# LIMITATIONS OF PROCEDURAL FAIRNESS: THE CONSTITUTIONAL COMPLAINT AS AN EFFECTIVE REMEDY IN PRACTICE AND LAW

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*Even though the conduct of fair proceedings is very important, it does not necessarily lead to a fair outcome of the given proceedings. Thus, fair proceedings must be complemented by a fair substantive outcome in order to render basic rights practical and effective. The reason for such a shortcoming of procedural fairness might be manifold, but it essentially boils down to the mechanical application of the law, excessive formalism in the application and interpretation of the law, and a failure to go beyond mere appearances and assess the realities of the situation complained of. In this paper, I expound on the role of the constitutional complaint as an effective remedy pertinent to individuals who have an arguable claim regarding a violation of their substantive rights guaranteed by the ECHR and the Constitution alike. This paper analyses a ruling of the Constitutional Court of Kosovo where it found a violation of the right to privacy and family life and the right to an effective remedy, notwithstanding the fair conduct of the proceedings. I will also show the impact of the relevant case law of the European Court on the approach and rationale of the Constitutional Court.*

Keywords: constitutional complaint, effective legal remedy, fair proceedings, practical rights, substantive rights

## 1. INTRODUCTION

First, it must be acknowledged that the importance of a fair procedure in international human rights law is undeniable. The right to a fair trial is affirmed as a basic human right at both the international and regional level. A review of the statistics of the European Court of Human Rights (the European Court) reveals that nearly 40 per cent of its judgments concern violations of Article 6 of the European Convention on Human Rights (ECHR), which protects the right to a fair trial.[1] In various contexts, it has been demonstrated by social psychologists that, as well as the outcome, the manner in which one's case is handled also matters to people.[2] However, the notion of procedural fairness as used, inter alia, in Article 6 ECHR is thus based on the assumption that even the fairest trial cannot always secure the correct outcome. Although the purpose of the right to a fair

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[1] Catherine Van de Graaf, *Procedural Fairness: Between Human Rights Law and Social Psychology*, Netherlands Quarterly of Human Rights 2021, Vol. 39(1) 11–29
< https://journals.sagepub.com/doi/pdf/10.1177/0924051921992749> accessed on 30 May 2022.

[2] Van de Graaf (n 1).

trial is to provide for a correct decision on the merits of the case, the outcome of the proceedings will not be fair simply because the trial is so.[3] Article 6 ECHR is usually understood as involving essentially procedural guarantees and concerning solely the procedural aspect of the case, whether this be the fairness of the proceedings or access to a court. Due to the training in the school of modern law, the distinction between substantive law and procedural law seems self-evident today and it is not surprising that it has always been tacitly accepted by the ECHR institutions under Article 6.[4] However, from the historical point of view, in classical Roman law, the procedure and the merits were always treated as indistinguishable.[5] Having said that, the process-based review is not necessarily limited to procedural issues because the fundamental role of the European Court is to analyse substantive outcomes at the domestic level.[6] The European Court's review will always, at a minimum, include a substantive assessment of whether the outcome of a decision by domestic public authorities is within the parameters of reasonableness.[7] Substantive access to justice may be hampered if procedural requirements are applied over-rigidly. The substantive perspective of access to justice allows for a rather more refined and nuanced analysis than the purely procedural perspective does.[8] It has further been demonstrated that, considering the ECHR system's objectives, access to justice in the ECHR system should mainly be regarded as access to substantive justice, that is, the effective protection of fundamental rights and freedoms. Based on the European Court's own requirements as to the effectiveness of national remedies in protecting these rights, it was found that substantive access to justice requires that such justice is delivered without excessive formalism and with sufficient legal certainty.[9] The following section will give an account of the legal basis which enables the Constitutional Court of Kosovo to use ECHR provisions and the relevant case law of the European Court to render basic rights practical and effective. The Constitutional Court also found a violation of Articles 8 and 13 ECHR in connection with equivalent provisions[10] of the Constitution of Kosovo. In this respect, for the sake of simplicity, the concepts of fair trail, privacy and family life, and legal remedy will be shown under Articles 6, 8 and 13 ECHR, notwithstanding the equivalent constitutional provisions used by the Constitutional Court.

[3] Arnfinn Bårdsen, *Reflections on "Fair Trial" in Civil Proceedings According to Article 6 § 1 of the European Convention on Human Rights,* p. 126, <https://scandinavianlaw.se/pdf/51-5.pdf> accessed 26 May 2022.
[4] Study of the ECHR case law Article 6 § 1, "Article 6 § 1 Elements of substantive law as obstacles to access to a court within the meaning of Article 6 § 1 of the Convention" Council of Europe/European Court of Human Rights, 2016, p. 5 <Case-law research reports (coe.int)> accessed 26 May 2022.
[5] Study of the ECHR case law Article 6 § 1 (n 4).
[6] Robert Spano, *The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law*, Human Rights Law Review, 2018, 18, 473–494 <https://doi.org/10.1093/hrlr/ngy015> accessed 8 June 2022.
[7] Spano (n 6).
[8] Janneke H. Gerards, Lize R. Glas, *Access to Justice in the European Convention on Human Rights System,* p. 29 <https://journals.sagepub.com/doi/pdf/10.1177/0924051917693988> accessed 26 May 2022.
[9] Gerards and Glas (n 8).
[10] Article 32 [Right to Legal Remedies] and Article 36 [Right to Privacy].

## 2. ESTABLISHMENT OF THE CONSTITUTIONAL COURT, JURISDICTION, AND THE INDIVIDUAL COMPLAINT

The Constitutional Court of the Republic of Kosovo (the Constitutional Court), as the youngest court of such a nature in Europe, was established after Kosovo declared independence in 2008. The role of this court was to become the guardian of the Constitution of the Republic of Kosovo (the Constitution) but it would be set in motion only when so requested by authorized parties as stipulated in Article 113[11] of the Constitution. Accordingly, the Constitutional Court ought to represent a legal remedy as a final authority for all those individuals who claim a violation of human rights and freedoms by public authorities. The constitutional provisions that lay down the foundation for individual constitutional complaints are Articles 22,[12] 53[13] and 113.7[14] of the Constitution. Article 22 stipulates that the ECHR, along with seven other international agreements and instruments, are directly applicable[15] in the Republic of Kosovo, and, in the case of conflict, have priority over the provisions of laws and acts of other public institutions. Article 22, however, does not say whether the ECHR is on a par with or has priority over the Constitution itself, but it is sufficiently clear that the ECHR has precedence over the domestic laws of the Republic of Kosovo. Article 53 of the Constitution provides that human rights and freedoms shall be interpreted consistently with the court decisions of the European Court. Article 113.7 of the Constitution provides that individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after all legal remedies provided by law have been exhausted. Article 113.7 indicates the subsidiary character of the constitutional complaint in that that it requires the aggrieved individuals to first exhaust all legal remedies before referring a constitutional complaint to the Constitutional Court.

Having briefly explained the foundational nature of Articles 22, 53 and 113.7 of the Constitution in relation to constitutional complaints referred by individuals to the Constitutional Court, in the following text, I will continue to elaborate on the limitations of procedural fairness under Article 31 of the Constitution[16] in connection with Article 6 (1) ECHR. This analysis is grounded on the premises of an individual constitutional complaint submitted to the Constitutional Court.[17] In this case, on the surface, it appeared that there was no violation of basic human rights because the requirements of procedural fairness were met, namely the correct invocation and application of the relevant legal provisions by the ordinary courts, the ability of the applicant to adduce all evidence and

[11] Article 113 [Jurisdiction and Authorized Parties].
[12] Article 22 [Direct Applicability of International Agreements and Instruments].
[13] Article 53 [Interpretation of Human Rights Provisions].
[14] Article 113 (n 11).
[15] There is no need for the lawgiver to enact a special law to give effect to the ECHR in the legal system of Kosovo.
[16] Article 31 [Right to Fair and Impartial Trial].
[17] Case no. KI56/18 *Applicant Ahmet Frangu*, Judgment of the Constitutional Court of the Republic of Kosovo adopted on 22 July 2020.

arguments relevant to his case, and the rationale of the ordinary courts versus the pleadings of the applicant. However, the Constitutional Court, by finding a violation of Article 8 ECHR, in connection with Article 13, revealed limitations of procedural fairness because its assessment went beyond mere appearances and looked into the reality of the situation complained of.[18] It must also be borne in mind that the relation of the Constitutional Court but also of ordinary courts and other public authorities in Kosovo with the ECHR is a peculiar one because, as stated above, the ECHR has precedence over domestic laws, and the case law of the European Court must be taken into account, but yet Kosovo is still not a Contracting Party to the ECHR. This means that the courts and other public authorities face a challenging task, to say the least, of having to apply the ECHR whenever the rights of individuals are at stake but without direct supervision from the ECHR institutions, which would have served as a genuine standard to gauge their performance with respect to the protection of basic human rights. Of course, not having direct supervision from the ECHR institutions is an undeniable handicap, but that should not be used as an excuse by the public authorities in the Republic of Kosovo not to render basic rights practical and effective as opposed to theoretical and illusory.[19] With that in mind, the following sections will give an account of the factual background of Case no. KI56/18,[20] the approach, attitude and rationale of the Constitutional Court, the relevant case law of the European Court, followed by conclusions on the limitations of procedural fairness, the necessity to complement procedural fairness with a fair substantive outcome, and why the individual constitutional complaint proved to be an effective remedy in practice and law.

## 3. THE CONSTITUTIONAL COMPLAINT (THE BACKGROUND OF CASE NO. KI56/18)

There is certainly abundant case law of the European Court where it has found a violation of substantive rights as guaranteed by the ECHR even in cases where it appeared that the conditions of procedural fairness were met. But such a holistic approach to the protection of basic rights is nothing extraordinary for the European Court, but it is a paradigm shift for the Constitutional Court because at the time of writing this paper, Case no. KI56/18 was the only one where the Constitutional Court implicitly accepted that procedural fairness conditions had been met but which did not lead to a fair outcome of the case and hence it found a violation of Articles 8 and 13 ECHR.

The gist of Case no. KI56/18 is that the applicant endeavoured without success to register the death of his son in the civil status records. The applicant's son was apparently suffering from a terminal disease, so in the hope of recovery he went to Sweden for surgery but unfortunately he died in a Swedish hospital. While in Sweden, the applicant's

[18] Gerards and Glas (n 8).
[19] *N.D. and N.T. v Spain*, App nos. 8675/15 and 8697/15 (ECHR 13 February 2020) para. 171.
[20] Case no. KI56/18, *Applicant Ahmet Frangu*, Judgment of the Constitutional Court of the Republic of Kosovo adopted on 22 July 2020.

son had apparently presented himself under an assumed name for asylum purposes and was issued with an asylum card by the Swedish immigration authorities. Meanwhile, the Kosovo Embassy in Stockholm issued a document[21] stating that the applicant's son (under his real name), a citizen of Kosovo, had died in a Swedish hospital and that his documents were in order for the return of his corpse back to Kosovo. Soon after the burial ceremony of his son, the applicant applied before the office for civil status records in the municipality of Prishtina, but his application was refused on the grounds that the documentation issued by the Kosovo authorities was under a different name, whereas the documentation obtained from the Swedish authorities was under the name that the applicant's son had assumed while seeking asylum and hospitalization. The office of civil status records told the applicant that due to the mismatch of documents issued by the Kosovo and Swedish authorities respectively, it was illegal to effect registration of his deceased son in the civil status records. According to the office of civil status records, there was confusion as to the identity of the deceased person whose registration into the civil status records was being requested by the applicant. The applicant then submitted complaints, without success, to the Agency of Civil Registration within the Ministry of Internal Affairs (MIA) and before the ordinary courts in three instances of judicial jurisdiction from the basic court, the court of appeals, and the Supreme Court. The MIA and all three judicial instances upheld the findings of the office for civil status records, thereby, in essence, corroborating the finding that there was a mismatch between the documents issued by the Kosovo and Swedish authorities, respectively, and that this created confusion as to the real identity of the deceased person whose registration into the civil status records was requested. Basically, the applicant was told that the law does not allow registration into the civil status records when there is a confusion of identity of the deceased person. In short, the applicant was obliged to provide all the necessary documents which unambiguously establish the identity of his deceased son in order to effect his registration into the civil status records.[22] The applicant, after having exhausted all legal remedies, then submitted a constitutional complaint to the Constitutional Court, asking for redress, allegedly, for the violation of his rights guaranteed by Articles 24,[23] 31[24] and 54[25] of the Constitution. The applicant did not expressly invoke the right to privacy and family life as guaranteed by Article 8 ECHR, but he did raise in substance the violation of the right to privacy and family life by stating that the widow and the under-aged son who had survived his deceased son were unable to obtain documents such as a passport and documents related to the inheritance of property.

The Constitutional Court found that there was a violation of Article 8 ECHR because: (i) the administrative authorities and the ordinary courts did not seek international cooperation with the Swedish authorities to clarify the confusion as to the real identity of

[21] Submission no. 09/13 of 13 June 2013 issued by the Embassy of the Republic of Kosovo in Stockholm, Sweden.
[22] Case no. KI56/18 (n 4) paras 21-41.
[23] Equality before the Law.
[24] Right to a Fair and Impartial Trial.
[25] Judicial Protection of Rights.

the deceased person, nor did they adduce any reasons as to the lack of an initiative for international cooperation; (ii) the administrative authorities and the ordinary courts failed to make use of the applicable law[26] which provides that if the factual death of a person cannot be proven by the documents foreseen by the law for the registration books, the competent court can render a decision to ascertain the death of that person; (iii) the approach of the administrative authorities and the ordinary courts was characterized by excessive formalism and mechanical application of the law because they failed to take into account the grave consequences for the applicant and the surviving widow and under-aged son of the deceased person; (iv) the administrative authorities and the ordinary courts failed to take into account that the non-registration of the applicant's deceased son into the civil status records had a negative impact on the psychological and moral integrity of the applicant and the surviving widow and under-aged son of the deceased person; (v) the administrative authorities and the ordinary courts did not show the required "due diligence" in dealing with the substantive complaint of the applicant as guaranteed by Article 8 ECHR, thereby rendering those rights "theoretical and illusory" as opposed to "practical and effective";[27] and, (vi) the administrative authorities and the ordinary courts had failed to find a "fair balance" between the competing interests of the applicant and public interest.

## 4. IS PROCEDURAL FAIRNESS TANTAMOUNT TO A FAIR OUTCOME OF PROCEEDINGS?

The most important question in Case no. KI56/18 is why should the parent (the applicant), the widow, and the under-aged son of the deceased person continue to suffer due to their unregulated civil status merely because their civil status depends on the effecting of the registration of death of the applicant's son in the civil status records? How is it possible for the office of civil status records, the MIA, and the ordinary courts to fail to see that refusal to effect registration of the deceased person in the civil status records was causing the close family of that person to suffer due to their unregulated civil status? This displays – as the Constitutional Court found – the mechanical application of the law, excessive formalism, and failure to take into account the realities of the situation complained of.[28]

Admittedly, if one limits oneself only to the procedural requirements of Article 6 ECHR, one can see that the office for civil status records, the MIA, and the ordinary courts rendered a 'correct decision' because it was based on domestic law under the rationale that there was a discrepancy of documents issued by the Swedish and Kosovo authorities, respectively, as to the real identity of the deceased person. One cannot argue otherwise if one limits the complaint of the applicant only to the vantage point of procedural fairness, and, of course, if one overlooks the specific-substantive aspect of the applicant's

[26] Articles 73 and 74 of Law no. 03/l-007 on Non-Contested Procedure.
[27] *N.D. and N.T. v Spain* (n 19).
[28] Gerards and Glas (n 8).

complaint. This is the tipping point where the proceedings as conducted by the ordinary courts were fair but the outcome of such proceedings was unfair[29] and thus impinging upon the fundamental human rights and freedoms of the applicant. In constitutional theory, it is said that it is possible for the courts to perform a "correct application of an unconstitutional normative act".[30] Perhaps legal provisions utilized by the courts are unconstitutional but the Constitutional Court did not review the constitutionality of those provisions, and neither does the scope of this paper allow for entertaining such matters. Moreover, on this point, it could be said that during the proceedings before the office for civil status records, the MIA, and the ordinary courts, the applicant had the benefit of adversarial proceedings; that he was able, at various stages of those proceedings, to adduce the arguments and evidence that he considered relevant to his case; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; and that, accordingly, the proceedings taken as a whole were fair.[31] Had the Constitutional Court adopted the approach of the ordinary courts, which is to limit its assessment of the case only to terms of procedural fairness and refuse to look at the reasonableness of the outcome,[32] then most likely the applicant's case would have been declared inadmissible as manifestly ill-founded. After all, the Constitutional Court, on many manifestly ill-founded cases, has stated that there is often a misunderstanding of the meaning of the term "fair" in Article 6(1) ECHR. The "fairness" required by Article 6 is not "substantive" fairness but "procedural" fairness. Article 6(1) only guarantees "procedural fairness", which translates in practical terms into adversarial proceedings in which submissions are heard from the parties who are placed on an equal footing before the court.[33] Therefore, it should be taken into account that the argument of protection that may be used by an individual who is denied by a state authority, for example in the exercise of freedom of speech, will not be procedural, but substantive, and hence constitutional rights which may be violated in their essence are unprotected as long as the due process of law is understood only in its procedural limb.[34] This is why the Constitutional Court tacitly did not review the applicant's complaint through the lens of

[29] Bardsen (n 3).
[30] European Commission for Democracy Through Law (Venice Commission) "Study on Individual Access to Constitutional Justice", CDL-AD (2010) 039 rev., Strasbourg, 27 January 2011, para. 159 https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e accessed 8 June 2022.
[31] Case no. KI131/19 *Applicant Sylë Hoxha*, Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo adopted on 11 March 2020, para. 58; and also see *Garcia Ruiz v Spain* App no 30544/96 (ECHR 21 January 1999) para 29.
[32] Spano (n 6).
[33] Case no. KI42/16 *Applicant Valdet Sutaj*, Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo adopted on 12 July 2016, para. 4; see also *Star Cate-Epilekta Gevmata and Others v Greece* (dec.) App no. 54111/07 (ECHR 6 July 2010).
[34] Sokol Sadushi, *Drejtësia Kushtetuese në zhvillim* (Toena, Tirana 2012) p. 619.

Article 6 ECHR which is understood to be mainly concerned with and limited to the fair conduct of proceedings.[35]

The rights guaranteed under Article 8 ECHR are not absolute and are subject to limitations which are allowed if they are in "accordance with the law" or "prescribed by law", or if they are in the interest of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[36] The office for civil status records, the MIA, and the ordinary courts did not adduce any reasons whatsoever as to why the effecting of the registration of the deceased person in the civil status records[37] had in some way a proportional relationship to the aim sought to be achieved, that it met a pressing need, or was necessary in a democratic society in compliance with the limitations stipulated in Article 8 (2) ECHR. Arguably, it could be said that the assessment of the applicant's complaint by the ordinary courts only met the first test of being in "accordance with the law" or "prescribed by law" but failed to meet all other tests under Article 8 (2) ECHR, either any of them individually or all of them taken together. In fact, they only stated in their decisions and during the public hearing before the Constitutional Court that there was a mismatch of documents issued by the Swedish and Kosovo authorities as to the real identity of the deceased person and that there was no international death certificate or similar document in the name of the deceased as required by the applicable law in Kosovo. In any event, it became abundantly clear to the Constitutional Court that it had never occurred to the civil registration authorities and the ordinary courts whether their measures had a reasonable relationship of proportionality to the aim pursued, whether such measures were legitimate at all, or whether there was a pressing social need not to effect registration of the deceased person into the civil status records, thereby permitting continuation of the unregulated civil status to his immediate family. Put differently, was it really in the public interest for the widow and the under-aged son of the deceased person to permanently be stuck with an unregulated civil status? What gain was there for the public interest? As the European Court has emphasized, a restriction on an ECHR right cannot be regarded as "necessary in a democratic society" – two hallmarks of which are tolerance and broadmindedness – unless, amongst other things, it is proportionate to the legitimate aim pursued.[38] In this regard, the European Court has considered cases raising similar issues concerning the marital or parental status of individuals to fall within the ambit of private and family life. In particular, it has found that the registration of a marriage, being a recognition of an individual's legal status, undoubtedly concerns both private and family life and comes within the scope of Article

[35] Guide on Article 6 of the European Convention of Human Rights, Council of Europe/European Court of Human Rights, 2020 <https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> accessed 11 September 2020.

[36] Guide on Article 8 of the European Convention of Human Rights, Council of Europe /European Court of Human Rights, 2020 <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 6 September 2020.

[37] It should be noted that during the public hearing before the Constitutional Court, the office for civil status records stated that, according to them, the deceased person still figured alive in their records.

[38] *Dudgeon v the United Kingdom*, App no. 7525/76 (ECHR 22 October 1981) paras 51-53.

8 (1) ECHR.[39] The European Court found that the denial of registration of the applicant's marriage for a period of over two years was a disproportionate interference with his Article 8 rights.[40] Likewise, the applicant in Case no. KI56/18 had initiated proceedings to effect the registration of his deceased son in around June 2013, whereas those proceedings ended with the final judgment of the Supreme Court on 22 December 2017. In addition, an applicant submitted his constitutional complaint to the Constitutional Court on 12 April 2018,[41] and the Constitutional Court rendered a judgment in his case on 22 July 2020, finding a violation of Article 8 ECHR in conjunction with Article 13 ECHR. It follows that the applicant was denied the effecting of the registration of his deceased son into the civil status registry for a period of no less than seven (7) years.

The Constitutional Court, by finding a violation of Article 8 ECHR, actually made a paradigm shift in its case law. The Constitutional Court, since it became operational in September 2009, in the vast majority of cases involving individual constitutional complaints, has mostly found violations of the right to a fair hearing and protection of property. In this respect, Case no. KI56/18 is a welcome development in its most recent case law, as it shows that the Constitutional Court has slowly but surely reached a phase of ripeness which enables it to review individual constitutional complaints not only as to the fairness of proceedings but also the fairness of the outcome of such proceedings,[42] thereby enabling it in the years to come to perform a holistic review of both substance and form.

## 5. THE CONSTITUTIONAL COMPLAINT AS AN EFFECTIVE REMEDY IN PRACTICE AND IN LAW

Article 13 ECHR requires that a remedy must be effective in practice as well as in law; it must be a remedy that can prevent the alleged violation and one which can provide adequate redress for any violation that has already occurred.[43] A remedy provided for by law must also be proved to be effective, sufficient, and accessible in order to comply with the requirements of Article 13.[44] The Constitutional Court emphasized that in the light of finding a violation of Article 8 ECHR, under the circumstances of the case, the complaints of the applicant about the violation of Article 13 ECHR are clearly "arguable". The Constitutional Court concluded that the applicant did not have avail of an effective legal remedy to redress the violation of his right to privacy and family life under Article 8 ECHR. It found that the circumstances of the case indicated a breach of Article 13 ECHR as well.[45] One must also bear in mind that the European Court has also held that notwithstanding

[39] *Dadouch v Malta*, App no 38816/07 (ECHR 20 July 2010) para 48.
[40] *Dadouch* (n 39) para 60.
[41] Case no. KI56/18 (n 20) para 6.
[42] Bardsen (n 3).
[43] D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights,* Oxford University Press 2009, Second Edition, p. 562.
[44] Harris, O'Boyle, Bates and Buckley (n 43) p. 563.
[45] Case no. KI56/18 (n 20) paras 139-144.

the terms of Article 13, the existence of an actual breach of another provision of the ECHR is not a prerequisite for the application of Article 13.[46] The corollary is that Article 13 is applicable in both situations, where there is a breach of a right guaranteed under the ECHR but also in cases where the applicant shows that he has an arguable claim in terms of the ECHR.[47] There is no abstract definition of the notion of arguability. In this regard, the European Court has held that an arguable claim is determined in the light of the particular facts and whether the nature of the issues raised are arguable in terms of Article 13, and, if they are, whether the requirements of Article 13 were met in relation thereto.[48]

The approach of the European Court to extend via its case law the protection afforded by Article 13 shows not only the importance of having in place effective and practical protection of basic human rights and freedoms, but also of giving full effect to the axiom "ubi jus ibi remedium" which means that where there is a right, there should be a remedy.[49] In this respect, it is also important to note that Article 13 is not concerned with the concept of "civil rights and obligations" under Article 6 (1) ECHR. Article 13 is concerned with the provision of an effective remedy before a national authority for the protection of "rights and freedoms" set forth in the ECHR.[50] Article 13 is the right that one has to secure the protection of other rights and freedoms guaranteed by the ECHR. It is essentially a "watchdog right", a right that guards one's rights guaranteed under the ECHR.

The notion of an arguable complaint as construed by the European Court under Article 13 does require the provision of an effective remedy in domestic proceedings even though the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant.[51] It simply means having an accessible remedy before an authority competent to examine the merits of a complaint.[52]

Turning back to Case no. KI56/18, the civil registration authorities and the ordinary courts failed to assess the substance of the applicant's complaint by not going beyond the mere appearances and looking into the realities of the situation complained of,[53] and thus having a negative impact on the moral and psychological integrity on the third persons due to their unregulated civil status. In light of such failings, especially by the ordinary courts, the Constitutional Court, accordingly, found that the applicant's right to an

[46] *Klaas and Others v Germany*, App no. 5029/71 (ECHR 6 September 1978) para 64; see also *Boyle and Rice v the United Kingdom*, App no. 9659/82 9658/82 (ECHR 27 April1988) para 52.
[47] *Boyle and Rice*, para 52.
[48] *Boyle and Rice*, para 53.
[49] Aharon Barak, *Constitutional Human Rights and Private Law*, p. 260, <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/3115/Constitutional_Human_Rights_and_Private_Law.pdf?sequence=2> accessed 27 May 2022.
[50] *Golder v the United Kingdom*, App no. 4451/70, (ECHR 21 February 1975) para 33.
[51] *Kudla v Poland*, App no. 30210/96, (ECHR 26 October 2000) para 157.
[52] Guide to Article 13 of the European Convention on Human Rights, Council of Europe/European Court of Human Rights, 2020 <https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf> accessed 7 September 2020.
[53] Gerards and Glas (n 8).

effective remedy before a national authority as guaranteed by Article 13 of the ECHR was violated.[54]

The individual constitutional complaint proved to be an effective remedy because the Constitutional Court declared the existence of a violation of Article 8 ECHR; it quashed decisions of the civil registration authorities and the ordinary courts, and ordered the relevant authority[55] to effect registration of the deceased person within three months from the date the judgment of the Constitutional Court was published and served.[56] In fact, following the judgment of the Constitutional Court, the applicant was finally able to effect registration of the death of his son in the registry of deceased persons, which is indicative of the existence of elements of the enforceability of the ruling of the Constitutional Court.[57] The scope of protection afforded by Article 13 ECHR in the applicant's case is broad because neither the courts nor the relevant civil registration authorities have shown nor suggested that non-registration of the death of the applicant's son is somehow a matter of national security which might have narrowed down the scope of Article 13 ECHR to the detriment of the applicant.[58] One can only hope that in future other public authorities and especially the ordinary courts will begin to follow the practice of the Constitutional Court in rendering rights and freedoms under the Constitution and the ECHR practical and effective as opposed to theoretical and illusory.[59] Rendering basic human rights and freedoms practical and effective is the question of a constitutional obligation under Articles 22[60] and 53[61] of the Constitution.

## 6. CONCLUDING REMARKS

As highlighted above, the approach of the Constitutional Court has exposed the limitations of procedural fairness by showing that in practice it is possible to have procedural fairness but without a fair outcome to such proceedings.[62] In order to have fair proceedings with fair outcomes, there is a need to cultivate and utilize the human qualities of excellence both in judgment and sympathy which provides the greatest promise for the realization of justice in contemporary society.[63] In the exercise of these qualities of form and content,

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[54] Case no. KI56/18 (n 20) 144.
[55] Office for Civil Status Records and the Ministry of Internal Affairs.
[56] See the enacting clause of Case no. KI56/18; see also Martin Kuijer, *Effective Remedies as a Fundamental Right* (Barcelona, 28-29 April 2014) <https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=martin+kuijer&btnG=> accessed 7 September 2020.
[57] Harris, O'Boyle, Bates and Buckley (n 42).
[58] Ibid., pp. 568-569.
[59] *N.D. and N.T. v Spain* (n 19).
[60] Article 22 (n 12).
[61] Article 53 (n 13).
[62] Bardsen (n 3).
[63] Donald H.J. Hermann, *The Fallacy of Legal Procedure as Predominant over Substantive Justice: A Critique of "The Rule of Law" in John Rawls' A Theory of Justice*, DePaul Law Review Volume 23 Issue 4 Summer 1974, p. 1419 <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=2817&context=law-review> accessed 28 May 2022.

substance and procedure appear only as aspects of integrated human personality and this is the true source of the rule of law, and, hence, of a just legal system.[64] The mechanical application of the law, the adoption of overly restrictive positions,[65] being unprepared to look at the realities of the situation complained of, and focusing solely on the fair conduct of proceedings does not always result in fair outcomes. There is an interdependence between procedure and substance because both are important pillars of the rule of law and there can be no practical and effective protection of basic human rights if procedural fairness is not complemented by substantive justice. Basic human rights as enunciated in the Constitution and the ECHR have a meta-legal character ingrained in them which is replete with ethical-moral values, and which transcend the precepts of domestic laws. The European Court has held that any measure undertaken by a public authority against an individual should, in principle, be assessed regarding its reasonableness and proportionality by an independent tribunal under the substantive rights guaranteed by the ECHR, notwithstanding domestic law.[66] This means that in some cases the conduct of fair proceedings is also to realize substantive justice because the lawgiver and the judge should not be individuals that remain indifferent in the face of an unfair outcome of the proceedings; indeed, they should be individuals that have a heightened sense of justice in tune with and not removed from the reality of the case under consideration.[67] The effective implementation of human rights requires a culture of human rights at all levels of government, as well as in society in general; they must become embedded in peoples' mindsets, as well as in the day-to-day workings of societal institutions such as the judiciary and the legislature.[68] In conclusion, I would like to add that the Constitutional Court is paving the way for the ordinary courts and other public authorities to give practical effect to the protection of basic human rights and freedoms in the young democracy that is the Republic of Kosovo. Things will only get better once Kosovo gains membership of the Council of Europe and becomes a Contracting Party to the ECHR, as direct supervision by the ECHR institutions is of paramount importance for the robust protection of basic human rights and freedoms.

[64] Hermann (n 63).
[65] *Guberina v Croatia*, App no. 23682/13 (ECHR 22 March 2016) para 86.
[66] Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* Cambridge Yearbook of European Legal Studies, Volume 14, 2012, pp. 381-418 <https://doi.org/10.5235/152888712805580570> accessed 27 May 2022.
[67] Partly Dissenting Opinion of Judge Borrego Borrego, p. 75, *Kafkaris v Cyprus*, App no. 21906/04 (ECHR 12 February 2008).
[68] Spano (n 7).

# OGRANIČENJA POSTUPOVNE PRAVIČNOSTI: USTAVNA TUŽBA KAO UČINKOVIT PRAVNI LIJEK U PRAKSI I PRAVU

Iako je vođenje pravičnog postupka vrlo važno, ono ne mora nužno dovesti do pravednog ishoda danog postupka. Stoga pravični postupci moraju biti dopunjeni pravednim suštinskim ishodom kako bi osnovna prava bila praktična i učinkovita. Razlozi za takav nedostatak postupovne pravičnosti mogu biti višestruki, ali oni se u suštini svode na mehaničku primjenu zakona, pretjerani formalizam u primjeni i tumačenju zakona i neuspjeh da se ide dalje od pukog privida i da se ocijeni stvarnost pritužene situacije. U radu se pojašnjava uloga ustavne tužbe kao učinkovitog pravnog lijeka za pojedince koji imaju argumentiran zahtjev za povredu svojih materijalnih prava zajamčenih EKLJP-om i Ustavom. U radu se analizira presuda Ustavnog suda Kosova kojom je utvrđena povreda prava na privatnost i obiteljski život te prava na djelotvoran pravni lijek, usprkos pravičnom vođenju postupka. U radu će se također pokazati utjecaj relevantne sudske prakse Europskog suda na pristup i obrazloženje Ustavnog suda.

Ključne riječi: *ustavna tužba, djelotvoran pravni lijek, pravičan postupak, praktična prava, materijalna prava*

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