

The Right to Freedom and Security in case of Detention on Remand and its Violation by Courts – Kosovo Case

PhD Adelina Rakaj

Faculty of Law at University "Ukshin Hoti", Prizren from 2015 to 2020

Abstract

The right to freedom and security is an important right that guarantees a fair criminal process for the defendants. The Republic of Kosovo has raised up this level to the constitutional level, with the aim of providing proper protection to the defendant and guaranteeing a fair criminal trial.

The right to freedom and security, apart from being a general procedural guarantee, appears at every stage of the criminal proceedings. This paper aims to analyse the compliance with this right, in the case of detention on remand, as a measure for ensuring the presence of the defendant in court hearings.

Moreover, this paper will analyse constitutional provisions, international acts on human rights, legal provisions of the Criminal Procedure Code and relevant judgements of the Constitutional Court of the Republic of Kosovo, in which the issue of detention on remand is handled, respectively the right to freedom and security as a procedural guarantee of the defendant.

Keywords: Constitutional of the Republic of Kosovo; Defendant; Criminal Procedure; Criminal Procedure Code of Kosovo; the right to freedom and security.

Introduction

The Republic of Kosovo, following the declaration of its independence on 17 February 2008, adopted a new constitution on 09 April 2008, which entered into force on 15 June 2008 (Marko, pp.437 and Muçaj, Muçaj, pp.195). One of the experts participating in drafting the Constitution of the Republic of Kosovo John Tunheim describes the Constitution of the Republic of Kosovo as a modern European constitution, with some additional control and balance of powers of the US style (Tunheim, pp.378).

The Constitution of Kosovo has a total number of 162 articles in its structure, especially the part of transitional provisions has been repealed by the package of constitutional amendments adopted in 2012, when Kosovo concluded the international supervision of its independence, which was also welcomed by the Kosovo citizens (Article, published in DW on 07.09.2012).

The Constitution of Kosovo has provided a significant advancement to Chapter II, which is related to human rights and freedom. When referring to the constitutional context of human rights and freedom in the Constitution of Kosovo, three issues should be stressed out. First, the provisions concerning human rights and freedom comprise the greatest number of provisions in the Constitution of Kosovo, including two chapters and numerous articles (Constitution of the Republic of Kosovo, Articles 21-56). Second, direct application of nine (9) international instruments, which prevail over other laws and acts applicable in the legal order of the Republic of Kosovo (Constitution of the Republic of Kosovo, Article 22). Third, it is about the fact that the

Republic of Kosovo has committed itself through constitution to apply directly all of the decisions of the European Court of Human Rights (ECtHR), though it is not a party in this court (Constitution of the Republic of Kosovo, Article 53).

The analysis of the context of constitutional freedoms and rights in Kosovo provides for the argument that Kosovo has given a very powerful constitutional position to the international instruments, which, apart from being directly applied to the constitutional system of Kosovo, prevail over other laws and acts applicable in the justice system of Kosovo. International instruments that are directly applied in the Republic of Kosovo and prevail over other laws and acts in case of conflict are as follows:

1. Universal Declaration of Human Rights;
2. European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
3. International Covenant on Civil and Political Rights and its Protocols;
4. Council of Europe Framework Convention for the Protection of National Minorities;
5. Convention on the Elimination of All Forms of Racial Discrimination;
6. Convention on the Elimination of All Forms of Discrimination Against Women;
7. Convention on the Rights of the Child;
8. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.
9. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Constitution of the Republic of Kosovo, Article 22).

Such an approach of the Constitution of the Republic of Kosovo towards international law, in terms of the space provided, is considered as 'friendly' relationship between the Constitution and the international law (Morina, Korenica, Doli, pp.275). The great space established for international law in the Constitution of Kosovo includes also human rights and freedom. The entirety of provisions dedicated to human rights in the Constitution of the Republic of Kosovo, due to vast space and quantity aspect, are designated as 'Kosovan Charter of Human Rights and Freedom' (Hasani, pp.21). Such a Kosovan Charter on Human Rights and Freedom, including all the provisions of Chapter II and III of the Constitution and all international instruments directly applied in the justice system of Kosovo, presents a quite important guarantee for protection of natural and legal persons from violation of rights and freedom by the public authorities in Kosovo.

As mentioned above, a quite significant guarantee for protection of human rights and freedom is introduced by Article 53 of the Constitution of Kosovo. This article determines that: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*". Consequently, this article has provided to the decisions of the ECtHR a constitutional status and direct application in the legal system of Kosovo. This means that all of the decisions of the ECtHR are binding to all public authorities in Kosovo. Interpretation of human rights and freedom, taking into consideration the Article 53 of the Constitution of Kosovo, and direct application of the decisions of the ECtHR, come into play especially when individuals file complaints with the Constitutional Court, as well as when rendering decisions and judgments by regular courts (Bajrami et al, pp.57 and 157).

The substantial importance that human rights and freedom have in the Constitution of Kosovo and in the justice system in general in Kosovo is argued by the fact that for any amendment of the Constitution of Kosovo, the Speaker of the Assembly is constitutionally obliged that prior to the adoption of such amendment to refer it to the Constitutional Court in order to assess whether such amendment lessens human rights and freedom guaranteed by Chapter II (Constitution of the Republic of Kosovo, Article 144, paragraph 3). In the jurisprudence of the Constitutional Court, there were cases when this Court found that a proposed constitutional amendment lessened human rights determined by the Chapter II of the Constitution.

Regardless of the space and position provided by the Constitution of the Republic of Kosovo to human rights and freedom, the same determined also cases when human rights determined by the Constitution under Chapter II may be limited. Article 55, paragraph 1 of the Constitution determines that human rights may be limited only by law (Marko, pp.448). This indicates that the only authority for limiting human rights and freedom in Kosovo is the Assembly of Kosovo, as it is only the Assembly that has constitutional power to adopt laws (Bajrami et al, pp.57-58). According to the Constitution of Kosovo, limitation of human rights and freedom should always have as grounds the principle of proportionality and that the rights should be limited to the level it is necessary. This means that limitation of human rights can never deny the essence of the guaranteed right (Constitution of the Republic of Kosovo, Article 55, paragraph .2 and 5). The Constitution of Kosovo also recognises the situation when human rights may be completely avoided, but this can be done only during the state of emergency. In this regard, the Constitution determines also that avoiding human rights and freedom can never take place in regards to the following: human dignity; equality before the law; the right to life; prohibition of torture; prohibition of slavery and forced labour, the right to freedom and security; the right to a fair and impartial trial; the right not to be tried twice for the same criminal act; the right to marriage and family and the right to freedom of belief, conscience and religion (Constitution of the Republic of Kosovo, Article 56, paragraph 1).

1. The Right to Liberty and Security in the Republic of Kosovo

The right to liberty and security is a right guaranteed by the Constitution of the Republic of Kosovo and by international acts directly applicable in the Republic of Kosovo, respectively by the European Convention on Human Rights (Constitution of the Republic of Kosovo, Article 29 and ECHR, Article 5).

Among others, provision of freedom, as one of the most important personal human rights, presents a guarantee for respecting human rights and freedoms.

In Article 29, paragraph 1, lit 1 to 5, the Constitution of Kosovo determines that: "Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows: (1) pursuant to a sentence of imprisonment for committing a criminal act; (2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law; (3) for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order; (4) for the purpose of medical supervision of a person who because of disease represents a danger to society; (5) for illegal entry into the Republic of Kosovo or pursuant to a

lawful order of expulsion or extradition" (Constitution of Kosovo, 2008).

Given that the nature of criminal procedure in many cases limits the freedom, with the aim of ensuring the presence of the defendant in court proceedings, in order then to avoid any unlawful deprivation of freedom, the CPCK has regulated in details any limitation of the right to freedom and security.

By Article 12 of the Criminal Procedure Code of Kosovo (CPCK), the legality of deprivation of freedom and trial in accelerated proceedings are determined, wherein paragraph 1 of this Article defines that: "No one shall be deprived of his or her liberty, save in such cases and in accordance with such proceedings as are prescribed by the law." From this stipulation, the clear purpose of the legislator to prevent any arbitrary form of freedom limitation is clearly understood, by clearly defining the circumstances in which the CPCK allows the limitation of freedom.

There is the principle that: "the defendant's right to liberty and security establishes a presumption in favour of remaining free", meaning that limitation of freedom appears as exemption in cases when legal requirements are met and based on the determined procedure (Criminal Procedure Code of Kosovo, Article 161).

In the CPCK, cases when freedom of movement is limited are clearly determined and that is implemented through temporary arrest and police detention (Article 162). According to the CPCK, limitation of freedom may take place by a short detention or temporary arrest, as well as by other measures of ensuring the presence of the defendant in court proceedings, which consist in limiting the freedom of movement. Therefore, Article 72 of the CPCK states that: "The police have the right to detain and gather information from persons found at the scene of the criminal offence who may provide information important for the criminal proceedings if it is likely that the gathering of information from these persons at a later time and date would be impossible or would significantly delay the proceedings or cause other difficulties. The detention of such persons shall last no longer than necessary for names, addresses and other relevant information to be gathered, and in any case it shall not exceed six (6) hours. Such detention should only be used when no other means are available to gather the information. The police shall treat the person being briefly detained with dignity and shall not briefly detain the person in a detention center or with handcuffs." (Criminal Procedure Code Of Kosovo, Article 72).

This provision is directly related to the authorizations of the police in criminal proceedings. As far as this paper is concerned, the issue of freedom limitation and the treatment of a detainee are important, as it is about an informal procedure, since the CPCK does not foresee taking any written decision for this type of detention, however, it determines that the detainee shall be treated with dignity and shall not be detained longer than 6 hours. Moreover, the lack of a written decision for detention results in a lack of entitlement to appeal in that regard (Sahiti, Murati, Elshani, pp.245).

Article 163, paragraph of the CPCK determines the limitations regarding temporary arrest and police detention, stating that: "1. The police shall not deprive a person of liberty unless: 1.1. an arrest is authorized under Article 162 of this Code, 1.2. there is a court order to arrest a person, 1.3. there is an arrest order or warrant that appears to be valid which has been received through INTERPOL or through diplomatic channels, 1.4. an arrest is authorized under Article 164 of this Code. 1.5. the deprivation of liberty is brief and complies with Article 72 of this Code." By such stipulation, the CPCK has clearly determined in which case the limitation of freedom is in compliance with this Code and which is considered as lawful deprivation of freedom, setting aside the possibility of arbitration and it furthermore presents certainty in applying the right to liberty and security.

The arrest includes the moment of freedom limitation of the arrested person, while

police detention includes the time of freedom limitation of the arrested person from the time of his/her arrest until his/her release or until ordering detention on remand. However, this cannot be longer than forty-eight (48) hours (Sahiti, E & Murati, R. 2016 pp.195).

In the CPCK, it was determined the deprivation of freedom though temporary arrest, which arrest may be executed in cases of flagrante delicto by the police or any other person without a court order. In the stage of investigation the detention is authorized by the state prosecutor (Sahiti, Murati, Elshani, pp.245).

In contrast to a short detention, for which no decision is rendered, the arrest as a form of freedom limitation is carried out by a written decision of the state prosecutor, which is issued to the detainee no later than six hours from the moment of detention (Sahiti, Murati, Elshani, pp.245). However, even though the arrest takes place by a written decision, it may not be appealed as Article 164 does not provide for such a possibility, though such remedy was determined by the previous Code of Criminal Procedure, under Article 212, paragraph 6, which Code was applicable until 2013.

The lack of such provision is contrary to the international acts on human rights and the Constitution of Kosovo, which determines such right under Article 29, paragraph 4.

Moreover, Article 12, paragraph 2 of the current CPCK determines that: *"Any person deprived of his or her liberty by arrest or detention shall be entitled under the procedures provided by the present Code to take proceedings by which the lawfulness of his or her arrest or detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful."* Therefore, referring to the constitutional provisions and the possibility provided by such Article of the CPCK, persons deprived from their freedom through detention or arrest, should be instructed without any delay for appealing.

The temporary arrest cannot last longer than forty-eight hours from the time of arrest, wherein the state prosecutor shall within twenty-four hours from the time of arrest file an application for detention on remand to the pre-trial judge (Criminal Procedure Code Of Kosovo, Article 163, par. 2). After such period, the defendant is either ordered detention on remand or any other measure to ensure the presence of the defendant in court hearing, or he is released. The time limitation for detention and arrest and the obligation to comply with the rights of the defendant during the detention stage present a guarantee for the status of defendants and compliance with the right of freedom and security.

In regards to the status of an arrested person during the stage of detention it is important to emphasize that the CPCK determines the rights of the defendant in criminal proceedings, such as: notification for the reason of detention, the right to remain silent, the right for professional defence, the right to translation, the right to inform family members and the right to medical examination.

The limitation of freedom is carried out by the CPCK through several measures serving for ensuring the presence of the defendant in court proceedings. Article 173 of the CPCK determines a total number of nine measures, such as: 1.1. *summons*, 1.2. *order for arrest*; 1.3. *promise of the defendant not to leave his or her place of current residence*; 1.4. *prohibition on approaching a specific place or person*; 1.5. *attendance at a police station*; 1.6. *bail*; 1.7. *house detention*; 1.8. *diversion*; and 1.9. *detention on remand*. Undoubtedly, out of all these measures determined by the CPCK, detention on remand presents the most severe measure that can be imposed on the defendant, because it comprises the limitation of freedom of movement and keeping the defendant in a detention centre. Article 187 of the CPCK determines the legal requirements for imposing detention on remand against the defendant, for which there is grounded suspicion that he/she has

committed the criminal offence, wherein it specifies when: “1.2.1. he or she is in hiding, his or her identity cannot be established or other circumstances indicate that there is a danger of flight; 1.2.2. there are grounds to believe that he or she will destroy, hide, change or forge evidence of a criminal offence or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices; or 1.2.3. the seriousness of the criminal offence, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted criminal offence or commit a criminal offence which he or she has threatened to commit; and.” If referred to these requirements for imposing detention on remand determined in the CPCK, it is noticed clearly that we deal with several types of requirements that aim to ensure the presence of the defendant in court hearings, to ensure a successful flow of criminal proceedings and protect the interests of the society.

Naturally, detention on remand as a measure to secure the presence of the defendant is imposed when it is deemed that other measures for ensuring the presence of the defendant in the court hearings would be insufficient or when a defendant has breached any of other alternative measures (Criminal Procedure Code Of Kosovo, Article 187, paragraph 1, lit. 1.3, and paragraph 3).

The CPCK has clearly defined that detention on remand should be imposed only when it is necessary and when other measures would be unsuccessful for ensuring the presence of the defendant in court hearings (Criminal Procedure Code of the Republic of Kosovo No 04/L-123, Article 185). Moreover, in the application for imposing detention on remand, it is not sufficient for the prosecutors only to describe legal grounds for imposing detention on remand determined by the CPCK, but they should justify the specific existence of such grounds for each case (Criminal Procedure Code of Kosovo, Article 185).

Based on the court monitoring report carried out by BIRN during 2015/2016, it was noticed that prosecutors not always managed to substantiate the real existence of grounds for imposing detention on remand in cases when a defendant is suspected or accused of having committed a criminal offence, but they only referred to the provisions of the CPCK without observing and analysing well each specific case and without proving that imposing detention on remand is truly necessary. According to this research, there are rare cases when prosecutors apply any other measure for ensuring the presence of the defendant in court hearings and all applications request imposing of detention on remand (Balkan Investigative Reporting Network- BIRN (2016), Court Monitoring Report, p.9).

As emphasized above, in comparison to other alternative measures for ensuring the presence of the defendant in court hearings, detention on remand presents the most severe measure. Therefore, in order to apply such measure, the CPCK has determined legal deadlines that along with ensuring the efficiency of criminal proceedings aim to provide also protection of defendant's rights. The duration of detention on remand was regulated by the CPCK in two ways, which includes: a) the duration of detention on remand prior to filing the indictment and b) the duration of detention on remand after filing the indictment.

The CPCK, respectively Article 190, determines the timeline for duration of detention on remand prior to filing the indictment, wherein detention on remand may initially last for the longest one month from the date of detention and it may then be extended if considered that the requirements for extending the detention on remand still exist.

Moreover, the duration of detention on remand is related to the criminal offence for which the defendant is suspected of, which determines that: *“Prior to the filing of an indictment, detention on remand shall not exceed: 2.1. four (4) months, if proceedings are conducted for a criminal offence punishable by imprisonment of less than five (5) years; 94 2.2. eight (8) months, if proceedings are conducted for a criminal offence punishable by imprisonment of at least five (5) years Criminal Procedure Code Of Kosovo, Article 190, paragraph 2, lit. 2.1 and 2.2.)* These timelines regarding the duration of detention on remand are strict deadlines, excluding the case when the maximum for duration of detention on remand for the criminal offences sentenced for more than five years of imprisonment may go to 12 months, in complicated cases also up to 18 months, if there is any risk of violence in case the defendant is released in a pre-trial procedure (Criminal Procedure Code Of Kosovo, Article 190, paragraph 3 and 4).

While the duration of detention on remand prior to filing the indictment is characterized by strict legal deadlines, whose conclusion results in releasing the defendant, the duration of detention on remand after filing the indictment is not related to any deadlines, but it depends on further existence of conditions for extending the detention on remand.

Undoubtedly, through determining the necessary requirements for imposing detention on remand and defining the timelines for the duration of detention on remand prior to filing the indictment, the CPCK aims to ensure the defendant any protection of his freedom and right from unlawful deprivation of liberty and from any unlawful detention on remand, thus avoiding any possibility to violate the rights of the defendant to liberty and security unlawfully.

Detention on remand is decided by a ruling for detention on remand, which ruling may be appealed according to Article 189, paragraph 3, which states that: *“Each party may file an appeal within twenty-four (24) hours of being served with the ruling. The appeal shall not stay execution of the ruling. If only one party appeals, the appeal shall be served by the court on the other party who may submit arguments to the court within twenty-four (24) hours of being served with the appeal. The appeal shall be decided within forty eight (48) hours of the filing of the appeal.”* By this paragraph, the CPCK provides for legal remedies to the defendant, such as the appeal to review the legality of detention on remand and the legality of the conditions for detention on remand.

Moreover, the CPCK determines that the proceedings in cases of detention on remand are urgent proceedings conditioned by legal deadlines either regarding to the duration of detention on remand and to filing legal remedies against imposing or extending detention on remand (Criminal Procedure Code Of Kosovo, Article 189 and 190).

2. Violation of the right to freedom and security during detention on remand by courts in Kosovo

The right to freedom and security, among others undoubtedly comprises a significant guarantee in criminal proceedings and it should be complied with. In the majority of cases in real life, the right to freedom and liberty was handled and appeared in case of detention on remand, as a necessary measure for ensuring the present of the defendant in court hearings.

However, there are cases when the courts of the Republic of Kosovo, while applying detention on remand, with the aim of ensuring the presence of defendants in court hearings, violated the right to freedom and security, wherein this matter was raised

at the level of constitutional interpretation. The Constitutional Court, in the case No KI10/18, concluded that the regular courts violated the right to freedom and security against the defendant Fahri Deqani, when deciding on the measure of detention on remand.

3. The case of Fahri Deqani and the interpretation by the Constitutional Court

One of the cases, which was decided by the Constitutional Court of the Republic of Kosovo, was the case of the defendant Fahri Deqani. The Applicant in this case challenged the Judgment of the Supreme Court of Kosovo, No 357/2017, dated 22.12.2017. When challenging the judgment at hand, the Applicant Fahri Deqani alleged that he was violated two fundamental rights, the right to freedom and security and the right to a fair trial, which derive from Articles 29 and 31 of the Constitution of the Republic of Kosovo (Case No KI10/18, Applicant Fahri Deqani, paragraph 2 and 4).

According to the summary of facts, on 31 July 2010, the measure of detention on remand against the defendant Fahri Deqani was imposed, who was suspected of committing the criminal offence of incitement to murder and aggravated murder under the Criminal Code of Kosovo, which was applicable at that time. On the other hand, on 16 February 2011, the District Public Prosecutor filed an indictment against the defendant for committing the criminal offence of aggravated murder under Article 147 of the Criminal Code of Kosovo. After filing the indictment, on 3 September 2012, the defendant in the capacity of the accused was sentenced by a decision of the court (Case No KI10/18, Applicant Fahri Deqani, paragraphs 23, 24 and 25).

Following the appeal filed by the defendant against the guilty verdict, the second instance court (the Court of Appeals) approved his appeal and returned the case for retrial with the Basic Court in Peja. That took place on 26 November 2013 (Case No KI10/18, Applicant Fahri Deqani, paragraph 27). In its judgment, the Court of Appeals, among others, stressed out that the judgment of the District Court was in contradiction to the Criminal Procedure Code and as such it was not based on any evidence.

Though the case was returned for retrial, the Basic Court, after conducting 18 hearings, until 9 March 2018, had not rendered any verdict on the case of the defendant Fahri Deqani. In April 2018, the Basic Court in Peja rendered a judgment, finding the defendant guilty.

In this case, the defendant remained waiting for around six years for a final decision in order to conclude his case. In such a situation, waiting for a final decision in his case, from 26 November 2013 until 9 March 2018, the Basic Court decided in every second month for extending the detention on remand against Fahri Deqani (Case nr. KI10/18, Applicant, Fahri Deqani par. 30 and 32). In the reasoning for extending the detention on remand, the Basic Court continuously provided the same reasoning, which was as follows: *“According to the assessment of the presiding judge against the defendant Fahri Deqani, there are still legal reasons for extending the detention on remand as provided for in Article 187 par. 1, sub. 1.1 and 1.2 point 1.2.3 of the CPCK, since there is a reasonable suspicion that he has committed the criminal offenses for which he is charged by the Indictment, and which is a suspicion resulting from the submissions attached to the indictment which are an integral of the case file. The Presiding Judge considers that there are still reasons for extending the detention on remand against the accused pursuant to Article*

187 par. 1 sub. 1.1 and 1.2, point 1.2.3 of the CPCK, taking into account the gravity of criminal offenses, the manner and circumstances under which the criminal offenses are suspected to be committed, and given the fact that the relations between the family of the accused Fahri Decani and of the deceased {B.K.} have been deteriorated, hence there is a real danger that if the defendant at liberty he could repeat such criminal offenses or similar ones. The Presiding Judge took also into account other measures as provided by Article 173 paragraph 1 of the CPCK, but according to the court's assessment it would not be sufficient for the successful implementation of criminal proceedings and for preventing repetition of criminal offenses by the defendant." (Case nr. KI10/18, Applicant, Fahri Deqani, par. 32).

The defendant Fahri Deqani filed appeals against the rulings of the Basic Court on extension of detention on remand. In the filed appeals, the defendant emphasized that the Basic Court had no legal reasons for extending his detention on remand (Case nr. KI10/18, Applicant, Fahri Deqani par. 22 and 34). In the flow of the case, the Court of Appeals rejected the appeals of the defendant providing the reasoning that the Basic Court had decided correctly on extension of his detention on remand. Moreover, the defendant filed an application for protection of legality with the Supreme Court, challenging the legality of extension of detention on remand. However, the Supreme Court rejected his appeals (Case No KI10/18, Applicant, Fahri Deqani par. 35-38).

Found in this situation, the defendant Fahri Deqani filed a referral to the Constitutional Court for protection of his rights, alleging that the Basic Court had violated two of his rights, the right to freedom and security under Article 29 of the Constitution and the right to a fair and impartial trial, under Article 31 of the Constitution.

In the framework of examining the case, the Constitutional Court of the Republic of Kosovo emphasized that imposing of detention on remand against the defendant in this case should be handles in light to the decisions of the ECtHR and of the provisions of Article 5 of the ECHR. *"The Court notes that under Article 29 paragraph 1, item 2 of the Constitution and Article 5.1 (c) of the Convention, the deprivation of liberty may be conducted in the case of a grounded suspicion of committing the criminal offence, and such a thing is considered necessary to prevent the commission of another offense or removal after its commission. Therefore, the Court notes that in order to comply with the Constitution and the ECHR, the detention on remand must be based on one of the grounds for deprivation of liberty set forth in Article 29 of the Constitution in conjunction with Article 5, paragraph 1 (c) of the Convention."* (Case nr. KI10/18, Applicant, Fahri Deqani par. 65 and 66).

The Constitutional Court of the Republic of Kosovo, when examining the challenge of the Applicant Fahri Deqani, emphasising the importance of the jurisprudence of the ECtHR, among others, highlighted that: *"In this regard, the Court notes that during the period between 3 September 2012 and 26 November 2013, namely after the Judgment of the District Court until rendering the decision of the Court of Appeals to remand the criminal case for reconsideration to the Basic Court, the detention on remand of the Applicant does not fall within pre-trial detention within the meaning of Article 29, paragraph 1, item 2 of the Constitution and Article 5, paragraph 3 of the ECHR."* (Case No. KI10/18, Applicant, Fahri Deqani par. 88). This finding of the Court means that the defendant remained on detention on remand as there was issued a guilty verdict.

For the Constitutional Court, the second period of detention on remand is disputable, which includes the period from 2013 until 2018, when it was decided on the merits of the case and the defendant Fahri Deqani was found guilty.

In the framework of examining facts regarding extension of detention on remand against the defendant in question, the Constitutional Court noted that the Supreme Court upheld and used the same justification as the other courts of lower instances.

In this regards, the Constitutional Court highlights that using of the same reasoning cannot indefinitely be a sufficient basis for extending the detention on remand (Case No KI10/18, Applicant, Fahri Deqani par.101). Therefore, the Constitutional Court emphasizes that also the ECtHR had found breaches of Article 5.3 of the ECHR in cases when the local courts used the same justifications for extension of detention on remand (Case No KI10/18, Applicant Fahri Deqani, paragraph 103).

In this context, the Constitutional Court, among others, highlights that: *“Moreover, the regular courts failed to provide a concrete and sufficient reasoning as to why the extension of detention pending trial against the Applicant was necessary and why the alternative measures were not applicable in the Applicant’s case.”* (Case nr. KI10/18, Applicant, Fahri Deqani par.105). In this case: *“Accordingly, the Court considers that the extension of detention on remand pending trial of the Applicant, confirmed by the challenged Judgment Pml. No. 357/2017 of the Supreme Court of 22 December 2017 constitutes a violation of Article 29, paragraph 1, pitemoint (2) of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR”.*(Case nr. KI10/18, Applicant, Fahri Deqani par. 109).

In its conclusions, the Constitutional Court emphasizes that the regular courts in this specific case failed to provide sufficient reasoning and to substantiate the conditions for extending the detention on remand. Moreover, the Constitutional Court in this case establishes the standard, through which it clearly and directly conveys the requirement, that all regular courts should be careful in providing the reasoning for extension of detention on remand in compliance with the Article 29 of the Constitution and Article 5 of the ECHR, always having into consideration the continuous reasoning for this specific case and in compliance with the circumstances of the case (Case No KI10/18, Applicant, Fahri Deqani, paragraph 118).

By this case, the Constitutional Court, apart from protecting a constitutional right and freedom, it also establishes clear standards with regard to the manner how regular courts should impose and extend the measure of detention on remand. In any case, the regular courts cannot extend detention on remand by always referring to the same facts and justifications. The reasoning of extension of detention on remand should be continuously linked to the specific circumstances of the case, at any time when it is decided on extension of detention on remand.

Conclusions

The right to freedom and security and its limitation only in cases determined by the law comprises an important guarantee for human rights and freedom, in particular of defendants in the Republic of Kosovo. Even though the Republic of Kosovo has ensured a very advanced legal and constitutional status, including the right to freedom and security, the same guarantees have not however sufficed to protect such right in direct application.

Having available a great number of constitutional and legal mechanisms for protecting human rights, the failure of Kosovo in the case that is a subject matter of review in this paper, regarding detention on remand, presents a serious deficiency in the judicial system, respectively of judges, in relation to application of guarantees for protection of defendants’ rights, in particular in case of jurisprudence of the ECtHR. While analysing the failure of judiciary on complying with the right to freedom and security, in relation to the case of Fahri Deqani, and taking into account monitoring reports by the civil society organizations, there is a serious necessity for the Kosovo

Judicial Council, within the legal framework, to establish policies that enable judges to apply the ECHR and ECtHR in specific cases.

References

- Arsim Bajrami, Enver Hasani, Hajredin Kuçi, Iliriana Islami, Haxhi Gashi, Iset Morina, Avni Puka, Azem Hajrari, Mirlinda Batalli, Remzije Istrefi, "Hyrje në Sistemin Ligjor në Kosovë", published by the Justice Academy, Prishtina, 2019, pp.57 and 157.
- Article "Qytetarët e Kosovës për fundin e pavarësisë së mbikqyrur", published in DW on 07.09.2012. <https://www.dw.com/sq/qytetar%C3%ABt-e-kosov%C3%ABs-p%C3%ABr-fundin-e-pavar%C3%ABsis%C3%AB-s%C3%AB-mbikqyrur/a-16224949>, accessed on 14.04.2020.
- Balkan Investigative Reporting Network- BIRN. (2016). Raporti i monitorimit të Gjykatave. f.9.<https://kallxo.com/wp-content/uploads/2017/05/BIRN-RAPORTI-I-MONITORIMIT-T%C3%8B-GJYKATAVE-2016.pdf>last accessed on 23.01.2020.
- Enver Hasani "Basic Characteristics of the Constitutional System in Kosovo ", Journal E Drejta/ Law, nr.1-4, 2014, pp.21.
- European Convention of Human Rights (ECHR).
- Fahri Deqani, Referral No KII10/18, Assessment of the Constitutionality of the Judgment of the Supreme Court of Kosovo, Pml. nr. 357/2017, Judgment of the Constitutional Court of Kosovo dated on 22 December 2017.
- Florent Muçaj & Avdylkader Muçaj, "Appointing a President that Represents the Unity of the People in Kosovo" ICLR, 2017, Vol. 17, No. 1, De Druyter, pp.195.
- Joseph Marko "The New Kosovo Constitution in a Regional Comparative Perspective" Review of Central and East European Law 33 (2008), pp.437.
- Judge John Tunheim "Rule of Law Symposium Rule of Law and the Kosovo Constitution" MINNESOTA JOURNAL OF INT'L LAW, Vol. 18:2, pp.378.
- Criminal Procedure Code of the Republic of Kosovo No 04/L-123.
- Constitution of the Republic of Kosovo, 2008.
- Sahiti, E., & Murati, R. (2016). "E drejta e procedurës penale". pp.195.
- Sahiti, E., & Murati, R., & Elshani. Xh. (2014). "Komentari i Kodit të Procedurës Penale të Kosovës". pp.245.
- Visar Morina , Fisnik Korenica and Dren Doli "The relationship between international law and national law in the case of Kosovo: A constitutional perspective" International Journal of Constitutional Law, (2011), Vol. 9 No. 1 274–296, pp.275.