



SOME OF THE MOST IMPORTANT RULINGS OF THE CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

Berisha, Dardan, *Ph.D., Teaching Assistant, Faculty of Law, University "Ukshin Hoti", Prizren, Kosovo;*
dardan.Berisha@uni-prizren.com

Vuniq, Dardan, *Ph.D., Assistant Professor, Faculty of Law, University "Ukshin Hoti", Prizren, Kosovo.*
dardan.vuniqui@uni-prizren.com

Abstract:

Almost all countries with liberal democracies have established specialized courts whose primary function and paramount role fulfil an extremely important role in the protection of human rights, interpretation and protection of the constitution as well as defining and promoting important principles such as the separation of powers, rule of law and the protection of minorities and other constitutional values. Constitutional courts utilizing case law and precedent have played pivotal roles in determining the constitutional identities of their respective states. Since its establishment, The Constitutional Court of the Republic of Kosovo ("CCK" or "The Court") has been very active in its decision-making and has greatly influenced the definition and cultivation of the constitutional identity of Kosovo. Its decisions have defined important constitutional frameworks such as the protection of human rights, protection of the rights of national minorities, separation of powers and unity of the state and many other important principles. It can be said that, in general, the Court has been the guardian of the Constitution and constitutional democracy, fulfilling the main purpose of its establishment. This paper will address the jurisdiction and organization of the Constitutional Court of Kosovo, and some of the important decisions which have undoubtedly played an important role in determining the constitutional identity of the country.

Keywords: *Identity, Constitutional Court, Judicial Decisions, Human and Minority Rights.*

1. Introduction

The comprehensive proposal for the settlement of Kosovo's status, known as the Ahtisaari package, laid the foundations for the formation of the Constitutional Court of the Republic of Kosovo. It set out several aspects related to the functioning of the Court, such as the number of judges, the manner of their election and appointment, and points regarding the jurisdiction of the Constitutional Court, which were afterwards incorporated into the text of the Constitution (Comprehensive Proposal For the Kosovo Status Settlement, 2007). The constitution defined the jurisdiction of the court, its composition and manner of appointment for its judges as well as defining the general principles and legal effect of its decisions (Constitution of the Republic of Kosovo, 2008). After the adoption of the Constitution, the process of drafting the Law on the Constitutional Court began with The Ministry of Justice, together with representatives of civil society and international experts discussing the issues that the law should contain and their concretization (Mansfield, 2013) Finally, the Assembly approved Law no. 03 / L-121 on the Constitutional Court of the Republic of Kosovo. The law regulates

important issues of the Court's work, such as procedures for submitting and reviewing claims, conditions and procedures for the appointment of judges and other procedural and organizational aspects (Law On the Constitutional Court of the Republic of Kosovo, 2009). In addition to the Law, the Court also adopted the internal rules of procedure, which generally formalize and supplement the organizational decision-making procedures (Rules of Procedure of the Constitutional Court of the Republic of Kosovo, 2018) The establishment and functioning of the Constitutional Court through the adoption of constitutional and legal acts was and is one of the main elements of the development of a constitutional democracy and the promotion of rule of law in the Republic of Kosovo (Mushkolaj, Morina and van Lamoen, 2014).. The CCK consists of a total of 9 judges, who are appointed by the President of the Republic upon the proposal to the Assembly of the Republic of Kosovo, for a non-renewable 9 year term (Constitution of the Republic of Kosovo, 2008).

2. Jurisdiction and model of the Constitutional court of Kosovo

firstly, the CCK is modelled upon the European pattern of constitutional judiciary, meaning that it is completely separate from the regular judiciary and is not part of the justice system or any other legislative or executive branch (Hasani, 2014). Secondly, the Constitution entrusts the CCK with a primary authority for the interpretation of the Constitution and the constitutional review of its laws (Constitution of the Republic of Kosovo, 2008). It has full jurisdiction over substantive and abstract constitutional validity of the laws of the Kosovo Assembly as well as the legal actions of public authorities in Kosovo (Hasani, 2011). Finally, the CCK has jurisdiction to exercise substantial control the constitutionality of individual decisions by the respective state bodies violating constitutional rights and freedoms of the individual. Thus, all individuals who claim that their constitutional rights have been violated by a decision made by public authorities have the right to file a constitutional complaint, after the exhaustion of all available legal remedies (Hasani., Korenica, and Doli, 2012). One important feature of the CCK is that it, cannot on its own, *sua sponte*, initiate proceedings. Only constitutionally authorized parties can set the Court in motion (Doli, Korenica and Rexha ,2016). According to the Constitution, the parties authorized to raise cases before the Constitutional Court are: the President, the Assembly, the Ombudsperson, the Government, the municipalities, individuals and the lower courts.

Despite the fact that the Court has an important role to play in interpreting the provisions and meaning of the Constitution, its jurisdiction is nevertheless not unlimited. Its decisions and interpretations are made within the jurisdiction defined by the constitution, which include:

- compatibility of laws, decrees of the President and Prime Minister, and government regulations and the municipal statute with the Constitution;
- conflict over competence, the constitutionality of the referendum, the state of emergency and proposed amendments to the Constitution;
- constitutionality of the election of the Assembly;
- serious violations of the Constitution by the President;
- constitutional validity of acts by the Government which are deemed to have undermined the responsibilities of municipalities;
- incidental control triggered by a referral from regular courts;
- individual complaints of persons alleging the violation of their constitutional rights (Constitution of the Republic of Kosovo, 2008).

Additional jurisdiction can be assigned by law (Constitution of the Republic of Kosovo, 2008). Decisions of the CCK are final and unappealable as well as being binding on all institutions within the Republic of Kosovo (Constitution of the Republic of Kosovo, 2008).. The role of the Constitutional Court has been very important in creating the Constitutional Identity of Kosovo as a guardian of democracy, separation of powers and human rights (Hasani, 2020). Through its interpretations, the Court has created and cultivated a constitutional identity, detached from the previous traditions and structures of Kosovar society (Hasani,2016). From case law and subsequent decisions of the Court, such as Diana Kastrati (which interpreted the right to life), the decision of the Prizren Logo (regarding the interpretation of minority rights) the decision on the Association of Serb-majority municipalities and decisions on constitutional amendments for the establishment of the Special Court we can see examples of pivotal moments in Kosovos legal democratic identity being defined.

2.1. The case of Diana Kastrati

In the case known as Diana Kastrati, the CCK interpreted the right to life and responsibility of the state of Kosovo in relation to protection of life. In its judgment, the Constitutional Court dealt accurately with the positive obligation of the state, and found that the responsibility of the state of Kosovo in relation to the loss of life of the individual from the violence of a third person be upheld (Constitutional Court of the Republic of Kosovo, 2013). In 2011, Diana Kastrati was shot dead by her husband. Prior to her murder, she had sought protection orders from the Municipal Court in Pristina due to the constant threats from her husband (Constitutional Court of the Republic of Kosovo, 2013). According to the law on protection from domestic violence, the competent court may impose protective measures in order to prevent domestic violence, to protect the person at risk of violence and has applied for such a protection order. The court makes a decision on such cases within 24 hours after the submission of the request, while the responsibility for the execution of these protective measures is the Kosovo Police. (Law On Protection Against Domestic Violence, 2010)

Diana Kastrati's parents filed their appeal with the Constitutional Court, alleging that the Municipal Court of Prishtina, by failing to comply with the legal obligations regarding the interim measure, had violated the constitutional guarantees of the deceased, specifically Article 25, Article 31 and Article 54 of the Constitution of the Republic of Kosovo in conjunction with those laws established by the European Convention on Human Rights. According to the Applicants, the court through this case, should raise public awareness and avoid such cases in the future (Constitutional Court of the Republic of Kosovo, 2013)..

The Constitutional Court initially stressed that the right to life is the most important human constitutional value and right. According to the Court, the Municipal Court in Prishtina, based on the course of events, should have known that the deceased was seriously endangered by her husband. Therefore, the Municipal Court of Prishtina was responsible for acting in accordance with the law on protection from domestic violence (Constitutional Court of the Republic of Kosovo, 2013).. The Constitutional Court ruled that the inaction of the Municipal Court to protect the deceased through a protection order was a violation of the right to life, guaranteed by the Constitution of Kosovo and other International acts relating to the victims human rights (Constitutional Court of the Republic of Kosovo, 2013)..

2.2. The case of the Prizren Logo

On October 15, 2008, the Municipal Assembly of Prizren approved the Statute of the Municipality which regulated the internal organization of the Municipality, including the functions and responsibilities of municipal bodies (The Assembly of the Prizren Municipality,2008) the rights of minority

communities to be proportionally represented in public bodies and services of local government and also defined the official languages of the Municipality of Prizren as Albanian, Serbian, Bosnian and Turkish (The Assembly of the Prizren Municipality, 2008). Within this Statute it was stipulated that the Emblem of the Municipality of Prizren consists of the house of the League of Prizren, while inside it will be the text “1878-Prizren” (The Assembly of the Prizren Municipality, 2008).. Article 7 of the Municipal Statute prompted the Deputy Mayor of Prizren, Cemal Kurtishi, to send a request to the Constitutional Court of the Republic of Kosovo. The Applicant alleged that the emblem of the Municipality of Prizren, which contained the year “1878-Prizren”, was contrary to some of the articles of the Constitution of Kosovo relating to the rights of minority communities, and that the decision on the symbols was not obtained according to established legal procedures (Hasani, 2016). According to the Applicant, the emblem of the Municipality of Prizren should not contain the year 1878 within it. This is due to the fact that, according to him, this represents only the identity of the Albanian majority in Prizren, entirely ignoring the identity and culture of other ethnic communities in the municipality of Prizren. From the Applicant’s point of view, the emblem does not convey the multiethnicity that is characteristic of the Municipality of Prizren (Constitutional Court of the Republic of Kosovo, 2010). On March 18, 2010, the Constitutional Court of the Republic of Kosovo issued a final judgment in this case (Constitutional Court of the Republic of Kosovo, 2010). The court argued that the symbol “1878” within the emblem of the Municipality, significantly favoured the majority community within the Municipality, excluding the identity and cultural heritage of other communities. Consequently, statutory and constitutional rights were violated (Constitutional Court of the Republic of Kosovo, 2010). According to the Court, Albanians and other communities should have equal opportunities to preserve and promote their tradition, culture and identity through symbols. The court found that the emblem of the Municipality of Prizren had placed the Albanian majority in a privileged position, and that it had not reflected the concerns and demands of traditional non-majority communities (Constitutional Court of the Republic of Kosovo, 2010). In this sense, the emblem should symbolize a multi-ethnic society, thus contributing to tolerance and dialogue between all communities (Constitutional Court of the Republic of Kosovo, 2010).. The court finally ruled that the Emblem of the Municipality of Prizren violates the rights of non-majority communities to preserve, maintain and promote their identity (Constitutional Court of the Republic of Kosovo, 2010). The Municipality of Prizren, on March 24, 2011, finally approved the decision to amend the Statute of the Municipality of Prizren.

2.3. The case of the Association

The First Agreement of Principles Governing the Normalization of Relations between Kosovo and Serbia, reached on 19 April 2013, provided for the establishment of an association or community of Serb-majority municipalities. It was determined that the Association will be established by statute on the same basis as the association of Kosovo municipalities. According to the agreement, the municipalities of the association will cooperate in exercising their competencies in important areas such as, economic development, health, education and urban planning (Government of the Republic of Kosovo, 2013). The Second Agreement of 2015, signed between Kosovo and Serbian high ranking officials, in this case the President of Serbia and the Prime Minister of Kosovo respectively, implemented the First Agreement. It defined the general principles on which the Association will be founded as well as the structure and competencies it would have. In legal terms, the Second Agreement stipulated that the Association would be established by Government decree, while the statute would be the internal act of the association to be approved by its founding assembly (Association of Serb-majority municipalities in Kosovo, 2013). In terms of objectives, the agreement provided that the association would perform various functions, including, the strengthening of local

democracy, developing the local economy, health, education, urban and rural planning, providing public services for its members and others. In terms of structure, the Association would consist of the Assembly as the highest body, the Chairman and Vice-Chairman, the Council, the Board and Administration with employees. In relation to the central authorities, the Association would have the right to propose legal changes related to the realization of its objectives, to initiate lawsuits in the courts (including the Constitutional Court) against any legal act that undermines the defined competencies represented before the Community Advisory Council. The Association would also have its own budget to include its own funds as well Governmental funding provided by both the Republic of Kosovo and that of Serbia. The Association will be able to accept new members only by full consensus. It will have a coat of arms and flag, and eventually, the founding statute would be confirmed by government decree, which will be subject to review by the Constitutional Court (Association of Serb-majority municipalities in Kosovo, 2013).. All the controversies and concerns of the public opinion regarding the constitutionality of the Association prompted the President of Kosovo, Atifete Jahjaga to send the case to the Constitutional Court of the Republic of Kosovo to assess the principles of the agreement (Bajrami and Mushkolaj, 2020)

The Applicant requested that the Court assess whether the principles of the second agreement, which regulate the establishment of the Association be in accordance with the goals of the Constitution of Kosovo and its provisions. The Applicant also requested that due to public interest, the Court impose an interim measure in order to suspend any further action of the Government regarding the establishment of the Association (The Constitutional Court of the Republic of Kosovo, 2015). The Constitutional Court ruled on said interim measure, arguing that such a thing was in the public interest (The Constitutional Court of the Republic of Kosovo, 2015)

The Constitutional Court also issued a final judgment on this issue, in which it asserted its jurisdiction over the request and elaborated upon the principles of the Association in relation to the Constitution of Kosovo and its goals (The Constitutional Court of the Republic of Kosovo, 2015). The Court found that the President's request was a constitutional issue, and that the principles for the formation of the Association would have a significant impact on the form of government and the constitutional order of the Republic of Kosovo (The Constitutional Court of the Republic of Kosovo, 2015).. In the judgment, the Court ruled, *inter alia*, that the statute of the Association could not replace or undermine the status of the participating municipalities and that the objectives of the Association defined by its principles of formation do not fully meet the constitutional standards and cannot be vested with full and exclusive authority to protect the interests of the Serb community while reducing the rights of participating municipalities to manage their expenditures and budget (The Constitutional Court of the Republic of Kosovo, 2015)..

2.4. The case of the “Special Court”

The Assembly of the Republic of Kosovo, on August 3, 2015, approved constitutional amendment number 24, presented by the Government of Kosovo (Assembly of Republic of Kosovo, 2015). The amendments provided for the establishment of Specialist Chambers and a Specialist Prosecutor's Office within the Kosovo judicial system. The establishment of a specialist chamber of the Constitutional Court, consisting of 3 international judges and a special Ombudsperson with specialized chambers, was also envisaged. All administrative procedures and functions of the specialist chambers and the specialist prosecutor's office were to be regulated by a special law (Assembly of Republic of Kosovo, 2015).

The Constitution of Kosovo stipulates that the judiciary is both unique and independent and enforcement of law be solely the remit of the courts with a provision that specialized courts can be established by law, if necessary, but in no way can extraordinary to the existing courts (Constitution of the Republic

of Kosovo, 2008).. The constitutional amendments for the establishment of the Special Court were necessary for two essential reasons. First, only through constitutional amendments could a special court be established otherwise the unitary constitutional and legal system of the country would be disrupted; Secondly, through constitutional amendments, the internal autonomy of the Special Court was established, which was one of the requirements of the International pressure (Korenica, Zhubi Argjend and Doli, 2016) The proposed amendments were reviewed by the Constitutional Court of the Republic of Kosovo, in accordance with the Constitution of Kosovo (Constitution of the Republic of Kosovo, 2008).

In its judgment, the Constitutional Court analysed the proposed constitutional amendments in relation to the two requirements of the Constitution for the establishment of specialized courts: that it be provided by law, and that its establishment be necessary. The Court stressed that the proposed amendments provide for the adoption of a special law on the functioning of the Special Court, and that consequently the first condition of the Constitution is met. Also, regarding the second condition, that it be necessary, the Constitutional Court found that the establishment of the Special Court was necessary for Kosovo, in order to fulfill the international obligations, which arose from the report of the Parliamentary Assembly of the Council of Europe (The Constitutional Court of the Republic of Kosovo, 2015).. The Court also stressed that the proposed amendments provide assurance on the implementation of international standards in the field of human rights, and that in this way, the Special Court is within the framework of the justice system of the Republic of Kosovo. As such, it is within the unique and independent judiciary exercised by the courts under the Constitution (The Constitutional Court of the Republic of Kosovo, 2015).. Finally, the Constitutional Court concluded that Amendment No. 24 does not diminish the constitutional human rights guaranteed by Chapters II and III of the Constitution and its spirit and letter, and that it is therefore in full compliance with the Constitution of the country (The Constitutional Court of the Republic of Kosovo, 2015)..

3. Conclusion

This paper has addressed the function of the CCK, its organization, model of jurisdiction as well as analysis of some of the cases which have been important in the founding of the constitutional system in the country such as the protection of human rights, minority rights and other constitutional principles. The Constitutional Court has been very active in its decision-making with a result that the extended jurisdiction of the Court and the subjects that can be brought before the court; consolidation and promoting Kosovo's constitutional democracy. Since declaring independence in 2008, and perhaps for the first time a purely constitutional judiciary has been established in Kosovo in line with principles of Western constitutionalism.

In the first case dealt with in the article, the Court ruled on the right to life, which is a fundamental right in the catalogue of constitutional human rights, and the responsibility of the state in protecting this right. The court protected the human rights, defined in Chapter II of the Constitution, which undoubtedly constitute the constitutional identity of the country. In the second case, the Court interpreted and protected the rights of national minorities in Kosovo, namely the right to promote their ethnic identity in governing institutions. The rights of minorities in Kosovo are found in Chapter III of the Constitution, and together with human rights, constitute the most important chapters. This is also due to the path that Kosovo has taken until the declaration of independence, and the influence of the international factor in this process. In the third case, the Court dealt with the agreement providing for the establishment of the Association of Serb-majority municipalities in Kosovo. In this important decision, the Court upheld the principle of state unity and the normal functioning of municipalities, protecting their independent constitutional powers. In the fourth case, the Court dealt

with constitutional amendments providing for the establishment of a Special Court, which would address allegations of war crimes in Kosovo. The Constitutional Court held that the establishment of such a Court does not diminish human rights, and is in line with the constitutional provisions governing the justice system. The Constitutional Court, through its decisions, has played a vital role in consolidating the constitutional democracy of the state, defending constitutional principles such as human and minority rights, separation of powers, state unity, rule of law and other important issues. Finally, it can be said that the Court has protected and refined the Constitutional Identity of Kosovo.

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This document was reviewed by Chris Wilson 21/06/2022, English Language Teacher at The Language Space in Prishtina, Kosovo.