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PROTECTION OF THE RULE OF LAW AS A CONSTITUTIONAL PRINCIPLE AND INDIVIDUAL RIGHT BY THE CONSTITUTIONAL COURT OF KOSOVO

Summary: This article examines the case law of the Constitutional Court of Kosovo and explains how this court protects the rule of law, as a fundamental constitutional principle and as a human right. The example of Kosovo is intriguing because of the peculiar historical, political and legal backdrop against which the Constitution was drafted, and the constitutional adjudication that has taken place. Methodologically, this analysis is based on a review of the landmark cases when the Constitutional Court of Kosovo reasoned its decisions with reference to the specific constitutional provisions that enshrine the principle of the rule of law. The paper highlights that the Constitutional Court of Kosovo refers to the rule of law as a general normative framework for adjudicating cases of abstract constitutional review, as well as for deciding cases submitted by individuals – mostly in conjunction with the right to a fair and impartial trial. By scrutinizing the cases of Kosovo, this analysis highlights the role of constitutional courts in ensuring that general constitutional principles, such as the rule of law, are justiciable and have practical effect for human rights of individuals.

Keywords: Kosovo, rule of law, constitutional court, constitutional review, human rights.

1. INTRODUCTION

For an ordinary citizen of Kosovo – a country still struggling with effects of multi-layered transition – the concept of the rule of law has an ideological as well as a legal connotation.

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Through an ideological lens, the rule of law is perceived as a fundamental political facet of the liberal world order that emerged after the fall of the Berlin Wall.¹ As such, the rule of law is a core principle of constitutional order in new democracies.² From the purely legalistic perspective, the principle of the rule of law is considered the legal backbone of the justice system. This principle is the guarantor of the equality of citizens and the strongest guardian for their protection against any arbitrary exercise of state power.³ The role of the constitutional courts in advancing or upholding the principle rule of law through control of constitutionality has been deemed of utmost importance,⁴ and the constitutional courts' transformative role in societies has been evidenced.⁵ In particular it has been stated that 'control of constitutionality is of the utmost importance to the rule of law, a primarily activist and judicially thoughtful court is necessary in transitional societies such as Kosovo'.⁶

This article investigates the case of Kosovo as an illustrative example of the role of constitutional courts in giving justiciable character to the general principle of the rule of law, particularly in relation to the protection of individual human rights. Given its emergence from a war and international administration, and its experience with multilayered socio-political and economic transition, the case of Kosovo presents a unique terrain for investigation of the judicial implementation of the principle of the rule of law and its impact on the protection of human rights.

Within this analytical scope, this article addresses two fundamental questions. First, how is the rule of law implemented through the decisions of the Constitutional Court of Kosovo? Second, what is the scope of the Court's jurisprudence in this regard? The article analyzes the twofold jurisprudence of the Constitutional Court of Kosovo pertaining to the principle of rule of law: first, we elaborate cases of the so-called abstract constitutional review, which means decisions of the Court related to the constitutionality of laws, separation of powers and decrees of the government. Second, we present the landmark cases when the Constitutional Court of Kosovo interpreted the principles of rule of law in connection with the protection of individual human rights. The analytical scrutiny of the case law will enable us to infer some major conclusions about the meaning and effects that the Constitutional Court of Kosovo attaches to the principle of the rule of law.⁷ Although, the jurisprudence of the Constitutional Court on the rule of law is quite modest – the Court itself has been established in 2009, yet,

- 1 European Parliament, 'Democratic Change in Central and Eastern Europe 1989–90, The European Parliament and the end of the Cold War' *EPRS Study(2015)* <https://www.europarl.europa.eu/EPRS/EPRS_STU_538881_Democratic_change_EN.pdf> accessed 26 January 2024.
- 2 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (A/67/L.1), 19 September 2012, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/478/66/PDF/N1247866.pdf?OpenElement>>. See also: Guidance Note of the Secretary-General on Democracy <<http://www.un.org/democrac yfund/guidance-note-un-secretary-general-democracy>> accessed 29 January 2024.
- 3 Simon Chesterman 'An International Rule of Law?' (2008) 56:2 *American Journal of Comparative Law* 331–361.
- 4 Jeremy Waldron 'The rule of law and the role of courts' *Judicial Authority, Legitimacy and the (International) Rule of Law* (2021) 10 (1) *Global Constitutionalism* 91–105.
- 5 Bertus de Villiers 'Breathing Life into the Constitution: the Transformative Role of Courts to Give a Unique Identity to a Constitution' (2023) 9(1) *Constitutional Review* 109–141.
- 6 Enver Hasani, 'Judicial Review of Democracy. Maintenance of Democracy as a Functionalist Mission in the Jurisprudence of the Constitutional Court of Kosovo' (2020) 68 (4) *Comparative Southeast European Studies* 530–553, 531.
- 7 For the viewpoints of the Croatian Constitutional Court on the principle of the rule of law in concrete judgements see: Zvonimir Lauc, 'The Principle of the Rule of Law in Theory and Practice' (2016) 32 (3–4) *Pravni vjesnik* 61–63.

the jurisprudence of Constitutional Court of Kosovo demonstrates that the rule of law principle is obtaining a dual status. Thus the rule of law is a pivotal constitutional principle of a general character, as well as a specific legal protection that individuals can invoke in court proceedings, in conjunction with their individual rights provided by the Constitution.⁸

The article is divided into three sections. The first section provides a brief historical overview of the multidimensional transition of Kosovo. The analysis focuses particularly on the process of legal transition and the adoption of the Constitution of Kosovo, which embodies the basic constitutional designs of Western liberal democracies. The second delineates the normative status of the principle of the rule of law, as defined in the Constitution, and the jurisprudence of the Constitutional Court of Kosovo (hereinafter: Constitutional Court), as the key judicial instrument for protection of this principle. The third section ventures into the core of this analysis, namely an exploration of the case law of the Constitutional Court pertaining to the principle of the rule of law. Accordingly, we first present first landmark cases of the abstract constitutional review, and also the cases in which the principle of the rule of law has been reviewed by the Constitutional Court in conjunction with an individual constitutional complaint. As our investigation underlines, a significant number of the individual constitutional complaints related to the principle of the rule of law are related to the specific elements of the right to fair and impartial trial. At the time of this writing the Constitutional Court has dealt with other institutional and individual cases-other than the ones analyzed in this article- however, which might be a subject for further analyses on the role of constitutional court in enhancing rule of law as a constitutional principle and as utilized in the individual protection of human rights.

2. BRIEF HISTORICAL BACKGROUND: MULTIDIMENSIONAL TRANSITION AND CONSTITUTIONAL DESIGN IN KOSOVO

Two crucial historical moments shaped the current legal order of the Republic of Kosovo: first, the period of UN-led international administration of Kosovo that was launched in 1999; and second, the declaration of independence of Kosovo in 2008.

The NATO military intervention to stop the unfolding genocide against Kosovo Albanians was concluded on 9 June 1999, with the signing of the Military - Technical Agreement (also known as the Kumanovo Agreement),⁹ concluded between NATO and the Belgrade government. As a consequence of this agreement, the Serbian military forces and the entire state apparatus withdrew from Kosovo. On 10 June 1999, acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 1244, which authorized the deployment of an in-

8 The practice of constitutional court in extending human right protections is not new. For instance the Croatian Constitutional Court has developed an impressive list of doctrinal positionson in the case of the nature of social rights. For an interesting account on this matter see: Valentino Kuzelj, Sonja Cindori and Ana Horvat Vuković, 'Apotheosis of the Social State, The Imperative of Achieving Social Justice in the Republic of Croatia' (2021) 37 (3-4) *Pravni vjesnik* 57-79.

9 North Atlantic Treaty Organization (NATO), "Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia", June 9, 1999, <<https://www.nato.int/kosovo/docu/a990609a.htm>> accessed 26 January 2024.

ternational administration in Kosovo, consisting of military and civil components.¹⁰ The military component, the multinational NATO led Kosovo Force (KFOR),¹¹ was mandated by the Security Council Resolution 1244 to preserve peace and security in Kosovo. The international civil administration over Kosovo was entrusted to the United Nations Interim Administration Mission in Kosovo – UNMIK and was headed by the Special Representative of the Secretary General (SRSG). UNMIK was empowered to exercise very broad powers and responsibilities, from humanitarian relief and return of refugees to economic recovery, maintaining law and order, re-building the justice system, and signing international agreements. Notwithstanding the somewhat blurry language of the Security Council Resolution 1244 on the issue of final status of Kosovo, UNMIK managed to establish a new political and economic system in Kosovo from scratch, based on ideological blueprints of Western liberal democracy. Consequently, a new legal order was created, the basis of a free-market economy was laid down, the Euro was introduced as the country's currency and the practice of free multi-party elections was set in motion.¹²

A landmark moment for the new constitutional tradition of Kosovo was the promulgation by the SRSG of the Constitutional Framework for Provisional Institutions of Self-Government in Kosovo, which entered into force on 15 May 2001.¹³ The Constitutional Framework created the legal bedrock for the sharing of powers between the local (i.e., Kosovo) institutions – that were created through democratic elections – and the UN interim administration. The Constitutional Framework defined Kosovo as “an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.”¹⁴ As Hajrullahu and Salamun succinctly observed, the Constitutional Framework was a surrogate “constitution” of Kosovo under UN administration.¹⁵ For, it was promulgated as an UNMIK Regulation and it basically maintained the ultimate authority of the SRSG in all key areas, including the right to dissolve the Assembly, to annul laws or to appoint and dismiss judges and prosecutors.¹⁶ Yet, the Constitutional Framework defined Kosovo as “an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.”¹⁷ It enshrined the core constitutional principles of parliamentary de-

10 UN Security Council, Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo], 10 June 1999, S/RES/1244 (1999).

11 KFOR is a NATO-led mission that also includes few other countries outside the North Atlantic alliance. For more information about KFOR, see: NATO, Kosovo Force <<https://jfcnaples.nato.int/kfor>> accessed 28 January 2024.

12 Marcus G. Brand, 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation' (2001) 70 (4) *Nordic Journal of International Law* 461–488.

13 UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, Signed on: May 15, 2001, Chapter 1 [Basic Provisions], <https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001regs/RE2001_09.pdf> accessed 13 December 2023.

14 UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, May 15, 2001, Chapter 1 [Basic Provisions] (1.1).

15 Arben Hajrullahu and Mihaela Salamun 'Der Verfassungsrahmen für die Provisorische Selbstverwaltung in Kosova' (2002) 51 (1–3) *Comparative Southeast European Studies* 122–150.

16 UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, Chapter 8 [Powers and Responsibilities Reserved to the SRSG].

17 UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo Chapter 1 [Basic Provisions] (1.1).

mocracy, such as separation of powers, checks and balances, rule of law, protection of human rights and special guarantees for minority rights.

It is important to note that during the international administration, Kosovo did not have a Constitutional Court. The Constitutional Framework guaranteed the authority of the SRSJ to ensure the exercise of the powers by the Kosovo institutions in compliance with the Resolution 1244 and with the Constitutional Framework (see, Chapter III and Chapter XII of the Constitutional Framework). The Constitutional Framework did not include a separate catalogue on specific individual human rights, but protection was provided through Chapter III, which enshrined eight major international human rights conventions and made the rights contained in them directly applicable in Kosovo. The rule of law was embodied as one of the key constitutional principles for the exercise of public authority by the Kosovo provisional institutions (this was enshrined in the Preamble and Chapter 2.b of the Constitutional Framework).

Kosovo declared independence on 17 February 2008, which marked a turning point for the legal order of Kosovo. Independence of Kosovo came after two years of negotiations between representatives of Kosovo and Serbia, with international mediation. Ultimately, on 2 February 2007 the Special Envoy of the UN Secretary General for Kosovo status talks, the former Finnish President Martti Ahtisaari, presented the Draft Comprehensive Proposal on the Kosovo Status Settlement (also known as the Ahtisaari Proposal) that provided for the supervised independence of Kosovo.¹⁸ Subsequently, Kosovo declared independence in close coordination with the US and the major EU countries, and by using the Ahtisaari Proposal as a design for the organization of statehood. Serbia vehemently opposed Kosovo's independence and continues to do so even after the Advisory Opinion of the International Court of Justice, issued on 22 July 2010, which confirmed that the declaration of independence of Kosovo did not violate international law.¹⁹

In line with the settlement proposed by Ahtisaari, on 15 April 2008 the new Kosovo Constitution was adopted, and it came into effect on 15 June 2008.²⁰ In addition to local experts and political leaders, European and American specialists played an important role in drafting the text of the Constitution of independent Kosovo.²¹ A few months later, namely in April 2009, the Constitutional Court was established. As envisaged by the Ahtisaari Plan, the Constitutional Court consisted of nine judges, six national and three international judges. Two of the six local judges were to be selected with the approval of the members of the parliament

18 This proposal was devised as a compromise to bridge the totally opposing position of Kosovo and Serbia. On March 26, 2007, the UN Secretary General endorsed the Ahtisaari Comprehensive Proposal, which, however, was not voted by the Security Council due to the Russia's veto threat. Additional four months of intense negotiations that were mediated by the envoys of EU, US and Russia, failed to yield any result. See United Nations Secretary-General, Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2007/723, <https://digitallibrary.un.org/record/613708/files/S_2007_723-EN.pdf> accessed 26 January 2024.

19 International Court of Justice, Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141 (July 22) <<https://www.icj-cij.org/sites/default/files/case-related/141/14799.pdf>> accessed 28 January 2024.

20 Constitution of the Republic of Kosovo[and its amendments], June 2008, <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>> accessed 27 January 2024.

21 An important account of the process of drafting of the Constitution is given by the American Judge, John Tunheim who was part of the working group to draft the Constitution. See, John Tunheim, 'Rule of Law and the Kosovo Constitution' (2009) 18 (2) *Minnesota Journal of International Law* 371–379.

representing ethnic minority communities.²² The hybrid composition of the Constitutional Court – consisting of national and international judges as well as judges from ethnic minorities – “as sensible and practical way to strengthen local institutions and to develop the rule of law at the local level”²³ According to the Constitution and the Law on the Constitutional Court of the Republic of Kosovo (which entered into force in January 2009), the Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution; the Court is the guardian of the functionality of the national institutions in accordance with the Constitution and guarantees the protection of individual rights and freedoms guaranteed by the Constitution”.²⁴

3. CONSTITUTIONAL STATUS OF THE PRINCIPLE OF RULE OF LAW AND THE ROLE OF THE CONSTITUTIONAL COURT

The embryonic constitutional tradition of Kosovo is a reflection of the peculiar historical circumstances outlined in the previous section. Hence, while constitution-making in most countries reflects their “constitutional heritage”,²⁵ in Kosovo the underlying circumstances surrounding the drafting and enactment of the constitution were different. As the first President of the Constitutional Court of Kosovo observed, the Constitution of Kosovo “belongs to the latest expansion of the Kelsenian model in Europe and stipulates the supremacy of the constitution and under it a powerful bill of rights, with normative effect.” He finds this normativity in the constitutional adjudication, which can be set in motion by a complaint to the Constitutional Court.²⁶

The Constitution of Kosovo puts strong emphasis on the principle of rule of law, alongside democracy, individual human rights and collective rights of ethnic minorities. This is reflection of the fundamental impact of the western constitutional tradition on which the constitution of Kosovo is modeled, as well as of the political determination to break with the past and to embark on the path of Euro-Atlantic integration.²⁷ The principle of the rule of law is

22 Nicolas Mansfield 'Creating A Constitutional Court: Lessons from Kosovo' (2013) East-West Management Institute: Occasional Paper Series EWMIOPSKosovoConstitutionalCourt.pdf, accessed 27 January 2024.

23 Variants on the concept of hybrid courts have been established in Sierra Leone, East Timor, Cambodia, Bosnia and Herzegovina, and Kosovo. For the Hybridity in Kosovo's Constitutional Court see generally: Steven Hill and Paul Linden-Retek 'Supervised Independence and Post-Conflict Sovereignty: The Dynamics of Hybridity in Kosovo's New Constitutional Court' (2010) 36 The Yale Journal of International Law Online 26–43, 26.

24 Constitutional Court of Kosovo, The roles and responsibilities, Official webpage of the Constitutional Court Role and responsibilities - Constitutional Court (gjk-ks.org), accessed 27 January 2024.

25 Hanna Suchocka 'Constitutional Heritage and the Form of Government' 2016 Report presented at International Conference on *Global Constitutional Discourse and Transnational Constitutional Activity* 7 December 2016. Strasbourg: Venice Commission of the Council of Europe, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2016\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2016)017-e)> accessed 27 January 2024.

26 Enver Hasani, 'Judicial Review of Democracy. Maintenance of Democracy as a Functionalist Mission in the Jurisprudence of the Constitutional Court of Kosovo' (2020) 68 (4) Comparative Southeast European Studies 530–553, 534–5.

27 During the 1990s, Kosovo has endured oppressive ethnic segregation, war and ethnic cleansing. On the Serbia's repressive and discriminatory policies against the ethnic Albanian population in Kosovo during the 1990s, see: International Commission on Kosovo, *Kosovo Report: a report from the independent International Commission on Kosovo*, Oxford, Oxford University Press, 2000, [The Kosovo Report].

enshrined in the first chapter of the Constitution [Basic Provisions], respectively in articles 3 and 7. Thus, Article 3 [Equality before the law], in paragraph 1 provides that: “The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.”²⁸ Article 7 [Values] specifies that “The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.”²⁹

These two fundamental articles of the Constitution of Kosovo enshrine the rule of law as one of the pivotal constitutional principles and a fundamental socio-cultural value of the country. The rule of law is thus considered to be among the foundational values of the constitutional order of Kosovo. Furthermore, Article 53 of the Constitution [Interpretation of Human Rights Provisions], provides that “human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”³⁰ This effectively means that courts and other public institutions in Kosovo should discern the meaning and interpret the substance of the individual rights provided by the Constitution in line with the interpretations of the European Court of Human Rights (hereinafter: ECtHR). The effect of the article is heavily reflected in the jurisprudence of the Constitutional Court, which in its decisions consistently refers to the case law of the ECtHR.

The Constitutional Court has employed the principle of the rule of law as a framework for discerning the meaning of specific principles and provisions of the Constitution. This includes cases of abstract constitutional review as well as cases of constitutional complaints lodged by the individuals. Thus, the principle of rule of law is not applied by the Constitutional Court as an independent self-executing constitutional norm, but as a broader basis for ascertaining the meaning and application of other specific constitutional provisions, mostly in conjunction with the fundamental rights that are enshrined in the Chapter II of the Constitution.

Since its establishment, the Constitutional Court has taken many landmark decisions, which have profoundly affected the political life of the country. These decisions have largely overshadowed the jurisprudence of the Constitutional Court on individual constitutional complaints, which has laid down the foundation for judicial protection of human rights. This includes the principle of the rule of law, which, as it will be elaborated in the following section, has become justiciable through the case law of the Constitutional Court.

<<https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/The%20Kosovo%20Report%20and%20Update.pdf>> accessed 23 January 2024. See also *Alex J. Bellamy 'Human Wrongs in Kosovo: 1974-99'* (2000) 4 (3-4) *The International Journal of Human Rights* 105-126.

28 Article 3.1, Constitution of the Republic of Kosovo.

29 Article 7.1, Constitution of the Republic of Kosovo.

30 Article 53 Constitution of the Republic of Kosovo.

3.1. APPLICATION OF THE PRINCIPLE OF THE RULE OF LAW IN THE ABSTRACT CONSTITUTIONAL REVIEW

Article 113 of the Constitution [Jurisdiction and Authorized Parties] defines the jurisdiction of the Constitutional Court and the authorized parties to lodge constitutional complaints. This Article provides that the President, Assembly (certain number of MP's), Government, Ombudsperson and, in specific cases, municipalities, are authorized to initiate abstract constitutional review before the Constitutional Court. These include judicial review by the Constitutional Court of the constitutionality of laws, exercise of constitutional powers by the major state institutions, or separation of powers and checks and balances.³¹

In deciding cases of abstract constitutional review, the Constitutional Court has utilized the principle of the rule of law as a constitutional parameter for evaluating whether laws or other general acts and actions of the major state institutions are in conformity with the Constitution. In most of these cases, the principle of rule of law has been raised in relation to Article 7 of the Constitution, [Values], which has been quoted above. Within this gambit, the Constitutional Court has referred to the principle of rule of law mostly in cases related to the constitutionality of laws and the constitutional prerogatives of the principal state institutions – including the Assembly of the Republic of Kosovo.

One of the most typical cases that the Constitutional Court has decided is the case KO43/19, submitted by Albulena Haxhiu, Driton Selmanaj and thirty other members of the Assembly of the Republic of Kosovo.³² The subject matter of the referral was the constitutional review of the Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia. The contested law provided for the establishment of the “state delegation”, with special competences, responsibilities, and decision-making procedures, to represent the Republic of Kosovo in the process of dialogue with the Republic of Serbia. The applicants alleged that the contested law, in its entirety, was not in compliance with the Constitution and raised three main arguments: (i) it was unconstitutional to change the decision-making hierarchy of the constitutional institutions, in the process of dialogue with Serbia; (ii) the legal competences of the state delegation directly interfered with the constitutional competences of the executive and legislative powers; (iii) giving its *lex specialis* character, the challenged Law was not in compliance with the Constitution.³³

In its judgment in KO43/19, the Constitutional Court relying on the paragraphs 1, 2, 3 and 4 of Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraph 12 of Article 65 [Competencies of the Assembly], paragraph 1 of Article 93 [Competencies of the Government], and paragraphs 1 and 9 of Article 94 [Competencies of the Prime Minister] of the Constitution, and therefore the challenged Law, in its entirety, is incompatible with the Constitution, found incompatibility between some articles of the con-

31 Article 113, Constitution of the Republic of Kosovo.

32 Constitutional Court of the Republic of Kosovo (CCK), Judgment, Case KO 43/19, Constitutional review of Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia, 27 June 2019, <https://gjk-ks.org/wp-content/uploads/2019/06/ko_43_19_agj_ang.pdf> accessed 28 January 2024.

33 CCK Judgement, Case KO43/19, para. 5.

tested law with the Constitution.³⁴ Specifically, the Court emphasized that the “constitutional order of the Republic of Kosovo is based on the democratic values of separation of powers and the rule of law. Accordingly, the trust of the people on democratic values and the rule of law represents the core of the functioning of the representative democracy in the country.”³⁵ The Court noted that although the “State Delegation” was not a constitutional body, nevertheless it was empowered with the classical state competences on foreign policy.³⁶ Consequently, the Court evaluated that the transfer of competences of the constitutional institutions to the special mechanism (not envisaged in Constitution) represents interference in the form of governance, separation of power, and is not in compliance with the democratic values and the rule of law, as set forth in Article 7 of the Constitution.

Another landmark case that led to considerable debates was the constitutional review of Law No. 06/L-111 on Salaries in the Public Sector. The Ombudsperson challenged this Law before the Constitutional Court, alleging that it failed to respect the constitutional spirit in terms of: (i) separation of powers, (ii) equality before the law (iii) guaranteeing the right to property; and (iv) the rule of law. Regarding to the principle of the rule of law, the Ombudsperson alleged that the Law on Salaries in the Public Sector undermined that principle of legal certainty that requires that “legal rules be clear and precise, the purpose of which is to ensure that legal situations and relationships are predictable.” Further, the Ombudsperson challenged the constitutionality of the Law on Salaries, in its entirety, under the substantive allegations that it violates the principle of separation of powers and the principle of legal certainty, part of the rule of law principle.³⁷ In its judgment KO219/19, the Constitutional Court found that the Law on Salaries in the Public Sector was not compatible with several articles of the Constitution. The Constitutional Court established *inter alia*, that there was ambiguity about the implementation of this Law, due to the lack of sub-legal acts, budgetary constraints and confusion about the calculation of salaries for several positions that are currently paid from the state budget. Consequently, the Constitutional Court argued that “all this careless legislative process, without any doubt, leads to an unacceptable situation of legal uncertainty that can in no way be compatible with the Constitution and its values and principles of predictability, legal certainty and the rule of law.”³⁸

The Constitutional Court referred to the principle of rule of law also in the case KO65/19 on the constitutional review of the Law no. 06/L-010 on Notary. The case KO65/19 was referred to the Court by the Ombudsperson, requesting constitutional review of several articles of the impugned law for which the applicant claimed not to be in compliance with Article 5 [Languages] and Article 46 [Protection of Property], of the Constitution. The applicant further requested that the Constitutional Court impose interim measures and to suspend the implementation of the contested articles of the Law on Notary until the final decision of the Court,

34 CCK Judgement, Case KO43/19, para. 107. Concretely the Court found that “Articles 1 (paragraph 1), 2, 4, 10 (paragraph 4, subparagraphs 1 and 2), and Article 11 (paragraph 3) of Law No. 06/L-145 on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia”.

35 CCK Judgment, Case KO43/19 Para. 67.

36 CCK Judgement, Case KO43/19 Para. 79.

37 CCK, Judgment, Case KO 219/19, Constitutional review of Law No. 06/L-111 on Salaries in Public Sector, 9 July 2020, <https://gjk-ks.org/wp-content/uploads/2020/07/gjk_ko_219_19_agj_ang.pdf> accessed 25 January 2024.

38 CCK, Judgment, Case KO 219/19, para. 316.

claiming that “the referral is prima facie grounded, and that the challenged articles of the Law caused irreparable damages to certain subject.” In this referral, the Ombudsperson alleged that the impugned law infringed a few constitutional rights, particularly the protection of property (Article 46 of the Constitution), because it required from notaries to carry out several services free of charge. Furthermore, by retroactive effect, the law lowered the age of retirement of notaries, which resulted in denial of their expectations for future material benefits. The Constitutional Court found no constitutional violation in this case. In its judgment the Constitutional Court reasoned that “the legislature – because of its position and democratic legitimacy – is in a better position than the Court to determine and advance the country’s economic and social policies.” Further, the Court emphasized that this implies the power of the legislative body to change the content of rights and obligations and the obligation to comply with the requirements set forth by the Constitution – in particular those arising from the principles of the rule of law.³⁹

From the above cases of abstract constitutional review, it transpires that the Constitutional Court of Kosovo did not strive to deconstruct the legal meaning of the principle of the rule of law, in relation to the cases it had to decide. Rather, the Court broadly has construed the principle of the rule of law, by adapting it to various situations and specific constitutional norms. Thus, in the case KO43/19, the Constitutional Court concluded that the principle of the rule of law, as enshrined in the Constitution, is disrespected when an ad hoc public body (i.e. the State Delegation for dialogue with Serbia) was established and empowered with constitutional-type of authorizations. In the case KO219/19, the Constitutional Court established that the Law on Salaries in the Public Sector infringed the principle of the rule of law, because of the legal uncertainty it created (particularly with lack of clarity about its implementation), budgetary constraints and confusion about the calculation of salaries for several positions.

3.2. THE RULE OF LAW IN THE INDIVIDUAL CONSTITUTIONAL COMPLAINTS

In most of the cases of individual constitutional complaints, the Constitutional Court interpreted the principle of the rule of law with reference to the right to a fair and impartial trial, as enshrined in Article 31 of the Constitution. Beyond the right to a fair and impartial trial, the Constitutional Court in few cases referred to the principle of rule of law in conjunction with the interpretation of other constitutional rights, including the electoral rights (provided by Article 45 of the Constitution).⁴⁰

The Constitutional Court has identified violation of the specific elements of the concept of a fair trial by interpreting them within the general scope of the principle of the rule of law. Thus, the Constitutional Court has found violation of the principle of rule of law mostly in the

39 CCK, Judgment, Case KO 65/19, Constitutional review of Article 32 (1), Article 41 (1.3 and 1.4), Article 76 (2), in conjunction with Article 2 (7) and Article 22 (1.3) of Law No. 06/L-010 on Notary, 23 August 2019, <https://gjk-ks.org/wp-content/uploads/2019/08/ko_65_19_agj_ang.pdf> accessed 24 January 2024.

40 The Constitutional Court referred to the principle of rule of law in the cases KI01/18 and KI48/18, which were related to municipal electoral disputes. While finding no constitutional violation in both cases, the Constitutional Court reiterated the consistent position of the European Court of Human Rights that the electoral rights “are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law”.

following types of cases: a) the non-execution of the final judgments of courts; b) the restriction of the right to access to court; c) inconsistency in interpretation of law by courts; and d) the highly formalistic interpretation of law by courts.

a) Non-execution of final judgments of court

The Constitutional Court has found a violation of the right to a fair and impartial trial in many cases where final decisions of courts have not been executed. In some cases, this has also been linked with the right to legal remedies (Article 32 of the Constitution) and the right to judicial protection of rights (Article 54 of the Constitution). In such cases, the Constitutional Court has concluded that there has been violation of the principle of legal certainty, which is a crucial element of the right to a fair and impartial trial. The Constitutional Court has argued that the respect for the principle of legal certainty is a fundamental requirement of the principle of the rule of law. The Court has arrived at such conclusions, among others, in the following cases: KI08/9 (Independent Union of Works of IMK Steel Factory); KI55/11 (Fatmir Pirci); KI04/12 (Esat Kelmendi); KI122/17 (Ceska); KI 87/18 (IF Skadeforsikring).

The first judgments in which the Constitutional Court referred to the principle of the rule of law, in connection with a violation of the right to a fair trial, was case KI08/09 (case known as “IMK Steel Factory”).⁴¹ The proceedings in the Constitutional Court were instituted in March 2009, by the Independent Union of Workers of the socially-owned enterprise IMK Steel Factory. This Union represented 572 workers, who had been dismissed arbitrarily from their workplace as a consequence of the discriminatory state policy that Milosevic’s Government of Serbia pursued against ethnic Albanians in Kosovo during the 1990s. After the end of the war in Kosovo and the deployment of international administration, the workers filed a claim in the Municipal Court of Ferizaj, against their dismissal and the loss of their salaries. In 2002, the Municipal Court ruled that the claim was well-founded and that the workers should be reinstated in their positions and should acquire all their rights from their labour relations with IMK Steel Factory, from 1990 to 2001. This included compensation for the unpaid salaries in the amount of 25.649.250,00 Euro. That judgment had become final, as no appeal was filed in the District Court within the procedural deadline. On 22 December 2005, the same Municipal Court allowed the execution of the judgment (in the meantime, the socially-owned IMK Steel Factory was privatized). However, the execution has never been enforced as it remained unclear which authority was obliged to pay the sum of compensation. In 2009, the Union had filed a constitutional complaint with the Constitutional Court alleging violation of the principle of *res judicata*, embedded in Article 31 of the Constitution and Article 6 of the European Convention on Human Rights. By its judgment of 17 December 2010, the Constitutional Court held unanimously that there had been a breach of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. The Court reasoned that:

“The right to institute proceedings before a court in civil matters, as secured by Article 31 of the Kosovo Constitution and Article 6, in conjunction with Article 13 of the European Convention of Human Rights, would be illusory, if the Kosovo legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that

41 CCK, Judgment, Case KI 08/09, Constitutional Review of the Decision of the Municipal Court of Ferizaj, Decision C No. 340/2001, dated 11 January 2002, 17 December 2010, <https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ki_08_09_ang.pdf> accessed 27 January 2024.

these Articles prescribe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe the above Articles, as being concerned exclusively with access to a court and the conduct and efficiency of proceedings, would be likely to lead to situations incompatible with the principle of the rule of law which the Kosovo authorities are obliged to respect.”⁴²

The Court emphasized that the rule of law, which is one of the fundamental principles of a democratic society, presupposes respect for the principle of legal certainty – particularly in relation to court decisions that have assumed the status of *res judicata*.⁴³

It has to be emphasized that the judgment of the Constitutional Court KI08/09 has not been implemented yet (owing largely to the confusion about determining which state institution is responsible to pay the financial compensation to the workers).⁴⁴

The Constitutional Court relied consistently on the principle of rule of law as an interpretative framework for finding constitutional violations in other cases when the final decisions of the judicial or quasi-judicial bodies were not executed. In the case KI04/12, the applicant, who was downgraded in the administrative position in the University of Prishtina, filed a referral to the Constitutional Court. He challenged the decision of the District Court of Pristina that rejected his proposal for execution of the decision of the Independent Oversight Board (IOB) – which is an administrative tribunal for civil servants. It is important to underline that the Municipal Court of Prishtina and the District Court of Prishtina had refused the applicants’ request, arguing that the decision of the IOB was a decision taken by an administrative body and did not involve any monetary claim, as was foreseen by the Law on Execution Procedure. As such, according to the Municipal Court and the District Court, the decision of the IOB was not a title for execution that the District Court should execute.⁴⁵

The Constitutional Court observed that the IOB had found a violation of the applicant’s employment rights and that decision had become executable. Therefore, the applicant had the right to an effective legal remedy since the University of Pristina refused to execute the IOB decision. Consequently, the Constitutional Court concluded unanimously that the decision of the District Court of Prishtina was taken in violation of applicant’s right to a fair and impartial trial as well as the right to equality before the law, which are guaranteed by the Constitution and the ECHR. The Constitutional Court reasoned that “ineffectiveness of the procedures and non-execution of the decisions produces effects which lead to the situations that are in contradiction with the principle of rule of law, which the Kosovo institutions are obliged to respect.”⁴⁶ In this case, the Court found that the following constitutional rights of the applicant

42 CCK, Judgment, Case No. KI 08/09, para. 61.

43 CCK, Judgment, Case No. KI 08/09, para. 62.

44 See Clarification of the Constitutional Court, attached to the Decision on Non-Execution of Judgment of the Constitutional Court of 17 December 2010 in Case No. KI 08/09 The Independent Union of Workers of IMK Steel Factory in Ferizaj, represented by Mr. Ali Azemi, President of the Union, <https://gjk-ks.org/wp-content/uploads/2021/08/KI08-09_Njoftim-p%C3%ABrmoszbatim-t%C3%AB-Aktgjykimit-t%C3%AB-Gjykat%C3%ABs-Kushtetuese_P.SH_HS_ANG.pdf> accessed 28 January 2024.

45 CCK, Judgment, Case KI 04/12, Constitutional Review of the Decision of the District Court in Prishtina, Ac. no. 647/2011, of November 30, 2011, para. 16, <www.gjk-ks.org/wp-content/uploads/vendimet/KI04_12_shq.pdf>, accessed 28 January 2024.

46 CCK, Judgment, Case KI 04/12, para. 47–48.

were violated: equality before the law, the right to a fair and impartial trial, the right to legal remedies, and the right to judicial protection of rights.⁴⁷

b) Restriction of the right of access to court

The right of access to a court (or access to justice) is a fundamental component of the right to fair and impartial trial. Some of the most significant cases of the Constitutional Court, related to the right of access to a court include KI62/17, KI20/21, KI54/21. In all these cases, the Constitutional Court has reviewed the right of access to a court from the perspective of the principle of the rule of law, and in conjunction with the guarantees of a fair trial.

In the case KI62/17, the applicant was found guilty by the Basic Court in Prishtina for the offence of fraud in the distribution of medicine. Following the applicant's guilty plea, she was imposed a suspended sentence and the obligation to compensate the material damage caused by the criminal offense. The applicant and the State Prosecutor filed separate appeals with the Court of Appeals against the decision of the Basic Court. The Court of Appeals rendered a judgment whereby it granted the appeal of the State Prosecutor and the applicant was imposed an effective imprisonment sentence. The applicant filed a request for protection of legality with the Supreme Court, which was rejected by that court as inadmissible with the argument that there was no evidence that the defense counsel was authorized to use this legal remedy. The applicant filed a request to the Supreme Court for annulment of the decision on the grounds that she had submitted the authorization to the Basic Court in Prishtina, which was confirmed by the receipt stamp. The Supreme Court declared the request as inadmissible on the ground that such a request cannot be considered an extraordinary legal remedy that can be used in the Supreme Court.

The Constitutional Court found that the applicant in this case had been deprived of her right of access to a court, which is an element of the right to a fair and impartial trial. The Court underlined the very substance of the applicant's claim that the Supreme Court rejected her request for protection of legality contrary to the legal provisions of the Criminal Procedure Code. The specific provisions of the Criminal Procedure Code require the courts to summon the person making the submission to correct or supplement the submission, and if they do not do so within a specified period of time, the court shall reject the submission. The Constitutional Court emphasized that the Supreme Court rendered a decision summarily rejecting the applicant's request on procedural grounds without allowing her to clarify the identity of her legal representative.

Another typical example where the Constitutional Court found violation of the right to access to court is the case KI20/21. This case was related to the privatization of a socially-owned enterprise and the exclusion of the applicant from the list of employees who were entitled to payment of 20 % of the revenues of privatization. The applicant filed a complaint with the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, and the first instance of the Special Chamber of the Supreme Court rejected the applicant's appeal as ungrounded. Against this Judgment, the applicant filed an appeal with the second instance of the Special Chamber, yet this appeal was dismissed as time-barred. The

⁴⁷ CCK, Judgment, Case KI 04/12, para. 49.

applicant filed a request with the second instance of the Special Chamber requesting to rectify the clear technical error of its judgment, in determining the time when the decision was served on the applicant. However, this request was rejected as inadmissible by the Supreme Court. This Court held that that the judgment of the second instance of the Special Chamber of the Supreme Court was final, although it concluded that the applicant's statement was correct, regarding the technical error committed by the Court in determining the timing of the service of the contested decision.

The Constitutional Court in this case argued that, even though it was undisputedly established that the applicant's allegations were correct, and consequently that her appeal has been filed according to the time limits defined by the law in force, the Supreme Court rejected the applicant's request for the correction of its error, considering her request as a request for reconsideration of the court decision. As a result, the Constitutional Court found that the challenged decision made it impossible for the applicant from having her appeal against the judgment of the Specialized Panel handled on the merits, despite the fact that her appeal was filed within the legal deadline. Consequently, the Constitutional Court found that the Supreme Court restricted the applicant's access to a court, which consequently triggered violation of right to a fair and impartial trial and infringement of the principle of rule of law.

c) Inconsistency in interpretation of laws by courts

In a few cases the Constitutional Court has found violation of the principle of rule of law because of the lack of consistency in the legal interpretations and reasoning of decisions of the regular courts. For example, in the case KI87/18 a foreign insurance company lodged a constitutional complaint claiming that its right to fair and impartial trial and the principle of legal certainty were violated, because the Supreme Court did not provide satisfactory reasoning to justify its changing of the judgment of the Appellate Court, related to the default interest. The Constitutional Court observed that the Supreme Court, in other cases that fully corresponded to the legal and factual situation with the case in question, did not take a consistent position regarding the calculation of interest rates and provided divergent legal reasoning.⁴⁸ Consequently, the Constitutional Court concluded that the Supreme Court had violated the rights of the applicant to a reasoned court decision. Furthermore, the Court established that this had also triggered the violation of the principles of legal certainty, which is one of the fundamental components of the rule of law, as embodied in the right to a fair trial under Article 31 of the Constitution and Article 6 of the European Convention on Human Right.⁴⁹

In the case KI78/21, the Constitutional Court found a violation of the right to fair trial because of the "profound and longstanding divergences" of the Supreme Court in interpreting labor laws. The case was related with the Notification issued by the Bank for the termination of the employment contract with an employee, due to the breach of work duties by the latter because of the approval of a loan for a client based on falsified documentation. The applicant had initiated court proceedings and courts of different instances took several decisions. Ulti-

48 CCK, Judgment, Case KI 87/18, Constitutional review of Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018, 15 April 2019, para. 82–85, <https://gjk-ks.org/wp-content/uploads/2019/04/ki_8718_agj_ang.pdf> accessed 28 January 2024.

49 CCK, Judgment, Case KI 87/18, para. 87.

mately, the Supreme Court rejected the applicant's appeal. The applicant, among other claims, alleged violation of his right to a fair and impartial trial as a result of contradictory decisions or divergence in the case law of the Supreme Court. In support of these allegations, the applicant submitted to the Constitutional Court six other judgments, in which the Supreme Court had interpreted and applied the provisions of the laws applicable to employment differently. In the reasoning of its decision, the Constitutional Court, among other findings, underlined that the Supreme Court did not use the mechanisms aimed of ensuring the necessary consistency of its case law, in the service of the legal certainty and the principle of the rule of law.⁵⁰

d) Formalistic interpretation of laws by courts

In a few cases, the Constitutional Court has established a causal link between the over-formalistic interpretations of law by the regular courts with the denial of access to court. Thus, in case KI 54/21 the Correctional Service had terminated an employment relationship with an employee as a result of disciplinary violations during working hours. The applicant had initially challenged this decision in the second instance body of the employer and subsequently initiated proceedings before the regular courts. The Basic Court upheld the applicant's claim. Subsequently, deciding upon the appeal of the employer the Appellate Court and the Supreme Court had quashed the Judgment of the Basic Court, after finding that the initial claim was filed out of the legal deadline as defined in the Law on Basic Rights from Employment Relationship of 1989. In the Constitutional Court, the applicant challenged the above findings of the Supreme Court including those of the Court of Appeals, by alleging that they were issued in contradiction with the guarantees embodied in his constitutional rights to a legal remedy and judicial protection of rights.

The Constitutional Court found a violation of the applicant's right to a fair and impartial trial, due to a highly formalistic interpretation and finding by the Supreme Court, in respect of the applicability of the provisions of the Law on Basic Rights from Employment Relationship of 1989. The Constitutional Court emphasized that the failure by the Supreme Court to ensure legal certainty and the proper administration of justice jeopardizes the rule of law, which is a basic principle of a democratic society.

4. CONCLUSION

The jurisprudence of the Constitutional Court of Kosovo pertaining to the principle of rule of law is not very rich. However, the analysis conducted in this paper highlights the fact that the Constitutional Court of Kosovo has established a consistent practice of two-pronged approach to the principle of rule of law. The rule of law serves as a broader normative framework for adjudicating cases of the abstract constitutional review. This means that the Constitutional Court has reviewed the constitutionality of laws, conflict of competences between different institutions and the separation of powers, by referring to the principle of the rule of law – in

50 CCK, Judgment, Case KI 78/21, Constitutional review of item II of the Judgment [Rev. No. 257/2019] of the Supreme Court of Kosovo, of 2 June 2020, 16 May 2022, para. 138–139, <https://gjk-ks.org/wp-content/uploads/2022/05/ki_78_21_agj_ang.pdf> accessed 29 January 2024.

generic terms. Consequently, in many cases this Court has found constitutional violation by, among others, proclaiming laws adopted by the national Assembly as invalid, because they infringed the constitutional principle of the rule of law.

The Constitutional Court relied more on the principle of the rule of law when reviewing individual complaints for alleged violation of human rights that are enshrined in the Constitution. Thus, in a great majority of the cases the Constitutional Court of Kosovo has interpreted this principle in conjunction with the specific components of the right to fair and impartial trial. In concrete terms, as the fourth part of this analysis has highlighted, the Constitutional Court has interpreted the principle of the rule of law in relation to non-execution of the final judgments of courts; the restriction of the right of access to court; the inconsistency in the interpretation of laws by the courts; and the highly formalistic interpretation of laws by courts. Although the Constitutional Court has occasionally linked the principle of the rule of law with other constitutional human rights, such as the electoral rights, the right to legal remedies, or the right to legal protection of rights, the jurisprudence of the Court is dominated by the cases of right to fair and impartial trial.

The case law of the Constitutional Court of Kosovo are typical examples of how the concept of the rule of law is progressively utilized in court adjudication. Also, case law is, as an interpretative tool for contextualizing the meaning of general constitutional principles, as well as for determining the violation of specific human rights provided by the Constitution. What makes the case of Kosovo very intriguing is the complex and multi-faceted transition that the country underwent since 1999 and, in particular, the important role of the Euro-Atlantic community in designing its constitution.

In a more general perspective, as the case of Kosovo demonstrates, the constitutional courts in a democratic country are an indispensable instrument for preserving the rule of law. The jurisprudence of the Constitutional Court of Kosovo highlights that the principle of rule of law is not merely an ideological slogan palatable to the ears of the liberal era of the post-Cold War order. More than that, the rule of law is a pivotal principle of the constitutional order of democratic countries, which through judicial adjudication enjoys the status of a justiciable legal norm.

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ZAŠTITA VLADAVINE PRAVA KAO USTAVNOG NAČELA I INDIVIDUALNOG PRAVA OD STRANE USTAVNOG SUDA KOSOVA

Sažetak

Ovaj članak ispituje sudsku praksu Ustavnog suda Kosova i objašnjava kako ovaj sud štiti vladavinu prava, kao temeljno ustavno načelo i kao ljudsko pravo. Primjer Kosova je intrigantan zbog osebujne povijesne, političke i pravne pozadine u kojoj je izrađen Ustav i ustavne presude koja se dogodila. Metodološki, ova analiza temelji se na pregledu ključnih slučajeva kada je Ustavni sud Kosova obrazložio svoje odluke, pozivajući se na posebne ustavne odredbe koje jamče načelo vladavine prava. U radu se ističe da se Ustavni sud Kosova poziva na vladavinu prava kao opći normativni okvir za presuđivanje u slučajevima apstraktne ocjene ustavnosti, kao i za odlučivanje u predmetima koje podnose pojedinci – uglavnom u vezi s pravom na pravično i nepristrano suđenje. Proučavajući slučaj Kosova, ova analiza naglašava ulogu ustavnih sudova u osiguravanju da su neka opća ustavna načela, kao što je vladavina prava, opravdana i imaju praktičan učinak na ljudska prava pojedinaca.

Ključne riječi: Kosovo, vladavina prava, ustavni sud, ocjena ustavnosti, ljudska prava



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