



# The Demand for Judicial Transparency

---

Policy Brief



February 28, 2017

*The Demand for Justice Program is funded by the U.S. Department of State/INL and implemented by the National Center for State Courts to support the development of robust, evidence-driven demand for justice in Kosovo. Through D4J, NCSC is mobilizing CSO partners to act as agents of change to foster accountability, transparency, and integrity in the justice sector.*

*This Policy Brief was made possible through support provided by the U.S. Department of State through the Demand for Justice Program. The opinions, findings, and conclusions or recommendations expressed herein are those of the author(s) and do not necessarily reflect the view of the U.S. Department of State or the National Center for State Courts.*

# **The Demand for Judicial Transparency**

---

**Policy Brief**

February 28, 2017

# The Demand for Judicial Transparency

## Policy Brief

### Executive Summary

Transparent judicial processes foster judicial accountability. Access to public hearings and published court decisions promote “legal certainty” for the legal community and offer the free press and private citizens a clearer understanding of the inner workings of the judicial system without compromising judicial independence. As U.S. Supreme Court Justice Louis D. Brandeis pointed out, “Sunlight is said to be the best of disinfectants,” and the “individual citizen must in some way collect and spread the information.”

The Kosovo justice sector’s transparency obligations (e.g., public hearings, access to court decisions, court and prosecutor performance, judge and prosecutor financial disclosure etc.) are enshrined in the Kosovo Constitution and several laws and regulations. However, the Kosovo justice sector’s failure to deliver on several of these transparency obligations keeps the public in the dark, frustrates the public’s ability to measure court efficiency and quality, and naturally contributes to public suspicions of a corrupt judiciary.

Guided by relevant international instruments directly applicable in Kosovo,<sup>1</sup>

<sup>1</sup> See Article 22 of the Constitution of the Republic of Kosovo, Available at: <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

this policy brief offers a legal and factual analysis on key matters of judicial transparency including publication of court decisions, access to court hearings and other information necessary to increase citizen oversight and trust in the Kosovo judiciary.

### Context and Introduction of the Problem

The concept of judicial transparency and the publication of court decisions has been with us for decades due to increasing pressure from funders and the European Commission<sup>2</sup>. However, little has been done in this regard. Kosovo citizens continue to face difficulties in accessing public hearings, court decisions and other court information. As a result, the public understandably withholds its trust in the justice system.

While rendering its decision in the case of *Pretto & Others v Italy*<sup>3</sup>, the European Court of Human Rights (ECtHR) explained that: “By rendering the administration of justice visible, publicity contributes to the achievement of the aim of a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within a meaning of the Convention<sup>4</sup>”.

<sup>2</sup> European Commission Kosovo Progress Report, pg. 13 (Oct 2014). [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2014/20141008-kosovo-progress-report\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf)

<sup>3</sup> Case of *Pretto and others v. Italy*, *Application no. 7984/77*, 8 December 1983. Retrieved from:

<http://www.bailii.org/eu/cases/ECHR/1983/15.html>

<sup>4</sup> *Id.* at pp.21.

## The Right to a Public Hearing

Respected by democracies worldwide, the right to a public hearing goes back several centuries and has now been embedded in the Kosovo Constitution and legal system as a fundamental constitutional principle. The right to a public hearing – stemming from fair-trial origins – is coupled with the right of the public to attend court proceedings – the public’s right to know<sup>5</sup>.

In Article 6, paragraph 1, of the European Convention on Human Rights (ECHR) – a treaty directly applicable in Kosovo pursuant to Article 22 of the Kosovo Constitution – the right to a public hearing forms part of the more general right to a fair trial. Similarly, the International Covenant on Civil and Political Rights guarantees that everyone shall be entitled to a fair and public hearing<sup>6</sup>. Kosovo has enshrined the right to a public hearing in the Constitution in order to emphasize its fundamental character *“Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law”*<sup>7</sup>. The purpose for such transparency was well articulated by in the *Szucs case* wherein the ECtHR explained:

“The Court reiterates that the holding of court hearings in public constitutes a

fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained.”<sup>8</sup>

In this same spirit, Kosovo subsequently adopted key legislation guaranteeing the constitutional right to a public hearing:

- **Article 7, paragraph 4 of the Law on courts:** *“All court hearings shall be open to the public unless otherwise provided by Law”*<sup>9</sup>.
- **Article 294, paragraph 1 of the Criminal Procedure Code:** *“The main trial shall be held in open court.”*<sup>10</sup>
- **Article 4, paragraph 1 of the Law on contested procedure:** *“The court may decide regarding the claim after reviewing the legal matter in direct and public session.”*<sup>11</sup>
- **Article 6 of the Law on Administrative Conflict:** *“The court shall decide based on verbal review directly and publicly regarding the administrative conflict.”*<sup>12</sup>

<sup>8</sup> Case of *Szucs v. Austria*, Application no. 20602/92, Para. 42, 24 November 1997. Hereinafter *Szucs*. Retrieved from: <http://webcache.googleusercontent.com/search?q=cache%3AnWnEJ6Afy5cJ%3Ahudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D001-58113%26filename%3D001-58113.pdf%26TID%3Dthkbhnlzk%20&cd=3&hl=en&ct=clnk>

<sup>9</sup> Law No. 03/L-199 on Courts, Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2700>.

<sup>10</sup> Criminal No. 04/L-123 Procedure Code, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>.

<sup>11</sup> Law No. 03/L-006 on Contested Procedure, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2583>.

<sup>12</sup> Law No. 03/L-202 on Administrative Conflicts, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2707>.

<sup>5</sup> Constitution of the Republic of Kosovo (RoK Const.), Art. 31. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>.

<sup>6</sup> International Covenant on Civil and Political Rights, Art. 14 of the Available at: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

<sup>7</sup> RoK Const., at Art. 31, para 3.

However, despite these legal guarantees, citizens and the media and civil society organizations are having difficulties accessing court hearings. In practice, not only do courts exclude the general public and the media from public hearings, but individual citizen access to court buildings is typically denied unless the citizen arrives armed with information about a specific hearing, including hearing time, court room number, and the name of the presiding judge. These case information requirements are unfair, not only because they appear nowhere in law, but this information is frequently not available to the public and in some cases not even to parties themselves.

#### **Illustrative case studies:**

---

- **The so-called “Stents” affair-** Sixty-four persons, including 44 doctors and nurses working in public health institutions were indicted for allegedly abusing their positions to divert patients to private hospitals in return for cash kickbacks. The court decided to **exclude** the entire public from the trial because there was not enough space for all interested citizens in the courtroom. Beyond the lack of a legal basis for closure, the court also failed to take the initiative to resolve this space issue, for example, by allowing limited citizen and media access with audio/visual equipment to ensure transparency.
- **Judge Salih Mekaj Case** – In an extremely high-profile case involving a member of the Kosovo Judiciary indicted for “misuse of authority or official position” and “exertion of influence”, the court decided to conduct the entire case as a closed door session,

**excluding** the public and the media from each and every hearing with the justification that an open door session would violate the privacy and the family life of the defendant by citing articles of Kosovo Criminal Procedure Code<sup>13</sup> allowing for closed court hearings. Here the court prevented access to approximately 50 to 60 court hearings upon defendant request, with prosecutorial consent, despite Media and CSO objections based on the argument that only a handful of these hearings touched upon sensitive information.<sup>14</sup>

- **Demand for Justice Clinic student experience** - As part of the D4J clinical program, clinic students armed with personal ID cards were assigned to attend a court hearing. However, students were prevented from entering the public courthouse by a security guard in the entrance. The students were allowed entry only if they had information about an actual trial (hearing schedule, courtroom number and judge) - information not actually available to the public. While courts claim this is done in the name of security, we consider that these security measures are neither appropriate, nor proportional, and therefore create an arbitrary barrier to access to public hearings that feeds public fears of unfair trials and corrupt courts.

---

<sup>13</sup> The *Mekaj* Court cited Criminal Procedure Code Art. 294.1 (all or partial closure of hearings)

<sup>14</sup> KLI Report (30 Nov. 2016)

### Importance of Public Hearings

Transparent proceedings serve several purposes:

- Confirms and symbolizes the obligation of judges to render judgments and decisions in the name of the People of Kosovo.
- Re-enforces public trust in the judgments rendered by judges
- Enables academic understanding amongst professional scholars and students regarding judicial system operations
- Increases opportunity for the public to demand accountability.
- Ensures public scrutiny with respect to safeguarding the right to a fair trial.
- Encourages behavioral changes amongst justice sector actors in terms of professionalism and fairness.
- Reduces opportunities for corruption

### Limits on the Right to a Public Hearing

The right to a public hearing in Kosovo is not absolute and is subject to certain limitations. The limitations come into play when the interest of morals, public order or national security in a democratic society are at stake, or where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.<sup>15</sup> There is a further statutory privacy protection afforded for important economic and financial interests of the Republic of Kosovo.<sup>16</sup>

<sup>15</sup> RoK Const., at Art. 31, para 3.

<sup>16</sup> Law on Data Protection, Art. 28.1.5.

### Publishing of Court Decisions

The Kosovo Constitution does not explicitly distinguish between the “trial” and the “judgment”. The word “trial”, as used in Article 31 of the Constitution, must be interpreted broadly to include both trial hearings and the judgments and decisions that arise from these hearings. A strict interpretation of the word “trial” in Article 31 would lead to an absurd result – that the public was only entitled to witness the delivery of evidence at trial, but not to read and understand the court’s conclusion, or more importantly, the grounds underlying its verdict in a particular case. Therefore, the principle of public trials requires the publication of judgments as well.

Moreover, regarding the duty to publish verdicts Article 6, paragraph 1 of the ECHR explicitly provides that, in principle, judgments (verdicts, rulings, etc.) must be pronounced publicly. The second sentence of the first paragraph of Article 6 reads: *‘(...) Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or to the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’*<sup>17</sup>

As it can be noted, even if the Kosovo Constitution does not explicitly mention judgments or verdicts, the ECHR is explicit on this point and has superiority over the laws of the Republic of Kosovo<sup>18</sup>.

<sup>17</sup> ECHR, Art. 6.1.

<sup>18</sup> Constitution of the Republic of Kosovo, Art. 19.



However, despite these fundamental provisions embedded in our Constitution, and in international instruments directly applicable in Kosovo, the issue of public decisions has not been properly addressed by national laws and other bylaws. For example, **Article 6 of the Law on Amendment and Supplementation of the Law on Court** (LoC) says that “Courts shall publish the **final judgments** in their official website, in a time limit of sixty (60) days from the day the decision becomes final, in accordance with the legislation in force and rules of the Kosovo Judicial Council [...], and by ensuring the protection of personal data.

The extremely limiting “final judgments” restriction imposed by Article 6 of the LoC is simply not compatible with Kosovo’s constitutional requirements, which clearly require the publication of all decisions, allowing for secrecy only when courts deem it to be *strictly necessary* or when *special circumstances* so require based on two grounds: a) Interests protected (ie. *morals, public order, national security, or interests of juveniles*) and b) Protection of privacy of parties involved. Hence, the LoC’s “final decisions” language stands in violation of the Kosovo Constitution, particularly when courts interpret it to relieve them of the obligation to provide all court decisions to third parties.

Though a state may argue that the “final decision only” principle is needed to protect the presumption of innocence of parties involved in a trial, the case of *Werner v. Austria*<sup>19</sup> tackles this concept head on. In *Werner*, the ECtHR rejected the Austrian’s State argument that the publication of a

---

<sup>19</sup> Case of *Werner v. Austria*, Application no. 21835/93, 24 November 1997. Retrieved from: <http://www.bailii.org/eu/cases/ECHR/1997/92.html>.

first instance court decision would breach the principle of the presumption of innocence on the ground that: “*it may be of importance to the person concerned that the fact that suspicion concerning him has been dispelled should be brought to the knowledge of the public*”<sup>20</sup>.

Furthermore, in the case of *Szücs v. Austria*<sup>21</sup>, the ECtHR found that there is a violation of the right to a public trial when court decisions of the first instance and the court of appeal are not made available to third parties, but only to a limited category of people.

Similarly, the **Administrative instruction on anonymization and publication of final court judgments** is equally unconstitutional as it contains identical language limiting publication.<sup>22</sup>

Notwithstanding the unconstitutional nature of Article 6 of the LoC, courts are, in most cases, currently failing to publish even final and enforceable decisions. Currently, only a small fraction of such decisions may be found online despite the KJC’s investment in construction of an online platform intended to publish information on the judiciary.

Although Article 6 of ECHR and Article 31 of the Kosovo Constitution do not impose an absolute obligation on the state to publish

---

<sup>20</sup> *Id.* at pp.59.

<sup>21</sup> Case of *Szücs v. Austria*, Application no. 20602/92, 24 November 1997. Retrieved from: <http://webcache.googleusercontent.com/search?q=cache%3AnWnEJ6Afy5cJ%3Ahudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D001-58113%26filename%3D001-58113.pdf%26TID%3Dthkbhnlzk%20&cd=3&hl=en&ct=clnk>

<sup>22</sup> Kosovo Judicial Council, Administrative Instruction On Anonymization and Publication of Final Court Judgment. 02.02.2016. Retrieved from: <http://www.gjyqesori-rks.org/en/legislation/list?id=0&type=3>



all court decisions, ECtHR jurisprudence clearly supports publication of court decisions “as a means to deliver transparency and invite public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained<sup>23</sup>.” As local examples of such transparency, it is important to note that the Constitutional Court of the Republic of Kosovo publishes its decisions, while the Ministry of Justice similarly publishes all civil and administrative decisions online when the government is a party.

### Importance of Publication of Decisions

Published decisions serve several purposes:

- Creates **legal certainty** for citizens and businesses by providing courts and advocates access to relevant, persuasive case law
- Creates a transparent public record which compels justice oversight institutions<sup>24</sup> to publicly justify performance evaluations or promotion of judicial actors.
- Enables academic understanding amongst professional scholars and students regarding jurisprudence.
- Provides information relevant to foster institutional reforms.

### Recommendations

Based on the assessment of the current situation presented in this brief, the following recommendations are made.

- Align local legislation regarding the publication of court decisions and judicial transparency with Kosovo’s Constitution and directly applicable international instruments.
- Develop a rational public hearing protocol to ensure timely public access court hearing schedules and locations.
- Train court administrative and security staff on their obligation to facilitate public access to court hearings.
- The KJC should officially consult with the Director of the Data Protection Agency to ensure that its Administrative Instruction related to anonymization does not call for more redaction than required by law.
- Train and mobilize court staff for timely anonymization and publication of court decisions.
- Consider possibilities for automated or computer-aided anonymization of court decisions.
- Address budgetary and human resources limitations in providing public access to court information.

<sup>23</sup> Case of Sutter v. Switzerland. Application no. 8209/78. 22 February 1984. Retrieved from:

[http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-57585\"\]}](http://hudoc.echr.coe.int/eng#{\)

<sup>24</sup> These Institutions include the Kosovo Judicial Council and the Kosovo Prosecutorial Council.



[www.levizjafol.org](http://www.levizjafol.org) | [info@levizjafol.org](mailto:info@levizjafol.org)  
Rr. Andrea Gropa No. 35 10000 Prishtinë - Kosovë