

THE IMPACT OF PRECEDENT IN THE LEGAL SYSTEM OF KOSOVO

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Abstract

It is known that there are two systems of law: Civil Law – Continental system in which source of law is the written and codified law, and Common Law - Saxon system characteristic of which is the system of law based on precedents. Kosovo is part of the continental or codified system of justice, but this does not exclude the possibility that in practice also the precedent finds application.

According to the Kosovo Constitution, some international conventions, among them the European Convention for the Protection of Human Rights and Fundamental Freedoms shall apply directly, and the rights and freedoms guaranteed shall be interpreted consistent with the court decisions of the European Court of Human Rights. Since the Strasbourg Court acts according to cases of precedent, this is a very strong argument to accept the theory of precedent in the judicial system of Kosovo. The Constitution of Kosovo, although it envisages that judicial power be exercised by the courts that adjudicate based on the Constitution and the law, in its legal provisions provides the application of international conventions directly and writes about the impact of the decisions of the Strasbourg Court. This means that the interpretation of the decisions of this Court, sends us towards the application of precedent.

It can be said that decisions of the Constitutional Court of Kosovo are practically representing the role of precedent in relation to the regular courts. The impact of decisions of the highest courts of Kosovo can be seen in several aspects, such as interpretation and precedent.

The paper aims to clarify the possibilities of applying the precedent and the arguments for its implementation in Kosovo.

Keywords: Precedent, International Conventions, Constitutional Court, judicial decisions, impact.

Introduction

The legal system in Kosovo has gone through several stages where each stage has its own particular characteristics. The judicial authorities in Kosovo have been created and developed in specific circumstances, in different time periods,¹ but this paper will reflect the period after the declaration of Independence, in 2008, and after the adoption of the Constitution of the Republic of Kosovo on 9 April 2008.

As a novelty in the Constitution of Kosovo is presented the involvement of international conventions in the legal system of Kosovo and their direct implementation, in particular those that include rules on the Human Rights and Fundamental Freedoms. The provisions of these conventions are superior in relation to laws and bylaws of the Kosovo institutions. Kosovo as a country in transition that aims membership in international institutions which as a condition have the respect of Human Rights and Freedoms, in its Constitution has given a special role to decisions of the European Court of Human Rights (ECtHR) which operates according to the principle of precedent.²

The impact of the decisions of the Strasbourg Court, practically comes to expression especially in the decisions of the Constitutional Court which when deciding on cases that are under its jurisdiction, is based on the decisions of ECtHR.³ The Supreme Court of Kosovo, as the highest judicial authority, has an important role in the unification of judicial practice.

In the practice of the Kosovo courts, it has happened that on the same matter different decisions be taken. With the Law on Courts of Kosovo, the impact of Supreme Court on decisions of lower courts is done by adopting principled positions and legal opinions in order to apply the law uniquely in the entire territory of Kosovo and to eliminate the judicial practice of rendering different decisions on the same matter. Regardless of the fact that with no constitutional and legal provisions, the decisions of the Supreme Court do not order the courts at lower levels, such decisions practically have influence on the decisions of these courts since that they are published on the website of the Kosovo Judicial Council and in the Bulletin of the Judicial Practice of the Supreme Court.

¹ Rafet Haxhaj: The position of the Judiciary in Kosovo during the period of the United Nations Mission, Master Paper, Faculty of Law, Prishtina, 2008, page 10.

² Kristaq Traja, Legal nature of the decisions of the High Court. Time of Precedents, Judicial Life, no. 1, Tirana, 2005, page 13.

³ See the decision of the Constitutional Court, AGJ. no. 62/10 dated, 18 October 2010

The role of the Supreme Court of Kosovo, as the highest judicial body, is observed even when a legal provision is not clear, when it makes the interpretation of such giving it the right meaning, having had in practice several cases when a court of lower instance or any other entity has requested the interpretation of legal provisions, as in criminal or even civil cases, be done.

1. Precedent in the Constitution of The Republic of Kosovo

Kosovo legal system, as part of the codified law, obliges courts that cases which are before them be on trial based on the Constitution and the Law (Article 102.3 of the Constitution), but other provisions contained in the Constitution of Kosovo are an exception to this rule. Other articles contain elements which take us toward precedent, which are a strong argument to accept the precedent in Kosovo law. There are several constitutional provisions that prove this fact. According to Article 19 of the Constitution, international treaties ratified by the Republic of Kosovo become part of the domestic legal system after being published in the official gazette and apply directly.

Article 22 of the Constitution, envisages the direct application of international conventions. With this article, Human Rights and Freedoms guaranteed by international agreements and instruments are guaranteed by the Constitution, are directly applicable in Kosovo and have priority in case of conflict with the legal provisions and other acts of public institutions. Whereas Article 53 stipulates that the human rights and fundamental freedoms guaranteed by the Constitution be interpreted consistent with the court decisions of the European Court of Human Rights. The provisions of this article show that the decisions of the Strasbourg Court are binding on Kosovo courts and they should also take them into consideration when it comes to human rights and fundamental freedoms. The European Court of Human Rights is a court based on precedents and it bases its decisions on similar cases.⁴ The Court of Strasbourg is an important and authoritative court for the standardization of the legal systems of the member states of the Council of Europe in the field of Human Rights and Fundamental Freedoms. This system has been embraced by the legal system of Kosovo. The European Convention on Human Rights as one of the Conventions on for the Protection of Human Rights and Fundamental Freedoms, in its provisions includes not only human rights, but also provides the control mechanism for its implementation, which is the ECtHR. Based on Article 33 of the Convention, each contracting party may apply to the court for any violation of the provisions of the Convention, while Article 34 determines that parties have the right to file a motion in case they claim to be harmed by any violation of human rights contained in the Convention or its protocols, by the contracting party.

The impact of the decisions of the Strasbourg Court in decisions of the courts of Kosovo, mainly started to be expressed with the establishment of the Constitutional Court in 2008 that supports its decisions primarily on the decisions of the Strasbourg Court.⁵

2. The Impact of Constitutional Court Decisions on Decisions of the Lower Courts

Decisions of the Constitutional Court are binding on the courts, citizens and all institutions. (Article 116.1 of the Constitution)

One of the competences of the Constitutional Court is deciding on the claims of the parties in cases when they claim that by the decision of the government body or the courts, their rights and individual freedoms, guaranteed by the Constitution, have been violated, after they have exhausted all legal remedies provided by law.⁶ The Constitutional Court of Kosovo has decided on a number of claims of individuals who have challenged the decisions of the judiciary and other state institutions. In deciding on the claims of the parties, this Court was based on the decisions of the Strasbourg Court. As more specific cases of decisions of the Constitutional Court have been the claims of a large number of employees of the Kosovo Energy Corporation (KEK). In the cases of KEK employees, which this Court has had in its work, the object under consideration was to assess the constitutionality of the individual judgments of the Supreme Court of Kosovo which deciding according to the recourse, had changed the decision of the first and second instance court where it has rejected as entirely unfounded the claim of the claimants (KEK employees), who had requested temporary wage payment.

These employees claimed that their rights were violated with the decisions of the Supreme Court. In this case, the Constitutional Court found a violation of Article 46 protection of property in conjunction to Article 1 of Protocol 1 of the ECHR and there has been a violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) in connection to Article 6 of the ECHR. As a result of these violations, Constitutional Court has invalidated the judgments of the Supreme Court and returned the cases for retrial.⁷ Supreme Court, which with previous decisions

⁴ Flutura Hoxha & Valdete Daka, ECHR, Legislation on Human Rights, Judicial Institute of Kosovo, 2008, Presentation 11, page 2.

⁵ See the decision of the Constitutional Court, Agj. no. 30/10 dated 23 June 2010.

⁶ Article 113.7 of the Constitution of the Republic of Kosovo.

⁷ See case I.I and others against individual decisions of the Supreme Court, no. 30/10 dated: 23.06.2010, no. 62/10 dated: 18.09.2010 and no. 285/12 dated: 20.07.2012).

had rejected the claim of KEK employees, in the retrial acted in conformity with the decisions of the Constitutional Court deciding in their favour.⁸

Another dilemma that was presented in judicial practice in Kosovo courts was the issue of the Decision of the Independent Oversight Board (IOB),⁹ whether they should be executed in court proceedings. In this regard, there were different opinions and positions as some courts have allowed the execution of the IOB decisions, even when those decisions are related to the return of employees to their jobs, while some courts have not allowed the execution of these decisions and have rejected the proposal for execution on the grounds that the IOB decision does not represent the executive title in court proceedings. The second instance court (the former District Court), deciding on the appellate procedure, had upheld the decision of the court of first instance. According to the Law on Execution Procedure (Article 24 of the Law), the decision of the IOB shall not constitute an executive title in terms of returning to the workplace, since according to the Law of IOB (Article 13 of the Law) such decisions are executed by high-level heads or responsible officials of the institution that has made the decision.¹⁰ This case came up to the Constitutional Court, where this Court deciding on the constitutional assessment of the decision of the Court of second instance, decided to render invalid the decision of the Court of Second Instance (District Court) and the case be returned for review to the same court. In deciding on this case, the Constitutional Court was also based in the decisions of the ECtHR.¹¹

Following the decision of the Constitutional Court, the Court of First and Second Instance, in retrial and all other similar cases, allowed the execution of IOB decisions in the court execution proceedings.¹² Also, the Supreme Court, in its General Meeting held on 12.11.2012, changed the Principal Position of 23.11.2012 and found that the decision of the Independent Oversight Council of Kosovo, which has to do with the return of employee to the workplace represents an executive title for the Court. This case shows that the Kosovo courts practically solve cases of precedent and the same is present in our judicial system, although theoretically this is denied. The practice of the Constitutional Court of Kosovo in the resolution of specific cases shows that it directly implements the provisions of the International Conventions and bases them on the decisions of the Strasbourg Court.

The presented example shows the chain linked impact of the ECtHR on court decisions, especially decisions of the Constitutional Court, while the latter's decisions are binding on Kosovo courts.

3. Unified Decisions and Interpretations of the Supreme Court in the Role of Precedent

3.1. Unified decisions – Submission of legal remedies of the parties provides the opportunity to the higher court to review decisions and ascertain possible violations whether of material or procedural law on the challenged decisions. Within the Supreme and the Appellate Court, there is a Panel on the unification of judicial decisions. The task of this panel is to ensure that similar cases, are rendered the same decisions, because otherwise, equal treatment of the parties before the law would be called to question. In order for the courts not to come to the situation that for the same matters different decisions be rendered, or for the same offense, under the same conditions, two people be sentenced to various sentences, there is a need for establishing panels for rendering unified decisions.¹³ In the practice of the courts, it has happened that on the same issue different decisions be rendered.

Higher courts, when deciding on challenged remedies, complaints or extraordinary legal remedies, in the reasoning of their decisions provide guidance on how to act, in the specific case for the lower courts, although legally this does not bind the latter, they take them into consideration. The practice of unified decisions is built on precedent.

Article 24 of the Law on Courts of Kosovo includes provisions for the publication of Supreme Court decisions, which are published in the Bulletin of Judicial Practice. This publication is important because in the case of deciding on legal remedies, the court of lower instance can be directed at how the Supreme Court has decided for similar cases and rely on those decisions when deciding on similar cases.

⁸ See judgment no. 52/2011 dated: 08.07.2011, no. 294/11 dated: 22.11.2011, no. 143/2010 dated: 07.02.2011, no. 308/2011 dated: 15.11.2011

⁹ Explanation: The Independent Oversight Board is an independent body reporting to the Assembly and which resolves claims of employees and ensures compliance with all rules and principles governing the Civil Service of the Republic of Kosovo. Civil servants are employees paid by the budget of Kosovo.

¹⁰ Article 13 of the IOB Law, stipulates: that IOB decisions are final and executable in administrative procedure and the appeal against the decision of the IOB does not stop the execution.

¹¹ See the decision of the Constitutional Court of Kosovo, Ref.no: AGJ.286/12 dated: 11 July 2012

¹² See the Decision of the District Court in Prishtina, Ac. no. 647/11 dated 16 October 2012.

¹³ In local elections in 2010 in Kosovo, there was widespread abuse by the commissioners at the polling stations and against a large number of them criminal proceedings were initiated and at the courts of first instance they were rendered different sentences such as: probation, fine. The court of second instance in the appellate procedure changed the decisions of the court of first instance and did unification of decisions by imposing the perpetrators of the offense of election fraud as envisaged by Article 180 in relation to Article 23 of the Criminal Code of Kosovo (CCK) with 6 (six) months imprisonment. see the decision of the District Court in Prishtina, no. 149/11 dated 29.11.2011.

3.2. Interpretation – Following the adoption of the Constitution of Kosovo, there was a need to pass laws that will be implemented by the Kosovo courts and according to them the function of courts be exercised. Due to the rapid adoption procedure, sometimes a legal provision is unclear. In these cases, the interpretation could come into place when there is ambiguity of a provision of applicable law, or when any norm should be given the correct meaning, and this has put judges in the challenging position on how to solve the specific case that is before them for decision.

The Supreme Court is the highest judicial authority that makes the interpretation of legal provisions.¹⁴ A provision or legal norm that is interpreted by the highest court, constitutes a rule of law to be applied in the concrete case.

Lower courts, although not obliged by any legal provisions to act on the basis of interpretation which is provided by higher courts, practically apply those interpretations in the decisions of the lower courts.

4. Renewed Annulment of First Instance Court Decisions Due to Inaction According to Instructions of the Second Instance Court

Any natural and legal person has the right to appeal decisions of the courts. This right is guaranteed by the Constitution of Kosovo, the Law of Civil Procedure, and the Law of Criminal Procedure of Kosovo. Higher courts, when deciding on the appeal of the party may annul the decision of the court of first instance and return the case for retrial to the Court of First Instance. In these cases, the court of highest instance in the reasoning of its decision gives remarks and instructions to the Court of lower instance on how to act in the retrial proceedings. According to Article 406 of the Code of Criminal Procedure of Kosovo (CPCCK), in case of annulment of the decision of the first instance, it undertakes all procedural actions in retrial and examines all contentious issues highlighted in the reasoning of the Court of Second Instance. Whereas, according to the Law on Contested Procedure (LCP), Article 199, in cases when annulment of the decision of the Court of lower instance in the retrial stage, it is obliged to perform all procedural actions and examine all contentious issues that were provided by the court of second instance in its verdict. If the Court of First Instance at the retrial stage acts not according to instructions given in the reasoning of the Court of Second Instance, the latter again annuls the Court of First Instance decision and sends the case back for retrial. According to this provision we can conclude that the decisions of the Court of Second Instance, in these cases present a kind of precedent for the Court of First Instance.

Example: The Second Instance Court in its decision no. 851/08 dated 19.03.2009, no. 180/08 dated 25.02.2009, no. 331/10 dated 05.05.2010, no. 1280/2009 dated 15.01.2010 annulled for the second time, decisions of the Court of First Instance and returned the case for retrial. The same court even after instructions and remarks given by the Supreme Court, did not act upon them. Article 199 of the LCP provides that the Court of First Instance is obliged that immediately after receiving the decision of the Court of Second Instance, set a hearing and do all procedural actions and review all contentious issues provided by the Court of Second instance in the reasoning of its decision. From the content of this provision, practice shows that the decisions of the Court of Second Instance represent precedents for the First Instance Court. In case of annulment of the decision of the Court of First Instance, the case is submitted for deciding back to the same judge who ruled in the first instance. If the judge in the retrial stage, does not act according to the indications in the reasoning of the decision of the higher court, he is not sanctioned, that means no disciplinary measure is imposed against him. The only action that can be taken against him is that the Court of Second Instance has the right to assign the case to another judge of the same court for ruling. In contrast to Kosovo legislation, the Law on the Organization of the Judiciary of the Republic of Albania (Article 32.2 f) provides that failure to implement unifying decisions and other decisions, constitutes a serious disciplinary offense which for a consequence has the dismissal from duty of the judge.¹⁵ The provisions of Article 198.3 of the LCP stipulate that in cases where the Court of Second Instance annuls the judgment of the first instance and returns the case to the same court for retrial, it may order that the review of the case be entrusted another judge. This higher court takes measure in cases where the judge of the lower court in the retrial stage does not act according to the instructions given in the reasoning of the decision of the higher court.

Example: Second Instance Court with its decision Ac. no. 928/2008 dated 03.02.2009 had ruled that the case for retrial be assigned to another judge on the grounds that he has not acted in the retrial according to instructions given in the reasoning of the Court of the Higher Instance. With the provisions of the LCP, it is envisaged the limitation of annulment of the decisions of the lower court up to two times, with the aim of economising and not delaying the procedure. From this is understood that the Higher Court may annul and return for retrial the First Instance decision no more than two times. This means that the judicial review shall be opened by the

¹⁶ See interpretation of the Supreme Court, no. 98/13 dated 28 February 2013.

Court of higher instance.¹⁶ The higher court has to decide on the case itself and has no right to return the case for retrial for the third time. In previous court practice, there were cases when the decision of the First Instance was annulled for the fourth time.

5. Reasons Pro Precedent

From the facts and arguments outlined in the Kosovo Constitution and other laws, especially the study of cases of judicial practice it is seen that there are elements of precedent and it is practically applicable in Kosovo courts, both directly (application of ECHR, decisions of ECtHR and decisions of the Constitutional Court of Kosovo), or indirectly (unified decisions, annulment of decisions, interpretation).

Based on these facts, we can conclude that the reasons pro precedent in Kosovo are:

1. **Legal security** – with the application of precedent cases, legal security of persons is guaranteed at a high level, as similar cases are resolved in the same way. While, on the contrary, when the courts for similar cases decide in different ways, it is violated the principle of equality of persons before the law, as it was the case regarding the implementation of the decisions of the Independent Oversight Board and imposing different penalties for the same offense of fraud during the voting in the municipal elections of 2010. In these cases, people will feel insecure, and this situation may push them to take the actions of vigilantism.
2. **Unified decisions** – the courts of the higher level, Supreme and Appellate, have a responsibility when deciding according to legal remedies to make the unification of judicial decisions in the cases of ruling different decisions by lower courts. These decisions serve as a kind of precedent and do not allow to have a diversity of similar cases which means that similar cases are resolved in a similar manner. With the implementation of precedent, the court eliminates differences, that means rules uniquely on the same issue.
3. **Public trust** - a key element in the work of the judiciary is the trust of the public in cases where the court for the same cases rules in the same way, public trust to the court increases and this is made possible by the precedent case. On the contrary, public trust is lost and this as a consequence has disrespect and degradation of the judiciary and the judges themselves.
4. **Elimination of differences in ruling on similar issues** – with the application of precedent, the court eliminates differences which means it does not allow the courts to violate the material or procedural law where they do not rule on the same issues in different ways.
5. **Implementation of International Conventions and decisions of ECtHR** - involvement in the Kosovo legal system and direct application of international conventions, and, especially obligation of implementation of ECtHR decisions by the courts in Kosovo is a very convincing argument, showing that precedent is practically applied in Kosovo.
6. **Decisions of the Constitutional Court of Kosovo** - the most practical argument that precedent should be applied in the Kosovo judicial system are the Constitutional Court decisions which practically when taking its decision implements a mixed system as the civil one, relying on the Constitution and laws as well as the Common Law system based on decisions of ECtHR.

Conclusion

With the adoption of the Constitution of Kosovo, the impact and role of international conventions was significantly increased as they apply directly and are part of the Kosovo judiciary. This has helped the precedent to have a special role in the decisions of the Kosovo courts.

Based on the case study of constitutional and legal provisions, especially the analysis of cases from the judicial practice of Kosovo courts whose decisions are influenced by higher courts, we can say that precedent is present in the constitutional provisions, especially those relating to international conventions which have priority in case of conflict against domestic legal provisions. According to the Constitution (Article 53) ECtHR decisions are binding for Kosovo courts and have to be considered when it comes to Human Rights and Freedoms, and this means the implementation of precedent by the courts of Kosovo.

¹⁶ Article 190.3 of LCP stipulates that the court of second instance will schedule the direct review of the case even if the judgment of first instance was cancelled twice and when the panel session evaluates that the judgment against which the present appeal is based on violation of the provisions of the contested procedure or the factual state was evaluated wrongly or incompletely.

The precedent in addition to the Constitution is also included in the other laws, perhaps not to the extent as in the Constitution but to a certain measure in the Law on Courts of Kosovo, the Law on Contested Procedure and the Law on Criminal Procedure. Law on Courts requires the publication of Supreme Court decisions in the Bulletin of Judicial Practice which serves in the role of precedent for courts of lower instance since they take these decisions into consideration when ruling on similar cases.

Also, the principled positions and legal opinions are taken into account by the courts of lower rank since with their help are eliminated differences in resolution of similar cases which allows the courts to have unique enforcement of the law throughout the entire territory of Kosovo for the same cases.

In unclear cases, or when there is any legal provision ambiguity, it is interpreted by the Supreme Court which constitutes a rule of law that applies in the concrete case.

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