

GUARANTEE AND CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS AND FREEDOMS IN THE REPUBLIC OF KOSOVO

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Abstract

In the vast majority of European countries, the Constitutional Courts have jurisdiction over the protection of human rights and freedoms guaranteed by the Constitution. This jurisdiction also belongs to the Constitutional Court in the Republic of Kosovo, which also targets the protection of individuals from violations that may be committed by public authorities against individual rights and freedoms guaranteed by the constitution. In this case, the authorized parties are only individuals who can make this reference only after having exhausted all legal remedies provided by law.

Through this paper, I have elaborated on the guarantee of rights and freedoms with the highest legal and political activities in the Republic of Kosovo, as well as the constitutional protection in case of violation of these rights and freedoms, at the same time reflecting the obstacles that accompanied individuals over the years to seek effective constitutional protection.

Therefore, the research question is: Have the obstacles to seeking constitutional protection been avoided as a result of which many constitutional claims referred to by individuals regarding the violation of constitutional rights and freedoms have been declared inadmissible? Constitutional jurisprudence has proven that there is considerable progress in this regard as individuals have become aware and now have the knowledge to meet the necessary constitutional and legal criteria to seek effective constitutional protection.

Keywords: Constitutional Court, rights and freedoms, individuals

1. Guarantee of human rights and freedoms in the Republic of Kosovo

In the legal order, human rights and freedoms are protected on two levels. At the local level, constitutions usually contain a significant number of human rights provisions. Similarly, the Constitution of the Republic of Kosovo qualifies human rights and freedoms as a constitutional value, continuing further in the second chapter where it guarantees human rights and freedoms for all citizens in the Republic of Kosovo, and in the third chapter guarantees the rights and freedoms of communities. Analyzing and comparing the constitutional provisions of chapter II with those of chapter III, it can be concluded that the former refers to all citizens of the Republic of Kosovo regardless of national, ethnic, and language affiliation, as well as to all foreign citizens in Kosovo (apart from the special rights enjoyed only by Kosovars

citizens), while the second ones are complementary rights that are recognized to members of communities¹ that are not the majority (Omari, 2010, p. 77)

While at the international level, the Constitution of the Republic of Kosovo, within its provisions in Article 22, accepts as part of the legal order of the state of Kosovo nine international agreements and instruments which are based on the protection of fundamental human rights and freedoms (Amendments of the Constitution of the Republic of Kosovo, 2012).

In terms of legal power, these international agreements and instruments find direct application in the Republic of Kosovo and have priority, in case of a conflict with any of the legal provisions and other acts of public institutions (Constitution of the Republic of Kosovo, 2008). One of the most important international acts is the European Convention for the Protection of Fundamental Human Rights and Freedoms (Idrizi, 2017), based on which the European Court for Human Rights and Freedoms (ECHR) was established.

The European Convention for the Protection of Fundamental Human Rights and Freedoms (ECHR) constitutes a unique reflection of the values of civilization and democracy; therefore the first European Council convention aimed at the protection of human rights (Drzemczewski, 1999). Ratification of the convention automatically implies the permanent acceptance of the jurisdiction of the European Court of Human Rights. Furthermore, the parties to a case must respect the court's decisions and take all necessary measures to comply with them. The highest interest of Strasbourg lies in the protection of human rights as well as the commitment of states to reform and improve their internal systems in their function. The rich jurisprudence of the ECHR should be recognized and applied by member states in their national domestic systems.

Also, it should be specified that the Constitution of the Republic of Kosovo also defines the limitation of constitutional rights and freedoms, respectively it specifies that they can be limited only by law (Constitution of the Republic of Kosovo, 2008), which means that their limitation in the Republic of Kosovo is not allowed by by-laws. To clarify this constitutional restriction on human rights and freedoms, we refer to the Judgment of the Constitutional Court in case no. KO 54/2 where the legal action was contested i.e. decision [no. 01/15] dated March 23, 2020, of the Government which limited the freedom of movement of citizens in the Republic of Kosovo during the pandemic. This limitation through the decision was claimed to be inconsistent, among other things, with the constitutional provision that determined the limitation of fundamental rights and freedoms that could only be accomplished by law, while in this case they were limited by a decision of the executive power, the latter according to the hierarchy of legal acts is categorized as a sub-legal act, i.e. with lower legal power than the law (Constitutional review of Decision No. 01/15 of the Government of the RK, 2020). Moreover, this court clarified that it can apply the restriction of fundamental rights and freedoms only to the extent determined by the Assembly through the relevant law.

¹ The communities are: Serbian, Roma, Ashkali, Egyptian, Bosnian, Turkish and Gorani.

Therefore, the Republic of Kosovo guarantees and protects the basic human rights and freedoms provided by this Constitution (Constitution of the Republic of Kosovo, 2008).

2. Constitutional protection of human rights and freedoms in the Republic of Kosovo

In the practices of the constitutional judiciary, it is arguable whether citizens can request the protection of their constitutional freedoms and rights before the Constitutional Courts (Bajrami, A. et. al., 2015). In this regard there are two constitutional practices when individual requests can be exercised to set the constitutional judge in motion: directly (European model) and incidentally or objection (American model) (Bajrami, A., & Muçaj, F., 2018, p. 464).

However, the constitutional judge can be set in motion directly by the individual in many European countries, while in Kosovo, based on Article 113 par. 7 of the Constitution, “The Constitutional Court is obliged to protect human rights and freedoms” (Constitution of the Republic of Kosovo, 2008). Thus, it has the power to decide on violations committed by public authorities against individual rights and freedoms guaranteed by the constitution. It should be emphasized that in this case, only individuals are authorized parties. Therefore, the constitutional protection of human rights and freedoms is auxiliary.

As far as the notion of individual, the constitution does not specify in this article who is considered an individual that can have access to the Constitutional Court, however, as long as “the fundamental rights and freedoms guaranteed pursuant to Article 21 of the Constitution, they also apply to legal entities to the extent they are applicable” (Constitution of the Republic of Kosovo, 2008) then these are also considered authorized parties in addition to natural persons. This assessment has also been made by the Constitutional Court through its jurisprudence, giving the right to legal persons to submit a constitutional complaint (AAB-RIINVEST L.L.C., 2010). In the case of the protection of constitutional rights and freedoms, the Constitutional Court exercises concrete control, because the object of control is the concrete legal act of the public authority from which the violation derives. Therefore, it is required that the authorized party necessarily clarifies “the claim what rights and freedoms have been violated and the concrete act of the public authority with which this violation was committed” (Law no. 03/L-121, 2008).

Through constitutional practice, the Constitutional Court in the Republic of Kosovo has exercised concrete constitutional control during the protection of human rights and freedoms. We will deal with some of these cases as follows.

In case “no. KI 08/09”, the claimants were the “Independent Trade Union of Steel Pipe Factory” employees, represented by its chairman, and as a result, they are considered an authorized party according to the constitution, and the legal action claiming that the constitutional violation derived from the ruling of the Municipal

Court of Ferizaj, dated October 6, 2008, respectively by the latter it was considered that there was a violation of the “principle of *res judicata*” guaranteed by the constitution in the framework of “the right to a fair and impartial trial”. The Constitutional Court examined this claim and concluded that there was a violation of human rights and freedoms, specifically the right to a fair and impartial trial guaranteed by the Constitution related to similar rights guaranteed by the European Convention on Human Rights (Independent Trade Union of Steel Factory Employees, 2010). At the same time, in the judgment, the Constitutional Court, in addition to finding the constitutional violation, offers protection by ordering the competent authorities who have committed this constitutional violation of human rights and freedoms to take measures to avoid it.

Whereas in the case “no. KI 55/11”, the claimant was a natural person; in this case, it is considered an individual who claimed that constitutional violations were committed with the legal action being the decision of the District Court in Prizren. And in his request, he also specified specific constitutional violations of human rights and freedoms. In its judgment, the claimant found violations of judicial protection and the right to effective legal remedies. He was offered constitutional protection by returning the contested decision of the District Court to reconsideration (F. Pireci, 2012).

The protection of constitutional rights was accomplished by the Constitutional Court also in the case “no. KI 27/20” where the latter found that there was no violation of equality before the law, freedom of expression, and prohibition of discrimination guaranteed by the constitution and by international agreements and instruments which are incorporated into the Constitution. In this case, the authorized party was “Levizja Vetëvendosje” (Self-determination Movement (LVV), which in the capacity of individuals, respectively as a legal entity, had contacted the legal act in the form of a judgment given by the Supreme Court (Self-determination Movement (LVV), 2020).

In the practice of the Constitutional Court in the Republic of Kosovo, respectively from the cases elaborated above, the cases related to the guarantee and protection of human rights as a pillar of the rule of law dominate, where the object of the constitutional requirements were mainly the decisions of the judicial power and claims for violations of the rule of law, legal certainty, the right to a fair and impartial trial, judicial protection, the right to legal remedies, equality before the law, the property right have dominated.

During the analysis of the judicial practice of the Constitutional Court, it turns out that over the years the requests referred by individuals have dominated the requests submitted by public authorities. Whereas the year 2014 is singled out, when the Constitutional Court proved to be more successful by resolving requests, since out of a total of 289 requests, it managed to resolve 226, however, over the years it is observed that it was engaged in resolving of over 50% of the requests, which proves

the efficiency and commitment that the judges of this Court that have continuously shown in reviewing the constitutional requests within the legal deadlines.

Table 1. Referrals submitted and resolved by the Constitutional Court of the Republic of Kosovo (RK) in the period 2011-2020

Year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Referrals from state organizations (KO)	16	20	24	26	12	17	19	48	38	34
Individual referrals (KI)	148	119	209	161	152	134	140	158	205	161
Total demand / subject matter ² at work	252	259	327	289	227	252	241	299	410	392
Total demand / subject matter resolved	132	165	225	226	126	172	148	133	213	195

Source: (The Constitutional Court of the RK, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020)

Concretely, the decision of the Constitutional Court from the table below is distinguished by the relative increase of judgments by which cases of individual requests were decided. This shows that in the constitutional practice concerning the referral of constitutional requests by individuals there is progress in fulfilling the constitutional and legal conditions for the referral of a constitutional request to the Constitutional Court.

Table 2. Types of decisions taken by the Constitutional Court in the Republic of Kosovo during the period 2011-2020

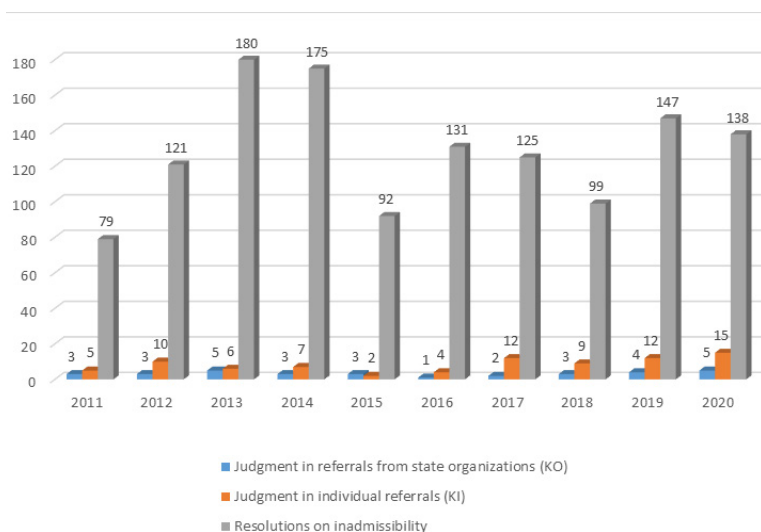
Year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Judgment in referrals from state organizations (KO)	3	3	5	3	3	1	2	3	4	5
Judgment in individual referrals (KI)	5	10	6	7	2	4	12	9	12	15
Inadmissibility resolutions	79	121	180	175	92	131	125	99	147	138
Other decisions	15	7	8	13	25	7	13	17	15	25

Source: (The Constitutional Court of the RK, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020)

² This includes referrals carried over from previous years that failed to be resolved within the year they were submitted.

However, the number of rulings on the inadmissibility of requests that do not meet the formal criteria in terms of non-compliance with the legal deadline within which the request must be submitted, non-extension of legal remedies, and cases where they are not authorized parties continue to remain high.

Chart 1: Judgment in referrals from state organizations, individual referrals, and resolutions on inadmissibility during 2010-2020



Source: (The Constitutional Court of the RK, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020)

The effects of ECHR decisions on the decision-making of the Constitutional Court in the Republic of Kosovo

Many constitutional courts do not hesitate to refer expressly in their judgments to the Strasbourg Court Convention and practice. Other constitutional courts rarely indicate in their judgments what inspires them. However, observers of the work of the courts suggest that the constitutional courts take into account the case-law of the ECHR (Velaers, 2016, p. 278).

The Constitutional Courts of most European countries through the implementation and interpretation of the constitutional provisions on human rights, in accordance with the practice of the ECHR, have accepted the interpretation of the provisions on human rights in accordance with the judicial decisions of this Court. This form of interpretation of the constitutional provisions on human rights in harmony with the practice of the ECHR has been represented by the state of Kosovo through Article 53 of the Constitution of the Republic of Kosovo.

The Venice Commission considers this “willingness to interpret national constitutional provisions in a way that favors the requirements arising from ECHR

decisions “as a means of reducing the possibilities of conflicts between European and national protection of human rights” (Velaers, 2016, p. 273).

Courts of all levels, and especially the Constitutional Court of the Republic of Kosovo, in its practice of the vast majority of cases related to human rights and freedoms, have referred to the decisions of the ECHR. To demonstrate this, we will mention several cases like “no. KI 40/09”, in which case the Constitutional Court of the Republic of Kosovo examined the alleged violation of the property right, the right to a fair trial guaranteed by the Constitution, and the ECHR. As a result, during the examination, the constitutional body referred to the practice of the ECHR pursuant to Article 53 of the Constitution and thus directly implemented the effects of the decisions of the ECHR in the internal legal system of the Republic of Kosovo (I.Ibrahimi and 48 other former employees, 2010).

Then in case “no. KI 68/09”, the claimant claimed that the independence of the judiciary and the judicial immunity guaranteed by the Constitution were violated, here too the Constitutional Court during the examination of the admissibility of the request refers to the practice of the ECHR during its reasoning regarding the exhaustion of legal remedies (E. Kastrati, 2010).

In case “no. KI 06/10”, the claimant claimed violation of the freedom of movement and the right to effective legal remedies guaranteed by the Constitution and the ECHR, and during the examination, the Court also in this case referred to the practice of the ECHR during the argumentation and determination of these violations (V.Bislimi against the Ministry of Internal Affairs, the Kosovo Judicial Council, the Ministry of Justice, 2010).

From the cases elaborated above, I find that the Constitutional Court has accepted its obligation to refer to the practice of the ECHR.

The ECHR has also elaborated the position of the practice of the ECHR, in which case initially Article 19 clarifies the intention of the creation of the ECHR, which consists in “ensuring compliance to the commitments undertaken by the high contracting parties of the European Convention and its Protocols” and in article 46 it is clarified in more detail that this “practice of this court is binding only for the state that is a party to that case, so the inter parties effect is observed” (ECHR, 1950). But the “res interpretata” effect of ECHR decisions means that all national authorities, including national courts, must carry out their activities in accordance with the Convention as clarified by ECHR in its case law, and if their state was not a party in the case in which the decision or interpretation was given, which aims to create a uniform minimum level of protection of fundamental rights throughout Europe that can only be realized if all national courts are prepared to accept the interpretations of Convention by the ECHR (Gerards, 2014).

Furthermore, the ECHR has also defined the procedure for its ratification by the member states. In this regard, Kosovo is the exception as it has not ratified this Convention like the other countries, but it finds direct application, that in reality

means that our country is not a party to this Convention and, as a result, it has no international responsibility to comply with and apply the judicial practice of the ECHR, but only constitutional responsibility.

From a broader perspective, some authors claim that there is no “European human right”, but only a universal right and that there is a “European” system of protection of these rights (Boyle, 2009). Therefore, in conjunction with this, the provisions of the ECHR are included and applicable in the national legal order of the Republic of Kosovo pursuant to Article 22 of the Constitution. While separately from the provisions of the ECHR, it is provided in Article 53 of the Constitution that defines the position of the judicial practice of the ECHR in the legal order of Kosovo, where the interpretation of human rights and guaranteed fundamental freedoms is accomplished in harmony with the decisions of the European Court to Human Rights, with which this constitutional provision reflects the relationship that exists between the ECHR and the Constitutional Court in Kosovo, and obligatorily refers the Kosovar courts to the judicial practice of the ECHR, an essential proposal regarding the relationship of Kosovo’s internal law with the European Law on Human Rights. Since Kosovo is not a member of the Council of Europe and due to the non-ratification of the ECHR according to one of the ways specified in the Constitution, then I consider that our country does not have an international obligation to refer to the jurisprudence of the ECHR, but it has a national obligation that has been designated through the highest legal and political act of the country.

Through the application of international instruments as well as the interpretation of human rights and freedoms in harmony with the practice of the ECHR, the internationalization of the constitution is made possible even though these international acts are not constitutions; however, they are equivalent to constitutional norms. Constitutional judges consult the decisions of the ECHR to confirm the relevant jurisprudence, as well as for the expansion of judicial professional knowledge on the issue in question. Therefore, the role of the ECHR is distinguished especially in the protection of human rights and freedoms, which affects the strengthening of the constitutional order in the Republic of Kosovo, where international law has a special and very advanced status.

Conclusion

- Human rights and freedoms in the Republic of Kosovo are guaranteed at the national and international levels.
- International agreements and instruments for human rights and freedoms in the Republic of Kosovo are directly applicable, unlike other international agreements that must be ratified in advance so that they can be implemented later.
- The guarantee of human rights and freedoms is strengthened through the constitutional protection that is applied by the Constitutional Court after the exhaustion of legal remedies.

- The protection of human rights and freedoms in the Constitutional Court can be requested by individuals, including natural and legal persons, the latter can request protection only for the guaranteed rights and freedoms that apply to them.
- Referral to the Constitutional Court, which is recognized by the Constitution when there is a violation of guaranteed rights after the exhaustion of legal remedies, affects the quality of the professional work and the greater responsibility of judges and officials in the state administration, this is because they take into account that their decision in case of violation of rights and freedoms can ultimately be appealed to the Constitutional Court.
- It turns out that Individuals in this decade of the existence of the Constitutional Court do not have sufficient knowledge about referring their requests to the Constitutional Court; this is argued through the dominance of the high number of decisions on the inadmissibility of individual requests, although there is relative progress also in issuing judgments of individual requests.
- From the constitutional practice, it derives that the Constitutional Court is continuously engaged in the materialization of one of the constitutional powers such as the protection of human rights and freedoms.
- In conclusion, the state of Kosovo offers the constitutional and institutional guarantee of the protection of human rights and freedoms.

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