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Protection of the Right to Life in Kosovo: Does the Performance of Public Authorities in Kosovo Meet the Standards Established by the Case-law of the European Court of Human Rights?

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Abstract

The aim of this paper is to elucidate how public authorities in Kosovo discharge their duty to protect the right to life of individuals who are under their jurisdiction. The analysis will be predicated upon the case-law of Constitutional Court of Kosovo and on that basis actions or failure to act of other public authorities will be analyzed as well. The paper shall address questions of protection of individuals from violent actions perpetrated by private persons, protection of individuals who are under custody of public authorities, compensation of victims and temporal jurisdiction of the Constitutional Court of Kosovo. We shall see whether the performance of public authorities in Kosovo in relation to the right to life can withstand the standards set out by the well-established case law of the European Court of Human Rights or is it a rigid performance characterized by excessive formalism.

Keywords: right to life, compensation, domestic violence, state responsibility, temporal jurisdiction.

1. Introduction

Before looking into the performance of public authorities in Kosovo in relation to the right to life as guaranteed by Article 2 of the European Convention on Human Rights (hereinafter, the ECHR), we should expound a little bit on the basic principles that govern the approach of the European Court in relation to the right in question. The approach of the European Court to the interpretation of Article 2 is guided by the fact that the object and purpose of the ECHR as an instrument for the protection of individual human beings requires that its provisions must be interpreted and applied so as to make its safeguards practical and effective (Guide on Article 2 of the ECHR). Article 2 ranks as one of the most fundamental provisions in the ECHR, one which in peace time, admits of no derogation under Article 15 of the ECHR. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe (*Ibid.*). Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life, delimited by a list of exceptions (*Ibid.*). Having regard to its fundamental character, Article 2 of the ECHR also contains a procedural obligation to carry out an effective investigation into alleged breaches of its substantive limb (*Ibid.*). The Constitutional Court of Kosovo (hereinafter, the Constitutional Court) since it

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became operational on September 2009 has had to deal with several cases involving the right to life as guaranteed by Article 2 of the ECHR and Article 25[1] of the Constitution of Kosovo (hereinafter, the Constitution). The Constitutional Court and other public authorities by virtue of Articles 22[2] and 53[3] of the Constitution-as far as human rights are concerned-are bound by the ECHR and have a constitutional duty to make their decisions consistent with the decisions of the European Court. This is a reason why we shall analyze the protection of the right to life by public authorities in Kosovo in relation to the standards and tests developed by the well-established case-law of the European Court. In the ensuing chapters of this paper we shall analyze two cases culled from the case-law of the Constitutional Court in relation to the right to life, as guaranteed by Article 2 of the ECHR and Article 25 of the Constitution, as well as the performance of other public authorities in that regard, most notably the courts of general jurisdiction. We shall also see whether Kosovar authorities have shown to be characterized by excessive formalism and rigidity when called to protect a fundamental right, such as the right to life. There shall ensue an analysis of the obligation of public authorities including the Constitutional Court pertinent to: (i) protection of the right to life of individuals from violent acts perpetrated by private persons and domestic violence; (ii) the obligation to protect the right to life of individuals in public prisons with the view to both substantive and procedural limbs of Article 2 of the ECHR ; (iii) obligation to award compensation to the victims for non-pecuniary injury sustained by them; (iv) the obligation and awareness not to impose undue and disproportionate burden on the victims in pursuing legal avenues which offer no prospect of success; and, (v) application of the temporal jurisdiction of the Constitutional Court with respect to allegations of violation of the right to life.

- The responsibility of authorities should be engaged even in cases where the life of an individual is threatened by a private party.
- The application of the rule on temporal jurisdiction of courts must take into due consideration the specificities of safeguards guaranteed by Article 2 of the ECHR and 25 of the Constitution.
- The applicants must not be made to bear the disproportionate burden to exhaust legal remedies which offer no prospects of success.
- Judgments of courts finding a violation of the right to life should, inter alia, afford just satisfaction for moral injury.

2. The obligation of public authorities to protect the right to life of individuals from violent acts of private persons, domestic violence and the question of compensation of victims

In an individual but high profile case (Case No. KI41/12, *Applicants, Gëzim and Makfire Kastrati*), the applicants are the parents of the deceased D.K., who alleged, inter alia, before the Constitutional Court that the municipal court in Prishtina by its inaction namely by not issuing an emergency order[4] (Law on Protection Against Domestic Violence, No.03/L –182, Article 13) has violated the right to life as guaranteed by Article 25 of the Constitution in

[1] Article 25 of the Constitution of Kosovo establishes that everyone enjoys the right to life and that capital punishment is prohibited.

[2] Article 22.2 of the Constitution of Kosovo establishes that the European Convention on Human Rights and its protocols are directly applicable in the legal system of Kosovo, and that, in case of conflict; it has priority over provisions of laws and other acts of public institutions.

[3] Article 53 of the Constitution of Kosovo establishes that human rights and fundamental freedoms guaranteed by the Constitution must be interpreted consistent with the case-law of the European Court of Human Rights.

[4] Article 13.2 of the Law on Protection against Domestic Violence stipulates that an emergency protection order may be requested by the protected party, an authorized representative of the protected party, a victims advocate and a representative of social welfare center in case the victim is of minor age.

conjunction with Article 2 of the ECHR to the detriment of D.K. as a direct victim and to them as indirect victims (*Ibid.,* Case No. KI41/12). The Applicants further stated that the municipal court in Prishtina was under legal obligation to act within twenty four (24) hours from the moment D.K., submitted the request for an emergency protection order, and that, there were no remedies which may be used by the victim in case of inaction by the municipal court (*Ibid.*). The Constitutional Court qualified the right to life as the most important right of human rights from which all other rights derive. The Constitutional Court also referred to the general principles laid down by the relevant case-law of the European Court, namely the Case of Osman v. the United Kingdom[5]. The Constitutional Court reiterated that it is the duty of public authorities not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (*Ibid.*). The Constitutional Court further noted that this duty also extends to a positive obligation on public authorities to take preventive operational measures, to protect an individual whose life is at risk from the criminal acts of another individual (*Ibid.*). The Constitutional Court went on to state that in cases where authorities knew or ought to have known the existence of a real and immediate risk to an identified individual by a private person, they are under positive obligation to take measures, which judged reasonably, might have been expected to avoid such a risk (*Ibid.*). The Constitutional Court noted that the municipal court in Prishtina knew or ought to have known that there was a real and immediate risk to D.K., by a private person (ex-spouse) from the moment she had requested a protection order (*Ibid.*). In the light of the material before it, the Constitutional Court found that the municipal court in Prishtina was responsible under the law to take action in order to protect the life of D.K., but it had failed to do so. That inaction violated Article 25 of the Constitution and Article 2 of the ECHR (*Ibid.*).

Pertinent to the applicants' complaint about the lack of an effective legal remedy, the Constitutional Court noted that the law for protection against domestic violence does not foresee measures in cases when institutions fail to act (*Ibid.*). The Constitutional Court also noted that the Law on Kosovo Judicial Council[6] (Law on the Kosovo Judicial Council, No. 03/L-223, Article 45.5) does not offer any other possibility of complaint save for the Office of the Disciplinary Council-who has the right but not the obligation-to summon witnesses, gather information, investigate and determine whether the recommendation of disciplinary action should be presented to the Disciplinary Committee (*Ibid.,* Case No. KI41/12). The Constitutional Court concluded that the main responsible institution, the municipal court in Prishtina, failed to act with regard to the request of the deceased D.K., for issuing an emergency protection order as well as the failure to act by the KJC by not addressing the inaction of the municipal court (*Ibid.*). There was accordingly a violation of the right to an effective remedy as guaranteed by Articles 32 and 54[7] of the Constitution and Article 13 of the ECHR (*Ibid.*). In my view in this case, the Constitutional Court omitted to add the responsibility of public authorities to investigate, put to trial and punish the perpetrator of the violent act against the victim D.K. That is a crucial omission on the part of the Constitutional Court because there is a need to send home a strong message to public authorities to be more alert and sensitive and quick to act in order to prevent the loss of innocent life, which after all, the selfsame court qualified as the "most important right from which all other rights derive" (*Ibid.*). What is more, acting with due celerity to prevent loss of innocent lives goes to the very heart of substantive obligation of public authorities as required by Article 2 of the ECHR in connection with Article 25 of the Constitution. In addition, Case No. KI41/12, is a typical case of

[5] On the point of general principles with respect to the right to life see Judgment on the Merits by Grand Chamber, *Osman v. the United Kingdom*, No. 87/1997/871/1083, 28 October 1998.

[6] Article 45.5 of the Law on the Kosovo Judicial Council stipulates that it is the discretion of the Office of the Disciplinary Council to investigate and determine whether a disciplinary action should be forwarded before the Disciplinary Committee.

[7] Articles 32 taken together with Article 54 of the Constitution establish that everyone has a right to an effective remedy and to enjoy judicial protection of rights.

domestic violence against women and the Constitutional Court also should have touched upon the topic of making all forms of violence within the family as criminal offences which would enable the prosecutor to initiate criminal proceedings against the perpetrator and to enable the judiciary to adopt interim measures aimed at protecting victims[8]. To the above-statement one could object that neither the applicants nor the deceased D.K., while she was alive, did not bring the matter to the attention of the Public Prosecutor with the view to initiating criminal proceedings against the perpetrator. The fact is that on several occasions the deceased D.K., petitioned with the municipal court in Prishtina requesting the issuing of an emergency protection order (*Ibid.*). That situation should have prompted the municipal court in Prishtina to bring the matter to the attention of the Public Prosecutor in Prishtina, which the court in question, regrettably and fatally failed to do. Regardless of the fact whether the applicants or the deceased D.K., informed or not the Public Prosecutor, the municipal court in Prishtina, was under a positive obligation to do all what can reasonably be expected to be done i.e., to either issue a protection order or to bring the matter to the attention of the Public Prosecutor. In this respect, according to the well-established case-law of the European Court, the national authorities cannot rely on victims' attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim. In the context of domestic violence, victims are often intimidated or threatened into either not reporting the crime or withdrawing complaints (Opuz v. Turkey). With respect to the State's obligation to protect the right to life of individuals from violent acts of other private persons, the Inter-American Court of Human Rights has held that an illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the respondent State, because of the lack of due diligence to prevent the violation as required by the American Convention on Human Rights (Velasquez-Rodrigues v. Honduras). The corollary is that in Case No. KI41/12, the municipal court in Prishtina was under obligation to either issue a protection order against the perpetrator or inform the Prosecutor about the threats aimed against the victim D.K., by the perpetrator. Clearly the burden of action, in that situation, fell squarely with the municipal court in Prishtina because the victim D.K., and her next-of-kin have discharged their duty of "due diligence" merely by petitioning the said court, on several occasions, for a protection order. Such attitude as displayed by the municipal court in Prishtina, no doubt, amounts to a violation of the substantive limb of Article 2 of the ECHR in connection with Article 25 of the Constitution.

Another issue which should have been elaborated by the Constitutional Court, but which was not touched upon, was the issue of compensation of the applicants for the non-pecuniary damage they have sustained. Surely in sensitive cases such as the right to life the finding of a violation in and of itself cannot be considered to be a just satisfaction for the applicants[9]. The Constitutional Court itself is not vested with the power to award compensation for non-pecuniary damage in favor of the applicants. But that does not mean that the Constitutional Court, in the reasoning part of the judgment, cannot mention and remind public authorities to afford compensation for the non-pecuniary damage, at the very least, in line with the legal tradition and standard of living in Kosovo (Bokshi, 2018). The question of compensation for non-pecuniary damage is an international standard for protection of human rights alongside with the responsibility of public authorities on account of their lack of due diligence to prevent human rights violations, and to investigate and punish the perpetrators (*Ibid.,* Opuz v. Turkey). Moreover, on this point, in 2004, the Council of the European Union adopted a Directive (The Council of the European Union Directive, 2004/80/EC) relating to compensation of crime victims. That

[8] On this point see Recommendation by the Committee of Ministers of the Council of Europe Rec (2002) 5, 30 April 2002, on the Protection of Women against Violence. Retrieved 10 April 2019, from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612.

[9] With respect to awarding compensation for non-pecuniary damage see Judgment on the Merits delivered by a Chamber, *Trubnikov v. Russia*, no. 49790/99, 5 July 2005.

Directive acknowledges that frequently victims of violent crimes will not be able to receive compensation from the offender for various reasons, including their lack of funds and means to compensate the victim but also in cases where the offender cannot be identified (*Ibid.*). Accordingly, all member states shall ensure proper information dissemination in order to inform all potential applicants about the possibility of applying for compensation (*Ibid.*). In this regard, the Constitutional Court could have mentioned the issue of compensation of the applicants with the view to the international standards on effective protection of human rights especially seeing that the law on compensation of crime victims (Law on Crime Victim Compensation, No. 05/L-036) did not enter into force until 2015[10]. Due to fundamental nature of the right to life and pertinent to compensation of the applicants for non-pecuniary damage, the European Court has held that itself will in appropriate cases award just satisfaction, recognizing pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage (Kontrova v. Slovakia). The European Court in its case-law has persistently found that, in the event of a breach of Articles 2 and 3 of the ECHR, which rank as the most fundamental provisions of the ECHR, compensation for the non-pecuniary injury flowing from the breach should in principle be available as part of the range of possible remedies (*Ibid.*) Sure, the Constitutional Court is not vested by the Constitution nor by the Law on the Constitutional Court to award non-pecuniary damage but it has a constitutional duty to-at the very least- remind and place an obligation on Kosovar authorities to award non-pecuniary compensation to the Applicants due to death of their daughter. After all, the Constitutional Court and other public authorities in Kosovo have a constitutional responsibility predicated on Articles 22 and 53 of the Constitution to interpret fundamental rights and freedoms consistent with the decisions of the European Court. Thus, the Constitutional Court and other public authorities in Kosovo would do good to follow the logic of awarding compensation for non-pecuniary damage, as it is done by the European Court.

3. Protection of the right to life of persons in public prisons, the question of effective remedies and the temporal jurisdiction of the Constitutional Court

In Case No. KI134/14 (Case No. KI134/14, *Applicant, Sadik Thaqi*), the Applicant complained before the Constitutional Court about the death of his son while in prison and the responsibility of public authorities to investigate the cause of his son's death (*Ibid.*). He alleged a violation of the right to life as guaranteed by Article 25 of the Constitution in connection with Article 2 of the ECHR on substantive and procedural grounds (*Ibid.*). According to the summary of the facts as presented by the decision of the Constitutional Court, on 4 September 2003, a number of inmates in the Dubrava Prison attacked unarmed prison guards and took control of Pavilion No. 2 of that prison (*Ibid.*). The inmates in the Dubrava Prison barricaded the entrance to the cell block using mattresses and requested improved living conditions from prison authorities (*Ibid.*). The prison authorities intervened by removing the mattresses which were used by the inmates as barricade. In response the prisoners set the mattresses on fire and, as a consequence, five inmates died from the inhalation of toxic fumes and injuries sustained in the ensuing fire (*Ibid.*). The Applicant's son A.Th., was one of the prisoners that died in the riot in the Dubrava Prison (*Ibid.*). The United Nations Mission in Kosovo[11] (hereinafter, the UNMIK)

[10] Law on Crime Victim Compensation, No. 05/L-036, entered into force in 2015, which means that the Constitutional Court could not refer to it because its judgment in Case no. KI41/12 was rendered in 2013.

[11] See Article 10 of the Resolution 1244 (1999) Adopted by United Nations Security Council at its 4011th meeting, on 10 June 1999, which provides that the Secretary-General is authorized to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo while supervising the development of provisional democratic self-governing institutions ensuring conditions for a peaceful and normal life in Kosovo. Retrieved 25 April 2019, from https://peacemaker.un.org/sites/peacemaker.un.org/files/990610_SCR1244%281999%29.pdf.

Prosecutor requested examination and autopsies of the bodies of the five deceased inmates (*Ibid.*). UNMIK established a commission "the Dubrava Commission" in order to establish the events of 4 September 2003 and the facts that had led up to them (*Ibid.)*. The UNMIK Prosecutor requested that UNMIK investigators expand the scope of investigation and to include possible criminal conduct or negligence by the UNMIK employees. That recommendation was ignored by the UNMIK authorities (*Ibid.*). On December 2008 the case was officially handed over from UNMIK to the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO[12] in accordance with the Law on Special Prosecution Service in Kosovo[13] (Law on Special Prosecution Service in the Republic of Kosovo, Law No. 03/L-052). The EULEX Prosecutor terminated proceedings against the prisoners finding that there was no justified suspicion that the defendants had committed criminal offences (*Ibid.*). The Applicant was informed about the above-stated decision of the EULEX Prosecutor and that he had an option to submit a written application for extension of the investigation or to file an indictment against the defendants before the competent court within eight days upon receipt of ratification on termination of the investigation. The Applicant, it appeared, did not exercise either option (*Ibid.*). Instead, the Applicant filed a complaint with the Human Rights Review Panel[14] (hereinafter, the HRRP). With regard to the actions and omissions by UNMIK, the HRRP observed that it lacked jurisdiction and therefore declared that complaint inadmissible (*Ibid.*). With regard to the complaint against the prisoners, the HRRP declared that it had jurisdiction but found that EULEX discharged its responsibilities with regard to that complaint and consequently found that there was no violation of Article 2 of the ECHR (*Ibid.*). Thereafter, the Applicant pleaded the case of his son's death requesting an investigation to be made with the Government of Kosovo, the State Prosecutor, the Supreme Court, the European Court and even reiterated his complaint with the EULEX (*Ibid.*). In a letter dated 07 June 2013, the Office of Chief Prosecutor of EULEX informed the Applicant that an investigation may be reopened only if new evidence is available that was not previously administered and considered (*Ibid.*). So the Applicant then, submitted a constitutional complaint with the Constitutional Court. The Constitutional Court first assessed the standing of the Applicant, and declared that the Applicant as the parent of the deceased A.Th., in accordance with its own case-law and the case-law of the European Court- is an indirect victim and is thus an authorized person to submit a complaint with the Constitutional Court (*Ibid.*). As regards the Applicant's complaint against public authorities for failing to protect his son's right to life, the Constitutional Court declared that it lacked temporal jurisdiction and that that complaint is *ratione temporis* incompatible with the Constitution (*Ibid.*). The Constitutional Court reasoned such a finding by declaring that the alleged interference, i.e., the death of the Applicant's son occurred on 4 September 2003 whereas the Constitution entered into force on 15 June 2008, from which date the Constitutional Court has temporal jurisdiction (*Ibid.*). The Constitutional Court in order to support such a finding relied on

[12] EULEX Kosovo was launched in 2008 as the largest civilian mission under the Common Security and Defence Policy of the European Union. EULEX's overall mission is to assist the Kosovo authorities in establishing sustainable and independent rule of law institutions. For more on EULEX Kosovo see COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO. Retrieved 25 April 2019, from https://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf.

[13] Article 2 of the Law on Special Prosecution Service in Kosovo, Law No. 03/L-052, stipulates that the Special Prosecution Office is established as a specialized prosecutorial office operating within the Office of the State Prosecutor of Kosovo.

[14] The European Union established the Human Rights Review Panel on 29 October, 2009 with a mandate to review alleged human rights violations by EULEX Kosovo in the conduct of its executive mandate. The Human Rights Review Panel was established on the basis of Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Retrieved 9 Avgust 2019 http://hrrp.eu/index.php.

its own case-law and the case-law of the European Court namely the case of Blečić v. Croatia[15]. Furthermore, the Constitutional Court added that it appears that the Applicant forfeited his right to complain because, under the applicable law at the time, he did not request extension of investigation nor did he file an indictment against the defendants[16] before the competent court (*Ibid.*). In addition, the Constitutional Court referred to the case-law of the European Court, namely the case of Hugh Jordan v. the United Kingdom[17], wherein, inter alia, it was held that the obligation to investigate is not an obligation of result, but one of means. The Constitutional Court noted that the onus is on authorities to take reasonable steps available to them from to secure the evidence concerning the incident, including inter alia eyewitnesses testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (*Ibid.*). In the end, the Constitutional Court concluded that: (i) the complaint with regard to the responsibility of UNMIK/public authorities about the death of the applicant's son is incompatible *ratione temporis* with the Constitution; and, (ii) the complaint with regard to a lack of an effective investigation, is manifestly ill-founded because there is no evidence that the Public Prosecutor did not conduct a proper investigation when he took the decision that there was no person who could be indicted for the incident that caused his son's death (*Ibid.*). My estimation is that in Case No. KI134/14, the Constitutional Court was formalistic with the application of the *ratione temporis* principle and did not give due consideration to the specificity of the rights guaranteed by Article 2 of the ECHR and 25 of the Constitution. The Constitutional Court relied on the Blečić case in order to support its lack of temporal jurisdiction. However, in respect of Blečić case and pertinent to the application of *ratione temporis* principle vis-à-vis Article 2 of the ECHR, the European Court held that the test and criteria established in *Blečić* are of a general character, which requires that the special nature of certain rights, such as those laid down in Article 2 and 3 of the ECHR, can be taken into consideration when applying those criteria (*Šilih v. Slovenia*). The European Court reiterated in that connection that Article 2 together with Article 3 of the ECHR are amongst the most fundamental provisions and also enshrine the basic values of the democratic societies making up the Council of Europe (*Ibid.*).

On this point, even if it is accepted that the Constitutional Court lacked temporal jurisdiction to assess whether authorities, at the material time, did all that could reasonably be done to prevent the death of the Applicant's son, there is still the unresolved question whether there was an effective investigation with the view to establishing the cause of the death of the Applicant's son and punishment of the perpetrators. Having said that, the Constitutional Court should have been prepared to have some regard to the facts which occurred prior to entry into force of the Constitution because of their causal connection with subsequent facts which form the sole basis of the Applicant's constitutional complaint (*Ibid.*). According to the European Court, the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty (*Ibid.*). In that light, the European Court noted that although the procedural obligation under Article 2 is triggered by the acts concerning substantive aspects of the said article, it can give rise to a finding of a separate and independent interference. In that respect it can be considered to be a detachable obligation arising out of Article 2 capable of binding the

[15] Pertinent to the concept of temporal jurisdiction see Judgment delivered by Grand Chamber, *Blečić v. Croatia,* no. 59532/00, 8 March 2006.

[16] The Constitutional Court should have used the term suspects rather than defendants because individuals were suspected but no one was accused or stood trial. The term "suspect" is defined as "A person believed to have committed a crime or offense". The term "defendant" is defined as "A person sued in a civil proceedings or accused in a criminal proceeding". See Black's law Dictionary, Seventh Edition, ST. PAUL. MINN., 1999.

[17] On the question of state's obligation to carry out investigations see Judgment on the Merits delivered by a Chamber, *Hugh Jordan v. the United Kingdom,* no. 24746/94, 4 May 2001.

State even when the death took place before the critical date (*Ibid.*). The European Court noted that this approach finds support also in the jurisprudence of the United Nations Human Rights Committee and the Inter American Court of Human Rights, which have accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction (*Ibid.*). With regard to the State's temporal jurisdiction, the Inter-American Court of Human Rights has held that according to the principle of continuity of the State in international law, responsibility exists both independently of changes in government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal (*Ibid.,* Velásquez-Rodríguez). In this light, it is regrettable that the Constitutional Court remained silent on the patent disregard of the recommendation of the UNMIK Prosecutor to the UNMIK authorities to investigate the alleged criminal conduct or negligence of UNMIK employees (*Ibid.,* Case No. KI134/14). Such lack of accountability of UNMIK-as a surrogate state- can be described as a paradox, whereby those entities that are in Kosovo to help preserve human rights and the rule of law are themselves not answerable to the very person they are obliged to protect (Benedek, 2005). The Constitutional Court should have at the very least declared that, in Case No. KI134/14, UNMIK insisted on being untouchable and should have voluntarily refrained from making full use of the immunity of itself and its staff (*Ibid.*). As an aside but related note nonetheless, the reason for full immunity of UNMIK before Kosovo courts was due to UNMIK Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (*Ibid.*). In this regard, the Constitutional Court, at the very least, should have recognized the overriding preeminence of the right to life in the face of the regulation on immunities of UNMIK personnel because there must be some limit to such immunity which cannot be characterized by absolutism.

Bearing in mind the foregoing considerations, the Constitutional Court should have inquired whether public authorities did all that could be reasonably be expected of them-after entry into force of the Constitution[18]- to conduct an effective investigation and establish whether the death of the Applicant's son occurred due to negligence of prison authorities or due to violent acts of inmates? Unfortunately, the Constitutional Court failed to inquire whether state authorities conducted an effective investigation with the view to identify and punish those responsible for the death of the Applicant's son. Clearly the Applicant was denied of an effective remedy regarding the conduct of investigations related to his son's death which is in contravention with the general law principle, according to which where there is a right, there is a remedy (Barak, 1996).

In the context of prisoners, the European Court has held that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them (Paul and Audrey Edwards v. the United Kingdom). It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (*Ibid.*). The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to request particular lines of inquiry or investigate procedures (Nachova and Others v. Bulgaria). In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case (Giuliani and Gaggio v. Italy).

In Case No. KI134/13, the Constitutional Court should have said or admitted that there was no effective investigation conducted by the UNMIK authorities because it was not established how the death of the Applicant's son came about. Was he killed as a result of negligence of UNMIK

[18] The Constitution of Kosovo entered into force in June 2008 whereas the interference with the right to life which the Applicant complained occurred on or about 2003. This is a very important distinction because from 2008, public authorities of Kosovo exercised full powers in all areas related to the rule of law, the legislative, executive and the judiciary branches of the government.

officials or by fellow prison inmates? What about the actions or omissions of Kosovar authorities after the Constitution entered into force on 15 June 2008? Did they take action to shed light on the cause or the culprits for the death of the Applicant's son? The answer to those questions is negative. The Kosovar authorities did not take any steps to meet the criteria set out by the procedural aspect of Article 2 of the ECHR, which is an autonomous duty independently from the substantive aspect of Article 2 (*Ibid.,* Silih v. Slovenia). The Kosovar authorities-not unlike UNMIK authorities-failed to establish responsibility for the death of the Applicant's son. In the light of the foregoing, the Constitutional Court should have found that Kosovar authorities have violated Article 25 of the Constitution and 2 of the ECHR on procedural grounds due to failure to conduct an effective and thorough investigation.

As to the Constitutional Court's rationale that the Applicant had an option to file an indictment against the defendants/suspects before the competent court pertinent to the termination of the investigation, and thus, forfeited his right to complain (*Ibid.,* Case No. KI134/14). In this respect, it must be said that the Constitutional Court should have interpreted its subsidiary jurisdiction as set out in Article 113 (7)[19] of the Constitution with a degree of flexibility owing to the fundamental nature of the right protected by Article 25 of the Constitution in connection with Article 2 of the ECHR. The Constitutional Court did not do all it could do, in order to determine whether the remedy which the applicant allegedly did not use was effective and practical as opposed to theoretical and illusory (*Ibid.,* Opuz v. Turkey). Because the rights guaranteed by the ECHR should be practical and effective, and by the same token the rights guaranteed by the Constitution should be practical and effective too. In this respect, it must be underscored that the request of the UNMIK Prosecutor to expand the scope of investigation and to include possible criminal conduct or negligence by the UNMIK employees was ignored by the UNMIK authorities (*Ibid.,* Case No. KI134/14). Against this backdrop, the Applicant's decision not to file an indictment against suspects must not be held against him because it cannot be seen how an additional criminal complaint about the same issues lodged by the applicant might have led to a different outcome[20] (Branko Tomašić v. Croatia). In cases concerning a death in circumstances that might give rise to the State's responsibility the authorities must act of their own motion once the matter has come to their attention (*Ibid*.). They cannot leave it to the initiative to the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (*Ibid*.). In the light of the foregoing, it must be reemphasized that the Applicant, on many occasions, pleaded the case of his son's death before all authorities in Kosovo without success. Therefore, he should have been absolved of the disproportionate requirement to exhaust remedies which much likely would have proved to be futile as well. In other words, the Applicant, with respect to exhaustion of effective remedies showed that: (i) in fact he used legal remedies to his avail; (ii) that the legal remedies used by him were ineffective in relation to his case; and that, (iii) by way of ineffectiveness of legal remedies used by him, there were in fact, special circumstances absolving him from the requirement to pursue other legal avenues[21]. It follows, that the Applicant was denied of an effective legal remedy with the view to enforcing the substance of rights guaranteed by Article 2 of the ECHR in connection with Article 25 of the Constitution.

[19] Article 113 (7) of the Constitution of Kosovo determines that individuals may petition the Constitutional Court but only after having exhausted all legal remedies to their avail.

[20] On the concept of not straining applicants with undue and disproportionate burden to seek other legal avenues which offer no prospect of success see *Branko Tomašić v. Croatia*, no. 46598/06, Judgment on the Merits delivered by a Chamber, 15 January 2014.

[21] See conversely Case No. KI116/14, *Applicant Fadil Selmanaj,* Resolution on Inadmissibility of the Constitutional Court of Kosovo, of 21 January 2015.

4. Conclusion

The highlighted cases in this paper indicate that public authorities including courts in Kosovo have a lot of catching up to do when it comes to affording protection of the right to life to individuals in line with the standards set out by the well-established case law of the European Court. The law enforcement bodies including the judiciary must be less formalistic and not place unreasonable burden of proof on the victim, for example, it cannot be expected from a victim to have knowledge of arcane aspects of the law, or to have blanket solution when construing concepts such as temporal jurisdiction without having due regard to the specificities of safeguards provided for by Article 2 of the ECHR and 25 of the Constitution. The public authorities as well as the public at large must sensitized about the vulnerability of women in cases of domestic violence, and in that regard, public authorities must act with due diligence in order to protect women from violation of their physical and psychological integrity and that the perpetrator's rights cannot supersede the victims' human rights to life (*Ibid.,* Opuz v. Turkey). The public authorities in Kosovo must recognize that in democratic states ruled by law, it is usually private parties that kill individuals, interfere with their private and family life, limit their freedom to express opinions, and disrupt peaceful assemblies (Florczak-Wator, 2017). That is the reason why the European Court replaced the idea of protecting the individual against State measures with the idea of protecting the individual through State measures (*Ibid.*). In addition, the Constitutional Court and the courts of general jurisdiction, in cases where they find a violation of the right to life, must make sure to award compensation for non-pecuniary damage in favor of the victim because only finding of a violation is not sufficient just satisfaction; and must not be satisfied to only render judgments of a declaratory nature. When applying and interpreting the principle of temporal jurisdiction, the Constitutional Court must have due regard to the specific safeguards guaranteed by Article 2 of the ECHR in connection with Article 25 of the Constitution and not apply the said principle indiscriminately. Moreover, public authorities in Kosovo must make sure that the remedies afforded to individuals produce real tangible results in order to truly live up to the standard that the rights guaranteed by the Constitution and the ECHR are intended to be practical and effective rather than theoretical and illusory, and provide a robust protection of fundamental rights, as it is set out by the well-established case law of the European Court.

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African Constitutionalism and Barotseland

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Abstract

Current constitutions of African States, such as Zambia, are a mix of traditional features, exemplified by chieftainship and customary law, and mainly of European-type ones, so they are marked by glocalization. Besides, it is no coincidence that the British protectorate of Barotseland within the protectorate of Northern Rhodesia was incorporated in the Republic of Zambia, with some privileges being granted on the basis of the 1964 Barotseland Agreement, but with no clause in the 1964 Zambian Constitution. Kaunda's ruling party of Zambia was initially prepared to allow the process of Barotseland's submission to Zambian rule to transpire gradually and gently, which reminds slightly of the British intervention in the Cretan autonomous State, from 1903 to 1906. The Consul General Howard against the High Commissioner of Crete managed to "…let him down gently". In 1969 the Barotseland Agreement was terminated abruptly whilst a revival of this controversial question has recently taken place.

Keywords: African constitutionalism, Barotseland, Crete ("…To let him down gently"), glocalization, Western Province, Zambia.

1. Introduction: Constitutionalism and Barotseland

Africa has experienced a protracted and important period of colonial control on behalf of many European countries. The British empire played the leading role in the framework of this penetration, particularly in the Sub-Saharan part of the continent whilst France was the Protagonist mainly in countries of the Mediterranean region and of the Western part of the continent.

In this context, in 1960s a very extended tendency to grant the independence to the colonies took place. The emergence of the new sovereign countries was based on the model of constitutional States and, as a result, is related to constitutionalism. However, constitutionalism in not synonym to the existence of a State endowed with a Constitution. It is about a concept that has to do with the adoption and application of a formal Constitution in the legal order of a sovereign State, protecting human rights and consecrating the fundamental principle of separation of powers.

In this context, it would be interesting to examine constitutionalism in African countries and particularly in Zambia, with a special reference to the emblematic conflict case of the Kingdom of Barotseland. So, the current analysis focuses on the phenomenon of African constitutionalism, on the basis of the comparative method.

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The profile of current African constitutionalism

- African constitutions are marked by tradition (chieftainship, customary law).
- They are dominated by European-type institutions, such as Constitutional Courts.
- They have adopted presidentialism, invented in Latin America.

Barotseland

- The 1964 Barotseland Agreement granted privileges to Barotseland.
- It would be undermined "gently" but was terminated abruptly, in 1969.
- This "gentle" approach reminds of British diplomacy in Crete (1903-1906).
- The revival of the controversial question of Barotseland has taken place recently.

After analyzing the post-independence era, it examines the current phase.

On account of these data, it highlights the profile of constitutionalism of the Republic of Zambia.

Then, it presents some aspects of the history of Barotseland, from the precolonial era to its conversion into a mere Province of the Republic of Zambia.

Besides, it refers to a similar case in Greek history, having to do with the autonomous Cretan State in combination with the influence of the British factor.

Furthermore, it analyzes the current question of Barotseland and its perspective.

Finally, it ends up to some critical remarks on both the profile of African constitutionalism and the crisis of Barotseland.

2. The post-independence era of African constitutionalism

It is possible to make a comparison between Latin America and Africa, in constitutional terms. In the domain of politics, the New World has proved to be creative, it has invented the President (Ba, 2019). It is about presidentialism, being a form of State, which could be characterized as typical of new States coming from colonial rule. Africa has experienced this form of State, like the American regimes, already in its post-independence era (1960-1980).

Independence constitutions of the former colonies of the British Empire in Africa have borne the imprint of the Westminster model of representative government (Ndulo et al., 1996). However, the shaping of these Constitutions according to a stereotype model does not implicate that the new sovereign States acquired a form of State identical to the British one. First of all, these countries have acquired from scratch a Constitution whilst the UK has no written Constitution. Furthermore, they have not adopted a parliamentary form of governance as long as the President cannot lose his office due to lack of political confidence of the National Assembly towards him. So, it is basically inaccurate to characterize the form of State as "parliamentary government", although there are eventually some features being intrinsic to the parliamentary form of governance. It is about a presidential (non-parliamentary) system, marked by the fact that in most African countries and in other ones, such as Cyprus and Latin America, the President is elected directly by the people.

Anyway, there are differences between the constitutions of States in Africa, which were granted their independence from the UK. In some constitutions, a non-executive president substituted for the Queen as head of state whilst in others the President became in addition the chief executive (Ndulo et al., 1996). The tri-partite structure had in some ways the look of the USA rather than Westminster, but its degree of detail reflected the colonial tradition (Ndulo et al, 1996).

The competencies of the Governor which ruled the country in the colonial era passed largely intact to the executive President. So, presidentialism to an important extent has got the imprint of the form of governance of the colonial era.

The post-independence era was characterized by various cases of authoritarian governance, some years after the declaration of independence. In that context, the regimes of General Sani Abacha of Nigeria, Idi Amin of Uganda, Jean Bédel Bokassa of the Central Africa Empire (now Republic), Marcias Nguema of Equatorial Guinea as well as Gnasingbe Eyadem of Togo had constitutions in one form of the other, which however were devoid of constitutionalism, like the sui generis case of the former Apartheid in South Africa (Olasunkanmi, 2018). In some cases, the mechanism of constitutional commissions preparing constitutional amendments was used, but the reports of those commissions were simply ignored after elaborate ceremonies aimed at diverting public attention and convincing donors and the international community that something positive was being done about democracy (Olasunkanmi, 2018).

3. The post-cold war era of African constitutionalism

The second period of African constitutionalism, which coincides with the post-cold war era of world history (1990 to date), has been called "neo-constitutionalism". It is marked by a double movement towards democratization and the contribution of the new mechanism of constitutional tribunals to the principle of the rule of law (Ba, 2019). The emergence of new Republics, replacing authoritarian regimes, is comparable to the phase of new constitutionalism in Latin America, from the beginning of collapse of dictatorships in the 1980s and on. Latin American constitutional changes are likely to be more relevant to many of the new African constitutional systems than the Anglo-Saxon models.

Anyway, African constitutionalism is endowed with rigid constitutions in almost all countries, so neo-constitutionalism is ensured by the non-flexible character of its constitutions. In the current period it is characterized by the promotion of multiculturalism (Mvaebeme, 2019). For instance, article 6 of the Constitution of Central Africa previews that "*the State provides stronger protection for rights of minorities, of indigenous people"*.

Furthermore, African neo-constitutionalism is also marked by the fact that it promotes the traditional structures against the European-type model of democratic and republican legitimacy, based on the principle of national sovereignty. This promotion has to do with diachronic institutions of African societies, such as the chiefs. After the collapse of colonialism, no country of the black, French-language Africa made any mention to chieftainship in its Constitution. So, in an innovative way the 1996 Constitution of Central Africa cites that the "*Republic recognizes and protects the traditional values*". This "revenge" of tradition, "base of custom", in the modern republican State carries the assimilation of chiefs to civil servants (Mvaebene, 2019). The chiefs are intrinsically related to the existence of customary law in their traditional communities. However, being allies of the central power and "auxiliaries of the administration", the traditional chiefs become frequently more powerful and more uncontrollable than the legal-rational authorities (Mvaebene, 2019).

As for the Arab Spring, which began in December 2010 in Tunisia, has very important effects in some countries of Northern Africa, such as Tunisia, Egypt and Libya, and of Middle East, given that the African countries on the matter have not experienced the wave of neo-constitutionalism and political alternance in power on the basis of democracy, at least as early as the rest regions of their continent. Nevertheless, this revolutionary movement constitutes a subversion of major importance, far beyond the context of Africa, for the promotion of both democracy and fundamental rights of private individuals and the people.

4. Zambian constitutionalism

Zambia was among those countries that rode on the tail of the wave of democratization following the fall of communism in Eastern Europe, and greater liberalization and democratization in Latin America and parts of Asia in the 1980s whilst Zambia's "opening" began with the steep economic decline of the 1980s (Sims et al., 2013). Its constitutionalism has a rather odd prehistory, given that the British Empire had loosely called "Constitutions" some orders-in-council. This country, which became internationally known for a very significant foreign sovereign debt crisis (Maniatis, 2018), has some pioneer features in its political and constitutional history, at least in the African context, such as the following ones:

a. Presidential (non-monarchical) form of the State

Till the emergence of the Zambian State, with the unique exception of Cyprus, which was of course sui generis, all the territories of the UK had gone into independence with a monarchical form of government, and with the Queen represented by a Governor-General. This record should be seen as a realistic acceptance, right at the outset, of what many African countries had (already) found, after only a brief period of independence, the medium best adapted to their political aspirations.

b. The flexibility of the Constitutions

In contrast to the overwhelming majority of African countries, Zambia has shaped a tradition of very flexible Constitutions, as far as the possibility to amend any constitutional disposition is concerned.

c. The Christian character of the Zambian Nation

For the first time in the Third Republic (1991 and on), Zambian State has gradually been transformed into a non-secular State, in spite of the fact that the 2016 version of the Constitution follows the above-mentioned African trend of pluralism, particularly in the form of multi-culturalism. For instance, the Preamble of this version recognizes the multi-ethnic, multi-racial, multi-religious and multi-cultural character of the Nation of the Republic of Zambia.

The tendency to transform Zambia into a Christian State was inaugurated through the 1996 amendment of the 1991 Constitution, given that the Preamble has been endowed with the so-called "declaration" of the Republic of Zambia as a Christian Nation. Scholars confirm that Zambia's political psychic is deeply entrenched with the declaration within Pentecostal-Charismatic moral sensibilities and theo-political imaginations, which greatly influence public discourses and define national identity (Kaunda, 2018).

Christianism has gradually followed the way of Constitutionalism, into which it is in a process of incorporation, in the current era of neo-constitutionalism. The two ideological movements of the Western-type culture eventually will be also met formally, in the main text of the Constitution, as official values and principles, if the 2019 amendment leads to the replacement of the value consisting in "morality and ethics" by "Christian morality and ethics".

More precisely, Part II of the current version of the 1991 Constitution explicitly previews constitutionalism as a value. According article 8, the national values and principles are the following:

(a) *Morality and ethics;*

(b) *Patriotism and national unity;*

(c) *Democracy and constitutionalism;*

(d) *Human dignity, equity, social justice, equality and non-discrimination;*

(e) *Good governance and integrity; and*

(f) *Sustainable development*.

All these core rules apply to the interpretation of the Constitution, enactment and interpretation of the law as well as development and implementation of State policy.

As for the institutionalization of constitutionalism, it is no coincidence that democracy and constitutionalism are mentioned together. Obviously, as Zambian State is defined as a democratic Republic after the protracted period of the Second Republic (1972-1990), known as the "one-party participatory democracy", the mainstreaming principle consists in democracy. However, it is rather marginalized, if not partly altered, through the addition of many other attributes to the character of the State. This sui generis lack in democracy is comparable with the problem of extended, if not also contradictory, limitations, in the recognition of human rights, in Part III of the Constitution. This problem is not new, as the Bill of Rights of the 1991 Constitution, which was never amended in spite of the relevant attempts, is very similar to the Bill of Rights of the 1964 Constitution.

Anyway, constitutionalism is intrinsically related to the principle of democracy, particularly as long as the Constitution is not flexible, for instance as for the amendment of the Bill of Rights. This process requires inter alia a constitutional referendum (being endowed with a turn-out clause).

From 1972 and on, there is a political concern for the adoption of a people driven Constitution, obviously in contradiction to the 1964 Constitution, which was granted by the UK after negotiations with various factors, including Barotseland, but it is not quite clear what is people driven constitution and what is not people driven constitution. There is the opinion that the Constitution of Zambia is not a people-driven Constitution unless a comprehensive Bill of Rights is a part of it. In other words, it seems to make use of this political project for scopes being controversial, if not obviously antithetical, to the aforementioned constitutional set of democracy and constitutionalism, in a context of authoritarian governance (Second Republic) or populism (Third Republic).

5. Barotseland from the precolonial era to its conversion into a mere Province

The colonial period in the territory of the current Republic of Zambia had its effective beginning with the 19th-century journeys of European explorers: missionaries, visionaries, adventurers. Through them Europe became aware and interested in Central Africa. The Scottish missionary and explorer Dr. David Livingstone was the most important of these; he opened the way for the first Christian missionary settlements. In 1845, Barotseland had been conquered by the Makalolo (Kololo) from Lesotho, which were in power when Livingstone visited this country, but after thirty years the Luyi overthrew the Kololo King. Before the advent of European explorers, such as Livingstone, the Barotse had no written history, so the history was passed down by word of mouth and, as a result, customary law was favored.

In precolonial era, only a few ethnic groups of the current population of Zambia had politically centralized chieftainships with developed bureaucracies.

The Lozi Kingdom or what is referred to as Barotseland can be argued to have been the most politically centralized and socio-culturally coherent, and thus its people have always had a sense of Lozi national consciousness. The Kingdom on the matter evolved out of a citizen and subject paradigm, where the Aluyi or Luyanas subdued or coerced other groups in most of Western Zambia, namely a lot of different other ethnic groups, and created extensive spheres of influence and also often posted consuls in its neighboring other groups. The governance modes related to these oppressed populations were based on the structures of the central authority of the Litunga

(King). However, there was not a monolithic exercise of public power, as all subjects had representation in spiritual, military and judicial roles. This participatory limitation of this authoritarian governance left intact the principle of supremacy of aristocratic heredity.

In other words, the form of State was clearly a monarchy whilst antidemocratic shaping of governance was common in precolonial Africa. More precisely, the various tribes comprised in what is today known as Zambia had their own justice systems for dispute resolution and for maintaining peace and order among themselves (Sakala, 2009). These justice systems varied from one indigenous group to another but they shared certain fundamental features in their organization. All indigenous groups had village "headmen", chiefs and Paramount Chiefs. It was through this hierarchical set-up that the indigenous judicial system operated. In these systems, there was no separation of powers in Dicey's sense of the term (Sakala, 2013).

As far as Barotseland is concerned, King Lewanika I began trading with Europe, after diamonds were discovered. The first concession was signed on 27 June 1889 with Harry Ware and, in return, this Kingdom would be protected. The concession was transferred by Ware to John Cecil Rhodes of the British South Africa Company (BSAC). Barotseland was the first territory north of the Zambezi river to sign a minerals concession to British South Africa Company (BSAC). On 27 June 1890, Lewanika I and the BSAC signed the Frank Lochner Treaty, which previewed Barotseland as a British protectorate under indirect rule and so, to a notable extent, diminished autonomy of its population, the Lozi people.

Afterwards, through its leaders, Barotseland very often formulated a demand for self-rule, against the BSAC, then the British colonial administration itself, and subsequently the national regime of the Republic of Zambia. In October 1964, this British protectorate within the protectorate of Northern Rhodesia gained its independence from the UK, but not in a separate way. In virtue of the Barotseland Agreement, which was negotiated by the British government, between Northern Rhodesia and Barotseland, and was concluded on 18 May 1964, the two protectorates involved, would gain their independence as a single nation-State, to be called Zambia. That text previewed that the customary law of Barotseland would be the principal local authority for the government and administration of Barotseland. It also cited that the Litunga of Barotseland, acting after consultation with his Council, would be authorized and empowered to make laws for it in relation to the matters that include:

- The Litungaship;
- The Barotse Government;
- Local government land;
- Forests, traditional and customary matters relating to Barotseland alone;
- The institution at present known as the Barotse native treasury; and
- Local taxation.

This Agreement, which introduced essentially a form of limited self-governance within the non-federal Republic of Zambia, was not incorporated in the 1964 Constitution because Kenneth David Kaunda, the prime minister of Northern Rhodesia and, just afterwards, first President of the Republic of Zambia, did not agree that the agreement be entrenched in the Constitution. Though Lozi people were disappointed that the agreement would not be incorporated into the Constitution, they considered that they had won a substantial victory (Caplan, 1970). This text was terminated by the Republic of Zambia, without the consent of Barotseland, in a context of very intense tribalism (factionism) against nationalism (in the sense of dominance of the unity of the State Nation of Zambia). More precisely, it was ended through the Constitutional (Amendment) Act No 36 of 1969. The national government proceeded to mass arrests of the activists who demanded the repeal of that Act. Not only Western Province, as this

territory was renamed unexpectedly, was transformed in a mere Province of the State but afterwards the government passed the Western Province (Land and Miscellaneous Provisions) Act No. 47, depriving the Litunga of his powers over land and vesting all land in this territory in the President of the Republic.

6. The Cretan State ("…To let him down gently")

The doctrine has highlighted the undoubtful perspective consisting in Zambian rule over Barotseland, in reference to the Kaunda's ruling United National Independence Party (UNIP) and the National Council of Barotseland. It signalized that "*UNIP was initially prepared to allow this process to transpire gradually and gently, but the intransigence and uncooperative attitude of both factions of the National Council assured that it came swiftly, brutally, and definitively*" (Caplan, 1970). This approach of the real intentions of the major power (Northern Rhodesia) over the minor one (Barotseland) is not merely very realistic but also indicative of the fact that History repeats itself, even in different sociopolitical contexts.

Indeed, the word "gently" had been explicitly used against another non-sovereign State, in the framework of the Ottoman empire, that time by the UK itself. On 10 July 1903, Esmé William Howard, later 1st Baron Howard of Penrith, went to Crete, being a territory, which was essentially free from the Ottoman rule and protected by the UK, France, Italy and Russia. After a long period of time, that skilled diplomat resumed his career in that year and played the role of Consul General for Crete, from 1903 to 1906. The main scope of his mission was revealed by himself, about three decades later, in his book *Theatre of Life*. In the second volume of his book, under the title *Life Seen from the Stalls*, he wrote that his role was not easier, as the Foreign Office made him understand that Prince George of Greece and Denmark, the High Commissioner of the Cretan State, was the favorite nephew of King Edward VII and the Queen Alexandra, and that he would have "*…to let him down gently*".

The UK, maintaining troops on the island of Crete, would anyway attempt to accomplish its secret mission, but it found a very skilled partner of Greek origin. It was about the Cretan political leader Eleftherios Venizelos, later prime minister in the Greek State, who wanted to run a fight against Prince George. The British government loosely supported Venizelos and coordinated its action with the subversive armed movement of Cretan patriots, known as the 1905 Theriso Revolution. Finally, due to the constant undermining attitude of the British factor, the Head of State was led to resign, in 1906. That year was a crucial one not only for the High Commissioner, who left Crete, but also for Howard, who was sent to Washington as a counsellor at the embassy of the UK there.

The diplomat had managed to accomplish in a splendid way his mission, undertaken at the behest of his service but in ignorance, if not against the moods, of his King (Maniatis, 2008). This secret mission has been characterized as an exquisite specimen of the raw realism of English diplomacy whilst arguably the success of Howard in Crete contributed in his glorious career as diplomat (Markezinis, 1966). Besides, by analogy, Kaunda's liberation action has some things in common with Venizelos's struggle for the Union of Crete with the sovereign Greek State.

7. The question of the Western Province's perspective

Gerald Caplan in his book *Elites of Barotseland* observes that "*Barotseland had existed as an independent national entity long before the creation of Northern Rhodesia, and was legally and historically entitled to maintain or dissolve the attachment as its people wished*" (Mufalo, 2011).

In March 2012, at a meeting of the Barotseland National Council, called by the Litunga for the purpose and appointed in accordance with tradition by the people from across Barotseland, the Council resolved that it finally accepted the repudiation of the 1964 Barotseland Agreement by the Government of Zambia and inter alia that it no longer wished to be part of Zambia but resolved instead for its people to exercise their own right to self-determination as an independent nation. As a result, activists have contacted various international organizations, such as African Union and United Nations, with no tangible results. They are in a process to petition the International Court of Justice, demanding their right to becoming a sovereign State following the abrogation of this Agreement (Kakanku, 2018).

It is to signalize that the struggle of some social groups of Western Province to gain their independence from the Republic of Zambia is peaceful. As Barotseland is not a sovereign State, at least recognized by the international community, cannot be a member of United Nations. As a result, it entered in 2013 the Unrepresented Nations and Peoples Organization. The Barotse National Freedom Alliance (BNFA) in November 2019 sent a letter to Prince Harry of the UK, in which it invited him to meet with Barotse leaders and drew attention to the fact that they unilaterally declared independence in 2012, since there is no legally binding legislation for Zambia's rule over Barotseland (Unrepresented Nations and Peoples Organization, 2019). The choice of no violence, in contradiction to various armed movements in Africa in the second half of the twentieth century, ties in well with the relatively peaceful character of the political history of the Republic of Zambia, which constitutes one of the particular features of Zambia in the African context.

Besides, the Western Province is the poorest and least developed of the (nowadays ten) provinces but the incidence of poverty is characteristic of all rural provinces. There is an important "convention of the constitution" in the political system of the Republic of Zambia, inaugurated by Kaunda and maintained by the rest Presidents. It is about the "tribal balancing" policy, due to which governance representation in Zambia has been void of inequities likely to cause dissent in the dominant ethnic groups, and, as a result, equities at the "governance elite level" has caused inequalities at the regional levels (Mufalo, 2011). In this context, the revival of Barotse secessionism should not be attributed to a sense of socioeconomic and political marginalization but be interpreted on the basis of the sense of belonging to a traditionally and colonially recognized, historically defined, nationhood, and the consequent Lozi national consciousness (Mufalo, 2011).

The resulting democratic governance modes in post-independent Zambia, though recognizing the polarity between traditionalists and nation-State building advocates (nationalists), created a dichotomous governance system, which, according to an approach of the doctrine, usurped most of the traditionalists' autonomy and privilege and, as a result, does not provide adequate regional political and administrative space to traditionally and culturally diverse social groups (Mufalo, 2011).

On account of these data, a proposal was formulated, in 2011, for both the introduction of a federal type of State, with its consequent self-rule for the regions of Zambia, and the adoption of a democratic reform for Barotseland, preserving its monarchical form of governance, as far as the head of the country is concerned (Mufalo, 2011).

This proposal, being nowadays much more controversial due to the political mobility of some groups of the Barotse community towards the creation of a sovereign State, was not easy to accept. On the one hand, it was not compatible with both the Preamble and article 1 of the 1996 version of the Constitution, according to which Zambia is a unitary, indivisible State. So, uniquely through a constitutional amendment could be created a Federation. On the other hand, the emergence of federalism would be likely to enhance centrifugal political tendencies, such as sectionalism and, at least as far as Western Province is concerned, secessionism. On the other

hand, this proposal is rather problematic in material terms, as well. Poverty and underdevelopment of rural areas are a challenge of the already established national values of the Constitution, such as social cohesion and sustainable development. In other words, the mainstreaming constitutional normativity is available for the application of a socioeconomic policy in favor of rural population, including the people of the Western Province. Last but not least, posterior political data have demonstrated the political impasse of the decentralization reform. The 2016 version of the Constitution has been considered as very progressive as many, if not all, of the submissions that were made to the Mung'omba Constitutional Review Commission have been included, with the exception of the creation of the provincial parliaments. The rejection of this proposal for the democratization of provinces was justified with the argument that it would be too costly for the nation (Chipalo, 2016).

8. Conclusions: Glocalization in Africa and mobility in Western Province

The current study has ended up to the following remarks:

a. Glocalization of African constitutionalism

African Constitutionalism has been based on presidentialism, an invention of Latin America, which is a region whose Southern part is symmetrical to Africa in both geographical and constitutional terms. In its first phase, this movement had to cope with serious obstacles, such as the colonial preliminary shaping of the independence Constitutions and shortly afterwards authoritarian forms of deviance. For this reason, some scholars make reference to the existence of three periods of post-independence constitutional history, along with the post-cold war period, namely just as three Republics of Zambia are mentioned. Anyway, mainstreaming concepts of constitutional principles and human rights, such as democracy and peace, have been altered in some points of Zambian Constitutional History, at least as far as the Second Republic is concerned.

The current era of neo-constitutionalism has implicated a gradual modernization of both State and society, introducing novelties in Pan-African level, such as the mechanism of Constitutional Court which was introduced in the 2016 version of Zambian Constitution, and the alternance of political parties in power, with Cabo Verde and Zambia as the two pioneer countries. Furthermore, regional novelties have been added, such as the constitutional consecration mainly of chieftainship, related to customary law, but also of traditional values, in the former colonies of France. This tendency has contributed to a further convergence of Constitutional Law of African countries, particularly of the former French colonies to the former British ones, but also exemplifies glocalization. This term is a portmanteau of globalization and localization and has to do with an osmosis of globalization with particular features of local societies, including normativity and political institutions.

b. The "gentle" character of diplomacy

The Barotseland question has proved to be slightly comparable with the (partly parallel) Cretan one. In the case of Crete, the UK made use of the services of a new Consul General with the secret mission, decided by the Foreign Office, to undermine "gently" the political position of the Head of State, Prince George of the Kingdom of Greece. 41 years later, Kaunda, the Prime Minister of a British protectorate who was very experienced on the "know how" of the diplomacy of the UK, had the intention to undermine gently the political establishment of Barotseland in the framework of the Barotseland Agreement, which however resulted in being terminated by Kaunda's regime not only unilaterally but also abruptly. Anyway, the similarity of political and legal adventures of territories protected by the UK is amazingly important, even between non-neighboring lands in different historical phases.

c. The international mobility of Western Province (Barotseland)

As far as Western Province is concerned, elements of self-rule can be ensured in a wider project for democratization of provinces in their whole. Besides, not only is the question of Barotseland controversial but also difficult to resolve, at least through the eventual recognition of a State. Indeed, it is difficult to establish a new State, even a union State within a federation, inter alia because Zambian constitutionalism has led to the model of the unitary Republic, reinforced by important national values, in spite of the fact that neo-constitutionalism of the Republic of Zambia has exemplified the African tendency to promote multi-culturalism (pluralism). This tendency ties in with an important, diachronic Zambian "convention of the constitution", consisting in the "tribal balancing" practice in terms of governance.

It is to put the stress on the fact that the State on the matter is not only unitary, officially, but also unified through some national values and principles, which have been explicitly incorporated in the Preamble of the Constitution (democracy and Christianism) and – at least in the process of constitutional amendment – in the article on national values and principles (democracy, constitutionalism and Christianism). Indeed, initially Christianism and later constitutionalism itself both have gained territory in the framework of Zambian constitutionalism, through the amendments of the 1991 Constitution whilst democracy constitutes the oldest principle being explicitly recognized. Besides, tradition is represented, obviously in a secondary way, in the same framework, and is exemplified by various components, such as the chiefs and the institutionalized House of Chiefs as well as customary law. However, this hardcore aspect of African constitutionalism has raised criticism as long as it is rather anachronistic, if not democracy-unfriendly and dangerous for human rights. For instance, like its predecessor, the 1991 Constitution provides for the protection of fundamental rights and freedoms of the individual without getting rid of some limitations contained in the previous Constitution, as it is the case of potential discrimination based on customary law and resulting in disadvantaging of women. Article 23 on this role of customary law is still in vigor, as the entire Bill of Rights has never been amended, to date.

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Perspective of Islamic and Custom Law toward the Position of *Mamak Kepala Waris* in Managing High Ancestral Inheritance in Minangkabau

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Abstract

Mamak kepala waris is the title name within a community whose role is to lead the whole community members, to handle, to manage, to observe and to be responsible to the community's high ancestral inheritance. High ancestral inheritance is a property which owned by family member hereditary from woman side. This study aims to know the perspective of Islamic and custom law toward the position of *mamak kepala waris* in managing high ancestral inheritance in Minangkabau inhabitants. This study is an empirical juridical research with descriptive analysis methodology using comparative approach. The data were collected through observation, interview, and books, journals and laws theory. The result shows that the way *mamak kepala waris* manages the high ancestral inheritance is different with Islamic law. In Islamic law, theinheritance will be given to a son and daughter based on the Al-Qur'an and Hadiths. Meanwhile, the custom law in Minangkabau gives the inheritance to the woman lineage only.

Keywords: mamak kepala waris, high ancestral inheritance, custom law, Islamic law.

1. Introduction

Customary law is a traditional law system that handed down from ancient times to present time. The situation is still enforced and maintained by the indigenous people. One of the communities that still has a traditional nature is Minangkabau indigenous community in West Sumatra Province. Minangkabau indigenous community prioritizes communal interests rather than individual interests. This makes the relationship between members of the communities is based on a sense of togetherness, kinship, help and mutual cooperation. Most of Minangkabau indigenous community are Muslim(Noviardi, 2017). The customary law itself is reflected through the Islamic law and the holy Qur'an (Anwar, 2012). However, Minangkabau indigenous community is still respecting and practicing their customary law which proved on their customary law in marriage and inheritance system.

Minangkabau indigenous community is formed from matrilineal kinship system which prioritize the maternal (female) lineage and implemented *semando* in its marriage system. *Semando* is a marriage system in which after marriage the husband positioned under the influence of the wife's relatives. If he has a daughter, the daughter will be the descendant successor of his

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wife's lineage. But if he has a son, the son cannot be the descendant successor of his wife. In Minangkabau community the inheritance is divided into four parts, namely:

(a) High ancestral inheritance

High ancestral inheritance is inherited from several generations following the matrilineal system. The existence of high ancestral inheritance is appeared due to the history of *kampuang* and *koto* followed by opening rice fields as a life source. The opening of rice fields is the result of *galuah taruko* by the founder of *kampuang* and *koto*. Hence, it inherited from generation to generation until today. In relation to the high ancestral inheritance in Minangkabau, Hadikusuma states that *gadang* house or rice field belongs to the clan in which the mother is the center of control(Hadikusuma, 1993). The high ancestral inheritance cannot be divided and sold, except in necessary circumstances it can only be pawned.

(b) Low ancestral inheritance

Low ancestral inheritance is the properties acquired from the work of someone. In contrast with high ancestral inheritance, low ancestral inheritance is allowed to be sold and pawned as needed by the agreement of the heirs. According to Hilman Hadikusuma, low ancestral inheritance is the inheritance from one or two relatives, for example from derived from one grandfather or grandmother that includes in a family(Hadikusuma, 1993). Low ancestral inheritance is a joint property of relatives which will continue to grow and the ownership is undivided.

(c) Acquired inheritance

Acquired properties are the properties acquired by husband and wife during marriage. The acquired properties which obtained from buying or called as *tembilang emas* were in the form of rice fields, fields, gardens, and other. However, if the couple gets divorced, these properties will be divided. Since Minangkabau adheres to matrilineal system. Thus, if the husband dies, his children are not the heirs of his properties but the heirs to their mother's family.

(d) *Suarang* inheritance

Suarang inheritance is the properties owned by an individual before and after marriage.

In Minangkabau, high ancestral inheritance is a hereditary property which controlled and maintenance by a person called "*mamak kepala waris*". High ancestral inheritance cannot be traded as stated in the traditional proverb "*dijual tidak dimakan beli, digadai tidak dimakan sando*", which mean the high inheritance must not be sold and pawned due to its acquisition by previous ancestors. Every clan in Minangkabau owns communal inheritance that used and utilized by the members of the clan for the welfare of the family. It is mainly used for the leader's nephews or nieces. *Mamak kepala waris* has important role with responsibilities to lead all clan members, to manage, to regulate, to supervise, and to be responsible for the ancestral inheritance of the clan. Heis the one who will manage and expand the high ancestral inheritance for the benefit of his nephews or nieces (Ilusia & Muliadi, 2015). Meanwhile, *mamak kepala waris* in Islamic perspective is called as inheritor. Inheritor defines as someone who manage the inheritance of dead people to be given to people who deserve it, including family or people who need it. The partition of the inheritance is regulated in Qur'an and Hadiths. Hence, this study aims to know the perspective of Islamic and custom law toward the position of *mamak kepala waris* in managing high ancestral inheritance in Minangkabau inhabitants.

2. Methodology

This study used empirical juridical research or socio-legal research using comparative approach as the methodology. Based on its characteristic, empirical juridical research can be categorized in descriptive analysis. It observes on community groups' behavior in Minangkabau that uses matrilineal system. Comparative approach is used in this study due to compare the cultures on Minangkabau community groups and Islamic perspective on inheritance system. The data were collected in two sources, namely primary and secondary. The primary data were obtained through observation and interviews with respondents and important persons who understand the condition of the Minangkabau community in the matrilineal system. While, the secondary data were taken from desk study on legal documents including jurisprudence and legal theories.

3. Result and discussion

3.1 *The position of mamak kepala waris in managing high ancestral inheritance*

Minangkabau community group adheres to the collective inheritance system, including (a) the inheritance is continued or transferred by the owner to the descendant and cannot be divided on its ownership, and (b) the inheritance is inherited by a group of inheritor in which they are allowed to use it but not to divided its ownership. Minangkabau inheritance law is a continuation that is in accordance with the orderly structure according to the law of the mother, but on the other hand, it has relevance and is influenced by the law of *sharak* (religion) (Anwar, 2012). Therefore, according to the orderly structure according to the law of the mother, the heirs according to Minangkabau customary law are calculated from the line of women (women).

In the Minangkabau indigenous community who deserve to be heirs are daughters, but not solely female heirs who control and regulate inheritance, heirs are accompanied by male relatives of the mother *(mamak)*. The inheritance process does not always run smoothly but often causes disputes among heirs. The problem that often occurs in the Minangkabau indigenous community is that high inheritance is used for the benefit of large families (clans). In its implementation, there are often irregularities with the use of inheritance for personal interests and the pawning of the inheritance of people outside the specified conditions.

The position of *mamak* in the Minangkabau indigenous community, there are three, namely:

> (1) *Mamak* is the Head of the People (*Kepala Kaum*);
> As the head of people, *mamak* is responsible for the people. Heis obliged to maintain, protect, guide, and resolve the problems faced by his nephew. Furthermore, he also judges on the cases that arise within his people. Thus, *mamak* should be a wise person who has deep knowledge of custom and religion. *Mamak* should have noble character and high authority for his nephew.
>
> (2) *Mamak* the Head of Inheritance (*mamak kepala waris*);
> *Mamak kepala waris* or also known as *tungganai* is the leader of people of *Separuik*. His obligation is to save property that has been hereditary inheritance. He also became the leader of his *saparuik* nephew and responsible for developing the inheritance. Thus, *mamak* can maintain the unity, togetherness and welfare of his nephew; and
>
> (3) *Mamak* as a guide;
> *Mamak* is obliged to guide his nephew with traditional custom. His nephew has right to know and demanded to know on things related to the custom. Other than that the nephew also has right to know about all problems related to family property from *mamak*.

The Minangkabau society adheres to a distinctive kinship system, namely the matrilineal kinship system. Matrilineal kinship system is drawn from the mother or female lineage. It is used as the basis on which people and descendants gather in a shared residence called *gadang* house. In *gadang* house the brother from the mother is the one who responsible for its inhabitants who is called as *mamak kepala waris*. Therefore, the organization of the Minangkabau community is ruled by men from the maternal line and usually called brothers of the oldest mothers. However, if there is no brother from the mother then it will replace by the oldest male child. Based on the matrilineal kinship system, the position of *mamak kepala waris* plays an important role in the community. *Mamak kepala waris* is considered as a protector of family members who has responsibility for his nephews or nieces. Therefore, *mamak kepala waris* permanently acts as the spokesperson for every meeting concerning Minangkabau customary law.

Meanwhile, *mamak kepala waris* in Islamic perspective is called as inheritor. Inheritor defines as someone who manage the inheritance of dead people to be given to people who deserve it, including family or people who need it. The partition of the inheritance is regulated in Qur'an and Hadiths.

3.2 *The comparison between Minangkabau and Islamic inheritance system*

In Minangkabau community group, the inheritance is divided into two categories, namely; high ancestral inheritance and low ancestral inheritance. High ancestral inheritance is an inheritance owned by group and obtained hereditary through female's lineage, including properties such as land, field, *Gadang* house (Minangkabau traditional house), graveyard, pool and others. Moreover, the high ancestral inheritance is cannot be traded but only be pawned. But, pawning the high ancestral inheritance must followed specific requirement and get permission from *mamak kepala waris*, such as;

> (a) *Membangkit batang terendam*, meaning that in the Minangkabau, a clan with a lower dignity must improve their dignity to be equal with other clans. The dignity of the clan refers to the title inheritance belonged to the clan.
>
> (b) *Gadis tua tak bersuami* refers to a mother with no daughter. In Minangkabau community it is known as an extinct group. It means that there is no heir to receive the high ancestral inheritance.
>
> (c) *Mayat terbujur di tengah rumah*, means that if someone dies, then the members of the family will need a lot of money to bury and pay the inheritor's debts.
>
> (d) *Rumah gadang ketirisan,* or refers to the house of *gadang* that must be nurtured and requiring a lot of money to preserve and maintain it (Haries, 2014).

While, low ancestral inheritance is a joint property of relatives, of which the ownership is undivided and will continue to grow with the income acquired by the heirs. The example of low ancestral inheritance is there is only one traditional house where members of the family gather, there are several hectares of land for rice fields, and there are several traditional clothing equipment and traditional jewelry.

Different with Minangkabau inheritance system, Islamic inheritance system did not differentiate between high or low ancestral inheritance. It only follows what was written within Al-Qur'an and Hadiths. *Mamak kepala waris* in Islamic perspective is called as inheritor. Inheritor refers to someone who manage the inheritance of dead people to be given to people who deserve it, including family or people who need it. The partition of the inheritance is regulated in Qur'an and Hadiths. Inheritor is categorized in two; *sababiyah* and *nasabiyah* inheritor. *Sababiyah* inheritor is someone who has right to get some part of the inheritance due to marriage relationship with the dead people. Whereas *nasabiyah* inheritor is someone who has right to get the inheritance due to its *nasab* or family relationship (Firdaweri, 2015). Islam adheres to bilateral

system which divided the inheritance in 2:1 ratio where men are getting two times larger rather than women. As written in Qs. An-Nisa 11 that,

> "Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise."(Qur'an, n.d.).

It can be seen that Islam guides on the distribution system of inheritance of the dead people. This guide will not be changed and will be remain the same until forever. It did not differentiate between man and woman or between high ancestral or low ancestral inheritance. It distributed the inheritance in a fair system following the rules from Allah. This rulesare an obligation that should and must to be followed in life. Therefore, the comparison can be described as below;

Islamic inheritance system:

(a) It adheres bilateral inheritance system,

(b) It refers to Al-Quran and Hadiths,

(c) Man is getting two times bigger than woman due to his job as the head of the family.

Whereas, Minangkabau inheritance system:

(a) It adheres matrilineal inheritance system,

(b) It refers to the custom (*tamboalam*),

(c) Woman is getting the whole rights on inheritance rather than man due to woman's stereotype as a weak creature and her job to take care and raise to children in her family.

4. Conclusion

The inheritance system between Minangkabau custom and Islamic law has discrepancy in the distribution of the inheritance. Minang society still adheres to the customary system which uses women lineage in their inheritance distribution and managed by *mamak kepala waris*. While, Islamic law adheres to the Qur'an and hadiths which put no differentiation between men and women in its distribution and use inheritor as the one who manage the inheritance.

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