Article

The pronouncement of decisions and implementing and enforcing the Constitutional Court's judgments: some observations from Kosovo

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I PRONOUNCEMENT OF DECISIONS

The Constitution of Kosovo, the Law on the Constitutional Court (CC) and its Rules of Procedure (RoP) regulate the pronouncement of decisions separately for the various types of procedures with which they are concerned. The contents of the decisions of the CC are however primarily oriented towards the targets of the decisions. The *operative part* of the decision is the same in all procedures of control of norms, be it abstract norm control (initiated by the Assembly or the Government), concrete norm control, procedure of courts' referrals to the CC, or individual referrals against a court's decision concerning the constitutionality of a law as applied in a particular case. Furthermore, the dictum of the CC is important as far as the interpretation of "invalid" (r 65 RoP) is concerned. Does it mean "void", or could "invalid" mean "destructible" or "inapplicable" (r 66 RoP), or are there methods available to interpret a law in a "legislature-friendly" manner (partly) to uphold its applicability?

The instrument for guaranteeing the forthcoming final decision and its effectiveness is the injunction, which suspends the contested action or law until the final decision is made.

The *enforcement and implementation* of decisions will be examined in relation to the targets of the decision in the following three groups:

(a) disputes between constitutional organs concerning competences – determining the borderlines of competences;

(b) control of norms, be it abstract or concrete – norm control or courts' referral – invalid or valid?

(c) individual referrals against courts' decisions and remand to the issuing court.

II INTERIM MEASURES

The CC, *ex officio* or upon the referral of a party, may temporarily decide upon interim measures in a case that is the subject of a proceeding if such measures are necessary to avoid any risk of irreparable damage, or if such an interim measure is in the public interest (Art 115, para Constitution, Art 27 Law on the Constitutional Court, r 54 RoP). The decision of the CC should be secured by the injunction, which is applicable to all types of procedure. It is admissible if the CC has jurisdiction, and can be raised by anybody who is a party to the main procedure and has been involved in every phase of it.

The injunction may not anticipate the final decision. The interim measures must be effective and adequate. The content requires a summary examination of the case, and in many instances the operative part of the measures is congruent or even identical with the final decision of the CC. A right exists to obtain an injunction, but not if the case pending in the CC is ripe for final decision or if the injunction is not the proper procedure for protecting the rights of the party.

As to the procedure of the CC, it must balance the consequences which could follow if no injunction was given and the subject of the dispute was subsequently declared

unconstitutional with the disadvantages which could occur if the matter was suspended temporarily.

The form the interim measure takes is at the discretion of the CC: It could be either the suspension of:

- applicability of a norm;
- execution of an act, for instance taking somebody into custody; or
- execution of a civil law court decision.

III ENFORCEMENT

(i) General provisions

The implementation and enforcement of the CC's decisions is the test of a functioning constitution and an effective rule of law regime in the country. The right of everybody to a fair and effective trial is guaranteed by Article 6, Constitution and Article 31 of the European Convention of Human Rights (ECHR). It is violated if the appropriate authorities fail to enforce the resulting judgment. The operative provisions of the judgment shall state the manner of implementation of the judgment, resolution or other order, when the decision shall take effect, and on whom the decision shall be served. The CC is the "master of enforcement". It is not obliged to decide exactly how its judgment shall be enforced. The manner of enforcement may, however, include a time limit for enforcing acts, and a time limit for the legislature to enact a constitutional regulation. The decision on how to enforce may also include transitional provisions in case of an invalid law and a time limit for applying these transitional provisions.

The CC has the freedom to implement its decision in the quickest, most effective, and most useful way. The instruments should be:

- appropriate to reach the individual and public purpose;
- necessary;
- proportional in that they must maintain the balance between the purpose of interfering with competences of other state organs or encroachment into individual rights on the one hand, and the weight of the competences or rights, on the other.

Possible contents of an enforcing decision may involve:

- the reinstatement of the status quo;
- a decision to strike out; or
- orders for the execution of the judgment.

The CC's decision may take the form of:

- an order to effect a performance,
- mposing a duty to tolerate;
- ascertaining a law; or
- changing a legal right or status.

In other words the CC has a general authorisation to order what is necessary to create the facts which are prerequisites for the implementation of the law as decided on by the CC.

Decisions are binding on the judiciary and all persons and institutions of the Republic. All constitutional organs as well as all courts and authorities are obliged to respect, to comply with and to enforce the decisions of the court within their respective competences (rr 1, 63, paras 1, 2, RoP). The extraordinary power of the CC is that res *judicatae* are binding on all constitutional organs, all public institutions and all physical and legal persons (r 63, para 3, RoP). They are binding *inter omnes*, not yet *inter partes* as is the case with decisions of other governmental actors and the courts. The CC itself is not bound by its decisions and has the right to overrule them at any time.

It is arguable whether the power to bind is limited to the operative part of the judgment or extends to the reasons on which the decision is based. It would be preferable to extend the binding power to at least the main, essential reasons. But care should be taken, because including too many arguments relating to the reasoning within the binding power would petrify the CC's litigation process and lead to a loss of flexibility.

The body under obligation to enforce the decision – as ordered by the CC – shall submit information, if and as required by the decision, about the measures taken to enforce the decisions of the CC (r 63, para 6, RoP). In the event of failure to enforce a decision or delay in giving information, the CC may issue a ruling in which it shall establish that its decision has not been enforced. This ruling shall be published in the *Official Gazette* (r 63, para 6, RoP).

The State Prosecutor shall be informed of all decisions that have not been enforced (r 63, para 7, RoP). The secretariat shall follow up the implementation and report back to the CC.

(ii) Conflicts between constitutional competences

A few remarks on the enforcement of the CC's decisions in the different types of procedure are necessary. The decisions of the CC shall state which conflict exists between the competences of highest state organs, and decide which action

or omission violates the competences of a party and how the distribution of competences under the constitution should take effect (Art 113, para 3, item 1, Constitution; Art 31, Law on the CC; r 67, RoP). The court only establishes the law; it does not oblige the parties, or condemn any party, or enforce its decision. However, the CC operates on the notion that the parties will understand the "hint" and will act or desist accordingly.

(iii) Control of norms

The control of laws and other norms is, in essence, the subject of the:

1. procedure of Article 113, paragraph 2, item 1, Constitution *(abstract norm control)*;
2. examination of *municipal statutes* (Art 113, para 2, item 2, Constitution);
3. examination of a proposed *referendum* (Art 113, para 3, item 2, Constitution);
4. declaration of a *state of emergency* (Art 113, para 3, item 3, Constitution);
5. examination of *elections of the Assembly* (Art 113, para 5, Constitution);
6. examination of proposed *constitutional amendments* (Art 113, para 3, Constitution);
7. *courts' referral* (Art 113, para 8, Constitution; *concrete norm control*);
8. *individual referral*, if the reason for an allegedly unconstitutional decision of a court is a law.

According to rule 65, paragraph 2, RoP the CC shall declare the entire law, decree or other provision to be invalid if the court determines that the normative instrument cannot achieve its legislative goal (without the unconstitutional provisions which are a part of it). Rule 65, paragraph 1, RoP leaves the legal option that the law is only partially invalid if the rest of the law, after subtracting the unconstitutional provisions, can reach, at least partially, the intended goals of the legislator.

One may question what the meaning of "invalid" is. It could mean that the norm is void, from the adoption (*ex tunc*) and without further acts (*ipso iure*). But could the consequence of unconstitutionality, as stated by the CC, also mean that a norm is not void, but destroyed or destructible? Rule 66 RoP reads: "Secondary and administrative acts shall not be applied from the date the Court's judgment becomes effective." How could an act, which is based on a norm which is void from the beginning, have effects for the past, although not for the future? It seems that the court, by declaring a norm "invalid", in fact only destroyed it *pro futuro*.

Article 29, paragraph 2 of the Law on the Constitutional Court reads: "A referral shall indicate whether the full content or certain parts are deemed to be incompatible with the Constitution." A decision of the CC can also do this. "Partly invalid" means that the text of the norm, if applied in the future, is to be read without the unconstitutional part. The CC has the discretion:

- to declare the norm as invalid as a whole, for instance if the competence of the legislator is missing, or if the partly invalid norm cannot reach the legislator's goal;
- alternatively, the court may declare the norm only partially invalid, so that the rest remains valid and an amendment by the legislator may not be needed.

There may be a declaration that the norm is partially invalid without a reduction of the norm text. This would mean, in effect, that the CC cuts out some possibilities of application, which the CC feels are not in accordance with the Constitution. All other applications are constitutional. This would be a "constitution-friendly" – namely a "legislator-friendly" – examination and decision on the repealed norm.

Some Constitutional courts took a wide discretion to decide that a norm is incompatible with the Constitution, and – as an intermediate regulation of the matter – this would still be applicable for the time being (ie until the date of an amendment by the legislator). Some judgments took the liberty to set a time limit for amendments to be enacted. These decisions might be evaluated as calls for amendments or even as substitute legislation to maintain a full constitutional situation, but certainly avoid the existence of non-regulated areas. They block the application of the norm on cases which have caused the referral and are no longer applicable. The decision in the starting case is quashed or suspended. But instead of declaring a norm void from the beginning (ie being retroactive), the unconstitutional norm is valid for the past and the courts would find measures to regulate on transitional cases. There would be no loophole in the law, and this provides for certainty and trust in the legal order.

Constitutional courts discovered another alternative to find a *period of grace*. They tried to interpret norms "in favour of constitutionality", in conformity with the constitution. Each judge, in trying to avoid a court's referral, would do so. They tried to give the norm a sense which was in line with the constitution: if not the clear text, then the history and the goal of the norm enforce another interpretation. But this "constitution-friendly" interpretation is inadmissible, if the clear intent of the legislator does not support this interpretation.

Of course there are many critical voices against "constitution-friendly" interpretation. Is the Constitutional Court indeed "saving the legislator"? Or does it act "instead of the legislator"? It is obvious that constitutional jurisdiction wants to avoid the declaration of norms as void; in other words, it is trying to find a softer interpretation. But one may ask whether it is legitimate to lift the "sharp cut" of cassation.

If an *amending or reform law* is declared "invalid" and the decision understood in the sense of declaring the law as "void", what happens to the old, amended law? The legislator wanted to invalidate it, but did not succeed, since the new law is unconstitutional. Would the consequence be that the old law is valid for the foreseeable future, until the legislator takes responsibility to amend it in a constitutional manner?

The procedural and operative parts of decisions are *equal in all types of norm control – abstract*, concrete and individual referrals – if the latter are the subject of examination by the CC and in effect are (indirectly) contesting the constitutionality of a law as the basis of the court's decision:

- in cases of abstract norm control the CC decides that the norm is invalid or links the arguments to the operative provision of the decision: "para X, Y, Z is compatible with the constitution in the interpretation, as found in the arguments";
- the same is true in cases of concrete norm-control, which are the courts' referrals;
- as far as an individual referral against a court's decision indirectly addresses the unconstitutionality of the law on which the decision is based, the CC holds – in addition to the quashing of the decision – that the law is unconstitutional, invalid or void.

IV Abstract norm control: Article 113, paragraph 2, Constitution

The Assembly, the President, the Government and the Ombudsperson are authorised to refer to the Constitutional Court the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of Government regulations.

V Referral of courts – concrete norm control: Article 113, paragraph 8, Constitution

The courts have the right to refer questions of constitutionality of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the constitutionality of the contested law, and provided that the referring court's decision on that case depends on the constitutionality of the law at issue. The referral has a suspending effect.

VI Individual referral: Article 113, paragraph 7, Constitution

Individuals are authorised to refer violations by public authorities of their individual rights and freedoms guaranteed by the construction, but only after exhaustion of all legal remedies provided by law. In the focus of this paper are *referrals against court decisions*.

A mistake by the court, which is relevant for violation of human rights, may be based on an *erroneous interpretation* or *application* of the law. The mistake could be based on a *deficit of perception* of the law. In the latter cases, individual referral is founded if the judge, in interpreting or applying the norm, did not realise that human rights impacted on his decision or that it was necessary to balance contradicting human rights. The judge's mistake could also take the form of an *erraneous assessment of human rights*, so that the judge misunderstood the impact of human rights in the case, in particular the extent of protection of the party by a human right.

The violation of the relevant human right could occur *in the content of the decision*. If the result of the decided case could not be understood in the light of human rights and it could be concluded that the decision was *arbitrary,* this would mean that it violated the equality principle as a human right.

The individual referral may be founded if the judge applied *illegitimate judge-made law*. It could be that the court misunderstood the *range of application* of a norm or the *range of reservation of formal law* and consequently violated the rule of law and human rights.

The referral may be based on an inadequate *intensity* of encroachment into a human right. The more intensive the impact, the more intensive the examination of the case will be by the CC.

Most individual referrals allege violation of fair procedure principles. In this area, the CC claims a wide discretion. "Full hearing", for instance, covers the whole proceedings before the ordinary courts. In these cases the CC acts as a *fourth instance*, which should not happen. In recent cases the CC has taken notice of this problem and a*dmonished* the ordinary courts to take careful note of the *rules of fair procedure*.

If the CC determines that a court has issued a decision in violation of the Constitution, it shall declare such a decision *invalid* and *remand* the decision to the issuing court for reconsideration in conformity with the judgment. If the referral against a court's decision indirectly addresses the unconstitutionality of the law on which the decision is based,

the CC will hold – in addition to quashing of the decision – that the *law is invalid*. This declaration is effective *erga omnes*.

When the CC holds that a court's decision is *invalid*, this declaration restores the procedure of *the case in its former position*, before the referral was raised and the court's decision was edited. It then lies within the responsibility of the *ordinary courts* to decide the case when obeying the CC's decision on unconstitutionality.

If the act of a public authority has been confirmed by more than one court decision (Basic Constitutional Court, Appellate Court, Supreme Court), the CC declares *all decisions as invalid*. In this, the CC has a certain discretion. If a court, for instance the Supreme Court (SC), has to decide other legal issues in the case (ie other than the constitutional one), the CC would deprive the SC of the chance to continue the examination if it would declare the decisions of the other court – basic or appellate – *as invalid*.

If the CC declares one or more decisions of lower instance courts as invalid, the upper instance decisions, including the decision of the SC, are *without object*. It is not necessary to quash them explicitly, because they could no longer be a point of complaint. This is particularly true, if the SC did not decide on the *merits*, but simply declared the *appeal as inadmissible*. It is, however, not adequate to declare the upper court's decisions as being without object if tacitly based on a violation of human rights. *The operative part of the CC* would be: "The decision/s is/are invalid" or, if they are only partly unconstitutional: "The decision/s is/are to the extent…invalid.". As far as the upper court's decision is concerned: "The decision/s … is/are without object."

Secondly, rule 74, paragraph 1, RoP orders: "*… and remand the decision to the issuing court*". If the individual referral is founded against all courts' decisions (basic, appellate, Supreme Court) the CC has discretion. In general, it would remand to the ordinary court of *first instance*, which released the decision the CC has claimed is unconstitutional. It could also remand to another court of first instance in another circuit. The CC could also remand to a court of higher instance. This is *preferable* if the unconstitutionality of the appealed decision is based on a violation of procedural norms. The court then has the chance to repair and the appellant's rights to further instances are not curtailed.

The CC could also remand to a *court of higher instance*. This is preferable in the interests of a speedy hearing. A remand to the appellate court or to the SC may be suggested, if further substantial amendments of the decision are not necessary. This is the case, for instance, if just one legal question is to be decided differently, according to the CC's judgment. If *new facts* have to be taken into consideration, the CC must remand to the court of first instance.

The decision of the CC on remanding must follow the *interest of the appellant*.

The CC rarely takes the *final decision*, and does so only if there is no room for further deliberations of the ordinary courts, eg if an order has to be taken solely with regard to the costs of the procedure. The operative part of the CC's decision would be: "The case is remanded for further decision to the basic or appellate court (in the xyz circuit) or to the SC."

V CONCLUSION

In summary the following three points can be made.

First, in norm control cases the relationship of the CC and the legislature arises. The focus is the principal question of distribution of state functions and separation of powers. This is underlined by the notion that a declaration by the CC that a law was invalid could mean "negative legislation".

Second, in referral cases which contest court decisions, the advisable burden-sharing within the judiciary is at stake. This is underlined by the notion that jurisdiction of the CC effectively means "control of the controllers".

Finally, there is the issue of the position, authority and flexibility of the legislature. The more tightly the net of the constitution's interpretation is knitted by the CC, the more all courts receive the law, as it is to be applied by them, from the hands of the CC and not from the Assembly.

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