held completely closed for media and public, but again has obliged the media to write reports with the accused initials, and not to take photos of the face during the hearing, which the ruling again refers as “court review”.

Vis-a-vis requests and standards that determined by ECtHR’s, that are emphasized above, the reasoning of this ruling remains as such.

Initially, the judge did not state the article that was referred in the case when he defined that reporting to be with initials. Article 294, paragraph 1, point 4 of the CPCRK, to which the ruling was referred, does not give such an option, but defines that in case when are fulfilled the listed conditions paragraph 1, the Court “can **exclude** the public throughout the judicial review or from a part of it”, by not giving the opportunity of obligation for media that reporting to be with initials. In this way, it is observed that the Court has only invented such a restriction. This

restriction of the court implies closing the hearing to the public on one side as well as to the media on the other, which are a bridge to the public. By this ruling, the Court has formally ruled that the trial is not closed, but essentially closed the trial, not allowing the public to be informed of the case, albeit based on the offenses charged by the defendants, judgment is of particular importance to the public.

As to the limitation on not photographing the faces of the accused, Article 301, paragraph 3 of the CPCRK permits such an option, stating that such restriction requires a reasoned written decision.

For all this, the reasoning of the ruling was that "media reporting would affect the defendant's private life". Regarding this reasoning, the ruling is contradictory, as in one case it states that the party did not provide sufficient reasons, while on the other hand it states that media reporting would affect his private life. The court has not even given a single fact or evidence to justify why such reporting would affect the defendant's private life. Despite the legal requirements and standards of the ECtHR, the Court has not given any justification as to the weighting between the principle of publicity of hearings, namely the public interest to be informed about the case, and the protection of the accused's privacy. Likewise, the Court has not provided any justification as to whether this measure is most appropriate or if it is necessary to achieve the intended purpose. Based on this logic, the overwhelming majority of the hearings would have to be closed, as a large number of defendants would make an ungrounded claim that media reporting on his case would affect private life. With regard to the protection of personal data, non-disclosure is an obligation, whether or not there is a ruling of a particular court. Consequently, no party can invoke that reasoning.

KLI considers that such rulings do not represent transparency and accountability of the judicial system to the public. Moreover, such judgments only undermine transparency for the public and set the most unnecessary precedent in the judicial system. All the more so when the judicial system, based on domestic and international reports, continues to have significant problems with transparency and accountability to the public, media and civil society

Also, in 2016 the Basic Court in Pristina completely closed the trial where former President of the Court of Appeal, Salih Mekaj, and three other defendants were charged with corruption offenses. Also in the same year, the same Court closed to the public what was known as the largest post-war case - the "Stenta" case. The reasoning of the judge regarding the closure of this case was the lack of sufficient space due to the large number of defendants in the case

KLI reacted against this practice on November 30 2016, finding the approach used by the Basic Court in Pristina as unacceptable in closing the "Mekaj" case and closing one of the biggest cases "Stenta", that are of great interest to the public. Through this public reaction, KLI has demanded that the constitutional and legal obligations for the proper conduct of judicial proceedings for all parties to the proceedings be respected, including informing the public and the media within this legal framework and opposed the ungrounded reasonings in the constitution and laws to close

judicial proceedings for the public and media because of the biases of any judge. Further, KLI has expressed disappointment with this approach and mindset of some judges, who should be exemplary in enforcing legal provisions to increase transparency, rather than attempting to prohibit, restrict and censor media freedom to information for the public on the most important judicial proceedings.¹¹

3.2. Arbitrary closure of public hearings

Apart from cases such as these two cases, there are a number of other cases where judges exclude the public and the media in a completely arbitrary manner, excluding the public only by ordering them orally to leave, and not issuing a written ruling at all, as required by the provisions set in the CPCRK.

In one case, a judge from the Basic Court in Pristina had excluded the media and public from the courtroom, while when justice system court monitors required the written decision regarding closure and reasons for closure of the court hearing, the same had expressed surprise that why such a decision is required¹². In the other hearing of the same case, judge had opened the hearing¹³.

In another case, closed the court hearing without a written decision, with reasoning that it is election time, while the accused is representative of a political party. Exclusion of the public without decision, the judge had simply justified it based on a request from the accused, because she had said “The hearing is open but I have received a request from him (from the accused)”¹⁴.

In the other case, during a hearing, the witness had requested from the presiding judge not to mention his name and company’s name, with the justification that the publication of names is affecting negatively in reputation of the company.

After this, presiding judge, without decision, had required that this request of the witness to be implemented by the media and monitors. In this case, from the KLI’s monitor /”Oath for Justice”

¹¹ “KLI reacts against the closure without reason of the court hearings”. KLI. November 30 2016. (see the link <https://kli-ks.org/ikd-reagon-kunder-mbylljes-pa-arsye-te-seancave-gjyqesore/>). (Accessed for the last time on May 16 2019).

¹² “Judge Lindita Jakupi without any clarification closes the hearing for the public in the case of a doctor that is accused for unconscious medical treatment”. Oath for Justice. September 24 2018. (See the link <https://betimiperdrejtesi.com/gjykatesja-lindita-jakupi-pa-kurrfare-sqarimi-mbyll-seancen-per-publikun-ne-rastin-e-mjekut-qe-akuzohet-per-trajtim-te-pandergjegjshem-mjekesor/>). (Accessed for the last time on May 16 2019).

¹³ “Mother says that gynecologist used inappropriate method during the birth of her baby”. Oath for Justice. October 2 2018. (See the link <https://betimiperdrejtesi.com/nena-thote-se-gjinekologu-perdori-metode-te-papershtatshme-gjate-lindjes-se-femijes-se-saj/>). (Accessed for the last time on May 16 2019).

¹⁴ “The court without decision closes the court hearing for the former deputy prime minister of Kosovo Sllobodan Petroviq, cause elections”. Oath for Justice. May 25 2017. (See the link <https://betimiperdrejtesi.com/gjykata-pa-vendim-mbyll-seancen-gjyqesore-per-ish-zevendeskryeministrin-e-kosoves-sllobodan-petroviqin-shkaktar-zgjedhjet/>). (Accessed for the last time on May 16 2019).

requested a written ruling, for that request, the presiding judge had expressed surprise by saying: “Do we have to issue rulings also to the monitors?”¹⁵.

In this case, the witness does not enjoy the capacity of a protected witness, that for the same, his personal data and his statement to be confidential and closed to the public. Whereas, in this case there was no request for the exclusion of public from the courtroom, which is also regulated with the Criminal Procedure Code.

In the case of three suspects involved in the murder of former leader of civic initiative SDP in Kosovo, Oliver Ivanović, where the request was reviewed for detention on remand, the judge of previous procedure has closed the trial. Although the interest of public to be informed for this case was extremely big, the judge did not give any reason for the closure of hearing, he has announced that it will be closed¹⁶.

3.3. Judge in the role of Prosecutor, does not allow the recording of the hearing on the grounds that the proper administration of the judicial process is endangered

On 4 July 2019 at the Basic Court in Peja was scheduled court hearing against four (4) defendants. They were accused for criminal offense, murder. In this hearing, team “Oath for Justice”, had gone with camera to record the development of this hearing.¹⁷ Presiding judge, did not allow recording of the hearing with camera, suggesting that for the forthcoming hearings to make written request to allow recording the hearings. KLI team /”Oath for Justice” in accordance with the legal obligations under Criminal Procedure Code, did not make a request, according to judge’s suggestion, but only informed him that in all forthcoming hearings, monitoring of hearing will be also with camera, recording the hearings.¹⁸ On 10 July 2019, Presiding judge of the Basic Court in Peja, by answering to the notification of KLI’s team/”Oath for Justice” has issued a written Ruling, through which has decided to **prohibit** recording (audio-video) of the hearings of judicial review scheduled to be held on September 23, 24, 25 and 26, whereas has **allowed** recording (audio-video) of the hearing of judicial review of date October 3 2019.

In the reasoning of this ruling, Presiding judge, writes that Basic Court in Peja – Serious Crimes Department – is in process of criminal case against four defendants charged for criminal offense

¹⁵ *“Witness asks not to mention his name, judge without issuing the ruling says to the media to implement such a request”*. Oath for Justice. April 12 2018. (See the link <https://betimiperdrejtesi.com/deshmitari-kerkon-te-mos-i-permendet-emri-gjykatesja-pa-nxjerr-aktvendim-u-thote-mediave-ta-zbatojne-nje-kerkese-te-tille/>). (Accessed for the last time on May 16 2019).

¹⁶ *“The hearing closes against three of the accused for the murder of Oliver Ivanović”*. Oath for Justice. (See the link <https://betimiperdrejtesi.com/mbyllet-seanca-degjimore-ndaj-tre-te-dyshuarve-per-vrasjen-e-oliver-ivanoviqit/>). (Accessed for the last time on May 16 2019).

¹⁷ *“Trial for murder, court does not allow that lawyer of cooperative witness to be lawyer of one of the accused”*. July 4 2019. Oath for Justice. (See the link <https://betimiperdrejtesi.com/gjykimi-per-vrasje-gjykata-slejon-qe-avokati-i-deshmitarit-bashkepunues-te-jete-mbrojtes-i-njerit-nga-te-akuzuarit/>). (Accessed for the last time on July 30 2019).

¹⁸ Monitor of the KLI/”Oath for Justice” on July 9 2019, has informed Presiding Judge of the Basic Court in Peja that forthcoming hearings that are public in this judicial review will be monitored and recorded with camera.

of murder by article 179, paragraph 1, subparagraph 1.6 and 1.8 regarding article 34 paragraph 1 of Criminal Code.

In the ruling states that “Court in this criminal case has scheduled hearings of judicial review on 23.09.2019, 24.09.2019, 25.09.2019, 26.09.2019 and 03.10.2019.”

Further, Presiding judge, writes that from KLI, has received a submission, through which was informed that forthcoming hearings will be monitored and recorded with camera.

Following the reasoning of the ruling for the prohibition of recording the hearings with camera, writes that:

“The Presiding Judge considers that given that the main trial has reached the stage where the defendants will give their defense in respect of the criminal offense for which they are charged and since all four defendants are charged with having committed the criminal offense in criminal union , recording them while giving evidence may affect the course of the main trial. The court has planned for the defendants to appear at the hearings scheduled on 23.09.2019, 24.09.2019, 25.09.2019, 26.09.2019, so that each of them will give the defense on different days hence, since the defendants are accused of a criminal offense of a serious nature and the punishment provided for this offense is high enough, there is a risk that the recording of a defendant's statement may be misused in order to co-ordinate defense between them and thereby hamper the attainment of the purpose of the trial.

Judicial review will continue on 03.10.2019, for when it is planned to give the final word from the parties in procedure, recording is allowed in the hearing of this date.

Appeal is allowed against this ruling within 3 days at the Appeal Court in Pristina, upon receipt of the same, through this Court.”¹⁹

According to CPCRK the role of judge and parties has changed significantly. The role of judge has changed in less proactive during proceedings, whereas defense and prosecution have more responsibilities. Prosecutor has greater duty for the development and presentation of evidences (**“case of prosecution”**). On the other side, the defense ensures that prosecutor has acted properly and that has presented evidences provided legally and has raised indictment based on the law. According to the CPCRK, the defense also has the opportunity to seek evidence that support the position of the defendant, as are alibis or evidences which show that the defendant

¹⁹ *Clarification:* KLI did not make appeal against this ruling, according to legal advice made in this ruling by the Basic Court in Peja. Appeal was not made because based on the CPCRK, appeal against the ruling for the exclusion of public is not allowed at all. Paragraph 2 of article 296 of the CPCRK speaks about the ruling on exclusion of the public decisively determines that “The ruling for holding the hearing closed can be objected only by appeal against the judgment”. In the sense of article 384.1.4 of the CPCRK, appeal against this ruling is permitted only in the moment of presenting the appeal against first instance judgment, and not against the ruling issued during development of judicial review.

had no motive to commit the offense. (**“case of defense”**). However, **the judge remains “protector of rights” and has new clear duties to defend the rights of the parties.**²⁰

Therefore, it is essential that judge to interfere and ensure equality of the parties during judicial review. According to CPCRK, although the judge’s role is transformed from a very proactive role in a less active role during proceeding, he continues to be “protector of rights” and has new explicit duties for the defense of the rights of parties.²¹

Therefore, considering those that were said above, KLI considers that the Presiding judge in this case of the Basic Court in Peja, has taken a ruling, which does not coincide with the proper application of the legal provisions, less with the ECtHR practice, a practice that is directly implemented in Kosovo.

KLI considers that this ruling is paradoxical because it does not prohibit the monitoring and public reporting of all the details of these hearings in this case, but only prohibits camera recording. If there were reasons for these hearings not to disclose details of the defendants' testimony, due to the possibility of co-ordinating their statements, then this should logically be prevented through the complete closure of the sessions to the public and the media. On the contrary, the reasoning of the intention of the court to achieve the purpose of the judgment, in which the judgment is invoked, cannot stand. Filming or filming the hearing could not disclose more information than reporting all the details made by monitors and journalists, except for the direct testimonies and testimonies of the defendants that could be displayed through cameras. So, as a justification, KLI considers that it does not stand because it is not reasonable to ban filming and not to ban the whole hearing, the information of which, if published, could in any way jeopardize the administration of justice for a fair trial..

Moreover, in this ruling, the judge did not relate the reasoning for the closure of hearing with none of 6 peremptory cases on which according to article 294 of the CPCRK allows exclusion of the public.

Moreover, KLI considers that in this case, the Presiding judge changed his role as arbiter. The care of the arbiter in this case, similar as in the role of prosecutor, which in the phase proceeding of criminal investigation, develops strategy of genuine investigation to prevent any hindrance or coordination between defendants and their statements that will hinder revealing of the truth, consequently the revealing of perpetrators of criminal offense. This case belongs to the prosecutor, while judge, as determined in the system of criminal justice, which is embodied in the Republic of Kosovo, plays exclusively the role of arbiter, in the fair administration of proof and evidence, which are provided from included party in a criminal proceeding.

²⁰ Report of the OSCE, regarding the Review of implementation of the New Criminal Procedure Code in Kosovo. June 2016.

²¹ Ibid.

Consequently, the Basic Prosecution of Peja against the defendants conducted criminal investigations, received their statements in the pre-trial and criminal investigation, which procedure was closed and served to prove the facts related to the committing of the criminal offense, while the statement of the defendants in the main trial, as in all other cases, is manifested by confessions, confrontations, questions which are, in principle, directly addressed in a public hearing, in order to administer them fairly and publicly so that the citizen may obey the decisions taken by the court. On the contrary, due to other specifics, as provided by the provisions of the CPCRK, in cases where it is considered that there are reasonable grounds to properly administer a court proceeding, the proceedings may be closed to the public in whole or partially.

Therefore, KLI considers that ruling of the Basic Court in Peja is not based on legal provisions and moreover is not balanced well with the interest of principle of publicity for a transparent judicial system of a democratic society on the one side and causes of damage of the interest of justice.

Transparency and publicity during judicial proceedings are substantial elements, which influence in increasing the citizens's confidence in justice and give meaning to the administration of justice.

Moreover, transparency in the administration of justice contributes on ensuring a fair trial, by creating opportunities that media to exercise their role as public controllers.

3.4. Unlawful practice of some judges for exclusion of the public from hearings for the review of requests on assigning security measures

Regarding preliminary proceeding, from systematic monitoring that KLI makes in the justice system, it is seen that in some courts is created as practice that all hearings on which requests for security measures are reviewed to be closed. This practice has no legal basis, and the same represents an arbitrariness of the judicial system. Article 188 of the CPCRK stipulates that "...judge shall then conduct a hearing on detention on remand."... In this case, nowhere is mentioned that public and media can not be present at the hearing. Regarding closure of preliminary proceeding for the public and media, this is defined in some other specific cases, as is article 85 of the CPCRK that stipulates the procedure for confidentiality of gathering information. In these cases, circumstances and conditions are determined for the closure of file. By this we understand that there is no legal provision that defines that hearing for assigning security measures are closed which means that this practice build by some judges is completely arbitrary. Moreover, this practice is not followed by all courts, but in some of them.

KLI condiders that those wrong and unlawful practices only reveal the lack of transparency and accountability of some judges of the justice system before the public, the media and civil society. Such practices are completely arbitrary, and contrary to the statements that stakeholders of the

justice system constantly proclaim. As well, any closure of the hearing as in above mentioned cases represents an extremely dangerous precedent for the transparency of the judicial system before the public, the media and civil society, and in this form creates an avalanche of non-transparency, and can turn into a phenomenon, if it continues to deepen even more with new cases.

4. Closure of trials as a denial of promise and achievements for transparency

Heads of the justice system and judges themselves constantly proclaim that in their work they are maximally transparent before the public, the media and civil society. In each of their public appearance, transparency is their main word, adding that the judicial system is already a system with almost full transparency.

In all concept documents of presidents of courts, on the basis of which the same are elected in those positions, the same pledge that during their mandate, their work will be developed on the basis of full transparency and accountability before the public, the media and civil society.

As well, in each compiled report, the courts state that in respective period, court has been maximally transparent. The same was stated also by all presidents of courts during reporting before members of the Kosovo Judicial Council (KJC) for their work for certain periods.

But, for many findings of local and international reports, the same do not have answer. KLI through periodic reports constantly has identified extremely specific fields where judges of the judicial system have failed to be transparent in some cases. As well, the lack of transparency in some cases with interest for the public, this report also proves it, with the above mentioned cases.

Like this report, also the preliminary reports of the KLI, but also other international reports prove that justice system, especially in certain cases that make huge interest of the public continues not to be transparent. There upon, KLI calls on all stakeholders of the justice system to realize their continuous promises for transparency and to not allow any kind of arbitrariness in the case of closure of hearings by judges.

5. The silence of stakeholders of the justice system before this phenomenon

Although media and civil society reported many cases of unlawful and arbitrary closure of court hearings for which the public is interested to be informed, all stakeholders within the justice system are silent before these occurrences.

KLI makes it known the fact that a certain judge has independence in deciding and is *dominis litis* in a case, doesn't make him immune to unlawful decisions for the closure of hearings, that by law are public, and even more to the cases when the same exclude the public and media in completely arbitrary way, without taking any decision.

Regarding periodic reports of the courts, but also of the KJC itself, now has become practice that the same to be just descriptive and somehow analytical, in that way that to describe challenges and

identified problems, as well as the access of the courts for the resolving these problems. Such fate has also the occurrence of closure of hearings in unlawful and arbitrary way.

For those reasons, is an immediate and urgent request that KJC in cooperation with presidents of the courts and supervisory judges, to treat this issue and to take adequate measures to stop this phenomenon. In this regard, important consultative role can give also the Assembly of Presidents of the Courts and Supervisory Judges.

On the other side, the importance of publicity of hearings and the logic of reasoning of rulings for the closure of hearings should be part of the training that Judges attend at the Justice Academy (JA).

6. Conclusions

- In principle, each court hearing is open for the public, media and civil society. Matters when the same are closed are exclusive cases, circumstances for which cases are mentioned explicitly in the CPCRK.
- For the circumstances referred to in the CPCRK for which the trial to the public, the media and civil society may be closed, it is not sufficient that the court's rulings merely state in a "template" manner those circumstance, but that circumstance must be justified through thorough evidence, in the sense that such a ruling would also create confidence in the public itself that closing a particular hearing is a legal and just action.
- Exclusion of the public, media and civil society without any written decision, in the least represents arbitrariness.
- Based on the CPCRK, in principle, the hearings for the requests's review for scheduling security measures are open. Various practice created within the judicial system, where in some courts are public whereas in some courts are closed, is unacceptable. Regarding this variety created, also the KJC has obligation to discipline judges in sense of implementation of legal obligations.
- Despite the fact that it is the judge who decides whether a hearing will be public or closed, prosecutors should also make a contribution in terms of good administration of justice. In this regard, they should engage that in cases where a request to close a hearing has no legal basis, prosecutors must oppose it. Likewise, in cases where hearings are closed in violation of the law, prosecutors must appeal this decision to the Court of Appeal when appealing the final judgment.
- The Court of Appeal and the Supreme Court are obliged to set legal standards and fairness in dealing with cases. Given this obligation, even with regard to the closure of public hearings in violation of the law, the Court of Appeal should be active in this field and establish fair and legal standards in such a way as to filter and not allow judgments to be final out of the public eye.
- The publicity of hearings should be understood in such a way that in no circumstances undermines the administration of justice. On the contrary, as the ECtHR's practice states, it protects litigants against the administration of justice in a secret manner and is one of the ways in which confidence is maintained in the courts.
- Judges should be aware that publicity of the court hearings, according to ECtHR, is one of the elements that forms the right for a regular process.
- Judges should be aware that based on article 53 of the Constitution of the Republic of Kosovo, judgments of the ECtHR are obligatory to be implemented in each case. Thereupon, it is necessary that the same should refer to the practice of this court and to apply standards that the same has set, while reviewing a request for the closure of hearing.
- Transparency of the justice system is not a well known fact, that can be proclaimed in a general way. There are very specific measures, for the estimation of transparency.

Regarding judicial system, greater non-transparency is presented on cases when public is excluded from attending the court hearings which by the law are open, and for which public has interest to be informed.

7. Recommendations

- Judges to review their decisions for the closure of hearings.
- Judges to be trained to understand right the purpose for holding public hearings.
- Decisions for the closure of hearings to be justified conform legal requirements and standards determined by the ECtHR and for this field they should be trained constantly. Following development of trainings, the KJC should monitor the implementation of ECHR's practice and judges that do not follow this, should call them on disciplinary responsibility.
- Judges in any case to not exclude the public, media and civil society from the hearings, without rendering a written ruling and justified well.
- Basically, all hearings for the requests's review for scheduling security measures to be open to the public.
- The Appeal Court and the Supreme Court to determine fair judicial practices regarding the opening and closure of the hearings for the public, media and civil society.
- Prosecutors to oppose ungrounded requests for the closure of the court hearings. In cases when they consider that decisions for the closure of hearings have been unlawful, the same to dispute the rulings in the Appeal Court regarding this part.
- The KJC to react conform its mandate to discipline judges that the same to adhere the legal obligations in case when they decide regarding opening and closure of the hearings for the public, media and civil society.
- The KJC to treat the multiplicity created regarding opening for the public of hearings for the requests's review for scheduling security measures.
- Towards addressing better this topic, the Assembly of Presidents of the Courts and Supervisory Judges to also contribute.
- Stakeholders of the justice system to implement their constant promises for transparency and accountability of the justice system before the public, media and civil society.