

CONSTITUTIONAL CONTROL OF THE DECISIONS FROM THE ORDINARY COURTS BY THE CONSTITUTIONAL COURT OF KOSOVA THROUGH EVALUATION OF CONSTITUTIONALITY AND CLASHES OF JURISDICTIONS

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Abstract

Constitutional Court of Kosova is the final authority to interpret the Constitution and the accordance of laws with the constitution in the Republic of Kosova. This court is totally independent when exercising its responsibilities. Issues that come to be treated before this court are of a “sui generis” nature, they are specified with the constitutional norms and they are characterized with the limitation of subjects that present requests before it. Kosova Supreme Court is the highest court institution and it has the jurisdiction over the entire territory of the Republic of Kosova. Organization, function and jurisdiction of the Supreme Court as well as other courts is regulated by the law. Paper aims to treat issues of turning to retrial of Kosova court cases from the Constitutional Court. This practice was not known in the past. From the legal though of experts it is said that it is not covered with the legal basis and it is seen as paleness of the Kosova Supreme Court competence that in these cases is losing its role as the last level decision of justice.

Paper also aims to raise issues underlying to find out what such a practice would bring in achieving modern standards for fair judgement in the court system in Kosova.

Key words: judicial system, interference, jurisdiction, modern standard, fair trial

Introduction

By establishing the Constitutional Court Kosova has finalized the process of building of local institutions in the sphere of judiciary. Creation of this institution enabled also the right of parties to request evaluation of constitutionality of court decisions. Constitutional Court by doing such evaluation has installed the practice of turning to the retrial of court issues to the regular judiciary. This practice was not known in the past in Kosova. By analyzing this problem it is important to treat issues about who the subjects that can raise issues before the Constitutional Court are and which is the jurisdiction and the authorized parties before the Constitutional Court of the Republic of Kosova. In this line, issues related to the jurisdiction of Kosova Supreme Court that is the highest judiciary authority in Kosova. There also an analysis should be done related to the issues of individual constitutional appeal and the evaluation of constitutionality of the court decisions – issues through which it is made possible a meeting point for Constitutional Court and the Supreme Court of Kosova jurisdiction.

1. Jurisdiction and the authorized parties before Constitutional Court of the Republic of Kosova

Kosova Constitutional Court was established in January 2009 almost a year after Kosova declared its independence.¹ It is the final authority in the Republic of Kosova to interpret the Constitution and the compliance of laws with the constitution.

¹ During the UNMIK administration it was foreseen the formation of a Special Panel of the Supreme Court for the issues of the Constitutional Framework that indeed was never established. At that time there was no judicial organ that had authority to review constitutionality of laws and other judicial acts. See also: Rafet Haxhaj, *Position of judiciary during the UN mission-master thesis, Faculty of Law Prishtina, 2008, pg.55*

This court is totally independent in exercising its responsibilities. Issues that are treated by this court are of sui generis nature, they are specified with the constitutional norms and they are characterized with the limitation of subjects that can appear before this court with their requests. Constitution of the Republic of Kosova has determined who are the parties that can initiate a case before the Constitutional Court of Republic of Kosova and the issues as well, and they are:

1. Kosova Parliament, President of the Republic of Kosova, Government and the Ombudsperson are authorized bodies that can raise issues on as follows:
 - Compliance of laws, President, Primeminister decree and government regulations with the constitution;
 - Compliance of municipal statute with the constitution;
2. Kosova Parliament, President of the Republic and the Kosova government are authorized to raise the following issues:
 - Conflict of constitutional competences between Kosova Parliament, Kosova President and Kosova Government; and
 - Compliance of proposed referendum with the Constitution;
 - Compliance if extraordinary measures are announced and the acts undertaken under the extraordinary measures;
 - Compliance of a proposed constitutional amendment with the international obliged agreements, ratified according to this constitution and the re-assessment of the followed constitutional procedures;
 - If the constitution was violated during the elections for the Parliament.
3. Other authorized parties that may raise issues as follows:
 - Commune is authorized to contest the constitutionality of laws and government acts that affect municipal responsibilities or reduce the municipal resources, in cases when commune is affected by that law or act;
 - Ten or more Kosova MPs within 8 days from the day of approval of a decision can contest the content and the procedure;
 - Thirty or more MPs are authorized to raise the issue if President of Kosova Republic has seriously violated the constitution;
 - Individuals are authorized to raise the issues if their rights were violated from the public authorities guaranteed by the constitution, but only after they have used all other judicial means determined by the law;
 - Courts have the right to transfer issues to the constitutional court regarding compliance of a law with the constitution --- if that compliance is raised during the trial and the court is not sure if the law is in compliance with the law whereas the court decision depends on the mentioned law;
 - The Speaker of the Parliament should refer constitutional amendments before approved with the aim of seeing if the proposed amendment reduces the rights and freedoms guaranteed with the constitution Chapter II.²

Procedures before the Constitutional Court are special and differ from the classic rules of judiciary. The nature of contest before this court is of constitutional character and thus the procedures are special expressing features of the constitutional nature of contests.³

2. Jurisdiction of the Kosova Supreme Court

Judicial power in Kosova is exercised by courts which judge based on the constitution and based on the laws.

Organization, function and jurisdiction of the Supreme Court and other courts is regulated by the law. Supreme Court is the highest judicial authority and it has the jurisdiction over the entire territory of The Republic of Kosova.⁴

² Constitution of the Republic of Kosova, article 113.

³ Bajrami, A., (2011), *Constitutional system of Kosova*, pg.. 338.

⁴ Constitution of the Republic of Kosova, article 103.

Supreme Court is competent to decide related to:

- Request for extraordinary judicial means against final decisions of the Kosova courts as foreseen with the law;
- Revision against the second instance court decisions in the contentious issues as foreseen by the law;
- Determines principal attitudes and judicial opinions for the issues that are important on law implementation from the courts in the entire territory of Kosova;
- Subjects of the Kosova Property Agency as foreseen by the law;
- In the special chamber, subjects from the Kosova Privatisation Agency as foreseen by the law.⁵
- Appeals of judges against decisions for removal.⁶
- In the second instance related to the appeals against decisions of the Election Panel for Appeals and submissions - PAZP, etc.

3. Individual constitutional appeal

The Constitution of the Republic of Kosova has determined that individuals are authorized to raise issues when the rights and freedoms are violated from the public authorities guaranteed by the constitution. Constitution has put limits when individual may raise issue and they can be raised only after all means foreseen by the law are used as determined by the law. This appealing instrument enables every individual to ask Constitutional Court from constitutional protection if he/she pretends that the rights and freedoms guaranteed by the constitution are violated from a public authority⁷. Word individual should be seen on the general meaning and that not only for physical persons but also for judicial persons all the time if such rights are implemented also for judicial persons.⁸

The right to individual constitutional appeal can be realized only related to the rights and freedoms and this of course based on the Chapter II of the Kosova Constitution---the individual political, economic, social and cultural rights.

The second condition for individual constitutional appeal is interconnected with the principle of exhaustion of all means and this means that complainant initially should use all judicial possibilities (regular and extraordinary judicial means) in order to later on address the Constitutional Court. Individual appeal should be specified precisely. This means that complainant should precisely explain which rights and freedoms are violated and which is the concrete act from the public authority that complainant desires to contest.⁹ Law on the Constitutional Court determines that the pretended violation of a constitutional right should be concrete and this derives from current system that does not allow appeals *in abstracto*. Law has foreseen also the term within which the appeal is to be submitted and that is four months term. Term starts from the date when the court decision was taken whereas in the other cases the term starts on the date when the decision or act is publicly announced or when the law has entered into the force.¹⁰

4. Constitutional evaluation of the court decisions

Above with this paper there were presented jurisdiction and the authorized parties before the Constitutional Court, jurisdiction of the Supreme Court as well as constitutional individual appeal (request). It is the last one that made it in Kosova to start constitutional evaluation of court decisions and to appear jurisdiction clashes between two most authoritative courts in the country.

In the case KI 40/09 Imer Ibrahim and 48 employers from Energy Corporation of Kosova against 49 individual court decision from the Supreme Court, the Constitutional Court turned back for re-trial of Supreme Court decisions---Constitutional Court on point I of the decision has announced the request unaccepted for 12 cases, partially accepted 5 cases, accepted – request related with the complainants under numbers 18-49.

⁵ Law Nr.03/L-199 on Courts, article 22.

⁶ Constitution of the Republic of Kosova, article 104, point 5

⁷ Bajrami, A., (2011), *Constitutional System of Kosova*, pg. 346

⁸ Ibid

⁹ Law Nr.03/L-121 on the Constitutional Court of Kosova, article 47

¹⁰ Law Nr.03/L-121 on Constitutional Court of Kosova, article 49.

In the II point it has found that there were violations of the article 46 of the Kosova Constitution connected with the article 1 of the Protocol 1 of the European Convention for Human Rights in the listed cases 13-49 and that there were violations of article 31 of the Constitution connected with the article 6 of the Convention. Constitutional Court further with the point III of this decision has announced as invalid 36 decisions of the Supreme Court, in the point V., these decisions are turned back for re-trial in accordance with the Constitutional Court decision.

In the above mentioned case applicants have required from the regular courts to approve their indictments regarding payment of their pensions since KEK (Kosovo Energy Corporation) had agreements with employees to pay them pensions until the Fund for Pensions and Disability is not established that indeed is still not established and there is no law to regulate this. Supreme Court refused such indictments evaluating that respondent KEK has fulfilled its obligations according to the agreement that is compensation of salaries specified until the establishment and function of Fund for Pensions and Disability until coming into force on January 01, 2004.¹¹

Supreme Court comes to a conclusion that there was violation of article 31 of Constitution connected to article 6 of European Convention for Human Rights.¹²

This case displayed the first dilemma in the judicial life in Kosova whether the Constitutional Court has legal competence to return for re-trial the court decisions. This has split the the opinion of legal experts in Kosova.

To the first group belongs to the experts represented in the Supreme Court and the members of the former Constitutional Court of Yugoslavia evaluating that by this act the Constitutional Court comes to a position of the fourth instance court and this group of experts evaluate that this is not at all covered with the legal basis. By this Kosova Supreme Court in these cases loses its role as of being the last/final instance in judiciary decisions.

In the second group there are experts from the Constitutional Court that evaluate that the Constitutional Court is not fourth instance court but the right to turn issue to the retrial is based in the german and czech model of evaluation of the constitutionality in which case it is made an impact to correct justice and the regular court process is ensured.¹³

There is also the third group of experts which is consisted of university professors and that have not expressed their will to take part, at least not publicly in the debate regarding this issue.

After this case a clash between these two institutions appeared when the execution of the decision of the Independent Supervising Council for Civil Servants-KPMSHC. Constitutional Court has turned to the retrial around 200 court decisions. Supreme Court previously had taken a Principal Attitude according to which decisions of KPMSHC do not present bailiff title.

Culmination of these disagreements was reached by the decision of the Constitutional Court with the case KI04/12 presented by E.Kelmendi regarding the evaluation of constitutionality of the Prishtina District Court, Ac.nr.647/2011 dated November 30, 2011.

In the case KI04/12 Constitutional Court has announced as invalid the decision Ac.nr.647/2011 of the Prishtina District Court of November 30,2011 which has violated articles 24,31,32 and 54 of the Constitution and article 6 connected to article 13 of the European Convention for Human Rights. Constitutional Court in the point III of the decision had decided to turn decision Ac.nr.647/2011 to the Prishtina District Court for re-trial in accordance with the judgement of this court, in accordance with the Rule 74 (1) of the Working Regulation. In the point IV., the Prishtina District Court has to inform the constitutional court regarding the measures on how the decision of the constitutional court is being implemented.

This case has put in a difficult situation judges from the Prishtina District Court since they now are in such a situation where there is inconsistency between Supreme Court regarding these activities of Constitutional Court in one side¹⁴, and the obligation to develop retrial in accordance with the Constitutional Court decision.¹⁵

¹¹ Decision of Supreme Court Rev. Nr. 57/2009, dt., February 11, 2009.

¹² Newsletter of Practice of the Constitutional Court of the Republic of Kosova, 2009-2010.

¹³ Daily "Koha Ditore",pg.3 e dt.01.08.2012.

Judges from the District Court even though the Supreme Court was against, decided according to guidelines from the Constitutional Court.

Although in many decisions Constitutional Court has underlined the fact that it is not the “fourth instance court” and that it has not the “appeal jurisdiction” it has not completely managed to keep this line and to save “extreme nicety” not to interfere in the decisions of the regular courts, so its decisions not to be understood from the public as the fourth instance court.

In the case KI 78/12 deciding regarding the evaluation of the constitutionality of the Supreme Court decision Pkl.Nr.70/2012 dated June 22,2012, Constitutional Court after concluding that there was violation of article 31 (the right for fair and independent trial) of the Constitution and article 6 (the right for proper process) of the European Convention for Human Rights, with the majority of votes decided to announce invalid the Supreme Court decision and turned it back for retrial in accordance with the Supreme Court decision. Court had agreed the temporary measure until the time when the Supreme Court decides as *ratio decidendi of the Constitutional Court*.

Applicant pretended that the Supreme Court decision had violated the rights guaranteed with the Constitution of the Republic of Kosovo, article 31 (the right for proper and independent trial) and article 6 (the right for proper trial) of the European Convention for Human Rights and Universal Declaration of Human Rights, article 10. Apart from this applicant has requested from the Constitutional Court to impose the temporary measures until so he remains non arrested until Supreme Court decides.

In this case Constitutional Court has concluded that the way how the evidence was treated in the case of applicant (from Supreme Court side), demonstrates a complex of decisions that reciprocally strengthen their impact on the appropriateness of the trial. First, the regular courts continually have refused to authorize an additional expertise about the factors that affected accident (traffic accident). Second, regular courts justified this refusal based on the fact that the situation was enough clear for them according to the existing expert report. However, the expert report was based on the Police report, in sketches and photo without any procedure from the expert that would himself verify it, with individual efforts information from the police reports. Validity of the Police reports were not in any procedure phase verified from any authorized court official or from any court. It is questionable that in what measure was the applicant to contest content of the police reports even if he was able to contest the expert report based on the police reports.¹⁶

This decision of the Constitutional Court from the judiciary representatives is considered as a fourth instance court whereas from the daily press as interference of politics in the Constitutional Court decision.¹⁷ Such a decision could not have been avoided from the European Commission report for Kosovo: “In reviewing of a criminal case (including a mayor) in January, Constitutional Court taking over the case by referring again the Supreme Court for retrial, by mistake suggested that it could take as a duty to act as a court (additional) of the final instance¹⁸ - it is said in the part of the report regarding the judicial system.

¹⁴ Article/newspaper “Decisions of KPM initiate polemic in the high level organs of judiciary – Constitutional and Supreme Court in the conflict for competences” - Daily “Koha Ditore”, pg.3 e dt.01.08.2012.

¹⁵ At the same day it was published an interview with the Head of the Constitutional Court where “Kosova Constitution foresees that the decisions of the constitutional court are obligatory for judiciary and all other persons and institutions of the Republic of Kosovo, and thus disrespect for this leads towards penal responsibility.

¹⁶ Decision of the Constitutional Court of the Republic of Kosovo KI 78/12 i dt., 24.01.2013.

¹⁷ Article/newspaper “Progress report received with concerns – even constitutional court is not free of critics”- Daily “Kosova Sot”, dt.12 October 2013, fq. 2.

¹⁸ Progress Report 2013 for Kosovo – Communicate from the Commission for the Parliament and European Council, Brussels, 16.10.2013 – Albanian version published by the Ministry for EU integrations - official web site.

Conclusions

Clash between two high level courts in the country and the different approaches on the same issue have created uncertainties and for a while a perception is created that there are two types of judiciaries in the judicial system of Kosova.

The issue of turing back to the retrial should have legal coverage from the Kosova legislation system and this is coming to the final need to be sanctioned by law.

The issue of request from the Constitutional Court addressed to the regular courts on deciding based on the Constitutional Court decision in a way loses the importance of developing again trial from the lower instance court. From the practice it is seen that this has reflected prejudices of the case and in a way it had an impact in the regular legal process.

It is immediate for a judg of the Constitutional Court in the future to be elected professionals that come from judiciary, since the nowadays judges come from the academic world so there is a lack of experience of these judges.

We evaluate that the role of Constitutional Court is similar to the European Court for the Human Rights: it does not act as the “fourth instance court” and it does not replace its legal interpretations with those of ordinary courts. Constitutional Court should be limited in that if the lower instance court has respected the constitutional courts of applicants as it is the right for proper and independent trial (article 31 of the Constitution).

Literature:

1. Bajrami, A., (2011), *Sistemi Kushtetues i Republikës së Kosovës (Constitutional System of Kosova)*;
2. Haxhaj, R., (2008), *Pozita e gjyqësorit në Kosovë gjatë periudhës së Misionit të Kombeve të Bashkuara, (position of judiciary in Kosova during the UN mission -punim i magjistraturës – master thesis)*, Fakulteti Juridik në Prishtinë;
3. Buletini i Praktikës Gjyqësore të Gjykatës Kushtetuese të Republikës së Kosovës, 2009-2010; (newsletter from the Practice of the Constitutional Court 2009-2010)
4. Kushtetuta e Republikës së Kosovës (Constitution of the Republic of Kosova);
5. Ligji Nr.03/L-121 Për Gjykatën Kushtetuese të Republikës së Kosovës; Law on Constitutional Court of the Republic of Kosova
6. Ligji Nr.03/L-199 Për Gjykatat; Law on courts
7. Raporti i Progresit 2013 Për Kosovën (i Komisionit European); Progress report for Kosova
8. Aktgjykimi i Gjykatës Kushtetuese të Republikës së Kosovës KI 78/12 i dt., 24.01.2013; Decision of the Constitutional Court of the Republic of Kosova
9. Aktgjykimi i Gjykatës Supreme të Kosovës Rev. Nr. 57/2009, dt., 11 shkurt 2009; Decision of the Kosova Suprem Court
10. Aktvendimi i Gjykatës së Qarkut në Prishtinë Ac.nr. 647/11, dt, 16.10.2012. Decision of Prishtina District Court