ENVER HASANI

Judicial Review of Democracy. Maintenance of Democracy as a Functionalist Mission in the Jurisprudence of the Constitutional Court of Kosovo

Abstract. Using Kosovo and its constitutional jurisprudence as a case study, this paper discusses the role of constitutional courts as agents for implementing a democratic project on behalf of the sovereign as the principal. It discusses that role primarily from the point of view of the court's functional intervention in improving the behaviour of the three branches of government. The paper begins by unveiling the historical development of constitutional justice, with as its focus the concept of new constitutionalism and the European/Kelsenian model encountered in Kosovo. It discusses too the theories of delegation of power, the contractual relationship, and trust between sovereigns and constitutional adjudicators in the context of subjects connected with this article. To present scenarios where the court manifests itself as a negative legislator, a positive legislator, and as an influencer of attitudes, the article includes convincing illustrations from both legal theory and case-law.

Enver Hasani is a Professor of International Law and Relations in the Faculty of Law at the Hasan Prishtina University of Prishtina and a former President of the Constitutional Court of Kosovo.

Introduction

Who rules the constitutional court and its judges? US Supreme Court Justice Antonin Scalia identified the nub of the question most elegantly in a famous dissent: 'It is of overwhelming importance ... who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast to coast is a majority of the nine lawyers on the Supreme Court.'¹

The question rests on the landscape of a fundamental conflict between the sovereignty of the people, their constitution, and the interpretation of that constitution by an 'independent' judiciary not accountable to the sovereign. Using Kosovo as an example, this paper shows that constitutional courts, including

¹ US Supreme Court, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting opinion).

the Constitutional Court of the Republic of Kosovo (CCK), serve as state agents with delegated powers to enforce and implement certain policies. By 'delegated powers' we mean that the court is seen as possessing a mandate from the people. In the text of the constitution the people are deemed to have entrusted the court to serve justice by means of reasonable arguments presented in formal decisions. Differently from US and hybrid models, constitutional courts as agents belong logically in the category of the European/Kelsenian model of constitutional justice based on the precepts of Hans Kelsen.

Because control of constitutionality is of the utmost importance to the rule of law, a primarily activist and judicially thoughtful court is necessary in transitional societies such as Kosovo. However, it might be possible to establish the rule of law using models other than the European/Kelsenian theory of constitutional justice, so our discussion here will try to address their relevance, even if in only limited depth.

This article follows a simple methodological framework, beginning with the theoretical basis developed by Alec Stone Sweet² and building upon it using other literary sources, which will include certain papers of my own. The theory will then be applied to Kosovo's case-law and broadly follows a multi-disciplinary perspective to deconstruct the legal and sociological meanings of court decisions. The article takes an unashamedly positivist approach—an indispensable attitude in fact and one which shapes its interpretation of primary and secondary sources which underpin its overarching aim to test the case-law of the CCK against the theoretical backdrop of agent theory.

The paper has three sections, each divided into three or four subsections. The first section provides a comparative overview of the *raison d'être* of constitutional review and constitutional politics in general. Case-law from the CCK is used to illustrate the institutional, jurisdictional, and societal aspects,³ essential for the non-expert reader as it blends history and institutional memory. Section two dives more deeply into the research question, addressing the theory of delegation of power and how that relates to constitutional justice in general, and there too the discussion is related to Stone Sweet's 'trust' or 'fiduciary' theory. The comparative method further supports analysis from the broader

² Alec Stone Sweet, Constitutional Courts and Parliamentary Democracy, *West European Politics* 25, no. 1 (2002), 77–100, DOI: 10.1080/713601586. The basic idea is that since human rights contain values of natural justice and very general principles, courts, in particular constitutional courts, are better placed to take the lead in their implementation. Alec Stone Sweet / Jud Mathews, Proportionality Balancing and Global Constitutionalism, *Columbia Journal of Transnational Law* 47, no. 72 (2008), 68–149; Alec Stone Sweet / Jud Mathews, *Proportionality Balancing and Constitutional Governance. A Comparative and Global Approach*, Oxford 2019, 1–29. All internet references were accessed on 25 August 2020.

³ Case-law used for the production of this paper is available in English at the official view site of the Constitutional Court of the Republic of Kosovo (CCK), Decisions, <https://gjk-ks.org/en/decisions/>.

perspective of former communist nations in transition, and its in-group comparative analysis in this case highlights why Kosovo's past legacy is troubling. The subsections delve into how constitutional courts have controlled both the form and substance of legislative enactments, and scrutinize how judges—holding as they do a monopoly over the interpretation of constitutional law—have used their power to control rights and constitutional limits. This article discusses three CCK cases in more detail, which examples concern heads of state, constitutional amendments, and restrictions on the right to work. The analysis shows how CCK decisions have affected policy choices and the government's attitude to democratisation.

The third section is dedicated to the court's role in transforming the behaviour of parliamentary democracy. It demonstrates how constitutional adjudicators shape the operation of the judiciary and, as in any society in transition, define constitutional identity within a multi-ethnic yet unitary state. The section makes the case for Kosovo as the country best representing post-communist countries in its development of a review mechanism that is deeply protective of its parliamentary democracy. The final section offers general observations on the CCK's role in interpreting the constitution against a backdrop of development.

Raison D'être of Constitutional Review and Constitutional Policy. How It Applies to Kosovo

The Constitutional Court—an Organisational Logic Warranted by Tradition and History

Kosovo made a deliberate choice of institutional design, selecting a separate European/Kelsenian-model court to conduct independent constitutional review. The decision was rooted in the tradition of the first constitutional court ('First Court'), constituted in 1972 when Kosovo was an autonomous province within communist Yugoslavia,⁴ although the later developments which led to Kosovo's independence in 2008 provided much stronger impetus.

The First Court followed the classical logic of delegation, whereby the principal as the representative of the sovereign authorized an agency to act for the state in his name. The principal controlled effective mechanisms to oversee the exercise of delegated powers under the court's jurisdiction as well as the appointment and dismissal of judges, an arrangement well suited to the socialist system of government which was based on the principle of delegation.

⁴ Cf. Kurtesh Salihu, Lindja, zhvillimi, pozita dhe aspektet e autonomitetit të Krahinës Socialiste Autonome të Kosovës në Jugosllavinë Socialiste [Birth, Development, Position and Aspects of Autonomy of the Socialist Autonomous Province of Kosovo], Prishtina 1984, 141.

However, the First Court fitted the European/Kelsenian mould only in organizational terms since its constitutional design was based on the theory that power belonged exclusively to one segment of society—namely the working class. In practice, power was exercised by the communist party as the interpreter of the constitution, which explains why decisions of the First Court were not legally binding.

Kosovo's First Court ceased to be effective in March 1989 when Serbian dictator Slobodan Milošević rescinded Kosovo's autonomy. Then came war and resistance which eventually led in March 1999 to the 78-days of NATO intervention on behalf of the majority Albanian population which led to the establishment of the UN-led administration known as UNMIK.⁵ Kosovo finally declared independence on 17 February 2008.

However, constitutional justice under UNMIK made no sense. All power was vested in the hands of the Special Representative of the Secretary General, who exercised it based on UN Security Council Resolution 1244 meaning that the logic of delegation could not be applied within an international administration. A basic component of the European/Kelsenian model of constitutional justice was therefore missing in that no Kosovo state 'sovereign' was present to delegate power over constitutional justice, while 'institutional memory' carried over from the communist era could play no role because it was unable to express itself under the conditions of the UNMIK administration. Under UNMIK therefore, with no judicial review of abstract acts, Kosovo missed an opportunity to revive its past constitutional justice from the era of its First Court.⁶

New Constitutionalism—Emphasis on Separation of Powers, Human Rights, and Constitutional Review

New constitutionalism refers to a model of government that recognizes the separation of powers while providing for a separate constitutional adjudicator to review acts and omissions of public authorities.⁷ As Butleritchie describes, it insists that the sovereign cannot be above the law⁸ and Liberman⁹ is of the same

⁵ UN Security Council, Resolution 1244, 10 June 1999, S/RES/1244, [https://daccess-ods.un.org/access.nsf/GetFile?Open&DS=S/RES/1244\(1999\)&Lang=E&Type=DOC](https://daccess-ods.un.org/access.nsf/GetFile?Open&DS=S/RES/1244(1999)&Lang=E&Type=DOC).

⁶ A document drafted under UNMIK, provided for a special constitutional chamber of the Supreme Court to tackle constitutional issues of the provisional institutions. Council of Europe, European Commission for Democracy Through Law, UNMIK Regulation 2001/9, On a Constitutional Framework for Provisional Self-Government in Kosovo, Strasbourg, 18 June 2001, section 9.4.11, 24, [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2001\)056-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2001)056-e). But the chamber never came to fruition.

⁷ Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 78–82.

⁸ David T. Butleritchie, *The Confines of Modern Constitutionalism*, *Pierce Law Review* 3, no. 1 (2004), 1–32, 10–32, http://scholars.unh.edu/unh_lr/vol3/iss1/3.

⁹ Michael T. Gibbons, ed, *The Encyclopedia of Political Thought*, Chichester 2014, 730–732.

opinion. The adjudicator has broad and clear jurisdiction on matters of human rights and fundamental freedoms and is there to secure the supremacy of the constitution, not the supremacy of mere legislation. Supremacy of legislation was rather the goal of old constitutionalism, intended to uphold the entirety of the will of the sovereign, a system under which human rights can wield little power.¹⁰ Old constitutionalism, therefore, leaves little room for an independent constitutional adjudicator, with the Weimar Constitution an exemplary hostage to that paradigm, for with no mechanism to implement it, Weimar's elaborate bill of rights had no normative value.¹¹

The Kelsenian model, with an adjudicator independent of the ordinary judiciary, was largely a novelty in countries that experienced harsh Fascist and Nazi regimes, for until then most of Europe viewed constitutional control as incompatible with parliamentary democracy and the unitary state, echoing French Revolution ideology that saw no value in judicial independence.¹² That, of course, differs from Yugoslavia's socialist system of government by assembly, in which delegates exercised unique, indivisible power—in diametric opposition to the system of separation of powers, first officially introduced to the Western political scene by the federal American constitution.¹³

New constitutionalism was based not on the supremacy of law and the absolute separation of powers, but on the constitution's supremacy and powerful normativity. As conceived by Hans Kelsen, such a constitution's normativity could be given life by a mechanism both entirely independent and specially designed for constitutional cases and controversies. The point of the Kelsen model is simply to maintain the constitution as an inalienable act, something not to be subject to the will of any majority or even the government, but rather to codify certain fundamental values rather than norms.

Normativity does not extend to mere majoritarian rule in the sense of constitutional review of law, but implies control of the constitutionality of any act or omission of public or state authorities to bring them into line with the nation's constitution. Naturally enough then, human rights and fundamental

¹⁰ Butleritchie, *The Confines of Modern Constitutionalism*, 30.

¹¹ Michael Stolleis, *Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic*, *Ratio Juris. An International Journal of Jurisprudence and Philosophy of Law* 16, no. 2 (2003), 266–280, DOI: 10.1111/1467-9337.00236.

¹² Abbé Sieyès proposed a third body—a *jurie* within the French parliament—to tame the will of majority. Marco Goldoni, *At the Origins of Constitutional Review. Sieyès' Constitutional Jury and the Taming of Constituent Power*, *Oxford Journal of Legal Studies* 32, no. 2 (2012), 211–234, 216–226, DOI: 10.1093/ojls/gqr034; Cf., also, Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation. Toward Decentralization?*, *International Journal of Constitutional Law* 2, no. 3 (2004), 461–491, DOI: 10.1093/icon/2.3.461.

¹³ US courts were not yet empowered to check the will of the majority. Judicial review was introduced in 1803. Or Bassok, *The Schmitelsen Court. The Question of Legitimacy*, *German Law Journal* 21, no. 2 (2020), 131–162; 143–150, DOI: 10.1017/glj.2020.2.

freedoms occupy a special place in new constitutionalism and Kosovo is certainly no exception to that. Its Constitution, adopted on 15 April 2008, in fact belongs to the latest expansion of the Kelsenian model in Europe, and stipulates the supremacy of the constitution and under it a powerful bill of rights, with normative effect.¹⁴ Normativity is materialized through constitutional justice, which can be set in motion by a complaint to the Constitutional Court. I would therefore argue that through its transformative role the Court, with its jurisdiction provided in articles 112 and 113 of the Constitution, unambiguously fulfils the criteria of new constitutionalism.¹⁵

For case-law illustration, I have selected cases that reflect Kosovo's new constitutionalism. I have not focused on the protection of human rights through the derivative mechanism of constitutional complaint, but on the constitutional control, both preventive and repressive, of laws and other acts of the Kosovo Assembly, whereby human rights are protected through the abstract control of legal norms. Such a constitutional policy sanctioned by articles 112 and 113 was part of the debate on Kosovo's constitution-making, which took place within an internationally imposed framework known as the Ahtisaari Plan.¹⁶ In that sense, the 2008 Constitution could be considered an utterly internationalized document due to the international factor's decisive role in its drafting and position.¹⁷

¹⁴ Constitution of the Republic of Kosovo, Article 16.

¹⁵ Transformative constitutions aim to transform society based on liberal values. Non-transformative constitutions sanction the material culture and habits of a given society and reflect them in a constitutional text. Cass R. Sunstein, *Designing Democracy. What Constitutions Do*, Oxford 2001, 67–68; Juan E. Mendez, *Constitutionalism and Transitional Justice*, in: Michel Rosenfeld / András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law*, 1282–1285.

¹⁶ UN Security Council, S/2007/168/Add. 1, *Comprehensive Proposal for the Kosovo Status Settlement*, 2 February 2007; Views from the Field. On Constitution Writing. The Case of Kosovo. Interview with Professor Louis Aucoin, *Praxis. Fletcher Journal on Human Security* 23 (2008), 123–128, 123, 124; John Tunheim, *Rule of Law and the Kosovo Constitution*, *Minnesota Journal of International Law* 18 (2009), 371–379, 375–376, <https://scholarship.law.umn.edu/mjil/253>. Aucoin and Tunheim are international lawyers who did most of the drafting of the Constitution of Kosovo.

¹⁷ Referring to Bosnia-Herzegovina, Cambodia, and Cyprus, Bosnian scholar Edin Šarčević considers internationalized constitutions and their constitution-making process as 'constitution out of necessity'. Edin Šarčević, *Ustav iz nužde. Konsolidacija ustavnog prava Bosne i Hercegovine* [Constitution Out of Necessity. Consolidation of the Constitutional Law of Bosnia-Herzegovina], Sarajevo 2010, 325–327. For more on internationalized constitutions and the notion of internationalized constitution-making power, including the current trends, cf. Emily Hay, *International(ized) Constitutions and Peacebuilding*, *Leiden Journal of International Law* 27, no. 1 (2014), 141–168, DOI: 10.1017/S0922156513000678; Enver Hasani / Getoar Mjeku, *International(ized) Constitutional Court. Kosovo's Transfer of Judicial Sovereignty*, *Vienna Journal on International Constitutional Law* 13, no. 4 (2019), 373–402, DOI: 10.1515/icl-2019-0016.

It is the role and position of the international actors in drafting Kosovo's Constitution that explain the CCK's expansive jurisdiction. Its main mission is to enable Kosovar institutions to pursue the basic tenets of new constitutionalism, the primary goal of which is to build a society based on the rule of law, the separation of powers with appropriate checks and balances to guarantee human rights and fundamental liberties, including the protection of minorities. Such a constitutional policy could not be implemented without the all-pervasive intervention of international experts, given that Kosovo's history and legal tradition originated in a previous socialist system with little cognizance of modern constitutionalism. Human rights and minority protection are conspicuous features of the new constitutionalism of Kosovo, for both are enshrined in Chapters II and III of the Constitution not as natural rights, but as positive rights and freedoms implemented through an adequate judicial mechanism activated by constitutional complaint.¹⁸

*'Modern Constitutionalism' in Practice. The Kosovo Court as
Negative Legislator*

In human rights cases the CCK has avoided natural-law argumentation, resorting instead to a classical review of the constitutionality of legislative action, thereby adopting the role of 'negative legislator'.¹⁹ Seminal cases include rulings on public-broadcasting fees, pension benefits for MPs, and the law on dialogue with Serbia. I have selected those landmark cases because they show the consolidation of modern constitutionalism in Kosovo. Indeed, their relevance transcends the law itself, to rather rigorous effect on segments of public life and social order.

*Public Broadcaster Fees. The Case of Radio and Television of Kosovo (RTK)*²⁰

This was first judgement ever handed down by the CCK. The initial referral consisted of an individual complaint filed by Tomë Krasniqi, a senior citizen who asked the Court to suspend a subscription fee of 3.5 euro paid monthly to *Radiotelevizioni i Kosovës* (RTK), the nation's public broadcaster.²¹ As initially

¹⁸ Constitution of the Republic of Kosovo, Article 113.7.

¹⁹ Unlike 'positive legislators' (i. e. parliaments) that make laws of their own choosing, 'negative legislators' may merely annul unconstitutional acts. Hans Kelsen, *La Garantie juridictionnelle de la constitution (la justice constitutionnelle)*, *Revue de droit public* 35 (1928), 197–257; Hans Kelsen, *Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution*, *Journal of Politics* 4, no. 2 (1942), 183–200, 183, 187, <https://www.jstor.org/stable/2125770>.

²⁰ CCK, Decision (Interim Measure), Case KI 11/09, Krasniqi v. RTK, 26 October 2009, https://gjk-ks.org/wp-content/uploads/vendimet/ki_11_09_vmp_ang.pdf.

²¹ CCK, Case KI 11/09, para. 5.

provided by contract and later under article 20.1 of the Law on RTK, the payment was collected by the sole provider of electricity, *Korporata Energjetike e Kosovës* (KEK), which added the fee to every one of its electricity bills. The Court noted that KEK had suffered material loss from its collection of the fee.²²

The Court stated that Krasniqi's petition was not, as it might at first have appeared, an *actio popularis*. The case was then deemed admissible under the argument *ratione personae* as a measure which 'directly concerned' the applicant's right to private property free from intermediate executive action.²³ In granting relief, the Court effectively suspended article 20.1 of the Law on RTK, and urged the Assembly of Kosovo to review the provision,²⁴ which the Assembly did in 2010 when the case was removed from the docket.²⁵ The decision initiated the Court's role as human rights guardian under Chapter II of the Constitution, building upon the premise, which Butleritchie sees as essential to modern constitutionalism, that civil actors and individuals must enjoy the strong protection of the state.²⁶

*Lifetime Pensions for MPs. A Question of Rule of Law, Equality, and Social Justice*²⁷

This ruling disciplines parliamentary behaviour and encourages an ethical approach when politicians decide on their own privileges. The case was initiated by the Kosovo Ombudsman who asked the Court to review the provisions of a law on benefits to members of parliament (MPs), shortly after that law's adoption in the Assembly.²⁸ The law effectively granted its makers themselves a lifetime 'supplementary pension' of at least 50 % of an MP's basic salary, depending on number of parliamentary terms served.

The CCK disagreed. In a comparative analysis that drew on the case-law of former communist countries, it invalidated the MPs' pension provisions as unconstitutional on the grounds that they violated the right to equality and non-discrimination, the right to property, and constitutional values including

²² CCK, Case KI 11/09, para 11.

²³ CCK, Case KI 11/09, paras. 13 and 17.

²⁴ CCK, Case KI 11/09, Disposition (item II).

²⁵ Two judges submitted separate 'dissenting opinions' —unprecedented in the history of constitutional justice, for they opposed an order to adopt interim measures. CCK, Dissenting Opinion of Judge Almiro Rodrigues and Dissenting Opinion of Judge Gjyljeta Mushkolaj, Case KI 11/09, Krasniqi v RTK, https://gjk-ks.org/wp-content/uploads/vendimet/ki_11_09_mm_ar_ang.pdf.

²⁶ Butleritchie, *The Confines of Modern Constitutionalism*, 30.

²⁷ CCK, Judgment, Case KO 119/10, Constitutional Review of Articles 14 (1) 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L111 of 4 June 2010, 8 December 2011, https://gjk-ks.org/wp-content/uploads/vendimet/ko_119_10_eng.pdf.

²⁸ Law 03/L-111 on Rights and Responsibilities of the Deputy, Official Gazette of the Republic of Kosovo, 20 July 2010, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2680>.

social justice. Placing human rights and fundamental freedoms on a normative pedestal, the judgment recognized them as a constitutional safeguard against dishonest legislation. The CCK explicitly acknowledged its role as a ‘negative legislator’ in that the Assembly was not deprived of its legislative powers.²⁹

*Law on Dialogue with Serbia. An Ad hoc Body may not Negotiate Treaties*³⁰

This case illustrates the Court’s negative legislator role in protecting the separation and balancing of powers. The Assembly passed a law to govern Kosovo’s representation in a dialogue with Serbia that it was hoped would produce final agreement between two countries previously at war and which had not yet formally recognized each another. The law therefore provided for a state delegation — a sort of parallel structure to existing institutions as a unique body to represent Kosovo in the process — and was given the status of a *lex specialis* such that its provisions would prevail in case of conflict with other laws.³¹

However, that parallel structure created by law established a very different hierarchy of institutions from what the Constitution prescribes.³² In fact the parallel structure infringed constitutional provisions for the separation of powers, the state’s sovereignty, and its authority to negotiate and enter into treaties affecting sovereignty, territory, political alliances, peace, human rights, and so on.³³

Key Elements of the Delegation of Power and Contractual Relationship to Constitutional Review

Alec Stone Sweet’s idea of the delegation theory of constitutional justice does not exclude contractual aspects, which became particularly relevant in the constitution-making of post-communist countries. New constitutions entailed broad public debate and compromise concerning the responsibilities of a third, neutral, professional institution, the job of which was to give effect to an ‘original compact’. That original compact was the constitution, and the institution chosen to realize its terms was derived from the European/Kelsenian model of constitutional justice.

²⁹ CCK, Judgment, Case KO 119/10, para. 82.

³⁰ CCK, Judgment, Case KO 43/19, Constitutional Review of Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia, 27 June 2019, https://gjk-ks.org/wp-content/uploads/2019/06/ko_43_19_agj_ang.pdf.

³¹ CCK, Judgement, Case KO 43/19, para. 45.

³² CCK, Judgement, Case KO 43/19, paras. 55–109

³³ These treaties are ratified by the Assembly of Kosovo with the support of two thirds of deputies. Constitution of the Republic of Kosovo, Article 18.1.

Delegation of power by contract implies that the parties' have faith in the modalities of safeguarding the original compact. Ensuring the supremacy of the constitution is the main feature of any agreement to delegate responsibilities to a third, neutral and professional institution, in this case a constitutional adjudicator. That in fact exceeds the remit of a classical delegation, for it carries an element of trust vested in the constitutional court along with the processes and dynamics of the new institution. Here we discuss the elements of the contractual theory of the legitimacy of constitutional courts which must faithfully exercise the duty delegated to them within a predefined legal framework. Such framework must in turn guarantee the personal, organisational, functional, and financial autonomy of the constitutional adjudicator. We shall therefore proceed to illustrate the contractual theory with seminal rulings of the CCK.

The contractual framework, which provides for the court's original autonomy, allows it to build legitimacy by means of reasoned decision-making. At its origin, constitutional justice is based not on the will of the majority nor on the views of the general public regarding the decision-making process, but on high legal expertise.³⁴ Only later, with the advent of opinion polls, did the views of the public become part of the constitutional courts' decision-making.³⁵ Reasoning, provided in professional terms, is an 'obligation' assumed by the courts in order to justify the faith vested in them by the representatives of the sovereign, who in turn make a commitment to respect the court's rulings, having regard to the courts' professionalism. As Stone Sweet put it, the more the courts manage to solve complex constitutional problems in reasoned terms, the more will political and social actors rely on those courts, which serves only to increase the courts' legitimacy.³⁶ Law is no longer merely an instrument of public order, but becomes a means to an end, namely that of transformational social justice.³⁷ Constitutional courts play a special role in attaining that goal.

Independent constitutional courts as products of new constitutionalism resulted from three systemic developments.³⁸

The first factor was the emergence of constitutional democracy. Following World War Two many European nations set up democracies featuring separation of powers with checks and balances, an independent judiciary, and constitutions with their supremacy guaranteed by separate constitutional

³⁴ Lars Vinx, *The Guardian of the Constitution*. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law, Cambridge 2015, 31, 47–48.

³⁵ Bassok, Schmitelsen Court.

³⁶ Alec Stone Sweet, *Judicialisation and the Construction of Governance*, *Comparative Political Studies* 32, no. 2 (1999), 147–184, DOI: 10.1177/0010414099032002001.

³⁷ Robert A. Kagan / Diana Kapiszewski / Gordon Silverstein, *New Judicial Roles in Governance*, in: Erin F. Delany / Rosalind Dixon, eds, *Comparative Judicial Review*, Cheltenham 2018, 142–163, 159–160.

³⁸ Kagan / Kapiszewski / Silverstein, *New Judicial Roles in Governance*, 159–160.

adjudicators. In fact the first to do so was Austria, by restoring its pre-Nazi federal constitution and Constitutional Court, while both Germany and Italy established their constitutional courts shortly afterwards. Spain and Portugal too set up constitutional tribunals during their transitions to democracy in the 1970s, so that as the Cold War came to an end, the constitutional model was embraced by countries in former socialist Europe, Latin America, Asia, and Africa, to become nearly universal.³⁹

The second important factor was that globalisation and liberal economic trends brought promotion of the free market as well as an increased regulatory role for the state. As a result, independent courts were empowered to interpret new market rules, while constitutional courts assumed a special role as guarantors of constitutional rights and freedoms affecting economic activity.

The third and final factor has to do with the activist state, which responds to economic growth with efforts to transform society. In developing nations, rapid economic growth and social progress require a more active role from government, which in turn gives constitutional courts another kind of transformational role. Nevertheless, activist states can emerge in developed countries too, as in the United States during the *Lochner Era* (1897–1937) which was marked by the Supreme Court's tendency to invalidate individual states' labour and market regulations.⁴⁰

Constitutional justice has therefore assumed a merited role in governance, steering societies towards constitutional values and principles advocating equality for all, a thing most particularly notable in societies in transition, best illustrated by three features.

Judges Controlling the Procedure and Substance of the Legislation

The main defining feature of new constitutionalism is that constitutional judges control both the form of the manifestation of the sovereign's will, and its content.⁴¹ We refer here not only to legislation but to constitutional and other

³⁹ Tom Ginsburg, The Global Spread of Constitutional Review, in: Keith E. Whittington / R. Daniel Kelemen / Georgey A. Caleira, eds, *The Oxford Handbook of Law and Politics*, Oxford 2008, 81–98; Daniel M. Brinks / Abby Blass, Rethinking Judicial Empowerment. The New Foundations of Constitutional Justice, *International Journal of Constitutional Law* 15, no. 2 (2017), 296–331, DOI: 10.1093/icon/mox045 (trade-offs among judicial autonomy and politically relevant matters on behalf of broad range of actors count for the current judicial empowerment in the world).

⁴⁰ Sujit Choudhry, The *Lochner* Era and Comparative Constitutionalism, *International Journal of Constitutional Law* 2, no. 1 (2004), 1–55, DOI: 10.1093/icon/2.1.1.

⁴¹ Alica Hinarejos, Judicial Control in the European Union. Reforming Jurisdiction in the Intergovernmental Pillars, Cambridge 2009, 24 (discussing indirect effect of EU law and the role of this law in shaping judicial review in national courts); Philip Sales, Judges and Legislature. Values Into Law, *The Cambridge Law Journal* 71, no. 2 (2012), 287–296, DOI: 10.1017/

norms the adoption of which is provided for under the national constitution. The upholding of constitutional principles is most challenging when it comes to reviewing proposed constitutional amendments, while constitutional control of legislation on the other hand, is an ordinary procedure—the very essence of the Kelsenian model. However, that is not the case with the control of constitutional norms or amendments, for such cases typically elicit questions about the legitimacy of constitutional justice and raise doubts about the authority of constitutional courts to control the sovereign's exercise of its constitution-making power. For judgments of that type, the courts have always had an ear to the *vox populi*, but still have the potential to substitute their will for that of the entire nation. To prevent that, many constitutions limit the constituent power of national parliaments as well as the scope of the courts to trespass upon that power. That approach follows the doctrine known as 'unconstitutional constitutional amendments', which protects the very essence of the constitutional identity of a nation.⁴² The German Basic Law is a typical example in that it expressly limits constitutional amendments with an 'eternity clause' protecting the country's constitutional identity and influencing its foreign relations.⁴³

Judges Controlling Rights—a Virtually Open-Ended Delegation of Policy-Making Authority

The role of judges in determining rights emphasizes two secondary features of judicial review as it occurs on both sides of the Atlantic, although it is most clearly expressed in Europe. In fact, protection of human rights is what has driven the expansion of judicial review in Europe since World War Two.⁴⁴

First, judges control constitutional rights and freedoms by interpreting their meanings when national norm-makers adopt new legislation and constitutional norms, as when countries such as Italy allow for the abstract control of legal

S0008197312000499 (the legislative role of judges has been enhanced by their obligation to apply EU and ECHR law over domestic norms); John Harrison, Legislative Power and Judicial Power, *Constitutional Commentary* 22 (2016), <http://scholarship.law.umn.edu/concomm/22> (discussing the role of judges in the American context; the issue of judge-made law is as old as the American legal tradition and the crux of the matter is how to reconcile the principle of separation of powers with judge-made law; the author argues that judge-made law making is inherent in the common law tradition).

⁴² Yaniv Roznai, Unconstitutional Constitutional Amendments. The Migration and Success of a Constitutional Idea, *The American Journal of Comparative Law* 61, no. 3 (2013), 657–719, <https://www.jstor.org/stable/43668170>.

⁴³ German Basic Law, Article 79(3). See more on this Monika Polzin, Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power. The Development of the Doctrine of Constitutional Identity in German Constitutional Law, *International Journal of Constitutional Law* 14, no. 2 (2016), 411–438, 422–431, DOI: 10.1093/icon/mow035.

⁴⁴ Michel Troper, The Logic of Justification of Judicial Review, *International Journal of Constitutional Law* 1, no. 1 (2003), 99–121, DOI: 10.1093/icon/1.1.99.

norms, or in jurisdictions with concrete constitutional control of legal acts and omissions.

Secondly, constitutional judges control rights through special procedures of constitutional complaint. Judges follow theoretical and philosophical reasoning resembling the natural-law discourses of medieval, illuminist, and modern-era jurists. It is worth pointing out here that the European/Kelsenian model did not originally envisage such a situation, in which human rights form a parameter for constitutional review, for that juridical function was added at a later stage.⁴⁵

*Constitutional Judges' Monopoly of Constitutional Interpretation,
Effectively Banning Judicial Review by Ordinary Judges*

Another feature of Kelsenian constitutional justice is its monopoly of the final interpretation of constitutional law by constitutional adjudicators, of which two aspects stand out. The first concerns the genesis of constitutional justice and the second the fact that such monopoly of constitutional interpretation encompasses the corpus of the nation's constitutional law.

Constitutional justice as we understand it was developed to address structural defects in post-World War One Europe. While democracies across the Atlantic had already enhanced the separation of powers with control of constitutionality by the least dangerous power,⁴⁶ a similar advance was impossible in Europe. Instead of serving as a check on the other two powers, European judges tended to side with the repressive and corrupt regimes of the day. A remedy for that defect was therefore sought outside the classical trichotomy, with the theoretical reasons for separate constitutional adjudicators first appearing in a historic debate between Hans Kelsen and Carl Schmitt. The preferred solution was not to attempt to create a mechanism using a single one of those powers, but to place a check on them all.⁴⁷

To general approval, the primary monopoly of Kelsenian constitutional justice is anchored in the text of a nation's constitution. Meanwhile certain states, operating a hybrid system of constitutional justice, allow ordinary judges to disregard legislation of dubious constitutionality.⁴⁸ The scope of control, however, encompasses the entirety of constitutional law, which is sometimes

⁴⁵ Thilo Tetzlaff, Kelsen's Concept of Constitutional Review Accord in Europe and Asia. The Grand Justices in Taiwan, *National Taiwan University Law Review* 1, no. 2 (2006), 75–107, 77–88.

⁴⁶ Alexander Hamilton presented the idea in Federalist Paper 78. Cf. also Alexander M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Yale 1986.

⁴⁷ Slobodan Samardžić, *Norma i odluka. Karl Šmit i njegovi kritičari* [Norm and Decision. Carl Schmitt and his Criticizers], Belgrade 2001; Vinx, *The Guardian of the Constitution*.

⁴⁸ In hybrid or mixed models of constitutional review, lower courts may review constitutionality, but separate constitutional courts have the final word. Mauro Cappelletti, *Judicial*

scattered among domestic documents, international conventions, and other constitutional obligations that societies assume as their constitutional systems evolve. The most obvious example in Europe is the adherence of all its nation states to the European Convention on Human Rights (ECHR) and the norms of the European Union (EU).⁴⁹

The three qualities just described are well reflected in Kosovo's constitutional jurisprudence. I shall now discuss three decisions of the Constitutional Court to illustrate the first two features, that of judges' controlling the form and content of norm-making and their controlling of constitutional rights. Under the Constitution, the ECHR applies directly in Kosovo as do many other documents offering guidance to EU member states.⁵⁰

Illustrations from Case-Law. The Kosovo Court as Positive Legislator

These cases show that the CCK played the role of 'positive legislator' by substituting the will of the Assembly of Kosovo for its own will.⁵¹

The Powers of an Acting President

From September 2010 until March 2011 the CCK decided the fate of two presidents of Kosovo—both were removed because of constitutional violations. In the first case, President Fatmir Sejdiu had violated the Constitution as an individual by simultaneously holding both the presidency and the chairmanship of a political party,⁵² while in the second the Assembly of Kosovo had collectively violated election procedures in selecting Behgjet Pacolli as president.⁵³

Review in Comparative Perspective, *California Law Review* 58, no. 5 (1970), 1017–1053, <https://www.jstor.org/stable/3479676>.

⁴⁹ Oreste Pollicino, The New Relationship between National and the European Courts after the Enlargement of Europe. Towards a Unitary Theory of Jurisprudential Supranational Law?, *Yearbook of European Law* 29, no. 1 (2010), 65–111, DOI: 10.1093/yel/29.1.65; Guiseppe Martinico, Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts, *The European Journal of International Law* 23, no. 2 (2012), 401–424, DOI: 10.1093/ejil/chs027.

⁵⁰ Constitution of the Republic of Kosovo, Article 22.

⁵¹ Allan R. Brewer-Carrias, *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge 2011. The author presents an overview of country reports on both sides of the Atlantic, depicting courts as positive legislators.

⁵² CCK, Judgment, Case KO 47/10, Naim Rrustemi and 31 other Deputies of the Assembly of the Republic of Kosovo vs. His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo, 28 September 2010, https://gjk-ks.org/wp-content/uploads/vendimet/ki_47_10_eng_2.pdf.

⁵³ CCK, Judgment, Case KO 29/11, Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, Concerning the Election of the President, 30 March 2011, https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_29_11_eng.pdf.

In response, political parties agreed in April 2011 to empower Atifete Jahjaga as 'interim' president, and based on that agreement the Assembly began procedures to amend the Constitution to provide for direct presidential elections and further define the powers of the acting president.

When Fatmir Sejdiu resigned in 2010,⁵⁴ the speaker of the Assembly, Jakup Krasniqi, stepped in as acting president. Krasniqi appointed judges and prosecutors, granted pardons, and exercised other presidential powers for which he was criticized by both public opinion and state officials. For that reason, the proposed amendments sought to curb the role of the acting president, but concerning only certain competences.⁵⁵ The package of new measures eventually included restrictions on the power to grant pardons, to appoint judges and prosecutors, and to exercise other powers such as the declaration of a state of emergency, appointment of ambassadors or heads of diplomatic missions, and to award medals and decorations.

In reviewing the proposed amendments, the CCK held that a delay in the appointment of judges and prosecutors would threaten the administration of justice and jeopardize the right to fair trial. Failure to declare a state of emergency (in coordination with the Government) when required to do so would also jeopardize human rights and liberties, and withholding due pardons would unfairly penalize anyone qualifying for forgiveness under the law.⁵⁶

The Case of President Jahjaga. Term of Office Could Not Be Shortened

President Atifete Jahjaga took the oath of office on 7 April 2011, based on political agreement for an 'interim' presidency. Constitutional amendments were to be enacted that, among other changes, would reform the electoral system and allow Kosovars to elect their head of state directly. The draft amendment on direct election also sought to end Jahjaga's term prematurely, removing her from office six months before her successor would be sworn in. The CCK declared that particular provision unconstitutional in that it violated human rights, namely the active and passive electoral rights not only of Ms. Jahjaga but of all the citizens of Kosovo, who expected a legitimate president's term to last five years.⁵⁷

⁵⁴ CCK, Judgment, Case KO 47/10, para. 68, and disposition, part II.

⁵⁵ CCK, Judgment, Cases KO 29/12 and KO 48/12, Proposed Amendments of the Constitution Submitted by the President of the Assembly of the Republic of Kosovo, 20 July 2012, paras. 158–172, https://gjk-ks.org/wp-content/uploads/vendimet/Aktgjykim%20Anex%20A&B%20KO29_48_12_ANG.pdf.

⁵⁶ CCK, Judgment, Cases KO 29/12 and KO 48/12, paras. 162–171.

⁵⁷ CCK, Judgement, Cases KO 29/12 and KO 48/12, paras. 244–286.

The Law on Health Restricting the Right to Work and Follow a Profession

This was another case of the CCK's involvement in the legislative process,⁵⁸ and one that clearly illustrates its position as a negative legislator. The ruling invalidated, as incompatible with article 49 of the Constitution, ('The Right to Work and Follow a Profession') certain provisions of the Law on Health which restricted the exercise of their professional skill outside working hours for those employed in the public sector. Such restrictions were deemed not to pass the proportionality test under article 55 ('Limitations on Fundamental Rights and Freedoms') of the Constitution.⁵⁹

Outcomes of Constitutional Policy

Following the Kelsenian model of constitutional justice, an imperfect relationship between principal and agent is improved through trust. Entrusting constitutional adjudicators with the job of interpreting national constitutions for the purpose of their implementation supersedes the parliamentary sovereignty seen in classical constitutionalism. After the adoption of the Kelsenian model therefore, parliaments and governments will be obliged to govern according to rules and procedures enshrined in national constitutions, placing such rules and procedures beyond the executive's control, the interpretation of which for purposes of implementation is entrusted to constitutional courts. By instituting the normative superiority of the 'original compact', for its part the constitutional court is entrusted via this compact with securing its supremacy. That prerogative is of one body alone—namely the constitutional court. For that reason, the relationship between the constitutional court and the executive and representative organs is one based on rules and procedures previously defined in the national constitution. Such rules and procedures are therefore beyond the control of representative and executive bodies.

Constitutional Courts as a Transformative Mechanism of Parliamentary Behaviour

Kelsenian constitutional justice provides a means to limit majoritarian rule, protecting minorities and ensuring the supremacy of the constitution. It is rooted in ideals of political pluralism and the understanding that majorities and

⁵⁸ CCK, Judgment, Case KO 131/12, Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health, NO. 04/L-125, 15 April 2013, https://gjk-ks.org/wp-content/uploads/vendimet/KO131_12_Judgment_ANG.pdf.

⁵⁹ CCK, Judgement, Case KO 131/12, paras. 127–175, disposition, §§ III–IV.

minorities do not remain so.⁶⁰ National constitutions prescribe mechanisms to protect and cultivate diversity and ensure that all groups are able to participate in public life. The system is known as 'consociational democracy', and the constitutional court is tasked with ensuring its implementation. The goal is to transform the classical parliamentary system by limiting the expression of the will of the representative body.⁶¹

Literature identifies three causes for the active role of constitutional courts in transforming the parliamentary system:⁶² (1) structural factors, (2) current political dynamics, and (3) factors pertaining to the courts.

Structural Factors

The basic features of the political regime are the foremost structural factor and must be examined when assessing whether a state is democratic or autocratic. Among democracies, federations differ from unitary states in that power is fragmented, or shared among the federated units. Other questions include whether the state operates under parliamentary or any other form of government based on the separation and balancing of powers; and whether the country is a new democracy or a traditional and consolidated one. In all cases, the roles of courts and constitutional justice differ. Constitutional justice will be weaker in countries with a reigning parliamentary majority, a lesser tradition of democracy or where the state has a unitary nature. Such limitation of the will of the majority, as noted above, is known as 'the counter-majoritarian difficulty' and its history is firmly associated with the US Supreme Court during

⁶⁰ Wojciech Sadurski, Judicial Review in Central and Eastern Europe. Rationales or Rationalizations?, *Israel Law Review* 42, no. 3 (2009), 500–527, DOI: 10.1017/S0021223700000704 (discussing the replacement of parliamentary choices with the courts' own views); Michael C. Drot, Majoritarian Difficulty and Theories of Constitutional Decision Making, *University of Pennsylvania Journal of Constitutional Law* 13, no. 2 (2010), 283–304 (discussing the American context); Valentina Volpe, Drafting Counter-Majoritarian Democracy. The Venice Commission's Constitutional Assistance, *Heidelberg Journal of International Law* 76, no. 4 (2016), 811–843 (focusing on four constitutional features with a counter-majoritarian dimension, which the Venice Commission consistently promoted in assisted countries: primacy of international law, respect for the European Convention on Human Rights standards; checks and balances; and constraints on direct democracy).

⁶¹ Dren Doli / Fisnik Korenica, The Consociational System of Democracy in Kosovo. Questioning Ethnic Minorities' Special Status in Kosovo's Constitutional Regime, *International Journal of Public Administration* 36, no. 9 (2013), 601–613, DOI: 10.1080/01900692.2013.773035 (arguing that consociational democracy in Kosovo is meant to protect minorities); Adem Beha, Consociational Democracy and Political Engineering in Postwar Kosovo, *Nationalities Papers* 47, no. 4 (2019), 674–689, DOI: 10.1017/nps.2018.17.

⁶² Kagan / Kapiszewski / Silverstein, New Judicial Roles in Governance, Note 20, 150–157.

the so-called Progressive Era. A similar thing was to be repeated in Europe after World War Two.⁶³

The next structural factor is the general legal status of the judiciary, a point which includes any traditions of independence from political interference, of constitutional review, and which considers the degree of support constitutional justice and the judiciary in general enjoy among legal professionals, judges, prosecutors, scholars, and others.

Another important structural factor is the impact of supranational and international forces. The state's international obligations are important here, as with Kosovo's commitment to the Special Court, set up in 2015 under an international obligation to prosecute alleged war criminals for certain crimes against humanity and international law they were suspected of committing during and after the Kosovo war (1998–1999).⁶⁴ Additional restrictions derive from supranational structures, such as the EU, the Council of Europe, and other organisations which significantly limit national norm-makers. Certain constitutions, including that of Kosovo, authorise constitutional courts to determine whether internal acts meet international obligations.⁶⁵

Finally, structural factors include how far the country resembles foreign powers culturally and politically, such as in Latin America where constitutional courts are very similar in jurisdiction to tribunals in Spain and Italy but differ markedly from courts in the United States or other geographically closer countries.⁶⁶ Similarly, certain former French colonies—in West Africa for example—have modelled their constitutional justice on that of their former colonial master.⁶⁷

In independent Kosovo, the same structural factor was present during the period of international supervision (2008–2012) when the CCK was bound to uphold the supremacy of the Ahtisaari Plan rather than the 2008 Constitution.⁶⁸ That was because of a promise Kosovo made in its 2008 Declaration of

⁶³ Barry Friedman, *The Birth of an Academic Obsession. The History of the Counter-majoritarian Difficulty. Part Five*, *The Yale Law Journal* 112, no. 2 (2002), 153–259, DOI: 10.2139/ssrn.312024.

⁶⁴ Hasani / Mjeku, *International(ized) Constitutional Court*. The authors discuss the formation of the Special Court for Kosovo with its seat at the Hague to try war crimes and crimes against humanity allegedly committed by the current leaders of Kosovo, former guerrilla fighters. This is probably the only fully internationalized court in history.

⁶⁵ Constitution of the Republic of Kosovo, Article 113.3 (4).

⁶⁶ Daniel M. Brinks / Abby Blass, *The DNA of Constitutional Justice in Latin America. Politics, Governance, and Judicial Design*, Cambridge 2018 (noting that while constitutional courts in Latin America have traditionally been used to limit power and preserve the status quo, they are evolving into a functioning part of contemporary politics).

⁶⁷ Charles Fombad, *Constitutional Adjudication in Africa*, Cambridge 2017.

⁶⁸ CCK, Judgment, Case KO 38/12, Assessment of the Government's Proposals for Amendments of the Constitution, 15 May 2012, <https://gjk-ks.org/wp-content/uploads/vendimet/>

Independence to implement the Ahtisaari Plan and adopt a constitution based on it.⁶⁹ That Constitution was adopted in April 2008 and came into effect the following June, while the Declaration sanctioned the temporary supremacy of the Plan.⁷⁰

Political Dynamics

The history of constitutional justice has shown that when a country is politically divided on a particular matter, constitutional courts are more likely than not to step in and solve the problem. Such matters might include the use of religious symbols, discrimination, and other divisive elements related to constitutional democracy and its basic tenets of pluralism and diversity. Additionally, daily political dynamics might tend to homogenize some particular political grouping to the extent that parliamentary majorities change, leading to the complete de-factorisation and marginalisation of constitutional courts, as happened with the constitutional courts and ordinary judiciaries of Hungary and Poland.⁷¹

Judicial Factors

The active role of constitutional justice stems from factors pertaining to constitutional adjudicators tied to the intellectual profile of the chief judge, of the several judges, and the motives, strategies, techniques, and tactics they use in determining constitutional cases and addressing controversies. The decisive role of the president of a constitutional court is illustrated by Israeli Chief Justice Ahron Barak, who spearheaded a so-called constitutional revolution in Israel, laying the doctrinal basis for the supremacy of Israel's basic laws. Similarly, respective chief justices challenged the authoritarian leaders of India and

gjk_ko_38_12_ang.pdf.

⁶⁹ For the limits on the exercise of this constituent power of the sovereign of Kosovo, including the context of the formation of the Special Court of Kosovo, cf. Hasani / Mjeku, International(ized) Constitutional Court.

⁷⁰ The Declaration was a *Grundnorm*. Cf. Hans Kelsen, *Pure Theory of Law*, New Jersey 2002/2009, 193–194, 198–205; Dren Doli / Fisnik Korenica, What about Kosovo's Constitution. Is There Anything Special? Discussing the *Grundnorm*, the Sovereignty, and the Consociational Model of Democracy, *Vienna Journal on International Constitutional Law* 5, no. 1 (2011), 49–70, 54–55, 69, DOI: 10.1515/icl-2011-0106 (contesting the Plan's supremacy).

⁷¹ Cf. articles discussing the return to authoritarianism and the destruction of constitutional justice in Hungary, Poland, and other countries with a tradition of authentic constitutional democracy: Nathan J. Brown / Julian G. Waller, Constitutional Courts and Political Uncertainty. Constitutional Ruptures and the Rule of Judges, *International Journal of Constitutional Law* 14, no. 4 (2016), 817–850, DOI: 10.1093/icon/mow060; Gábor Halmai, Unconstitutional Constitutional Amendments. Constitutional Courts as Guardians of the Constitution?, *Constellations* 19, no. 2 (2012), 182–203, DOI: 10.1111/j.1467-8675.2012.00688.x.

Pakistan.⁷² Another related factor is the constitutional court's desire to preserve and strengthen its legitimacy.

Constitutional adjudicators have often devised instruments to expand their participation in governance and assist in democratic processes. An example is the US Supreme Court's ruling to expand the right to *habeas corpus* of arrestees and detainees, acknowledging their right to challenge in federal courts the decisions of local and state courts. India's Supreme Court meanwhile liberalized the criteria for active legitimacy (or standing) to hear petitions by persons arrested or detained indefinitely.⁷³ Other courts have devised procedures to admit cases that affect their own legitimacy, for example the Ukrainian Supreme Court which, during an electoral dispute in 2005, set up a plenary hearing before the entire civil department instead of the standard three-court panel, and arranged for its live broadcast on national television to demonstrate its impartiality.⁷⁴

Finally, structural factors related to the judiciary include tactics of decision-making where a court may admit the unconstitutionality of an act or omission but at the same time deny the legal remedy sought by the party. In *Marbury v. Madison* (1803), the US Supreme Court established the judiciary's prerogative to exercise constitutional review of law, but declined to annul the act of appointment as sought by Marbury. In the *Bank Hamizrachi* case (1995), the Israeli Supreme Court assumed the power of constitutional control of law, but held that concerning the point at issue the Knesset had instituted proportional measures to limit the right to property, and the claimant was therefore denied relief.⁷⁵

Constitutional Courts as a Transformative Mechanism for the Ordinary Judiciary

In Kosovo, as in most constitutional democracies, Supreme Court judges favour classical interpretations of the law, mostly tending to ignore both the Constitution and the case-law of the CCK. Exceptions are made for when the CCK has declared unconstitutional a ruling of the Supreme Court and remanded the case, for in such cases the CCK provides clear instructions on how to correct the decision, including an order to keep the CCK informed of further actions to be taken by the ordinary judiciary. In that regard the jurisprudence of the CCK ensures the unification of Kosovo's constitutional law.

⁷² Kagan / Kapiszewski / Silverstein, *New Judicial Roles in Governance*, 20, 155.

⁷³ Kagan / Kapiszewski / Silverstein, *New Judicial Roles in Governance*, 156.

⁷⁴ Kagan / Kapiszewski / Silverstein, *New Judicial Roles in Governance*, 156–157.

⁷⁵ Kagan / Kapiszewski / Silverstein, *New Judicial Roles in Governance*, 157.

Individual complaints under article 113.7 of the Constitution, which make up 95 % of all cases, undoubtedly spurred the constitutionalization of Kosovo's legal order vis-à-vis its judiciary. Through the procedure, as in cases of incidental control, the CCK controls the final result of the judgments handed down by the ordinary judiciary, thereby helping to unify Kosovo's constitutional law and bridge the gap between the constitution and the country's actual laws.⁷⁶

Case-Law Illustration. The Court as a Guide to Consolidating Kosovo's Constitutional Identity

The CCK has had an indispensable role in strengthening the country's constitutional identity—an identity based on parliamentary consociational democracy, separation of powers, rule of law, and human and minority rights.

The Prizren Logo Case. Representing Cultural Diversity

This case concerned the cultural rights of non-majority communities in the municipality of Prizren.⁷⁷ The subject of constitutional control was the municipality's own charter. The deputy chairman of the municipal assembly argued that the charter's appearance on the municipality's logo—with its references to the history of the Albanian majority—undermined the equality of its communities and undervalued the ethnic, linguistic, religious, and other identities of the communities living in Kosovo.⁷⁸ The CCK agreed, and Prizren's logo now reflects the unique identities of all its communities.⁷⁹

Agreements with Serbia. Review of Treaties and Constitutional Order

Following Kosovo's declaration of independence in 2008 and its recognition by most sovereign states, the international community called on Kosovo and

⁷⁶ Enver Hasani / Dren Doli / Fisnik Korenica, Individual Complaint Mechanism as a Means to Protecting Fundamental Human Rights and Freedoms. The Case of the Constitutional Court of Kosovo, in: Wolfgang Benedek et al., eds, *European Yearbook of Human Rights* 2012, Vienna 2012, 367–383. Authors discuss the individual complaint procedure in Kosovo, an effective means to protect human rights.

⁷⁷ CCK, Judgment, Case KO 01/09, Cemailj Kurtisi vs. the Municipal Assembly of Prizren, 18 March 2010, https://gjk-ks.org/wp-content/uploads/vendimet/ko_01_09_Ven_ang.pdf.

⁷⁸ CCK, Judgement, Case KO 01/09, paras. 12, 15–17.

⁷⁹ By the Order of 21 June 2010, the Court extended the deadline set by the judgment in Case KI 01/09. The municipality of Prizren complied with the judgment in March 2011 when it changed the logo. Municipality of Prizren, Decision Nr. 01/011-3581. For comments, cf. Enver Hasani, Key Decisions that Made Constitutional History in Kosovo, in: *Constitutional Court of Albania*, ed, 20th Anniversary of the Constitutional Court of Albania, Tirana, 7–8 June 2012, 206–208.

Serbia to begin a dialogue to resolve outstanding disagreements between the two countries.

A number of accords were reached in the meantime, with the most important being the 'first agreement of principles governing the normalization of relations', signed in April 2013 and ratified the following June by the Kosovo Assembly.⁸⁰ I shall refer to it here as 'the First Agreement'.

A third of its provisions deal in both broad and concrete terms with the establishment of an association of ethnic-Serb majority municipalities hereinafter called 'the Serb Association'. To bring that international obligation to life, Kosovo and Serbia signed the Second Agreement in 2015, but that instrument became the subject of a CCK judgment which held that many of its provisions were unconstitutional because it provided for a legal entity with rights and obligations at central and local government levels such that could severely undermine the fundamental principles of the constitutional order.⁸¹ The CCK judgment stated in its operative section that the Serb Association is a constitutional and international obligation placed on the Republic of Kosovo based on the First Agreement, signed and ratified in 2013.⁸²

The First Agreement is an international treaty that, according to article 18.1 of the Constitution, must be ratified by a two-thirds majority of Assembly members. Article 18.1 agreements are not subject to constitutional control by the Court, in line with the nature of constitutional courts as propounded by Kelsen, who as far back as in 1929⁸³ had elaborated a theory against any authorisation of such courts to review duly ratified international agreements. Kelsen's view has become the general standard today and the CCK applied it in its judgment on the First Agreement.⁸⁴

Through its 2013 and 2015 judgments on the two above-noted agreements with Serbia, the CCK participated in governance, supplying the executive with

⁸⁰ Law 04/L-199 on Ratification of First Agreement of Principles Governing the Normalization of Relations Between the Republic of Kosovo and the Republic of Serbia, 17 September 2013.

⁸¹ CCK, Judgment, Case KO 130/15, 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', 23 December 2015, https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf.

⁸² CCK, Case KO 130/15, Disposition, § II.

⁸³ Kelsen stated that judicial review of international treaties and agreements would hinder international cooperation between states and infringe upon the right of states to conduct their foreign affairs freely. Olivera Vučić, *Austrijsko ustavno sudstvo. Čuvár federacije i ustava*, PhD Thesis, University of Belgrade 1995, 201, footnote 269; Maja Nastić, *Constitutional Review of International Agreements. Comparative Law Perspective*, *Facta Universitatis* 13, no. 1 (2015), 59–72, 60.

⁸⁴ CCK, Judgment, Case KO 95/13, Constitutional Review of the Law, No. 04/L-199, 9 September 2013, https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_95_13_ang.pdf.

a roadmap towards the conclusion of international agreements, their legal nature, and the role and position of the Assembly of Kosovo in making agreements part of the domestic legal order.

Raiffeisen Bank. Protecting Consumers from Usury

The CCK solved this case, as it does in more than 90 % of cases, by upholding as correct the original ruling of the Supreme Court.⁸⁵

Declared ‘manifestly ill-founded and thus inadmissible’⁸⁶ the case was referred to the CCK by a commercial bank, known as *Raiffeisen*, that had lost a civil case at all stages of the Kosovar legal process. The bank then asked the CCK to overturn the ruling of the Supreme Court, which held that penalty interest for failure to pay the principal could not be contracted for monetary payments. For such payments, penalty interest has long been determined by law, not by contract between the parties, which would constitute unjust enrichment, as held by all instances of the ordinary judiciary.⁸⁷

The legal effect of the *Raiffeisen* ruling was colossal for it simply upheld a thoroughly constitutional and lawful decision of all other courts up to and including the Supreme Court, which had disallowed the conversion of late-payment interest into penalty interest—in other words, the courts had refused to condone legalized usury. The decision instituted discipline and ethics among financial institutions which had previously been accustomed to exploit their clients’ unfavourable position for unjust enrichment. At the same time, the Constitutional Court’s judgement helped cement a relationship based on mutual trust between the CCK and the Supreme Court, for the ruling confirmed that, in constitutional terms there should be—and clearly is—strict division of responsibilities between the two bodies.

Conclusion

This paper has shown that constitutional courts have very significantly affected the work of legislators and that Kosovo is no exception. That is in fact the longest-established aspect of constitutional justice and is generally known as the ‘negative legislator’ role of constitutional courts, which usually remain within the confines of their classical duty. History shows, however, that out of necessity and political pragmatism, constitutional courts sometimes exceed their competence to act not only as ‘positive legislators’ but also as creative

⁸⁵ CCK, Resolution on Inadmissibility, Case KI 118/14, Constitutional Review of Judgment E. Rev. no. 24/2013 of the Supreme Court of Kosovo, 9 March 2015, https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ki_118_14_ang.pdf.

⁸⁶ CCK, Resolution on Inadmissibility, Case KI 118/14, para. 89.

⁸⁷ CCK, Resolution on Inadmissibility, Case KI 118/14, paras. 55–84.

policymakers involved in the governance of society. That too has been observed in the case-law from Kosovo surveyed in this paper.

The impact of legislators is part and parcel of constitutional justice when legislation and other acts are reviewed in the abstract. Along with abstract control, constitutional courts enact constitutions and clarify the constitutional law of the country. Such enactment and its corollary, the clarification of constitutional law, stretch beyond abstract control covering other competences of constitutional courts. Cases mentioned in this paper, including those relating to jurisprudence in Kosovo, show that unequivocally.

Constitutional courts may influence lawmakers directly, in the role of 'negative legislator', or indirectly, by self-limitation or corrective revision. In the latter case, legislators anticipate courts' policy preferences and act to prevent a finding of unconstitutionality. The case of *Krasniqi v. RTK* shows us legislators acting prior to final court judgment, while abstract-control cases cited in this paper show that the CCK has generally remained within the confines of its role as negative legislator without much recourse to substantial activism.

The interpretation and clarification of national constitutional law goes beyond review of legislation for it is part of a process known as 'constitutionalization of the legal order'. The term signifies that the constitution is a direct source of law, that constitutional courts serve as super-courts of appeal in constitutional matters, that constitutional decision-making is a model for argumentation not only for the legislature but for the ordinary judiciary and other branches of public power particularly concerning constitutional rights and the scope of their application.

Here, Kosovo's constitutionalization logic is simple, since Article 53 of the Constitution clearly recognizes the case-law of the European Court in Strasbourg as a standard for interpreting human rights. Additionally, thanks to the Constitutional Court's broad jurisdiction constitutionalization has found solid ground in Kosovo. Addressing both abstract and concrete questions of the control of constitutionality and individual complaints, the Kosovo tribunal is much like its counterparts in Germany, Spain, and in certain former socialist countries in Eastern Europe where courts have taken a substantial part in governance.

CORRESPONDING AUTHOR

Enver Hasani Hasan Prishtina University of Prishtina, Faculty of Law, Agim Ramadani Str. P.N., 10000 Prishtina, Kosovo. Email: enver.hasani@uni-pr.edu