

Fair trial based on penal legislation of Kosovo

PhD (C) Mirvete Uka

University "Hasan Pristina", Kosovo

Abstract

Fair trial is the main principle or as is often said principle above principles on penal procedure. This principle is based on respecting basic human rights and freedom towards defendant in penal procedure. The presumption of innocence, publicity of trial, right to protection, trial in reasonable time are some of the rights that are guaranteed to defendant on penal procedure by European Convention on Human Rights and Fundamental Freedoms (ECHR) and by the applicable local legislation. Penal procedure legislation of Kosovo is harmonized with legislations of countries of the European Union but it has still many challenges. Since Kosovo is not part of European Council and not signatory of ECHR its citizens do not have possibility to appeal on European Court on Human Rights (ECHR) in case their rights are violated regarding fair trial by local courts. In Kosovo, there is a perception that these rights are respected based to the society range. Main objective of this manuscript is the analysis of fair trial on penal legislation in Kosovo in comparison to ECHR.

Keywords: fair trial, penal procedure, presuming of innocence, defendant, ECHR, Kosovo Penal Procedure Code.

Introduction

The right for fair and impartial trial is based in article 31 of Constitution of Republic of Kosovo, which states that everyone is equal in front of the law. Based on article 5 of Kosovo Penal Procedure Code (KPPC) every person suspected or accused for a penal act has the right to request impartial penal procedure implemented in reasonable time. The Court has to take care for the procedure without crawling and prevent any misuse of rights that belong to participants in procedure (Sahiti, Murati, 2016, 80).

Regardless that on article 2 of Penal Procedure Code is said that "only independent competent and impartial court can pronounce penal sanction to committer of penal act..." without précising that Court should be founded by law, this article also as article 6 of KPPC expresses the spirit of article 14, paragraph 3, point c) of International Pact on Civil Right (IPCR) and article 5 and 6 paragraph 1 of ECHR. Standard determined by European Convention for Courts founded on law aims creating of security regardless changes of political classes on the country the Courts will guard its independence. Implementation of the right for fair trial plays decisive role in preserving order, rule of law and trust in state authorities. If a fair trial system is guaranteed in front of independent and impartial courts there may be a guarantee that:

- the guilty plea shall be based on well-reasoned evidence;
- that the executive power, if deemed necessary, bears responsibility and
- has an effective system for solving the disagreements between private parties.¹

The basic aspect of the right to a fair legal process is that respect for it is not simply

¹ Manual Training for International Human Rights (2016). 195.

a matter of the state. The government should also establish and determine a legal and institutional framework for its protection. As such the right to a fair legal process requires states to foresee, among other things:

- Access to legal aid, including free legal aid;
- A prosecution service
- Trained and independent judiciary.²

Legal establishment of Courts consists primarily of drafting and approving the Law on Courts from the Parliament of Kosovo. Like other laws, the Law on Courts has been approved by highest legislative body of the country - Parliament of Kosovo composed of representatives of the entire political spectrum and thus disables the executive (government consisting of the majority), affect the work of the judiciary. Every effort of executive to influence the way of organization and more so in the work of judiciary is an interference with powers of other (judicial) authority which must be independent and impartial. This however does not imply a complete ban on the delegation of legal powers to executive branch as regards to judicial organization nor detailed regulation by law (Sahiti, Murati, 2016, 62). Procedural requirements for fair trial and in a reasonable time are accompanied by requests for procedural economics. Nevertheless, procedural economics however important, should not reflect the detriment of finding truth in criminal proceedings.

Kosovo will soon apply for membership in the Council of Europe. When it will become a full member of this international body, its citizens will be granted the right to appeal to Strasbourg Court alleging that their fundamental rights have been violated by the country's courts. But being part of an international mechanism of course besides its advantages it carries new responsibilities as well. This will be not only an achievement of the state but also a new challenge because eventual irregularities and violations of human rights and freedoms will result in new decisions in favour of complainants, for which the state of Kosovo will have to indemnify applicants in the ECHR. So this will also affect state budget. On the other hand, it can rightly be hoped that public institutions and especially courts will increase their care in relation to the individual and his fundamental rights. The relationship between the right to a fair trial and the right to an effective appeal / solution is a symbiotic. The obligation for a fair or fair legal process remains the same as when they are normally applied during court proceedings or even through judicial review of administrative acts.³ Independence of justice institutions and their impartial attitude and only in harmony with the laws in force also implies the independence of prosecutorial system. The lawmaker also emphasized the independence of prosecutor in all his legal actions in a fair and efficient procedure. The inability of public bodies to influence the work of prosecutor whether formal or informal is regulated by Article 47 of the PPC and the law for state prosecutor.⁴

² Manual Training for International Human Rights (2016). 196.

³ Recommendation of Council of Europe (2004) 20, Minister Comitee for Member States about judicial review of administrative acts, 15th december 2006.

⁴ Law no. 03/L-225.

Report of fair trial with other principles

As a general principle in criminal cases even when it comes to civil proceedings the right to a fair trial is considered essential in the overall human rights scheme. Consequently, this principle should be enabled for an extended interpretation. The narrow or strict interpretation of this principle does not correspond to the scope and purpose of ECHR. Giving justice is a much wider concept than “revealing the truth.” Truth is an integral part of justice. But justice has to be done, so it is important here to respect the principle of publicity which among other things means holding hearings in the presence of public and media. However delays resulting from lengthy delays in judicial system coupled with failure to take remedial measures by the state are considered as violations of the ECHR.⁵ Failure to timely or delay proceedings both at trial and at the investigation stage can sometimes be done with the aim of avoiding justice. Such cases may occur due to the connection, proximity, joint interest or corruption of the judicial system by suspected persons.

Presumption of innocence

Presumption of innocence implies assurance that the accused is considered innocent until his guilt is verified by a court decision. The presumption of innocence can be violated not only by a judge but also by other persons representing public authorities such as police, prosecutors⁶ or other government officials.⁷ Even the use of the term “accused/guilty” persons during the retrial of the case was found to violate the presumption of innocence, as it has been established for statements on revocation of the suspension of a conviction, in which the complainant’s guilt was revealed in other cases for which he had not yet been declared guilty. The presumption of innocence requires for judges not to leave with the preconceived idea that the accused has committed the offense. Thus, throughout the course of criminal proceedings presumption of innocence lies facing a reasonable (later grounded) suspicion to which investigation begins and then a judicial proceeding takes place. The presumption of innocence can be violated for example by public statements of police or prosecution that refer to an individual as the author of a criminal offense, or dismissal from post or duty of the accused while the penal process has not ended. The presumption of innocence resolves the burden of proof which according to Kosovo penal legislation it falls on claimant. He is obliged to present to the court on occasion of the accusation of a person the evidence that justifies his guilt (Sahiti, Murati, 2016, 54). The probationary material leading to the punitive verdict must have proving force that his presence would oblige any judge to make such a decision.

For a fair trial it is also necessary to respect principle *in dubio pro reo* which implies obligation of judiciary and especially courts who are puzzled about facts relevant to the case or any provision of the criminal law to interpret in favour of the defendant.

⁵ For more see decision of ECHR “Zimmerman and Steiner vs. Switzerland” EHCR, 13th July 1983, par. 27 and 32 and case “Guincho against Portugal” EHCR, 10th July 1984.

⁶ See Peltureau-Villeneuve v. Switzerland regarding statements after interruption for the reason of timely obstacle.

⁷ See Neagoe v. Romania regarding the spokesperson of the Appeal Court.

Failure to respect this principle is considered to be an essential violation of legal provisions it creates grounds for appeal and consequently breach of verdict of the highest instance of the court. Principle *in dubio pro reo* has to do with two kinds of facts:

- a) facts that make figure of penal act and
- b) facts by which depend application of penal legislation (Sahiti, Murati, 2016, 57).

The doubt about the decisive facts exists:

- 1) when the decisive facts are doubtful;
- 2) when there are suspicions that there are facts that counteract such facts or
- 3) when there is doubt that guides for something else (Sahiti, Murati, 2016, 57).

Non-discrimination and equality of arms

In ECHR notification of criminal offense and grounds of the charge are included within the minimum rights that must be met whenever one is charged with a criminal offense in order to achieve a fundamental right - the right to a fair trial (Sahiti, Murati, 2016, 417). In case of doubt regarding the examination of any evidence, the defendant has the right to seek expertise and super expertise. This is sometimes called equality of arms or the principle of contradictions. The defendant also has the right to use all legal remedies provided by law. Any form of discrimination of the defendant in procedure is a violation of legal provisions authentication of which must produce a breach of the decision and reconsider the case. Guaranteeing the principle of equality of arms is more apparent in criminal trials - where the individual is against the power of state.

Principle of equality of arms gives the right to the accused "to ask or to request witnesses of the accusation and to enable presence and question of witnesses for his benefit in same conditions with witnesses of the accusation. But adherence to the maximum of this principle is likely to create serious challenges in context of criminal prosecutions against terrorism with regard to materials or evidence that should or should not be disclosed to the defence lawyer.⁸ Therefore, not all evidence is always possible to present the defendant in proceedings. ECHR notices that the right for discovering of respective evidence is not an absolute right. In a court proceeding there may be competitive interests such as national security or the need to protect witnesses at risk of retaliation or keeping secret police methods of crime investigation which should be weighed against the rights of the defence. What is of public interest and what can be called a state secret for a country is a domestic affair of a particular country and the competence of local courts therefore ECHR in its decisions ascertains whether the rights of the accused are violated related to article 6 of the Convention without being released in the non-eligible role.

⁸ Manual Training for International Human Rights (2016). 227.

The right for a trial in reasonable time

The right to a fair trial is an integral part or element of fair trial under the spirit of Article 6 of ECHR. In Kosovo Penal Procedure Code this right is regulated by provisions of Article 5 paragraph 2 of which there is a need for an acceleration of procedure and obstruction of any misuse by procedural participants. The norms governing issue of deadlines have an imperative character. On the contrary we are dealing with human rights violations. In cases where justice authorities intentionally or unintentionally commit violations by not respecting legal deadlines, the damage may be caused in two ways: a violation of human rights or inefficiency of criminal proceedings.

But responsibility will not fall on local courts if procedure is delayed for defendant's guilt. Even most common misconduct comes from the defendant and his defence. Such misconduct concerns the avoidance of participation in a hearing with collection of claims with obstruction of delivery of remittances, unreasonable requests for exclusion, etc., in order to influence the course of proceedings (Sahiti, Murati, 2016, 63).

Although the right to a hearing within a reasonable time has been examined by ECHR in numerous cases the general extension of reasonable time has not in absolute sense been determined given the fact that length is determined, first of all by circumstances of specific case and depends on provisions of national law. For this paragraph 3 of Article 5 of KPPC instructs that any deprivation of liberty and especially the length of detention in criminal proceedings should be reduced in the shortest possible time. It is therefore the duty of all bodies participating in criminal proceedings and bodies providing legal aid to act with special urgency when the defendant is in detention. Before the indictment is filed the detention cannot last more than four months when procedure applies to a criminal offense punishable by less than five years of imprisonment and eight months when proceedings are enforced for a criminal offense punishable by more than five years of imprisonment.⁹

In exceptional cases when procedure is applied for a criminal offense punishable by at least five years of imprisonment and when the case is complicated as well as when the delay cannot be attributed to the state prosecutor in addition to the foregoing deadlines, detention may be extended to four more months for a maximum total detention up to twelve (12) months.¹⁰

When there is a grounded and persuasive reason to believe that there is a general risk or risk of violence if the defendant is released in a pre-trial detention the continued detention from paragraph 3 may be extended for another six months for a total maximum detention on remand in eighteen (18) months.¹¹

A complicated case is considered a criminal procedure involving but not limited to more than ten defendants, organized criminal activity, corruption or investigation of which requires numerous forensic evidence, accounting analysis or international co-operation (Sahiti, Murati, 2016, 499).

⁹ Article 190, parag. 2 of KPPC.

¹⁰ Article 190, parag.3 of KPPC.

¹¹ Article 190, parag.4 of KPPC.

If no indictment is filed up to the expiry of maximum lengths of detention on remand the defendant is released from detention. For delays in proceedings in absence of a co-accused there were also reports of trials in our country.

Since criminal proceedings are not immune from unjust and unlawful decisions of the court that violate human rights and fundamental freedoms, this indicates the importance and the need for scientific processing of the review institutions.

The right of the accused to protection

Protection is defined as procedural activity directed at full or partial objection to the charge. There are two types of defence in penal procedure: material and formal protection. The material protection recognized in the Penal Procedure Code as personal protection is exerted by the defendant himself, while the formal defence is that for defendant other than the defender also exerts other defendants, such as a court that is obliged to establish facts regarding accusation of the defendant. If the defendant is already arrested and unable to choose defence counsel himself, in the name and interest of the defendant this can be done by someone else. On the other hand the defendant may give up this right¹²as well as some other rights.¹³

Persons who show signs of disorder or mental disability cannot renounce the right to engage counsel.¹⁴In this context Penal Procedure Code has predicted cases where the legal protection is compulsory. This is related to the seriousness of the offense, the age of the defendant or his psychological state. Protection is also mandatory in proceedings against juveniles.¹⁵

According to Kosovo Penal Procedure Code the first hearing is held no later than 30 days after the indictment has been filed and 15 days after indictment has been filed when the accused is in detention. Thus the defence has time to prepare defence, 30 respectively 15 days. Although it seems like optimal time to do so the defence does not have in disposal the time that state prosecutor has who conducted investigations.

Right of the accused to an impartial procedure

The right to be heard by an independent and impartial court is among the most important pieces that make up the whole of the principle of fair trial.

Among factors that are mostly mentioned as indicators in lack of independence and without the bias of the courts are: way of appointing judges, duration of their mandate and amount of payment.

In Kosovo the body that proposes judges is Kosovo Judicial Council.¹⁶The proposed of KJC get appointed by the president of the country according to Constitution (article

¹²Article 53 of KPPC.

¹³Article 13, parag.3 of KPPC.

¹⁴Article 53, parag.6 of KPPC.

¹⁵Convention on Children Rights, article 40 (2) (b); Pekin rules, article 7.1, 15.1; ECHR, article 6 (3) (c); article 43 of KDM.

¹⁶Law no. 03/L-223.

84 point 16) and Law on presidents,¹⁷ has the right also of refusing the proposals made by KJC.

The Kosovo Government has no right to interfere in election of judges of none of the Courts. Although the fact that members of a court are appointed by executive does not in itself constitute a violation of the Convention¹⁸ such a thing would influence in losing of independence and impartiality of courts. The executive power and judiciary are divided and selection of judges by executive would put in doubt the trust in judiciary.

Impartiality can be: subjective and objective. In sense of subjective test the impartiality of judges must be presumed until the opposite is proved. As far as the objective test is concerned it implies that apart from personal conduct of each member of trial panel it must be proven whether there are convincing facts which are in doubt without his/her impartiality. In order for the courts to be completely independent of politics in Kosovo shortly after the declaration of independence the EU Rule of Law Mission EULEX was established; they have just completed its mandate in terms of executive powers and now will continue to have an advisory role.

Presence of the defendant in procedure

Task of guaranteeing the right of a criminal accused to be present in the courtroom can be considered as one of the essential requirements of Article 6 of ECHR. But this right is not absolute and Article 6 of Convention gives no assurances about this. The defendant's case can be heard in court fairly through his legal representative. The ECHR has been reluctant to regulate this matter with their domestic legislation.

Trial of penal cases in absence are prohibited in Republic of Kosovo since the special UNMIK regulation of year 2001¹⁹ afterwards also with the Temporary Code of penal procedure dated 2004 where law dispositions emphasize the right of the defendant to be present in judicial hearing in particularly the right of declaring, presenting of evidence and interview of witnesses.²⁰ Likewise also in Penal Procedure Code of 2013 which is currently in force the position of defendant in criminal proceedings is emphasized as stipulated in Article 149 paragraph 6 of special investigative possibility; Article 233 paragraph 8 of the plea bargaining agreement; Article 245 paragraph 1 of the initial hearing and 287 paragraphs 1, 2, 3 and 5 of the main trial. According to KPPC in force if the defendant was not present at the initial hearing or the second hearing, the single trial judge or presiding judge issues a ruling on suspension of main trial due to absence of the defendant. The trial resumes when the defendant is arrested.²¹

¹⁷Law no. 03/L-94.

¹⁸ECHR, Campbell and Fell v. the United Kingdom, 28 June 1984.

¹⁹Article 1 of UNMIK regulation, 2001/1, 12th January 2001.

²⁰Article 10.2, article 238.2 and article 313.2 of KPPC.

²¹Article 285 of KPPC.

Right of the accused to speak in his / her own language and have a translation if necessary

Provision that accused has the right to be informed in the shortest possible time of accusation in a language that he understands is one of the rights that are otherwise called as the minimum rights of the accused. In case of not knowing the language in which procedure is conducted the accused has the right to an interpreter and that all case files should be sent in his or her language or in the language that he understands. By allowing the accused to be notified in a language that he/she understands, competent authorities will ask the defendant what language he/she understands and then ensure the verbal translation and the complete file in the same language.

Not providing interpreter during criminal proceedings is equal to violation of Article 6 of the ECHR. But if the accused understands well the language in which the procedure is conducted but for different reasons he or she wishes to address authorities in another language, the latter are not required providing interpretation to the accused. If the accused is able to express himself clearly in the language of the procedure so long as he can understand it, that is relative. The United Nations Human Rights Committee also estimates that if "a person is likely to understand and express himself in the official language," the authorities are not obliged to provide interpretation.²²

State has no right to request from suspected or accused persons to pay for translation and interpretation. This right of defendant is realized free of charge and at all stages of criminal proceedings. ECHR has found a violation of Article 6 of ECHR in case where authorities have asked tried persons to compensate costs of interpretation during judicial procedure.²³

The right of interpretation when necessary for protection of justice in procedure must also be ensured during communication²⁴ between a suspected or accused person and his or her legal representative, in respect of any investigation, review at a judicial session during the main hearing and during the filing of a complaint or other procedural complaint. This right also includes appropriate assistance for persons with hearing and speech impairment. In case of non-fulfilment of this right defendant may contest any decision taken in procedure which is conducted in a language that he/she does not understand. It is therefore an obligation of authorities to make sure that this right is fulfilled and to avoid consequences that may arise from its opposite.

Conclusions

It should be emphasized that ECHR concluded that also execution of court decisions is integral part of a fair trial. Government authorities should not refuse or fail in

²²ECHR, Yves Cadoret, Hervé Le Bihan v France (323/1988), 11th April 1991, parag. 5.6.

²³During the investigative work in follow-up of court hearings held in English and Albanian (with interpreters), we encountered cases when asked by defense lawyers to pay for translated minutes. Not wanting to spend money, some of them have refused to take them, which can be considered to have been damaged and the rights of the defendants have been violated.

²⁴ECHR, Luedicke, Belkacem and Koç v Germany (6210/73, 6877/75 and 7132/75), 28th November 1978, parag. 50. 111 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1433806057348&uri=CELEX:32010L0064>.

execution of court decision undertaken by courts in judicial system. Even the unreasonable delay in the execution of the final judgment constitutes a violation of the right to a fair trial and within a reasonable time (Sahiti, Murati, 2016, 65). Recently media reported a large number of cases where due to detention on remand of defendants had to be indemnified after being acquitted of all charges. Keeping in custody of innocent persons is an irreparable violation of human rights and while for state costs double as such. Its construct of the procedure and structure of courts enables finding, provision, examination, comparison and certification of evidence that influence creation of conviction to Court for based trial to be turned into a complete confirmation of factual situation and decision-making. Here aims principle of presumption of innocence respecting which is required not only by judiciary system bodies, but also by media, various organizations and observers as well as researchers who follow the course of criminal proceedings. In small country as Kosovo the reputation of individual can be damaged easily. A society almost just out of the war is prone to believe only in negative things without making effort to try learning the truth.

On the other hand it is absurd to think and hard to justify when cases of major affairs of organized crime and corruption, followed by a broad media spectacle cease to be filed without raising any indictment due to expiration of a certain deadline time for filing an indictment. Tendency for efficiency of criminal procedure and protection of rights of suspects are confronted with one another. Such cases cannot be neglected to the extent that the subject is overruled. On the contrary officially of investigations and media coverage of suspected names even spectacular arrests make responsible institutions that have carried out such actions. Closure of cases for which there is reasonable suspicion that criminal offenses have been committed only because indictment has not been filed within the prescribed legal deadline is a failure of the justice institutions. While legal deadlines should be strictly respected also rights of suspect must not be violated in the name of covering human errors, competent persons and their superiors should be held accountable. Such negligence must not pass without punishment. This loses trust of citizens throughout justice system and encourages potential criminals to commit criminal offenses and find corrupt methods of people within justice system. Most of the cases of disciplinary proceedings by Disciplinary Prosecutor are of a conflict of interest character or a failure to implement principle of impartiality. However, it remains worrying that in almost all of these cases decisions issued on basis of procedures initiated by Disciplinary Prosecutor have been dismissed as unfounded.

References

- Sahiti, E. Murati, R. (2016). The right of penal procedure, Pristina.
Murati, R. (2006). Review of penal procedure, Pristina, 2006.
European Convention on Freedom and Human Rights.
Convention on Children Rights.
The Constitution of Kosovo.
Code of Criminal Procedure of Kosovo 2013.
Kosovo Court Law, No.03/L-199.

Kosovo Law no. 03/L-223.

Kosovo Law no. 03/L-225.

Kosovo Law no. 03/L-94.

Manual Training for International Human Rights (2016). Foundation SLYNN, London.

UNMIK regulation, 2001/1, 12th January 2001.

ECHR Decision, Dicle and Sadak v Turkye, 16th June 2015.

ECHR Decision, Neagoe v Rumania regarding the spokesperson of the Appeal Court.

ECHR Decision, Sigurson against Island, 10th April 2003.

ECHR Decision, Feldbrugge v Netherland, 29th May 1986.

ECHR Decision, Henri against Italy, dated 18th of October 2006.

ECHR Decision, Campbell and Fell v. the United Kingdom, 28 June 1984.

ECHR Decision, Zimmerman and Steiner against Switzerland, 13th July 1983.