

Can constitutionalism build the rule of law?

Abstract

Kosovo as a new state aspires to EU membership; however, it is lagging behind other countries in the region in its path to European integration. Progress in Kosovo has, up to now, been generally positive and Kosovo has moved a long way since it declared independence on 17 February 2008. Nevertheless, in almost all the Progress Reports of the EU Commission there is a remark about the rule of law, mostly concerning the inefficiency of the regular courts as a result of corruption and other bad practices. The independence of the judiciary is a cornerstone of the whole process of the rule of law. Constitutional courts were frequently seen domestically as an instrument of change following the collapse of communism. Their establishment and operation has proved useful in promoting the rule of law and constitutionalism – and in Kosovo, too, without exception. This article aims to address the rule of law and EU policy concerning the judiciary, while the main focus is devoted to whether the practice of the Constitutional Court could lay down a basis for the rule of law in Kosovo.

Keywords: rule of law, EU, Kosovo, constitutional courts, human rights

Understanding the rule of law

The concept of ‘rule of law’, although often quoted, is differently defined and understood. The philosopher Joseph Raz comments that the core idea is that it represents the ‘principled faithful application of the law’. Its features are its insistence on an:

Open, public administration of justice, with reasoned decisions by an independent judiciary, based on publicly promulgated, prospective, principled legislation. (Raz 1994: 374)

The principle of the rule of law is addressed to the courts, the legislature and also other bodies such as the police and the administrative authorities (Craig 1997; Eyer 2008: 653-668). This definition opens a new way of looking at the ‘rule of law’ that is not a traditional part of Anglo-American discourse and, instead, can be traced back, *inter alia*, to Hans Kelsen (Kelsen, 1978). It finds its modern manifestations in the administrative law traditions of France and Germany.

The concept as such, despite its different meanings in various legal cultures, contains elements that tend towards the creation of a notional framework. Mostly, it is understood as the separation of powers between the legislature, the executive and the judiciary. At the same time, it encompasses wide support for the proposition that no-one is above the law. Furthermore, it is necessary that law is made by representatives of the people in an open and transparent way, meaning that general prospective

norms should enjoy substantial legal predictability and that they be published in advance so that the public is aware of their existence and that everyone can comply. In addition, laws should also be open to free criticism by the people who, in turn, are free to assemble without fear (Walker, 1988).

Some authors include only the principle of legality and the independence of the judiciary and see it as a situation which is not necessarily dependent on the prevalence of the liberal ideology of constitutionalism (Lane, 1990). Nevertheless, the rule of law has to include the components of democratic accountability and procedural fairness (based firstly on the presumption of innocence and secondly on the principle of *nullum crimen sine lege*; i.e. that no-one can be made subject adversely to a retrospective change in the law). At the same time, it must also include substantive support for liberal values (such as the values of justice, the independence of the judiciary, equality, freedom, the protection of minorities and so on) (Saunders and Le Roy 2003; Tamanaha 2004; Krygier 2010).

The rule of law is enshrined in most constitutions. In the Constitution of the Republic of Kosovo, too, the rule of law is encompassed in Chapter 1 which sets out its Basic Provisions, laying the grounds for a secular state, and is also specifically protected in Article 3 (Equality Before the Law) and Article 7 (Values) establishing values as we might find in elevated western liberal democracies.

Therefore, the protection of certain rights and other political values are placed in the hands of a constitutional court by empowering the judges of the Constitutional Court in Kosovo,¹ as the supreme legal authority of the country, to interpret the ‘true meaning’ of these constitutional rights.

However, the most universally accepted and general feature in implementing a rule of law is an independent judiciary; without an independent judiciary there can be no discussion about the rule of law in any of the meanings referred to above (Bingham 2010: 171-174).

EU standards and the rule of law

EU standards concerning reform of the judiciary

Nowadays there is a general call, from every international institution (the EU, the IMF and others) to require policies to be based on the principle of conditionality (Pippan 2000): states are urged to undertake the steps to fulfil a whole range of political and economic conditions in return for either partnership, membership or monetary aid. Conditionality is screened through new lenses of order and stability based on the rule of law, democracy, the free market economy and respect for human rights, envisaged as western values (Brandt, 2000). To achieve this aim, the rule of law is considered to occupy a unique position in a democratic society. Therefore, states are called upon to create the conditions for reform of the judiciary as the traditional mechanism to determine disputes and to protect citizens from arbitrary politi-

1 The author was a judge of the first generation at the Constitutional Court of Kosovo with a mandate of three years.

cal affiliation or from private individuals. As such, it fights corruption, too (Azzopardi 2006).

The European Union has been growing; as such, membership of the European Union is the clear aspiration of leaders across south-eastern Europe as well as central and eastern Europe. In consequence, the EU established in 1993 a series of principles behind accession to the EU, known as the Copenhagen Criteria.² One of the criteria is that of judicial reform, a key segment in EU accession. Included in this segment is the operation of a functioning judiciary, and it is a precondition for the accomplishment of the political and legal ideals on which the EU is based, meaning the ideals of the rule of law.

The EU itself plays an important role in the reform of the judiciary. As such, successful accession for states aspiring to membership depends upon the candidate country adopting the *acquis communautaire* of the European Union, which means some 80 000 pages of statutes, regulations and opinions promulgated by the EU (Grabbe 2002). Indeed, the conditionality of EU membership creates its own dynamics both internal and external to the state. The EU's regular reports assess a candidate country's progress toward meeting all the requirements for membership (Grabbe 2002: 262). Specifically, the regular reports and opinions provide a 'gatekeeping' function because they are used to determine when further negotiations can commence and thus provide a constraint on domestic policy (Sasse 2008).

In principle, the justice system so far, within the processes of EU integration has not resulted in the creation of uniformity, i.e. a united model of justice system for every EU member; therefore, a rational justice system remains with the specific features of each member state. The EU accepts that each state has the right to organise its own judicial system in the manner it considers most appropriate. The aim behind this policy of the EU is to protect the rights granted to individuals and legal persons (and the rights defined by EU law) in a practical and effective manner despite differences in the form of how each justice system is organised. The European Court in Luxembourg³ has supported such an idea, albeit that there are some inconsistencies.

The question of the capacity and effectiveness of the judiciary in states aspiring towards EU membership is required at a more basic level, mostly focused on the political domain, in requiring that states present themselves as stable democracies with institutions capable of guaranteeing human rights in putting into effect the principle of the rule of law. At the same time, states which join the EU will have from the outset an important role in the accomplishment of judicial reform, while their further progress in the creation of a competent and independent judiciary will be monitored

- 2 Political: stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities; economic: existence of a functioning market economy and the capacity to cope with the competitive pressure and market forces within the Union; and acceptance of the Community *acquis*: the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.
- 3 The directives of the Brussels I and II Conventions on the execution of judicial judgements have been passed, as has directive 1348/2000 expediting the transmission of documents in judicial and extrajudicial matters and directive 743/2002 on the general rules for encouraging judicial co-operation in the area of home and justice affairs.

throughout at local and international level. In any event, the EU – even with the current membership – is focused on drafting policies and pursuing strategies giving insight into the importance of having a highly competent and effective judicial system.

EU members were aware that home and justicial affairs needed to be addressed as the immediate concern. In this direction, specific tasks for the European Commission were laid down in the Treaty of Rome;⁴ the Treaty of Amsterdam, which came into force in 1999; and the conclusion of the European Council meeting in Tampere (Finland) in 1999.⁵ Concrete measures based on co-operation in the area of home and justice affairs were achieved when the Maastricht Treaty was signed in 1992 with the setting up of a small task force. However, the aspirations of EU member states towards uniform standards have, so far, been limited mostly to the area of the mutual recognition and execution of judicial decisions, i.e. to facilitating access to the courts for EU citizens on the territory of other member states, with the crucial intent of ensuring that every EU citizen can have equal access to bodies of state power everywhere in Europe, as if with his or her own national bodies.

In this situation, one should acknowledge that the assessment of a country's progress towards judicial reform is a challenging task, especially when there are no strictly enunciated criteria that the principle of the reform of the judiciary are required to meet.

Judicial independence and the EU

Nevertheless, there seems to be a global consensus that independence, impartiality and integrity are core attributes which any judge should be required to possess in order for a state adequately to reflect the paradigm of the rule of law. Such values are, therefore, internationally accepted for judges and, for that matter, the other professions which play a significant role in court proceedings.

In the context of the motive force that prospective EU membership gives to the reform of the judiciary, it is clear that an independent judiciary is an ultimate goal within the ambit of EU states to support the EU as a community based on common normative principles and values. However, at this point, too, there is substantial disagreement in the interpretation of judicial independence concerning the checks and balances which exist between major power domains; consensus no longer exists even among established democracies.⁶

Trends regarding judicial appointments have been identified within the Council of Europe. In 2007, the Venice Commission issued a report on judicial appointments establishing that the choice of an appropriate system for judicial appointments was one of the primary challenges faced by newly-established democracies. According to

4 Part two, Articles 17-22; Part Three, Title III, Articles 39-47.

5 http://ec.europa/justice_home/index_en.htm.

6 For more on EU inconsistency in the monitoring of judicial independence regarding Latvia and the Czech Republic, see Smilov (2006) 'EU Enlargement and the Constitutional Principle of Judicial Independence' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (Eds.) *Spreading Democracy and the Rule of Law* Springer Netherlands, pp. 313-334 at pp. 321-322.

the report,⁷ an appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees as regards its composition, powers and autonomy. Members of the body governing the judicial system are appointed from the executive and legislative domains; therefore, it is considered as one of the checks and balances within the overall judicial system (Smilov 2006: 318). International standards in this respect are more in favour of the extensive de-politicisation of the process. However, no single non-political ‘model’ of appointment system exists.

In the Anglo-Saxon model, the minister of justice has the power to make judicial appointments based on advice or nomination from among senior members of the judiciary. Additionally, the minister of justice retains powers regarding the promotion and demotion of already-appointed magistrates and may well have certain powers concerning the imposition of disciplinary sanctions. Other systems prefer not to empower the minister of justice with powers in the appointment, promotion and demotion of magistrates. Rather, in these systems this function is entrusted to an independent body governing the judicial branch.

Accountability is another component strongly linked to an independent judiciary. Some systems are in favour of political accountability via the minister of justice; other systems rely more on professional ethics and peer evaluation on the basis of professional standards.

It is acknowledged that there is no best solution; all these systems have advantages and disadvantages. Instead, what is required is a basic minimal set of requirements which all democracies must meet and, as long as these requirements are met, different institutional models reflecting a diversity of principles and values are acceptable.

After all, as the European Court of Justice had already argued in the early 1960s, if the European Community left it entirely up to the member states to decide on how to embed European law in the national legal order, a uniform Community-wide application of European law could well be frustrated. It would then depend on member states on whether or not to allow individuals to rely on European law in national courts, and whether or not to give European law precedence over national law. Indeed, the European Union only possesses those powers that member states have conferred upon it, namely in treaties that states have all voluntarily and unanimously ratified.

Some states have gone further, referring to a ‘Europe clause’ inserted into their national constitutions. Germany and France have such a clause; the Netherlands does not; while the UK is more specific since the UK statute of accession to the (then) European Economic Community is an ordinary piece of legislation having extraordinary constitutional consequences. Kosovo does not have any ‘Europe clause’ *per se* inserted into the Constitution; however, European values are evidently enshrined in the Constitution (Emmert, 2008).

7 Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

The uniqueness of the Kosovo Constitution

The constitutional sovereignty of Kosovo is one of the requirements which the international community deems essential for building statehood, as a constitutional order is a necessary precondition to create a viable and effective state. In this vein, modern constitutions define the power of a state within the international community through the limitations that are imposed on the government. Nowadays, constitutionalism is understood, and has been celebrated, as an internationalisation of a new global commitment to human rights and democracy (Peters 2009: 49).

Thus, in Kosovo the constitution does not only reflect the relationship or the architecture of the government and guarantees citizens' rights; instead, the shape and the principles of the institutions that form the basis of the constitutional regime are to be considered as unique. The drafters of the Constitution of Kosovo – USAID as the main donor, the Venice Commission and a group of national experts – prevailed with the concept that the prevention (or resolution) of ethnic conflict is crucial in maintaining stability and peace. Therefore, the Kosovo Constitution became a model for attaining the highest standards of human rights, with Article 53 considered as an innovation in its stipulation that:

[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

On the one hand, this Article opened the possibility for the citizens of Kosovo to direct their requests to the national Constitutional Court until such times as Kosovo becomes a member state of the Council of Europe (in the language of the Convention). On the other hand, through this provision international law directly becomes a part of the national law of Kosovo.

Minority rights are regarded as an instrument for attaining stability and are considered as a core element of a viable constitutional framework. Consequently, there is a need to build a constitutional regime that softens the origin of conflicts between ethnicities. In general, the constitutional choices towards establishing the mechanisms and tools for promoting the interests of ethnic minorities were inserted mainly by establishing constitutional inventions that guarantee spaces to minorities. This being said, developing the constitutional order in post-conflict societies becomes the most crucial point in making an effective viable state (Islami 2010). In Kosovo, too, the drafters were strict in embracing international standards, providing protections for the rights of Kosovo's minority Serbian population that would extend beyond the European standards which are enshrined in Chapter III of the Constitution (Lantscher, 2008).

Regarding the security of citizens within the state, the constitutional drafters succeeded in their task of envisaging Kosovo as a multi-ethnic society. The concept of a multi-ethnic society is a rather modern one. Even the term 'communities' used by the drafters is innovative. This term is used in the Constitution in order not to have differences between the term 'majority' and 'minority'. As such, it responds to the needs of states with a plural ethnic composition and which are noted for internal violence. The declaratory considerations for the Constitution of Kosovo remain pro-

foundly important in terms of envisaging Kosovo as a state of citizens, rather than a nation state or a state in which one ethnicity prevails, defining it as a multi-ethnic society and regarding Kosovo as a state which provides additional human rights guarantees for ethnic minorities.

Building the rule of law through the constitutional system

The Constitution is not a particular historic document or even a legal structure but rather a broader regime constituted from a combination of legal commitments, institutions and the continuing political contestation over ideas and resources. Such an approach to the Constitution delivers an extraordinary insight into the structure and functioning of varied constitutional orders and the struggle to elucidate mechanisms and pathways leading either to gradual or to dramatic change. Therefore, the Constitutional Court, through its role as interpreter of the Constitution, comes to the fore in revealing the basic values of the system.

In Kosovo too, like in other eastern European states, the desire to consolidate the state has shown that jurisprudence in its first steps was targeted more on disciplining the government and less on human rights *per se*.

Therefore, decisions of the Constitutional Court saw the resignation of two presidents. In the case of President Fatmir Sejdiu,⁸ for instance, it was found that he was in violation of the Constitution by holding the position of president of a political party while, at the same time, being president of the country. Concerning President Paçolli, it was found that he had been elected president without reaching two-thirds of the votes of parliament.⁹

The Constitutional Court of Kosovo was seen as the institution with the highest reputation, especially after the resignation of these two presidents. However, the Court also came to be seen as a guardian of the activities of parliamentary deputies. This was seen especially in two decisions on the ‘immunities’¹⁰ and the so-called ‘privileges’.¹¹ In the ‘immunities’ case, the government of the Republic of Kosovo, as applicant, filed a reference with the Constitutional Court on the issue of immunities for deputies, government and the president of the Republic since there were deputies with criminal backgrounds. The issue was whether they could be sheltered under the immunity norm. The Constitutional Court came to the conclusion that:

- 8 *Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo vs. HE Fatmir Sejdiu, President of the Republic of Kosovo* Constitutional Court of Kosovo Judgment (28 September 2010) Case KI 47/10.
- 9 *Sabri Hamiti and Other Deputies – Constitutional Review of the Decision of the Assembly of the Republic of Kosovo Nr. 04-V-04 Regarding the Election of the President of the Republic of Kosovo of 22 February 2011*, Constitutional Court of Kosovo Judgment (30 March 2011) Case KO-29/11.
- 10 Case No. KO-98/11, Government of the Republic of Kosovo, *Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo*.
- 11 Case No. KO-119/10, Ombudsperson of the Republic of Kosovo, *Concerning the Constitutional review of Art. 14, Art. 22, Art. 24, Art. 25 and Art. 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L111, of 4 June 2010*.

... outside the scope of his/her responsibilities a deputy is to be treated as any other citizen... Therefore, while not performing his/her duties, he/she may be arrested or detained without a decision of the Assembly according to the regular law. (para. 96)

On the issue of the 'privileges' of deputies, the Ombudsperson as applicant filed a reference concerning the law which gave deputies who had two parliamentary mandates a 'supplementary pension'. In relation to regular pension, the Court highlighted that:

... by determining pensions to the scale of 50%, 60% and 70% of the current salary of the deputy [the Law] has set pensions that will be 8-10 times higher than basic pensions that are also paid by Kosovo budget. (para. 79)

This level of disproportion was sufficient for the Court to rule that the law was incompatible with the Constitution and should be struck out.

The Constitutional Court has achieved its aim of being addressed as the most senior institution, with its decisions respected, considered binding and properly executed. Furthermore, it was shown that the decisions of the Constitutional Court are meant to create a level of internal justice, propounding the values and democratic principles which are accepted by and binding on the people, and thus disciplining the government.

The most intrinsic part of the interpretation of the Constitution came while dealing with the general election in 2014. The major party PDK won the election; however, it could not gain a majority of seats without entering into a coalition. The issue was that no-one from the other parties (LDK, AAK, Vetëvendosje and NISMA) wanted to form a government with the major party; instead, all these parties formed a coalition and considered that they had sufficient seats to form a government. For six months, however, Kosovo existed without the creation of a new government. The President of the country did not succeed in consultations with the parties. To overcome the vicious circle, the President filed a reference (KO 103/14) with the Constitutional Court concerning the interpretation of Article 84 (14) (Competencies of the President) in relation to Article 95 (Election of the Government). The Court had to interpret the phrases 'won', and 'necessary to create the Government'. After different analysis and debates, the Court gave its decision that the coalition should have been registered before the election (according to the Electoral Law) and not following its loss. Therefore, it decided that the party who won the election could form the government and the candidate for Prime Minister would be as nominated by the political party or coalition that had the highest number of seats in the Assembly.

Many among the people were dissatisfied with the decision, but it was important that the decision was respected by all.

Relationship with Supreme Court

The issue of creating internal order through a constitutional review of individual complaints is the point at which the Supreme Court and the Constitutional Court have their meeting points. The Constitution of Kosovo makes clear the division of

tasks between the two courts. The Supreme Court belongs to the regular system of the judiciary and its main task is to apply and implement the law in line with the constitutional requirements. On the other hand, the Constitutional Court is not part of the judiciary but entirely separate from it and from any other power, in line with the general standard of the Kelsenian model.

The Constitution reflects that:

The judicial power is unique and independent and is exercised by courts. (Article 4(5))

Also, it specifies the role of the Supreme Court in the same manner as other countries of Europe do in their constitutions:

The Supreme Court of Kosovo is the highest judicial authority, (Article 103(2))

while its:

Organization, functioning and jurisdiction... shall be regulated by law. (Article 103(1))

As such, the Constitutional Court, as an independent organ of the Constitution, has the duty to protect constitutionality and to make final interpretations of the Constitution. These general provisions are further operationalised in Chapter VII of the Constitution (Articles 102-107).

On the issue of references brought based on the decisions of the Supreme Court, the Constitutional Court has not found any violation and has generally been in agreement with the findings of the Supreme Court, as far as both the facts and the law are concerned. Thereby, the Constitutional Court has repeatedly stated that it is not a court of appeal, or a court of fourth instance, in relation to the Supreme Court as the final instance of the regular system of the judiciary.

Otherwise, three decisions of the Constitutional Court have found violations of constitutional rights. In these cases, the Court has emphasised that the Constitutional Court has the jurisdiction to enquire whether ordinary court proceedings, including those conducted before the Supreme Court, implement the rights protected by the Constitution of Kosovo. However, its role is not to impose a decision on the merits of such cases based on their facts.

Human rights as a prerequisite for rule of law enforcement

The Constitutional Court refers to the European Convention on Human Rights and Strasbourg case law in its jurisprudence, by interpreting the Constitution and the Convention in a complementary manner as would be required to protect the fundamental rights and freedoms enumerated in both. Many of the countries of Europe which emerged from totalitarian rule in the last number of years have adopted European standards in the protection of human rights. The constitutional system in Kosovo

vo is one, like others, which is based on the pillars of ‘democracy, human rights and the rule of law’ (Article 53).¹²

Initially, most of the referrals to the Court were individual complaints. This led to the development of admissibility criteria, developed in conjunction with Article 113(7) of the Constitution and the Law on the Constitutional Court of the Republic of Kosovo. What is more, the Court drew on ECtHR case law, not only with regard to substantive rights but also with regard to the admissibility of individual referrals. At the same time, the Constitutional Court has managed to give many decisions as regards the non-exhaustion of legal remedies and, therefore, the inadmissibility of cases before it, concerning religious freedoms, reiterating the constitutional provision on secularity and the neutrality of the state in religious matters, as well as on electoral rights, property and the need for a fair trial. In this direction, the decisions which emanate from the ECtHR provide binding interpretative guidelines not only for all courts in Kosovo but also other state organs, assisting them on how fundamental rights and freedoms must be interpreted and applied in Kosovo.

Conclusion

The rule of law is one of the founding principles stemming from the common constitutional traditions of all EU member states and is one of the fundamental values upon which the European Union is itself based. Respect for the rule of law is a prerequisite for the protection of all the fundamental values listed in the Treaties, including democracy and fundamental rights.

In recent years, the EU has been confronted with crisis events in some member states which have revealed systemic threats to the rule of law. This article has, in consequence, aimed at analysing the rule of law in Kosovo, trying to give an answer as to whether the Constitutional Court could set down a template as regards the system of the rule of law. In order to give such an answer, the system of the EU regarding the search for a best practice model, which could serve as a guideline to build upon, was analysed. There is, however, no uniform standard among member states; therefore, Kosovo is striving to build its own system. In as much as the Constitutional Court is respected and its decision are executed, the establishment and performance of the Court has certainly contributed to building the rule of law in Kosovo through judicial review within the political system. Justices and their rulings in general, both in former communist countries and in Kosovo, have promoted the institutionalisation of a political pattern which relies on constitutionally-resolved conflict. The Constitutional Court in Kosovo has, from the beginning, been a stabilising factor in the political system during the complicated period of democratic transition and the building of a new statehood.

In this way, the decisions of the courts in general may be understood as interpreting the constitutional text, but without losing their general commitment to the rule of law, constitutionalism and the separation of powers.

12 And cf. also Copenhagen criteria 1993.

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