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Promising Early Years: The Transformative Role of the Constitutional Court of Kosovo

Dren Doli, Fisnik Korenica and Albana Rexha

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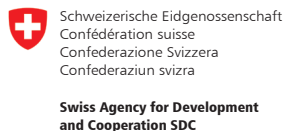
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1.

Introduction

In constitutional democracies, constitutional courts are established in order to support the establishment and maintenance of democratic regimes, being devised as a last resort mechanism to protect both human rights and the integrity of constitutions.¹ The leitmotiv behind the establishment of the constitutional courts in Austria and what was then known as Czechoslovakia, in the period between the World Wars, has traditionally been explained in this manner.² According to Tushnet, many countries have established ‘[...] specialized constitutional courts on the German model, rejecting the older U.S. system of having the nation’s highest court for ordinary law also serve as the highest court for constitutional law’.³ Tushnet argues that until the late twentieth century there were two ideas about the means of policy control that are arguably inconsistent with the constitution’s limits. The first ‘...was parliamentary supremacy which allowed for democratic self-governance surrounded by some institutional constraints on power-holders and many more normative ones. The second was judicial review, that is, the creation of a separate institution, removed from the direct influence of politics and staffed by independent judges charged with the job of ensuring that the legislature remained within constitutional bounds’.⁴

Constitutional courts, through the jurisdiction entrusted to them, have had direct impact upon the consolidation of newly-established democracies around the world. Vanberg notes that the constitutional review has become an inherent part of the constitutional democracies in many western states.⁵ While operating at the heart of politics, constitutional courts continuously face challenges that directly impact their work, including their independence. Boulanger, for example, argues that ‘...judges have to consider the political effects of their actions, they

¹ See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 2.

² For more see European Commission for Democracy through Law, ‘The Role of the Constitutional Court in the Consolidation of the Rule of Law’ CDL-STD(1994)010 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD%281994%29010-e> accessed 4 August 2016. See Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 18, 19.

³ Tushnet, *Weak Courts, Strong Rights* (n 2) 18, 19.

⁴ Ibid.

⁵ Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005) 19.

have to strategically choose opponents and allies, and this will in turn have an influence on their decisions. Starting from a rational choice approach, we can predict that no court will decide cases with complete disregard for daily politics.⁶ In that context, it could be reckoned that the final outcomes may be determined by both ideological and political motives. In light of this, Waluchow did not reject the possibility that the judicial review sporadically assists in confirming political decisions ‘...by judges pursuing, consciously or not, their preferred political agendas’.⁷

In this paper, however, we analyse whether and, if yes, how, the Constitutional Court of Kosovo has influenced and guarded the essentials of the nascent democracy.⁸ While we strive to assess the Constitutional Court’s role in the democratic transition of Kosovo, various external factors, such as political influence and the legitimacy of the Court, will necessarily be part of the equation. The first section of this paper briefly reviews the role of constitutional courts in transitional democracies, and identifies the common denominators which explain their endeavours to influence democratic developments. The second section focuses on the jurisdiction, functioning and organisation of the Court, and its relationship with public opinion. The third section analyses internationalised constitutionalism⁹ and its impact on the legitimacy and integrity of the Court in Kosovo. The fourth and fifth sections assess specific indicators, including the perceived level of confidence in the Court by political actors and the public at large, the role of international actors, and the perceived outside pressure on judges, doing so through analyses of the most notable cases and their impact upon societal and political life in the country. The final section provides a brief conclusion.

⁶ Christian Boulanger, ‘Europeanization through Judicial Activism? The Hungarian Constitutional Court’s Legitimacy and the “Return to Europe”’ in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer 2006) 268.

⁷ Wilfrid J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press 2007) 70.

⁸ The Constitution of Kosovo strictly follows modern constitutional principles for a multi-cultural state. For more on the collection of constitutional principles for a multi-cultural state see: Thomas Fleiner and Lidija B. R. Fleiner, *Constitutional Democracy in a Multicultural and Globalised World* (English translation from the German 3rd revised edition “Allgemeine Staatslehre” by Katy Le Roy, Springer 2009) 646-650.

⁹ For more about the application of internationalised constitutionalism in both Kosovo and Bosnia and Herzegovina see Constance Grewe and Michael Reigner, ‘Internationalised Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared’ (2011) 15 *Max Planck Yearbook of United Nations* 1.

2.

Methodology

The Constitutional Court of Kosovo has yet to be widely studied by scholars. Thus, this research tries to fill the gap, by examining the role of the Constitutional Court of Kosovo (CC) since the declaration of independence. As the Court is an important and yet distinct institution, this paper aims to identify its contribution to Kosovo's transition to democracy, and to democratic consolidation of the republic. This paper thus responds to the question of whether, how and to what extent the Constitutional Court of Kosovo has acted as an agent and facilitator of societal change in the country. The analysis pursues a two-level approach, mainly qualitative, that focuses upon a pool of individual Court cases, and behavior observation, mainly resulting from analysis of the interviews and findings from specific Court cases. A dozen interviews were conducted with various interlocutors, including independent observers, scholars, judges of the Kosovan Constitutional Court, and journalists.¹⁰ Results from the interviews are treated not as mere (bulk) data, but are further analysed and commented upon, with analysis of case-law, academic writings and media reports as empirical sources of information.

With regard to Kosovo's democratic traits and its consociational features,¹¹ the list of selected cases includes Constitutional Court decisions from three main categories: a) the separation of power and democracy, b) individual human rights and fundamental freedoms, and c) protection of ethnic community rights and power-sharing mechanisms. The selection of cases was made using at least two of the following principles:

¹⁰ More than 20 in-depth interviews were conducted. Some of the interviewees choose to remain anonymous due to their official positions within the Constitutional Court of Kosovo, Kosovo Institutions and Political Parties. Respondents included two former Constitutional Court judges, three current legal advisors to the Constitutional Court, six Members of the Kosovo Assembly, three lawyers, three journalists and three university professors.

¹¹ For more on Kosovo's constitutional democracy see: Fisnik Korenica and Dren Doli, *Constitutional Law in Kosovo* (Wolter/Kluwer Law International 2012); Fisnik Korenica and Dren Doli, 'The Consociational System of Democracy in Kosovo: Questioning Ethnic Minorities' Special Status in Kosovo's Constitutional Regime' [2013] *International Journal of Public Administration* 601; Fisnik Korenica and Dren Doli, 'What about the Kosovo Constitution: Is There Anything Special? Discussing the Grundnorm, the Sovereignty and the Consociational Model of Employed Democracy' (2011) 5 (1) *Vienna International Constitutional Law Journal* 49; Fisnik Korenica and Dren Doli, 'The Politics of Constitutional Design in Divided Societies: The Case of Kosovo' [2010] *Croatian Yearbook of European Law and Policy* 265.

- a) Whether the case was highly debated in the public and media, and triggered public controversies;
- b) Whether the case manifested the Court's counter-majoritarian¹² function, and impacted on the change of the political landscape leading to the break-up of the coalition government, new elections, and/or dismissal/resignation of high-ranking officials (President, Speaker of the Assembly, Prime Minister);
- c) Whether the case identified failures by the state to protect human rights;
- d) Whether the case had a seminal impact on the protection of ethnic communities and power-sharing mechanisms; and
- e) Whether the case pursues a move against the political élites and ruling parties.

An individual analysis of each selected case will briefly explain the background of the case and parties involved; offer a review of the decision and their impacts in the three key categories described above, review dissenting opinions, if any; and highlight reactions and expectations from the media, academics, and parties involved.

¹² We use the term 'countermajoritarian institution' to explain the ability of the Constitutional Court to continuously use the abstract review to overturn decisions of the majority in the Assembly and major political players. The term 'countermajoritarian' has been employed by Alexander Bickel to explain the effects of the judicial review in the American political system. In 1962 Bickel argued that '*nothing... can alter the essential reality that judicial review is a deviant institution in the American democracy*' (emphasis added). See Alexander Bickel in Barry Friedman, 'A History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' [1998] *New York University Law Review* 333. Ginsburg argues that by '... serving as a countermajoritarian institution, judicial review can ensure that minorities remain part of the system, bolster legitimacy, and save democracy from itself.' See Ginsburg (n 1) 22. For more about the concept of countermajority see John Ferejohn and Pasquale Pasquino 'The Countermajoritarian Opportunity' [2010] *Journal of Constitutional Law* 353; Or Bassok 'The Two Countermajoritarian Difficulties' [2012] *Saint Louis University Public Law Review* 333.

3.

Constitutional Courts and the Strengthening of Democracy: Experiences and Lessons

The jurisdiction vested in constitutional courts aims to ensure that public authorities' decision-making complies with the principles and values enshrined in the constitution. The court's decisions, on the one hand, significantly affect the behaviour of the three branches of government, and delineate borders that public authorities should respect vis-à-vis individuals, on the other. In many regards, the overall impact of courts on governments and public policy can be profound. Ginsburg, for example, argues that the powers of judicial review vested in constitutional courts are not '...only a function of institutional design.'¹³ He goes on to argue that choices made in the courts can determine how the system of constitutional review operates and whether it will become an intrinsic part of the political system.¹⁴

However, it is noteworthy that polarized views exist, regarding the role that constitutional courts have in consolidating democracy in newly-established democracies. For example, in 1994 representatives of Central and Eastern European countries (CEE) exploring the role of constitutional courts in consolidating the rule of law, underlined that their expectations of constitutional courts were high, particularly with regard to the protection of human rights.¹⁵ Similar hopes were expressed by scholars, who viewed 'strong' and 'independent' constitutional courts as essential for democratic consolidation.¹⁶ Placing Kosovo in the context of this pool of expectations is an interesting exercise, which this paper strives to consider.

Yet, while courts remain determined to perform these functions, constitutional courts' decisions are perceived as joining the external and internal systemic obstacles that influence those courts. To that end, Dahl argues that decisions in a constitutional review process are not only based on legal arguments, but are also influenced by the judges' own perspectives. Reflecting on the Supreme

¹³ Ginsburg (n 1) 104.

¹⁴ Ibid.

¹⁵ For more see European Commission for Democracy through Law (n 2).

¹⁶ James Gibson and Gregory Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court' [2003] *The Journal of Politics* 1.

Court of the U.S., Dahl acknowledges that it would be to underestimate its role in the American political system if the Supreme Court were not perceived as part of the conglomeration of political institutions.¹⁷ Of course, the political nature of selecting judges is another, if not, the primary, reason why Dahl was doubtful about the political independence of the U.S. Supreme Court and its role in defending human rights.

Cappelletti, on the other hand, observes that uncertainties over the role of the judiciary have pushed civilized legal systems to envisage and dictate ‘...some limits of judicial freedom, both procedural and substantive’.¹⁸ Such examples are found in both Hungary and Russia. Elliott concludes that equivalent boundaries, as explained by Cappelletti, are to some extent reasonable. He maintains that ‘...limits are required partly because judicial law-making is beset by a number of practical difficulties, and also because judge-made law lacks democratic legitimacy.’¹⁹

Epstein, Knight and Shvetsova highlight that that Constitutional Courts have to abide by ‘...certain strategic imperatives...’ if they want to ensure the conformity of other branches of government with their decisions. Disregarding this, and the interests of other political institutions, the courts ‘...have no chance of survival.’²⁰ Analysing the first Russian Constitutional Court, they argue that the inability of the Court to respect the tolerance intervals between the executive and the legislative in Russia, left that Court without allies.²¹ Boulanger affirms that the study by Epstein et al. confirms that ‘...although we usually consider a constitutional court to be a ‘legal’ institution only subordinated to the commands of ‘the law,’ it is actually an institution that has to take part in power-plays in the political arena.’²² Hence, it is imperative that the Courts reflect upon power relations, and, presumably, acknowledge that the implementation of their rulings may require other institutions to ‘...refrain from engaging in certain behaviour’ or an institution to ‘take certain action’.²³

The perimeter within which constitutional courts have been able to influence political transitions and transformation has been limited by various factors. Experiences in post-communist countries, for example, suggest that governments are the biggest threats to the role of the constitutional courts,

¹⁷ Robert Dahl, ‘Decision – Making in a Democracy: The Supreme Court as a National Policy- Maker’ [1957] *Journal of Public Law* 279. Gerald Rosenberg, ‘Road Taken: Robert A. Dahl’s Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker’ [2001] *Emory Law Journal* 613.

¹⁸ Cappelletti in Elliott Mark, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001) 17.

¹⁹ Elliott (n 18) 17.

²⁰ Boulanger (n 6) 268.

²¹ *Ibid.*

²² *Ibid.*

²³ Vanberg (n 5) 6.

especially in situations in which the latter has a clear stake in the outcome.²⁴ The composition of coalition governments and the extent to which they can affect the courts' ability to actively make use of, and occasionally expand, their jurisdiction is the first aspect of the threat. The second is the governments' demonstrated will to frequently ignore the enforcement of constitutional court rulings. As for the first, Tushnet and Ginsburg maintain that divided governments or strong political parties in opposition, allow such courts to become unequivocal arbiters to resolve political controversies and maintain democratic stability.²⁵ Such political constellations permit '...courts the freedom to expand judicial power, build up legitimacy over time, and deepen the constitutional order.'²⁶ In the same vein, Clayton argues that without '...a stable coalition controlling the elected branches, the Court has less fear of institutional retaliation if it makes unpopular decisions.'²⁷ Therefore, it is unequivocally true that the role that the constitutional courts play is conditioned, as Ginsburg puts it, by the existence of 'equally balanced political forces'.²⁸

Thus, constitutional review does not dismiss the fact that the rulings of the courts, that is the output of the constitutional review cycle, must be properly implemented, regardless of the fact that in doing so other institutions have limited discretion.²⁹ Of course, resisting the courts' decisions could have some political consequences. Vanberg contends that refusing to implement court rulings may result '...in a loss of public support. The fear of such a public backlash can be a forceful inducement to implement judicial decisions faithfully. Moreover, the number of such citizens need not be very large. Politicians and party leaders are

²⁴ Clarissa Dias, 'Do Constitutions Matter/Essays on the Impact of Constitutional Provisions on De Facto Judicial Independence in Latin American Countries' (Political Science Dissertation, Georgia State University 2013) <http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1030&context=political_science_diss> accessed 4 August 2016. Eskridge, for example, argues that regardless of the interest that governments share in relation to the courts' decisions, judicial review is a technical exercise that can help lower 'the stakes of politics'. See William Eskridge, 'Pluralism and Distrust – How Courts Can Support Democracy by Lowering the Stakes of Politics' [2005] *The Yale Law Journal* 1279.

²⁵ See Mark Tushnet, *The New Constitutional Order* (Princeton University Press 2003) 31, 32; Ginsburg (n 1).

²⁶ Ginsburg (n 1) 89.

²⁷ Clayton in Tushnet, *The New Constitutional Order* (n 25) 31.

²⁸ Ginsburg (n 1) 89.

²⁹ In addition Vanger argues that: 'The possibility is not simply academic. Evasion of constitutional decisions in Germany, for example, is sufficiently frequent that an article published in one of the nation's pre-eminent newspapers, the *Suddeutsche Zeitung*, recently concluded that legislative majorities in Germany routinely evade or circumvent FCC decisions that are politically costly or have significant budgetary implications.' See Vanberg (n 5) 6, 7.

concerned about shifts in support at the margin.³⁰ Equally important, advocates of the role of courts in democratic transitions particularly emphasize their potential in limiting misuse of power and distortion of democratic governance by political élites.³¹ According to Richardson and Uitz, constitutional courts have become the primary vehicles for promoting democracy in former communist countries, and guarantors of democratic institutions.³² In comparative constitutional law literature, the Hungarian Constitutional Court is largely viewed as a success story. In this case, the term 'success' refers to the major impact that the Court has had in consolidating democratic institutions and ensuring rule of law. For example, in a period of six and a half years the Hungarian Court has decided on one thousand and five hundred (1500) cases, covering various issues, and it has struck down one law in every three passed by the country's parliament, thereby affecting, more or less, every aspect of the democratization of Hungary.³³ Despite a number of criticisms from the parliament and a number of scholars about judicial activism, all Hungarian Court decisions have been respected, transforming the Hungarian Constitutional Court into the strongest body of state throughout the 1990s.³⁴ Boulanger argues that, to some extent, the success of the Court was due largely to the 'possibility of easy access by the citizens', which the Court used to actively challenge the legislature, to the extent that the political system of Hungary was portrayed as a 'courtocracy'.³⁵

³⁰ See Vanberg (n 5) 20. However, there are two conditions that can help public support serve as a proper enforcement mechanism. First, there '...must exist sufficient public support for the court (or for a specific decision) to make an attempt at evasion unattractive.' And secondly '...citizens will become aware of an evasion attempt so that any support the court enjoys can be brought to bear against legislative majorities that choose not to comply with a decision.'

³¹ Kim Lane Scheppelle, 'Democracy by Judiciary: (Or Why Courts Can Sometimes be More Democratic than Parliaments)' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (CEU Press 2005).

³² James Richardson, 'Religion, Constitutional Courts, and Democracy in Former Communist Countries' (2006) 603 (1) *The Annals of the American Academy of Political and Social Science* 129. It should be noted that numerous scholars have particularly focused on identifying the impact of constitutional courts in transitional democracies. See for more: Adam Przeworski, 'Democracy as a Contingent Outcome of Conflicts' in Jon Elster and Rune Slagstad (eds) *Constitutionalism and Democracy* (Cambridge University Press 1993); Larry Alexander, 'Constitutionalism and Democracy: Understanding the Relation' (2007) San Diego Legal Studies Paper No. 07-121, 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019631> accessed 18 July 2016; Dimitrios Kyritsis, 'Constitutional Review in Representative Democracy' [2012] *Oxford Journal of Legal Studies* 297; Hans Lietzmann, 'Constitutional Courts in Changing Political Systems: A Comment' in Ralf Rogowski and Thomas Gawron (eds), *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* (Berghahn Books Publishing 2002); Saïd Arjomand, 'Law, Political Reconstruction, and Constitutional Politics' [2003] *International Sociology* 7; Renata Uitz, 'Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?' [2007] *Juridica International* 47.

³³ Boulanger (n 6).

³⁴ Richardson (n 32).

³⁵ See Boulanger (n 6) 265, 266. See also Ginsburg (n 1) 100.

Other experiences in post-communist countries show that the constitutional courts can help to limit majoritarian rule and protect the interest of the few, i.e., 'isolated individuals or minorities'.³⁶ Sadurski notes that the main (although not sole) purpose of the constitutions is to safeguard 'minority rights against majoritarian oppression'.³⁷ Acknowledging that those rights cannot, by their very nature, be trespassed upon by majoritarian decisions, the fundamental protection of those rights is guaranteed by Constitutional Courts. This is particularly important in countries that were both undergoing democratic transformation and addressing post-conflict challenges, and which, as a precondition, devised power-sharing mechanisms aimed at guarantying ethnic community rights.³⁸

However, within the post-communist framework, challenging legacies of the past regimes was a "passport" to legitimacy.³⁹ In this context, the role of courts in differentiating between 'democratic' law and 'autocratic' politics was particularly important. Consequently, the constitutional courts had to base their decisions upon legal arguments, ensuring that each outcome was unaffected by political deeds and legacies of the past. As Sadurski claims, often '...there is a certain tension between bringing the courts into the very heart of political controversies, and maintaining the fiction of them being neutral and impartial umpires operating in a court-like fashion'.⁴⁰ Transitioning countries experienced regular clashes among state institutions, i.e. the executive versus the legislative, regular courts versus constitutional courts, and among key political parties. Thus, consolidated constitutional courts allowed the transformation of political problems into constitutional issues that were then addressed through jurisdictional avenues.⁴¹ As Solyom notes '...constitutional review has a neutralising function. Under the circumstances of transition, it is especially important that political debates be transformed into pure constitutional law issues and decided in legal terms – and it is even more important that both the new political class and the people accept this way of conflict resolution'.⁴²

One important dimension of the discussions of the role of courts in consolidating democracies, is whether the actions of the courts are legitimate.

³⁶ Santiago Carlos, *The Constitution of Deliberative Democracy* (Yale University Press 1996) 197.

³⁷ Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Springer 2005).

³⁸ Santiago affirms that the '...the intervention of the judges is by nature unidirectional, their activism in this respect is always directed to broadening the democratic process requiring more participation, more freedom of the parties, more equality, and more concentration on justification.' See Carlos (n 36) 200; Richardson (n 32).

³⁹ For more see European Commission for Democracy through Law (n 2).

⁴⁰ Wojciech Sadurski, 'Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?' [2009] *Israel Law Review* 500.

⁴¹ László Sólyom, 'The Hungarian Constitutional Court and Social Change' [1994] *Yale Journal of International Law* 223.

⁴² *Ibid.*

According to Weber, 'legitimacy involves the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society.'⁴³ Stone Sweet, on the other hand, argues that the legitimacy of the judicial review stems from the constitutional court's ability to play its role. In addition, Stone Sweet maintains that as long as '...the court is able to portray itself as a neutral "third" - for which there are a couple of techniques such as giving partial victories to all sides - the legitimacy of judicial review is preserved.'⁴⁴ For example, Boulanger insists that the legitimacy of the Hungarian Constitutional Court is derived from it being an 'effective dispute resolution forum', and that it has achieved this status through coherent and law-based interpretations.⁴⁵ To that aim, Schyff acknowledges that possessing the '...ultimate wisdom when it comes to understanding higher law' regardless of the court's status as the final authority to interpret the constitution, can be one of the sources of legitimacy.⁴⁶ For example, the legitimacy of the Hungarian Constitutional Court relies on the support that it garnered not by only serving as the ultimate authority to interpret the constitution, but rather by offering '...a jurisprudence based on the whole coherent system of principles which made it difficult for political actors to argue that the court was deciding the cases "politically."⁴⁷

Overall, in transitioning democracies, constitutional courts are burdened with many tasks, which, characteristically, generate huge popular expectations. Constitutional court rulings have often had a positive impact on the consolidation of democracy, through the maintenance of the rule of law and the protection of fundamental rights. Still, as has been explained, constitutional courts face various difficulties in establishing their own prestige, authority and in positively contributing to the consolidation of new democracies. Since most of the issues addressed above are particularly relevant to the Constitutional Court of Kosovo, in the following sections we will analyze and evaluate whether the performance of that Court has had any impact on the consolidation of democracy in the country.

⁴³ Weber in Boulanger (n 6) 267.

⁴⁴ Stone Sweet in Boulanger (n 6) 269. In addition see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2002).

⁴⁵ Boulanger (n 6) 273.

⁴⁶ Gerhard Van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (Springer 2010) 56.

⁴⁷ Boulanger (n 6) 273.

4.

The Establishment of the Constitutional Court of Kosovo: Independence and International Constitutionalism

4.1. Explaining Independence and International Constitutionalism

Due to the consociational constitutional regime in Kosovo, the role of the country's Constitutional Court is idiosyncratic. As well as protecting the integrity of the constitution, its fundamental function is to ensure that ethnic diversity, local self-government and power-sharing principles are respected. Guided by the Ahtisaari Plan, the Constitution of Kosovo has devised a court that includes features that are also found in the German, as well as other post-communist, constitutional courts.

The Kosovan Constitution designates the Constitutional Court as ‘...the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.’⁴⁸ It further determines that the Constitutional Court⁴⁹ in exercising its functions shall be “fully independent”.⁵⁰ The Court is entitled to serve as the ultimate arbiter for the interpretation of constitutional provisions on the protection of human rights and freedoms.⁵¹ However, this means that the Constitutional Court's decisions cannot be appealed and ‘...are binding on the judiciary and all persons and institutions of the Republic of Kosovo.’⁵²

⁴⁸ Constitution of the Republic of Kosovo (CRK), art. 112 para. 1 <www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> accessed 18 July 2016.

⁴⁹ Constitutional Court in the Republic of Kosovo, Court in the Republic of Kosovo, Court are used interchangeably throughout this paper and refer to the Constitutional Court of the Republic of Kosovo.

⁵⁰ CRK (n 48) art. 112 para. 2

⁵¹ Dren Doli and Fisnik Korenica, ‘Kosovar Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses’ [2010] German Law Journal 803.

⁵² CRK (n 48) art. 116, para. 1.

A basic feature of the Court is that it provides direct access only to a limited number of authorised parties.⁵³ In general, the Assembly of Kosovo, the President of the Republic, the Government, a limited number of MPs (10 MPs or 30 MPs on specific issues), Municipalities, Courts through preliminary references, and the Ombudsman have direct access to the court in issues pertaining to their competences. Admissibility *ratione personae* is guaranteed for the privileged institutional applicants.

The Court's jurisdiction is broad and reflects the variety of issues that can be referred to it. The Court does not have the power to act *sua sponte*, that is, to initiate a constitutional review *ex officio*. By December 2015, the Constitutional Court had issued 773 decisions.⁵⁴ Almost ninety-six percent (96%) of the cases comprise constitutional complains by individuals, while the remaining come from privileged applications (mainly in the context of abstract review).⁵⁵

According to the Constitution, the Court shall have nine judges with a mandate of nine years.⁵⁶ Judges shall be appointed and dismissed by the President of the Republic of Kosovo, upon the proposal of the Assembly.⁵⁷ Seven judges are proposed by a two-thirds majority of the Assembly, while the remaining two are proposed by the majority of the Assembly, only after the consent of those MPs holding guaranteed seats in the Assembly (ethnic community MPs).⁵⁸ If the mandate of a judge ends, than the new appointment should be made in accordance with Article 114, with re-appointment precluded.

The initial composition of the Court; however, was based on transitory provisions of the Constitution. These provisions established that out of nine judges, three judges should be foreigners appointed by the International Civilian Representative (ICR), after consultation with the President of the European Court of Human Rights.⁵⁹ The membership of the Court is fashioned in a vein similar to that of Bosnia and Herzegovina. As to the international judges, the Constitution determines that international judges shall not hold the citizenship of Kosovo, nor that of any neighbouring country.⁶⁰ After the end of supervised independence, in 2012, the Kosovo Assembly renewed the mandate of the three international

⁵³ The kinds of matters/questions than can be referred to the Court are established in the CRK (n 48) art. 113 par. 2, 3, 4, 5, 6, 7, 8, 9, 10.

⁵⁴ CC, 'Decisions' <www.gjk-ks.org/?cid=1,57> accessed 5 August 2016.

⁵⁵ Interview with Kadri Kryeziu, Constitutional Court Judge, CC (Prishtina, Kosovo 3 March 2015).

⁵⁶ CRK (n 48) art.114, paras. 1, 2.

⁵⁷ Ibid para. 2 and art. 118.

⁵⁸ Ibid paras. 2, 3.

⁵⁹ Ibid art. 152.

⁶⁰ Ibid para. 4.

judges through an international agreement with the EU, within the framework of EULEX, which will expire in June 2016.⁶¹

With the exception of provision for international judges, the initial and transitory mandate of the Court has followed a very distinct formula. The Constitution determines that of ‘...the six (6) judges two (2) judges shall serve for a non-renewable term of three (3) years, two (2) judges shall serve for a non-renewable term of six (6) years, and two (2) judges shall serve for a non-renewable term of nine (9) years’.⁶²

It should be noted that there are several characteristics of the Kosovan Constitutional Court’s institutional independence. The appointment and hybrid membership of the Court is clearly distinctive. The appointment of Constitutional Court judges involves an interaction between two important institutions, namely the Assembly and the President.⁶³ It follows a twofold pattern; a proposal by two-thirds of the members of the Assembly and the appointment, by decree, of the President of the Republic. To that end, the procedural requirement related to the proposal of judges is designed to block any appointment which does not satisfy the two-thirds requirement. The two-thirds majority requirement is not applicable to the proposal of two judges, which, distinctively, must be proposed by the majority of the Assembly, but with the consent of the majority of the representatives of non-majority communities holding guaranteed seats in the Assembly. Thus, it is not possible for any candidate to satisfy the procedural requirements of appointment without the expressed consent of representatives of non-majority communities in the Assembly. Moreover, given Kosovo’s electoral system (a nationwide proportional representation with a single electoral district) and guaranteed representation scheme for ethnic communities in the Assembly, an unequivocal consensus between incumbent, opposition and

⁶¹ See Law No. 04/L-148 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo. <[www.mfa-ks.net/repository/docs/Ligji_per_ratifikimin_e_marreshes_KS-BE-Eulex_\(anglisht\)-1.pdf](http://www.mfa-ks.net/repository/docs/Ligji_per_ratifikimin_e_marreshes_KS-BE-Eulex_(anglisht)-1.pdf)> accessed 7 July 2016.

⁶² CRK (n 48) art. 152, para 2.

⁶³ According to Sadurski in most post-communist countries the appointment process of constitutional court judges is ‘...thoroughly political although high legal qualifications (or an equivalent description) are usually listed as one of the criteria of eligibility. In most Central and Eastern European countries, constitutional judges are appointed in a process which requires the participation of both the legislative and executive branches (Romania, Albania, Czech Republic, Slovakia, Russia, etc.). See Wojciech Sadurski, ‘Post-communist Constitutional Courts in Search of Political Legitimacy’ (2001) European University Institute Law Working Paper No. 2001/11, 4 <http://law.wustl.edu/harris/conferences/constitutionalconf/Constitutional_Courts_Legitimacy.pdf> accessed 3 April 2015.

ethnic communities' political parties is imperative.⁶⁴ Then again, the involvement of President of the Republic is another layer of guarantee, ensuring that the constitutional requirements are nonetheless formally satisfied. Although the power of the President of the Republic to refuse the appointment of candidates proposed by the Assembly has yet to be tested; the broad constitutional discretion (to appoint or refuse the Assembly proposal) explains why another procedural cycle, that is, the Presidential consensus, has nonetheless, to be satisfied.

Another characteristic of the institutional independence of the Kosovo Constitutional Court lies in its hybrid membership.⁶⁵ The latter relates to the international judges that serve for a transition period as judges of Kosovo's Constitutional Court. Currently the Constitutional Court is composed of nine judges, three of whom are international judges.⁶⁶ Of the 6 remaining national judges, four are Kosovo Albanian, one is Kosovo Serb and one is Kosovo Turk. The majority of the Kosovars (including non-majority communities living in Kosovo) strongly believe that international actors have more credibility in managing important offices than locals.⁶⁷ International judges have been perceived as more neutral, more independent and more experienced than local judges in the Court.⁶⁸ The independence of judges, in this vein, is understood as comprising a process whereby judges are not influenced or pressured by political élites or the public at large, when making decisions.⁶⁹ However, as experiences from other countries show, the hybrid composition of the Court can have an impact in terms of the

⁶⁴ For example, Vanberg argues that 'Hungarian judges are selected by parliament using a two-thirds majority rule. The most important consequence of these supermajority requirements is not necessarily to depoliticize judicial appointments. Rather, these rules ensure that broad parliamentary consensus is required for appointments. As a result, seats on the constitutional court are usually distributed to reflect the balance of power between parties in the legislature.' See Vanberg (n 5) 83.

⁶⁵ It should be noted that the hybrid features of the CRK are similar to that of Bosnia and Herzegovina.

⁶⁶ For more about the Judges of the Constitutional Court see: <www.gjk-ks.org/?cid=2,41> and <www.gjk-ks.org/?cid=2,64> accessed 3 April 2016.

⁶⁷ Interview with Besnik Krasniqi, Journalist and Independent Observer, Koha Ditore (Prishtina, Kosovo 20 February 2015).

⁶⁸ Ibid.; Interview with Korab Sejdiu, J.D Executive Director of 'Sejdiu & Qerkini', Law Company (Prishtina, Kosovo 27 February 2015).

⁶⁹ According to Resnik there are 'distinctive ideas about what "judicial independence" could mean and how to protect it. One aspect relates to aspirations for impartial judgments in individual cases; the idea is that a judge should be able to make specific decisions without fear of suffering personal sanctions.' Moreover, she explains that literature on the independence of courts '...distinguishes a second set of issues, focused on the institutional setting in which judges work – how they are appointed, their length of tenure, mechanisms for removal, their salaries, budgets, facilities, and jurisdiction, as well as whether they run their own internal affairs and set their own procedures. Institutional independence aims to generate environments that equip courts with the resources to render the volume of decisions now expected of them as well as to shape a culture supportive of a unique role for judges'. See Judith Resnik, 'Judicial Independence' in Vikram D. Amar and Mark V. Tushnet (eds), *Global Perspectives in Constitutional Law* (Oxford University Press 2009) 16.

legitimacy and integrity of the Court.⁷⁰ The question for the internationalised court in Kosovo is whether its legitimacy, as a process wherein court decisions are generally accepted, is due mainly to the fact that it is perceived as an independent, professional and credible institution for delivering such decisions, and whether that perception has been improved with the participation of international judges.⁷¹ According to Grewe and Reigner, the hybrid composition of the constitutional courts in both Kosovo and Bosnia are designed

... to fulfill the function of *pouvoir neuter* in the divided societies, where constitutional politics tend to play out along ethnic lines. At the same time, ethnic dividedness makes their character as neutral institutions somewhat precarious. In order to ensure their ethnic and political neutrality, both courts are internationalised in several respect and designed as hybrid institutions, drawing from experiences with hybrid courts in other situations.⁷²

All three international judges in the Constitutional Court of Kosovo have international experience⁷³ and especially, in countries in democratic transition. However, as we will see, there have been times when international judges have remained silent and reluctant to express dissenting/concurring opinions, and this reflects two diverging hypotheses concerning their role and influence.

⁷⁰ For more on the international constitutionalism see Aoife O'Donoghue, 'International Constitutionalism and the State' [2013] *International Journal of Constitutional Law* 1021; Philip Dann and Zaid Al-Ali, 'The Internationalised *Pouvoir Constituant* - Constitution-Making under External Influence in Iraq, Sudan and East Timor' [2006] *Max Planck Yearbook of International Law* 423.

⁷¹ For more on the legitimacy of the Constitutional Court see: Boulanger (n 6); Stone Sweet (n 44); Van der Schyff (n 46). However, not all politico-legal cultures perceive the power of courts in the same manner by complying with their decisions. For example, Vanberg argues that 'Evasion of constitutional decisions in Germany, for example, is sufficiently frequent that an Article published in one of the nation's preeminent newspapers, the *Suddeutsche Zeitung*, recently concluded that legislative majorities in Germany routinely evade or circumvent FCC decisions that are politically costly or have significant budgetary implications.' See Vanberg (n 5) 6,7.

⁷² Grewe and Riegner (n 9) 40. Another argument which favours hybrid court system and besides, the involvement of international judges in constitutional adjudication, applicable in Kosovo, is the integrity and legitimacy of the court. Interview with Korab Sejdiu (n 68).

⁷³ For more about the experiences of the international judges of the CRK see Prof. Dr. Snezhana Botusharova-Doicheva who served as a judge in the European Court of Human Rights <www.gjk-ks.org/repository/docs/snezhana_botusharova_eng.pdf?phpMyAdmin=jHkxek15EPd3sC-%2CexFpB9Vr7R3>; Almiro Rodrigues who served as an International Judge in the Appellate Division of the War Crimes Chamber of the Court of BiH <www.gjk-ks.org/repository/docs/almiro_rodrigues_eng.pdf?phpMyAdmin=jHkxek15EPd3sC-%2CexFpB9Vr7R3>; Robert Carolan J.D. who served as international judge in BiH and chaired the Minnesota Supreme Court Criminal Rules Advisory Committee and Civil Litigation Department of the Minnesota Judicial College <www.gjk-ks.org/repository/docs/robert_carolan_eng.pdf?phpMyAdmin=jHkxek15EPd3sC-%2CexFpB9Vr7R3> accessed 16 July 2016.

Our first hypothesis takes note of the experience of the international judges. According to the latter, their experience has incentivized them to influence and shape most of the Court's decisions. Their influence has been mainly exerted during the Court's deliberations, and their opinion duly reflected in the decisions of the Court. The rarity of international judges dissenting from the majority opinions is explanatory of this hypothesis.

The second hypothesis seeks to explain the lack of dissenting opinions through apathy and a lack of knowledge, on the part of international judges, of the constitutional system of Kosovo. The very few dissenting opinions of international judges, in cases having an important impact upon Kosovo's democracy, show that their role has not been relevant in shaping the Court's decisions. To date, international judges have issued and/or been associated with twenty dissenting and/or concurring opinions. Of these, nine dissenting/concurring opinions were issued individually by Judge Carol, and three by Judge Rodriguez. Only on three occasions did national and international judges jointly dissent from and/or concur with the majority opinion (in two cases one international and one national judge dissented, while in one case, two international judges and one local jointly dissented). Moreover, there is no case in which three international judges have jointly dissented and/or concurred from or with the majority opinion. The latter suggests that claims the international judges are representatives of the international community's interests are incorrect. However, there were five cases in which two international judges jointly dissented or concurred. In general, these results tend to suggest that the influence of international judges in shaping Constitutional Court decisions has been significant but limited. Despite that, and since insights from internal deliberations of the Court are not made public, these two hypotheses are equally likely to be valid. Nonetheless, while analysing the most important Constitutional Court decisions, the role of international judges can be more fully explained through the lens of 'influence' than 'apathy'.

The last dimension of the Kosovo Constitutional Court's institutional independence is best explained through its procedures for the dismissal of judges. It should be noted that the Constitutional Court judges are dismissed by the President of the Republic only after two-thirds of the judges of the Court propose such a measure to the President. Two aspects of this are noteworthy. First, the Constitutional Court can propose the dismissal of one of its own judges only after (a) a competent court has sentenced the judge for a serious crime; (b) the judge, according to the opinion of the two-thirds of judges, has seriously neglected their duty; or, (c) the judge suffers from an illness or health problem which that prevents them from carrying out their duties and functions.⁷⁴ Second, the President of the Republic, according to the Constitution and the

⁷⁴ CRK (n 48) art. 18, and see Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo <www.confueconstco.org/en/congress/congress-XVI/Law_of_the_Constitutional_Court_of_Republic_of_Kosovo_-_E.pdf> accessed 10 June 2016.

laws underpinning the Constitutional Court, can only act based on the proposal of the Court, and no additional discretion to refuse or amend such proposal is recognised. The imperative determination is that a judge's dismissal can be invoked only via the consent of two-thirds of Court judges.

As to the immunity of Constitutional Court judges, according to the Constitution, those judges have immunity from '...prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as Judges of the Constitutional Court.'⁷⁵ Clearly, the immunity of judges is functional, and its application is very limited. The constitutional provision concerning the immunity of constitutional judges is identical to that applicable to MPs and the President of the Republic, and therefore both the length and nature of the immunity of Constitutional Court judges follows the patterns of those of MPs and the President of the Republic. However, this type of immunity does not apply to the international judges serving the Constitutional Court. Their immunity, status and privileges are fashioned according to the conventions of international law.⁷⁶

As far as the personal qualifications of the Judges of the Court are concerned, the Constitution and the law determine that Judges 'shall be distinguished jurists of the highest moral character, with not less than ten (10) years of relevant professional experience' in the field of public law and constitutional law.⁷⁷ In addition, the Constitution determines that the principle of gender equality shall guide the process of judicial appointment.

Finally, as has been noted, the main institutional features of the Kosovo Constitutional Court are to be viewed as preconditions which, if combined with the active application of the authority recognized as belonging to the Court, can transform it into one of the most influential courts in the region. However, the extent to which the Court has been able to use its features to benefit the democratic transition of Kosovo will be discussed in the following chapters.

⁷⁵ CRK (n 48) art. 117.

⁷⁶ Law No. 03/L-033 on the Status, Immunities and Privileges of Diplomatic and Consular Missions and Personnel in Republic of Kosovo and of the International Military Presence and its Personnel. *Ministry of Foreign Affairs*. <www.mfa-ks.net/repository/docs/2008_03-L033_en1.pdf> accessed 10 June 2016. According to the latter, the following treaties shall apply: '... the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 14 April 1963, the General Convention on the Privileges and Immunities of the United Nations of 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations of 21 November 1947'.

⁷⁷ CRK (n 48) art. 114, para. 1, and See Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo. art. 4, para. 1. <www.confeuconstco.org/en/congress/congress-XVI/Law_of_the_Constitutional_Court_of_Republic_of_Kosovo_-_E.pdf> accessed 10 June 2016.

4.2. Explaining the Fragmented Application of the Court's Jurisdiction

It is notable that the hybridity of Kosovo's Constitutional Court has deepened since the adoption of constitutional amendments related to the establishment of the EU-designed Specialist Chambers on war crimes. These Specialist Chambers, although established within the constitutional system of Kosovo, will consist of international judges and prosecutors only, and will function within an autonomous and vertically-integrated justice system (including a separate chamber of the Constitutional Court). The Specialist Chambers are entitled to a specific *ratione materie* and *ratione personae* jurisdiction. According to the law, the Specialist Chambers '...shall be attached to each level of the court system in Kosovo: the Basic Court of Prishtina, the Court of Appeals, the Supreme Court and the Constitutional Court.'⁷⁸ Moreover, the Specialist Chamber of the Constitutional Court shall deal only with any referral relating to the Specialist Chambers and Specialist Prosecutor's Office and will decide '...any constitutional referrals under Article 113 of the Constitution relating to the Specialist Chambers and Specialist Prosecutor's Office in accordance with a specific law.'⁷⁹

The constitutional amendment establishes a separate, parallel chamber of the Constitutional Court that will function independently of the current Constitutional Court. This separate chamber of the Constitutional Court, comprising three international judges, will be the final authority to interpret the constitution with regard to the constitutional submissions which relate to the jurisdiction and '...the work of the Specialist Chambers and Special Prosecutors' Office'.⁸⁰ The special Constitutional Court Chamber is entitled to decide referrals initiated by authorised parties under the general conditions as specified in Article 113 of the Constitution, which relate to that which '...directly impacts the work, decisions, orders or judgments of the Specialist Chambers or the work of the Specialist Prosecutor's Office'.⁸¹

In addition, the Specialist Chamber has jurisdiction over individual complaints, including where the accused and/or victims are part of the proceedings of the Specialist Chambers on war crimes, in which cases the Specialist Chamber may rule on matters concerning the alleged violations '...of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all

⁷⁸ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, art. 3, para. 1. <www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf> accessed 4 June 2016.

⁷⁹ CRK (n 48) art. 162 (Amendment no. 24); the Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutors' Office (n 78), art. 3, para. 1.

⁸⁰ Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (n 78), art. 49, para. 1.

⁸¹ Ibid para. 2.

remedies provided by law'.⁸² Since the jurisdiction of the Specialist Chamber of CC mirrors the original jurisdiction of the Constitutional Court, the former is also entitled to decide preliminary references addressed to it by a pre-trial judge or panel of the Specialist Chambers, as well as references addressed by the Ombudsperson of the Specialist Chambers and/or the Ombudsperson of Kosovo. The pre-trial judge or panel of the Specialist Chambers can submit constitutional referrals only as far as the constitutional compatibility of a law and when '...the question arises in a judicial proceeding, the judge or panel is uncertain as to the compatibility of the contested law with the Constitution and their decision in that case depends on the compatibility of the law at issue'.⁸³

As noted, the current constitutional amendments introduce a unique, bivariate model of constitutional review to Kosovo. This institutes two separate layers of constitutional review. The first, original, constitutional review process will continue to be exercised by the Court consisting of nine judges (including three incumbent international judges of the Court), serving as the final arbiter for the interpretation of the constitution. The second layer, the derivative constitutional review process, will be exclusively exercised by a separate Chamber of the Constitutional Court, comprising three international judges, which shall review solely issues involving the jurisdiction and the work of the Specialist Chambers and/or the Special Prosecutors' Office.

4.3. The Status of ECHR and ECtHR Case Law in Kosovo

The Constitution of Kosovo mandates the Constitutional Court of Kosovo to guarantee that human rights and fundamental freedoms are interpreted in terms consistent with the decisions of the European Court of Human Rights.⁸⁴ It furthermore determines that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols shall be guaranteed by Kosovo's constitution and will be directly applicable in Kosovo.⁸⁵

There are, however, two important principles deriving from the Constitution that must be highlighted. The first is that the European Convention and its protocols, according to the Constitution of Kosovo, have the status of the constitutional law. The Constitution acknowledges that: 'Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are

⁸² Ibid para. 3.

⁸³ Ibid paras. 4, 5.

⁸⁴ For more see: Fisnik Korenica and Dren Doli, 'Taking Care of Strasbourg: The Status of the European Convention on Human Rights and the Case law of the European Court of Human Rights in Kosovo's Domestic Legal System' [2011] *Liverpool Law Review* 209. CRK (n 48) art. 53.

⁸⁵ CRK (n 48) art. 22.

guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions'.⁸⁶ Second, and in order to reconcile the constitutionalisation of the ECHR and apply the latter accordingly, the Constitution determines that human rights guaranteed by the Constitution, including those contained in the ECHR, should be '...interpreted consistent with the court decisions of the European Court of Human Rights'.⁸⁷ The Constitution explicitly obliges every regular court, and the Constitutional Court, to use the ECtHR case-law as a benchmark when interpreting constitutional rights and fundamental freedoms. In addition to that, and given that Kosovo is not a member of the Council of Europe, and therefore not a member of the Convention, the Constitutional Court of Kosovo, as far as the citizens of Kosovo are concerned, serves as the final arbiter that confirms whether a particular right or freedom has been interpreted and applied in line with ECtHR case-law.⁸⁸ In other words, non-membership of the CoE means that citizens of Kosovo cannot challenge the decisions of regular courts and/or of the Constitutional Court before the ECtHR, thus making the Kosovo Constitutional Court mandate unique among constitutional courts in the region.

⁸⁶ Ibid para. 2.

⁸⁷ Ibid art. 53.

⁸⁸ Kosovo's membership into the Council of Europe can help reverse this trend. Of course this trend will unequivocally alter when Kosovo becomes a member of the EU. For example, referring to the relationship between the Federal Constitutional Court of Germany and CJEU, Lietzmann argues that 'the European Court of Justice appears, in relation to everyday problems, as a practical, organized body, and operates on the basis of totally unaura-like criteria, which take over the necessary coordinating tasks in legal and political business matters. In this respect, the European Court of Justice deals with business while the Federal Constitutional Court produces the nation-state aura. The dispute as to supremacy in questions of the interpretation of basic rights thus has institutional as well as political-cultural consequences. These lie in the clear distribution of functions, in the division of application, and the presentation of the power of justice'. See Lietzmann (n 32).

5.

Jurisdiction of the Constitutional Court

The jurisdiction of the Constitutional Court is broad, and frequently echoes that of neighbouring countries. Except individual submissions, the Court has jurisdiction to decide any referral addressed to it by various privileged parties, including, ‘The Assembly of Kosovo, through the Speaker of the Assembly, 10 MPs and 30 MPs, the President of the Republic of Kosovo, the Government, the Ombudsperson, Municipalities and Deputy Chairperson for Communities of the Municipal Assembly’.⁸⁹ The Court is entitled to jurisdiction to control the constitutionality of any legal act issued by the Assembly, President, Prime Minister, Government and Municipalities,⁹⁰ to decide regarding any conflict of competences among the Government, the President and the Assembly,⁹¹ as well as jurisdiction to decide preliminary references (incidental review) addressed by regular courts⁹². The Court, in addition, has jurisdiction to decide ‘the compatibility with the Constitution of a proposed referendum’⁹³ and jurisdiction to decide the “compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency”⁹⁴. The Constitution vests in the Court the jurisdiction to *ex ante* control of the proposed constitutional amendments *vis-à-vis* both international agreements and the rights and freedoms listed in Chapter II of the Constitution,⁹⁵ jurisdiction to decide ‘whether violations of the Constitution occurred during the election of

⁸⁹ CRK (n 48) art. 113 para. 2. For a detailed overview of the jurisdiction of the Constitutional Court of Kosovo see Doli and Korenica, ‘Kosovar Constitutional Court’s Jurisdiction’ (n 51).

⁹⁰ The CC decides “the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government”, “the compatibility with the Constitution of municipal statutes”, “the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed”. See Constitution of the Republic of Kosovo, art. 113 para. 2 (2 and 3) and 5.

⁹¹ *Ibid* para. 3 (1).

⁹² CC shall decide upon “questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court’s decision on that case depends on the compatibility of the law at issue” art. 113, para. 8.

⁹³ *Ibid* para. 3 (2).

⁹⁴ *Ibid* para. 3 (3).

⁹⁵ *Ibid* paras. 3 (4), 9.

the Assembly’,⁹⁶ jurisdiction to decide the constitutionality of ‘...laws or acts of the Government infringing upon their responsibilities’ of municipalities,⁹⁷ and jurisdiction over allegations of violation of the Constitution by the President of the Republic of Kosovo⁹⁸. The Court is entitled to decide referrals addressed by 10 or more MPs challenging the constitutionality of any law or decision of the Assembly, as well as jurisdiction over alleged violation of the constitution by the President of the Republic when this is addressed by 30 or more MPs.⁹⁹

Except municipalities, which may challenge any legal act of the Assembly or of the Government on the presumption that it limits their constitutional competences, the constitution and the law on local self-government determine additional avenues through which municipal authorities may access the Court. It is envisaged that the deputy-chairperson for communities of the municipal assembly is entitled to submit directly to the Constitutional Court any decision or action of the municipal assembly, if that deputy-chairperson considers that it violates a constitutional right.¹⁰⁰ This type of jurisdiction has its roots in constitutional features of Kosovo that prescribe a special status for non-majority communities living in Kosovo.¹⁰¹

The abstract control of legal acts through *action popularis* is not permissible in Kosovo, however, the constitution provides for individual complaint mechanism. The Court has jurisdiction to decide any individual submission submitted by both legal and physical persons as far as individual human rights and fundamental freedoms, and only after parties have exhausted all other (judicial) remedies.¹⁰² This type of constitutional control makes up 90% of the cases that the Court has so far decided, as well as pending cases until December 2015.

⁹⁶ Ibid para. 3 (5).

⁹⁷ Ibid para. 4 .

⁹⁸ Ibid para. 6.

⁹⁹ Ibid para. 5, 6.

¹⁰⁰ CRK (n 48) art. 62, para. 4; Law No. 03/L-040 on Local Self-Government, art. 55, para. 4., <www.parliament.am/library/Tim/kosovo.pdf> accessed 10 April 2016.

¹⁰¹ Apart from the above-mentioned specific jurisdictional powers, the Constitution stipulates that “additional jurisdiction may be determined by law.” Additional jurisdiction of the Court is provided by the Law on Ombudsperson, Law on protection of personal data and the Law on local self-government. The Law on Ombudsperson provides the right to Ombudsperson to file a constitutional complaint in the Constitutional Court within the circumstances defined in the constitution and the Law on Constitutional Court. Similarly, the Law on protection of personal data determines that the Agency on the protection of personal data can initiate a constitutional review of laws and regulations issues by public authorities on the grounds of the right to data protection as provided in article 36 of the Constitution. See Constitution of Kosovo (n 48) art. 113 para. 10, see Law No. 05/L-019 on Ombudsperson, art. 16, para. 10, and see Law No 03/L-172 on Protection of Personal Data, art. 40, para. 1; CRK (n 48), art. 113, para. 7.

¹⁰² CRK (48) art. 113, para. 7.

6.

Significant Constitutional Court Decisions and the Court's Role in the Democratic Transition of Kosovo

6.1. Division of Powers and Court Positioning Concerning Political Parties

The Constitutional Court of Kosovo is the most recently instituted court of its type in the region. While its rulings have addressed several important features of Kosovo's democracy, when compared to the broad array of issues addressed in neighbouring courts, its body of case-law is still limited. So far, its decisions have influenced many changes in Kosovo, and the broad interpretation of its jurisdiction has transformed it into the most activist and one of, if not the, most influential court(s) in the region.

The President Sejdiu case was an early example of cases used by the Constitutional Court to demonstrate its ability to become involved in political controversies and actively apply its jurisdiction. The case originally referred to as Naim Rrustemi and 31 Other Deputies of the Assembly of the Republic of Kosovo v. His Excellency Fatmir Sejdiu (henceforth, the President Sejdiu Case). This was the first notable decision made by the Constitutional Court following its establishment. The decision prompted the resignation of the President of Kosovo, broke up the coalition government and consequently triggered early elections.

In June 2010, Naim Rrustemi and thirty-one (31) members of the Assembly of Kosovo lodged a referral to the Constitutional Court, claiming that the incumbent President of the Republic, Mr. Sejdiu, had seriously violated the Constitution¹⁰³ by simultaneously holding the position of the President of the Republic and that of the President of the Democratic League of Kosovo (LDK).¹⁰⁴ The referral

¹⁰³ Their referral was based on article 88, Incompatibility of the constitution which states that 1. The President shall not exercise any other public function. 2. After election, the President cannot exercise any political party functions.

¹⁰⁴ See Constitutional Court of the Republic of Kosovo, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo Vs. His Excellency President of Kosovo Fatmir Sejdiu, Judgment, Case No. KI 47/10, 28 September 2010 <www.gjk-ks.org/repository/docs/ki_47_10_eng_1.pdf> accessed 30 July 2016.

was based on Article 113(6) of the Constitution¹⁰⁵ and Article 44 of the Law on the Constitutional Court of Kosovo. According to the Constitution, thirty or more MPs may refer questions as to whether the President of the Republic of Kosovo has committed serious violation(s) of the Constitution, to the Constitutional Court. The referral was initially lodged by thirty-two (32) MPs, but afterwards, in June and July 2010, six MPs withdrew from the petition. Considering that their withdrawal from the petition could have affected the admissibility of the referral, the Court had to decide on two separate questions. First, whether the case should be considered admissible in light of Article 113 (6) and the time limits set by the law, and second, whether the President had in fact violated the Constitution.

The Court initially addressed the issue of admissibility, and whether the withdrawals from the constitutional submission affected the admissibility of the case. The President of the Republic made the claim that the case should be declared inadmissible because the number of MPs required, by Article 113 of the Constitution, for this petition to be valid was no longer fulfilled when the six MPs withdrew. The President of the Republic argued that the jurisdiction of the Court to respond to this claim could not be exercised unless the petition addressed to it had been continuously supported by 30 MPs until admissibility was considered. Since six MPs had already withdrawn from the petition, prior to constitution of the Constitutional Court's review, the criterion of 'authorised parties', that is thirty (30) MPs, had not been satisfied. The second admissibility-related claim concerned the disputed time limit. According to Kosovan law governing the Constitutional Court, the petition, specifically Article 113 (6) of the Constitution, allows matters of this type to be submitted by 30 MPs within thirty (30) days from the day that the purported violation of the Constitution by the President of the Republic has been made public.¹⁰⁶

However, the Court, apparently perceiving the withdrawal of MPs as 'politically motivated' and the suspension of his party position as a continuous violation of the Constitution, dismissed both arguments and decided that the case was admissible. As to the time limit, the CC declared:

...that the time limit of 30 days set by Article 45 of the Law on the Constitutional Court, for referral of serious violations to the Constitutional Court, applies to serious violations that were "one off events in time or were continuing violations that ceased. The time cannot apply to serious violations that continue...where a violation

¹⁰⁵ See more in the Constitution of the Republic of Kosovo, art. 113, jurisdiction and authorised parties, para. 6 which allows: Thirty (30) or more deputies of the Assembly are authorised to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution. See (n 48).

¹⁰⁶ Law on CC, art. 45.

is continuing the thirty days cannot commence to run because the violation has not ceased.¹⁰⁷

In the same vein, the Court addressed the withdrawal of the MPs, and decided that the MPs who signed the referral and agreed to jointly initiate a concerted enterprise '...could not but be aware of that importance...' and of the collective and joint nature of the referral.¹⁰⁸ In addition, the Court argued that the 32 MPs jointly agreed that this was an important question to be addressed to the Court and it would consider the petition legally lodged with the Court once it was officially filed to its registry. Therefore, the Court argued that the wishes of one, two or more individual MPs who withdraw their signatures, without any supporting cause, cannot affect the legality of the referral addressed to it.¹⁰⁹

As to merit, the Court had to respond as to whether the provision of the Constitution which barred the President of the Republic from holding or exercising any function in a public institution and in any political party had been continuously violated by the President.¹¹⁰ The Constitutional Court, in September 2010, responded by addressing two separate, but intertwined issues. The first of these was whether the President of the Republic, who froze/suspended his position as the President of a political party (LDK), had deliberately violated the prohibition defined in the Constitution. And secondly, whether, the violation by the President of the Republic of the prohibition can qualify a 'serious violation' of the Constitution. Since the dismissal of the President can be initiated only after the Court confirms that he or she has 'seriously violated' the Constitution, the decision of the Court was relevant to the country's political stability and coalition government.

As to the first question, the Court responded by conceding that the President of the Republic exercises political party activity even when he formally submits a declaration by which he freezes/suspends his party position. Through this formula, according to the Constitutional Court, the President deliberately crafted the perception that:

¹⁰⁷ See Constitutional Court of the Republic of Kosovo, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo Vs. His Excellency President of Kosovo Fatmir Sejdiu (n 104) para. 34.

¹⁰⁸ Ibid. In addition the Court held that: 'Article 23 of the Law on the Constitutional Court provides: The Constitutional Court shall decide on matters referred to it in a legal manner by authorised parties notwithstanding the withdrawal of a party from the proceedings. In its ordinary meaning this Article obliges the Court to decide matters referred in a legal manner. This is emphasised by the use of the word "shall.'" See para. 35.

¹⁰⁹ See Constitutional Court of the Republic of Kosovo, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo Vs. His Excellency President of Kosovo Fatmir Sejdiu (n 104) paras. 38, 45.

¹¹⁰ 'The President shall not exercise any other public function. 2. After election, the President cannot exercise any political party functions'. See the CRK (48) art. 88, paras. 1 and 2.

...he or she is the Chairman of their political party even under circumstances where he or she as Chairman will not make any active decisions on behalf of the party... and allowed ...the political party to “make use of his name and position as President of the Republic. The President has continued to permit his name to be associated with the LDK. LDK has permitted him to remain as their President and has permitted him to “freeze” the exercise of the functions of that party.¹¹¹

Second, the Court had to respond to whether such a violation qualifies as a serious violation within the meaning of Article 91 of the Constitution.¹¹² In doing so, the Court initially explained that the President is a ‘powerful constitutional officer’, with significant constitutional powers. It is the quality of these constitutional powers, combined with the effect of the President’s decision *vis-à-vis* public bodies which make, according to the Court, the holding of any political party chairmanship a serious violation of the Constitution. The Court, in addition, argued that the constitutional provisions confer upon the President the obligation to represent the unity of the people, along with the prohibition to exercise any function at political party level, because the Constitution aims to ensure the impartiality, integrity and independence of the President’s role. Therefore, the Court decided that this objective cannot be achieved if the incumbent President holds the position of the chairman of a political party, and consequently found that the President ‘...has committed a serious violation of the Constitution under Article 88.2 of the Constitution by continuing to permit him-self to be recorded as President of the LDK’.¹¹³

¹¹¹ See Constitutional Court of the Republic of Kosovo, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo Vs. His Excellency President of Kosovo Fatmir Sejdiu (n 104) paras. 66, 67 and 68.

¹¹² Article 91 acknowledges that: ‘1. The President of the Republic of Kosovo may be dismissed by the Assembly if he/she has been convicted of a serious crime or if she/he is unable to exercise the responsibilities of office due to serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution. 2. The procedure for dismissal of the President of the Republic of Kosovo may be initiated by one third (1/3) of the deputies of the Assembly who shall sign a petition explaining the reasons for dismissal. If the petition alleges serious illness, the Assembly shall consult the medical consultants team on the status of the President’s health. If the petition alleges serious violation of the Constitution, the petition shall be immediately submitted to the Constitutional Court, which shall decide the matter within seven (7) days from the receipt of the petition’. See the CRK (n 48) art. 91.

¹¹³ See Constitutional Court of the Republic of Kosovo, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo Vs. His Excellency President of Kosovo Fatmir Sejdiu (n 104) paras. 69, 70. This conclusion of the Court was also partially challenged by a joint dissenting opinion of two international judges. For more see Constitutional Court of the Republic of Kosovo, Joint Dissenting Opinion of judge Almiro Rodrigues and judge Snezhana Botusharova, Naim Rrustemi and 31 Deputies of the Assembly of the Republic of Kosovo Vs. His Excellency President of Kosovo Fatmir Sejdiu, Case No. KI 47/10, 12 October 2010 <www.gjk-ks.org/repository/docs/ki_47_10_dissenting_opinion_judge_snezhana_botusharova_and_judge_almiro_rodrigues.pdf> accessed 1 August 2016.

Regardless of the avenues that the Constitutional Court chose to follow in addressing both the admissibility and the merits of this case, a careful reading of the decision shows the willingness of the Court broadly to interpret its jurisdiction by engaging in substantive assessment of the role of the President in the context of Kosovo's system of government. Several constitutional requirements related to the admissibility could have made it possible for the Court to declare the case inadmissible – as one can also conclude from the dissenting opinion of the two international judges. Judge Botusharova and Rodrigues, referring to the majority conclusion on the admissibility of the case, regardless of the withdrawal of several MPs from the submission, claimed that the ruling of the majority:

...is against the procedural principle of legal stability and consistent presentation at proceedings. That principle establishes that the case must be “stable” in relation to the persons, petitum and reasons for the petitum from the notification of the case to the opposing party until the final decision of the case. So, it requires the same applicants to stay until the end of the proceedings.¹¹⁴

They also concluded that the majority ruling - that the President of the Republic held, simultaneous with his presidency of Kosovo, the post of president of his political party -was manifestly ill-founded, since the Court was not able to evidence that this had occurred – clearly this was to request that the Court evaluate the facts, rather than the potential meaning of perceptions regarding this issue.¹¹⁵

In general, the decision of the Court had several consequences, mainly reflecting a broad array of external issues that the Court had to consider. In September 2010 the President of the Republic Mr. Sejdiu, announced his resignation from that office, at the same time stating that he disagreed with the

¹¹⁴ For more see Constitutional Court of the Republic of Kosovo, Joint Dissenting Opinion of Judge Almiro Rodrigues and Judge Snezhana Botusharova (n 113).

¹¹⁵ In addition, Judge Botusharova and Judge Rodrigues claim that ‘... the arguments of the Majority about the role of the political parties and of the President, and the influence of a politically active President on behalf of his party are in principal correct when taken in general and in principle. But in the same line of general discussion, one could also speculate that, even after a full president's resignation from a party position or even a party membership, he could and would continue to be associated with this same party and its policy, even he could be more party-active, while not holding formally any party position. The Constitution is barring the President of the Republic from exercising any political party function. What were the concrete acts, behaviour or damages to substantiate and confirm the alleged violation of the Respondent party? The Applicants should have been given the possibility to respond, if they wished. How the holding of a leadership position, “frozen” according to President, was an exercise of a political party function? These questions were not answered through evidence. Such evidence was not present, analysed and interpreted in order to establish facts which constitute a serious violation.’ For more see Constitutional Court of the Republic of Kosovo, Joint Dissenting Opinion of Judge Almiro Rodrigues and Judge Snezhana Botusharova (n 113).

Court's conclusions.¹¹⁶ The resignation of President Sejdiu led to major changes in the political context, in particular it triggered an immediate break-up of the coalition government and forced an extraordinary election, following dissolution of the Assembly. The Democratic League of Kosovo (hereinafter, LDK) left the coalition government on 18 October 2010, and the government suffered a vote of no confidence on 2 November 2010; elections were set for 12 December 2010.

The model set by the Court's application of the admissibility criteria in the President Sejdiu case will set a precedent for its approach to many future cases. This judgment shows that the admissibility test applied by the Court is fluid, and depends upon the personal attitudes of whichever judges happen to be sitting at the time. The decision of the Court in this case demonstrated its immunity from the influence of the governing majority. In addition, the decision helped to demarcate the constitutional function of the President of the Republic, limited opportunities for incumbents to use the position of the President for the mere political purposes of the governing coalition, and shaped the President's standing as a representative of a united people. Bearing in mind that this was one of the first politically sensitive cases to come before the Constitutional Court, we argue that the lack of public reaction, and total obedience of the political parties, to the Sejdiu decision can be attributed to their neutral perceptions of the Court. Many citizens, as well as political parties, *apriori* entrusted confidence to the Court, mainly due to a lack of clarity around the limits to Court power with regard to issues of this type, as well as by the absence of previous experience concerning the constitutional review of the decisions issued by senior officers. Acknowledging this, the Court made active use of this neutral perception and transformed the lack of resistance by citizens and political parties as a device to create an illusion of legitimacy. This was reflected in subsequent rulings issued by the Court.

6.1.1. Demystifying the Role of the President of the Republic

In another case, that of President Pacolli, which once more involved the President of the Republic, the Court reasserted its powers and the ability to rule against the claims of the governing majority in the Assembly. The President Pacolli case, officially known as Sabri Hamiti and other MPs, concerned a constitutional review of the decision of the Assembly of the Republic of Kosovo on the election of the President of the Republic, Mr. Behgjet Pacolli; hereinafter, the President Pacolli case.¹¹⁷ The outcome was the annulment of the Assembly's decision and

¹¹⁶ *BBC NEWS Europe*, 'Kosovo President Resigns over Breach of Constitution' 27 September 2010 <www.bbc.co.uk/news/world-europe-11420795> accessed 1 August 2016.

¹¹⁷ See Constitutional Court of the Republic of Kosovo, Sabri Hamiti and Other Deputies, Judgment in Case No. KO 29/11, 22 February 2011 <www.gjk-ks.org/repository/docs/ko_29_11_agj_om_ang.pdf> accessed 1 August 2016.

therefore the revocation of the President's status. Thus the Court, within the space of two years, managed to dismiss two consecutive presidents.

Following the parliamentary elections in December 2010, and after the resignation of President Sejdiu, a new governing coalition was established between the New Kosovo Alliance (AKR)¹¹⁸ and the Democratic Party of Kosovo (PDK). The coalition government agreement designated Hashim Thaci, the chairman of PDK, as the new Prime Minister and Behgjet Pacolli, the head of AKR, as the President of the Republic. On 22 February 2011, Mr. Pacolli was elected President of the Republic of Kosovo, with 62 votes in favour, four against, and one vote invalid. Three other major political parties including LDK, AAK, and Vetevendosje Movement (VV) boycotted the parliamentary session. The opposition political parties¹¹⁹ submitted a referral to the Constitutional Court concerning the procedures for the election of President Pacolli by the Assembly. Their submission was based on Article 113 (5) of the Constitution, which establishes that 10 or more MPs of the Assembly can challenge the constitutionality of any decision of the Assembly within eight (8) days of its adoption. There were three main arguments listed in the referral, which, according to the opposition political parties, demonstrated that the Assembly's decision was unconstitutional.

The first issue the Court had to address was related to the lack of quorum in the parliamentary session for election of the President of the Republic. The second issue concerned the lack of any opposing candidate, while the third was related to allegations that the interruptions and breaks during the voting made the voting procedure unconstitutional. As to the admissibility, the Court explained that standing requirements, in the light of Article 113 (5), including the time limits, had been respected. The case was thus declared admissible.

It should be noted that as to the appointment of the President, the Constitution determines that the President shall be elected with a two-thirds majority of all members of the Assembly. If the two-thirds majority is not reached '...by any candidate in the first two ballots, a third ballot takes place between the two candidates who received the highest number of votes in the second ballot, and the candidate who receives the majority of all deputies of the Assembly shall be elected as President of the Republic of Kosovo.'¹²⁰ The Constitutional Court established that, in this case, the two important constitutional requirements had not been met. The first procedural prerequisite, stated the Court, requires that there be more than one candidate standing for the post of President of the Republic. The court thus stated that:

¹¹⁸ This is the party led by Begjet Pacolli, elected as President by the coalition PDK and AKR.

¹¹⁹ The submission was made by 25 MPs from the Democratic League of Kosovo (LDK) and 9 Deputies from the Alliance for Future of Kosovo (AAK).

¹²⁰ CRK (48), art. 86, para 4, 5.

...there must be more than one candidate for the election of the President of the Republic of Kosovo in order for the election procedure to be put in motion. In particular, its paragraph 5, is explicit in stipulating that, if a two thirds (2/3) majority is not reached by any candidate in the first ballot, a third ballot takes place between the “two candidates who received the highest number of votes in the second ballot”.¹²¹

The second procedural requirement with which the Assembly failed to comply, according to the Court, relates to the quorum needed to start the procedure for election of the President. The Court found that the two-thirds quorum of the MPs in attendance and voting had not been met, since when the vote took place, only 67 MPs (out of 120) were present and cast their vote. The Court ruled that the constitution requires two-thirds of all MPs to both be present and to vote, and that this condition had not been met in this case.¹²² The Court finally decided by a majority of votes that the procedure for election of Mr. Pacolli as President of the Republic of Kosovo had been in violation of Article 86.

Following the decision, President Pacolli resigned, recognizing that the Constitutional Court's decision had to be implemented.¹²³ The decision of the Court in this case was further confirmation of the Court's willingness to act on constitutional issues that have been raised as a result of intense political conflict between governing and opposition political parties. The dissenting opinion of two international judges best reflects the intense examination and exploration through which the Court reached its interpretation.¹²⁴ For example, the two dissenting judges argued that the majority:

...at least implicitly, erroneously concludes that the definition of a “quorum” for purposes of electing a President is the same as the minimal number of votes that a successful candidate for President must receive to be elected and that this minimal number of voters must be present when opening the session. A quorum is different than voting. A quorum is “the minimum number of members of a deliberative assembly necessary to conduct business”. Voting by the members of legislative body is part of the business of that legislative body. The rules applicable to each can be, and often are, different.¹²⁵

¹²¹ See Constitutional Court of the Republic of Kosovo, Sabri Hamiti and Other Deputies (n 117) para. 68.

¹²² Ibid paras. 86, 87.

¹²³ Lajme [News], ‘Pacolli: Vendimi Gjykares Kushtetues eshte I shenjte’ [The Decision of the Constitutional Court is Holistic] <www.lajme.org/pacolli-vendimi-i-gjykares-kushtetuese-eshte-i-shenjte/> accessed 30 July 2016.

¹²⁴ For more see the Constitutional Court of the Republic of Kosovo, Joint Dissenting Opinion of Judges Robert Carolan and Almiro Rodrigues, Sabri Hamiti and Other Deputies, 30 March 2011 <www.gjk-ks.org/repository/docs/gjk_ks_29_11_om_ang.pdf> accessed 30 July 2016.

¹²⁵ Ibid.

Despite the prevailing perceptions, the decision of the majority of the Court's judges to support that outcome reflects its general consensus to actively broaden the range of controversial issues that the court is entitled to decide upon. It also demonstrates its willingness to broaden the ambit of constitutional concepts – such as unwritten values in the election of the President of Republic – on which its jurisdiction relies.

The decision of the Court and the resulting resignation of President Pacolli, prompted immediate consequences in terms of the coalition agreement and the appointment of the new President of the Republic. Attributable to the interpretation of the court, which defined the quorum of two thirds of votes of all members of the Assembly as obligatory for the ballot process, the appointment of the new President took place through a consensus between incumbent and opposition political parties. Due to this, a non-political, independent President was elected, Ms. Atifete Jahjaga, the first female President in the history of Kosovo and of the Western Balkans.

Another consequence was that Kosovo's main political parties agreed to pursue a constitutional reform process to facilitate the institution of a directly elected President.

The election of the President directly by the people has been perceived for some time as a potential solution to the high likelihood of deadlock in elections, because the two-thirds (out of 120) has been almost impossible to achieve without political consensus among opposition and governing political parties. However, the Court, making use of its pre-emptive review jurisdiction, in Cases K.O. 29/12 and K.O. 48/12, deemed unconstitutional the proposed amendments to make the election of the President directly by the people.

According to the Constitution, the Court confirms whether proposed constitutional amendments comply with the fundamental rights and freedoms outlined in the Constitution, before their approval by the Assembly. A pre-emptive review mechanism can only be initiated by the Speaker of the Assembly.¹²⁶ However, the appetite to institute those amendments was related to an attempt to prematurely terminate the mandate of the consensual President, Ms. Atifete Jahjaga. The Constitutional Court deemed that early termination of the mandate of a President touches upon the principle of separation of powers and directly impacts upon the principle of legal certainty within Kosovo's constitutional order.¹²⁷ The Court went on to argue that the early termination of the mandate of the President can be valid under limited circumstances, as defined by the

¹²⁶ CRK (n 48) art. 113, para 9.

¹²⁷ Constitutional Court of the Republic of Kosovo, Judgment in Cases K.O. 29/12 and K.O. 48/12 Proposed Amendments of the Constitution Submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, 20 July 2012, para. 268 <www.gjk-ks.org/repository/docs/Aktgjkim%20Anex%20A&B%20KO29_48_12_ANG.pdf> accessed 10 July 2016.

Constitution.¹²⁸ Therefore, according to the Court, there is no other avenue to pursue termination of mandate of the President through constitutional amendments. In addition, the Court noted that un-anticipated revocation of President's mandate

...touches upon fundamental constitutional principles, in particular, the principle of the prohibition of the shortening of a legitimately obtained mandate of a constitutional office as well as the principle of protecting the justified confidence of the citizens in the laws of Kosovo and the election and mandate of their President based upon such laws.¹²⁹

This meant, in essence, that arrangements between political parties cannot serve as a means to re-define the borders of competences conferred to the Assembly and to undermine constitutional principles guaranteeing the ambit of the mandate of constitutional bodies.

6.1.2. Who Governs? The Court Answers Again

In 2014 the Court was faced with two highly vexing questions. Both were directly linked to competing claims of political parties represented in the Assembly, and concerned the question of who is entitled to nominate the Speaker of the Assembly and the Prime Minister.

In the case referred to as 'The President of the Republic of Kosovo concerning the assessment of the compatibility of Article 84 (14) (Competencies of the President) with Article 95 (Election of the Government) of the Constitution of the Republic of Kosovo'¹³⁰ (hereinafter, the Nominee for the Prime Minister case), the Court had to determine whether the President of the Republic had any discretion – and if so, to what degree – in the nomination of candidates for Prime Minister.

In the early parliamentary elections of June 2014 the PDK-led coalition won 30.38% of votes, followed by LDK with 25.24%, VV (Self-Determination Movement) with 13.59%, AAK (Alliance for the Future of Kosovo) achieved 9.54%, Nisma

¹²⁸ Ibid para. 269.

¹²⁹ Ibid para. 270.

¹³⁰ See Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of Article 84 (14) (Competencies of the President) with Article 95 (Election of the Government) of the Constitution of the Republic of Kosovo, Judgment in Case No. KO 103/14, 1 July 2014 <www.gjk-ks.org/repository/docs/gjkk_ko_103_14_ang.pdf> accessed 30 July 2016.

(Initiative for Kosovo) got 5.5% and others received less than 5.5% of the vote.¹³¹ The winning party, PDK, tried to form a coalition government with political parties represented in the Assembly, but all refused to co-operate. In a very distinctive arrangement, the LDK, AAK, NISMA and VV established a post-election political bloc referred to as VLAN, and *en bloc*, refused to form a coalition government with PDK. This political stalemate manifested a contentious debate, about the ambit of the powers of the President to propose the nominee for Prime Minister. Since the President's power to select the nominee can be initiated only after the proposal of the political majority in the Assembly, in lieu of Articles 84 (14) and 95 (1) of the constitution, the President declined to use her powers and instead referred the issue to the Constitutional Court.

Article 84 (14) of the Constitution stipulates that the President of the Republic of Kosovo appoints:

...the candidate for Prime Minister for the establishment of the Government after proposal by the political party or coalition holding the majority in the Assembly.¹³²

A similar provision appears in Article 95 (1) of the Constitution, although this goes on to determine that the President proposes to the Assembly a nominee for the Prime Minister after consultation with '...the political party or coalition that has won the majority in the Assembly necessary to establish the Government'.

According to the President's claim, there was a difference between the '...the majority in the Assembly' and '...the majority in the Assembly necessary to establish the Government'. The referral by the President was therefore intended to elucidate whether the coalition holding the majority in the Assembly refers to the party/coalition that won the elections, in this case PDK, or the post-electoral coalition, in this case VLAN, the latter holding the majority of seats in the Assembly that are necessary to establish the Government. In addition, the extent of the President's discretion to decide the political majority in the Assembly, and consequently who had the right to nominate the Prime Minister, was also questioned.

The President of the Republic, Ms. Jahjaga, thus lodged a referral to the Court in order to clarify two issues. First, whether Articles 84 (14) and Article 95 (1)

¹³¹ Central Election Commission, Zgjedhjet për kuvendin e Kosovës 2014: Rezultatet për fundim tarenga QNR [Final Results: Parliamentary Elections 2014] <www.kqz-ks.org/Uploads/Documents/Rezultatet%20sipas%20Subjeketeve%20-%2020140526%20Party%20Results%20-%20Kosovo%20Level_jywcwsfyts.pdf> accessed 28 July 2016. The following political parties received less than 5% of votes: Aleanca Kosova e Re 4.67%, Kosova Demokratik Türk Partisi 1.02%, Koalicija Vakaf 0.89%, Progresivna demokratska stranka 0.82%, Partia Demokratike e Ashkanlivetë Kosovës 0.46%, Nova demokratska stranka 0.39%, Kosova Türk Adalet Partisi 0.32%, Partia Liberale Egjiptiane 0.27%, Pokret za demokratski prosperitet 0.24%.

¹³² See CRK (n 48) art. 84, para. 14 and 95, para. 1.

conflicted,¹³³ and, second, whether the Constitution accords sufficient discretion to the President, to propose a nominee from the coalition holding an absolute majority in the Assembly, as is necessary to form the Government.

Since the President's access to the Court is limited by strict constitutional requirements, in particular Article 113 of the Constitution, the Court had initially to consider whether the case was admissible. As to that admissibility, the Court argued that the circumstances of the case connote that the President addressed questions of constitutional relevance. The court maintained that the questions referred by the President aimed to ensure a '...consistent application of the President of the Republic's mandated constitutional competences in accordance with the letter and spirit of the Constitution.'¹³⁴ This type of decision pulls the Court into a type of advisory jurisdiction without there having first appeared a constitutional controversy on which to pronounce. To that end, the court declared the case admissible and in doing so agreed to enter into a political, rather than a purely constitutional, controversy.

Concerning the questions addressed to the Court, it determined that the meaning of Article 84 (14) cannot but acknowledge that the electoral party or coalition that has won the highest number of seats in the Assembly should be given the opportunity to propose a candidate for Prime Minister.¹³⁵ The court reached this conclusion by acknowledging that '...democratic rule and principles, as well as political fairness, foreseeability and transparency...' require that the party who won the elections shall be entitled to this right, and consequently the President '...does not have the discretion to approve or disapprove the nomination of the candidate for Prime Minister by the party or coalition, but has to assure his/her appointment'.¹³⁶

¹³³ Article 95 of the Constitution stipulates that: 'Article 95 [Election of the Government] 1. After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.' While Article 84 acknowledges that the President: '... appoints the candidate for Prime Minister for the establishment of the Government after proposal by the political party or coalition holding the majority in the Assembly'. See CRK (n 48), Article 84, para 14 and Article 95, para 1.

¹³⁴ Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo concerning the assessment of the compatibility of Article 84 (14) [Competencies of the President] with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo, Judgment in Case No. K0103/14, 1 July 2014, paras 26, 27 <www.gjk-ks.org/repository/docs/gjkk_ko_103_14_ang.pdf> accessed 28 July 2016.

¹³⁵ Ibid para. 88.

¹³⁶ Ibid.

The Court went on to explain the role of the President within Article 95 (4)¹³⁷ of the Constitution, and argued that the failure of the Assembly to appoint the nominee for Prime Minister at the first attempt implies that the President is entitled, in view of her discretion and after consultation with parties represented in the Assembly, to independently decide ‘...which party or coalition will be given the mandate to propose another candidate for Prime Minister.’¹³⁸ Furthermore, the court deemed that this discretion of the President is limited and therefore the President has the obligation to assess ‘...what is the highest probability for a political party or coalition to propose a candidate for Prime Minister who will obtain the necessary votes in the Assembly for the establishment of a new Government.’¹³⁹

The ruling of the Court did not remain uncontested. For the first time, there was a clear disagreement with the Court’s ruling, mostly induced by the belief that the contested constitutional provisions were sufficiently clear and that the court had no mandate to alter their original meaning.¹⁴⁰ The critique was also based

¹³⁷ Article 95, para 4, stipulates that ‘If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the Government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement.’ CRK (n 48) art. 94, para 4.

¹³⁸ Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo concerning the assessment of the compatibility of Article 84 (14) [Competencies of the President] with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo (n 134) paras. 90, 91.

¹³⁹ Ibid para. 92.

¹⁴⁰ Some reactions about the decision of the Court are reflected in the following articles: *Gazeta Express*, ‘Vendimi I Gjykatës Kushtetuese u jep mundësi të gjitha palëve’ [The Constitutional Court Decision Give Rights to All Stakeholders] 2 July 2014 <www.gazetaexpress.com/lajme/smaka-vendimi-i-gjykates-kushtetuese-u-jep-mundesite-gjitha-paleve-26027/?archive=1> accessed 23 July 2016; *Telegrafi.com*, ‘GjK u hap derën spekulimeve: Dy versionet për mandatarin e ardhshëm’ [The Constitutional Court Opened the Door to Speculations: Two Versions for the New Successor] 30 June 2014 <www.telegrafi.com/lajme/gjk-u-hap-deren-spekulimeve-dy-versionet-per-mandatarin-e-ardhshem-2-47263.html> accessed 26 July 2016; Zijadin Gashi, ‘Pas PDK-së, mandatarin I qeverisë nga cilado parti’ [After PDK, the Successor of the Government Can be from whatever Party] (*Radio Free Europe*, 2 July 2014) <www.evropaelire.org/content/Article/25442706.html> accessed 26 July 2016.

on conclusions contained in the dissenting opinion of one of the international judges.¹⁴¹

Thus the ruling triggered a political stalemate, which again, involved the Court. In a subsequent case, the Court had to state whether the constitutional term '*parliamentary group*' describes the party/coalition that won the elections and within the terms defined in the nominee for the Prime Minister case.

In the second case of this type, in 'Haliti and 29 other Deputies of the Assembly of the Republic of Kosovo on the constitutional review of the Decision of the Assembly of the Republic of Kosovo on the election of the President of the Assembly of the Republic of Kosovo',¹⁴² (hereinafter, The Speaker of the Assembly case) the Court was faced with another politically sensitive question. In regard of the fact that the admissibility of the case was not an issue, in this case the Court had to decide, on the merits, the meaning and the scope of the term "parliamentary group".

The Constitution establishes that the Assembly of Kosovo shall elect, among its members, the Speaker of the Assembly and five Deputy Presidents.¹⁴³ The Speaker of the Assembly, according to the Constitution, is proposed by the largest parliamentary group and is elected by the majority of votes of all members of the Assembly.¹⁴⁴ From a post-electoral perspective VLAN was the biggest parliamentary group represented in the Assembly, thereby holding the right to propose the Speaker of the Assembly. However, PDK, the party that won the elections, referred to the previous decision of the Court (Nominee for the Prime Minister case), and thus claimed that for the purpose of electing the Speaker

¹⁴¹ Judge Carolan argues that: 'The majority of this Court have erroneously concluded that the drafters of the Constitution intended that the term "won the majority in the Assembly necessary to establish the Government" as it appears in Article 95.1 of the Constitution means "the majority who won the previous elections" even though nowhere in the Constitution is such a term ever used or referenced. It is important to recognise that the drafters understood that in many instances the political party or coalition formed before the election may not win an absolute majority of the seats in the Assembly resulting in a plurality of parties gaining seats in the Assembly. If that happens as it has in every parliamentary election in Kosovo to date, the majority of the Court fail to explain how the term "necessary to form the Government" simply means the political party or coalition who received the most votes in the previous election even though to form the Government such a group would need the approval of more than just the members of their political party or coalition that may have been formed before the elections.' See Constitutional Court of the Republic of Kosovo, Dissenting Opinion of the Judge Robert Carolan, The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of Article 84, paragraph 14, with Article 95 of the Constitution of the Republic of Kosovo, Case No. KO-103/14, 1 July 2014 <www.gjk-ks.org/repository/docs/gjkk_ko_103_14_mm_shq.pdf> accessed 25 July 2016.

¹⁴² See Constitutional Court of the Republic of Kosovo, Applicants Xhavit Haliti and 29 other Deputies of the Assembly of the Republic of Kosovo. Constitutional Review of Decision No. 05-V-001 votes by 83 Deputies of the Assembly of the Republic of Kosovo on the Election of the President of the Assembly of the Republic of Kosovo, Dated 17 July 2014, Judgment in Case No. KO119/14 26 August 2014 <www.gjk-ks.org/repository/docs/gjk_ko_119_14_ang.pdf> accessed 25 July 2016.

¹⁴³ CRK (n 48) art. 67, para 1.

¹⁴⁴ Ibid para. 2.

of the Assembly, in the inaugural session, they were the biggest parliamentary group. The argument therefore was that the first composition of the Assembly in its inaugural session reflects the electoral patterns, and therefore determines PDK as the largest parliamentary group. In contrast, VLAN considered the right of the elected MPs to establish and leave parliamentary groups as an expression of the MPs' free mandate, and that no constitutional provision obliged them to associate and/or join with a particular parliamentary group.

In August 2014, VLAN, in the absence of PDK, elected Mr. Isa Mustafa, chairman of the second-largest political party in Kosovo, as Speaker of the Assembly. There were 65 votes in his favour.¹⁴⁵ The Constitutional Court deemed this decision unconstitutional, which resulted in the resignation of the Isa Mustafa from his position as the Speaker of the Assembly.¹⁴⁶

According to the Court, the biggest parliamentary group is whichever party/coalition that has won the elections, and this '...is de-facto in accordance with the parliamentary practice in democratic states.'¹⁴⁷ In this case, the Court pointed out that 'parliamentary group' within the meaning of Article 67 of the Constitution and for the purposes of the inaugural session of the Assembly, should correspond to the electoral party/coalition that has won seats in the Assembly of Kosovo. The Court explained that this qualification of the term 'parliamentary group' is valid only as far as the Assembly is fully constituted, thus only until it elects its Speaker and five Deputy Presidents.¹⁴⁸ On the basis of these conclusions, the Court affirmed that the election of Mr. Isa Mustafa as the Speaker of the Assembly was in violation of the constitution, since the right to propose the Speaker rests with the biggest parliamentary group, namely the party/coalition that won the elections. Following the Court's decision, the leader of LDK, who was the revoked parliamentary Speaker, described the Court's decision as political, but agreed to respect it.¹⁴⁹

¹⁴⁵ Independent Balkan News Agency, 'Isa Mustafa is Elected Speaker of the Parliament of Kosovo' 17 August 2014 <www.balkan.eu.com/isa-mustafa-elected-speaker-parliament-kosovo/> accessed 15 May 2016.

¹⁴⁶ For more details, see Constitutional Court of the Republic of Kosovo, Applicants Xhavit Haliti and 29 Other Deputies of the Assembly of the Republic of Kosovo (n 144).

¹⁴⁷ Ibid para. 116.

¹⁴⁸ Ibid para. 117.

¹⁴⁹ *Bot Sot News*, 'Mustafa pranon vendimin e kushtetueses – pezullon postin' [Mustafa Accepts the Constitutional Court Decision and Suspends the Post] 23 August 2014 <<http://botasot.info/zgjedhjet-2014/315894/mustafa-pranon-vendimin-e-kushtetueses-pezellon-postin/>> accessed 15 May 2016.

The arguments presented by Judge Carolan in his dissenting opinion¹⁵⁰ were, according to Mr. Mustafa, evidence of the Court's political motivations and sympathies.¹⁵¹ With regard to the term 'parliamentary group', Judge Carolan concluded that unlike political parties:

...and coalitions, parliamentary groups do not run in political elections but can be formed independent of elections by individual members of the Assembly. The practice of forming a parliamentary group frequently occurs after, not before, elections.¹⁵²

Having said this, Judge Carolan further claimed that the procedure for the election of the Speaker of the Assembly by the majority of votes of all MPs:

...clearly demonstrates that ... the group in the Assembly that had the best chance of electing a person to be President, the largest parliamentary group, not the largest political party or coalition that may only consist of a minority of the members of the entire Assembly, would have the right and obligation to propose a candidate for President.¹⁵³

Given the reactions of the political parties and independent observers, the decision of the Court in this case seriously threatened its reputation as an independent and neutral arbiter.¹⁵⁴ This distrust arose for two reasons in particular. The first reason relates to the definition of the term 'parliamentary group', which, according to the Court is fluid and has two separate meanings

¹⁵⁰ See Constitutional Court of the Republic of Kosovo, Dissenting Opinion of the Judge Robert Carolan, Applicants Xhavit Haliti and 29 Other Deputies of the Assembly of the Republic of Kosovo. Constitutional Review of Decision No. 05-V-001 Votes by 83 Deputies of the Assembly of the Republic of Kosovo on the Election of the President of the Assembly of the Republic of Kosovo, Dated 17 July 2014, No. KO119/14, 26 August 2014 <www.gjk-ks.org/repository/docs/gjkk_ko_119_14_mm_ang.pdf> accessed 15 May 2016.

¹⁵¹ *Zeri Info*, 'Mustafa: Vendim politik i Gjykes Kushtetuese' [Political Decision of the Constitutional Court] 26 August 2014 <<http://old.zeri.info/artikulli/46862/mustafa-vendim-politik-i-gjykes-kushtetuese>> accessed 15 May 2016.

¹⁵² See Constitutional Court of the Republic of Kosovo, Dissenting Opinion of the Judge Robert Carolan, Applicants Xhavit Haliti and 29 Other Deputies of the Assembly of the Republic of Kosovo (n 150).

¹⁵³ *Ibid.*

¹⁵⁴ Albatrit Matoshi and Fadil Sertolli, 'Çka parasheh Kushtetuesja për PDK-në?' [What Does the Constitutional Court Say for PDK] (*Gazeta Zeri*, 27 August 2014) <<http://zeri.info/artikulli/46880/kushtetuesja-vec-pdk-se>> accessed 30 July 2016; *Indeksonline*, 'Vendimi i Kushtetueses, skandaloz dhe politik' [The Court Decision, Scandalous and Politic] 26 August 2014 <www.indeksonline.net/?FaqeID=2&LajmiID=113000> accessed 30 July 2016; *ABC News*, 'Gjykata Kushtetues e anulon zgjedhjen e Isa Mustafës Kryetar të Kuvendit' [The Constitutional Court Annuls the Selection of Isa Mustafa as the Chairman of the Parliament] 22 August 2014 <www.abcnews.al/lajme/rajoni/7/45527> accessed 27 July 2016.

at two different points in time. The second reason is the rationale given by the Court to explain the ambit of MPs' freedom to choose their mode of political representation within the Assembly, regardless of their political affiliations. Of course, PDK welcomed the Court's decision and asked all to respect it¹⁵⁵ while knowing that the decision would not end the prevailing political deadlock, which continued for another three months. Some viewed the Court's decision as depressing¹⁵⁶ because it represented the Court's engagement in an issue of political doctrine, and some stated that the Court had become an 'institution with unconditional power'.¹⁵⁷ Regardless of the fact that the court was able to dismiss two Presidents and one Speaker of the Assembly, and induce early elections and the collapse of a government coalition, its role in these recent cases, namely those of President Pacolli and the Speaker of the Assembly, was perceived by the public and political parties as mainly negative although highly influential in re-writing some of the fundamental principles of constitutional law in the newly-established republic.

6.2. Kosovo-Serbia Agreement Case(s)

6.2.1. The Brussels Agreement Case

In September 2013 and December 2015, the Constitutional Court of Kosovo delivered judgements in relation to two important agreements reached between Kosovo and Serbia. These cases drew the Court into the midst of fierce, often emotional, political debate.

Kosovo-Serbia relations have been characterised by tensions that rise above political differences, expressed through historical and post 1999 war narratives. Often, the debate among political elites in Serbia and Kosovo relies on the politics of hatred and contradictions, as a discourse to claim the truths about war, history, identity, and above all, statehood. Against this background, the Constitutional Court of Kosovo had to rule on two, very specific, agreements that Kosovo and Serbia had reached in a dialogue process, facilitated by the EU.

In 2011, Kosovo and Serbia started a dialogue process, mediated by the EU, which aimed to normalise relations between Kosovo and Serbia, 'promote cooperation',

¹⁵⁵ *Telegrafi News*, 'PDK pershendet vendimin per Mustafen, "blloku" me rezerva' [PDK Welcomes the Decision for Isa Mustafa, "the Block" with Reserves] 22 August 2014 <www.telegrafi.com/lajme/kosove/pdk-pershendet-vendimin-per-mustafen-blloku-me-rezerva.html> accessed 27 July 2016.

¹⁵⁶ *Gazeta Jeta ne Kosove*, 'Pasojat Politike nga Vendimi I Gjykates Kushtetuese' [Political Consequences from the Constitutional Court Decision] 24 August 2014 <www.gazetajnk.com/index.php/kulture/5879-narcisi-i-koliqit-testament?cid=1,1018,8701> accessed 27 July 2016.

¹⁵⁷ Zijadin Gashi, 'Krijimi I krizave politike ne kushtetuese' [Establishment of Political Crises in Constitutional Court] (*Evropa e Lire News*, 24 July 2014) <www.evropaelire.org/content/Article/25469013.html> accessed 27 July 2016.

and help both parties to 'achieve progress on the path to Europe and improve the lives of the people'.¹⁵⁸ Initially, in 19 April 2013, the EU High Representative, Catherine Ashton, announced that Kosovo and Serbia had reached a 'landmark agreement'.¹⁵⁹ In a press communiqué released immediately after the signing of that agreement, Catherine Ashton praised both Prime Ministers (of Serbia and of Kosovo) and congratulated them 'for their determination over these months and for the courage that they have. It is very important that now what we are seeing is a step away from the past and, for both of them, a step closer to Europe'.¹⁶⁰ It should be noted that Kosovo and Serbia had previously signed several technical co-operation agreements in the period from March 2011 to April 2013;¹⁶¹ however this was the First General Agreement (henceforth the Brussels Agreement) which included the principles that would govern the more political normalisation of relations between Kosovo and Serbia. A second agreement on the principles on the Association of Serb Municipalities, based upon the first Brussels agreement, was reached in August 2015.¹⁶² Regardless of the importance of these agreements, political parties, as well as public opinion, in Kosovo were deeply divided concerning the content and the constitutionality of the agreements.

The first case the Court had to decide was the referral lodged by 12 MPs of the Assembly of Kosovo, challenging the constitutionality of the Brussels Agreement. According to Kosovo's Constitution, international agreements relating to the territory, peace, alliances, political and military issues and fundamental rights

¹⁵⁸ EEAS Press, 'EU Facilitated Dialogue for the Normalization of Relations between Belgrade and Prishtina' <www.eeas.europa.eu/dialogue-Prishtina-belgrade/index_en.htm> accessed 16 June 2016.

¹⁵⁹ The authentic text of the Agreement between Kosovo and Serbia (Brussels Agreement): See Law No. 04/L-199 on the Ratification of the First International Agreement of Principles Governing the Normalization of Relations Between the Republic of Kosovo and the Republic of Serbia, *Official Gazzete of the Republic of Kosova* 38/03, <<http://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=8892>> accessed 16 June 2016.

¹⁶⁰ Catherine Ashton in Press Communiqué, EEAS, 'Serbia and Kosovo Reach Landmark Deal' 19 April 2013, <www.eeas.europa.eu/top_stories/2013/190413__eu-facilitated_dialogue_en.htm> accessed 16 June 2016.

¹⁶¹ See for example the text of three initial agreements on IBM, Freedom of Movement, Custom Stamps, Cadastral Records: European Union, 'Press Statement: EU Facilitated Dialogue: Three Agreements' 2 July 2011 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/123383.pdf> accessed 16 June 2016; European Union, 'Press Statement: EU Facilitated Dialogue: Agreement on Customs Stamps and Cadastre' 2 September 2011 <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/124501.pdf> accessed 18 June 2016; Council of the European Union, 'EU Facilitated Dialogue: Agreement on IBM' 2 December 2011 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/126543.pdf> accessed 18 June 2016; European Union, 'Press Statement: EU Facilitated Dialogue: Agreement on Regional Cooperation and IBM Technical Protocol' <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/128138.pdf> accessed 19 June 2016.

¹⁶² 'The Agreement between Kosovo and Serbia about the Association of Serb Municipalities', <http://eeas.europa.eu/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf> accessed 19 June 2016.

and freedoms, must be ratified by two thirds of all members of the Assembly.¹⁶³ Amid fierce political debate among the main opposition political party, the Self-Determination Movement (VV), and the ruling political parties (PDK and AKR), on 27 June 2013, the Kosovo Assembly adopted the Law on Ratification of the First International Agreement of Principles Governing the Normalisation of Relations between Kosovo and Serbia.¹⁶⁴ On 4 July 2013, 12 members of the Assembly challenged the Law on the Ratification of the First Agreement, via the Constitutional Court. The Court, on 9 September 2013, declared the case admissible but rejected the request of the parties that it review the Agreement, deciding that this was outside the jurisdiction *ratione materiae* of the Court.¹⁶⁵

The referral was lodged by 12 MPs based on Article 113 (5) of the Constitution, which authorises ten or more MPs to ‘...contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed’ within eight days after the adoption of the concerned decision.¹⁶⁶ The MPs claimed that the Law on the Ratification of Agreement was unconstitutional, and supported this claim with two separate clusters of argument, to which the Court had to respond.

Firstly, the Court had to decide whether the provisions contained in the Agreement (incorporated as part of the law on the ratification of the Agreement) violated the general principles that define the Republic of Kosovo, namely a) the principles of indivisibility and unity of the state, b) the principle of sovereignty and territorial integrity, c) the principle of equality before the law and, d) the principles defining the exercise of judicial power by courts within a unitary justice system that is ‘independent, fair, apolitical and impartial and ensures equal access to the courts’.¹⁶⁷ Secondly, the Court had to respond as to whether the Law on ratification of the Agreement was in violation of the constitutional principles of local self-government, rights of communities and the principle of multi-ethnicity.¹⁶⁸

¹⁶³ CRK (n 48) art. 18, para. 1.

¹⁶⁴ See Law No. 04/L-199 on the Ratification of the First International Agreement of Principles Governing the Normalization of Relations Between the Republic of Kosovo and the Republic of Serbia (n 159).

¹⁶⁵ Constitutional Court of the Republic of Kosovo, Visar Ymeri and 11 Other Deputies of the Assembly of the Republic of Kosovo, Constitutional Review of the Law, No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of This Agreement, Judgment in Case No. KO 95/13, 9 September 2013 <www.gjk-ks.org/repository/docs/gjkk_ko_95_13_ang.pdf> accessed 24 August 2016.

¹⁶⁶ CRK (n 48) art. 113, para. 5.

¹⁶⁷ Ibid art. 102, paras. 1, 2; Constitutional Court of the Republic of Kosovo, Visar Ymeri and 11 Other Deputies of the Assembly of the Republic of Kosovo (n 165) paras. 34, 35.

¹⁶⁸ Constitutional Court of the Republic of Kosovo, Visar Ymeri and 11 Other Deputies of the Assembly of the Republic of Kosovo (n 165) paras. 34, 35.

In its decision the Court initially ruled the case admissible, however, for the first time in its short history of activity, opted to abstain and consequently refused to respond to the claims highlighted in the referral. The Court strategically decided the case as being outside the jurisdiction *ratione materiae*. It did this using a two-step strategy. First, the Court, as will be explained, arbitrarily concluded that the Law on Ratification of the Agreement and the Agreement itself were two separate legal acts, whose objectives and legal effects could be distinguished. In this regard the Court concluded that:

...the Court is of the opinion that the purpose of the contested law is to establish the binding nature of the agreement on the Kosovo state, and to incorporate the First International Agreement into the Kosovo legal system.¹⁶⁹

Secondly, and having thus distinguished the two separate legal acts, the Court analysed whether it was *ratione materiae* entitled to decide upon the constitutionality of an international agreement, ruling that:

In these circumstances, it follows that under the Constitution the Court has jurisdiction to review the Law on Ratification, but is not empowered to review whether the international agreement as such is in conformity with the Constitution.¹⁷⁰

As argued, the Court concluded by ruling unanimously that the case was admissible, and that the procedure followed to adopt the Law on the Ratification of the First Agreement was compatible with the Constitution. However, the Court, by a majority of votes (Judge Carol dissenting), opted not to respond to the questions raised in the referral, argued that they fell outside its material jurisdiction.

There are two arguments that help to illuminate the Court's rationale for its unwillingness to become involved with the merits of the referral. As to the jurisdiction, the Court plainly refused to acknowledge that the Constitution does not limit it to reviewing the content of laws — including a law which ratifies an international agreement. The Court formally established a distinction — on the one hand, between the Law on Ratification, which it qualified as a separate legal act of the Assembly and as having a limited objective, that is, the incorporation of an international agreement within the constitutional system of Kosovo, — and on the other hand, the substance of the Law on Ratification, that is, the text of the International Agreement as an expression of Kosovo's will to be bound by it. The Court tried to establish a distinction between an international agreement and the

¹⁶⁹ Ibid para. 98.

¹⁷⁰ Ibid paras. 99, 100.

law on the ratification of that agreement, regardless of the fact that questions posed to the Court neither related to nor contested the nature of the agreement under international law. Since the Constitutional Court is not an arbiter of international law, its role was to respond to the question of whether or not the Assembly, as well as the Prime Minister, acting as agents of the Constitution, had the power to commit to an international agreement which called into question some basic constitutional principles. Hence the Court's unconditional intention not to respond to the fundamental questions posed to it in this context.

Judge Carolan argues that the Court failed to recognise that the jurisdiction vested in it allows it to review any decisions, including laws of the Assembly, in terms of either the procedure and/or the content, asserting that:

Article 65(4) of the Constitution merely authorises the Assembly to ratify international treaties. It does not prohibit the Constitutional Court from reviewing whether those treaties comply with the Constitution. Indeed, Article 113.5 of the Constitution clearly authorises the Constitutional Court to review the substantive provisions of a treaty whether they be adopted by enactment of a law or decision of the Assembly of the Republic of Kosovo.¹⁷¹

Carolan tried to say that the Court had not been called upon to undertake a repressive review procedure, but rather to carry out a pre-emptive review concerning an international agreement that had not yet entered into force (noting that, until a decision was provided by the Court, the law on ratification remained suspended in view of its own entrance into force). To this extent, one may envisage that this decision puts the fundamental principles of the Constitution at risk, because it opens the way for the Assembly to conclude international agreements that could, presumably, violate the Constitution.¹⁷² Regardless of the Court's activities in the President Sejdiu and President Pacolli cases, the Kosovo-Serbia Agreement case demonstrated a different facet of the Court. This decision led to the Court being perceived as both inert and unable to direct constitutional interpretation that proved troublesome to deals made between Kosovo's government and the international community.¹⁷³

¹⁷¹ Constitutional Court of the Republic of Kosovo, Concurring Opinion Judge Carolan, Visar Ymeri and 11 Other Deputies of the Assembly of the Republic of Kosovo, Constitutional Review of the Law, No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia, Case No. KO 95/13, 9 September 2013 <www.gjk-ks.org/repository/docs/gjkk_ko_95_13_mk_ang.pdf> accessed 15 July 2016.

¹⁷² Ibid.

¹⁷³ *Telegrafi.com*, 'VV: U dëshmuar edhe njëherë, Gjykata Kushtetuese është e kapur nga pushteti' [Proved Once Again, the Constitutional Court is Seized from the Government] <www.telegrafi.com/vv-u-deshmuar-edhe-njehere-gjykata-kushtetuese-eshte-e-kapur-nga-pushteti/> accessed 15 July 2016.

6.2.2. The Agreement on the Association of Serb Majority Municipalities

The Court, however, opted for a different, proactive, strategy when reviewing the Agreement between Kosovo and Serbia on the Principles of the Association of Serb Majority Municipalities. In August 2015, Kosovo and Serbia reached agreement over the establishment of the Association of Serb Municipalities (henceforth referred to as the Agreement on Association).¹⁷⁴ The Agreement on Association contains a list of principles intended to guide the establishment of the Association of Serb Municipalities, to define its institutional structures, and delineate its relationships with both local and central institutions in Kosovo. The Agreement establishes that the Association will have, among others, the following objectives:

a) strengthen local democracy; b) exercise full overview to develop local economy; c) exercise full overview in the area of education; d) exercise full overview to improve local primary and secondary health and social care; e) exercise full overview to co-ordinate urban and rural planning; g) adopt measures to improve local living conditions for returnees to Kosovo; h) conduct, co-ordinate and facilitate research and development activities; i) promote, disseminate and advocate issues of common interest of its members and represent them, including to the central authorities;¹⁷⁵

9) The Association/Community will promote the interests of the Kosovo Serb Community in its relations with the central authorities.¹⁷⁶

The Agreement on the Association generated a political stalemate and provoked popular protest all over Kosovo. The opposition political parties in Kosovo, acting as a single unified political group, have blocked all of the work of the Assembly of Kosovo through a range of means, and disputes have become very heated (tear gas has been thrown). Arguments put forward by opposition political parties, non-governmental organisations and independent analysts have concluded that this agreement violated the constitutional principles of multi-ethnicity and the equality of citizens, and that it ignored the constitutional guarantees about the Serbian majority municipalities and the constitutional principles that

¹⁷⁴ The original text of the Agreement on the Association of the Serb Municipalities is available at: <http://eeas.europa.eu/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf> accessed 15 July 2016.

¹⁷⁵ Ibid art. 3.

¹⁷⁶ Ibid art. 8.

guarantee the autonomy of local self-government in Kosovo.¹⁷⁷ In contrast, the incumbent political parties have insisted that the Agreement is in line with the constitution, and that it will serve as a tool to help integrate parallel structures within Kosovo's institutions.¹⁷⁸ The political tensions and resulting hindrance of the Assembly's work led the President of the Republic to refer the Agreement to the Constitutional Court for review. In December 2015 the Court accepted the case as admissible and declared that many principles of the Agreement did violate the Constitution, however the Court went on to affirm that the Association of the Serb Municipalities should be established as required by the First Brussels Agreement.

In this case, there were three crucial issues for the Court to address. First, the Court had to establish whether the President was authorised to refer the Agreement to the Court at all, and consequently, to decide whether the questions so addressed to it fell within the scope of its jurisdiction. Secondly, and since the Agreement on the Principles of Association had not been ratified (either in the Assembly or by the President of the Republic), the Court had to define the legal nature of this document. Thirdly, the Court had to decide whether the Agreement on the Principles of Association complied with the fundamentals of the Constitution, principles of multi-ethnicity and equality before the law,

¹⁷⁷ For more on the reaction about the Association see: *Top Channel*, 'Reagimet e opozitës për Asociacionin e Komunave serbe' [Opposition Reactions for the Serb Municipality Association] 26 August 2015 <<http://top-channel.tv/lajme/artikull.php?id=307118>> accessed 15 July 2016; *Koha.net*, 'Konjufca: Asociacioni Kosovën e çon drejt federalizimit' [Konjufca: Association Sends Kosovo to Federalization] 2 September 2015 <<http://koha.net/?id=27&l=73262>> accessed 15 July 2016; *Telegrafi.com*, 'Bashkë në protesta' [Together Protesting] 16 August 2015, <www.telegrafi.com/lajme/bashke-ne-protesta-2-68732.html> accessed 15 July 2016; *Koha.net*, 'Asociacioni me autonomi kulturore, por joterritoriale e politike' [Association with Cultural Autonomy, but not Territorial and Political] 27 August 2015 <<http://koha.net/?id=27&l=72429>> accessed 15 July 2016; *Telegrafi.com*, 'Asociacioni me Kuvend kushtetutëbërës' [The Association with Constitution-Making Assembly] 7 November 2015 <www.telegrafi.com/lajme/baraliu-asociacioni-me-kuvend-kushtetuteberes-2-74344.html> accessed 15 July 2016; *Kosovapress*, 'Me Asociacionin krijohet nivel i tretë qeverisjes' [With Association, the Third Level of Governance Will Be Established] 26 August 2015 <www.kosovapress.com/sq/nacionale/kdi-asociacioni-krijon-ndarje-etnike-ne-kosove-49621> accessed 15 July 2016.

¹⁷⁸ For more on the reaction of the governing political parties see: Deutsche Welle (DW), 'Kosovë: reagime pro dhe kundërmarrëveshjes me Serbinë' [Kosovo: Reactions Pro and Against the Agreement with Serbia] 26 August 2015 <www.dw.com/sq/kosov%3C%AB-reagime-pro-dhe-kund%3C%ABr-marr%3C%ABveshjes-me-serbin%3C%AB/a-18673930> accessed 13 July 2016; *Botasot*, 'Mustafa: Po presim epilogun e Gjykatës Kushtetuese për Asociacionin' [Mustafa: We are Waiting for the Outcome of the Constitutional Court] 7 November 2015 <<http://botasot.info/kosova/476190/njohesite-kushtetutes-asociacioni-me-kuvend-kushtetuteberes/>> accessed 13 July 2016; *Telegrafi.com*, 'Themelimi i Asociacionit një proces i gjatë' [The Establishment of the Association is a Long Process] 5 January 2016 <www.telegrafi.com/lajme/themelimi-i-asociacionit-nje-proces-i-gjate-2-78358.html> accessed 13 July 2016.

fundamental rights and freedoms, rights of communities and principles governing local self-governance in Kosovo.¹⁷⁹

Concerning admissibility, the Court, referring to its own previous case-law, asked: a) whether the President was an authorised party within the meaning of the Court's jurisdiction, b) if the questions raised by the President were of a constitutional nature, and c) whether or not the Court was entitled to decide the case. The Court confirmed that the President of the Republic had raised legitimate constitutional questions, and further, that the President was authorised to refer those questions to it.¹⁸⁰ In addition, the Court, applying its activist logic (in sharp contrast to the first case on the Brussels Agreement) affirmed that it was vested with the final authority to interpret the Constitution. According to the Court, its constitutional status as 'the final authority to interpret the Constitution' gives it the jurisdiction to respond to any legitimate constitutional questions when that request is made by an authorised party. In reaching this conclusion, the Court revealed an expansive approach to interpreting the scope of its jurisdiction, an attitude it had rarely exhibited before.

The second issue that the Court had to materially consider was the legal nature and status of the Agreements on the Principles of Association. The Court had to explore two avenues. First, it had to interpret whether the Agreement on the Principles of Association constituted a legal act that was reviewable within the meaning of Article 113 of the Constitution. Secondly, if the Court concluded that this was not the case, i.e. that the Agreement was not reviewable within the meaning of Article 113 of the Constitution, it would then have to ascertain a new general principle that defined more broadly the scope of its own jurisdiction, and use this as the basis of its authority to review the Agreement on the Principles of Association, regardless of the legal nature of that Agreement.

According to the Constitution of Kosovo, international agreements, depending on the nature of the matter they regulate, can be ratified either by the Assembly of Kosovo or by the President of the Republic. The Agreement on the Association was signed only by the Prime Minister, and no ratification process was undertaken. In the referral submitted to the Court, the President qualified the Agreement as a document, signed by the Prime Minister, which expressed the '...dedication of the Government to create a new legal entity which produces legal effects in the constitutional order of the Republic of Kosovo.'¹⁸¹ Moreover, the President argued that the Agreement on the Principles of Association was:

¹⁷⁹ Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of the Principles Contained in the Document Entitled "Association/Community of Serb majority municipalities in Kosovo general principles/main elements" with the CRK, Judgment in Case No. K0 130/15, 23 December 2015 <www.gjk-ks.org/repository/docs/gjk_ko_130_15_ang.pdf> accessed 1 August 2016.

¹⁸⁰ Ibid paras. 101, 103.

¹⁸¹ Ibid para. 86

...an intermediary legal act, which stems from the “First International Agreement”, adds additional elements in the process of creating the legal entity itself (the Association/Community), and precedes the founding act (Decree of the Government of Kosovo on Establishment, as per Article 2 of the Principles of Association), hence having a conditioning effect on the founding act.¹⁸²

The Court, devoid of any argument, simply noted that the Agreement on the Principles of Association was not a law, decree or regulation of the Government, nor was it a municipal statute. It concluded, therefore, that the Agreement on the Principles of Association could be qualified as legal act within the meaning of Article 113 (2) of the Constitution.¹⁸³ However, referring to its previous jurisprudence, the Court maintained that the Agreement on the Principles of Association was a document deriving from the First Agreement, with potential implications for the form of governance applied in the republic.¹⁸⁴ The Court acknowledged that the legal nature of the Agreement of the Principles of Association was irrelevant, given that the Agreement could generate effects upon the constitutional order of Kosovo.¹⁸⁵ The Court ruled that it fell within its authority to ensure that such acts comply with the Constitution.

In his dissent, Judge Sejdiu claimed that ‘...this “document” represents a legal act, within the ambit of the domestic legal system of the Republic of Kosovo, by the virtue of the fact that it introduces new formal norms into the domestic legal system.’¹⁸⁶ The conclusions of Judge Sejdiu, among others, show that the rationale and decision of the Court in this case, had the potential to lead the Court to review any act of the Government which may be presumed to have the capacity to affect the constitutional order of Kosovo.

As to the merits of the referral, the Court concluded that the main principles of the Agreement on the Association were in violation of constitutional principles. The Court was then confronted with three separate but intertwined issues. First, the Court had to rule whether the Agreement on the Principles of

¹⁸² Ibid.

¹⁸³ Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of the Principles Contained in the Document Entitled “*Association/Community of Serb majority municipalities*” with the Constitution of the Republic of Kosovo (n 179) paras. 95, 96.

¹⁸⁴ Ibid para. 107.

¹⁸⁵ Ibid paras. 107, 108.

¹⁸⁶ Constitutional Court of the Republic of Kosovo, Dissenting Opinion of Judge Bekim Sejdiu, Judgment in Case No. KO 95/13, Visar Ymeri and 11 Other Deputies of the Assembly of the Republic of Kosovo. Constitutional Review of the Law, No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of This Agreement, 23 December 2015 <www.gjk-ks.org/repository/docs/gjk_ko_130_15_mm_ang.pdf> accessed 15 July 2016.

Association posed a risk to the constitutional guarantees of the participating municipalities, and to the concept of local self-government. Thus, the Court had to decide whether the characteristics of the Association could qualify it as an intermediary/regional public body with the potential to undermine the status of participating municipalities. Secondly, the Court had to determine whether the Government was competent to establish a public body, i.e. an Association which possessed the authority to oversee the work of municipalities, within the ambit of the freedom of association enshrined in the Constitution. Thirdly, the Court had to determine whether the Agreement on the Principles of Association could limit the fundamental rights and freedoms and, in particular, the rights of the Serb community and its members as guaranteed by the Constitution.

Initially, the Court declared that the principles inherent in the Agreement on Association did not comply with constitutional standards, and thus if implemented in their existing form, would undermine and/or potentially displace the status, objectives and competences of the participating municipalities as units of democratic local self-government.¹⁸⁷ The Court further argued that the principles contained in the Agreement on the Principles of Association swerved from or circumvented those constitutional standards guaranteeing administrative review by central authorities of the participating municipalities.¹⁸⁸ Concerning the Principles of Association that gave the Association of Serb Municipalities exclusive competences to promote the interest of the Kosovo Serb community in relation to central authorities, the Court concluded that the Association could not bear such power, because:

... Chapter III provides for specific rights to establish associations and to provide representation to central government bodies for the purposes of protecting the rights of communities. The Court notes that these rights are granted to individuals and groups by virtue of belonging to a community within the meaning of Article 57.1 of the Constitution. As such, the Court finds that these rights are inalienable and inviolable attributes of these communities and their members.¹⁸⁹

Finally the Court concluded with a declaration that the Agreement on the Principles of Association violated the Constitution, specifically the principle of equality before the law, fundamental rights and freedoms, and the rights of

¹⁸⁷ Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of the Principles Contained in the Document Entitled "Association/Community of Serb majority municipalities" with the Constitution of the Republic of Kosovo (n 179) para. 148.

¹⁸⁸ Ibid para. 149.

¹⁸⁹ Ibid paras. 165, 166.

communities and their members.¹⁹⁰ However, Judge Sejdiu criticised the majority in the Court for failing to intercept, what he calls the ‘...territorial-based approach to the rights of a particular ethnic community in the Republic of Kosovo, namely the Kosovo Serbs.’¹⁹¹ Judge Sejdiu identified two layers of differentiation deriving from the Agreement on the Principles of Association, claiming that:

Apparently, only the Kosovo Serbs who live in the municipalities where the Serbs are in majority in demographic terms are “entitled” to benefit from the advanced political position granted by the Association/Community. Kosovo Serbs living in other municipalities, for example, will not have any say in the election of the Assembly, as the main body of the Association/Community, and, by default, in other bodies of the Association (Paragraph 6 of the Principles).¹⁹²

According to Judge Sejdiu, this constituted a differentiation that contradicts the principles of equality before the law and non-discrimination, and the Court should have carefully considered this particular issue. Sejdiu maintained that this second layer of differentiation distinguishes between the Kosovo Serbs living in those municipalities included in the Association, and the citizens of other ethnic backgrounds living in those municipalities. Moreover, Judge Sejdiu argued that:

The Association/Community is ethnocentric and this is expressed also by its title: “Serb-majority municipalities,” instead of using other terminology that is not exclusionary along social identity lines (e.g., mentioning the municipalities by their official names).¹⁹³

This ruling saw the Court begin to move away from its previous policy, which was not to review international agreements that had not yet come into force. The Court delicately decided to expand the scope of its jurisdiction, and to review the constitutionality of those alien forms of governmental ‘legal acts’ that,

¹⁹⁰ The Court moreover determines that ‘The elaboration of the Principles into the legal act and the Statute shall be done in accordance with the spirit of the Constitution, Article 3 [Equality Before the Law], Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution, and in particular with Articles 3, 7, 12, Chapter II [Fundamental Rights and Freedoms] Articles 21 and 44, Chapter III [Rights of Communities and Their Members] Articles 57, 59, 60, 61 and 62, as well as with Articles 79, 81, 93, 101, 113, 123, 124 and 137 of the Constitution of the Republic of Kosovo. Thus, these Principles shall be in compliance with the constitutional standards of the Republic of Kosovo as reasoned by the Judgment of the Court.’ See Constitutional Court of the Republic of Kosovo, The President of the Republic of Kosovo Concerning the Assessment of the Compatibility of the Principles Contained in the Document Entitled “*Association/Community of Serb majority municipalities*” with the Constitution of the Republic of Kosovo (n 179).

¹⁹¹ Constitutional Court of the Republic of Kosovo, Dissenting Opinion of Judge Bekim Sejdiu (n 186).

¹⁹² Ibid paras. 13, 14.

¹⁹³ Ibid para. 14.

according to the Court, have the capacity to significantly affect the constitutional order of Kosovo. This approach, as has been argued in the previous section, clearly and sharply contradicts the conclusions reached by the Court regarding the First Agreement between Kosovo and Serbia. Then, the Court was open about its intention to proactively use the general provisions of the Constitution to inflate its authority to guarantee the integrity of the Constitution. Secondly, the consequences of the decision on the Serb Municipality Association made it possible for observers to label the Court as a counter-majoritarian institution. The Court demonstrated strength in dismissing the arguments of the governing coalition, despite its holding more than two-thirds of the 120 seats in the Assembly, and ruling that the Agreement on the Principles of Association was inconsistent with the Constitution.¹⁹⁴ That led some to maintain that this decision was politically balanced.¹⁹⁵

6.3. Constitutional Court Approach to Rule of Law, Minorities and Fundamental Rights and Liberties

6.3.1. Protection of Multi-Ethnicity and Ethnic Communities' Identities

One of the most important jurisdictional functions of the Court is its power to guarantee that all protection mechanisms for, and the rights of non-majority

¹⁹⁴ The declarations of the Prime Minister and the Deputy-Prime Minister, the leaders of the coalition government, before the ruling of the Constitutional Court that the Agreement on The Principles of Association is in compliance with the Constitution were reflective of the competition and contradictions among political parties in Kosovo. See *Telegrafi.com*, 'Thaçi optimistic se të hënën do të arrihen marrëveshjet me Serbinë' [Thaçi Optimistic that on Monday the Agreement with Serbia Will Be Reached] 25 June 2015 <www.telegrafi.com/lajme/thaci-optimist-se-te-henen-do-te-arrihen-marreveshjet-me-serbine-2-65813.html> accessed 16 July 2016; *Top-Channel*, 'Krerët e Kosovës, për marrëveshjet e nënshkuara: Investim për të ardhmen' [Heads of Kosovo, for the Written Agreements: Major Investment for the Future] 26 August 2015, <<http://top-channel.tv/lajme/artikull.php?id=307098>> accessed 16 July 2016; *Koha.net*, 'Thaçi: Opozita po prodhon tensione për'Illegjitimuar trazirat' [Thaçi: The Opposition is Creating Tensions to Legitimize the Tensions], 23 September 2015 <<http://koha.net/?id=27&l=76268>> accessed 16 July 2016.

¹⁹⁵ See *Koha.net*, 'Sipas analistëve, vendimi I Kushtetueses çon drejt ri-negociimit të Asociacionit' [According to Analysts, the Court's Decision Would Lead to Renegotiation of the Association] 24 December 2015 <<http://koha.net/?id=27&l=90637>> accessed 16 July 2016; *Gazeta Express*, 'Hyseni: Kushtetuesja ia ka huqur' [Hyseni: The Constitutional Court is Wrong] 26 December 2015 <www.gazetaexpress.com/lajme/hyseni-kushtetuesja-ia-ka-huqur-154747/> accessed 16 July 2016; *Lajmi.net*, 'Korenica: Vendimi I Kushtetueses I balancuar, Qeveria duhet të tërheqë Marrëveshjen dhe ta rinegociojë' [Korenica: The Court's Decision is Balanced, the Government Should Withdraw and Renegotiate the Agreement] 24 December 2015 <<http://lajmi.net/korenica-vendimi-i-kushtetueses-i-balancuar-qeveria-duhet-te-terheqe-marreveshjen-dhe-ta-rinegocioje/>> accessed 16 July 2016.

communities that are enshrined in the Constitution are appropriately respected. With regard to this, a landmark ruling of the Court occurred in the Prizren Municipality Emblem case. The case was originally referred to as Cemajl Kurtisi and The Municipal Assembly of Prizren¹⁹⁶ (hereinafter, Prizren Municipality Emblemcase), in 2010. The Court ruled that the logo of the Municipality of Prizren (approved by the Municipal Assembly) was unconstitutional, on the basis that it did not represent minorities in accordance with the constitutional principle of multi-ethnicity.

At the time, the logo used by the Prizren municipality contained an image of the League of Prizren Building, along with the word “Prizren” (written in the Albanian language), and reference to the year 1878. The League of Prizren Building is an important historical monument for all Albanians, because it is emblematic of Albanians’ efforts to secure independence from the Ottomans. The disputed logo was adopted after Kosovo had achieved independence in October 2008. However, in 2009, the Deputy Chairperson of the Prizren Municipality, Mr. Cemajl Kurtisi, filed a complaint to the Constitutional Court, claiming that the municipal logo did not represent the values and ethnic identities of other minorities living in Prizren, but solely those of the Albanian majority. Thus, Mr. Kurtisi’s claim noted that the municipal logo did not reflect the multi-ethnicity of, and co-existence of several communities within, the Prizren municipality. He also specified that reference to the year 1878 should be removed from the logo.

The Court declared the case admissible, in accordance with Article 113 of the Constitution, and by a majority vote ruled that the logo of the Municipality of Prizren was unconstitutional. The Court maintained that the symbols of the municipalities were a means of helping communities to foster and preserve their traditions, cultures and distinguishing characteristics, and

...they have an influence on assembling and joining in one idea and one belief. It is beyond any doubt that symbols convey certain emotions and meaning which are experienced in a specific way by those who recognise their history, tradition and culture in those symbols. The symbols are not pure images and decorations but each of them carries certain deeper and hidden meaning.¹⁹⁷

The Court argued that the municipalities’ logos should reflect a respect for all citizens, regardless of the ethnic composition of the municipality in question, and therefore not merely ‘...the local symbol of only one Community that should be reflected in the tradition and historical heritage of that people but the official

¹⁹⁶ See Constitutional Court of the Republic of Kosovo, Cemajl Kurtisi and The Municipal Assembly of Prizren, Judgment in Case No. KO 01/09, 18 March 2010 <www.gjk-ks.org/repository/docs/ko_01_09_Ven_ang.pdf> accessed 13 July 2016.

¹⁹⁷ Ibid. para 26.

symbol ought to reflect the multi-ethnic nature of the Municipality¹⁹⁸ The Court acknowledged that the Constitution of Kosovo guarantees the right of Albanians — and, on an equal basis, all other communities in Kosovo — to preserve their culture and identity through such emblems.

Through this case, the Court clearly elucidated the extent of the principle of multi-ethnicity and further confirmed its commitment to community rights. Its ruling confirmed that the foundations of the principle of multi-ethnicity rely on the neutrality of the constitution towards members of the various different ethnicities living in Kosovo. In a rather specific interpretation of the concept of multi-ethnicity, the approach followed by the Court affirms that no ethnic group can claim to have a privileged position that could lead to discriminatory treatment of members of other ethnic groups living in Kosovo. Statehood and citizenship are reflections of the constitutional norms that empower, on an equal basis, members of any ethnic group to claim a stake in the state and the values of Kosovo. Grewe and Reigner provide an interesting conclusion about the case, claiming that:

...the decision solicits two remarks: firstly, the case illustrates that constitutional law and the Constitutional Court in Kosovo, supported as elements of state building by the international community, are able to effectively determine negatively which forms of majority government are inconsistent with minority protection and nondiscriminatory principles. They experience much more difficulty, however, when engaging in positive measures of identity construction, and thus 'nation' building, which largely remains the domain of democratic and inclusive politics. The second remark regards the Court's reasoning, which seems to oscillate between ethnic collectivists and civic conceptions of equality – the Court quotes almost all relevant constitutional provisions, and refers to both 'citizens' and 'communities' in its argument.¹⁹⁹

Reactions to the Court's decision were mixed. The Self-determination Party (VV) found the decision unacceptable.²⁰⁰ However, the decision was welcomed by Mr. Pieter Feith, the then International Civilian Representative, who described the decision as "well-reasoned" and a boost to the rule of law, because it bolstered the protection and equal representation of minorities.²⁰¹ Regardless of the reactions, the decision was respected by the municipal authorities, and represents the first case wherein the Court ruled unconstitutional the emblem of

¹⁹⁸ Ibid. paras. 27, 28.

¹⁹⁹ Grewe and Riegner (n 9) 25.

²⁰⁰ *Kosovo Haber News*, 'Komuna e Prizrenit mbetet pa logo' [The Municipality Remains without a Logo] 17 September 2010 <www.kosovahaber.net/?page=1,9,2914> accessed 13 July 2016.

²⁰¹ *Balkan Insight News*, 'Kosovo: Court Bans Prizren Emblem' 22 March 2010 <www.balkaninsight.com/en/Article/kosovo-court-bans-prizren-emblem> accessed 10 July 2016.

a municipality, on the grounds of the principle of multi-ethnicity and the rights of communities living in Kosovo. Thus, this case marks an important step taken by the Court to safeguard the interests of minority ethnic communities.

6.3.2. State Failure to Act and Failure to Respect Right to Life and Effective Legal Remedies

The Case originally referred to as G. K. and M. K. against Municipal Court in Prishtina and Kosovo Judicial Council²⁰² (hereinafter Kastrati Family case) is one of the very few landmark decisions of the Court establishing that an omission to act as was a deliberate violation of the right to life and effective legal remedies.

Pursuant to Law on Protection against Domestic Violence,²⁰³ a female citizen of Kosovo, D. K., had in 2011 submitted a request to the Municipal Court of Prishtina, for an emergency protection order. In her request for protection, D. K. clearly stated that she had suffered violence at the hands of her former husband, and that her life was endangered. Kosovan law determines that a municipal court, after receiving such a request, must decide within twenty-four hours whether there is sufficient evidence to issue such an order. However, the Municipal Court of Prishtina never acted upon D. K.'s request, and 22 days later she was murdered by her former husband.

A year later, the deceased woman's parents filed a referral in the Constitutional Court, based on Article 113 (7) of the Constitution, claiming that a deliberate refusal to act on the part of the Municipal Court in Prishtina, had violated the victim's right to life and her right to effective legal remedies. The Court concluded that the Municipal Court of Prishtina did have a responsibility to take all necessary measures as defined in the law, and that the failure by the Municipal Court of Prishtina to act in this case did indeed violate the '...constitutional obligations that derive from Article 25 of the Constitution and Article 2 of the ECHR.'²⁰⁴

In relation to the second claim, the Court concluded that both the Municipal Court of Prishtina and the Kosovo Judicial Council had failed to act. The Kosovo Judicial Council had failed to address the inaction of the regular court, and this amounted to a violation of Articles 22 and 54 of the Constitution and Article 12 of ECHR.²⁰⁵

This case established a precedent, being the first to address a failure to act as generating the violation concerned. It also established that state responsibility

²⁰² See Constitutional Court of the Republic of Kosovo, *Gezime and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council*, Judgment in Case No. KI 41/12, 26 February 2013 <www.gjk-ks.org/repository/docs/gjkk_ki_41_12_ang.pdf> accessed 10 July 2016.

²⁰³ See Law no. 3.L-182 on Protections against Domestic Violence <www.assembly-kosova.org/common/docs/ligjet/2010-182-eng.pdf> accessed 9 July 2016.

²⁰⁴ See Constitutional Court of the Republic of Kosovo, *Gezime and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council* (n 202), paras. 62, 63.

²⁰⁵ *Ibid* para 74.

for violation of the right to life and effective legal remedies should be proactively applied. However, the then Minister of Justice, in commenting on this case, alleged that this Court decision proved that the judiciary had failed to perform its duty, i.e. to address the case in due time.²⁰⁶

6.3.3. Gender Equality

The case originally referred to as 'Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by 55 Deputies of the Assembly of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 6 February 2015 by letter No. 05-259/Do-179' (hereinafter, the Women Quota case), is a significant (and recent) Court decision, delivered in March 2015, which dismissed as unconstitutional, a constitutional amendment by the Speaker of the Assembly.

The Speaker of the Assembly of the Republic of Kosovo, in accordance with Articles 113 (9) and 144 (3), referred an amendment of the Constitution to the Constitutional Court. The amendment was proposed by 55 members of the Assembly, and read as follows: "None of the genders can be represented by less than 40% in the positions of ministers and deputy ministers of the Government of the Republic of Kosovo."

The Constitutional Court therefore had to determine whether the proposed amendment accorded with the fundamental rights and freedoms enshrined in the Constitution. It ruled that the proposed amendment would in fact diminish the rights and freedoms guaranteed by Chapters II and III of the Constitution. In its decision, the Court noted that the proposed amendment could be considered a measure of positive discrimination, only to the extent that there is sufficient evidence '...showing that the current constitutional safeguards of the principle of gender equality are insufficient to guarantee the gender equality [which would then] constitute [...] "a serious situation of discrimination"'.²⁰⁷ The Court deemed that it was not a general practice to balance the participation in public institutions through gender quotas. According to the Court, '...the principle of equal opportunities for both women and men should be applied. The constitutional practice does not establish a qualified form of positive discrimination whereby preference is automatically and unconditionally based on gender, notwithstanding the requirement of professional merit.'²⁰⁸

²⁰⁶ Ministry of Justice, 'News: Kuçi: We are Working to Strengthen the Accountability of the Justice System' 7 March 2013 <www.md-ks.net/?page=2,8,863> accessed 5 July 2016.

²⁰⁷ Constitutional Court of the Republic of Kosovo, Assessment of an Amendment to the Constitution of the Republic of Kosovo Proposed by Fifty-Five Deputies of the Assembly of the Republic of Kosovo and Referred by the President of the Assembly of the Republic of Kosovo on 6 February 2015 by Letter No. 05-259/D0-179, Judgment in Case No. K013/15, 16 March 2015, para 61 <www.gjk-ks.org/repository/docs/gjk_ko_13_15_ang.pdf> accessed 5 July 2016.

²⁰⁸ Ibid paras. 60, 61.

Moreover, the Court determined that it is the duty of the Assembly and of the Government to determine the composition of the Government, and ensure that the principles of equal treatment are applied.

This ruling prompted immediate reaction from the “Female Caucus of the Assembly” who completely disagreed with the decision, claiming that the decision was incompatible with Chapter II of the Constitution.²⁰⁹ The “Female Caucus” was particularly dissatisfied with those female judges in the Court that voted against the amendment, because, they claimed, those female judges formed part of the Court due to the application of gender quotas. One MP even referred to the Court decision as being scandalous,²¹⁰ as the court had missed an opportunity to open up greater opportunities for women’s participation in the political executive.

It should be noted that in this instance, the Court played an important role in affirming that equal opportunities for both men and women in politics cannot be ensured through artificial and non-electoral tools such as quotas. Furthermore, it determined that gender should not be a tool used to guide the design of Kosovan Government.

The Court had responded to two competing arguments. The first of these was that gender quotas can help to increase the representation of women in government, the second foregrounded the autonomy of the Assembly of Kosovo and the Prime Minister, through parliamentary political parties, to select on the basis of merit, the people to manage ministerial cabinets. The Constitution guarantees the representation of ethnic communities in the government, and the additional use of gender quotas in the cabinet would seriously restrict the discretion of both the Assembly and the Prime Minister to select a cabinet. Moreover, the Court recognised that Kosovo already guaranteed the representation of women in the Assembly of Kosovo, and argued that political representatives of women can impose such membership by conditioning the composition of the Government. Considering the proactive and transformative role of the Court, as evidenced in previous cases, this decision revealed as finite the role of the Court in promoting the representation of women in government.

²⁰⁹ *Kosovo Info News*, ‘Grate deputete reagojne per vendimin e Kushtetueses’ [Female MP React against the Court’s Decision] 18 March 2015 <www.kosova.info/lajme/grate-deputete-reagojne-per-vendimin-e-kushtetueses.html> accessed 15 July 2016. *Indeksonline Info News*, ‘Grupi I Grave Deputete: Gjykata Kushtetuese kunder barazise gjinore’ [The Group of Female MPs: Constitutional Court against Gender Equality] 18 March 2015. <www.indeksonline.net/?FaqeID=2&LajmID=148872> accessed 15 July 2016.

²¹⁰ *Lajmi Net Info*, ‘Kushtetuesja rrezon kerkesen e grave per kuota edhe ne Qeveri’ [The Court Rejects the Request of the Quote for Females in the Government] 16 March 2015 <<http://lajmi.net/kushtetuesja-rrezon-kerkesen-e-grave-per-kuota-edhe-ne-qeveri/>> accessed 15 July 2016.

6.4. Specialist Chambers on War Crimes

The Specialist Chambers case is one of the most controversial rulings in the history of the Constitutional Court. In this case, the Court, acting under the preliminary review procedure, had to confirm whether the constitutional amendments made to facilitate the establishment of the EU-designed Specialist Chambers for war crimes were compliant with the fundamental rights and freedoms guaranteed in the Constitution.

The intention was for the Specialist Chambers on war crimes to consist of international judges and prosecutors, to perform their functions within a system of vertically integrated and autonomous structures, which would formally be part of the justice system of Kosovo. According to the constitutional amendments, the Specialist Chambers '...shall be attached to each level of the court system in Kosovo: the Basic Court of Prishtina, the Court of Appeals, the Supreme Court and the Constitutional Court.'²¹¹ Regardless of the impact that the establishment of this court would have upon individual rights and freedoms and the constitutional powers of the Constitutional Court, the latter argued that amendment 24 '...does not diminish human rights and freedoms set forth in Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case law...'²¹² The Court also, however, noted that the Specialist Chambers on war crimes '...must act in compliance with the international human rights standards as guaranteed by Articles 22 and 55 of the Constitution, meaning that any limitation of fundamental human rights and freedoms must be done in accordance with Article 55. However, as foreseen by Article 56 of the Constitution, the derogation of some of the fundamental human rights and freedoms enshrined in Chapter II of the Constitution shall not be permitted under any circumstances.'²¹³

There were immediate reactions from opposition political parties, including VV, and from war veterans, all of whom disagreed with the Court's decision. The head of the War Martyrs Organisation described the establishment of the court as "absurd".²¹⁴ Public perceptions of the Specialist Chambers on war crimes were mixed and largely reflected two prevailing views. Firstly, that the mandate of the war crimes tribunal included only a few categories of the war crimes committed

²¹¹ Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (n 78), art. 3, para. 1.

²¹² See Constitutional Court of the Republic of Kosovo, Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and Referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, Judgment in Case No. Ko26/15, 15 April 2015 <www.gjk-ks.org/repository/docs/KO26-15_ANG.pdf> accessed 10 July 2016.

²¹³ Ibid.

²¹⁴ *Koha net News*, 'Jashari: Krijimi i Gjykes Speciale 'absurd' [Jashari: The Establishment of the Special Court is 'Absurd'] 15 April 2015 <<http://koha.net/?id=27&l=53124>> accessed 10 July 2016.

from 1999 to 2001, and excluded a long list of war crime allegations that had never been addressed. Secondly, that with the exception of ICTY, war crimes in Kosovo have fallen within the scope of judicial management by international prosecutors and judges serving under UNMIK, as well as EULEX. That being said, the international institutions' limited success in addressing war crimes in Kosovo underlies this distrust. Of course, most perceived the decision of the Court as being influenced by politics and as a reflection of broad consensus throughout the international community, concerning the Specialist Chambers. This decision thus demonstrates the Court's extremely passive attitude towards constitutional adjudication, tolerating a system of justice that – although controlled by the EU – directly interferes with the principles of unity of the judicial system, and Kosovo's constitutional sovereignty.

6.5. Immunity of MPs

Another notable Court decision concerned the Immunities of Members of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo (hereinafter, the Immunities Case).

This case was addressed to the Court by the Government of Kosovo following a declaration by the then Deputy Head of EULEX, Andrew Sparkes, that it was unclear whether members of the Assembly enjoy immunity from arrest, and if so, to what extent.²¹⁵ Therefore, Mr. Sparkes wrote to the Speaker of the Assembly Krasniqi, to clarify this ambiguity. Ultimately, the Government took the matter over and asked the Court to interpret the immunity of all high-ranking state officials, with a focus on MPs.

Mr. Fatmir Limaj, a powerful MP and former KLA commander was at this time under EULEX investigation, and it was this matter that drew the immunity issue to the fore. Since the Assembly refused to address the issue to the Constitutional Court, EULEX was unable to take any action in relation to Mr. Limaj. The ambiguity surrounding the extent of MPs' immunity from prosecution, if any, was hindering the prosecution's ability to fully address the allegations. The issue was hotly debated, and had a direct impact on the stability of the coalition government.

In September 2011, the Prime Minister, Hashim Thaci, acting on behalf of the Government, filed a referral to the Constitutional Court on the legal basis of

²¹⁵ For the full interview see USA Embassy NEWS, 'Ambassador Christopher Dell and Deputy Head of EULEX Andrew Sparkes Interview with Jeta Xhara – 'Life in Kosovo' (*BIRN*, 14 July 2011) <http://Prishtina.usembassy.gov/ambassador_dell_and_deputy_head_eulex_july_14_2011.html> accessed 23 July 2016.

Articles 93 (10) and 113 (1) (3)²¹⁶ and asked the Court to clarify the content and the limits of the immunity of MPs, the President and the Government. Referring to the entire chronology laid before the Court, the President of the Court notified the President of the Assembly, the President of the Republic of Kosovo, and the Prime Minister of the lodging of the referral, and asked them to respond and to comment on the questions within 45 days. The Court received several responses and comments in that regard.

Considering the admissibility test, the Court went beyond the provisions of the Constitution that defined the circumstances under which the Government can access the Court, and declared the case admissible. The admissibility test applied in this case, in conjunction with the test applied in Qeska case, served as a precedent that lengthened *ratione materie* jurisdiction for the Court to hear questions posed by the President, the Government, and the Speaker of the Assembly.²¹⁷

As to the merits of the case, the Court interpreted the immunity of MPs very narrowly and addressed it only within the scope of their responsibilities. Indicating that public officials in Kosovo are entitled to a particular type of functional immunity, according to the Court, the latter applies only '...for actions taken or decisions made within the scope of their respective responsibility. Accordingly, deputies of the Assembly, the President of the Republic and the members of the Government are non-liable in judicial proceedings of any nature over the opinions expressed, votes cast or decisions taken within the scope of their responsibility.

²¹⁶ See Constitutional Court of the Republic of Kosovo, The Government of the Republic of Kosovo Concerning the Immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo, Judgment in Case No. KO-98/11, 20 September 2011 <www.gjk-ks.org/repository/docs/KO98-11_ANG_AKTGJYKIM.pdf> accessed 23 July 2016.

²¹⁷ In the Case No. KO 80/10 the Court maintained that: 'It is clear that the pursuant to Article 84(9) of the Constitution, the President of the Republic of Kosovo is authorised to refer constitutional questions to the Constitutional Court. The Court has therefore to consider whether the raised question is a "constitutional question" in line with Article 84(9) of the Constitution.' See Constitutional Court of the Republic of Kosovo, the Referral of the President of the Republic of Kosovo, His Excellency, Dr. Fatmir Sejdiu, for Explanations Regarding Jurisdiction over the Case of Rahovec Mayor, Mr. Qazim Qeska, Judgment in Case No. KO 80/10, 7 October 2010. The Court in Case No. KO 97/10 further explained the eligibility of the President and held that: 'In accordance with Article 112.1 of the Constitution, "the Constitutional Court is the final authority for the interpretation of the Constitution" and because of that there is no other body from whom the Applicant may seek an answer to the constitutional questions. The Court is of the opinion that the questions are "constitutional questions" that are contemplated by Article 84 (9) and the questions raised are fit to be addressed by the Court.' See Constitutional Court of the Republic of Kosovo, Judgment in Case No. KO 97/10, In the Matter of the Referral Submitted by Acting President of the Republic of Kosovo, Dr. Jakup Krasniqi, Concerning the Holding of the Office of Acting President and at the Same Time the Position of Secretary General of the Democratic Party of Kosovo, 22 December 2010.

This type of immunity is of unlimited duration.²¹⁸ The Court unanimously decided upon and explained the length and the nature of the immunity of MPs, members of the Government, and the President of the Republic. Furthermore, it ruled that MPs, the President and members of the Government are not immune from criminal prosecution for actions taken, or decisions made, outside the scope of their responsibilities.²¹⁹

Following publication of the Court's decision, responses were varied. EULEX responded within 24 hours, ordering the house arrest of Mr. Limaj. The reaction of the third-largest parliamentary group, VV, was to declare the Court decision undemocratic.²²⁰ In contrast, there were some who considered the decision "historic", because it removed a "loophole" that may have allowed MPs to evade justice. Furthermore, some feel that this decision has placed members of the Government on an equal footing with other citizens, and has clarified that no-one is untouchable, and no-one can hide behind immunity for the crimes they have committed.²²¹ The decision reflects a proactive approach by the Court, and a willingness to act to such a degree that the constitutional norms on immunity were practically rewritten.

²¹⁸ Constitutional Court of the Republic of Kosovo, *The Government of the Republic of Kosovo Concerning the Immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo* (n 216).

²¹⁹ For more details on the legal assessment: Constitutional Court of the Republic of Kosovo, *The Government of the Republic of Kosovo Concerning the Immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo* (n 216); Constitutional Court of the Republic of Kosovo, 'Press Release' 20 September 2011 <www.gjk-ks.org/?cid=2,28,246> accessed 5 July 2016.

²²⁰ *Koha News*, 'Gjykata Kushtetuese eshte nen presionin nderkombetar' [The Constitutional Court is under the International Pressure] 21 September 2011 <<http://koha.net/?id=8&arkiva=1&l=70184>> accessed 10 July 2016.

²²¹ Interview with Besnik Krasniqi (n 67).

7.

Conclusions

The Constitutional Court of Kosovo was established in 2009, a year after Kosovo's independence, and has until December 2015 issued more than 900 decisions. Although the Court has not drawn significant attention from international scholars, it has been one of the most active and influential courts in the region. The Constitutional Court of Kosovo, as the analysis of selected cases shows, has frequently violated, what Epstein et al. called 'tolerance intervals', but has been sufficiently careful not to provoke the 'power centre'.²²²

Resembling, partially, the Hungarian Constitutional Court, the ability of the Kosovo Constitutional Court to garner sufficient support from competing political parties and to maximize that from the 'equally balanced political forces' within the Assembly of Kosovo, has made the Court unequivocally an important 'neutral third', and has helped transform it into a dispute resolution arbiter.²²³ In less than a year, the Court has ruled as unconstitutional the holding of the post of the President, and the procedure for the appointment of an elected President, in the President Sejdiu and President Pacolli cases, respectively. It did so also by triggering the dismissal of the Speaker of the Assembly and the Chief Prosecutor of Kosovo; as well as by ruling that the immunity of the MPs is very relative and can be applied only as far as the MPs are exercising their duties within the Assembly and its committees.

Most of the rulings of the Court have been made possible through the implementation of a 'fluid' admissibility test. The Court was able to develop broad admissibility principles, which allowed it to reach decisions about a vast array of Constitution-related topics, regardless of its *rationae personae* and *materiae* jurisdiction. This pattern can be detected in the most significant cases it has decided. For example, in the President Sejdiu case, the Court ruled that the freezing/suspension of Mr. Sejdiu's position as the President of the political party, as a means of circumventing the prohibition of holding that post, contravenes the constitutional prohibitions that apply to the President of the Republic. The admissibility test applied by the Court in this case was vague, because the required number of authorised parties was not met at the point the Court started to review the application.

²²² Epstein et al. in Boulanger (n 6).

²²³ On the Hungarian Constitutional Court please see: Vanberg (n 5) 269-273.

The Court has used the same logic when interpreting constitutional values. In the President Pacolli case, it annulled the Assembly's decision on the election of the President of the Republic, and triggered the resignation of the latter. While the Court had no reason to declare the case inadmissible, its naturalist interpretation of the provisions and the spirit of the constitution changed the constitutional formula for the election of the President, by dictating that election of the President could be valid only after a new set of general requirements, not prescribed in the Constitution, had been respected.

Against this background, our analysis shows that the Court has been unable to establish itself as an institution that prioritises constitutional concepts beyond those present in daily politics, in all its decisions. In any case, most would agree that such an expectation of the Court would be unreasonable. The President Pacolli case, along with the Kosovo-Serbia Agreement and Speaker of the Assembly cases, are among the few cases where the Court has reasoned its decisions through a very thin line of reckoning. To some extent, the Court was able to recognise that the use of its discretion to amplify its jurisdiction, within the first three years of its mandate, would pose difficulties in relation to the implementation of its decisions. Given that fact, and as it matured as an institution, the Court's rulings in some of the most contentious cases were supportive of the arguments mainstreamed by the governing majorities. The decisions in the Kosovo-Serbia Agreements case, the Speaker of the Assembly case and Nominee for the Prime Minister case are some of the most representative in that regard. This, however, does not imply that the Court was unable to reasonably achieve this balance, and acquire sufficient support from the public as an intermediary strategy to prevent the evasion of implementation of its rulings.

Even so, the Court's status as the final dispute resolution arbiter was made possible by the complicity of the privileged applicants (mainly political institutions) that activated the Court's proceedings.²²⁴ In the cases mentioned above, the constitutional review process was mainly instigated by political institutions.

Weak coalition governments, or those political parties too partitioned to unite and 'retaliate against the Court'²²⁵, were additional factors facilitating the ability of the Court to controversially apply its jurisdiction. This was particularly so in the President Pacolli case, the Kosovo-Serbia Agreement case and the Speaker of the Assembly case. In those three cases, the Court's decisions were supported by a

²²⁴ For example, Stone Sweet argues that courts are not self-activating, and '...it can evolve into a political actor worthy of our attention only with the complicity of individuals who would initiate review processes. Individuals go to the court to alter legislative regimes already in place, and/or to revise the constitution rules governing in a specific policy domain, as long as the costs of activating the court do not outweigh these potential benefits.' See Stone Sweet (n 44) 197.

²²⁵ Andras Sajó argues that '...the political elite were too divided to retaliate against the court. The court only ever mobilized a part of the elite, and sometimes a part of the population, against its decisions.' Sajó in Boulanger, (n 6) 273.

marginalised majority within the Assembly of Kosovo, and the reasons applied by the Court to either decide upon the merits or dismiss the cases as inadmissible were, in some aspects, devoid of legal arguments. For example, in the Speaker of the Assembly case, the Court explained that the term ‘parliamentary group’ refers to the parties and/or coalitions that have won seats as a result of elections, and that this understanding of the term ‘parliamentary group’ should apply until the Assembly is fully constituted. To illustrate this point, the Court ruled that the term ‘parliamentary group’ is somewhat fluid, and that its meaning varies before and after the point at which the Assembly is considered fully constituted (by election of the Speaker and the President of the Assembly). The consequence of this ruling was to limit the independence of the elected MPs when choosing their mode of political representation, and coupled them with their political parties, inasmuch as the inaugural session is concerned.

In the Kosovo-Serbia Agreement case, the Court tried to establish a distinction between the Law on Ratification of the Kosovo-Serbia Agreement, and the Agreement itself. Without any interpretative reasoning, the Court discerned that the Law on Ratification and the Agreement constituted two separate legal acts, which had different objectives. Since the Court decided not to explore the scope of its jurisdiction, it simply concluded that it had no jurisdiction *ratione materiae* to review the matter of whether the Kosovo-Serbia Agreement violated the Constitution. The alternatives that the Court had, to pre-emptively review the text of the Agreement as part of the Law on Ratification of the Agreement, and excuse itself from entering into a dubious interpretative process lacking any reasoning, were straightforward. The Court could have conventionally established that it was vested with the jurisdiction to review the Agreement, and declare that the latter was (or was not) compliant with the Constitution. However, it should be noted that the Court, through this decision, applied a strategy that indirectly boosted the Kosovo-Serbia dialogue process, by preventing an invocation of the Constitution as a means to make the dialogue process even more complex. However, the Court soon changed its strategy. In the Kosovo-Serbia Agreement on the Association of Serb Municipalities case, the Court went on to review the text of the Agreement.

In another set of cases, the Court was able to have a direct impact upon the consolidation of democracy and the rule of law in Kosovo, and fortified its role as a counter-majoritarian institution. In the case concerning the immunity of public officials, the Court interpreted the scope of the immunity very narrowly, and ruled that MPs are not immune from criminal prosecution or from civil lawsuits for actions taken or decisions made outside the scope of their responsibilities.²²⁶

²²⁶ For more details on the legal assessment: Constitutional Court of the Republic of Kosovo, The Government of the Republic of Kosovo Concerning the Immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo (n 216); Constitutional Court of the Republic of Kosovo, ‘Press Release’ 20 September 2011 <www.gjk-ks.org/?cid=2,28,246> accessed 5 July 2016.

However restrictive the interpretation of the Constitutional Court on the immunity of the public officials in Kosovo was, it paved the way for the prosecution and the judiciary to address allegations about corruption and war crimes involving high-ranking officials in Kosovo. Furthermore, the role that the Court played in the establishment of the Specialist Chambers for war crimes was immense. The debate surrounding the creation of the Specialist Chambers for war crimes in Kosovo was associated with huge divisions within political parties as well the public. The Court concluded that the constitutional amendments to establish an autonomous and vertically-integrated system of chambers within the justice system, dealing with allegations of war crimes in Kosovo, did not violate constitutional rights and freedoms. The decision of the Court resulted in the subsequent approval of the law on the Specialist Chambers by the Assembly.

More than 90% of the cases submitted to the Court are constitutional complaints submitted by individuals. Owing to this, the Court has been very active in annulling the decisions of regular courts and public authorities on the basis of the violations of human rights and the rights of communities. The Court, moreover, has applied the principle of multi-ethnicity as one of the guiding references in addressing tendencies to ethnicize public institutions, as evidenced by the case of the Prizren Municipality logo. As the Republic of Kosovo embeds almost all key international legal standards on minority rights, and has pledged to promote and implement the highest level of minority rights, the Constitutional Court of Kosovo has taken a head-on approach to protecting rights and promoting the equal representation of minorities and the expression of their identity in Kosovo.

In the context of Kosovo, the protection of minority rights and guaranteeing diversity in representation is manifested in a range of settings, from politics to culture. The Court, in the Municipality Emblem case, ruled that the emblem of the Municipality of Prizren was unconstitutional on the basis that it ought to reflect the separate identities of all citizens, regardless of their ethnic background. In addition, the Court affirmed that the logo of a municipality is not ‘...the local symbol of only one Community that should be reflected in the tradition and historical heritage of that people but the official symbol ought to reflect the multiethnic nature of the Municipality’.²²⁷ The Court, in addition, maintained that the symbols of the municipalities are instruments that are used to help communities preserve and foster their distinctiveness.

To conclude, the protection of human rights and the rights of communities remains one of the functions that characterises the work of the Constitutional Court. The Court has been able to use its jurisdiction within a broad remit and in doing so, has employed as thoroughly as possible the ECtHR’s legal doctrines. While referring to ECtHR case-law, the Court has been able to apply the legal standards defined by the Strasbourg Court, while interpreting the rights and

²²⁷ Constitutional Court of the Republic of Kosovo, Cemajl Kurtisi and The Municipal Assembly of Prizren (n 196), paras. 27, 28.

fundamental freedoms guaranteed by Kosovo's Constitution. The extent to which this trans-judicial communication between the Constitutional Court of Kosovo and the ECtHR has practically ensured the equal protection of human rights, however, remains questionable.²²⁸

²²⁸ Dupre explains that the term 'Trans-judicial Communication' '...is borrowed from the title of an article published by Anne-Marie Slaughter in 1994 in which she noted that 'courts are talking to one another all over the world'. She proceeded to try to elaborate a typology of what she calls 'trans-judicial communication'. According to her typology, communication between courts can be horizontal, vertical or mixed (horizontal and vertical). Horizontal communication takes place between courts having the same status, i.e. between national courts or between supranational courts. Vertical communication takes place between supranational courts and national courts. The example given here is that of the European Court of Justice and national courts, or of the European Court of Human Rights and national courts. Vertical communication takes place between supranational courts and national courts.' See Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003) 43. It should be noted that Kosovo is not a member of the Council of Europe and therefore not a signatory of the European Charter on Human Rights and Fundamental Freedoms and its Protocols. This objectively prevents the ECtHR from exercising its authority and review the decisions of the Constitutional Court of Kosovo.

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