

Krystian Nowak¹

The Constitutional Court of Kosovo – Introductory Remarks

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Abstract

On February 17, 2008, Kosovo declared independence. Over twelve years after the adoption of the Declaration of Independence, the issue of universal, international acknowledgment of Kosovo still has not been resolved. The foundation for the establishment of the Republic of Kosovo was international society, which created the legal framework for the future statehood of Kosovo. The problem of the functioning of the constitutional judiciary was one of the key issues during the creation of the basic law of the Republic of Kosovo. This article s to analyze the constitutional position of the Constitutional Court of the Republic of Kosovo in the state system established under the Constitution of 2008. It presents the composition of the Court, its competence, and principles of organization and functioning. The solution applied in the Kosovo basic law fits into the broadly understood model of the European constitutional judiciary.

¹ ORCID ID: 0000-0003-4853-1591, PhD, Department of Systems of European States, Institute of Law Science, College of Social Sciences, University of Rzeszów. E-mail: nowak@ur.edu.pl.

Streszczenie**Trybunał Konstytucyjny Kosowa – uwagi wstępne**

W dniu 17 lutego 2008 r. Kosowo ogłosiło niepodległość. Ponad dwanaście lat po uchwaleniu Deklaracji niepodległości kwestia powszechnego, międzynarodowego uznania Kosowa nadal nie została rozstrzygnięta. Fundamentem powstania Republiki Kosowa była społeczność międzynarodowa, która stworzyła ramy prawne przyszłej państwowości Kosowa. Problem funkcjonowania sądownictwa konstytucyjnego był jednym z kluczowych podczas prac nad powstaniem ustawy zasadniczej Republiki Kosowa. Niniejszy artykuł stanowi próbę analizy pozycji ustrojowej Sądu Konstytucyjnego Republiki Kosowa w systemie państwowym ukształtowanym pod rządami Konstytucji z 2008 r. Przedstawia skład Sądu, jego kompetencje oraz zasady organizacji i funkcjonowania. Rozwiązanie przyjęte w kosowskiej ustawie zasadniczej wpisują się w szeroko rozumiany model europejskiego sądownictwa konstytucyjnego.

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I.

Kosovo is the youngest European country which declared independence on February 17, 2008. The issue of Kosovo's status in the light of international law remains to be resolved². Kosovo's independence has been acknowledged by 118 countries (including 23 countries of the European Union)³. It is currently important that the failure of internal structures and economic weakness cause Kosovo to be dependent on international support from the EU and NATO. The functioning of the constitutional judiciary is an integral part of modern democratic political regimes. This article aims to present the systemic position of the Constitutional Court in the Republic of Kosovo established under the Constitution of 2008. Due to the framework of this analysis, the praxeological aspects of constitutional judiciary and case law have not been analyzed.

² G. Asta, *Il processo di state-building in Kosovo: una rilettura a venti anni dal suo avvio*, "Ordine internazionale e diritti umani" 2020, No. 1, p. 119 et seq.

³ As of June 22, 2020.

The concept of the creation of a constitutional judiciary in Kosovo should be looked for in Vienna, in the office of a special envoy of the Secretary-General of the United Nations for the future status process of Kosovo, where mediation between the representatives of Serbia and Kosovo took place. The special envoy, Martti Ahtisaari, prepared a conciliatory document concerning the status of Kosovo, under the name of “Comprehensive Proposal for Kosovo’s Status Settlement”⁴. The so-called Ahtisaari’s plan was a complex solution to the Kosovo problem since it included the basic legal and institutional frameworks and thus created foundations to build the independent country of Kosovo. The plan also included, among others, the creation of a constitutional judiciary. The creation of a constitutional judiciary was crucial as it was to become the final institutional guarantor of the provisions of the basic law, concerning far-reaching individual rights, including arguably the most extensive protection of the rights of national minorities in Europe⁵.

According to the provisions of the plan, the Constitutional Court consisted of 9 members, who were exceptional lawyers of the highest morality level. Six of the nine judges were chosen by the President of the Republic at the request of the parliament. From among those six judges appointed for their first term after the entry of the Constitution into force, two were to hold office for 3 years, two were to hold office for 6 years, and the last two for nine

⁴ The Comprehensive Proposal for Kosovo Status Settlement, dated 26 March 2007, addressed the following issues: Constitutional provisions; rights of Communities and their Members; decentralization of local government; justice system; religious and cultural heritage; international debt; property and archives; Kosovo security sector; International Civilian Representative; European Security and Defense Policy (ESDP) Rule of Law Mission; International Military Presence (e.g., continuation of KFOR) and the legislative agenda. See Comprehensive Proposal for the Kosovo Status Settlement, <http://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf> (20.08.2020).

⁵ N. Mansfield, *Creating A Constitutional Court: Lessons from Kosovo*, East-West Management Institute Occasional Paper Series, Spring 2013, p. 2. More on the protection of national minorities rights in Kosovo from: E. Bujwid-Kurek, *Status instytucjonalny i polityczny mniejszości serbskiej w Kosowie*, “Wschodnioznawstwo” 2015, No. 1, pp. 287–303; R. Rajczyk, *Prawno-instytucjonalny wymiar podmiotowości politycznej mniejszości etnicznych w Republice Kosowa*, “Studia Politicae Universitatis Silesiensis” 2017, vol. 18, pp. 61–73; K. Nowak, *Konstytucja Republiki Kosowa wobec problemu mniejszości narodowych*, [in:] *Nowe wyzwania i rozwiązania w europejskim systemie ochrony praw człowieka*, eds. J. Jaskiernia, K. Spryszak, Toruń 2018, pp. 604–616.

years. The next judges appointed were to hold office for a non-renewable period of 9 years. For four judges (appointed by the President of the Republic), approval of the parliament with the qualified majority of 2/3 of the votes of the members of the Meeting was required. Then, the other two judges had to obtain the approval of the majority of members of the parliament, including the approval of the majority of the members of the Meeting in possession of mandates reserved for or guaranteed to the representatives of minority communities of Kosovo. The remaining three judges were the so-called international judges, who were chosen by the President of the European Court of Human Rights after consulting the International Representative of the Civil Population. The plan also assumed that at least ten of the parliament members would obtain the right to make a request to the Constitutional Court for the examination of the constitutionality of law or the decision made by the parliament, both concerning its substance and the procedure of adoption. The communes also had the right to make a request to the Constitutional Court for the review of constitutionality of law or government acts concerning the infringement of rights of the communes or the reduction of its income. The plan also assumed that judges and prosecutors would be appointed and dismissed by the President of the Republic of Kosovo at the request of the Kosovo Justice Board. The provisions of Ahtisaari's plan concerning the Constitutional Court were included in the basic law adopted in 2008, with minor changes⁶.

The basic law of the Republic of Kosovo currently in force entered into force on June 15, 2008. The Constitution refers to the Constitutional Court in Chapter VIII ("The Constitutional Court"), which consists of eight articles (from 112 to 118). Similar to other European countries, the Constitutional Court of Kosovo is not classified as a common judiciary⁷. It results from the contents of the constitution, which differentiates between the matter of the judiciary (Chapter VII. Judicial Authority and Prosecutor's Office) from the control of constitutionality of law (Chapter VIII. Constitutional Court). The Constitution in Art. 4 points to the function of the Court in the system, i.e. "The Constitutional Court is an independent constitutionality protection body and is

⁶ Art. 152 of the Constitution of the Republic of Kosovo, <https://gzk.rks-gov.net/Act-Detail.aspx?ActID=3702> (20.08.2020).

⁷ For example, the Constitution of Italy (Art. 134), Austria (Art. 137) or the Constitutional Council in France (Art. 56).

responsible for the final interpretation of the Constitution”. According to the Art. 112 of the Constitution, the Constitutional Court constitutes the final authority responsible for the interpretation of the Constitution and the compliance of acts with the constitution. While in the Chapter I of the Constitution (“General provisions”), Art. 16 states that the Constitution is the most important legal act of the Republic of Kosovo and other acts and legal documents must comply with the Constitution. Authority in the Republic of Kosovo has its roots in the Constitution. Whereas any person and business entity in the Republic of Kosovo are subject to the provisions of the Constitution.

After adopting the basic law, works were initiated to prepare the act on Constitutional Court. For this purpose, a workgroup has been appointed, consisting of the representatives of the Government of the Republic of Kosovo, Chancellery of the President, the Faculty of Law of the University in Pristina, independent experts in the field of legal sciences, experts from International Civil Office (ICO), United States Agency for International Development, East-West Management Institute, as well as the representatives of the European Council. Several issues concerning the functioning of the Constitutional Court arose during the works, and a significant portion of the working meetings has been dedicated to those issues. Notions that caused the biggest doubts of the working group concerned the level of detail of the draft act, the method of choice of the chairman and their nationality, the initial control of requests submitted to the court, the secrecy of vote of the adjudicating panel, and the publication of opinions differing from the judgments of the court⁸. Works on the act were in progress for almost six months. On December 16, 2008, the People’s Assembly adopted the Act on Constitutional Court⁹ without amendments.

II.

According to the provisions of the Constitution (Art. 4 sec. 6 and Art. 112 sec. 1) the Constitutional Court performs two main functions: control of constitutionality of law and the final interpretation of the Constitution. The con-

⁸ N. Mansfield, *op. cit.*, pp. 2–4.

⁹ Law on the Constitutional Court of the Republic of Kosovo (No. 03/l-121).

trol of constitutionality of law is the *raison d'être* of the Kosovo Constitutional Court and concerns the adjudication of conformity of the lower legal norms (acts, Presidential decrees, government and commune regulations, legal acts, and City Assembly decisions) with the higher legal norms (Constitution of the Republic of Kosovo) and the elimination of lower legal norms from the system of applicable law in case of lack of conformity. The second function, which is to interpret the basic law, is currently performed by the Constitutional Court only in cases referred to the Constitutional Court based on Art. 113 of the constitution, as both the Constitution and the Act on Constitutional Court of 2008 do not provide an individual procedure of interpretation of the basic law.

The Constitution of the Republic of Kosovo provides a preventive and repressive control of legal norms. The *ex-ante* control is possible in three cases. The first case applies when the only entity authorized to initiate *ex-ante* control is a group of at least 10 members who can submit a request to examine the constitutionality of contents of the act and the procedure of its adoption within 8 days from the date of adoption of such act. The Constitutional Court issues its judgment on the act called into question within 60 days from the date of the request. The President announces the act according to the provisions stated in the judgment issued by the Constitutional Court. The preventive control takes place also in cases in which the authorized entity may apply to the Court for the review of constitutionality of the proposed amendments to the constitution with binding international agreements, ratified as part of the Constitution, as well as the review of the compliance of the adopted procedures with the Constitution. The third case of *ex-ante* control concerns all amendments to the constitution. The confirmation of amendments to the Constitution must be preceded by the Court's decision whether the proposed amendments do not violate civil rights and liberties guaranteed in Chapter II of the Constitution. The duty of presenting the proposed amendments for the Court to process lies with the chairman of the Assembly of the Republic of Kosovo¹⁰. Repressive control applies to acts and parliament decisions, presidential decrees, government and commune regulations, legal acts, and City Assembly decisions.

¹⁰ K. Nowak, *Konstytucja Republiki Kosowa. Wstęp i tłumaczenie*, Rzeszów 2008, p. 48.

In the Republic of Kosovo, two forms of constitutional review of normative acts occur concrete and abstract control. The right to call into question the constitutionality of a given norm based on a general belief that it contradicts the Constitution is given to 1/4 of the members of the parliament, the president, the government, and the Ombudsman. The entities authorized to take the special initiative are the commune, in the scope in which the given legal act violates its obligations or reduces the commune's income, and the Vice president of the City Assembly for Communities, in the scope in which the legal act or a decision of the City's Assembly constitutionally violates the guaranteed laws of the community members. The concrete control can be executed in the manner of legal questions and must be related to a given case presented to the court. If during the case examination doubts will arise concerning the compliance of the act (or another normative act) with the constitution, which is the basis of court settlement, the court is authorized to submit a legal question to the Constitutional Court. The court suspends proceedings until a decision is issued by the Constitutional Court. The scope of such control also includes a constitutional complaint, which can be submitted to the Constitutional Court by physical persons.

The Constitutional Court does not work *ex officio*, but only on request of authorized entities. The examination of compliance of law with the Constitution is performed by the Court in the following modes: 1) at the request of generally authorized entities, i.e. those that may complain about normative acts to the court if their control has jurisdiction in the Constitutional Court. According to the Constitution those are: the Parliament of Kosovo, the President of the Republic of Kosovo, the Government and the Ombudsman, 2) at the request of individually authorized entities, i.e. communes and the Vice presidents of City Assembly's for Communities, 3) as a result of legal questions presented to the Constitutional Court by the court, if the conclusion of a case ongoing in the court is dependent on such question, 4) as a result of a constitutional complaint in case of violation of rights or liberties stated in the Constitution by public authorities, as well as after the exhaustion of legal action¹¹.

¹¹ B. Besard, Z. Elezi, *Constitutional control of the Constitutional Court of the Republic of Kosovo*, "Revista de Stiinte Politice" 2016, No. 50, pp. 150–151.

The Kosovo Constitutional Court – similarly to other Constitutional Courts – adjudicates also in cases usually considered in secondary sources as “additional powers” or “powers connected to the functioning of various state authorities”. In the case of Kosovo, those cases refer to:

1. the settlement of conflicts of competence between the Parliament, the President, and the Government;
2. adjudication of compliance with the constitution: a) of the proposed referendum, b) the announcement of the state of emergency and actions undertaken during its duration¹²;
3. adjudication in cases of violation of the Constitution during the election;
4. adjudication of constitutional responsibility of the President of the Republic.

The entities authorized to initiate proceedings concerning: 1) the settlement of conflicts of competence, 2) the declaration of compliance of the proposed referendum with the constitution, 3) the declaration of compliance of the state of emergency and actions undertaken during its duration with the constitution, 4) the declaration of violation of the Constitution during the election, are the Parliament of Kosovo, the President and the Government of the Republic. The request to hold the president constitutionally liable can be made by a group of at least 1/3 of the Meeting members. The members are obliged to indicate the violated rules of the Constitution and provide evidence. The role of the Constitutional Court is to declare the guilt of the president. If the Court decides that the President has committed a serious infringement of the constitution, the Meeting may vote him out of the office with a majority of 2/3 of the overall number of members.

Also, a broadly described scope of competences influences the constitutional position of the Constitutional Court. According to Enver Hasani, the Constitutional Court in Kosovo has the broadest competences among Balkan Constitutional Courts¹³. What is also important is the fact that the constitutional port-

¹² K. Nowak, *Pozycja ustrojowa Rady Bezpieczeństwa Republiki Kosowa*, [in:] *Problem państw nieuznawanych we współczesnym świecie*, eds. V. Serzhanova, J. Wilk, K. Nowak, J. Plis, Warsaw 2019, pp. 254–258.

¹³ E. Hasani, *Basic Features of the Constitutional System in Kosovo*, [in:] *Rule of Law, Human Rights and Judicial Control of Power. Some Reflections from National and International Law*, eds. R. Arnold, J.I. Martínez-Estay, Springer International Publishing AG 2017, p. 614.

folio of competencies is not of closed nature, because the Constitution allows for vesting new competencies in the court by way of ordinary legislation. What could be noted here is an example is an act on local government in which the legislator included the competence for the Constitutional Court, which competence involved determining the breach of the Constitution or applicable law by the Mayor¹⁴. It is also worth noting that in the initial period of operation of the Constitutional Court, the scope of its competencies included the examination of electoral complaints¹⁵. From November 2010 this authorization was transferred to the cognition scope of the Supreme Court of Kosovo.

The admissibility of requests to the court is decided by the so-called Inspection Panel, which consists of three judges appointed by the Chairman of the Constitutional Court, who have been chosen by the means of a draw of lots. In case of a unanimous decision by the Inspection Panel on the inadmissibility of the request due to formal grounds, the request is directed to the rest of the judges. The objection of at least one judge (who is not a part of the Inspection Panel) results in the request being enabled to continue and directed to the adjudicating panel. The Constitutional Court examines all cases in full court. The examination proceedings in full-court require the participation of at least seven judges. The decisions of the Constitutional Court are binding and final. As a rule, the decisions come into force on the day of declaration, but the Court may define a different date of termination of the currently binding normative act.

III.

The organization of the Constitutional Court is regulated by the Art. 114 of the Constitution of the Republic of Kosovo of 2008, which defines the composition of the Court and the manner of appointment of the judges, the Chairman and Vice-chairman of the Court. The Constitutional Court is managed by the Chairman¹⁶. The Chairman and Vice-chairman are appointed for 3

¹⁴ Art. 64 Law on local self government (No. 03/1-040).

¹⁵ Art. 106 sec. 1 Law No. 03/1-073 on general elections in the Republic of Kosovo.

¹⁶ B. Belegu, *The independence of the Constitutional Court of the Republic of Kosovo*, [in:] *3rd International Multidisciplinary Scientific Conference on Social Sciences and Arts SGEM*, book 2, Sofia 2016, p. 834.

years in a secret vote by the majority of the judges of the Court. The competences of the Chairman include: the coordination of activity of the Court and work of the judges, convening and chairing meetings, as well as representing the Court.

The Constitutional Court consists of nine judges appointed for 9 years. In Kosovo, a concept of separation of competence to appoint judges by the government has been accepted. The judges are appointed by the President of the Republic at the request of the parliament. Re-election is not possible. The judges take an oath in front of the President of the Republic, in which they undertake to protect the Constitution when fulfilling the duties of a judge and to fulfill their function fairly, responsibly, impartially, and with respect to professional ethics.

To be appointed as a judge one must be a citizen of the Republic distinguished with a high sense of morality and possessing a full legal capacity, who:

- is an exceptional attorney with a profound professional reputation;
- has at least ten years of professional experience, especially in the field of public and constitutional law, which is reflected in the performance of a profession of the judge, prosecutor, attorney, civil servant, academic staff or another profession related to the legal activity;
- has not been convicted of any crime.

The extraordinary commission to consider candidates for judges of the Constitutional Court presents a list of candidates for judges to the parliament. The commission consists of the Chairman of the Meeting of the Republic of Kosovo (or their representative) as the chairman of the committee, leaders of parliamentary clubs (or the representatives appointed by them, who are also members of the parliament), the chairman of the Justice Board of the Republic of Kosovo, Ombudsman, Representative of the Advisory Council for Community, representative of the Constitutional Court. The two assistants of the chairman are appointed by the committee from among its members. Moreover, one of the chairman's assistants, according to the act on Constitutional Court, must be a representative of the "community", meaning national minorities¹⁷. The commission adopts acts by majority votes, and in cases of a draw, the vote of the chairman of the com-

¹⁷ K. Nowak, *Konstytucja...*, p. 29 et seq.

mittee is decisive. The commission announces recruitment for the position of a judge in electronic and printed media. Every physical person may propose themselves as a candidate for a judge. The commission conducts the recruitment procedure for all candidates who fulfill the constitutional and statutory criteria for the position of a judge of the Constitutional Court. The commission creates a list of candidates based on the results of the conducted recruitment procedure. The list may include no more than five candidates for one judge position. Next, the list of candidates is presented to the Meeting of the Republic of Kosovo. An Act of the Meeting on the recommendation of the seven judges to the President of the Republic requires the qualified majority of votes from 2/3 of the present and voting members. On the other hand, the act on the recommendation of the other two judges takes place through a majority vote of the present and voting members after the acquisition of prior permission from the majority of the voting members who possess mandates reserved for or guaranteed to the representatives of the “community”, which in practice means that two judges of the Constitutional Court are representatives of national minorities. Moreover, the Constitution imposes the duty of inclusion of the principle of gender equality during the selection of judges (Art. 114 sec. 1 of the basic law), which has been elevated to constitutional rank. According to Art. 7 sec. 2, the Constitution of the Republic of Kosovo guarantees gender equality as a fundamental value of democratic society development, creating equal chances for both men and women, the political, social, cultural, or economic life, and other aspects of social life.

The function of a judge of the Constitutional Court is terminated in case of withdrawal, death, permanent incapacity of the judge to fulfill their duties, declared by the relevant court, illness or other health problem which causes incapacity of the judge to fulfill their duties, commitment of a serious crime or serious negligence of their duties.

The dismissal of a judge before the expiry of their term of office due to an illness or another health problem that prevents the fulfillment of the mandate of a judge occurs after the consideration of medical documentation based on a resolution of the Constitutional Court adopted by a qualified majority vote of 2/3 with the exclusion of the judge concerned. While the dismissal of a judge due to the commitment of a serious crime or negligence concerning

their duties takes place after a vote of 2/3 of the judges of the Court, and the organ authorized to the dismissal is the President of the Republic.

The judges of the Constitutional Court possess formal and material immunity. The formal immunity means that the judges are – according to the provisions of the Constitution – protected from prosecution and civil court proceedings. While the essence of material immunity means that judges may not be dismissed from office for the undertaken activities, decisions, and expressed opinions that fall into the scope of duties of a judge of the Constitutional Court.

The judge of the court may not simultaneously work for consideration or hold any other public office, except for a lecturer of legal sciences in accredited universities. Moreover, a judge may not be a member of a political party or another political organization or movement, a member of the management board of public companies, enterprises or non-governmental organizations, or a member of a trade union.

The Act on Constitutional Court also introduces the institution of legal counselors, who support the work of judges through the preparation of legal advice. To become a legal counselor a person must: 1) be educated to university legal degree level (with the preferred specialty in constitutional law, human rights, public international law, or other public law), 2) have at least two years of professional legal experience, 3) be personally and morally impeccable. According to statutory regulations, the administrative services of the Court are governed by the Secretariat. The work of the Secretariat is governed by the Secretary-General, appointed by the judges of the Court. The Secretary-General is a supervisor of the Secretariat workers. The court is based in Pristina.

IV.

A model of the concentrated and specialized constitutional judiciary has been adopted in Kosovo. The concept of appointing a specialized organ appointed to review the constitutionality of the law has been triumphant in the “Vienna talks”, which defined the future process of the status of Kosovo¹⁸. The

¹⁸ M. Weller, *The Vienna Negotiations on the Final Status for Kosovo*, “International Affairs” 2008, vol. 84, pp. 659–681.

constitutional competence of the Constitutional Court presents itself as varied and broad in this context. The analysis of provisions of Chapter VII of the basic law leads to the conclusion that the leading goal of the Court is to protect the constitutionality of the law. However, granting the Constitutional Court the competence unrelated to the control of constitutionality and processing of constitutional complaints caused the Kosovo model of the constitutional judiciary to be in line with the broadly understood European model of the constitutional judiciary.

The Kosovo Constitutional Court is situated beyond the classic judiciary. This type of solution is justified by certain traits, which clearly distinguish it from courts: 1) the urgent procedure of appointing judges, 2) the constitutionally guaranteed term limits of judges, 3) no relation between the Constitutional Court and the Justice Board of Kosovo, 4) no application of the two-tier rule in Constitutional Court proceedings.

The constitutional position of the Constitutional Court in the Republic of Kosovo is determined by a few rules. First, it has been excluded from the judiciary and is an independent organ of constitutionality protection, responsible for the final interpretation of the Constitution. The second trait of the Constitutional Court is its independence, which results from a rule of the Constitution which states that “The Constitutional Court is completely independent in the fulfillment of its duties” on the one hand, while on the other from the independence of judges in the fulfillment of their duties. The important traits are also finalities (decisions of the Constitutional Court cannot be repealed, no form of appeal is possible against them) and the generally binding use of decisions of the Constitutional Court. Moreover, the scope of competence of the court of Kosovo has been broadly defined, which also determines its rank and constitutional position.

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