



## Interpretation of the Constitutional Court of Kosovo in relation to Immunity

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**Abstract:** The basic idea of every state which is based in the state of the law, is equality before the law. The essence of democracy is the state of the law. Nobody within a democratic state can not refuse to obey the laws. Democracy is only when the law applies equally to the people in power, the authorities and the citizens. Exemption from the principle of full implementation of the law violates the basic values of society. Immunity is the privilege of high authorities not to account before the law as a protection for the independence of some institutions. The need for this legal guarantee is directly related to the level of independence and neutrality of the judiciary in each state. In some European developed countries, recently social demand has increased in order to reduce immunity. In recent times, in modern countries, there is a need to find a proper balance between the need to protect the independence of constitutional actors and the need for legal control of all powers exercised within the state. The legal loopholes in the rule of law have to deal with increased control over the misuse of official powers.

**Keywords:** law; state; power; immunity; judiciary

### 1. Constitution of the Republic of Kosovo and Immunity

The Constitution of the Republic of Kosovo has provided an incredibly complete staff regarding the issue of immunity. Has raised immunity as a full constitutional category. As such, the Constitution has provisions relating to the immunity of all senior state officials, ranging from: MPs, President, Government members, judges, prosecutors and judges of the Constitutional Court. Article 75 of the Constitution of the Republic of Kosovo is the article that deals with the issue of the immunity of MPs. As such, the content of this article is such as “Assembly MPs are immune to prosecution, civil lawsuit, or dismissal for their actions and decisions within their scope of work as MP of the assembly. Immunity does not impede the prosecution of

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MPs for actions taken outside the scope of their responsibilities as MP of the Assembly” (Constitution of the Republic of Kosovo, 2008, article 75, paragraph 1). While, the next paragraph of this article refers to the issue of the MPs arrest, who says “MP cannot be arrested or detained while performing his or her duties as MP of the Assembly, without the consent of the majority of the MPs of the Assembly” (Constitution of the Republic of Kosovo, 2008, article 75, paragraph 2). In the context of regulating the issue of immunity of MPs, in addition to the constitutional provisions, the immunity is also detailed with the legal provisions respectively those of the law on the rights and responsibilities of the MP, as well as those of the Assembly Regulation. In the practical context, the question is raised: What are the key elements worth to be discussed and analyzed on the issue of MPs immunity? Surely, we must start by concretizing the constitutional provisions, in terms of interpretation, on how far can immunity go. In paragraph 1 of Article 75 of the Constitution of the Republic of Kosovo, MPs can be protected in the framework of immunity from all civil lawsuits and criminal prosecution for all actions they undertake, within the scope of their mandate as MPs. But what are the duties of the MP and how they are exercised? In this case, the scope of the MPs means the exercise of their powers as foreseen by the applicable laws and the Constitution of the Republic of Kosovo, regardless of all tasks of the MP, such as speeches in sessions, work in committees and other subsidiary bodies. During the sessions, representation of citizens’ interests, etc. Apart from the duties performed by the MP in the Assembly, the Law on Rights and Responsibilities of the MP in the field of competences and work of the MP also qualifies as a MP’s duty also its report with local and central institutions, eg. The right of the MP to participate in local government bodies may be one of the duties of the MP outside the assembly (see articles 11 and 12 of Law no. 03/L-111 on the rights and responsibilities of the MP). Depending on the angle at which the issue is considered, the scope of the MPs immunity is only within the scope of activity, ie in the framework of the MP’s duties, this is stated by the Constitution, the relevant Law and the Rules of Procedure of the Assembly of the Republic of Kosovo. Referring to the Constitution of the Republic of Kosovo, the protection of immunity for MPs only applies within the scope, although it is a very big problem, to summarize the scope of a MP. In this context, the question is immediately raised whether the MP is considered only when it is inside or even outside Parliament, since it is very easy for a MP to be in duty even outside Parliament’s offices. Although this issue is still controversial, some constitutions determine decisively that the MP has immunity only within the parliamentary offices, and even go as far as to exclude immunity even in the

corridors of parliament. In fact, this dimension of immunity protection would be conditionally called the “dimension of scope” of protection from immunity. Regardless the interpretations that we can make, however, the Constitution of the Republic of Kosovo, and nor the other sub-constitutional frameworks are not quite clear in terms of the so-called “immunity of scope” of the MP, as if is left to the certain judgments, assessments and interpretations. Therefore, on this issue the Constitutional Court of the Republic of Kosovo has given some interpretation which we will later elaborate as part of the analysis of this institution’s verdict on the immunity issue. In addition, the immunity of a MP can be viewed from the timeframe, so “the time dimension of immunity”. What does this mean? This dimension implies the time that is included within defence of a MP from its immunity, ie the time when immunity starts to flow and has effect. Even on this issue, the Constitution of the Republic of Kosovo but also the laws referring to the immunity of MPs are not specified with regard to the timely immunity action matter. Usually this is related to the theory of mandate, which means that immunity complies within the mandate of a MP. It is well known that the mandate of a MP automatically starts with its certification in the respective election commission, but this approach is also opposed by the other approach, since the mandate begins when the MP takes the oath (Omari, 2002, p. 95). Without discussing the issue of starting a mandate as an element, it means that the parliamentary immunity of a MP is valid only during the period as MP, ie within the mandate and even outside of it. Even though the Constitution of the Republic of Kosovo is silent, about time when the MP mandate begins to run, this is explained by the Rules of Procedure of the Assembly of the Republic of Kosovo, “MP’s immunity begins on the day of verification of the mandate and ends on the day of completion of its mandate” (Rules of Procedure of the Assembly of the Republic of Kosovo, 2010, article 22, paragraph 4). According to this, the Assembly Regulation has conceived the theory that the mandate of the MP begins with its verification in the respective election bodies. In the Republic of Kosovo there have been such interpretations that immunity even applies to actions that are made outside the mandate of a MP. However, it is the Constitutional Court of the Republic of Kosovo, which has clarified the issue of timely action of the immunity of a deputy, and to the same we will refer below. In addition to the dimension of criminal prosecution, the Constitution of the Republic of Kosovo also refers to the arrest of MPs and the impacts of immunity in this aspect. Decisively, the Constitution of the Republic of Kosovo refers to the issue of arrest of MPs, so “The MP of the Assembly of Kosovo cannot be arrested or detained while performing his/her duties as a MP of the Assembly without the consent of the

majority of the Assembly MPs” (Constitution of the Republic of Kosovo, 2008, article 75, paragraph 2). In the context of the immunity action, the Constitution of the Republic of Kosovo also refers to the possibility of arresting a MP. The Constitution is very clear in this regard, in that sense that the MP of the Assembly of the Republic of Kosovo can not be arrested, nor detained without the consent of the majority of the Assembly MPs. This means that in all cases the MP can not be arrested unless a prior approval is received from the Assembly itself. Nevertheless, in the Rules of Procedure of the Assembly of Kosovo and the Law on Rights and Responsibilities of the MP, an exception was made regarding the issue of arrest of the MP. What is this exception? The MP may be arrested without prior removal of immunity only if caught in act (in flagranti) while committing an offense punishable by five or more years in prison (Rules of Procedure of the Assembly of the Republic of Kosovo, 2010, article 22, paragraph 7 and the Law no. 03/L-111 on Rights and Responsibilities of the MP, 2010, article 9, paragraph 9). However, certain issues are still raised, when a MP is in duty or performing a duty because the same can perform its duties while still at home etc. However, without wanting to be exposed toward a wider meaning, we will refer to the opinion given by the Constitutional Court of Kosovo that is related to the question of the arrest of the MP. As it can be seen the Constitutional and Legal System of the Republic of Kosovo, has also applied the same standards as the other states on the immunity of MPs, which are in the same dimensions. Almost in most countries, immunity protects the MP from the words spoken and its statements at the Assembly (Law no. 03/L-111 on Rights and Duties of the MP, 2010, article 9, paragraph 2). In addition, as in the Republic of Kosovo and in other systems, immunity almost likewise acts against the arrest of MPs, where in most cases the MPs enjoy immunity from arrest and can not be detained nor arrested without the consent of the Assembly. Another important issue when it comes to the immunity of the MP is the immunity removal, ie the procedure of its removal. In this regard, the Constitution of the Republic of Kosovo remains silent, the issue of the immunity removal is regulated by the Law on Rights and Responsibilities of the MP but also with the Rules of Procedure of the Assembly of the Republic of Kosovo. In the context of the immunity removal in 2011, uncertainty was created, especially with regard to procedures of its removal. Exactly in June, the Head of Mission for Rule of Law in the Republic of Kosovo, Xavier Bout de Marnhac, had asked the Chairman of the Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi for adoption of a resolution through which removes the MPs immunity, thus avoiding legal proceedings regulating this issue. This had happened, since at that time several circumstances of that nature had been introduced and several legal processes had

been opened against the MPs of the Assembly of the Republic of Kosovo, while in silent was aluded in the MP of the Assembly, Mr. Fatmir Limaj, who faced charges in the so-called "Klečka".

## **2. Immunity of other Senior Officials**

Apart from the immunity of MPs, as a special category, the Constitution of the Republic of Kosovo, but also the relevant applicable legislation refers to the issue of immunity of other senior officials. In this context, the immunity of the President of the Republic of Kosovo is important. The Constitution of the Republic of Kosovo in this way refers to the immunity of the President "The President of the Republic of Kosovo enjoys immunity from prosecution, civil lawsuit or dismissal for actions taken within the scope of the responsibilities of the President of the Republic of Kosovo" (Constitution of the Republic of Kosovo, article 89). Within this provision, we observe three common dimensions of immunity in the case of the president. The first, is seen that immunity only acts within its scope, a common element also in the immunity of a senior official, the immunity in this case also acts against prosecution, civil lawsuits, but also dismissal. The third, which is important, unlike the immunity of MPs, in the case of the president, the Constitution of the Republic of Kosovo does not refer at all to the protection of the President from possible arrests. The question of the eventual protection of the President from arrest within its immunity does not refer itself to the Law on President. Such a situation in this case would be qualified as a legal vacuum, facing an issue that can easily be presented in practice. Within the immunity of the President, the protection of the President comes within its testimonies. Thus, the immunity in this framework protects the President of the Republic of Kosovo, to such a degree by protecting the President even during the process of eventual testimony. Thus, the President of the Republic of Kosovo while giving its testimony is not obliged to disclose any information that would incriminate it on any criminal or civil case, for the actions undertaken during its mandate within the scope of work (Law no. 03/L-094 on the President of the Republic of Kosovo, 2009, article 8, paragraph 3). This provision constitutes a matter of preventive measures, in order to apply in some form the effect of immunity, in this case the president. Also, the Vice-President under the effects of immunity is deprived of protection from the disclosure of any information for which has become aware during the exercise of its mandate (Law no. 03/L-094 on the President of the Republic of Kosovo, 2009, article 8, paragraph 2). What matters to the President's immunity is related to the fact that immunity continues even after the termination of

the President's mandate and as such is not related to the so-called "time dimension" of action. Another important category of immunity within the top state officials is also the Immunity of the Government's Officials of the Republic of Kosovo. Looked at other officials also in the Government of the Republic of Kosovo, the immune system operates roughly in the same proportions "Members of the Government of the Republic of Kosovo enjoy immunity from prosecution, civil lawsuit and dismissal, within their responsibilities as members of the Government of the Republic of Kosovo" (Constitution of the Republic of Kosovo, 2008, article 11). As we can see immunity acts in the same way, as in the case of the President and even at members of the government. What is important to emphasize in case of Immunity of Government Officials has to do with the fact of the legal vacuum for the removal of immunity. The Republic of Kosovo has not yet adopted the Law on Government. In this way the work of the government is still based on its Rules of Procedure. The current draft of the Draft Law on Government, although it exists as such, does not speak at all about removing the immunity of Government Officials. The only provision referring to this issue is Article 11 of the Draft Law, which as such states that the termination of Immunity of Government Officials is done in accordance with the Law on Immunity (Draft Law on Government of the Republic of Kosovo, 2009, Article 11). Also, the Republic of Kosovo does not yet have a law on immunities, therefore reference in the draft law is prejudiced, perhaps in the future such a law will be adopted. The same applies to the judges of the Constitutional Court and their immunity "Judges of the Constitutional Court of the Republic of Kosovo from criminal prosecution, civil lawsuit and dismissal for the decisions taken, opinions expressed and actions taken within the scope of the Constitutional Court's responsibilities (Constitution of the Republic of Kosovo, 2008, article 117). Even in the provision referring to the immunity of judges of the Constitutional Court, action of immunity is the same, ie protection from immunity and its action applies only within the the judges' scope of work and within their mandate. Regarding the other dimensions of immunity of judges of the Constitutional Court, the Law on the Constitutional Court on the one hand and the Rules of this Court do not refer to the issue of the removal of immunity or other important matters. However, the Rules of the Constitutional Court indirectly refers to the immunity issue in the provision referring to the dismissal of the Constitutional Court judges. Since immunity also protects judges from dismissal, the procedure for their dismissal in this case may be considered indirectly as a procedure for obtaining their immunity. To interconnect this issue with immunity, we will refer to the procedure of dismissal of judges of the Constitutional Court. There are some important issues regarding dismissal and the

reasons for dismissal are among the first, and as such a judge of the Constitutional Court may be dismissed in these cases: 1. In case of committing of any serious crime, 2. In case of serious neglect of job tasks, 3. In case of permanent loss of ability to act, 4. In case of illness or a health problem that makes it impossible to exercise the responsibility and functions of a judge (Rules of Procedure of the Constitutional Court of the Republic of Kosovo, 2014, Rule 6). In some form the procedures and cases of dismissal of a judge mentioned above may be personified by the immunity removal procedure which is not decisive, as in the Constitution, but also in the applicable legislation which refers to this issue to the judges of the Constitutional Court. In this case, also the dismissal procedure should be seen in analogy with the procedure for removing the immunity of judges if, for the four above-mentioned cases, the judges of the Constitutional Court are not protected by immunity. So the judge in case of committing a serious crime will of course be arrested and subjected to other legal proceedings. Also, immunity does not protect the judge in case of violation of its duties. Above, we emphasized that immunity only works for decisions within their scope of work. Obviously loss of ability to act and illness are the causes that lead to their immediate discharge (Rules of the Constitutional Court of the Republic of Kosovo, 2014, paragraphs 2, 3, 4 and 5). As can be seen above, the immunity of judges of the Constitutional Court acts and protects them only for actions undertaken within their scope of work and competences. Whereas there are no specific provisions regarding the case of eventual arrest of a judge of the Constitutional Court. The question arises, what if there is a need in the future and the circumstances are created for the arrest of a judge, should a permit be obtained from the Constitutional Court, respectively by a panel of judges or arrest can be made immediately. Perhaps before the eventual arrest was made, a prior approval would be needed, as it occurs in the case of MPs and in the case of court judges and also of prosecutors. In addition, there are also no concrete provisions on immunity removal, as there are no cases of the removal of immunity of Government Officials but also of the President. The last category of senior officials is the immunity of judges and prosecutors of the Republic of Kosovo. The Constitution has clearly defined the protection level of the judges immunity of the Republic of Kosovo. Hence, the Constitution refers to the immunity of judges in this way: "Judges, including also jury judges, enjoy immunity from prosecution, civil lawsuit and dismissal, for decisions made, voting made, expressed opinion, and other actions undertaken within the scope of their duties and responsibilities as judges" (Constitution of the Republic of Kosovo, 2008, article 107, paragraph 1). The second paragraph of Article 107 of the Constitution, is extremely interesting, the same specifies "Judges

and jury judges do not enjoy immunity and can be discharged in case they have violated the law intentionally. Another issue is therefore raised, so on how to prove that a judge has deliberately violated the law, of course that this belongs to the Judicial Council, since there are many ways that a judge may abuse or tentatively violates the law, but it will be difficult to prove the will or purpose of the judge to violate it. The other dimension of immunity of judges is their arrest. In no way, the immunity of judges not act against their arrest. The constitution refers only to a matter regarding the arrest, and it is the notification that should be made to the Judicial Council in case of a judge arrest (Constitution of the Republic of Kosovo, 2008, article 107, paragraph 3). The Constitution, nor the relevant laws do not provide more clarifications regarding the judges arrest. Among other things the law on courts, when speaking of the immunity of judges, refers to the Constitution, "judges have immunity as defined in the constitution" (Law no. 03/L-199 on Courts of the Republic of Kosovo, 2010, article 31). In addition, another category that is classified under the immunity of judges are members of the Kosovo Judicial Council, a special institution in the justice system that cares for an independent justice system and oversees the work of the courts. Just as judges, members of the Judicial Council are also protected from immunity for all actions and decisions within their scope and competences. Just like judges, members of the Judicial Council are not protected by immunity, if it is proven that they have committed violations of the law on purpose, situation which is the same even for judges. Regarding the arrest, while for judges should be notified the Judicial Council, in case of arrest of the members of the council, the Chairman itself of the Judicial Council should be notified (Law no. 03/L-223 for the Kosovo's Judicial Council of the Republic of Kosovo, 2010, article 12). Perhaps, with regard to the immunity of judges, we should also point out an issue, the immunity of the Chairperson of the Judicial Council. The relevant law does not refer separately to this immunity and in this case also for the Chairperson of the Judicial Council, there are provisions for the immunity referred to all members of the Judicial Council, since the same is one of the members of this council. The Constitution has foreseen nothing regarding the immunity of the State Prosecutor, leaving everything to the law in order to regulate such a thing. The same situation and at the same level of immunity also applies to prosecutors as well as to judges, so the immunity only acts within the Prosecutor's scope and does not act if it is proven that the Prosecutor has committed violations of the law intentionally (Law no. 03/L-225 for State Prosecutor of the Republic of Kosovo, 2010, article 23). On the other hand, if a prosecutor is arrested or is only charged, the Chief State Prosecutor must be notified without delay. This situation is similar to that of judges, when for a



similar case should be notified the Judiciary Council, in this case the Chief Prosecutor is notified. In addition to prosecutors, members of the Prosecutorial Council also have the same immunity. In the same way, the immunity also acts on members of the Prosecutorial Council, therefore, only within their scope and the same can be discharged if they have deliberately violated the law and can only be arrested after the Chief Prosecutor's Office has been notified (Law no. 03/L-224 on the Kosovo's Prosecutorial Council of the Republic of Kosovo, 2010, article 10).

### **3. Interpretation of the Constitutional Court regarding the MPs Immunity, the President and Members of the Government of the Republic of Kosovo**

Above, we have mentioned that the immunity of MPs, chairman and members of the government had gone to the Constitutional Court for interpretation, as a result of a request made by EULEX chief in 2011, to the Chairman of the Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, requesting the issuance of a resolution to remove or weaken the immunity of the Assembly MPs. In response to this request, the Chairman of the Assembly replied that the immunity removal procedures were clear, so these procedures should also be followed in order to do such a thing, without the need for a resolution to remove the immunity. Despite legal clarity for the removal of the MPs' immunity, this issue was never voted at the Assembly and was not subjected to regular legal remedies for its removal. In fact, the issue of immunity began to be discussed and to take this way of interpretation when factual circumstances were presented and the MP of the Assembly of the Republic of Kosovo, Fatmir Limaj, was indicted for war crimes in the "Klecka" case. In this context regarding immunity, many questions and dilemmas began to be raised, such as, for example. Can the MP be arrested, to what extent has immunity, who can remove immunity and in what procedure, Is immunity also valid for acts committed when a person does not have the status of a MP. Mostly these were the key issues that were raised at this time stagnation that was created in connection to immunity and situation, while the factual situation was created. "The Constitution clearly defines who can remove the immunity in this case the Assembly of Kosovo has provided the correct answer". Thus, was approached by another connoisseur of constitutional affairs, K.Sejdiu, to the response that the Assembly had given to the EULEX rule of law mission in relation to the removal of immunity (<http://www.qendra.info/aktualitet/politike/10767-imunitetin-deputetit-ia-merr-kuvendi.html>, accessible on 18.11.2018). Meanwhile, university professor I. Salihu, 222

the issue of immunity and debate about it, has called complication and unnecessary debate, while unable to reach an agreement between the Parliament and the Government, he preferred the Constitutional Court as an option to make the interpretation. Regarding the immunities, among others, one of the best known constitutional issues was also pronounced, simultaneously Chairman of the Committee on Constitutional Amendments, university professor A. Bajrami, who among other things emphasized that the procedures for removing the immunity of the MP were extremely clear and denied the need for involvement of the EULEX Chief Prosecutor in this matter (Bajrami, 2011, p. 3). That is all concerning the scientific debate about immunity, but of course this debate shows best how controversial the issue of immunity was, most of all, when the road was lost, it was complicated as a whole. As a consequence of these debates, the immunity issue has ended at the Constitutional Court for interpretation, by choosing a secondary route from what was already paved, by the clarity of the legal provisions. Since the Assembly, namely the Chairman, Mr. Jakup Krasniqi, had returned the refusal letter for issuing a resolution on the removal of immunity, another secondary route was found to interpret and clarify the immunity as a whole, and this route was the interpretation of the constitutional provisions that were about immunity, with particular emphasis on the immunity of MPs.

#### **4. Immunity Case no. K098/11 before the Constitutional Court of the Republic of Kosovo**

The request to the Constitutional Court on behalf of the Government of the Republic of Kosovo was deposited by Prime Minister Hashim Thaçi. The request was filed on July 21, 2011. The request of the Government of the Republic of Kosovo explained the clarification of some questions concerning the immunity of various state bodies, including MPs, Chairman and members of the Government of the Republic of Kosovo, since such a thing was necessary for the democratic functioning of the institutions (The Judgement of the Constitutional Court of the Republic of Kosovo, case no. K988/11, point 1, 2 and 3). The constitutional basis of the Government of Kosovo request was Article 113.3.1. of the Constitution of the Republic of Kosovo. Meanwhile the issue, whether the government is entitled to seek an interpretation of the Constitutional court has not remained without debate, much less when the provision of the constitutional basis of Article 113.3.1., refers to the conflict for competence, while it is not clear for what conflict of competence is about in the concrete case. The other constitutional basis on which the government's request is

based is Article 93.10, which emphasizes the competence of the government, that the same can refer the issue before the Constitutional Court, a general provision, which is then reflected in Article 113 of the Constitution of the Republic of Kosovo. Debates on the issue of whether the government under these circumstances can put the Constitutional Court in motion for the aforementioned aspects, have also been transformed into profound scientific debates. In fact, by analyzing the constitutional basis upon which the government was summoned, when has submitted the request to the Constitutional Court, the connoisseurs of constitutional affairs had estimated that this should have be declared inadmissible and the court would create a dangerous practice if it did such thing. Immediately on July 22, the President of the Constitutional Court, officially informed the Chairman of the Assembly, the President and the Prime Minister of the Republic of Kosovo, requesting clarification on the issues raised within 45 days (see Paperwork sent to the President by the Chairman of the Constitutional Court of the Republic of Kosovo, 2012, ref. no. KK 154/11). It is important to stop at the paperwork that the President of the Constitutional Court has send to the Chairman of the Assembly of the Republic of Kosovo, Mr. Krasniqi, in which he requested the so-called Traveaux preparatoires (preparatory works), of the Constitution of the Republic of Kosovo, respectively articles 75, 89 and 98, which deal with immunity and issues raised by the government (see Paperwork sent to the Chairman of the Assembly by the Chairman of the Constitutional Court, 2012, ref. no., KK 155/11). Apart from the preparatory work, by this paperwork was also required the preparatory work and all the minutes that pertain to the Law on Rights and Responsibilities of the MPs regarding immunity, preparatory work and all minutes of articles of the Assembly's Regulation adopted in 2010, as well as preparatory work regarding Articles dealing with immunity in the Law on President of the Republic of Kosovo. Now, in this context, the question arises as to why the Constitutional Court has required Traveaux preparatoires, or perhaps wanted to go itself beyond the Constitution, beyond what the Constitution itself has stated. In fact, a narrow interpretation leads us to that way of thinking, that the Constitutional Court, even in its interpretation, has gone beyond what constitutes the Constitution and the applicable laws, since has analyzed and he has also based its interpretation on preparatory work, to look in a way for something that is authentic in terms of immunity.

#### **4.1. Eligibility of the Request**

An extraordinary argument of debate was made regarding the eligibility of the Constitutional Court's request whether the request for review should be accepted or

not. In the context of the eligibility of the request, the Constitutional Court usually assesses whether the request is submitted by the authorized party and whether this request is within the legal deadline. So, did the Government's request met these two important elements, right here was seen the problem of the matter. In fact, Article 113 clearly defines who is entitled to bring the Constitutional Court into motion and for what issues can eventually this court be brought into motion. The constitutional basis of the government's request was Article 113.3.1 and he 93.10, in fact Article 113.3.1, was related to the resolution of the conflict of competence, because as stated above this section of the Constitution specifies in which cases the entities are entitled to put into motion the Constitutional Court, while the actual qualification did not correspond and did not legitimately justify the fact that the government had made a request to the Constitutional Court for an issue outside its scope, ie on the immunity of MPs and the President of the Republic of Kosovo, something that was very clear. The problem was precisely here, whether it would be qualified as such? However, the Constitutional Court was generally accepted in a general manner, so that the immunity issue is a constitutional issue and as such, should be subject to interpretation by the court, since the issue of immunity affects the democratic functioning of the state, but also the independent functioning of the institutions. In fact, the Constitutional Court had even ruled out the constitutional basis regarding to Article 113.3.1, considering as sufficient the general provision of Article 93.10, where it was said that "the Government has the right to refer issues in front of the Constitutional Court" (Constitution of the Republic of Kosovo, 2008, article 93.10). As noted above in his testimony, Mr. Fatmir Limaj, among others by "attacking" the decision on the issue of its admissibility, has noted the deadline issues, which were in fact not respected. Meanwhile, the Constitutional Court decided to accept the request solely on the ground that the immunity issue constituted a constitutional issue, whereas for the issue of time-limits the court was reasoned that within the framework of Article 93.10, the deadlines were not foreseen.<sup>1</sup> The Constitutional Court, in fact, believed that immunity was valid only within the scope of the MPs. Above, before commenting on the opinion of the Constitutional Court, we raised the question of what can the scope of a deputy mean?, The Constitutional Court relates this issue to the competencies of the Assembly of the Republic of Kosovo, and therefore the scope of the MP is considered the functioning of the competences of the Assembly of the Republic of Kosovo. Furthermore, Article 65 of the Constitution of the Republic of Kosovo has determined decisively the competencies of the

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<sup>1</sup> See (The Judgement of the Constitutional Court of the Republic of Kosovo, case no. K098/11, points 40-50).

Assembly of the Republic of Kosovo. Also in the issue of the scope of work of MPs, the Constitutional Court also refers to Article 174 of the Constitution of the Republic of Kosovo, which states that MPs should perform their function for the benefit of the Republic of Kosovo, based on laws and the Constitution.

#### **4.2. Meritorious Matter**

The subject matter, as we defined above, was the immunity of MPs, the President's immunity and the immunity of the members of the government. In the dispute, the Constitutional Court, also following the practices of states and other systems in relation to immunity, has considered immunity in two directions: first immunity as a functional immunity, which included the actions of MPs within their scope, for which matter they would in no time give responsibility to any court or other body, and the second, has included the dimension for the actions of MPs undertaken outside their scope, including the dimension of prosecution on the one hand and the other on arrest, these were the two key points that the Constitutional Court focused regarding the immunity. Therefore, the Constitutional Court in relation to the immunity of MPs had responded to a series of questions, including the following: if the MP enjoys immunity from prosecution for actions undertaken outside his scope, if the MP enjoys immunity from civil lawsuits outside his scope, if the MP also enjoys immunity from discharge for actions undertaken outside his scope, and whether he also enjoys immunity from arrest also for actions undertaken outside his scope (The Judgement of the Constitutional Court of the Republic of Kosovo, case K098/11, points 40-50, 56).

### **5. How did the Constitutional Court respond to questions raised by the Government on Immunity?**

#### **5.1. Immunity from Prosecution and Civil Lawsuits for Actions and Decisions outside the Scope of Mps' Responsibilities**

The second sentence of Article 75 (1) of the Constitution provides restriction on immunity given to MPs, "Immunity does not prevent the prosecution of MPs of the Assembly for actions undertaken outside the scope of their responsibilities as MPs of the Assembly". In their capacity as ordinary citizens, according to the Criminal Code and the Code of Criminal Procedure of the Republic of Kosovo, MPs are treated the same as all other citizens. This conclusion derives from the second sentence of Article 75 (1) of the Constitution, which stipulates that immunity does not prevent the prosecution of MPs of the Assembly for actions undertaken outside

the scope of their responsibilities as MPs of the Assembly. This is further strengthened when considering Article 70 (6) of the Constitution, which stipulates that the mandate of the MP ends if the MP is sentenced for a criminal offense with one or more years of imprisonment by a final judicial decision. The Constitution does not allow restrictions or interference by the legislature in the prosecution of Assembly MPs for actions undertaken outside the scope of their responsibilities. Since the Constitution does not guarantee inviolability regarding the prosecution of the Assembly MPs for actions undertaken outside the scope of their responsibilities, they are not inviolable either in relation to criminal prosecution for criminal offenses that are alleged to have been committed before the beginning of their mandate as MPs or during the course of their mandate. Article 22 (3) of the Rules of Procedure of the Assembly stipulates that “MP shall enjoy immunity from ... criminal prosecution, while the Assembly does not take the decision to remove its immunity”. The Constitutional Court notes that this provision, regarding criminal prosecution, is of no legal value as the Constitution does not have such immunity against the prosecution of the MP. The Court reiterates once again that there is no immunity preventing the prosecution of MPs from action undertaken outside the scope of their responsibilities. There is no need for a decision by the Assembly for such criminal prosecution. The only circumstance when requesting the Assembly’s decision to waive immunity is to arrest or detain a deputy when he/she is performing his or her duties as a deputy. This is a constitutional stance (The Judgement of the Constitutional Court of the Republic of Kosovo, case K098/11, points 65-71). Regarding civil lawsuits, the Constitutional Court did not present dilemma, claiming that for both criminal prosecution and civil lawsuit, the constitutional provisions are very clear and do not require interpretation in this respect (The Judgement of the Constitutional Court of the Republic of Kosovo, case K098/11, point 72).

## **6. Immunity of Mps from Discharge and Arrest for Actions and Decisions outside the Scope of Their Responsibilities**

Regarding the issue of discharge of MPs, the Constitutional Court interprets that there is no specific provision referring to the issue of discharge of a deputy, hence Article 70 of the Constitution regulates the duration of the mandate of the MP, in fact we can not talk about getting a mandate, even though the MP has taken action outside his scope, however, such a case should be interpreted as referring to concrete cases when it comes to dismissing a MP from the office upon conviction for a criminal offense, when a MP is sentenced for a criminal offense, punishable by more

than one year of imprisonment, by a final judicial decision (The Judgement of the Constitutional Court of the Republic of Kosovo, case K098/11, point 73). The whole debate and ambiguity, as we have focused above on the issue of immunity, was the possibility of eventual arrest of the MP of the Assembly of the Republic of Kosovo. The concrete question and interpretation requested by the government was “that the MP of the Assembly can not be arrested or detained while performing his or her duties...”. Which are the duties of the MP, we understood above how it had interpreted, ie the functioning of the competences of the Assembly of the Republic of Kosovo... in this regard the question now arises, what does the provision part means “... while doing his or her duties...” it is about the MP. The Constitutional Court connects this issue to the issue of MP's mandate, sessions of the Assembly, sessions of the Assembly and meetings of the Assembly Committees of the Republic of Kosovo (Constitution of the Republic of Kosovo, 2008, article 66 and 70). So the logic of interpretation of the Constitutional Court in this case is narrow. The MP is obliged to attend the sessions of the Assembly and is considered to be performing its duties only if is in the session or at the meetings of the Assembly Committees and the reason why in fact the arrest is forbidden according to the Constitutional Court is the fact that the work of the Assembly should not be hampered, in some way, by arresting or expelling the MP. In this case, the decision of the Assembly, according to the Constitutional Court, is needed only to remove the MP from the session, as it is necessary in the sessions of the Assembly and at the same time is also the representative of the people. As conclusion, the Constitutional Court in this case interprets; that the MP in any other situation should be considered as a ordinary citizen, and it may be arrested at any time without a decision of the Assembly, if it has committed certain offenses outside his scope of work. Regarding other situation that speaks about the arrest of the MP, if it is caught in committing a criminal offense in flagranti, this issue according to court is even indisputable, because according to the court the so-called public administration of justice can not be hampered only because the MP has immunity and arrest in this circumstance is inevitable. It is, however, clearly seen that the interpretation in this area of the Constitutional Court has been quite controversial and certainly narrow. In this line we can even say that the interpretation was made from the admissibility of the request up to the answers that were key to the concrete case (The Judgement of the Constitutional Court of the Republic of Kosovo, case K098/11, points 74-98). Another issue that can not be avoided without commenting in the context of adjudgment regarding the immunities. In the framework of the immunity case, there was also debate on two issues, we would say suburban in relation to the questions asked by the government regarding

the MP's immunity in the context of interpretation. The Constitutional Court has also dealt with who is entitled to seek the removal of the MP's immunity, as well as the immunity removal procedure, as we said two not very relevant issues, after explaining the dimension and "red lines" of immunity. However, it is unclear why the court in this case has dealt with such a large dimension of interpretation for accessory issues, versus what was essential to interpretation. Perhaps this has been done to overcome the curiosity of such a multidimensional debate on the immunity issue. Since, before giving this interpretation the Constitutional Court on immunity, there were in fact some interpretations of who could apply for immunity removal, only Chief Prosecutor or Prosecutor of Kosovo, or even Eulex. The Constitutional Court within the case had given an indirect interpretation that the request could be made by the Prosecutor of Eulex as their work is based on the Laws of the Republic of Kosovo. While regarding the immunity removal proceedings, the Constitutional Court, having clarified its immunity and its dimensions, interprets that the provisions of the Rules of Procedure of the Assembly as well as the Law on Rights and Responsibilities of the MP are no longer relevant, since in fact immunity is now somehow clarified. At the end of the reasoning, among other things, the Constitutional Court reasons: "Comparative studies show that it is a prevailing attitude, when an MP is arrested by committing a serious crime, it is the duty of the authorities to execute the arrest and to notify the leadership of the Assembly of the arrest that has taken place. Article 24(1) of the Rules of Procedure states that the competent prosecution body shall immediately inform the Chairman of the Assembly for the arrest or detention. This ensures proper functioning of the Assembly" (The Judgement of the Constitutional Court of the Republic of Kosovo, case K098/11, point 113).

## **7. How does the Constitutional Court Interpret the Immunity of the President of the Republic of Kosovo?**

There is no dilemma that the President's institution is special, unlike that of the deputy and that of government officials. The President represents the unity of the people above all, and performs special functions, representing the country inside and outside. Just as in the matter of MPs and the President, the government in its request has raised a number of questions about the President's functional immunity. There are four questions, criminal prosecution, civil lawsuit, discharge and arrest, so does the President enjoys immunity, when undertaking action outside his scope of activity. Of course, its scope implies the competences of the President provided in



Article 84 of the Constitution of the Republic of Kosovo. The Constitutional Court, regarding the issue of functional immunity, interprets that the President of the Republic of Kosovo has the same functional immunity as that of the MP, ie there is no immunity from prosecution for actions undertaken outside its scope. So, immunity protects the President from responsibility within his scope. The fact that the President has no immunity from prosecution is also proven by the constitutional provision of Article 91, which states that the President may be discharged. As far as concerning the immunity of the President's discharge, Article 91, provision which clarifies the discharge procedure of the President, the interpretation of this provision in relation to immunity, it means that the president does not have immunity from discharge for actions that he may eventually undertake outside its scope. While, regarding the arrest of the President of the Republic of Kosovo, the Constitutional Court among others interprets that the President exercises unique functions attributed to him/her only. Under the Constitution, the President must be available at all times to perform these functions. They are inseparable from the Presidency and, therefore, the President must not be prevented by arrest or detention while exercising these functions. The president must always be available to perform the functions of the institutions and state affairs. When Article 90 refers to the President's temporary absence, there is no indication that arrest or detention is foreseen. It is pointless to suggest that the President's temporary absence could be linked to the voluntary transfer of his/her duties for a certain period of time with regard to arrest or detention. The arrest and detention of such a person is in contrary to the virtue of the President representing the unity of the people and embodies the statehood as the head of state. The relevant mean is the proceedings against the President in accordance with the Constitution. The president can only be arrested or detained after being discharged because he/she is no longer a President, but ordinary citizen for whom ordinary laws apply (The Judgement of the Constitutional Court of the Republic of Kosovo, case K098/11, points 125-128).

## **8. Conclusion**

Based on the Constitution of the Republic of Kosovo, parliamentary immunity finds an adjustment that is closer to the requirements for: legal provisions according to European standards, transparency, fight against corruption, democratization. Absolute and unrestricted IP can be a shelter of corruption. The immunity enjoyed by politicians is seen as an obstacle to the anti-corruption war. A complete and unconditional immunity of parliament members, is an obstacle in the investigation

of corruption. The two main reasons for refusal of conditionality or removal of parliamentary immunity may be: 1. High level of corruption and 2. Political crisis. When restriction or removal of the IP is conditioned firstly by the aim of protecting the parliament and in particular of its functions and secondly by the fact that parliamentary immunity does not have to be lawyer of the MP that has broken the law, I can say that no opposition has any reason to refuse such initiatives. Bringing to justice the MPs or investigations for corruption are often interrupted due to immunity. Giving up the immunity is not a verdict of guilt, it simply enables national judicial authorities to continue legal proceedings against the Parliamentarian. The democracy reformers should be focused on empowering IP rules based on a vision that combines public education with clearly defined parameters and protective measures to provide a depoliticized process of restriction/removal of IP. Greed for money and greed for power on the one hand and parliamentary immunity on the other hand put parliamentarians over the law and completely weaken its operational power.

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