

An underutilized system: State of Play of the Human Rights framework in Kosovo

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Policy Analysis

An underutilized system: State of Play of the Human Rights framework in Kosovo

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I. Executive summary

The majority of the EU equality and Human Rights principles have been directly transposed in Kosovo's legislation. Kosovo has constitutionalized the Human Rights conventions, placing them above the internal legislation and making them directly applicable by the Courts and Public Administrations. Additionally, a set of laws and by-laws have been drafted and adopted to protect and promote Human Rights standards, covering discrimination cases and gender equality, as well as strengthening the Human Rights bodies and the mandate of the Kosovo Ombudsperson Institution.

However, results related to the actual implementation remain scarce. As of 2015, Kosovo adopted the so-called "Human Rights Package of laws," to protect and promote the rights of individuals, including anti-discrimination and gender equality provisions. The newly adopted package came as a result of the requirements of the EU Visa Liberalization Roadmap with Kosovo, which requested the adoption and implementation of legislation that calls for effective protection against discrimination as well as for full respect of domestic provisions on Human Rights. Still, two years after their adoption, the actual implementation lags behind.

Institutional capacities to implement these laws remain deficient, with cases of discrimination in regular courts and public institutions remaining rare. An exception has been the Constitutional Court, applying international Human Rights principles enshrined in the Constitution in a number of cases. Nonetheless, regular courts rarely use the Human Rights Package or rule on cases based on the international Human Rights principles listed in the Constitution. The use of the European Court of Human Rights case law is also very rare. Individuals rarely file anti-discrimination cases in Courts and when such cases are taken up, relevant laws are not correctly implemented. As stated by the Ombudsperson, the Courts continue to fail in implementing the anti-discrimination provisions, especially in cases related to the protection of the rights of persons from the Lesbian, Gay, Bisexual, Transgender (LGBT) community. Specifically, cases of violence based on sexual orientations are prone to the 'retrial' phenomenon, with Courts failing to issue final decisions for the perpetrators. Ignoring the problem seems to be seen as the solution. Further, in a few labor disputes that have been claimed in courts by persons dismissed from their jobs due to their sexual orientations, the anti-discrimination provisions have proven to be minimally known and remain unused by judges.

Other obstacles in implementation derive from a severe deficiency to collect related statistics, and more specifically, developing a tracking mechanism to monitor cases of discrimination by public institutions. Under the Law on Gender Equality, all institutions should collect and submit to Kosovo Agency for Statistics gender desegregated data for regular reporting and monitoring purposes. Moreover, the tracking of cases of discrimination also in the judiciary seems scarce, with problems arising from proper lack of identification and categorization cases by law enforcement agencies and the courts. For example, Kosovo Police fails to list violent cases against the LGBT community as 'based on discrimination by reasons of sexual orientation or gender identity' even though it is foreseen by the legislation.

With recorded jurisprudence remaining low and a weak, rather reactive action by law enforcement agencies, the fulfillment of the anti-discrimination and gender equality conditions required by the EU integration process remains delayed.

The report provides for a legal analysis of the current state of play pertaining to Human Rights, starting with systemic deficiencies and continuing with the relevant applicable laws and

institutions directly engaged in Human Rights protection, including that on Access to Public Documents, a question which is often ignored. All the while, it focuses on necessary actions to increase its effective implementation. It ends with a number of recommendations for improving the current delivery of Human Rights in Kosovo.

II. THE LEGAL FRAMEWORK FOR HUMAN RIGHTS

A) Systemic issues

The laws that make the so-called Human Rights Package, the Anti-Discrimination Law, Law on Gender Equality and the Law on the Ombudsperson, are only part of the broad governance system of Kosovo, which is ultimately responsible for upholding Fundamental Rights. Thus, they are just part of the problem. Kosovo is currently facing a systemic governance crisis, affecting both the political and judicial level, and any specific piece of legislation, no matter how well written it is individually, can only perform as good as the structure of the country allows.

These systemic issues have been pointed by different agencies or organizations working on Human Rights issues in Kosovo over the years, to the point that the Strategy and Development Plan of the Ombudsperson Institution 2017-2019 has also established that tackling these is a strategic objective for the Institution.¹ Those issues were broadly identified as relating to two main domains, a lack of legal harmonization and a low judicial independence in practice, which undermines the coherence of the whole legal implementation.² These questions undoubtedly affect the Human Rights situation, but their broad nature also pushes them beyond the scope of this report.

Another problem identified as having an effect on the implementation of the legal order is a lack of harmonization of the Law. The Assembly of Kosovo is missing a strong legal office capable of providing technical assistance to lawmakers. Consequently, each piece of legislation is considered separately and not as part of a broader legal order. Furthermore, in many instances such regulations continue to be drafted with international assistance, bringing a heterogeneous background, expertise and traditions to the drafting processes. The legal system, thus, can be defined most of the time as a patchwork that often lacks a well-defined structure, internal coherence and strategic planning. On the one hand, the use of language remains mixed, with different Laws (and in some cases within a single text) more often than not using the same term with different meanings or different terms for a single concept.³ On the other hand, no systematic review takes place before approval by the Assembly, and in far too many instances a new amending law needs to be passed afterwards to correct previous versions.⁴ This leads to low legal security and increases the difficulty for Courts and Administrations, but also for the public, to effectively use and implement the various laws. As for judicial independence, the situation remains troublesome as political interferences over the judiciary continue remaining a significant

¹ Ombudsperson Institution, *Strategy and Development Plan of the Ombudsperson Institution 2017-2019*, Pristina, 2017, available: www.ombudspersonkosovo.org/repository/docs/296-2017,_Strategjia_eng._166751.pdf

² Author's personal interview with Hilmi Jashari, Ombudsperson of the Republic of Kosovo, Pristina, 13 July 2017.

³ This can be noticed throughout primary and secondary legislation and has been brought up as a problem by the Ombudsperson in many occasions.

⁴ This has been the case for many different laws, administrative instructions, and regulations in the past years.

problem.⁵ Despite dispositions on the contrary, the Judiciary remain subordinated to the Executive, as it is evident, for example, in the role of the latter in deciding and covering staff and budgetary requirements for the former. This continues to undermine the proper implementation of the laws in force.

B) The Constitutional protection of Human Rights

The Constitution of Kosovo draws from common European constitutional traditions to design a framework of Fundamental Rights based on the European System of Human Rights, with the particularity of also recognizing a number of collective rights to minorities.⁶

In relation to individual rights, Chapter II provides for 35 articles devoted to the fundamental rights of the individual, ranging from the rights to life and integrity to privacy and family. According to Chapter III, relative to collective rights, the communities are entitled to full respect to their languages and customs, as well as to overrepresentation in both political and administrative institutions. Furthermore, Article 22, number of mechanisms, among them the Universal Declaration of Human Rights, that become automatically applicable irrespective of the status of Kosovo as signatory.⁷

This constitutional integration poses a number of problems. First, regarding their order of precedence, Article 22 falls short from setting a hierarchy of treaties or establishing criteria to solve eventual contradictions and overlaps.

Furthermore, the role of the European Court of Human Rights (ECtHR) case law remains problematic. While the European Convention on Human Rights is made an integral part of the legal order, Article 22 does not mention this jurisprudence. Instead, it is established as a mere interpretative criterion in Article 53. The Constitutional Court, consequently, has deemed itself empowered to decide on the basis of the case law stemming from the ECtHR, thus providing itself with a vast judicial corpus to reinforce its legal reasoning. Among other sentences, this phenomenon is visible in the *Valon Bislimi* case, where the Court benefitted from the reasoning of the ECtHR to decide on an, a priori, simple administrative question regarding the issuance of a passport, framing it within the due respect to freedom of movement.⁸ However, as Kosovo is not part of the Convention, the usual external redress mechanisms do not apply.

Moreover, this consideration by the Constitutional Court constitutes an exception, since it represents the sole court in Kosovo that regularly ponders this jurisprudence, even if in an

⁵ Freedom House, 'Kosovo' in *Nations in Transit 2017: The False Promise of Populism*, retrieved 2 October 2017, available: <https://freedomhouse.org/report/nations-transit/2017/kosovo>

⁶ *Constitution of the Republic of Kosovo*, Pristina, 15 June 2008

⁷ These are, as per article 22:

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;

⁸ Constitutional Court of the Republic of Kosovo, Judgment of 30 October 2010, *Valon Bislimi, vs. Ministry of Internal Affairs, Kosovo Judicial Council And Ministry of Justice*, Case KI 06/10, AGJ 63/10

inconsistent manner. According to the Ombudsperson, ordinary Courts fail to do so and instead rely solely on any internal disposition applicable to the case.⁹ In practice, this lack of application significantly reduces the effectiveness of the constitutional protection framework.

B) The ombudsperson institution and its role

The Ombudsperson is an independent institution devoted to the protection, promotion and supervision of the implementation of fundamental rights and freedoms. Established as an independent constitutional institution, its structure, mandate and scope is defined in the new Law on the Ombudsperson, which revamped the institution in 2015.¹⁰ The Law also designates it as the National Preventive Mechanism against torture.¹¹ It also is, by virtue of the Laws on Gender Equality and Protection from Discrimination, tasked with handling discrimination cases, based both on gender and on any other basis.^{12 13} Thus, it is entitled to investigate, *ex officio* or upon complaint, the action or inaction of public authorities that may have infringed on someone's rights. Furthermore, its functions regarding the prevention of torture entitle its officials to enter detention centers and request any document from public institutions.

The Ombudsperson is appointed by the Assembly for a non-renewable term of 5 years with the selection made through a two rounds voting, by an absolute majority of MPs.¹⁴ After a protracted legal conflict, a decision by the Constitutional Court granted the Ombudsperson full autonomy to define its administrative procedures, working requirements and systematization of posts, as well as to draft its yearly budget for approval by the Assembly.¹⁵

However, the legal changes of 2015 fell short of establishing independent appointment by the Ombudsperson, leaving again the Assembly responsible for selecting from two candidates for each position, based on the recommendations of the Ombudsperson. Since the Ombudsperson itself is already responsible to the Assembly for the action of the Institution as a whole, the role of the Assembly in the creation of its team seems to be unnecessary and disproportionate. A simple right to object the appointment or formal approval would have been more convenient, as it was proposed in 2013 by the Council of Europe (CoE), but not included in the Law.¹⁶

Back then, the CoE also proposed amending the dismissal process of the Ombudsperson to diminish the scope of grounds for deposition. In this case, the recommendations were followed, but the amendment introduced a dissonance regarding the required majority. Thus, while the Constitution requires a reinforced majority of 2/3 (which is followed by the Rules of Procedure of the Assembly), the Law on the Ombudsperson only mentions a simple majority.^{17 18} While the

⁹ This idea has been consistently presented by the Ombudsperson in a number of reports and public appearances. *Inter alia*, it was introduced on the interview held in Pristina in July 2017, and mentioned again in a speech given in Pristina on 8 September 2017.

¹⁰ Law No. 05/L-019 On Ombudsperson, 28 May 2015, Pristina, Official Gazette No. 16 / 26 June 2015

¹¹ *Ibid.* Article 17

¹² Law No. 05/L-020 on Gender Equality, 28 May 2015, Pristina, Official Gazette No. 16 / 26 June 2015, Article 13

¹³ Law No.05/L-021 on Protection from Discrimination, 28 May 2015, Pristina, Official Gazette No. 16 / 26 June 2015, Article 9

¹⁴ Constitution, Article 134

¹⁵ Constitutional Court of the Republic of Kosovo, Judgment of 30 October 2010, *Ombudsperson, vs. Ministry of Justice*, Case KO 73/16, AGJ 1015/16

¹⁶ Council of Europe, *Support to the implementation of European Human Rights Standards and the reform of the Ombudsperson Institution in Kosovo**, Strasbourg, 13 February 2017, p. 8

¹⁷ Constitution, Article 134

¹⁸ Law on the Ombudsperson, Article 13

relevant constitutional provision is overriding, this offers an opportunity for a slim majority to prevent the work of the Ombudsperson by attempting to dismiss it, as it would take time for the Constitutional Court to remedy the situation, as such an action would be clearly unconstitutional.

Similarly, as noted by the CoE, the Law on Protection from Discrimination created an inconsistency extending the mandate of the Ombudsperson to the private sector, while the Constitution limits it to the public one.¹⁹ It is worth mentioning that the design and scope of activities of these institutions is intended to monitor public activities, and thus the convenience of this mandate extension is doubtful. Whatever the case may be, this is yet another instance of legal disharmony that serves to illustrate the systemic inconsistency of the legal order mentioned before.

However, the main challenges faced by the Institution as of August 2017, and as stated many times by the current Ombudsperson, are the cooperation received from other institutions, and the aftermath of its interventions. Regarding the former, it is still frequent for public officials to disregard its requests. In most occasions, they are not even aware of their legal obligation to cooperate with an open investigation. A number of circular letters have tackled recently the issue, and the position of the Institution vis-à-vis public administration has improved in recent years. However, this is an *ad hoc*, *ex post* method that cannot guarantee full cooperation from others or in the future. Disciplinary sanctions are foreseen in article 25, but they are not mirrored in the disciplinary regime and seldom implemented.

As for the latter, although the Law on the Ombudsperson establishes an obligation to report on the actions taken to tackle comments and recommendations made by the Ombudsperson, many institutions fail to do so in a timely manner. The Institution has addressed the issue by actively requesting such actions, raising the issue at the central level and shaming the non-complying units and bodies. This is a common strategy employed by similar institutions across Europe, where it has proved unevenly successful, depending mainly on the relative public outreach of the respective Ombudsman.

C) Protection from discrimination

Part of the Human Rights Package, the Law no. 05/L-021 on Protection from Discrimination is a transversal norm that aims at creating a general framework for public action to fight discrimination in all its forms, according to the principles set in diverse European Directives. The Law does not set specific, direct obligations or rights. Instead, it builds up on the content of the Constitution to establish a framework for its practical implementation. It does so by categorizing attitudes that can be deemed as discriminative, establishing administrative sanctions and a framework for their judicial appreciation. The most innovative feature of the Law is developing the possibility (which in addition becomes a duty) for the Administration to launch public policies aimed at improving the situation of marginalized communities by means of positive discrimination, called affirmative measures in the current text.²⁰ Furthermore, the Law on Gender Equality adds specific actions from a gender perspective.

The Law itself is a sound document, but is not being effectively implemented. Few, if any, judicial or administrative decision is based on its dispositions. In fact, precisely due to its supporting character, public institutions at all level are failing to make use of the tools made available by the

¹⁹ *Support to the implementation of European Human Rights Standards*, p. 9

²⁰ *Law on Protection from Discrimination*, Article 7

Law. Clear cases of discrimination are not listed as such, and are considered offenses of diverse, lesser nature, instead.²¹

This being the case, statistics related to discrimination are not being properly collected. There are no pre-established indicators and variables, and an active, coordinated information gathering policy is also missing. As a result, the available information on discrimination remains fragmented and inconsistent, hindering decision-making processes. This problem has been confirmed by the Office of Good Governance (OGG), which however remains optimistic in future developments, as more attention is being put on the issue.²²

The institutions charged to implement the Law have yet to design and staff the respective units. So far, only 6 ministries and 2 municipalities have working units specifically charged with discrimination issues, according to the OGG.²³ Even the Office itself has still to hire an official to be exclusively dedicated to the discrimination issues. However, it is expected that the situation will unblock now that a new government has been established.

Finally, the Law on Protection from Discrimination presents another issue regarding its sanctioning character. It provides for punitive measures for discriminative activities, ranging from 350 to 1350 Euros, both for public and private entities.²⁴ The Law heavily stresses this dimension, while leaving the restitutive, arguably more important and a most effective mechanism to prevent discrimination, since it engages the very victim on its prosecution. Furthermore, these sanctions are listed without sufficient detail for proper implementation, thus undermining its very own purpose. It is also in contradiction with established European Court of Justice (ECJ) jurisprudence, according to which, such sanctions should not be formal and symbolic, as their severity should be commensurate to the seriousness of the breaches that were imposed and balanced proportionally.²⁵

D) Gender equality

Complementary to the Law on Protection from Discrimination, the Law No. 05/L-020 On Gender Equality attempts to promote gender parity by mainstreaming a gender perspective in all public policies aimed at overcoming the deep societal and cultural disadvantages that women are still facing. Not only that, it also tackles discrimination against transgender persons and those who identify themselves out of the traditional male – female divide. The status of women in Kosovo remains unequal, with challenges continuing in the most varied domains; both in the public sphere (political life, wages, representation, employment, health and education) and in the private sphere (domestic violence, family, marriage, household and sexual harassment).²⁶

²¹ “The Ombudsperson determines that violation of human rights and fundamental freedoms have occurred in the current case, since from the beginning treatment of violent cases at Kosovo Police are not recorded as cases to be treated as “violence exercised due to sexual orientation and gender identity.” Ombudsperson Institution, *Legal Opinion Concerning the situation of homophobia and transphobia*, Pristina, 2017

²² Interview with Habit Hajredini, Director of the Office for Good Governance, Pristina, 19 July 2017

²³ OGG representative, ‘Remarks’ in *Roundtable Discussion on Human Rights in Kosovo: An analysis of current laws and practices*, KIPRED, GLPS and Artpolis, Pristina, 6 September 2017

²⁴ *Law on Protection from Discrimination*, Article 23

²⁵ European Court of Justice, Judgement of 25 April 2013, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.

²⁶ For additional information on the unequal status of women in Kosovo please refer to the following publications: Kosovo Women's Network, *No more Excuses: An analysis of attitudes, incidence, and institutional responses to domestic violence in Kosovo*, 2015, at:

The Law introduces stricter requirements of consideration of the gender perspective in municipal and national policies, at different stages from analysis, planning, implementation, monitoring and evaluation of policies.²⁷ In addition, it provides for special, temporary affirmative measures to further equal rights guarantees and promote gender equality in specific areas. These measures are not considered discriminatory, as long as they aim to accelerate the actual equality between men and women.²⁸ Indeed, they are expected to cease once the aim is met. Moreover, the law provides equal opportunities to other persons whose gender identity is not binary to women and men, aligning Kosovo to Western European standards at least on this specific issue. Finally, the Law also calls for appointing of specific administrative units charged with providing input on gender mainstreaming, coordinated under the lead of the Agency for Gender Equality within the Office of the Prime Minister.²⁹

Although the Law is overall a solid law, and undoubtedly a step on the right direction, it presents several deficiencies that would recommend a review. Throughout the text there are several dissonances over terms and definitions. That includes a limited definition of 'gender', confusion between women/female and man/male thorough the text, and an imprecise definition of the basis as to when affirmative measures considered in article 6 are justified and the scope they can reach.

Another problem comes from the treatment made of gender quotas in the Law. These are commonly controversial, yet widely accepted measures that tend to ensure gender equality in the long-term. Currently, there are conflicting dispositions between the Law on Gender Equality, which requires a distribution by halves in electoral lists; and the Laws on General Elections and on Local Elections, which set a minimum threshold of 30%.^{30 31} The Ombudsperson has called for a full respect of the Law on Gender Equality in this regard.³² The underlying problem here is one of insufficient legal harmonization and the consideration of Laws as isolated documents. In a more developed legal tradition, the Law on Gender Equality would have explicitly or implicitly abrogated those contradicting dispositions. Since this is not the case here, a legal opinion on the matter by the Ombudsperson, possibly in cooperation with the Office of the Prime Minister (OPM), would be welcome, in order to avoid legal uncertainties and to ensure the full implementation of the gender equality provisions. Ultimately, amending the Laws on Elections and on Local Elections may be required.

In addition, and similarly to the case of the Law on Protection from Discrimination, the balance between punitive and restitutive elements in the Law could be improved. In regard with the

www.womensnetwork.org/documents/20151124105025622.pdf; Kosovo Women's Network, *Striking a Balance: Policy options for amending Kosovo's Law on Labour to benefit women, men, employers, and the state*, 2016, at: www.womensnetwork.org/documents/20160504154201373.pdf; Kosovo Women's Network, *Who Cares: demand, supply, and options for expanding childcare availability in Kosovo*, 2016, at: www.womensnetwork.org/documents/20161103153827186.pdf

²⁷ *Law on Gender Equality*, Article 5

²⁸ *Ibid.* Article 6

²⁹ *Ibid.* Article 12

³⁰ *Law No. 03/L-073 on General Elections in the Republic of Kosovo*, 5 June 2008, Pristina, Official Gazette Year III / No. 31 / 15 June 2008

³¹ *Law No. 03/L-072 on Local Elections in the Republic of Kosovo*, 5 June 2008, Pristina, Official Gazette Year III / No. 32 / 15 June 2008

³² Ombudsperson Institution, *Statement concerning equal gender representation in candidates' list by political entities*, Pristina, 19 May 2017, retrieved 3 October 2017, available: <http://www.ombudspersonkosovo.org/en/news/OMBUDSPERSON%E2%80%99S-STATEMENT-CONCERNING-EQUAL-GENDER-REPRESENTATION-IN-CANDIDATES%E2%80%99-LIST-BY-POLITICAL-ENTITIES---1511>

former, article 23 of the Law on Gender Equality establishes sanctions for acts of discrimination. It establishes minimal fines ranging from 300 to 500 Euros, without distinguishing between public and private sectors.³³ The same considerations stated above apply in this case.

As for the later, although the Law provides for a general right of compensation, it is not well developed, and thus rarely used. Under Directive 2006/54, any compensation or reparations may not be restricted by the fixing of a prior upper limit.³⁴ Such a requirement has been confirmed in a number of occasions by the ECJ.³⁵ Member States are thus expected to protect and provide not only for effective, proportionate and dissuasive sanctions, but also to guarantee relief to victims, by ensuring adequate reparation and compensation to victims of discrimination. Accordingly, the Directive requires that Member States ensure real and effective compensation to victims for the loss and damage sustained “in a way that is dissuasive, effective and proportionate to the damage suffered”.³⁶ Unfortunately, that is seldom the case in Kosovo.

Despite these internal problems, far more damaging is the insufficient implementation of the already existing framework, which is hampered by a lack of means and trained officials to fulfill all the roles foreseen by the Law. This is especially concerning regarding local institutions, which at this stage lack sufficient resources to fully consider the gender ramifications of their policies. However, even the Agency for Gender Equality has limited resources and a staff of merely 11 officials.³⁷ Furthermore, a widespread public ignorance on the Law and the rights it confers upon the citizens imply that any external pressure to change the situation remains low.

E) The role of the judiciary

The function of the courts in any working democracy is to protect the rule of law and, through that, the rights and freedoms of the people. To that end, the Law on Courts has been extensively amended since it came into force, to meet the requirements of such an endeavor. The Courts are organized along a three-tiered design with the lower instance formed by seven Basic Courts distributed among the territory, with additional branches to ensure access. A Court of Appeals serves as a second instance and the Supreme Court is charged with ensuring a uniform interpretation of the Law. With 18 judges per 100.000 inhabitants, the Courts of Kosovo have reached average staffing capacities compared to the broader European situation.³⁸ Thus, the

³³ *Law on Gender Equality*, Article 23

³⁴ *Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, 5 July 2006, Strasbourg, Official Journal of the European Union L 204/23, 26 July 2006

³⁵ European Court of Justice, Judgement of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, C-14/83, ECLI:EU:C:1984:153.

³⁶ Directive 2006/54, article 18.

³⁷ According to the Organigram of the Agency, it is composed of 1 Chief Executive Officer assisted by 1 Certification Officer, and 3 executive Divisions, on Legislation (3 officers), Cooperation (3 officers), and on Monitoring and Reporting (3 officers). An assistant to the CEO and a Division on Administration, Budget and Finance (5 officers) constitute the supporting staff. More information available at: [http://abgj.rks-gov.net/Portals/0/Organogrami%20i%20ABGJ_ENG%20\(2\)%20\(2\).pdf](http://abgj.rks-gov.net/Portals/0/Organogrami%20i%20ABGJ_ENG%20(2)%20(2).pdf)

³⁸ According to the Agency of Statistics, the overall population of Kosovo in 2016 was 1,771,604 for the 322 active judges reported by the Judicial Council. The resulting ratio is 18.17 judges per 100,000 inhabitants in 2016. On this note, according to the Council of Europe's *Report on Efficiency and quality of Justice*, in 2014 the average number of judges in European countries was 21 and the median, 18. While the use of data from different years prevents a proper comparison, the report points towards stability in the period 2012 - 2014. Assuming that the trend in Europe has remained stable for the following period, it can be roughly stated that Kosovo is currently in a comparative average position.

problems that remain within the Courts are related not with the number of judges, but of supporting staff, and with the professional capacities (or lack thereof) of both.

Consequence of this, unjustified lengthy procedures continue to undermine effective legal remedies in Kosovo. In fact, they provoked that, at the end of 2016, there were 399,031 cases pending.³⁹ Ironically, the focus put on reducing the backlog pressures judges to solve cases expeditiously, which necessarily reduces the legal consistency of the sentence. In addition to the backlog, there are a high number of unexecuted court decisions (estimated in around 117,000 in September 2017 by the Ombudsperson).

To make things worse, some other problems are direct consequence of the legal culture in Kosovo. A heritage of the Yugoslavian legal system, the figure of “retrial” has prevented the development of a proper case law corpus. As a result of a formal approach to the law, and facilitated by current procedural legislation, the most common response from a Court is to revert the process to a previous stage on the basis of any procedural defect. In the administrative domain, it implies sending a case back to the same administration that took the impugned decision. Since the merits of the case are not adjudged, there are no clear guidelines for that authority regarding the correct legal answer. Missing systematic corrective actions and clear judicial guidance, remedies remain ad hoc and the authorities have no incentive to improve their practices. Furthermore, the Court of Appeals and the Supreme Court have not hesitated in the past to send cases back to the Basic Courts as many times as necessary.⁴⁰ Not only individual cases take longer than necessary with numerous retrials taking place, but also the deciding Courts are applying laws and regulations to their best understanding, which necessarily differs. Thus, on top of lengthy procedures, it produces doctrinal dispersion, inconsistent implementation of the Law, unequal treatment of citizens and reduced legal security, all of them undermining an effective protection of Fundamental Rights.

G) Access to public documents

While talking about Human Rights, this one is a question that is often overlooked, since its direct effects are not that evident. However, free access to public documents is not only a fundamental right in any democratic society, it is also instrumental to guarantee public trust in the institutions, sound decision making processes and accountability of public officials. Thus, proper guarantee of the right is critical to legitimize the action of public authorities and ensure that they are held accountable; which is the best safeguard of the rights of the citizenship. In Kosovo, this requirement is regulated through a Law on Access to Public Documents.⁴¹ Its departing point is that any document is by nature public and everyone has access to it.

The Ombudsperson is designated as the independent authority responsible to assist citizens in securing access to documents when the authorities fail to deliver them in a timely manner. In order to ensure the rightful exercise of this right, it shall take all the necessary steps that may be required.

³⁹ Kosovo Judicial Council, *Annual Report, Statistics of the Courts*, Pristina, 2016

⁴⁰ “From 2006 to 2010, an average of 42.4 per cent of second-instance rulings of all District Courts were reversals and remittals, with a reversal rate amounting to up to 63.8 per cent p.a. in individual cases.”

Ministry of Justice, *Evaluation Report*, Twinning Project EU Standards for the Ministry of Justice, KS 08 IB JH 03, 21 November 2011.

The interview with the Ombudsperson held in July 2017 showed that the situation has not improved since.

⁴¹ Law No. 03/L-215 on Access to Public Documents, 7 October 2010, Pristina, Official Gazette Year V / No. 88 / 25 November 2010

Practice has shown several deficiencies. First, despite the overall principle of public access declared by the Law to any public document, it also allows the administration to reject access requests in exceptional conditions on the basis of national security, ongoing criminal investigations, privacy and major commercial and economic interests, which are only listed in very general terms.⁴² Furthermore, it does not offer concrete criteria to assess whether a document falls within one of those rejection causes or not.

The institutions and public authorities have been benefiting from what can only be described as a loophole to systematically reject requests. In fact, the Ombudsperson in its 2016 report stated that it had yet to come across a well-founded, soundly reasoned rejection decision.⁴³

Second, not every public institution publishes their documents electronically on their webpage, in spite of being a legal requirement. Even those that do so are not consistent on maintaining their web pages up to date. As a result, it is often necessary to specifically request public documents that should already be available. What is more, several institutions, such as the Municipalities of Malishevë and Kastriot, as well as the Agency for Business Registration, require an allegedly symbolic 1 euro fee upon delivery of the application form, which acts as an incentive to drive people away from institutions and is in clear contradiction with the Law.⁴⁴ In addition, the unpreparedness of the units and officials evaluating requests is often one of the main causes for the slow process of evaluation of application.

Third, since responsibility is only vaguely attributed to the institutions and no detailed procedure is foreseen, in many cases they simply opt for ignoring the request. This is a form of negative silence, and specific officials are rarely accountable for an inadequate handling of cases. In fact, most of the time relevant documents are not even published on the webpage, which shows an obvious disregard for any legal obligation.

III. CONCLUSIONS

The situation of Human Rights in Kosovo continues to be hampered by a number of inconsistencies, contradictions, misinterpretations and improper implementation of laws, making deficient protection in practice. Most of these deficiencies can be attributed to a lack of political will, without which ensuring a proper functioning of the whole system is impossible.

Systemic problems undermine the work of the State, both as a whole, and in the specific field of Human Rights. Individually taken, most pieces of legislation tend to be technically sound, but their articulation with one another remains difficult, and as a consequence, the legal order is not consistent. In addition, undue political interference in preventing an efficient judicial supervision of the public administrations, which in turn creates ramifications on daily, routine issues even when no such political interference is directly taking place.

⁴² *Ibid.* Article 12

⁴³ Ombudsperson Institution, *Annual Report 2016*, Pristina, 2017, p.41, retrieved 4 October 2017, available http://www.ombudspersonkosovo.org/repository/docs/Raporti_Vjetor_2016__ANG__no16_me_kopertine_per_web_338158.pdf

⁴⁴ K2.0, *Kosovo journalists need to demand implementation of their access to information rights*, 31 January 2017, retrieved 4 October 2017, available <http://kosovotwopointzero.com/en/kosovar-journalists-need-demand-implementation-access-information-rights/>

The legal framework, starting with the Constitution but including a number of legal texts, such as those contained in the “Human Rights Package” and the Law on Access to Public Documents, consolidates a wide range of Fundamental Rights and mechanisms for their protection that is comparable to those of the EU Member States. Unfortunately, the effect of these dispositions is challenged by a generalized lack of knowledge and misuse of such legal tools by both administration and courts.

On the institutional side, problems regarding personnel and means to fulfill the functions attributed by the respective laws remain at both the central and local levels. The main exception at this moment is the Ombudsperson, a constitutional independent institution charged with overseeing the actions of other public authorities in this regard. And even in this case, a limited number of inconsistencies, regarding the nomination of key personnel and mandate inconsistencies hamper the work of the institution.

IV. RECOMMENDATIONS

In order to ensure the effective protection and implementation of the laws, this report offers some recommendations for the authorities to consider, as a possible solution to the problems outlined above. The following recommendations are proposed as a way forward to remedy the deficiencies identified:

- **Human Rights mainstreaming.** Formal applicability of international treaties and principles, remain moot if their dispositions are unused. Kosovo will eventually become party to the ECHR and should not wait for the first condemning sentences from Strasbourg to reinforce its legal processes. The use of international covenants and case law regarding the interpretation of discrimination clauses need to be further elaborated and a manual should be developed for courts and public administration, for training purposes. Relevant *guidelines* should be made an integral part of the Strategy and Action Plan on Human Rights, which the OGG is currently preparing. In particular, the requirements and duties stemming from international covenants and the ECHR case law need to be increased especially among judges and legal professions, if they are to be effectively used in practice. That will require extensive training at different levels from the Constitutional Court to judges of the Basic Courts.
- **Legal amendments.** A set of legal interpretations by the Ombudsperson and amendments by the Assembly would be a welcome step towards clarifying the issues presented in the report. First, regarding the insufficient sanction and the almost nonexistent reparation regimes in the Laws on Protection from Discrimination and on Gender Equality. Second, regarding judicial shortcomings, which are greatly undermining efforts in that direction. Third, to resolve the contradiction regarding gender quotas. To that regard, an upcoming review jointly launched by the OGG and the EUOK in the framework of implementing the Stabilization and Association Agreement offers an opportunity for detailed review.
- **Role of the Ombudsperson.** The Assembly, in cooperation with the Ombudsperson Institution, should review the mandate of the latter to correct the discrepancies that have been identified, regarding nomination and dismissal procedures, as well as jurisdiction. Additionally, it should engage with it in providing a legal interpretation to further clarify the different issues of material law.
- **Tracking Mechanism for Human Rights Cases in Kosovo.** Indicators that focus exclusively on Human Rights are still few and their collections remain sporadic and ad hoc. Categorizing and reporting on cases defined by the Law on Protection from Discrimination

should be urgently addressed. Where possible, gender disaggregated statistics should be collected as highlighted in the Law on Gender Equality. To that end, ***Human Rights Indicators***, as developed by the Office of High Commissioner for Human Rights of the United Nations, should be considered as a departing point. Then, these data need to be gathered in a systematized, consistent and periodic manner to assist decision making processes. As long as information is not easily available, monitoring the effective implementation of the laws will remain problematic.

- **Stronger accountability.** At this moment, the Administration has strong incentives to remain passive, since there are no practical consequences to that neglect of duties. The current sanctions for not implementing the Human Rights Package of laws are weak and laws foresee only symbolic sanctions. Further, increased lines of responsibility need to be established to reverse this situation and facilitate a more proactive stance.
- **Access to Public Documents.** The Law on Access to Public Documents should clarify the liabilities of public institutions failing to grant access to public documents. This should include both the abuse of administrative silence and ungrounded refusals. The entire procedure should either be made explicit or, at the very least, referred to the general administrative procedure.

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