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**The Jurisdiction of The Constitutional Court In Controlling The
Constitutionality of Criminal Judgments: Kosovo Case**

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ABSTRACT

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This paper will deal with individual requests that are submitted at the Constitutional Court in order to assess the constitutionality of criminal judicial decisions. The right to submit issues for assessing the constitutionality of criminal court decisions is a constitutionally guaranteed right. Many individuals who are dissatisfied with the decisions of the judicial instances use their right to oppose such a decision even at the Constitutional Court.

Not all the cases submitted to the Court are based on the right which derives from the Constitution. While it is known that the constitutional judiciary in our country is a new practice, the legal professionals, including lawyers and other jurists, still have not understood the role of this Court.

In order to elaborate more in this paper, the conditions that must be fulfilled for a claim to be admissible in the Court will be treated by explaining one by one these conditions and even the practices which were developed at the court. Also, an important part of the paper will discuss the framework within which this court will decide upon the submission of the request. We will see that the Constitutional Court does not get out of the bases of the request submitted by the parties, by checking only the possible violation of constitutional rights guaranteed in criminal proceedings. It will not deal with the facts and the manner of obtaining the evidence, as this issue is in the hands of regular judicial instances. Finally, an emphasis will be placed on the legal effects of those decisions and obligations which produce Court decisions for the ordinary courts and other authorities.

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1. Introduction

The right to a fair and impartial trial in criminal proceedings is a constitutionally guaranteed right. Our country through the Constitution guarantees a range of rights to individuals charged with criminal proceedings. These rights are guaranteed in accordance with the international documents that provide citizens a fair and impartial trial.

Throughout the development of the procedures, the courts are obliged to respect the constitutional rights that belong to the defendants. They have to eliminate any kind of actions

that are inconsistent with the constitutional and legal requirements, by showing loyalty in their implementation in the judicial process. Not infrequently happens that the courts consciously or unconsciously, act on the contrary to the obligations they have in specific judgments. Knowing that the decision of an issue can never be ideal, the Constitution has guaranteed the opportunity to appeal the decisions and actions taken, for the purpose of not producing legal consequences due to the unfair and illegal decisions.

The decisions that are given by the ordinary judicial instances can be challenged in the Constitutional Court in terms of control of their constitutionality, by recognizing if in the specific cases are respected or not the requirements and constitutional principles guaranteed, in order not to issue a decision which contains anti-constitutionality and violations of other provisions that are guaranteed by laws and the Constitution.

The decision rendered by the highest judicial authority may be subject to the constitutional control. The individual constitutional complaints contesting the constitutionality of criminal judicial decisions can be appealed only in terms of claims related to any action or decision that contradicts the principles of constitutionally guaranteed, but not the control of the content of these judgments.

2. The conditions that have to be fulfilled in order for the request to be acceptable

In order to be addressed by the Constitutional Court, the request for constitutional review of the judicial decision taken by the court instances, certain conditions must be fulfilled. The conditions for admissibility are provided by the Constitution of Kosovo, the Law on the Constitutional Court and by the Rules of Procedure of the Court. According to the constitutional and legal requirements, a request that opposes the constitutionality of the criminal court decision must be submitted by an individual, in this case by the defendant who is dissatisfied with the decision, it should be filed within the deadline, it should use all legal remedies provided by law and clearly define which rights and freedoms he claims to have been violated and what is the criminal court decision that he wants to oppose.

2.1. The request submitted by the individual with active legitimization

The first condition for the admissibility of the request is that the request should be individualized. It must be submitted by an individual(s) who opposes the judicial decision in the aspects of the constitutionality. The Constitution does not allow the use of *actio popularis*. No one at the court without authorization and approval of the accused who admitted the criminal judgment cannot appear and follow the procedure on his behalf.

Even though someone is convinced that the same judgment contains elements which collide with the guaranteed constitutional rights, in front of the Constitutional Court he does not have active legitimization. However, according to the Article 21 of the Law on the Constitutional Court, it is determined that the parties during the proceedings are represented on their own or by an authorized representative of the party in front of the Constitutional Court. So, the applicant can initiate the issue in the Court only if the individual has a direct interest in it. The direct interest in the case, according to the ECHR, is assumed to be when the applicant is a victim of the violation of a public authority. (Hasani & Čukalović, 2013, 593)

2.2. The request should be submitted within the legal time limit

The second condition of admissibility of the request is the submission within the legal deadline. All the issues are linked to the legal deadline. Pursuant to Article 49 of the Law of Constitutional Court of the Republic of Kosovo "The request shall be submitted within four (4) months. The deadline shall be counted from the day when the claimant has accepted the court decision."

In cases of losing the deadline, in specific cases it may be allowed to return in the previous state (*restitution in integrum*), more precisely to respect the subjective deadline of 15 days and the objective deadline of one year from the moment of receiving the court decision. The legal limit for the decisions taken is calculated by the highest judicial instance, in this case for the criminal court decisions is the Supreme Court of Kosovo.

2.3. The usage of all legal remedies

The third condition of the admissibility of the request, according to the Article 113, paragraph 7 of the Constitution of Kosovo is that the applicant "Should have used all legal remedies provided by law". The object of the principle of using internal remedies is to allow the judicial authorities to treat the claims for violations of a right and, if appropriate, to enable relocation before the claim is presented to the Constitutional Court. (Mushkolaj & Morina & Lamoen 2014, 348) "The Constitutional Court justifies the concept of the usage of remedies before the issue is raised at the Constitutional Court with the argument of the European Court of Human Rights (Hereinafter: ECHR), which firstly must allow the regular courts, and also other state authorities in general, to correct the alleged violation. If this system does not work, the jurisdiction of the Constitutional Court as a subsidiary court will be included." (Hasani & Čukalović 2013, 592).

Considering the usage of legal remedies, the European Court of Human Rights has requested the application of the rule be flexible and with less formality, rules on usage of remedies is neither *absolute* nor *automatic*, and the usage of remedies should be considered in line with the real circumstances of the applicant's request, the remedy is *possible* as well as *effective*, and it is required to ascertain whether the applicant has used the remedies that are expected to be used by him. The reason why it is required to be done this way is because there may be circumstances in which the usage of remedies by the applicant would endanger him. Therefore, in such cases the Court may apply the principle where the applicant has no access to *possible* and *effective* legal remedy, and to accept the submission without using all the remedies (Hasani & Čukalović 2013, 592-593). The usage of legal remedies prescribed by legislation is an imperative request that obliges the applicant to use all legal ways for the realization of the right claimed and the elimination of all kinds of other anti-constitutionality that could be argued.

2.4. The identification of the violated right and the contested court decision

The fourth condition of admissibility of the request pursuant to Article 48 of the Law on the Constitutional Court is that "the applicant is obliged to clarify in his request exactly what rights and freedoms he claims to have been violated and what is the specific act of the public authority which he wants to oppose." "In submissions to the Court, the applicant must provide details of the alleged violation of rights and freedoms prescribed in the Constitution and show specific actions (or inaction) of public authorities that have caused those violations by attaching with the request all the relevant administrative decisions and court judgments in order for the Court to have a clear picture of the facts and the issues raised. Thus, the court will be able to determine whether the case is admissible, and if it is admissible, it must determine whether the applicant has been victim of violation of the rights and freedoms guaranteed by the Constitution, as claimed by the applicant". (Mushkolaj & Morina & Lamoen 2014, 358-359)

During the course of the criminal proceedings in any of the court instances, the accused can become a "victim" of not respecting the constitutional provisions guaranteed. If the act or anti-constitutional acts have been caused prior to the decision taken by the Supreme Court, aforementioned as recognized by the Constitution as the court highest authority, the claimant is obliged to present his claims for the violation of constitutional rights to the regular judicial authorities, as they also should act in accordance with the constitutional provisions. The

constitutional rights which are violated during the regular procedures in courts that handle the criminal case can eliminate the potential malfeasance by not utilizing the mechanism of constitutional control by the Constitutional Court. When the request is submitted by the applicant, the constitutional rights that were allegedly violated must be clarified.

In the case held in the Constitutional Court: *Bajrush Gashi vs. The Supreme Court*, the applicant claims that the contested decision has violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6 [Right to regular procedure] of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The applicant is also required to mention the act of the public authority which he opposes in terms of its containing elements that are not in line with the Constitution. Primarily, the applicant must mention the court's recent decision accepted by the Supreme Court as the highest judicial instance in the country. The decision which was taken by the highest instance and that is opposed by the applicant can be the instance that has legitimated only one of the applicant's claim, as it can happen that the violations of rights and constitutional provisions are done by lower instances, making it easy to not be corrected by higher instances.

2.5. The limits of handling the request for constitutionality evaluation

The Constitutional Court does not act based on its official duty, it only considers requests or complaints submitted to it. According to the provision of Article 23 of the Law of Constitutional Court, despite the fact that the party has withdrawn the request although it has initiated the proceedings, the Court will decide on issues which were referred to it based on legal manner by authorized parties notwithstanding the withdrawal of the party from the proceedings. According to the current practice of the Constitutional Court, in none of the cases in which the constitutionality of criminal court decisions were reviewed, none of the parties that started the procedure for these purposes has withdrawn. In case if the applicant withdraws after having submitted the request, it is at the discretion of the trial judge to assess the circumstances of the case submitted, in order to evaluate the importance and other consequences which may arise in case of taking the decision on its merits.

After we have realized that the Court acts only upon the request of a party, may arise dilemmas as follows: what are the limits of the decision review issued by public authorities opposed on the appeal? Will it be decided in general on the decision issued by the public authority, or will it be decided on the basis of points that have been raised in the complaint? Based on the analysis of several judicial decisions taken by the Court, it could be revealed that most of the parties contesting the court decisions have not been clear about the scope of this court. With the request submitted by the party not satisfied on receiving the criminal judgment, the Court will act only on the basis of the request frameworks and under no circumstances it will address issues outside of this request items. Thus, the Court is not authorized to address other elements which are not opposed in the complaint.

The court is obliged to act only on items represented in the complaint, by respecting the principle *tantum devolutum, quantum apelatum*. In some cases, the Court can get out of the items of the request, but it can never exceed the basis of the request without any further submission where the party would be able to improve or change the items of the request, although this cannot be considered as exceeding the items of the request due to the fact that still the decision will be taken based on the request that is changed by applicant. Furthermore, in the issues that are not addressed in the complaint, the Court has no obligation to handle them and as such it does not decide about them on the constitutional review. Such issues can be considered as *res iudicata*.

3. Constitutional Court as controlor of the compliance of the constitutional provisions on criminal procedure

It is a known fact that not all the judicial decisions taken in the regular judicial instances are in accordance with the Constitution. Given that the Constitutional Court does not act *ex officio*, many of these decisions remain not addressed, thus, the final decision is taken and legal consequences are produced, even though they are on contrary to the spirit and letter of the highest legal act. The Constitutional Court claims that in the absence of such above-mentioned jurisdiction, in specific trials that are done for the purpose of reviewing the constitutionality of judicial decisions, should act in accordance with the constitutional and legal requirements and it should eliminate the elements that are not in line with the Constitution.

The individual complaints submitted to the Constitutional Court must contain only the important aspects which are directly related to guarantees and constitutional rights of the accused denied in criminal proceedings. The Constitutional Court is not a court of facts to assess the circumstances that were done by other regular courts during preliminary proceedings.

In its decisions, "the Constitutional Court emphasizes that it is not a court that is focused on finding facts. The Constitutional Court wants to emphasize that the verification for fair and complete factual situation is a jurisdiction which refers to regular courts and the Constitutional Court's role is only to ensure compliance with the rights which are guaranteed by the Constitution and other legal instruments and therefore it cannot act as a "*fourth instance court*" ".

In another decision, the Court reiterates that it is not the Constitutional Court's duty to substitute its own assessment of the facts with those of regular courts and, as a general rule it is a duty of these courts to assess the evidences that are available to them. Therefore, the Constitutional Court's duty is to ascertain in general whether the proceedings in the ordinary courts were correct, including their way of obtaining the evidences.

The court does not address essentially the case or treat again the facts and their assessment mode, or standards which are used for assessing and evaluating the evidence. The court stops exclusively in the treatment of how to implement the constitutional standards in specific criminal proceedings. Most of the individual requests brought to the court are unacceptable requests. The most important parts contain the disputes for the methods used for assessing the facts and evidences. Although there may be different types of anti-constitutionality, yet, it is not its duty to evaluate them. Assessing other circumstances of the case, which are not guaranteed by the constitutional provisions, is defined as exceeding the mandate of the Constitutional Court itself, which practically cannot be decided otherwise.

Moreover, the requests that are treated by the court are linked with constitutional guarantees which belong to the party by the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution of Kosovo, or even other important rights that are constitutionally guaranteed. The constitutional provision of the right to a fair and impartial trial guarantees the accused for equality of parties, the right to a fair and impartial public review regarding the rights and obligations or for any criminal charge that is raised against him within a reasonable time limit from an independent and impartial court established by law; public trial; the right for accused to make questions to witnesses and to require the mandatory attendance of witnesses, experts and other persons who can clarify the facts; to presume that he is innocent until proven guilty; to ensure legal assistance in cases when it is necessary.

4. Constitutional Court decisions and their effects

According to the provision of Article 116, paragraph 1, of the Constitution of Kosovo all the "decisions of the Constitutional Court are binding for the judiciary, for people and for the institutions of Republic of Kosovo." While, under the provision of rule 66, paragraph 2, of the

Rules of Procedure of the Constitutional Court, it is determined that if the Court has issued a decision in a criminal case under the provision of law, regulation or municipal statute that is declared unconstitutional, the person against whom the decision brought, may re-open the criminal proceedings. Whereas, the provision of rule 74, paragraph 1, it is arranged that if the Court determines that a court has issued a decision in violation of the Constitution, it would declare the decision as invalid and return it for reconsideration in accordance with the judgment of the Court.

Although the Court does not address the substance of the claim, but only the procedure if it is in accordance with the requirements and constitutional rights, the retrial of the case will return to the first instance court, where this instance is obliged to act in line with the obligations that arise from the verdict. Ascertainment of the unconstitutional points will be a very important moment for the actions that are not in accordance with the Constitution to not be repeated.

In many of its decisions, the Court has given decisions that were taken on the contrary to the Constitution, where the case was referred to retrial.

CONCLUSION

The right to submit a request in the Constitutional Court of Kosovo in order to review the constitutionality of the decision rendered by the regular judicial instances is a guaranteed right. A request that opposes the constitutionality of the decision of the criminal justice, must be submitted by an individual, in this case by the defendant who is dissatisfied with the decision that he has received, submitting it within the legal deadline, after using all the legal remedies that are established by law and to clarify precisely what rights and freedoms he claims to have been violated and what is the criminal court decision that the applicant wants to oppose.

The Constitutional Court will review the request only within the limits. It will not address issues that are not raised by the applicant. Such individual requirements will be acceptable if the party has managed to identify his constitutional rights which have been violated by the regular judicial instances.

The Constitutional Court is not a court for finding and evaluating facts, or evaluating evidences or other circumstances. The verification of fair and complete factual situation is a full jurisdiction of the regular courts and the role of the Court is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and therefore it cannot act as a "*fourth court instance*". It will decide positively on the issue raised, only after the control of the constitutionality of judicial decisions has showed that the regular courts have violated the rights guaranteed by the Constitution.

Its decisions are binding to all authorities addressed, where each authority is obliged to act by taking into full consideration the obligations arising from the dispositive of the decision for the specific situations.

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