

Enver Hasani | Péter Paczolay | Michael Riegner [eds.]

Constitutional Justice in Southeast Europe

Constitutional Courts in Kosovo, Serbia, Albania and
Hungary between Ordinary Judiciaries and
the European Court of Human Rights



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Preface and Acknowledgements

The idea for this book originated at an international conference held in Pristina/Kosovo in November 2010. At that time, the Constitutional Court of Kosovo had just completed its first year of operation and was establishing itself as a strong and independent institution. It was thus looking for inspiration and lessons learned elsewhere, and the German Federal Constitutional Court was often cited in this context. It thus came as natural to the Legal Reform Project of the Gesellschaft für Internationale Zusammenarbeit (GIZ), the development cooperation agency of the German federal government, to support the Constitutional Court of Kosovo in organizing a conference on constitutional justice in a regional comparative perspective.

The conference, held in cooperation with the Justus Liebig University Gießen/Germany, focused on two topics felt to be pressing in Kosovo at the time. These topics soon turned out to be similarly relevant in other jurisdictions and for international legal research. The first issue was the relationship between constitutional courts and domestic supreme courts, which saw some initial irritations in Kosovo after the quashing of a number of last instance judgments, but which is also a recurring and almost timeless theme in many other jurisdictions which adopted the European model of specialized constitutional review. A second pressing issue was the domestic application of the European Convention on Human Rights and the proper domestic role of Strasbourg case law. Both are given a privileged position in the Kosovo Constitution, but equally and increasingly shape constitutional justice in the neighboring countries and all over Europe.

During the conference, it became clear that there was little comparative literature on how the Southeast European constitutional courts played their role as interfaces between domestic judiciaries on the one hand and judicial bodies beyond the nation state on the other. Given the international debate on composite constitutional justice in the European multi-level architecture of fundamental rights protection, the organizers thus decided to develop selected conference papers into academic articles and to publish them in an edited collection addressed to academic audiences in Europe. This involved two rounds of substantive revision of the papers, a full academic peer review over a period of six months, and finally a native speaker and form check. The initial versions of the contributions were drafted in the first half of 2011; they were peer reviewed and revised by the authors in the second half of 2011. The manuscript was completed in January 2012. GIZ would like to thank, first of all, the authors for their continued commitment to this project. All of them put considerable time and effort into writing and re-

vising their contributions, many of them alongside their challenging full-time occupations as constitutional justices or legal practitioners. GIZ would also like to thank our three editors, Enver Hasani and Péter Paczolay, as well as Michael Riegner, who developed the initial concept for the book and administered the peer review and revision process. We are indebted to everyone who contributed to this project at the Constitutional Court of Kosovo, at the GIZ Legal Reform Project in Kosovo, and at the Chair for Public and Comparative Law of Professor Philipp Dann at the Justus Liebig University in Gießen/Germany. Particular gratitude for their voluntary commitment goes to Matthias Hartwig at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and to our anonymous peer reviewers. We are grateful to Nomos Verlag for publishing this book. A last but important thank you goes to the many others, too numerous to be named, who supported this book as proof-readers and English language revisers, discussion partners and moral supporters, or in other capacities.

Pristina, January 2012

Volkmar Theobald
Project Leader
GIZ Legal Reform Kosovo

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Péter Paczolay

Abbreviations

ACC	Act on the Constitutional Court of Hungary
CC	Constitutional Court
CoE	Council of Europe
CSP	Comprehensive Proposal for Kosovo Status Settlement ("Ahtisaari-Plan")
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
FCC	Federal Constitutional Court of Germany
HRA	UK Human Rights Act 1998
MPs	Members of Parliament

The Relationship between the Constitutional Court and the Supreme Cassation Court in Serbia

*Ivan Čukalović**

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I. Introduction

It is interesting to analyze the relationship between the Constitutional Court and the Supreme Cassation Court of Serbia because it is illustrative of the changing Serbian approach to rule of law and constitutionalism. Notably, the current institutional framework reflects recent constitutional reforms: The numerous jurisdictions of both courts have been significantly changed by the enactment of the new Constitution of Serbia in 2006¹ and by the new Law on Regulation of Courts in 2008.² Both acts assign the control of constitutionality, as well as the protection of human and minority rights, to the Constitutional Court. The Constitutional Court is an independent state organ, whose decisions are final, executive and binding on everyone. The Supreme Cassation Court sits atop of the ordinary court system and performs different adjudicative functions. However, it is linked to the Constitutional Court in functional, procedural and – more peculiarly – in personal terms.

We will analyze the relationship of the two courts in three steps: First, we will set out the development and the present status of constitutional justice in Serbia (part II). Then we will give an overview of the Serbian justice system and the Supreme Cassation Court (part III). The last part analyzes the relationship between the two courts in a functional, procedural and personal perspective (part IV).

II. Evolution and present status of constitutional justice in Serbia

1. Historical development

The position of the Constitutional Court has undergone significant changes in past constitutional reforms. Today, it is the only organ of that kind in Serbia and, as such, the default carrier of the protection of constitutionality, and, to a certain extent, legality in the entire territory. This was not always the case, but is the result of the restructuring of the autonomous regions in the Constitution of the Republic of Serbia of 1990. The 1990 Constitution abolished the constitutional or legislative authority of the autonomous regions, which resulted in the abolition

of their constitutional courts. Consequently, the 1990 text deleted the provisions of the Constitution that addressed the relations towards the constitutions and laws of those regions, and towards their constitutional courts.

Another change over time was due to the general conception of the Constitution, which appears to be of a formal nature at a first glance, but in fact evidences fundamental changes in Serbian statehood: In the 1974 Constitution of Serbia, the analogous organ is called "The Constitutional Court of Serbia", while the constitutions of the Republic of Serbia from 1990 and 2006 use the term "The Constitutional Court". This linguistic change affected all organs of the Republic. In other words, the Constitutions of 1990 and after do not emphasize that the organs are those of the Republic of Serbia, as is done in the Constitution of Serbia from 1974. The important legal background to this wording is that the constitutions from 1990 and 2006 are written as complete constitutional documents of an independent state, while the Constitution from 1974 has been set out as the Constitution of one federal unit within the Socialist Federal Republic of Yugoslavia. Some of the significant differences between the 1990 – 2006 Constitutions and the 1974 Constitution are:

- 1) The Constitutional Court is now the carrier of constitutionality, and to a certain extent, legality in the whole territory of Serbia, as a result of the change in the character and jurisdictions of autonomous regions.
- 2) New jurisdictions: the banning of political parties and deciding in electoral disputes requires changes in operation and the procedure before the Constitutional Court.
- 3) Deleting the initiative abilities of the Constitutional Court.
- 4) Along with increasing the number of judges, important novelties are the limited mandate of judges (nine years), and the fact that one person may be elected twice only.

2. The Constitutional Court under the 2006 Constitution

The constitutional provisions, namely Article 166, on the Constitutional Court emphasize that the Constitutional Court is an autonomous organ of the Republic of Serbia and presupposed carrier of constitutional protection. "Presupposed" signifies that, in the Constitution itself, the Constitutional Court has been appointed as the guardian of constitutionality and legality, as well as human rights. That position puts it beyond the classical functions of the justice system, but also distinguishes it in principle from the legislator. But admittedly the work of the Constitutional Court also contains elements typical for the judicial system, and its decisions can have the effect of "negative legislator".³ In light of this, the

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¹ Constitution of the Republic of Serbia, published in the *Službeni glasnik* (Official Gazette of the Republic of Serbia) RS, No. 98/2006 of 10 November 2006.

² A new organizational scheme of courts was established by the Law on Court Organization; see Official Gazette of the Republic of Serbia No. 116/2008, 104/2009.

³ Certain authors point to the role of the Constitutional Court as the "negative legislator", especially when the Constitutional Court decides what is unconstitutional. Along with this, the Constitutional Court could also be seen as the "shadow positive legislator" when,

