RSP • No. 50 • 2016: 143-152

ORIGINAL PAPER

Constitutional Control of the Constitutional Court of the Republic of Kosovo

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Abstract
Constitutionality and legality are one of the essential elements of the rule of law, therefore the treatment of constitutional control in the scientific aspect is very important for the Republic of Kosovo, given that Kosovo is still being consolidated among its institutional and democratic elections after its Independency on 17 February 2008. This study aims to recognize the types of constitutional control, determining its positive and negative sides and finding appropriate proposals, adequate recommendations depending on practical problems. Methods of study in this research are descriptive method, normative method and the type of researching method that regards to the qualitative one. I hope this study to be a starting point for other potential researchers to explore further the rule of law, respectively the constitutionality and legality of the country, because it is not enough only the political debate on building and consolidating the rule of law but also the active participation of the main opponent of any power, so the opinion makers and academic critics and law experts as well, without never bypassing the raised awareness of the society..

Keywords: *Constitutionality, legality, constitutional control, the rule of law and society*

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Introduction

In the constitutional and political the expression "constitutionality" is used with different meanings. To distinguish constitutionality as a constitutional principle, whether by formal or political aspect, different theorists use the word "constitutionality" in its meaning as "constitutional" (constitutionality). As for the marking of the whole movement of the struggle for the adoption of the written constitution and limit the unlimited power of the rulers throughout history of human development, we use the word "constitutionality 'or its synonym phrase "constitutionalism". The difference is more doctrinal because the fight for constitutionalism did not aimed only issuing written acts (constitution), but also the institutionalization of society, in which the written constitution would appear as a tool for preventing arbitrariness of those in power and for setting behavior of everyone, including the "creator" of the constitution, under rules set by it. We will stick to the word (term) "constitutionality" in its wider meaning which means this constitutional principle as the formal aspect, as well as political; the existence of the written or not written constitution, as well as the institutionalization of the political overhaul of the society and respect for the legal rules and norms, as we have done so far. The word "constitutionalism" would only be used in this occasion in order to make a distinction between it and the word "constitutionality", mainly as a constitutional principle. Constitutionalism is presented as a political requirement of the liberal bourgeois for the institutionalization of the society with a written document. Therefore, from the beginning, especially from the half of XIX century, appeared entire political movement named based on this idea and word. Beside this, there were also presented different ideological currents, inspired and oriented for constitutionalism. This way, constitutionalism represents a doctrine against political absolutism and oppression of the rulers, for the institutionalization of the democratic order. Constitutionality is a formal – legal expression of this movement that means the principle of political overhaul of the society which guarantees the institutionalized power, and integrity, freedom and rights of individuals and groups. Therefore, at the beginning, at the presentation, Constitutionality did not mean just the idea of existence or issue of the written constitution, in its formal meaning, but also the implementation of the idea of popular sovereignty and limitation of absolutism and autocracy through the institutions which are represented by the people. Based on the above we can conclude that constitutionality is a target process, which appears in certain conditions of the history of mankind, by the end of the eighteenth century and during the nineteenth century, a period that coincides with that of the adoption of the prior first written constitutions.

As the struggle for written constitution, as well as the struggle for constitutionalism and its application as an integral part of the organization and functioning of political power is intensified or weakened depending on the objective circumstances in certain periods. It marked its worst crisis as on the eve of the First World War, as well as during the Second World War, as a result of the strengthening of autocratic, military tendencies etc. Between the two wars it has seen its crisis especially in fascist countries. Its crisis come under consideration after the Second World War as well, especially in countries where it is placed military dictatorship and the socialist countries, in which it is propagated and implemented the cult of the state and totalitarian state, as an ideology opposed to democracy and constitutionality . Sadly, this crisis as a result of the inertia of the past, as a result of the abandonment of one-party socialist flag of nationalism, is also present today in some post-socialist countries (transition),

especially in those with mixed national composition. In such countries, this crisis is felt in all segments, as in the political, economic, international ones, etc., but it is mostly felt in transnational terms, in disregard of the fundamental rights of national minorities and nations numerically small, and in disregard of the fundamnetal rights and freedoms of citizens in general. Besides the commitment of the international mechanisms for overcoming the constitutionality crisis in these countries it is necessary the internal struggle of democratic forces, as well as of the legal and political science and other social sciences for changing relations and institutions and overcoming the nationalist political, the centralized bureaucratic and monopolistic phenomena, that resul the unconstitutional situation and constitutionality crisis in these countries.

Systems of control and protection of constitutionality

Constitutionality in material terms is presented much earlier than constitutionality in the formal sense. Therefore, the struggle for the protection of constitutionality in the material sense is presented more time before submitting the Constitution of the United States, as a written, strong constitution, with which it is connected, in theoretical legal aspect, the principle of constitutionality and its control and defense. In this regard, it is reasonly claimed that the principle and protection organization of constitutionality is older than its judicial protection, implemented by the US Constitution. Already in old China, the Greek polis and, later, also in different countries of Europe and South America appear forms of protection of the existing rules of common life, in the form of political authority.

However, as the principle of constitutionality and legality (in the politico-legal sense), by reason are associated with the introduction of the written strong constitution, as well as their control and protection is linked with the presentation of the such constitution, because only this kind of constitution includes and implies the idea of constitutionality and legality. Only with the appearance of strong constitutions it is question the principle that any act of government must be legitimate and that any act contrary to the constitution is illegitimate, respectively unconstitutional. With such constitution are provided certain rules to be followed by the representative body in its legislative activity. Laws and other acts of it are the basis of the legal order, but the legal order is subjected to the highest order, the constitutional order.

Constitutionality, as in legal terms as well as political, it is the result of the proclamation and the legal guarantee of individual freedoms and rights of the human and citizens, and in the US, the federal state structure as well. To provide those rights to citizens, as well as the relationship between the federation and autonomous parts (federal units) are needed adequate mechanisms for the control and protection of the constitution, respectively of the "higher principles" and values guaranteed by its forms. Despite the disagreements in the order of the political and legal thinkers regarding to the "higher principles" containing the constitutions regarding the rights of man and citizen, in democratic constitutional theory and practice has dominated the opinion that these values must be protected and that through their realization it can be ensured democracy and democratic character of the state. However, there have remained disagreements on the type of guarantees and the authoritative body, who would be authorized to assess the compliance of the common laws with the constitution and decide on their removal from the legal order, in case that determines their incompatibility with the constitution. As a result of the different approaches regarding to the meaning of constitutionality, therefore regarding to its forms of control and protection, in the constitutional comparative theory

are presented three basic systems of control of constitutionality of laws and other legal acts: by legislative body, by the side of the special political and constitutional body or by the courts (regular or constitutional).

Control and protection of constitutionality by the Constitutional Courts

In order to control and protect the constitution, after the First World War, as a result of the awakening interest for constitutionalism and constitution, some countries with strong constitution apply the form of protection by the independent bodies of judicial power - constitutional courts. Constitutional Court as a "guardian of the Constitution" it is presented for the first time in Austria, with its Constitution of 1920, under the influence of Austrian federalism and theoretical legal opinion of the author of this Constitution, Hans Kelzenit. After World War II, along with the renewed interest for constitutionality, it is increased the interest for constitutional courts, as a way to protect her. The negative experiences before and during this war on respect and adherence to the constitutionality, especially the denial of fundamental rights and freedoms of the citizen, the denial of integrity and national sovereignty by fascism, have encouraged political forces to constitutionally implement mechanisms who would guarantee that the past would not be repeated. Therefore, the first countries to implement this form of control and defense of the constitutionality were precisely the former fascist totalitarian countries: Italy (1948) and Germany (1949). In Austria, too, in 1945 the Constitutional Court again applied the powers that had until 1934. In this period, this form of constitutional protection penetrates even outside Europe, in some countries that won independence and adopted strong constitution, as was the case of Sijami (in 1949), Syria (1950) and Cyprus (1960). In 1961 it was implemented in Turkey also, while in 1963 in SFR Yugoslavia and in 1968 in Czechoslovakia. In the last decade of the twentieth century, this form is presented to us in almost all transition countries. The carrier body of control and protection function of constitutionality is not called the same in all these countries. On the other hand, in some countries, the Constitutional Court is not the only organ of defense and guarantee of constitutionality, but this function is also given to other organs. In some federal contries are formed such courts at the level of federal units as well (in Germany, SFR Yugoslavia, etc.). Unlike countries where it is applied the protection of constitutionality by regular courts, where those courts protect the legality as well, in the majority of countries where there are implemented constitutional courts these bodies defend only the constitutionality, by exclusion, the legality (as was the case with the Kosovo's constitutional court and other independent countries in the case of dissolution of the SFRY). It is important to be noted that, in addition to protecting the freedoms and basic democratic rights of citizens in broad terms, and the protection of constitutionality and legality as a necessity of functioning and the existence of the rule of law, it is significantly expanding the powers of the constitutional courts in the area of electoral law and the election procedure, and in the area of responsibility of high state officials with before them.

Judicial control of constitutionality in Kosovo

The judicial control of constitutionality is an essential element of the rule of law and stems from the principle of the supremacy of the constitution in the legal order. It follows the right of courts to supervise the constitutionality of legal acts, primarily the acts of the legislature. The dominant attitude to constitutional justice looks at the narrow and wide meaning. In a narrow sense, by constitutional justice we understand the

constitutional control of laws, and in the wide sense we understand resolving constitutional issues through the courts, in order to protect, namely revive of the Constitution (Saliu, 2004: 163-164). Kosovo has a centralized system of control of constitutionality, because this responsibility is only focused on a specific constitutional body (the Constitutional Court of the Republic of Kosovo) where this authority was given by the Constitution of the Republic of Kosovo (See article 112 of the Constitution of Kosovo). The deciding forms during the constitutionality control of the law are indirect or direct deciding forms. The form of indirect estimation (accessory) of the constitutionality of the law, the question of constitutionality is not meritorious (MERITUM) of the legal proceedings, therefore the decision of the court regarding the constitutionality of the law in this form of deciding has effect only in the concrete case, where such decision on this case by the court has concrete effect (inter partes). In the US (United States), the highest authority for the defense of the constitutionality of the country (interpretation of the Constitution) is the Supreme Court, which is a regular court and decides accessory for the cases of assessment of constitutionality, not so explicit but being accepted as doctrine by declaring its famous question "Marbury against Madison" in 1803 (US Department of State's Bureau of International Information Programs, 2005: 85). The base of the federal judicial system in the US it is appointed in Article 3 of the US Constitution, which states, "the judicial power of the United States will be entrusted to a supreme court and other lower courts that the Congress will approve and establish from time to time (Maksuti, 2007: 35). Despite this form of deciding, the forms directly or abstract deciding about the constitutionality of the law, the compliance of the law with the Constitution is a matter of merits of the judicial procedure from the competent court. Since by this form of deciding we are dealing with constitutional dispute as a matter of merit, the court's decision in principle has effect on everyone (erga omnes) with consequences for the existence of the law itself. If the application is made by an ordinary court, because it doubts the constitutionality of contenders' norm to be applied, then it discontinues the judicial procedure until the Constitutional Court, with its decision, is declared related to its constitutionality, where the decision of the Constitutional Court shall also be applicable to all other cases (erga omnes) (Saliu, 2004: 187). Besides the problem of decision making way, constitutional theory has also treated the problem of time evaluation of constitutionality, namely the issue of preliminary (preventive) and subsequent (repressive) control of constitutionality. Preventive Control means any check that has to do with reconciliation, constitution, law or bylaw which have not yet entered into force (Saliu, 2004: 188),while the repressive control of constitutionality, despite the preventive one, starts from the fact that object of constitutional control may be only those acts (laws and bylaws) which have entered into force and have legal effect (Saliu, 2004: 190). The Constitutional Court of the Republic of Kosovo defines abstract form for the way of deciding for the constitutionality of the law and bylaws, which means that the constitutional issue presented to the Constitutional Court is a matter of merits of the Constitutional Court and such decision by the Constitutional Court has effect to everyone (erga omnes), or said more simply has the force of law (See article 116, paragraph 1 of the Constitution of Kosovo).

The Constitutional Court of the Republic of Kosovo, under the Constitution and the Law on the Constitutional Court, the terms of time of the constitutionality of laws and other state acts, contains elements of preventive and repressive deciding, and has accepted the incidental reference by ordinary courts to the Constitutional Court only in cases where it essentially suspects on the contender norm to be applied in the judicial procedure if it

is in accordance with the Constitution of the Republic of Kosovo (Constitution of the Republic of Kosovo, Article 113). The Constitutional Court of the Republic of Kosovo has also recognized the right of individual appeal which makes it a much more democratic and independent institution supporting and defending the fundamental human rights and freedoms.

Preventive control of the Constitutional Court of the Republic of Kosovo

Prevention (early) control of constitutionality by the Constitutional Court of the Republic of Kosovo is present on the Article 113, paragraph 5, of the Constitution of Kosovo, stating that 10 or more members of the Assembly, within a period of 8 days from the approval day, have the right to contest the constitutionality of any law or decision adopted by the Assembly, as regarding its substance or the procedure followed. In another case, preventive control is present in paragraph 9 of Article 113 of the Constitution of Kosovo, stating that the President of the Assembly of Kosovo has to refere the proposed Constitutional amendments before approval by the Assembly, in order to ascertain whether the proposed amendment decreases the rights and freedoms guaranteed by chapter II of the Constitution. A group of theoreticians of constitutional law considers that preliminary control is most likely to be misused, so we think that in no way should be the only option of constitutional control because it would create the inviolability of power because there could made nontransparent deals to adopt laws and other acts in the lawmaking body and those acts would no longer be subject to a lawsuit by the constitutional Court. Especially in countries with weak democracies should not be allowed this form of control as the only option. Kosovo fortunately provides also the subsequent constitutional control by the Court. Usually, the preventive control is exercised to very sensitive issues of state and public character, especially in the area of fundamental human rights and freedoms.

Repressive control of the Constitutional Court of the Republic of Kosovo

The Constitutional Court of the Republic of Kosovo in terms of time evaluation of constitutionality applies the form of repressive (subsequent) control of the constitutionality of laws with the Constitution after their entry into force, respectively, during the implementation of laws by administrative bodies and other relevant public institutions. However, this form of control is not expressively defined as in the case of preventive control, but implicitly. The Constitutional Court exercises repressive control in case of compliance of laws, decrees of the President or the prime minister and government regulations, with the Constitution, as well as municipal statute compliance with the constitution. The court realizes this only with the filing of the request of parties authorized to aforementioned issues where the parties authorized to raise such issues before the Court are: the Assembly, the President of the Republic of Kosovo, the Government and the Ombudsman. The municipality may contest the constitutionality of laws or acts of the Government which affect municipal responsibilities or reduce the revenues of the municipality, if the relevant municipality is affected by such law or act, this is another situation where it can be exercised repressive control of the constitutionality by the Constitutional Court. Other typical situation of repressive control of constitutionality is presented in the rights of citizens as individuals to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law (Constitution of the Republic of Kosovo, Article 113, paragraph 2). Repressive control also means the

control over possible violations of the constitution by the president, where 30 or more members of the Assembly have the right to raise constitutional issues in the case that the president has committed a serious violation of the Constitution (Constitution of the Republic of Kosovo, Article 113, paragraph 6). To put it simply and logically, the Constitutional Court exercises repressive (subsequent) control every time, except the above mentioned cases when we have preventive control. The presence of repressive (subsequent) form of control is welcomed to the country's legislature, as always theory teaches us that the flaws and shortcomings of the laws are best observed when they are applied.

Constitutional control of international agreements

International agreements ratified by the Assembly of Kosovo have primacy over the laws of the Republic of Kosovo, this supremacy over laws, international agreements guaranteed by the Constitution of the Republic of Kosovo, which proves the privileged status of international law in the constitutional system of the Republic of Kosovo (See Article 19 of the Constitution). Therefore we rightly conclude that the overall hierarchy of general state legal acts of the Republic of Kosovo, should be: Constitution; Agreements and international instruments set out in the constitution, Laws, Bylaws. Another argument in favor of the advanced status of international law in Kosovo's constitutional system consists on the constitutionality of several international instruments in the field of human rights which are directly applicable in the legal system of Kosovo. In this respect Article 22 of the Constitution of Kosovo, defines clearly that which international agreements are directly applicable in Kosovo. This article provides that: "The human rights and freedoms guaranteed by international agreements and instruments in addition, guaranteed by the Constitution, are directly applicable in Kosovo and have priority in case of conflict, over the provisions and laws and acts of other public institutions: (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Framework Convention of the Council of Europe for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhuman and Degrading. Furthermore, Article 53 of the Constitution makes clear constitutional obligation on the necessity of implementing the provisions of the European Convention on Human Rights and its jurisprudence (Bajrami, 2011: 342-343). Any law or decision adopted by the Assembly, any draft amendments, and any other legal act issued by public authorities must be in full compliance with international agreements and instruments which have been incorporated in the Constitution.

Incidental reference to the Constitutional Court of the Republic of Kosovo

Incidental reference known as a right in the theory of constitutional control, in the Constitutional Court is explained by the law of common courts, to be refered ex officio to the Constitutional Court issues pertaining to the constitutional compliance of a law, if the court during the judicial proceedings is faced with a situation to implement a provision claiming to decide by verdict, but that it is not certain that the implementation of that provision of the law is in accordance with the constitution, and that the court's decision on a particular case depends on the compatibility of the law in question, where the referral

of the matter to the Constitutional Court to review the constitutionality has suspensive effect to proceedings in the common court and the common court will decide only after the Constitutional Court announces the decision, and in accordance with the decision issued by the Constitutional Court (Constitution of the Republic of Kosovo). The incidental reference by ordinary courts in Kosovo is almost entirely silent in practice, and it lets the prejudice that it is not possible not encounter often in practice with conteder acts to be applied is unconstitutional, especially in the case of protection of freedoms and fundamental human rights provided by the Constitution of Kosovo.

Constitutional Control to the President of the Republic of Kosovo

Kosovo's constitution gives authority to the Constitutional Court in relation to the President of the Republic, for possible violations by his side. According to Article 113, paragraph 6 of the Constitution of the Republic of Kosovo, thirty or more members of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution. But how is it to be a serious violation to be considered a severe violation to the Constitution, the final decision and only merits for this has the Constitutional Court. A weird thing is present in the Constitution of the Republic of Kosovo and in the Law on the President of the Republic of Kosovo, Law Nr. 03 / L-094. At the dismissal of the President or the possibility of early termination of its mandate, is not projected to end the mandate of the President of Kosovo if it happens that the country's president, he or she dies. This is a serious omission that legally or formally, the Constitution of Kosovo means immortal president and will lead to confusion in the legal system of the country (The Law of the President of the Republic of Kosovo, article 10). In Kosovo constitutional violation by the presidents has had and the Constitutional Court has dealt them by deciding meritorious on those cases (Case Sejdiu and Pacolli case). The role of the President under the Constitution of Kosovo is very important where the President is considered the body or "guardian" who oversee the functioning of the constitutional order as a non-partisan man and unifier of the representative values for all the people and for the state and public institutions. The President of Kosovo from the formal side of competencies is "weak" against other powers because that is directly elected by parliament and that there are very few competing powers with the Prime Minister. More influential, the President of Kosovo would do his charisma if he has it, than his constitutional formal position.

The individual complaint to the Constitutional Court of the Republic of Kosovo

The Constitutional Court of the Republic of Kosovo under its jurisdiction also provides filing individual complaints by it. This shows the quite democratized institution and number one supporter of human rights and fundamental freedoms in the Republic of Kosovo. Although some more developed and democratized countries in Europe do not provide jurisdiction of national Constitutiona courts presentation and protection of individual complaints, Kosova in this direction has chosen to be in support of human rights by concretizing by the Constitutional Court through the recognized right of its citizens, individual complaint. The Constitutional Court decides on the admissibility of the application on the following grounds: (1) The Court may review referrals only if: a) They have exhausted all effective remedies prescribed by law against a decision or against the judgment to oppose; b) The request is filed within four months from the date of delivery of the last effective legal remedy to the Applicant, and c) The application is not

manifestly ill-founded. (2) The court shall reject an application as manifestly ill-founded, if it is satisfied that: a) The demand id not justified prima facie; b) The presented facts do not in any way justify the allegation of a violation of constitutional rights; c) The Court finds that the applicant is not subject to any violation of the rights guaranteed by the Constitution; or d) When the Applicant does not sufficiently substantiate his claim. (3) In addition, an application may be considered inadmissible in the following cases: the court has no jurisdiction in the matter; the request is anonymous; request submitted by an unauthorized party; the Court considers that the application is an abuse of the right to petition; the court has already issued a decision on the case and the request does not provide sufficient grounds for issuing a new decision; the requirement is not ratione materiae with the Constitution; the requirement is not ratione personae in accordance with the Constitution; or the request is not Ratione temporis in accordance with the Constitution. (4) If the request is incomplete or does not contain the information necessary for the conduct of the proceedings, the Court may require the applicant to make the necessary corrections within 30 days. (5) If the applicant, without any objective reason, fails to make the necessary corrections within the time limit referred to in paragraph 5 of this rule, then the request will be processed (Rules of Procedure of the Constitutional Court of the Republic of Kosovo, Rule 36).

According to the Constitution of the Republic of Kosovo, individuals are authorized to refer violations by public authorities of their rights and individual freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law (See Article 113, paragraph 7 of the Constitution of Kosovo). Kosovo's Constitutional Court has so far been a strong mechanism of treatment of individual complaints, where by the multiplicity of individual cases which addressed, it is likely had the role of the regular courts. However, it is desirable and in favor of strengthening the protection of human rights and fundamental freedoms in a democratic country,which it has always claimed to be, the newest country in the world, the Republic of Kosovo.

According to an interview conducted earlier with Mrs. Arta Rama, Chairperson of the Constitutional Court of the Republic of Kosovo, we found that 80% of the individual complaints before the Court are declared inadmissible due to some reasons of non-compliance with formal requirements for admissibility of complaints, driven mainly by the promoted parties of the lawyer’s services of irresponsible advocates. The Constitutional Court faces each year with a large number of individual filing complaints by natural and legal persons.

Recommendations

Upon completion of this scientific work with research character, of course we can offer some recommendations for positive change. Recommendations are commit at some point as follows: a) the Constitutional Court should reflect that the current President, the executive and legislative power to amend the Constitution in Article 91, paragraph 3 (discharge of the President) in order to provide the possibility of early termination of the mandate even in cases of death; b) the Constitutional Court with its independent budget, realize an awareness rising campaign for citizens on how to submit individual complaints especially for individuals, and when are fulfilled the conditions for the individual complaints to be acceptable to citizens; c) non-governmental organizations to be more active in criticizing the institutions that are approached to constitutional judgments for implementation, so that this would not only be done by the national media.

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Article Info

Received: March 10 2016
Accepted: June 14 2016