



## **Enforcement and Effectiveness of Decisions of Constitutional Court of Republic of Kosovo in Cases of Violation of Human Rights**

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**Abstract:** The aim of this paper is to shed light on the enforcement and effectiveness of decisions of the Constitutional Court of Kosovo in individual cases involving violation of basic human rights. The reader shall be informed about effectiveness of decisions of the Constitutional Court of Kosovo, whether they offer full or partial redress for the victims of violation of basic human rights. The key focus areas of this paper deals with the enforcement and effectiveness of decisions of the Constitutional Court of Kosovo in cases finding a violation of the right to have a final and binding decision enforced and the right to have proceedings concluded within a reasonable time. The approach used in this study is based on observations and review of legal practice and theory. The paper uses as a reference point the case law of the Constitutional Court of Kosovo, the case-law of the European Court of Human Rights, reports and opinions of the Venice Commission and documents produced by the Council of Europe on matters dealing with enforcement and effectiveness of court decisions. In conclusion, there will be introduced concrete recommendations to enhance the effectiveness of decisions of the Constitutional Court of Kosovo.

**Keywords:** compensation; partial redress; full redress

### **1. Introduction**

The execution of decisions of the Constitutional Court of Kosovo (hereinafter, Constitutional Court) is foreseen by Article 116.1 of the Constitution of Kosovo which determines that decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo (Kosovo Constitution). This means that execution of decisions of the Constitutional Court is a constitutional category and that their non-execution is in contradiction with the principle of supremacy of the Constitution. From the outset it must be said that the vast majority of decisions of the Constitutional Court have been respected by the ordinary courts and other public authorities in Kosovo. Usually, the most

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problematic cases are those that pertain to the execution of final and binding decisions entailing the return of property or reimbursement of certain amounts of money in favour of victims of violation of human rights. In this respect, the Constitutional Court always follows up execution of its decisions and in the operative part of its decisions enjoins the body under obligation to submit information about the measures taken to enforce the decision of the Court (Rules of Procedure of the Constitutional Court, Rule 63.5). In addition, the Constitutional Court may specify in its decision the manner of and time-limit for the enforcement of the decision (Rules of Procedure, Rule 63.4). In case of non-execution, the Constitutional Court shall publish in Official Gazette a ruling on non-enforcement of the decision and shall inform the State Prosecutor of all decisions that have not been enforced (Ibid, Rule 63. 6 and 7). Non-enforcement of decisions of the Constitutional Court and of courts of general jurisdiction falls in the domain of criminal law and the responsible person who does not enforce judicial decisions shall be fined or imprisoned up to two years. (Criminal Code of Kosovo No. 04/L-082, Article 402.1). Beside problems and bottlenecks in enforcement of final and binding decisions that enjoin return of property or reimbursement of money, there is also the question of effectiveness of decisions in cases where the Constitutional Court finds a violation of the right to have proceedings concluded within a reasonable time. The legal system of Kosovo does not provide for any preventive or compensatory remedy in cases of violation of the right to have proceedings concluded within a reasonable time (Case No. KI81/16, Applicant, Valdet Nikçi). The Constitutional Court can order speeding-up of the proceedings whenever it finds that they have been delayed beyond reasonable time, but, does this constitute a full redress for a violation of human rights? Another challenge for the Constitutional Court is that it cannot award compensation for pecuniary and non-pecuniary damage or to cover procedural costs and expenses. Hence, can it be said that remanding of a case for fresh consideration or to order to speed-up the proceedings offers full redress to a victim of violation of human rights? Does a mere finding of a violation afford just satisfaction for the victim of violation of basic human rights? In most cases, in my opinion, it does not. Therefore, the text below shall elaborate upon: (i) the effectiveness of decisions of the Constitutional Court with respect to the execution of final and binding decisions issued by the courts of general jurisdiction; and, (ii) effectiveness of decisions of Constitutional Court in cases of violation of the right to have proceedings concluded within a reasonable time. There shall ensue an analysis of some cases from the case-law of the Constitutional Court in relation to the abovementioned challenges in

addition to concrete recommendations on how to enhance the effectiveness of decisions of the Constitutional Court.

## **2. Establishment of the Constitutional Court, Jurisdiction and the Individual Complaint**

The Constitutional Court of Kosovo as the youngest of such nature was established after Kosovo declared its independence in 2008. The role of this court was to become the guardian of the Constitution of Kosovo but it would be set in motion only when requested so by authorized persons as stipulated in Article 113 of the Constitution of Kosovo (Constitution of Kosovo). It does not have an ex-officio authority to put its machinery in motion. Among authorized persons are individuals claiming concrete violation of basic human rights guaranteed by the Constitution. This Article is applicable to natural as well as legal persons as established duly by the applicable law in Kosovo (Case No. KI41/09, *Applicant, AAB-REINVEST L.L.C*). The Constitution of Kosovo Chapter VIII and Law on Constitutional Court lay basic foundation and jurisdiction of the Court. In this regard, Article 113.7 of the Constitution authorizes individuals to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution (Constitution of Kosovo). Accordingly, the Constitutional Court ought to represent a remedy as a final authority for all those individuals who claim violation of human rights by public authorities (Bokshi & Rrecaj, 2018, p. 2).

Although Kosovo aims to become member of the Council of Europe, due to political disagreements over political status, it has not succeeded in realizing this aim so far. This makes Kosovo a self-contained human rights regime with individuals not being able to hear their cases before larger and important institutional framework such as the European Court of Human Rights. However, in order to overcome this deficiency, drafters of the Constitution of Kosovo took care to provide a comprehensive human rights protection within this self-contained regime by unilaterally obliging itself to respect human rights in accordance with international standards and also by making the case-law of the European Court of Human Rights as the main reference for public authorities in interpretation of human rights guaranteed by the Constitution. The Constitutional Court by virtue of Articles 22 and 53 of the Constitution is under obligation to apply the European Convention of Human Rights, directly in cases involving human rights and fundamental freedoms and to interpret them consistent with the court decisions of the European Court of Human Rights. For these reasons the case-law of the Constitutional Court is replete

with references to the case-law of the European Court of Human Rights with regard to application of standards and safeguards of fundamental rights and freedoms (Ibid). We shall see in the following paragraphs as to what extent the Constitutional Court is in keeping with the case-law of the European Court of Human Rights with respect to execution of final and binding judicial decisions and compensation of victims of violation of basic human rights? We shall ascertain the extent of responsibility of the Constitutional Court and other branches of government in that regard as well.

### **3. Enforcement of a Final and Binding Judicial Decisions and the Responsibility to have them Implemented**

In an individual but high profile Case No. KI08/09 (Case No. KI08/09, *Applicant, The Independent Union of Workers of IMK Steel Factory in Ferizaj, represented by Mr. Ali Azemi*), the Applicant complained before the Constitutional Court about non-enforcement of a final and binding decision of the Municipal Court in Ferizaj. The backdrop of this case is that the Municipal Court in Ferizaj, rendered a judgment by which it approved the request for compensation of unpaid salaries of 572 workers of the socially-owned IMK Steel Pipe Factory in the amount of EUR, 25.649.250, 00. That judgment was not enforced even though the municipal court in question allowed its execution (Ibid, paragraph 3). The Constitutional Court stressed that the right to institute proceedings before a court in civil matters, as secured by Article 31 of the Constitution and Article 6 in conjunction with Article 13 of the European Convention on Human Rights, would be illusory, if the Kosovo legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. The Constitutional Court went on to state that rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become *res judicata*. The Constitutional Court added that execution of a judgment given by any court must be regarded as an integral part of the right to a fair trial (Ibid, paragraphs 61-63). The Constitutional Court concluded that there was a breach of the right to a fair trial and the right to an effective remedy as guaranteed by the Constitution of Kosovo and the European Convention on Human Rights (Ibid, the operative part of the judgment). That judgment has not been executed until now, which forced the Constitutional Court to issue a clarification (Case No. KI08/09, Clarification of Judgment) and later on a decision on non-execution of its judgment in case No. KI08/09 (Case No. KI08/09, Decision on Non-Execution). The Constitutional Court placed the responsibility for enforcement of its judgment on the Government of Kosovo and the

Kosovo Privatization Agency by holding that the “Implementing Authorities” have violated their constitutional obligation to execute the judgment of the Constitutional Court (Ibid, paragraph 27). In principle, judgments of the Constitutional Court should be straightforward to understand and should not need further explanation. Nonetheless, it may indeed happen that the Constitutional Court, in its judgment, was not able to solve the constitutional problem or it may even have created a new problem. In such cases a new judgment in a new procedure should be delivered, but not as an explanation of the former ruling (Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, CDL-PI, (2017) 008, p. 81). But that is not the case here, the author of this paper is deeply convinced that the judgment of the Constitutional Court in Case No. KI08/09 is clear and has logical coherence between the reasoning and operative part. It is an undeniable fact that the Government of Kosovo and Kosovo Privatization Agency have failed to fulfil their constitutional duty in enforcement of the judgment of the Constitutional Court. The aloofness of the relevant authorities have forced the Constitutional Court to issue a clarification and decision on non-execution of its judgment. It should be understood that such demeanour by the relevant authorities undermines not only the authority of the Constitutional Court but of the rule of law itself. The Constitutional Court did all it could do to have the judgment executed but it is not said in vain that the Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction (Barak, 2002, p. 59). All the Constitutional Court can do is to deliver a coherent and well-reasoned judgment, but in order to enforce that judgment, there is needed a strong commitment by other branches of the government to establish the supremacy of the Constitution and the rule of law. The Constitutional Court, in Case No. KI08/09, is not in a position to determine individual responsibility for non-execution of its judgment because it is a question of political will and collective responsibility of the Government of Kosovo. Once the Constitutional Court has made a decision and there is a refusal to implement this decision, other bodies should step in, in order to defend the Constitution and the Constitutional Court. The comparative overview shows that the responsibility for the Constitutional Court to contribute to the execution of its own decisions is the exception because this promotes the perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws (Ibid, Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, CDL-PI (2017) 008, p. 85). In the light of the foregoing, it is evident that the Constitutional Court, in Case No. KI08/09, did all it could do to defend the Constitution but now

“the ball” is on “the court” of other branches of government to have that judgment executed.

In another Case No. KI65/15 (Case No. KI65/15, Applicants, Tatjana Davila, Ljubiša Marić, Zorica Kršenković, Zlatoj Jevtić), four applicants of Serbian ethnicity, complained before the Constitutional Court about non-execution of final and binding decisions in their favour. They asserted that due to non-execution of final and binding decisions they were deprived of their right to a fair trial and peaceful enjoyment of their possessions (Ibid, paragraphs 62-73). The backdrop of this case is that the applicants were displaced from Kosovo after the war ended in June 1999, meanwhile, their property in Kosovo was usurped by third persons who had also built illegal objects on that property. Subsequently, the applicants lodged lawsuits with the Kosovo Property Agency and the Supreme Court of Kosovo with the view to re-establish ownership of their property in Kosovo and have the third parties evicted from their property. The Kosovo Property Agency and the Supreme Court issued five different decisions between them recognizing and upholding the applicants as lawful owners of the contested property. However, the rights of the applicants were realised only partially because final and binding judicial decisions in their favour were not being executed, for which, they lodged a constitutional complaint with the Constitutional Court (Ibid, paragraphs 11-61). The Constitutional Court-relying on the well-established case law of the European Court of Human Rights- explained that: (i) non-implementation of final and binding judicial decisions is inconsistent with the Rule of Law; (ii) the execution of a decision rendered by a court should be considered as an integral part of the right to a fair trial; and, (iii) the competent authorities have an obligation to organize an efficient system for implementation of decisions within a reasonable time, without unnecessary delays (Ibid, paragraphs 94-97). The Constitutional Court further held that the burden for non-execution and the failure to identify appropriate mechanisms for the execution of final and binding decisions falls solely upon the Kosovo Property Agency as competent authority designated by law (Ibid, paragraphs 100-101). The Kosovo Property Agency has expressed its willingness to comply with the judgment of the Constitutional Court in Case No. KI65/15, but it has also informed that execution of that judgment is a complex procedure and will take some time to get implemented because it necessitates overcoming challenges such as: (i) issuance of administrative directions for demolition of buildings erected by third parties in the property of the applicants; (ii) brokerage of agreements between the applicants and third parties; (iii) announcing of tender bids for demolition of objects illegally built on the property of the applicants; (iv) soliciting additional funds from the Government of Kosovo in

order to implement final and binding decisions. It is clear then, that execution of judgment of the Constitutional Court in Case No. KI65/15 constitutes a complex procedure from the financial and legal point of view in addition to real obstacles to implement that judgment on the ground. However, based on the well-established case-law of the European Court, lack of funds and complexity of a procedure cannot absolve the Government of Kosovo to guarantee to everyone the right to have a final and binding decision in his favour implemented. It is the obligation of the Government of Kosovo to organize its legal system in such a way that the Kosovo Property Agency as competent authority can fulfil its task to implement final and binding decisions (European Court of Human Rights, *Burdov v. Russia* no. 2). What is more, it must be taken into account that protection of human rights costs money and a society which respects those rights must be ready to carry the financial burden (Barak, 2012, p. 271). In Case No. KI65/15, one of the applicants also complained that competent authorities refused to make the appropriate changes in the property register in accordance with the final and binding decision in his favour (Case No. KI65/15, paragraphs 36-39). The Constitutional Court held that the inactivity of competent authorities to secure the necessary changes in the cadastre renders the final and binding decision in the applicant's favour theoretical and illusory rather than practical and effective (Ibid, paragraphs 109-113). This absurd situation of the applicant, can be addressed by a fine or suspension from office of the official who refuses to implement that final and binding decision (Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, CDL-PI (2017) 008, p. 86), and informing of the State Prosecutor about non-execution of the final judicial decision in accordance with the Criminal Code of Kosovo (Article 402.1, Criminal Code of Kosovo) and Rules of Procedure of the Constitutional Court (Rule 63.7 of the Rules of Procedure). In that case, the applicants also requested to be awarded monetary compensation, but the Constitutional Court did not deal with such requests because they are consumed by finding a violation of articles 31 (Right to Fair and Impartial Trial) and 46 (Protection of Property) of the Constitution. There is no doubt that finding a violation of the right to a fair trial and right to protection of property offers a considerable redress for the applicants in Case No. KI65/15; but, what about the compensation for pecuniary and non-pecuniary damage? What about the cost and expenses they have incurred during the course of judicial proceedings? The applicants got considerable redress for violation of basic human rights but can it be said that they got full redress in the light of them not being awarded for pecuniary and non-pecuniary damage as well as costs and expenses of judicial

proceedings? These questions shall be addressed in the text below when we deal with them in relation to the right to have proceedings concluded within a reasonable time.

#### **4. The Right to have Proceedings Concluded within a Reasonable Time and the Question of Compensation of Victims of Violation of Basic Human Rights**

In Case No. KI81/16 (Case No. KI81/16, Applicant, Valdet Nikçi) the applicant complained before the Constitutional Court that ordinary courts deprived him of the right to have a final decision on his case within a reasonable time. The crux of the matter in that case was that the applicant as an employee of socially-owned enterprise FMC, was allegedly, not paid his monthly salaries for the period of 1 June 1995 until 31 March 1997 (Ibid, paragraph 13). There ensued different sets of proceedings before courts of different levels of jurisdiction before ordinary courts decided to suspend the proceedings for an indefinite time by linking it to the privatization of a socially-owned enterprise FMC (Ibid, paragraphs 41-45). The applicant had no choice but to lodge a constitutional complaint requesting, inter alia, to have his case concluded within a reasonable time. The Constitutional Court by-referring to the well-established case-law of the European Court-explained that the right of the applicant for payment of unpaid salaries falls within the meaning of the phrase “civil rights and obligations” as established by article 6 of the European Convention and article 31 of the Constitution (Ibid, paragraphs 65-66). The Constitutional Court also noted that it is aware that Kosovo legal system does not foresee legal remedies in order to speed up the proceedings before the regular courts, and ensure a final decision in due time, and that, the Constitutional Court itself is the applicant’s only legal remedy to secure his right to a timed and final decision (Ibid, paragraph 106). The Constitutional Court noted that ordinary courts had confirmed suspension of proceedings *sine die* (indefinite suspension of proceedings), which in turn, deprives the applicant of a final decision on his request to be paid the unpaid salaries. The Constitutional Court found that there has been a violation of article 31 of the Constitution in conjunction with article 6 of the European Convention on Human Rights (Ibid, paragraph 113). In my view, the judgment of the Constitutional Court in Case No. KI81/16 offers only partial redress to the injury of basic human rights. The Constitutional Court has ordered the ordinary courts to issue a final decision within six months notwithstanding liquidation proceedings of the socially owned enterprise-FMC. This is a very positive facet of the judgment of the Constitutional Court and no doubt it is an effective legal remedy in relation to the speeding-up of



the proceedings, however, what about the question of compensation for pecuniary and non-pecuniary injury? Or better yet, what about the question of costs and expenses incurred by the applicant taking into account that the proceedings were delayed for a whopping 21 years commencing from the first lawsuit in 1995 up to the lodging of the constitutional complaint in 2016? The Constitutional Court has justly held that the Kosovo legal system does not provide for legal remedies to speed-up proceedings, and that, the Constitutional Court itself is the only legal remedy to speed-up such proceedings (Ibid). Unfortunately, the Constitutional Court does not have a legal basis to review questions of pecuniary and non-pecuniary damage or that of costs and expenses of the proceedings. In this respect, the European Court, in its well-established case-law, has assumed a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage, such as the fact of living in a state of uncertainty and anxiety about the outcome of the proceedings (Council of Europe Publishing, 2007, p. 97). Due to a lack of legal basis, the Constitutional Court is unable to award compensation for pecuniary and non-pecuniary damage or for costs and expenses of the proceedings. Conversely, a good example, in this regard, would be the Constitutional Court of Croatia which via article 63 of the Act on Constitutional Court of Croatia can award compensation and determine a time-line for payment of that compensation (The Constitutional Act on the Constitutional Court of the Republic Croatia). Besides Croatia, other States, such as Austria, Spain, Poland and the Slovak Republic, have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to award compensation. However, States can choose to introduce only a compensatory remedy, as Italy has done, without the remedy being regarded as ineffective (Council of Europe Publishing, p. 76). Kosovo institutions including the Constitutional Court can learn a great deal from the practice of the above-mentioned countries as well as the practice of the European Court in order to provide for a full redress to the victims of violations of basic human rights. In relation to the quantum of the compensation awarded, the European Court, in its well-established case-law, has accepted that a State which has introduced a number of remedies, one which is designed to expedite proceedings and one to afford compensation, will award amounts which-while being lower than those awarded by the Court-are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly (Ibid, p. 91). In addition, the European Court, has attached great importance on speediness of compensation as well, by holding that the Government should be ordered to pay a further sum

where the applicant has had to endure a delay while waiting for payment of the compensation due from the State so that frustration arising from the delay in obtaining payment is offset (European Court of Human Rights, *Scordino v. Italy*). Having regard to the foregoing considerations, an effective remedy according to the case-law of the European Court, is a three-fold one, and must provide for: (i) expedition of proceedings; (ii) a compensatory remedy which must be reasonable as to quantum; and what is more significant, (iii) in case of delay of compensation there must be paid to the victim an additional sum in order to offset that delay. Currently, with respect to having proceedings concluded within a reasonable time and without undue delay, the Constitutional Court is the only effective remedy for the prospective applicants, and even then, only in so far as it concerns expedition of proceedings. The Kosovo legislator must make sure to equip the Constitutional Court with express legal basis to award compensation for the victims of violations of basic human rights and to provide for legal mechanism to speed-up the proceedings without the applicants having to have recourse to the Constitutional Court. Once again, a good point of reference, would be the Constitutional Court of the Republic of Croatia as well as the well-established case-law of the European Court.

## 5. Conclusion

The European Court of Human Rights, in its well-established case-law, has held that in cases where there is a breach of basic human rights, the respondent State is under legal obligation to put an end to the breach and make reparations for its consequences in such a way as to restore as far as possible the situation existing before the breach (European Court of Human Rights, *Scordino v. Italy*). If the European Court of Human Rights, considers that the nature of violations found does not allow it to assume that *restitutio in integrum* can be made. An award of equivalent compensation must therefore be made (*Ibid*). It must be re-emphasized that the Constitutional Court by virtue of Articles 22 and 53 of the Constitution is under obligation to apply the European Convention of Human Rights, directly in cases involving human rights and fundamental freedoms and to interpret them consistent with the court decisions of the European Court of Human Rights (Bokshi & Rrecaj, 2018, pp. 2-3). Having regard to all the foregoing considerations, it is evident that the Constitutional Court, in many cases, is unable to provide for full redress to the victims of violation of basic human rights due to non-existence of an express legal basis to offer full redress, as is the case, for example, with the Constitutional Court of Croatia, and due to other reasons related to legal culture and tradition, institutional

awareness for basic human rights, as well as other socio-economic considerations. In this respect, and in conclusion of this paper, with the view of provision of an effective legal remedy and full redress for the victims of violations of basic human rights, the following measures are recommended: (i) creation of an express legal provision, by the legislator, which would enable the Constitutional Court to provide for full redress to the victims of violation of basic human rights; (ii) holding criminally liable persons for non-execution of decisions in accordance with article 402 of the Criminal Code of Kosovo, whenever individual liability can be ascertained; (iii) informing of relevant authorities and regular monitoring of execution of decisions of the Constitutional Court; (iv) a burden of responsibility to be shared by the interested parties to inform the Constitutional Court in cases of non-execution of its decisions; (v) compensation to be carried out in accordance with the legal tradition and standard of living in Kosovo; (vi) the legislator to establish a mechanism which would provide for payment of an additional sum in cases of delay of compensation in order to offset that delay; and (vii) creation of a mechanism, by the legislator, to provide for two types of remedies, one to expedite proceedings and the other to afford compensation, in cases where there has been a breach of the right to have proceedings concluded within a reasonable time. As a corollary, the Constitutional Court, can offer full redress to the victims of violation of basic rights only on condition that the legislator is determined to vest it with the requisite legal tools in order to dispense that task to full effect and consistent with the decisions of the European Court of Human Rights.

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