

## Judicial review and political (in)stability in Kosovo

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### Abstract

*Constitutional Court decisions are crucial for a sustainable and democratic state institution functions as well as a country's political stability. This article seeks to provide insights into the Constitutional Courts process, the role it plays in providing political stability under normal circumstances, when it is overburdened by a large case load and how that often does not provide satisfactory results for a variety of Kosovo stakeholders. The article also seeks to describe, discuss and analyse the development of Kosovo's judicial review process, important court composition issues and the legal basis for its activities and procedures, and to discuss the obstacles and political influences in several court decisions which caused ambiguity, political tensions and increased distrust in Kosovo's political systems and institutions including the constitutional court.*

**Keywords:** constitution, court, decisions, political tensions, constitutional court decisions

### Introduction

Various systems of judicial reviews could be mentioned and practiced in the comparison theory. All post-communist countries in CEE have constitutional courts. For example, Poland's Constitutional Tribunal and round table talks were established. Some were during their democratic transition. Ukraine and Latvia constitutional courts were established only in 1996 (Sadurski, 2009). Kosovo's Constitutional Court founded in 2009 will be explained further in the text.

The first half of XX century's idea of constitutional justice was not realized in Europe apart from cases of Austria and Czechoslovakia. The famous jurist Hans Kelsen first endorsed the creation of the constitutional court (Omari, 2011, pp. 120-121).

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Kelsen noted that the creation of Constitutional Courts charged with constitutionality of laws controls is in accordance with the theory of division of powers. As Schwartz (1992, p. 741) puts it,

“Before World War II, few European States had constitutional courts, and virtually none exercised any significant judicial review over legislation. After 1945 all that changed. West Germany, Italy, Austria, Cyprus, Turkey, Yugoslavia, Greece, Spain, Portugal and even France...created tribunals with power to annul legislative enactments inconsistent with constitutional requirements. Many of these courts have become significant—even powerful—actors.” Henckaerts and Van der Jeught (1998) agree, asserting that courts in both Western and Eastern Europe “have played an active role in ensuring the supremacy of constitutional principles” (Epstein *et al.*, 2000).

The case *Marbury vs. Madison*<sup>1</sup> first established the judicial review. This case became a precedent on which the system of judicial review was based in many countries including Canada, Australia, New Zealand and also in many European countries. In the United States of America, the control on constitutionality (judicial review) is done by the regular courts with the top position held by the Supreme Court.

### **1. Systems of judicial review (European and British)**

There were supporters as well as opponents of court control over constitutionality and not all countries worldwide have established constitutional courts. Great Britain, widely known as one of the most advanced democracies in the world, has no constitutional court. Great Britain believes the best control is done by

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<sup>1</sup> William Marbury was a Federalist partisan whose name would have long since disappeared from U.S. history if it were not for a piece of paper he didn't receive on the night of March 3, 1801. Just before leaving office, President John Adams appointed fifty-eight new federal judges. Secretary of State John Marshall worked furiously into the night to get formal appointment papers delivered but even with the help of his brother was unable to deliver four commissions. The four became known as the “midnight judges” and William Marbury was among them. When on the morning of March 4 Thomas Jefferson took the oath of office of president, he was clearly angered by the efforts on the Federalists to pack the federal bench. His secretary of state, James Madison, therefore, refused to deliver the appointment papers. Marbury filed suit with every expectation that he would receive a favourable decision. After all, the John Marshall who had been secretary of state was now the chief justice of the United States. Moreover, Marshall was known as a staunch Federalist and a leading opponent of the dangerous radical Thomas Jefferson. Alas, for William Marbury, he never became a judge. Marshall's opinion skilfully finessed the politics of the case by asserting a critical principle: federal courts have the authority to declare laws passed by Congress as unconstitutional (see more at: David W. Neubaumer, *Judicial Process*, Second edition, Harcourt Brace College Publishers, 1997 p. 52).

the parliament. Other countries consider that the Constitutional Court are needed for the review of legislation if it is in accordance with the constitution. “Parliament is supreme and court may strike down a law that it passes. As the second Earl of Pembroke is supposed to have said, ‘A parliament can do anything but make a man woman and a woman a man’”. All that prevents Parliament from acting contrary to the (unwritten) constitution of Britain are the consciences of its members and the opinion of the citizens (Wilson and Dilulio, 1998, p. 52).

Among the countries that practice the court review of legislation there are noted various forms of defending constitutionality and legality, as follows: protection of constitutionality by the representative organs; protection of the constitutionality by the regular courts; protection of constitutionality by a special constitutional organ; and protection of constitutionality by the constitutional courts.

Nearly all issues raised in the court, by nature are political to a certain extent. However, this doesn’t mean that the constitutional courts must take political decision. In practice, concrete cases are sometimes difficult to assess as to what is political consequence according to the addressee’s provisions. This derives from the nature of constitution as the legal-political act based on what the decisions are made, and that represents peculiar “linkage between politics and law” (Vrban, 2011, p. 419)

Opinions are divided about which system should be supported. But one thing is very clear regarding the countries in transition or in the countries of democratic consolidation: a period of democratic consolidation cannot occur without constitutional courts, as Tom Ginsburg says:

“In the process of democratic consolidation, constitutional courts can play various roles (1) they could be agents of the past who contest democratic processes by making efforts to save the politics of old authoritarian regime which are leaving, (2) could be agents of the future, who actively take part in the transformation of political order and encourage democratic consolidation, (3) constitutional courts in the procedures of democratic consolidation can take the passive role of observer, who neither push nor oppose the democratic consolidation” (Ginsburg, 2012).

There are many followers that favor the constitutionality of court control including Kelsen, Djakometi, and Bruner, who underline numerous arguments that can be summarized into two main principles: principle of hierarchy and the principle of legality (Blagojevic, 1971, p. 54).

According to the principle of legality the laws are promulgated by the parliament and they are formally and materially in accordance with the constitution. When this does not apply, a court control is needed to create sanctions to prevent this. Proponents of hierarchy also find that a mechanism to ensure the accordance of the lower acts with the upper ones is needed and that mechanism should be a system of court control.

Judicial review can be characterized as the rule of law in action and Judicial review thus defines our constitutional climate. It plays a key role in ensuring that the executive acts only according to law. Without it, we are closer to an authoritarian or even totalitarian state. With it, we live under the rule of law (Street, 2013, p. 12).

In the types of judicial review procedures, there could also be various forms of review including abstract control, incidental control, preventive control, the control of international agreements, etc. In this regard, Kosovo as a new state has managed to create a Constitutional Court, which will be presented below.

## **2. Research and discussion**

The literature on the issues covered by the research may be divided into two groups: the writings of foreign authors and the writings of domestic authors. In addition to this, legal acts as: constitutions, laws and the court decisions/judgments made the finalization of the research possible. Regarding the foreign authors it was inevitable to consult the work of Sadurski and Ginsburg who have produced opinions regarding the judicial review important studies for many years. Some authors and their works from Serbia and Croatia were consulted, since these countries derive from the process of dissolution of former Yugoslavia, whereas the Kosovo Constitution and several laws along with the court decision made the process of the research easier and led towards its finalization. The work of Arsim Bajrami, who took part in the process of drafting Kosovo Constitution is included. Sokol Sadushi, Luan Omari, from the Albanian resources made this research possible and helped to achieve the expected results. Indeed, the work of these authors gave good guidance for further exploration, a better understanding and explains the issues covered with the paper.

For the needs of this paper the combined methodology is used. This was followed by the methods: method of systemic analysis which is used for analysis of a variety of legal and historic resources (jurisdiction, institutional politics, statutes, conventions, publications and other research studies) and to draw conclusions, to generalize summarize them; method of logical analysis is used to draw conclusions based on the rules of logic as, i.e. giving interpretation of legal acts based on which the article is made up and interpretation of judgments provided by the Constitutional Court; method of teleological analysis which is used to interpret legal norms and resources aiming the implementation of goals deriving from the constitution and other legal resources; method of comparative analysis which is used to compare attitudes of authors, opinions and attitudes of states and the practical examples giving to this also some historical comparison; method of linguistic analysis which is used for the interpretation of legal terms; and method of theory analysis which is used for interpretation of legal resources, i.e. to explain the content of review, constitution, etc.

## 2.1. The constitutional court of Kosovo

Even when Kosovo was part of Yugoslavia, it had its own constitutional court, which indeed is quite different compared to the current one. A description of the process of development of this court is presented in the web page of the constitutional court. Based on this, historically, Kosovo as a federal unit of the former Yugoslav Federation exercised constitutional control through its Constitutional Court. Although, the first Constitutional Court in Federal Yugoslavia was established as early as in 1963, due to political and social situation the constitutional control in Kosovo began to be exercised only in 1969<sup>2</sup>.

The Kosovo position within the constitutional system of former Yugoslavia went through several phases and thus the system of courts and the control of constitutionality changed accordingly. Based on the Constitutional Law of the Socialist Autonomous Province of Kosovo (SAPK) initially the Constitutional branch of the Judiciary within the Supreme Court of Kosovo was established. The extension of provincial legislative functions following the constitutional amendments of 1971 also influenced a broader organization in the protection of constitutionality and legality. In this regard, the amendment X of the Constitutional Law of SAPK established the Kosovo Constitutional Court as an independent authority for protection of constitutionality and legality. This had the same position and functions as other constitutional courts of republics in the former Yugoslav Federation.

During the process of the dissolution of the Yugoslav federation, Kosovo with its governing institutions positioned itself towards its future opposing the actions of the Serbian regime which were undertaken at that time. It is widely known that the Yugoslavia's devolution process, initiated by Serbia led to a war and atrocities not seen in Europe since the World War II.

With the efforts of building its future, Kosovo Assembly adopted a constitution which has to be known as the second constitution of Kosovo. This is known as the Kaçanik Constitution. The Constitution of Kaçanik of 1990, also provided for the establishment of the Constitutional Court as guarantor and protector of constitutionality and legality, which due to the abolishment of the Kosovo autonomy and establishment of the Serbian rule over Kosovo, was never constituted.

After NATO air strike attacks against military forces of Serbia (Federal Republic of Yugoslavia - FRY), an agreement between FRY and NATO was reached and signed in Kumanovo (a town in the North Macedonia). This agreement made the UN Security Council adopt Resolution 1244, that put Kosovo under the international civil administration – known as UNMIK (UN mission in Kosovo).

After the end of war in 1999 Kosovo was put under the UN administration. The Constitutional Framework for Provisional Self Government of 15 May 2001

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<sup>2</sup> Available at <https://gjk-ks.org/en/the-constitutional-court/history>.

provided for the establishment of the so-called Special Panel of the Supreme Court on matters related to the Constitutional Framework. This institution was never established and never became operational. The Constitutional Framework determined only the functions of this panel and the entities that may request an initiation of procedure, yet not defining the number of judges or the rules of procedure of the Panel.

During a period of time, Kosovo passed through various processes of monitoring measured achievements of Kosovo provisional institutions, which opened doors for the negotiations for the final status between Kosovo and Serbia after the creation of the Independent State of Kosovo. In February 2008, the Kosovo Assembly proclaimed the Declaration of Independence which has been recognized by more than 100 states of the world. The Constitutional court was established based on the Kosovo new Constitution adopted by the Kosovo Assembly on April 9, 2008. This was the result of the new political developments in the country and the need to establish key institutions of the Republic of Kosovo. In May 2008, the President of the Republic of Kosovo, Prof. Dr. Fatmir Sejdiu and the Prime Minister, Mr. Hashim Thaçi, established the Working Group on the Establishment of the Constitutional Court.

This Working Group was authorized to prepare the legal framework needed for the functioning of the Court, a 2009 – 2011 budget, to design the organizational structure of the Constitutional Court, as well as create a plan for location and premises of the Constitutional Court of Kosovo. The Working Group reflected a comprehensive representation of the institutions of the Republic of Kosovo (Government and Office of the President), the international organizations (USAID, ICO, Council of Europe) and both local and international legal experts. During May – December 2008, the Working Group made valuable contributions on all duties assigned to them<sup>3</sup>.

The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution. (Kosovo Constitution, art.112, par.2) Chapter eight, from article 112 to article 118 provide detailed constitutional court issues, the procedure to electing judges and subjects that raise issues of the court, etc. In addition, the Law on the Constitutional Court<sup>4</sup> of the Republic of Kosovo provides more details on the organization, composition, procedures, etc., of the constitutional court.

The intention of independence could be taken as follows:

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<sup>3</sup> Available at the <https://gjk-ks.org/en/the-constitutional-court/history/>.

<sup>4</sup> Law on the Constitutional Court of the Republic of Kosovo, available at: [https://www.confueconstco.org/en/congress/congress-XVI/Law\\_of\\_the\\_Constitutional\\_Court\\_of\\_Republic\\_of\\_Kosovo\\_-\\_E.pdf](https://www.confueconstco.org/en/congress/congress-XVI/Law_of_the_Constitutional_Court_of_Republic_of_Kosovo_-_E.pdf).

Notwithstanding provisions of other laws, the Constitutional Court shall prepare its annual budget proposal and forward the said budget proposal to the Assembly of the Republic of Kosovo for adoption. Neither the Government nor any other budget organization shall be entitled to amend or otherwise modify or influence the budget proposal prepared by the Constitutional Court. The budget proposed by the Constitutional Court shall be included in its entirety in the Republic of Kosovo Consolidated Budget submitted to the Kosovo Republic Assembly for adoption (Law on Constitutional Court, art.14, par.2).

This provision formally shows the clear intention of having the constitutional court to be an independent institution, as it should actually be. However, many debates exist if this institution's decisions were independent and if the current composition is made up of independent judges.

The Kosovo Constitutional Court exercises abstract control of constitutionality, preventive control of constitutionality, control of international agreements and incidental referrals. From this, it is seen that Kosovo judicial review system belongs to common European systems which exist for basically three reasons: a) from the concept that exist in these countries regarding the division of powers; b) for the reason that precedents are not applied and c) because the judges of these courts are not usual judges, because if they are usual then they will not be suitable for the judicial review (Omari and Anastasi, 2017, p. 383). It [the Kosovo Constitutional Court] does abstract control of the constitutionality in the cases of verification of the decrees of the President and the Prime-minister to be in accordance with the constitution, as well as control over the government regulations, etc. The constitutional court, also based on the article 113 of the Constitution, exercises the preventive control of any law or decision adopted by the Kosovo Assembly on the content and on the procedure of adopting these laws. The constitutional court is competent to review the constitutionality of the international agreements, ratified by the Assembly. This court reviews laws based on the referrals from the regular courts and it also reviews the conflict of competences between the Assembly, the President and the Government, etc (Bajrami, 2014, pp. 29-54).

## **2.2. Procedure on electing judges and their mandate**

The legal basis of election of the judges is the Constitution and the Law on Constitutional Court of Kosovo. According to the Law on Constitutional Court, a Commission reviews the candidate's applications and exercises the entire procedure up to the voting in the Assembly on electing judges. This special Commission is composed of the following: the speaker of the Assembly or their designee; the heads of each parliamentary group; the President of the Kosovo Judicial Council; the Kosovo Ombudsperson; a representative of the Consultative Council for

communities and the representative of Constitutional Court (the Law on Constitutional Court). The Commission makes the short list of candidates which are appointed by and take the oath before the President. The mandate of a judge is 9 years but they can be dismissed by the President on the proposal of 2/3 of the Assembly. The mandate for the first composition of the constitutional court was different: two judges with a mandate of two-three years, two others with a 6 years mandate; two other judges representing minorities with 9 years' mandates. The first court mandate also had international judges. (Bajrami and Muçaj, 2018, p. 473)

When the first composition of the constitutional court was made, it was a consensus that this court was going to be politically independent and impartial. However, when the court reviewed laws and decrees, etc., its independence and impartiality began to be polarized. This is not something that has happened only in Kosovo and the long-term trend seems to be toward increased polarization as all countries appear to undergo cycles of agreement and discord (Ginsburg and Garoupa, 2011). In this regard some decisions of the Kosovo Constitutional Court were more debated and polarized and some went beyond the polarization.

Polarization derived from the composition of the court, regarding the integrity of judges, their independence and their qualities. This is not guaranteed automatically within the constitutional provisions. The process of electing judges was not always open and transparent. Judges may have formally fulfilled the conditions to be elected but their impartiality in some cases was a matter of question. For example, judge Kadri Kryeziu was involved in an election campaign of the Kosovo Democratic Party and at the same time he was the judge of the constitutional court. Even prior to being elected for the position of judge, he had held high political positions for two political parties. Similarly, the other judge, Selvete Gerxhaliu, was a candidate for the Democratic Leagues of Kosovo in the parliamentary elections. Two other judges served as diplomats before working for the constitutional court. Another judge was reported by media to be under arrest in Serbia from 2006 to 2009 as a part of the process known as "Custom Mafia" and was sentenced to 10 years in jail. Information about their background can easily be found through a simple google search. Taking this into the consideration, many questions can be rightfully raised regarding their impartiality, their independence and their professional qualifications. In fact, an endless academic and political debate develops in Kosovo regarding these issues, in which the author of this paper actively participates. However, apart from the debate and objection against some constitutional court decisions, finally all of them are respected by the stakeholders and the society as well. The following decisions are debated and broadly discussed but at the end they have impacted Kosovo developments.



### 2.3. Two decisions with a big impact in Kosovo developments

The Kosovo President has the rights to issue decrees in accordance with the Constitution, and based on this, “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” (Kosovo Constitution, art. 95).

In October 06, 2019 in Kosovo were held the elections, won by the political party Lëvizja Vetëvendosje. The winner is the party or coalition that leads with the number of seats in the composition of Assembly. Thus, Lëvizja Vetëvendosje won 29 seats in the Kosovo Assembly, followed by the Democratic League of Kosovo which won 28 seats. These two political parties very successfully played the game of opposition in the previous Assembly composition. During the 2019 election campaign, they proclaimed that whoever gets the biggest number of seats (being the first), will call the other (the second) to form the coalition. Indeed, polls predicted that these two political parties would be the winners and this happened. Even though these two parties claimed to be forming a coalition, it took months for the government to be created. This government had the shortest mandate in the history of elections in the Republic of Kosovo. Led by Albin Kurti, it only lasted fifty days. Why it took so long and why this government had such a very short life, is not something explained and analysed in the paper.

Legally it was created based on the Constitution, based on the Law of Elections and based on the other parts of the positive legislation.

This analysis deals with the phase after this government was overthrown, giving some background of the main movements and the situation of Kosovo. After the motion of no confidence vote, during the Covid 19 Pandemic lockdown, the governing partner the Democratic League of Kosovo and all parties present in the Assembly voted pro motion in favour of the no confidence vote and thus Kurti’s Government was overthrown. Everything to this end, it could be said, was legal. But, for sure, the legitimacy is to be heavily questioned.

Afterwards, the first to act was the President of the Republic based on his constitutional authority. The President determined his role is defined per constitutional provisions and as per a 2014 decision of the Constitutional Court regarding who contains the largest parliamentary group in the Assembly. According to that Constitutional Court decision, “The President of the Republic under Article 95, paragraph 1, of the Constitution proposes to the Assembly the candidate for Prime Minister nominated by the political party or coalition that has the highest number of seats in the Assembly” (Constitutional Court JUDGMENT in Case No. K0103/14)<sup>5</sup> According to that Constitutional Court decision, “The President of the

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<sup>5</sup> All Constitutional Court Decisions can be accessed, by simply entering into the web page of Constitutional Court, and then look for decisions. You may enter into this by simply filling

Republic under Article 95, paragraph 1, of the Constitution proposes to the Assembly the candidate for Prime Minister, nominated by the party or coalition that has the highest number of seats in the Assembly” (Constitutional Court Judgement in Case No.K0103/14). Respecting this norm created by the Constitutional Court, the president had to act from the beginning referring to the article 95 of the Constitution and issue a decree by which, “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” (Kosovo Constitution, Art. 95). But to make it clearer, the description of the entire provision of article 95 of the Constitution is important to be added here. Hence, this article goes:

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;
2. The candidate for Prime Minister, not later than fifteen (15) days from appointment, presents the composition of the Government to the Assembly and asks for Assembly approval;
3. The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo;
4. 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;
5. If the Prime Minister resigns or for any other reason the post becomes vacant, the Government ceases and the President of the Republic of Kosovo appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government;
6. After being elected, members of the Government shall take an Oath before the Assembly. The text of the Oath will be provided by law.

From what was mentioned above, on 30 March 2020, the President sent special letters to the presidents of all political entities represented in the Assembly,

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in the number of case and the decision/judgement you are looking for will be displayed. After this you can chose the language (English, Albanian or Serbian). This is the best and easiest way to access all decisions you need. Therefore, in the references it is not mentioned the date of accessing, since all these resources are located in the files of decisions and the date of accessing doesn't change the number of decisions, etc. They remain to be located at the same place, and they do not change if searched by number of cases.

inviting them to attend in a consultative meeting in order to discuss further steps regarding the situation. This was followed by the separate consultative meetings with the presidents of all political entities represented in the Assembly, which were held on April 1, 2020.

On the same date, responding to the letter of the President with a letter where he stressed out that: “The Constitution, as well as your previous practice in 2017, makes it clear that, after the successful motion of no confidence, the only way forward is to dissolve the Assembly. [...], in accordance with Article 82.2 of the Constitution, and the announcement of the early elections”. He added that “the only issue I will discuss with you is when will be the most appropriate time for the dissolution of the Assembly, taking into account in particular the state of emergency of public health that the Republic of Kosovo is currently facing.

After this, a series of letters were sent from the President to the Prime-minister providing opposing arguments of the President regarding one issue: the nomination of the candidate for the Prime-minister. Article 84, paragraph 4 issues a decree by the President to nominate a Prime-minister candidate after receiving a proposal from the political party which has the biggest number of seats in the Assembly, i.e. the party that won the biggest number of seats in the Assembly during the elections. Also, according to the Constitution provisions, the President determined his role is defined per constitutional provisions and per a 2014 decision of the Constitutional Court regarding who contains the largest parliamentary group in the Assembly. According to that Constitutional Court decision, The President of the Republic under Article 95, paragraph 1 of the Constitution, proposes to the Assembly the candidate for Prime-minister nominated by the political party or coalition that has the highest number of seats in Assembly” (Constitutional Court judgement in the case N0.KO103/14) had to be limited with two provisions: to wait for the proposal from the first political party and then to find an answer about the deadliness on how long he should wait for the proposal from the first political party. The constitution had no deadliness about this, whereas regarding the candidate for the Prime-minister, he has to follow the rule that goes: The President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. (Art. 95, Par. 5, Kosovo Constitution) Being aware that he has to get the name from the first political party and seeing that the proposal from that party was not coming, at least, not quickly, the President continued to with a kind of soft political pressure to push LVV propose their candidate. Thus, in the other letter sent to Mr. Kurti, he continues:

“...despite the requests I sent to you on 2 April 2020 (Ref. 354), on 10 April 2020 (Ref. 354/1), on 15 April 2020 (Ref. 370/1) and on 17 April 2020 (Ref: 370/3), you have not proposed that candidate for Prime Minister... I regret to conclude that with your actions you have not exercised your right to propose a new candidate to form the Government, in accordance with the Decision of the Central Election Commission [...] for the Assembly [...]. I have to remind

you that in accordance with the constitutional mandate of the President of the Republic of Kosovo, it is my responsibility to maintain the stability of the country and to guarantee the democratic functioning of the country's institutions. Therefore, in accordance with Article 95 of the Constitution and the Judgment of the Constitutional Court in case no. KO 103/14<sup>6</sup> I will hold joint consultations with all leaders of parliamentary political entities about further steps". (Letter, Prot. No. 380).<sup>7</sup>

After consultations were held with the other leaders of the parliamentary political entities, he decided to send a letter to the leader of the party receiving the second highest number of votes (Democratic League of Kosovo) where he asked as follows:..." please propose the potential candidate for Prime Minister for the formation of the Government of the Republic of Kosovo, who should ensure that he will have the right number of votes in the Assembly of Kosovo and pledge that he will establish a stable and inclusive Government". After the candidate from this party was proposed, the President issued the decree stated to have been issued based on:

- (i) paragraphs (4) and (14) of Article 84 [Competencies of the President] of the Constitution and Article 95 [Election of the Government] of the Constitution;
- (ii) Article 6 of Law No. 03/L-094 on the President of the Republic of Kosovo<sup>8</sup>;
- (iii) Judgment of the Constitutional Court in case KO103/14 Applicant the President of the Republic of Kosovo, Judgment of 1 July 2014;
- (iv) in the course of the proposal of the LDK, accepted by the Office of the President on 30 April 2020.

This imposes us to have a look on what these provisions actually say. Paragraph 4 says: it issues decrees in accordance with this Constitution, and nothing to be contested on this clear provision; paragraph 14 says that the President appoints the candidate for Prime Minister for the establishment of the Government after the proposal by the political party or coalition holding the majority in the Assembly; article 6 of the Law on the Presidency says: the competences of the President of the Republic shall exercise competences provided for by the Constitution of the Republic of Kosovo<sup>9</sup> and other laws in force.

It appears that the President has tried to create legal basis for issuing the decree but these citations do not mention the deadline that the first party has to meet. There is also nothing to be justified as per request that he has to follow the same rule if/when the second candidate is to be nominated. And the second candidate had to

<sup>6</sup> Kosovo Constitutional Court Judgment KO 103/14, <https://gjk-ks.org/vendimet/>.

<sup>7</sup> Letter of President sent to Albin Kurti, date: April 22,2020, Prot.Nr.380.

<sup>8</sup> Law on the President of The Republic of Kosovo, LAW No. 03/L-094, available at: [https://president-ksgov.net/repository/docs/LAW\\_No\\_\\_03L\\_094\\_ON\\_THE\\_PRESIDENT\\_OF\\_THE\\_REPUBLIC\\_OF\\_KOSOVO.pdf](https://president-ksgov.net/repository/docs/LAW_No__03L_094_ON_THE_PRESIDENT_OF_THE_REPUBLIC_OF_KOSOVO.pdf).

<sup>9</sup> The Constitution of the Republic of Kosovo, available at: <http://www.kryeministri-ks.net/repository/docs/ConstitutionIKosovo.pdf>.

be, according to this, from the first political party. Whereas the first political party [Lëvizja Vetëvendosje] did not, at least not explicitly refused the call of the President to propose the second candidate. This was more a political action undertaken by the President together with other political parties to avoid new elections. This happened because if the elections were to be held as the result of the overthrow of the government at the peak of pandemic, then it was clear that LVV would have won the elections with the higher percentage.<sup>10</sup> The President wanted to finish this job by creating the new government by all means. He went even further with this. One night before the session of the Assembly had to convene to vote on the new government, the President, accompanied by the former Prime-minister Ramush Haradinaj visited an MP after the midnight at his house to “convince him” to vote pro the new government.<sup>11</sup>

The new government was voted whereas, Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo raised the case before the constitutional court – fort the Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020. Constitutional court accepted the request for the constitutional review and even issued temporary measures, until the final judgment was to be delivered.

The issue to be reviewed, clearly had to be a contest more of a political character. If you judge an issue connected with politics it doesn't mean that it should be judged politically (Omari, 2011). It is a big question though how judges are not going to judge politically in the new democracies. Namely, in the still new, not enough consolidated democracies, the democratic procedures for electing judges of constitutional courts are politicized and the legitimacy of the judicial review function is even more undermined (Simovic, 2016). As long as courts are founded as they are now, it will always be difficult to make a very clear distinction of judicial or political, because, they (the courts) occupy their own ‘constitutional’ space, which is neither clearly ‘judicial’ nor ‘political’ (Sweet, 2001). And in politics, support for judicial

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<sup>10</sup> As the coincidence at the time this paper is being finished, LVV won elections, with the highest number of seats won by any political party in the history of Kosovo (note by the author).

<sup>11</sup> MP Haxhi Shala issued statement by which he was going to vote against. His vote seemed to be crucial on ensuring the number of needed votes for election of the government. Admitting this, Haxhi Shala said: “they came to me as two friends of mine, as two co-fighters. We talked that night as they said that there were ensured only 60 votes and therefore you have to either support other side...at the moment they said they had only 60 votes (61 one were needed) I said to them let's move to other issues and have tea...you have my vote”. (<https://kallxo.com/lajm/vota-e-arte-haxhi-shala-thote-se-thaci-dhe-haradinaj-i-shkuan-se-bashku-ne-shtepi-pas-mesnates/>). Later on, the son of Mr.Shala was nominated to be Kosovo consul general in Prague, which was debated in media, as a reward for the government vote (one of the forms of captured state). The decision for this nomination was abolished then by acting President, Vjosa Osmani.

review is sometimes intensely embroiled in support for particular decisions (Waldron, 2006, p. 6).

What did the court do with this case? Did it act and judge politically? What is the composition of the court and who are the judges? Do they interpret and judge independently? Is this the case where the court will play its role by giving an opinion about the constitutionality of the decree or it is the court to come up with a cassation judgement?

The Court's, decision (judgement) consisted of 580 paragraphs-items and 162b pages issued in the form of a judgement where in the third paragraph of the disposal stated:

The court decides to hold, by majority, that Decree [No. 24/2020]<sup>12</sup> of 30 April 2020 of the President of the Republic of Kosovo, by which „Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo a candidate for Prime Minister to form the Government of the Republic of Kosovo”, is in compliance with paragraph (14) of Article 84 [Competencies of the President] in conjunction with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo”.

This part of the disposal is in the form of an opinion, because the Court declares that the decree follows the constitution. Reading the entire text carefully, one can see that the court has tried to engage many possible arguments and compare other constitutions and legislations from many countries of the world, including the opinion of the Venice Commission. The nature of this court decisions doesn't belong to the following: “According to their nature and effects, a difference between decisions which confirm unconstitutionality (by which it is verified that the act is unconstitutional and its application is refused whereas it still remains in force) and the cassation decision by which unconstitutional and unlawful acts are abolished and canceled” (Veljkovic, 1988, pp. 125-127).

Once you think about this, it becomes difficult to say whether this judgement provides an opinion or is of the type to be considered a cassation. In the judgement the court describes the entire process from the moment it was brought until the decision was taken. It also describes the entire procedure it has developed including the work of the *amicus curiae* when it asked the Venice Commission for an opinion. The court considered the decree of President to be in the accordance with the Constitution. The President according to the Constitutions has an uncontested right, but how can the following item be justified?

The right to nominate a candidate for Prime Minister is a responsibility and a privilege. The proposal of this name represents the highest point of success of

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<sup>12</sup> Constitutional Court Decision, nr.24/2020, <https://gjk-ks.org/vendimet/>.

a political party or coalition for and within an election cycle. The first right to nominate a candidate for Prime Minister is guaranteed to the winning political party or coalition, through the Constitution. The exercise of this right is not vested with the authorization to block the formation of a Government within an election cycle. Such an attitude would submit the most important state institutions to the sole will of the winning political party or coalition. (KO72/20).<sup>13</sup>

From the acts undertaken by the President and the leader of LVV who was since overthrown as a caretaker, it is difficult to conclude there was an intention to block the government. None of the letters sent to the President refused nor said no to the proposal of the new candidate. No deadline was set by the constitution, since it remains silent on the time limit. The Court's decision regarding the deadline goes with the general formulation of sentences and does not formulate a norm to fulfil that legal vacuum. Dominique Rousseau in the cases when the work of constitutional court means such an interpretation of the law, it makes him [constitutional court judge] to be a creator of the law. He justifies this with the practice of some countries of Europe as Portugal, Spain, France and Italy, where constitutional judges prefer to issue "constructive" decisions, i.e. they add to the legislative text elements which makes it be in accordance with the constitution, in order not to reject the law. The law which is being applied is not indeed as much the product of the Parliament rather than the product of the Constitutional court (Rousseau, 1992).

However, it unclear if we have a "constructive" decision or creation of a new norm, or an opinion. Perhaps what we have here is all inclusive. Thus, the last item stated that "Finally, the Court concludes that the democratic functioning of institutions is the primary responsibility of every person who is vested with public authority." (item 580 judgement, nr. KO95/20)<sup>14</sup>. It is more than a perception that the court decided more in favour of those who raised the vote of no confidence, since indeed those parties have elected the judges of this court with the final say of the President. And when you have such election procedures in place, then, as argued by Garoupa, "Constitutional judges are appointed by heavily politicized bodies and could be heavily influenced by political parties when these play an active role in the appointment process" (Pablo Castillo-Ortiz, 2020). Indeed, in the composition of this court there are judges who were candidates on the elections representing political parties from those that raised the no confidence vote and there are judges that held positions nominated by these parties or by the President in the past. This is a fact and based on this. Therefore, doubts about the links between the President and the political parties exist, which leads towards not only a political polarized debate questioning the independence of court decisions. However, it is good that no matter

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<sup>13</sup> Constitutional Court Judgement, KO72/20, <https://gjk-ks.org/vendimet/>.

<sup>14</sup> Constitutional Court Decision nr. KO95/20 (retrieved from <https://gjk-ks.org/vendimet/>).

of how decisions of the court were contested in the debates and discussions, they were respected by all. This is also a decision which was respected by the winner of the elections which left the government, based on this court judgement. Following the same standard of respecting constitutional court decisions, the newly established government had a short life, because with the new constitutional court decision it was declared as unconstitutional.

This is seen clearly from the following provision:

To hold, by majority, that Decree [No. 24/2020] of 30 April 2020 of the President of the Republic of Kosovo, by which „Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo”, is in compliance with paragraph (14) of Article 84 [Competencies of the President] in conjunction with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo... (Court decision, no. 24/2020)

This process opened the door for establishing a new government which had a short life, as well, but for other reason. The created government was illegal. When the legitimacy of this government was discussed, it was mainly agreed that it was a government with no legitimacy. And you could have illegitimate governments which could be legal, whereas very soon it became clear that it was illegal, as well.

The President claimed to have been acting based on the Constitution, working to guarantee the unity of people and the functioning of state institutions, in order to create this new government. But constitutional court found that the Assembly violated constitution by voting new government. Thus, the Assembly's decision to vote on the new government was taken without the minimum of requested votes. Hence, a member of Assembly had no right to be exercising the duties of the Assembly member.

The applicant challenged the constitutionality nr. 07/V-014<sup>15</sup> of the Assembly of the Republic of Kosovo of June 3, 2020 on the election of the Kosovo Government. Based on the applicant, “the subject matter is the constitutional review of the challenged decision, which allegedly is not in compliance with paragraph 3 of Article 95 [Election of the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies], of the Constitution of the Republic of Kosovo”(Judgement nr.KO95/20). The referral was declared admissible and the court developed a procedure during which, among others, the Venice Commission was asked for an opinion. In addition, a public hearing was held.

The entire process regarding this case, especially during the public hearings, heard various arguments and contra arguments regarding the mandate of the deputy

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<sup>15</sup> Constitutional Court Decision, nr. 07/V-014-2020 (retrieved from <https://gjk-ks.org/vendimet/>)



who was sentenced with the final court decision, and thus he had no mandate. The court decided “To hold that, based on Article 71.1 of the Constitution of the Republic of Kosovo, in conjunction with Article 29.1 (q) of the Law on General Elections, a person convicted of a criminal offense by a final court decision in the last three (3) years, cannot be a candidate for deputy, nor win a valid mandate in the Assembly of the Republic of Kosovo” (Paragraph II of the Judgement nr. KO95/20).

Objections regarding the entire judgement came as part of the debate in public, after the judgement was issued and especially with the description of the final court decision that hinders candidatures for Assembly elections. This had an immediate direct impact on the elections to follow when it was learned that some candidates will not be allowed to run. Professor Stoichev says, “where the Constitutional Court rules on the legality of a Member of Parliament’s (MP) election other than in the cases of ineligibility or incompatibility, it may not determine which MP is to be stripped off their status and who shall succeed them; the Court simply establishes a violation; it is another body that quashes the MP’s election. In general, in all cases where the Constitutional Court’s activity bears the features of administration of justice, its decisions bear the general features of acts of justice administration”<sup>16</sup>.

Kosovo is not a special case where the Constitutional Court decides about the election regularity. Constitutional courts in almost all countries where these types of courts are organized, declare the legality of elections-gaining mandates, functions or termination of mandates. This protection of rights is not similar in all constitutional systems, somewhere it is broader, whereas somewhere else it is narrow (Mihajlovic, 2009, p. 602). The entire process had to clarify if the Kosovo Assembly’s decision on the election of the Government was made based on the Constitution.

According to the Constitution, in order for the government to be elected, at least 61 deputies must vote “for” the Government (Article 95, paragraph 3 of the Kosovo Constitution) The issue challenged was precisely this constitution provision, if there were exactly 61 votes “for”. According to the applicant, there were only 60 votes “for”, since one deputy was not a deputy. He could not have been a deputy, since a deputy cannot be a person who is sentenced by a final court decision for a criminal offence to one or more years of imprisonment. The Court emphasized article 70, paragraph 3, subparagraph 6 confirming this (Item 208, Judgement nr. KO 95/20).

Before drawing any conclusions, it is important to add something regarding the nature of the Kosovo Constitutional decisions. By their nature, these decisions could be: decisions by which a legislation is annulled, decisions by which a law or any other legal act is superseded, decisions by which it is concluded that a state official has violated the constitution and thus the conditions to initiate his removal

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<sup>16</sup> Stoichev, K. Dr. - Constitutional Justice: Functions and Relationship with the other public authorities, National report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Constitutional Court of the Republic of Bulgaria (retrieved from <https://www.confconstco.org/reports/rep-xv/BULGARIA%20eng.pdf>).

from office are fulfilled and decisions by which the unconstitutionality of electoral process, referendum or procedure for electing or removing an official from the office has been confirmed (Bajrami, 2014). Furthermore, the constitutional court decisions could be those that enforce the annulment of the legal norm from the moment it was issued (*ab initio or ex tunc*). The other court decisions enforce superseding of norms, so they act only in the future (*pro future or ex nunc*) (Sadushi, 2012, p. 143).

These two decisions of the Kosovo Constitution, along with previous decisions are the source of many debates. Sometimes the issues are only debated. Others are lightly to harshly criticized. However, decisions or judgements taken by the court were respected, implemented and highly valued by the society. The constitutional court's existence is to be appreciated and its existence is needed. Discussions and debates regarding the quality of judges and the work quality should continue, but the existence of such courts should not be put into question. In a perfect world, there would be no judicial review. There would be no judicial review because it would be unnecessary. Judicial reviews would be unnecessary, in a perfect world, because the legislature would always 'get it right'. Statute after statute, the legislature would simply spell out what the constitutional rights require, and it goes without saying that, in a perfect world, the executive would follow suit (Klatt, 2019).

## Conclusions

The Kosovo Constitutional Court, according to the Kosovo Constitution, is the only independent institution to make the final interpretation of the constitution. Since its existence, some of its decisions provided solutions to tense political issues. Many times, various Court decisions were contested, debated and questioned politically and professionally. But despite this, these decisions were respected by all stakeholders of the society and no obstacles were faced regarding their implementation. However, debate and discussion about the content, procedures and the quality of court decisions continued to increase a discourse of distrust on the work of this independent institution. The discourse of the increased distrust comes from the court composition, which is perceived to be politically influenced, the mechanisms for electing judges do not offer practical equality for all applicants and a politically free process of electing judges, and not all judges are professionally qualified. The work of the constitutional court is becoming overburdened, which complicates the decision-making process within the court and affects the quality of decisions. Many judges, if not all of them are mentioned in various ways, to have become judges due to their political affiliations or connections to political parties. For example, two of them were members of the political parties [one even candidate for the Kosovo Assembly]; two served in the diplomacy; one as reported by media was under the arrest in Serbia from 2006 to 2009 as a part of the process known "Customs Mafia" in Serbia and he was sentenced to jail for 10 years and he was forbidden to exercise his profession for ten years, etc.

When electing judges of the constitutional court, an appropriate legitimacy of court should be ensured because its function to control the representative body since in fact itself is elected by citizens and it disposes with the direct political legitimacy (Simovic, 2013). This [legitimacy], is not ensured under current circumstances and the current system. The short list of candidates [with proposed names of judges] has to undergo a voting process in the parliament where the needed majority is hardly achieved due to the complicated electoral system which imposes math for political bargaining. Results of such bargaining are sent to the president who is authorized to give the final say. Bargaining itself shows how legitimate is the process. Afterwards, the final say of the president is further to be analyzed in sense of his/her political neutrality. This neutrality was not always implicit.

The inability and the lack of courage of various subjects to take proper decisions, has created a habit of bringing various issues before the court. Hence, they try to hide behind the court decisions, regardless if this is time consuming and regardless if this affects the overall quality of the court work.

The Constitutional Court found that the former President Fatmir Sejdiu violated the constitution, which led to a resignation and new parliamentary elections to be organized. Clearly this has been unnecessary. This was not the only unnecessary case with which court was overburdened. Had the representatives of institutions worked responsibly, the case known as the Agreement on Establishing the Association of Municipalities with the Serb majority, would have not at all be brought before the constitutional court.

The Kosovo Constitutional court has become a centre for the solution of political difficulties. It is forced to work as a firefighter who prevents the outbreak of fire. Even in the description and analysis discussed in this paper the court played this role. In the conclusions, we point out some shortcomings that follow the work of the court. But the work and impact cannot and should not be denied. More importantly, it is important to note that, apart from debated, discussed and many times opposed decisions, its decisions were finally respected and implemented completely. However, the system has to be strengthened with making the judicial review first of all politically independent, otherwise stability may turn into the instability quite easily. Therefore, the article was entitled as it is. Nonetheless, the decisions and the coherence of judgements, even these two discussed in this paper serve as further analysis of the work of this court and many recommendations may be drawn. On this occasion we underline that the overall process of electing judges should be changed where the German and Austrian systems may serve as suitable guides. Specific recommendation would be: to set up the lower age limit (45 years old for candidate), candidates should not have been politically engaged during the last five years, judges should represent communities from all regions and from the judges to be elected, three judges should be elected by the president, three by the parliament and three by the government. This requires constitutional changes as well.

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