Policy Report

BPRG Balkans Policy Research Group

CONSTITUTION OF KOSOVO: A COMPREHENSIVE REVIEW & LEGAL ANALYSIS

- System of laws
- The functioning of institutions, and
- The jurisdiction of the Constitutional Court

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ACRONYMS

AGE	**Agency for Gender Equality**
AKR	**New Kosova Alliance**
CEC	**Central Election Commisison**
CEDAW	**Convention on the Elimination of All Forms of Discrimination Against Women**
CSO	**Civil Society Organization**
ECHR	**European Convention on Human Rights**
ECtHR	**European Court of Human Rights**
EU	**European Union**
IDEA	**International Institute for Democracy and Electoral Assistance**
KIA	**Kosovo Intelligence Agency**
KSF	**Kosovo Security Force**
LDK	**Democratic League of Kosovo**
ODIHR	**OSCE Office for Democratic Institutions and Human Rights**
OSCE	**Organization for Security and Co-operation in Europe**
PDK	**Democratic Party of Kosovo**
UN	**United Nations**
UNMIK	**United Nations Mission in Kosovo**
UNSC	**United Nations Security Council**
US	**United States**
VCLT	**Vienna Convention on the Law of Treaties**
VV	**“Vetevendosje” Movement**

EXECUTIVE SUMMARY

The Constitution of Kosovo was subject to an expedited drafting process with very limited public consultations. Its provisions are a product of a long political process of Kosovo's struggle with independence from Serbia, and they present the values, ideas, and ambitions of a new state and its society. The Constitution played a critical role in setting the constitutional foundations of the country, by incorporating the Comprehensive Proposal for the Kosovo Status Settlement ("Ahtisaari Plan") for the independence of Kosovo through temporary international supervision. It also enshrined fundamental principles and values for the well-functioning of the state and its institutions.

Yet, the practice has shown that the Constitution was not meant to be set in stone and it needs adaptation. A series of institutional crises reflected the gaps and problems which required frequent interpretation by the Constitutional Court. Case law revealed various gaps and ambiguities in the Constitution that remain an issue and call for intervention.

A constitutional text, by its nature, neither can nor should it be overly detailed and/or too technical. Yet, as a young democratic state, Kosovo is at the stage of evolving toward becoming a fully-fledged state, and a member of all international organizations and treaties. This may require clearer and more accurate constitutional and legal provisions. As case law shows, ambiguities in the Constitution and misinterpretation of its provisions can cause serious deadlocks in constitutional and institutional operations. These shortcomings show that the Constitution needs a comprehensive review of its provisions and identification of possible amendments.

The key issues that arise due to lack of clarity in the Constitution involve (i) issues related to the overall system of laws; (ii) issues related to the establishment and functioning of institutions; and (iii) issues related to the jurisdiction of the Constitutional Court and its methods of interpretation.

The Constitution needs to clearly define the various types of legal acts and the relation between them. The lack of clear terminology of legal acts and the absence of a normative hierarchy hinder the law-making process and the efficient implementation of laws. Thus, new provisions could provide more clarity so that authorities and individuals can easily navigate through the legal system.

The Constitution needs improvement on some aspects of the establishment, the competencies, and the functioning of institutions. Future changes to the Constitution could provide more clarity on the work of the Assembly, the election of its members, the validity of their mandates, the scope of their immunity, as well as the decision-making procedures including the appointment of the Central Election Commission (CEC) members. Case law also shows that the Constitution needs to be clearer on the election, mandate, and powers of the President and the Government. Future amendments would need to fill these gaps to ensure efficient procedures, and to avoid interference between the powers of institutions.

New constitutional and legal provisions should also push forward wide institutional gender-balanced representation, by establishing quotas in line with international standards. Strong affirmative measures should be put in place to increase women's participation in Kosovo's institutions, in line with the constitutional commitment to guarantee gender equality.

Vague and imprecise constitutional provisions hinder the functioning of the Court itself, especially concerning its jurisdiction and its methods of interpretation. Clarifying these matters is crucial to ensure consistency in the Court's case law. The Constitution also needs to clarify the extent to which it can be amended, to avoid uncertainties in the future when a constitutional amendment is proposed.

The review of constitutional provisions is not limited to these issues and possible amendments. As the country evolves, seeks to join international treaties, and ensures viable institutions, other provisions in the Constitution and/or the law may need to change as well.

Besides the Court's interpretations, the best examples from other countries and opinions of the Venice Commission are important reliable sources for eventual constitutional amendments. The compatibility of laws with the Constitution is another important segment when exploring alternative solutions and options for constitutional changes. Thus, future amendments to the Constitution may call for the adoption or modification of current laws as well.

	ISSUES	RECOMMENDATIONS
	I. SYSTEM OF LAWS	
1	**The Typology and Hierarchy of Norms in the Constitutional Order** The Constitution contains the principles of constitutionality and supremacy of the Constitution. It also affirms the primacy of international laws over internal laws. Yet, it does not define the various types of legal acts and how they relate to each other. The absence of clear terminology and a normative hierarchy makes it more difficult to navigate through the legal system. Thus, future changes to the Constitution and/or the law need to address the gaps and provide more clarity.	• Better establish the relationship between the Constitution and international law (treaty and customary; the latter is nowhere expressly referred to in the Constitution), the status of acts of international organizations, and jurisdictional decisions of international courts; • Include a new section with provisions on legal acts following the examples of the Constitutions of Albania (Normative Acts and International Agreements) and Slovenia (Constitutionality and Legality), which defines and clarifies the legal acts referred to in the Constitution; • A further possibility would be to include a new provision prescribing the mandatory application of several fundamental constitutional principles during the law-making process (e.g., constitutionality, constitutional values of Kosovo, constitutional order, gender equality, compatibility with the human rights obligations, and compatibility with international law)
	II. THE ESTABLISHMENT AND FUNCTIONING OF INSTITUTIONS	
2	**The Authority and Delegation of Competencies to Negotiate and Sign International Agreements (Treaties)** The Constitution lacks coherence in establishing the authority in charge of signing and ratifying international treaties. Three key questions were raised in practice: 1. Can the President ratify international agreements? 2. Can the Prime Minister sign international agreements? 3. Can the Assembly establish special bodies to conclude international agreements? While the first two questions found answers in the Law on International Agreements, the third one proved to be more problematic. Future constitutional changes could provide more clarity in all three matters by reflecting the Court's interpretation and exploring new options that could work in practice.	• If the Constitution is not amended, the relevant provisions on negotiating and signing international treaties must be interpreted by the reasoning of the Constitutional Court in Case KO43/19. The Assembly could clarify controversial issues, by adopting a new law as the Court suggests; • The Constitution could expand the jurisdiction of the Court to review the scope of authority of constitutional bodies regarding international treaties. • The Constitution could also allow the establishment of special groups/bodies to negotiate international treaties, without the authority to sign them. • The Constitution should include a clear and comprehensive provision about who is authorized to negotiate and sign international agreements. A further option is to explicitly state in the Constitution that the President has the authority to ratify certain international treaties and that the Prime Minister has the authority to sign international treaties, by preferably aligning them with the Vienna Convention on the Law of Treaties. Concretely, this could be done by: (a) listing all state officials, who in virtue of their functions, are considered as representing the state to perform all acts relating to the conclusion of treaties, or (b) leaving it up to the law to set out details on the signing of international agreements.
3	**The Parliamentary Group Entitled to Propose the President of the Assembly** The Constitution does not define the "largest parliamentary group" that is entitled to propose the candidate for President of the Assembly and its Deputy Presidents. Case law clarified the meaning by defining it as "the political entity, coalition, or citizens' initiatives that won more seats in the Assembly" and established that election results are the main factor when determining the largest parliamentary group. Yet, the text of the Constitution remains unclear, and many considered that the Court's interpretation could cause practical uncertainties in the future. Therefore, more clarity in the language of the Constitution remains a necessity.	• Articles 67(2) and 67(3) should incorporate the interpretation provided by the Constitutional Court. In this case, Article 67(2) would read as follows: "The President of the Assembly is proposed by the party, coalition, citizens' initiatives, and independent candidates that have more seats in the Assembly and are elected by a majority vote of all deputies of the Assembly." Article 67(3) would read: "Three (3) Deputy Presidents proposed by the three parties, coalitions, citizens' initiatives and independent candidates that have more seats in the Assembly, are elected by a majority vote of all deputies of the Assembly"; • Alternatively, new provisions of the Constitution and the Rules of Procedure of the Assembly could establish that the largest post-election parliamentary group may propose the President of the Assembly. • Other options based on other countries' examples could be 1) at least 15 deputies (Albania); at least 1/3 of the deputies (Croatia); any member of the Riigikogu (Estonia); the majority, the minority, a faction, or a group of at least 6 deputies (Georgia). These options could be included either in the Constitution or in the Rules of Procedure of the Assembly.

4	**The Mandate of the President and the Deputy President of the Assembly after Leaving their Parliamentary Group** Constitutional gaps in the mandate of the President and the Deputy Presidents of the Assembly brought up the question before the Court of whether they should resign when they leave their parliamentary group. The Court concluded that leaving their parliamentary group does not automatically result in their dismissal. The Constitution's language needs to reflect this interpretation. It could also provide for a lower requirement than the 2/3 majority for the removal of the Deputy Presidents of the Assembly, in order to facilitate procedures.	• The Constitution could incorporate in its text the Court's interpretation and expressively establish that the President and Deputy Presidents of the Assembly will remain in office even after leaving the parliamentary group that proposed them for those positions. The President and Deputy Presidents will only be dismissed by a vote of two-thirds (2/3) of the deputies of the Assembly. • An alternative amendment could be to allow for the dismissal of the President and Deputy Presidents by a lower threshold than a two-thirds (2/3) majority vote. This would require the amendment of the Constitution as well as of the Rules of Procedure of the Assembly.
5	**The invalidity of the Mandate of an Assembly's Deputy because of a Criminal Offence** The Constitution is silent on how and when a conviction of a criminal offense affects the mandate of the deputies of the Assembly. The current constitutional practice and the Law on General Elections provide some answers, yet the need remains for concrete provisions on the procedures for establishing the invalidity of the mandate of an Assembly's deputy. It is also unclear whether the criteria for the in(validity) of the deputy's mandate extends to the Prime Minister and to the President of Kosovo as well. An equivalent standard for these positions could avoid normative contradictions and ensure constitutional integrity. New constitutional and/or legal provisions could provide more clarity in these matters.	*On the procedure for establishing that the mandate of a deputy of the Assembly is invalid:* • In case of no amendment to the Constitution, the Law 03/L-111 on Rights and Responsibilities of the Deputy could include a procedure for determining the invalidity of the mandate, by amending the existing version of this law, or by alternatively drafting a new Law on the Assembly with the procedure set out therein. The procedure must be consistent with the Law on General Elections; • A further option is to set out the procedure for determining the invalidity of the mandate in the Rules of Procedure of the Assembly of Kosovo. *On the extension of the interpretation of the Court to other state institutions, such as the Prime Minister and the President:* • In case of no amendment to the Constitution, the Court would have to address the consequences of a criminal conviction for the election of the Prime Minister and President; • Another possibility would be to extend the Court's interpretation to the Prime Minister and the President while providing -in the relevant legislation- that a candidate who has been convicted of a criminal offense cannot be a candidate for Prime Minister or President. • In case of a constitutional amendment, a new constitutional provision could better establish the rules and limitations for the nomination of a candidate for Prime Minister or President.
6	**The Scope of the Immunity of the Assembly's Deputies** The deputies of the Assembly have immunity for actions taken "within the scope of their activities as deputies" and cannot be arrested while they are "performing their duties" without the consent of the majority of all deputies. Yet, neither constitutional nor legal provisions define the circumstances in which the deputies are performing their duties, which sought a further interpretation from the Court and the Venice Commission. Moreover, neither constitutional and legal provisions nor case law has addressed the issue of freedom of expression of deputies and the exceptions to it. All these gaps call for constitutional clarity to avoid practical uncertainties and obstruction of the Assembly's work.	• The Constitution, the Rules of Procedure of the Assembly, or the Law on Rights and Responsibilities of the Deputy could explicitly state that parliamentary immunity applies to opinions that deputies express in their capacity as deputies of the Assembly, subject to limitations, such as defamation and hate speech; • New constitutional provisions could explicitly permit the arrest or detention of deputies caught while committing a (serious) crime and when caught committing a crime in flagrance, in line with the Law on the Rights and Responsibilities of a Deputy. • New constitutional or legal provisions could clearly define what situations the expression "while performing her/his duties as a deputy of the Assembly" involve.
7	**The Authority of the President to Return Laws to the Assembly** The Constitution does not clearly define the scope of the President's right to return laws to the Assembly. Particularly, the extent to which the President can review the law is uncertain. The Court's conclusion that the President cannot propose amendments to the law may reflect the limited authority of the President that does not go beyond the review of formal and substantive constitutionality of the law. Yet, the right to propose legislation and to refer laws to the Court could affect the scope and nature of the President's authority to return laws to the Assembly. A clear definition in the Constitution of the scope and nature of this power of the President would prevent future constitutional conflicts.	• The Constitution should expressively refer to the President's power to temporarily prevent the entry into force of a law enacted by the Assembly - 'suspensive veto right'. • The Constitution should better clarify the scope and limitations of the veto right of the President and establish to what extent can the President review the content of the law. It could also firmly state, in line with the Court's interpretation, that the exercise of the suspensive veto right does not include the right to propose amendments to the law when returning it to the Assembly.

8	**The Quorum and Voting for the Election of the President** The uncertainties in the procedure for the election of Kosovo's President in 2011 reflected constitutional gaps in the quorum and voting requirements. The absence of a clear definition of the terms "quorum" & "voting" and the ambiguous constitutional and legal language created doubts in practice and called for the Court's interpretation. The latter affirmed the 2/3 majority requirement for a quorum for the election of the President. Even with this interpretation in place, the Constitution remains contradictory throughout its text and lacks clarity. Its future amendment shall reflect the best comparative examples and should meet Kosovo's needs.	• In case of no amendment, relevant provisions of the Constitution must be applied in accordance with the Court's interpretation. In addition, the interpretation given by the Court could be on the Law on the President as well; • The Constitution could be amended to provide for more precise wording concerning both the quorum and the voting process for the election of the President. New provisions could require a parliamentary consensus to establish a clear and acceptable formula for the quorum and the voting process. The new rules may follow the best examples and should meet Kosovo's needs.
9	**The (In)Compatibility of the President's Mandate with other Public and Political Functions** The Constitution does not address the incompatibility of the President's mandate with private, social, and/or philanthropic activities. Even though this gap did not lead to a case before the Court yet, it sure does leave the matter open for future conflicts and needs for interpretation. Considering the significant role of the President as the head of state, clear constitutional provisions need to provide answers.	• An amendment to the Constitution might also expand the notion of incompatibility beyond the public functions and political party functions, to include any private activity, economic activity, or any other occupation or professional duty, or even the belonging to management or supervisory bodies of for-profit institutions or enterprises, in line with the majority of the constitutions in Europe.
10	**What Happens When the President is Absent?** The Acting President exercises the functions of the President when the latter is temporarily unable to. The Constitution does not address what happens when the President is absent for other reasons, such as (i) when the term of the President ends and the Assembly has not elected the new President; (ii) when the President resigns; (iii) when the President is dismissed form position; (iv) in case of death; or (v) when the position remains vacant for other reasons. The absence of clear constitutional provisions also creates uncertainties on the scope of the powers of the Acting President. The current gaps may raise new issues in the future which is why new constitutional and/or legal provisions could clarify these matters.	*Discharge of duties in case of temporary absence or cessation of the mandate of the President* • A new constitutional provision could expressly provide that the President of the Assembly will be the Acting President in the following cases: o when the President is temporarily unable to fulfill his/her duties; o when the term of the President ends and the Assembly has not elected the new President; o when the President resigns; o when the President is dismissed from their position; o in case of death; or o when for other reasons the position remains vacant. This could be complemented with the following rules: a) In case of temporary absence of the President if the President is unable to resume their duties within six (6) months, the Assembly must begin the procedure for the election of a new President immediately; b) If the mandate of the President remains vacant, the Assembly must begin the procedures for the election of a new President immediately. *The responsibilities and powers of the Acting President* • In case of no amendment, the Acting President will exercise the responsibilities and powers of the President, but the Acting President's rights will be those of the office they were elected to (President of the Assembly); • A new constitutional provision may provide: 'An Acting President has the responsibilities, powers, and functions of the President. Additionally, it could demand that the President of the Assembly takes an oath before assuming the role of Acting President; • An alternative amendment could be to list the responsibilities and powers of the Acting President, while the President is temporarily unable to exercise their duties, or in case of vacancy. These options could be set in the Constitution, or in the relevant legislation i.e. The Law on the President and the Rules of Procedure of the Assembly.

11	**What Constitutes a Serious Violation of the Constitution by the President?** The Constitution lists the "serious violation" of the Constitution as one of the reasons for the dismissal of the President, yet it does not define what the term means. Rather, it depends on the Court's interpretation as it evaluates the facts of each case, finds whether there has been a violation, and determines whether that violation was serious. While many other countries follow the same pattern, some kind of threshold or criteria could be helpful and either the Constitution or the law could establish it.	• With no amendments to the Constitution, the Court will have to determine by interpretation -on a case-by-case basis- what a 'serious violation' means; • A new constitutional provision could expressly define the circumstances or acts and omissions of the President that constitute a serious violation of the Constitution; • Alternatively, the Constitution could be amended to authorize the Assembly to define -by law- the situations or acts and omissions of the President that constitute 'serious violations of the Constitution.
12	**The Interference of the Government with the Powers of the Assembly in Regulating the Salaries of Specific Government Positions, Senior State Functionaries, and Subordinates.** In the absence of a special law on salaries in the public sector and clear constitutional provisions, the question arises whether, and, if so, to what extent can the Government regulate and/or increase the salaries of specific government positions. It is also questionable to what extent can the Assembly entrust the Government, by law, to exercise such function. The Venice Commission's opinion on the draft law on salaries in the public sector and the examples of other countries that regulate salaries by constitutional laws and regulations should form the basis for future constitutional changes.	• A new constitutional provision could explicitly state that any government action and decision must have a specific legal basis in the Constitution or the law. • Alternatively, a new constitutional provision could specify that the salaries and remuneration of judges and prosecutors must be regulated by a law adopted by the Assembly and not become subject to regulation, directly or indirectly, by the Government.
13	**The Political Party or Coalition of Political Parties Entitled to Form the Government** The Constitution provides that the "political party or coalition that has won the majority in the Assembly" may propose a candidate for Prime Minister, without clarifying whether it should be an absolute or relative majority. It does not define the role of the President in determining that, either. The Court brought some clarity to these matters, yet the procedure needs further constitutional clarity. Amendments to the Constitution could avoid risks of delays and obstructions in the functioning of institutions.	• Article 95(1) could be reformulated as follows: "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 highest number of seats in the Assembly". This formulation would reflect the interpretation of the Court and would make clear that a relative majority is enough to entitle a party or coalition to propose the candidate for the Prime Minister; • Article 95(4) of the Constitution could remain as it is, but it has to be applied in light of the Court's interpretation; • Alternatively, the Constitution could be amended following the model employed by the Greek or Bulgarian Constitution. Thus, Article 95(4) could state: "If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo, within ten (10) days, appoints another candidate for Prime Minister from the second-largest party in the Assembly with the same procedure. If the Government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held no later than forty (40) days from the date of the announcement".
14	**The Procedure and Scope of the President's Power to Nominate a New Candidate for Prime Minister after a Successful Vote of No-Confidence.** Kosovo follows a destructive model of a vote of no-confidence with the simultaneous election of a new Government, and this is in line with the practice of other countries such as Austria, Croatia, Montenegro, and Serbia. Yet, the Constitution leaves a few matters unclear, including (i) the authority of the President to nominate a candidate for Prime Minister after a successful vote of no-confidence; (ii) the procedure for the formation of a new government; and (iii) whether the President must dissolve the Assembly after the successful vote of no-confidence. Possible constitutional changes could fill in the gaps and ensure efficient proceedings.	*Principle of loyal cooperation* • A new constitutional provision could explicitly set out the principle of loyal cooperation, in accordance with the Court's interpretation. *Deadlines for the nomination and appointment of a candidate for Prime Minister following a successful vote of no-confidence* • With no amendment to the Constitution, the Court's interpretation should apply as guidance (i.e., a formation of the government to ensure effective functioning of the institutions with no delay); • New constitutional provisions could establish clear deadlines for the nomination of a candidate for Prime Minister. *Reform the vote of no-confidence* • With no amendments to the Constitution, the model of a destructive vote of no-confidence will continue to apply; • In case of amendment, new constitutional provisions could provide a timeframe/limit, mandate, and responsibilities of the outgoing government in the office, until the Assembly elects a new Government. • Preferably, the destructive vote of no-confidence could be replaced with a constructive vote of no-confidence, which would secure a new majority and enable a swift formation of the new government.

15	**Gender Equality and Gender Quotas for Members of the Government** The Constitution contains internationally recognized standards for gender equality but does not provide quotas for gender representation in Kosovo's institutions. Even with a quite solid constitutional and institutional framework on gender equality, women's representation in decision-making positions remains a key challenge, which is why the Constitution and/or the law should establish explicit rules and push forward a quota of at least 40% for a wide institutional balanced representation between women and men. Alternatively, strong affirmative measures should be put in place to increase women's representation in institutions, especially where major gaps remain.	• The Constitution or the law could provide for at least a 40% gender quota for a wide institutional balanced representation between women and men, including the composition of the Government, namely its ministers and deputy ministers. The legislative and executive bodies should aim to adopt Venice Commission's recommendations on the gender quota. • The Law on General Elections and the Law on Political Parties should be amended to conform to the possible constitutional amendment with a new quota of 40%, moving forward to a 50% quota, in line with the Venice Commission's recommendations. This could be a positive step to consolidate the legislation in the field. In fact, there is no need to wait for constitutional changes. The laws could be amended nevertheless. • In absence of amendments to the Constitution or relevant laws, strong affirmative measures should be put in place. Their efficient implementation would increase women's participation in public institutions, especially where major gaps in equal gender representation remain.
16	**The Composition of the Government and Competencies of the Outgoing Government** The numerical composition of the Government and the powers of the outgoing government remain uncertain in absence of clear constitutional provisions. Once in 2020, and then again in 2021, a new law on the government was drafted in an attempt to address these issues but to no avail. The Venice Commission analyzed them both and provided guidelines to follow when regulating these matters. Either the Constitution or the law should (i) explicitly name the criteria for the size of the Government; and (ii) clearly define the scope of work of the outgoing Government.	• With no changes to the constitutional provisions, the Government should fully implement the Venice Commission's recommendations to first establish clear criteria by law, and then via an internal act, for determining the size and structure of the Government. • Alternatively, Article 96 (2) of the Constitution could be amended to allow the Government to establish its size and composition by law. • Another possibility would be that the size of the Government shall be set by following a clear formula (X+/ 3). Yet any nominee for prime minister shall have the liberty to increase or decrease the number of ministers in line with the policy objectives, the Government's program, and its agendas, pending the Assembly's approval. Besides that, important objective criteria for setting the size of the Government should cover and govern all sectorial needs of Kosovo and the program of the winning candidate, or the one forming the Government; • The law -or an internal rule- should limit the number of deputy prime ministers and assign them clear tasks and mandates. • Any new law or regulation shall guarantee a full and satisfactory representation of communities in line with the spirit of the Constitution; • Any new law on the government should spell out the outgoing Government's mandate and powers.
17	**The Appointment of Central Election Commission Members.** The issue with the term "largest parliamentary group" came up for the second time with regard to the appointment of the Central Election Commission (CEC) members. According to the Constitution, six members of the CEC are appointed based on the proposal of the six largest parliamentary groups without specifying what those groups are in practice. Despite the Court's re-confirmation that the largest parliamentary groups are those that won more seats in the elections, clear constitutional provisions are still needed to avoid future repeated doubts. The Constitution is also unclear on what happens in practice when less than six parliamentary groups are represented in the Assembly. It also leaves unaddressed the risk for overrepresentation of either the governing parties or the opposition parties in the CEC, as long as its composition takes into account the representation of parliamentary groups only. Thus, different options could be considered in addressing these matters through future constitutional changes.	• A new provision could specify that the President of the country formally appoints CEC members, besides the Chair, upon the appointment of the members by the largest parliamentary groups. • A new constitutional provision could specify the meaning of 'largest parliamentary group' in line with the Court's interpretation. • New constitutional or legal provisions could clarify more in detail the procedure for the appointment of CEC members in case there are less than six (6) parliamentary groups represented in the Assembly. Alternatively, the Constitution could establish that the procedure will be regulated by law, i.e. the Rules of Procedure of the Assembly, or the Law on General Elections. • A new provision could clarify that in case there are two or more parties, coalitions, or citizens' initiatives from a non-majority community with secured seats in the Assembly, the one with the highest election result has the right to appoint the CEC member. • New constitutional provisions should address the balance in representation of governing and opposition parties in CEC, in line with other countries' examples.

III. THE JURISDICTION OF THE CONSTITUTIONAL COURT AND METHODS FOR THE INTERPRETATION OF THE CONSTITUTION

18	**The Court's Authority to Address "Constitutional Questions" for the interpretation of the Constitution** Both the President and the Government have the right to refer "constitutional questions" to the Court. In absence of a constitutional definition of this term, the President and the Government interpreted it in a way that would allow them to ask the court to interpret constitutional provisions without a concrete dispute or conflict. There was an increased tendency to exploit the Court's authority for acquiring advisory opinions and the Court's practice has been inconsistent with the admissibility of such requests. After years of allowing their review, the Court suddenly changed its approach ten years later and concluded that it cannot interpret the Constitution if there is no concrete dispute. This sudden shift in the Court's practice, however, creates uncertainties. Thus, Article 113 of the Constitution needs to provide more clarity on the scope of the Court's jurisdiction.	• A new constitutional provision could explicitly provide that the President and the Government can submit referrals to the Court solely under Article 113. • New provisions could also allow the President and the Government to refer matters to the Court outside the scope of Article 113, in specific circumstances, and this rule could expand to the other authorized parties as well. However, they would need to be precise in what could be an exception. This can be reasonable considering the evolution of case law and the Court's jurisprudence over time. The Constitution would need to establish the criteria when there can be a deviation from the norm. • As a basic prerequisite, the Court's response could be discretionary, in that it decides based on constitutional criteria whether to render an advisory opinion. Such criteria could – as a minimum – include the following: (i) if they are of a constitutional nature; (ii) if they fall outside the scope of Article 113 of the Constitution; (iii) if they could endanger the constitutional order if not addressed; and (iv) if there is no other institution in the country that could give address it.
19	**The Court's jurisdiction on the Constitutionality of International Agreements** The Constitution provides for the ex-post review of the constitutionality of international agreements. In this case, the subject of the review is not the substance of the agreement itself, but rather the act of its ratification. Some other countries allow for an ex-ante review as well, which allows for the review of the constitutionality of the substance of the international agreement, prior to its ratification. Discussions on future constitutional amendments could explore options for possible changes in the Constitution or the Court's practice to allow for an ex-ante review as well, in line with the practices of some other countries such as Germany and Ireland.	• A new provision could spell out the jurisdiction of the Court to review the constitutionality -that is the substance- of international agreements. Article 113 of the Constitution would need to be amended, to recognize the jurisdiction of the Court to review the constitutionality of international agreements before their ratification. • For agreements that need ratification, another possibility would be to provide for constitutional review even before the signature of the international agreement itself. This would have the advantage of setting the basis for more political and legal certainty, given that the Court would have pronounced itself before political representatives signed the international treaty. • In case of the establishment of an ex-ante review, certain limitations would be necessary i.e. a limited number of subjects or a representative number of deputies of the Assembly that may file a request for review by the Constitutional Court or a review that is limited only to the core provisions of the Constitution.
20	**The Criteria for the Interpretation of the Constitution** The Court uses different interpretation methods on a case-by-case basis, in absence of established criteria for the interpretation of the Constitution. The latter only generally provides that the Court must interpret human rights and freedoms in accordance with the case law of the European Court of Human Rights (ECtHR). The current practice avoids the risk of over-limiting the Court's discretion in interpreting the Constitution. On the other hand, an improper interpretation may have far-reaching legal and political consequences not intended by the Constitution. Hence, the Court must be diligent in interpreting the Constitution by looking into the ECtHR case law and examining the methods of interpretations that ECtHR used in each of them, appropriately to the case before it. The Constitution could also explicitly include general basic principles of the Council of Europe for interpretation, such as democracy, the protection of human rights, and the rule of law.	• If there will be no amendments to the Constitution, the Court will apply the interpretation methods it deems fitting while ensuring compliance with general principles that define the constitutional order of Kosovo. • In case of an amendment, a new constitutional provision could expressively include standards of constitutional interpretation that would mitigate the risk of misleading interpretation and that would set a standard to evaluate the Court's decisions in the public policy process. These would include the specific methods applied by the ECtHR in similar cases, as well as the general basic principles of the Council of Europe, enshrined in the Constitution, including democracy, the protection of human rights, and the rule of law.
21	**The Limits to Amending the Constitution** There is a lack of specific and clear values, principles, criteria, or norms that would prohibit certain changes or modifications to the Constitution. While the Constitution refers to Chapter II on Fundamental Rights and Freedoms, the Court also looked at Chapters I and III on Basic Provisions and on the Rights of Communities and their Members when assessing a proposed constitutional amendment. Due to these gaps, possible constitutional changes could bring more clarity and prevent future perplexity.	• There shall be no limits to amendments to the Constitution except those under Chapter II of the Constitution and those defined by the Court's interpretation; • A new constitutional provision could codify the Court's interpretation of containing the Constitution's basic provisions and rights of communities when assessing the constitutionality of an amendment to the Constitution. • Alternatively, it would be possible to include an explicit list of values and principles that cannot be altered by an amendment to the Constitution or by explicitly stating that the values set out in the Constitution define limits to any amendment to the Constitution.

INTRODUCTION

The Constitution of the Republic of Kosovo (the "Constitution") was adopted in April 2008, a few months after Kosovo declared its independence, and it went into effect in June of that same year. Thus, its adoption was a speedy process that followed decades-long extraordinary circumstances prevalent in Kosovo.

The Constitution succeeded the temporal Constitutional Framework for Provisional Self-Government which derived from the United Nations (UN) Resolution 1244 of 1999. After the efforts of the international community toward a political settlement between Kosovo and Serbia failed, the Assembly of Kosovo adopted the Declaration of Independence in February 2008.

The Constitution reflected Kosovo's commitment in its Declaration of Independence, to be a democratic, secular, and multi-ethnic republic guaranteeing equal protection under the law for all its citizens and communities, respecting their human rights and fundamental freedoms. It also incorporated the Comprehensive Proposal for the Kosovo Status Settlement proposed by the UN Special Envoy, Martti Ahtisaari, and endorsed by the UN Secretary-General in 2007 ("Ahtisaari Plan").

The Ahtisaari Plan offered a proposal for settling the conflict between Kosovo and Serbia. It included the independence of Kosovo from Serbia, through temporary international supervision, coupled with institutional and legal safeguards for the protection of the interests of Kosovo's minority communities. However, the plan was not put up for a vote in the UN Security Council due to indications that some permanent members would not approve it. Hence, Kosovo incorporated its obligations under this plan, in the new Constitution.

Kosovo's Constitution had the disadvantage of being built with no previous constitutional practice. However, the Constitution served its purpose then, to set the constitutional foundations of the new state, to establish governing institutions based on the rule of law and respect for human rights, and to enshrine the fundamental principles and values. It reflects the experience of the people of Kosovo with systematic human rights violations, ethnic discrimination, and political disenfranchisement. Its provisions must therefore be read and understood within the political context that existed at the time when it was adopted.

Over time, as the institutions implemented the Constitution, political and constitutional controversies emerged. Many constitutional provisions appear difficult to interpret and apply in practice, which led to various institutional crises, the interpretations of the Constitutional Court (the "Court"), and a growing political and societal debate. This shows that today, more than a decade after the adoption of the Constitution, it is the right time to consider and discuss the need for constitutional changes.

Landmark cases decided by the Court clarified some of the controversial issues through interpretation, yet often revealed other issues and constitutional gaps that remain an issue to this day. Thus, Kosovo should dig deeper into the need for constitutional changes to eliminate ambiguities, avoid future institutional crises, and overall strengthen rule of law, legal certainty, and institutional stability. This would be a firm step in Kosovo's path toward full integration and consolidation.

This analysis addresses a total of 21 issues, which often contain other sub-issues as well. They relate to all identified gaps of the Constitution, except for provisions on human rights and rights of the communities. These have proven to be less ambiguous and are, after all, subject to constant development and interpretation based on the constitutionally mandated practice of the European Court of Human Rights (ECtHR). However, this does not exclude the need for a future review of the human rights aspects of the Constitution and the functioning of institutions related to human rights.

The Constitution lacks a clear system of laws as it does not define the various types of legal acts and it does not address what specific kind of legal act has superiority over which norms. It also leaves the status of acts

of international organizations and decisions of international courts, uncertain. These gaps call for a consistent terminology of legal acts and a well-defined normative hierarchy, which would preserve the principle of legality.

The well-functioning of institutions defines the country's overall legal and political certainty. Yet, a strong constitutional and legal basis for them is lacking, due to gaps and ambiguities. The Constitution is unclear on some aspects of the work of the Assembly, especially those involving voting and decision-making procedures. Matters related to the election and the scope of powers of the President and the Government lack clear provisions as well. This brought many uncertainties in practice throughout the years and caused various institutional deadlocks. Inconsistencies in the Constitution, the laws, and in the Court's practice call for intervention in the provisions addressing -inter alia- the authorities that can conclude international agreements, the absence, and dismissal of the President, the competencies and composition of the Government, and the extent to which the powers of these institutions overlap. Constitutional provisions on gender equality are not fully implemented in practice either, and this reflects in the disproportionate institutional representation of women and men.

The Constitution lacks clarity about the work of the Court as well. The scope of its jurisdiction became an issue in numerous cases, especially when addressing constitutional questions, the constitutionality of international agreements, and proposed constitutional amendments. It also fails to provide clear criteria for the Court's interpretation of the Constitution.

This analysis aims to provide a comprehensive review of these constitutional matters. It identifies constitutional gaps and proposes a new constitutional design suited to the requirement of a just and functioning legal system.

Although the analysis primarily focuses on the Constitution, it inevitably links to certain laws of primary importance and their constitutionality. Moreover, while case law provides a significant source to discuss constitutional issues, the analysis goes beyond that. It addresses issues that could be subject to interpretation by the Court in the future as well, and it offers concrete and practical recommendations.

Beyond the Constitution, this analysis addresses other laws and legal acts. In the case of constitutional amendments, certain laws may have to change as well to ensure compatibility with the Constitution. Laws can change notwithstanding constitutional amendments. Even with no changes to the Constitution, the amendment of relevant laws may fill certain gaps.

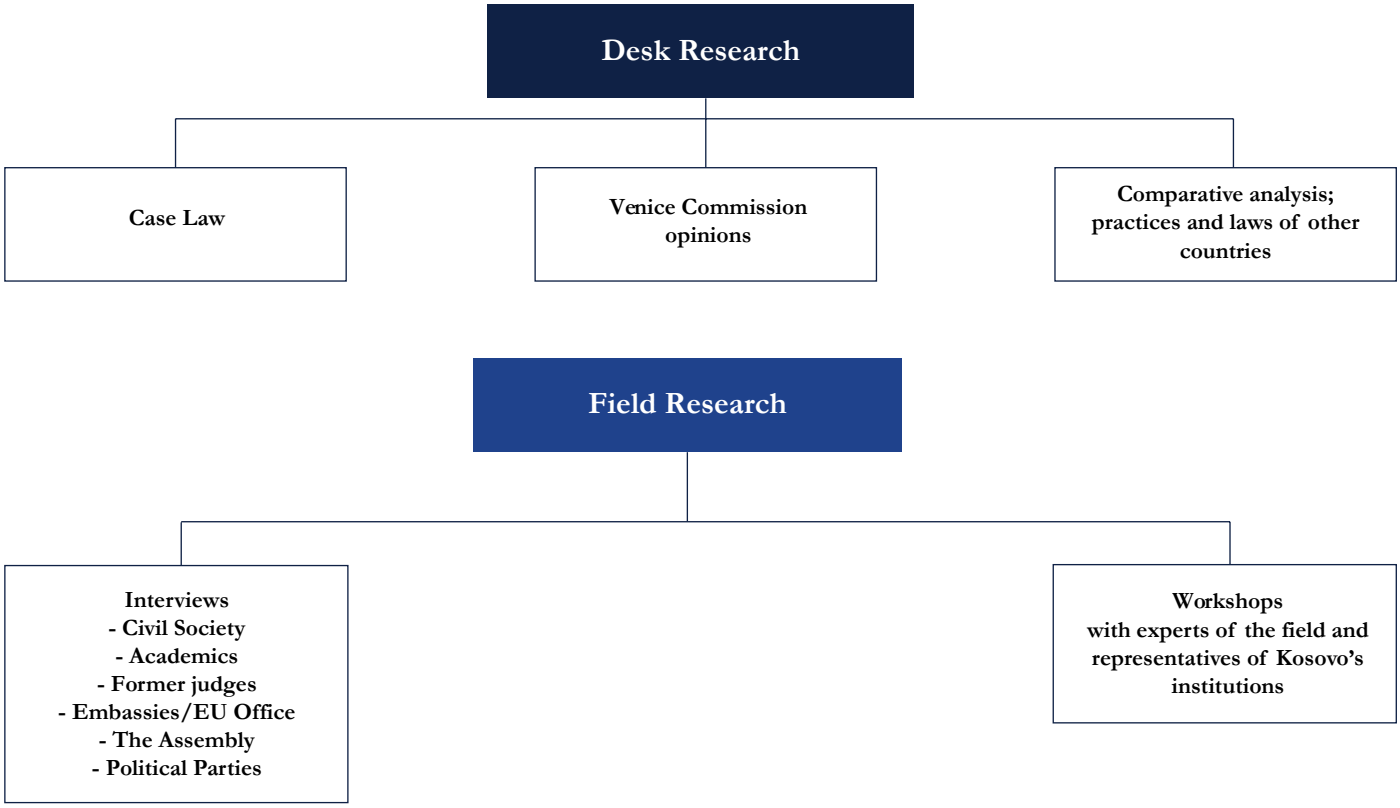
There are no fixed solutions for either of the issues. Different practices and opinions of relevant actors in the field may result in different recommendations for one issue. A broad political consensus might demand a wider spectrum of choice as well. The variety of options, along with the comprehensive analysis of each issue, may yield an open and productive debate on the improvement of the Constitution and/or the law.

STRUCTURE & METHODOLOGY

The analysis of each issue begins with an identification of constitutional and legal gaps. It then continues to summarize relevant case law, and pin-point the main conclusions from the court decisions and the opinions of the Venice Commission. This is followed by a comparative analysis of the issue, and conclusions and recommendations on how to move forward.

Issue	• Identification of the problem • Relevant constitutional and legal provisions
Case-law and opinions	• Decisions of the Constitutional Court and international case law • Venice Commission Opinions
Comparative analysis	• Relevant constitutional and legal provisions of other countries • Comparison between Kosovo's and other countries' practices
Conclusions & Recommendations	• Conclusions on the current situation and the problems with it • Options for future constitutional changes

This comprehensive analysis draws on various sources of information. The issues are identified based on relevant case law and discussions with relevant stakeholders through interviews and workshops. Each issue is analyzed from different angles, including court interpretations, international law, best examples from other countries, the current political situation in Kosovo, and Kosovo's need to strengthen its justice system and progress in its path toward becoming a developed country with viable and sustainable institutions.



I

The Typology and Hierarchy of Norms in the Constitutional Order

The Constitution contains the principles of constitutionality and supremacy of the Constitution. It also affirms the primacy of international laws over internal laws. Yet, it does not define the various types of legal acts and how they relate to each other. The absence of clear terminology and a normative hierarchy makes it more difficult to navigate through the legal system. Thus, future changes to the Constitution and/or the law need to address the gaps and provide more clarity.

A clear system of laws ensures efficient implementation of the law as one of the cornerstones of the principle of legality.[1] The Constitution of Kosovo lacks one despite containing the principle of constitutionality and the primacy of international laws over internal laws.

The Constitution is clear on the principle of constitutionality and supremacy of the Constitution but does not expressly define the normative hierarchy.

The Constitution affirms its superiority over laws and legal acts, but it does not expressly define the various types of legal acts and the normative hierarchy. It does not address what specific kind of legal act has superiority over which norms. The definition of and relation between normative, special, external, and internal acts is unsettled. The Constitution, therefore, fails to provide important rules on legislation, including key principles that would guide the law-making process.

The Constitution is silent on the status of the laws of vital interest in relation to other laws and legal acts.

Additionally, the Constitution lists some of the acts that the Assembly adopts (i.e., laws, resolutions, and other general acts) including laws of vital interest.[2] Yet the list is neither complete nor exhaustive. It can be argued that the laws of vital interest are on an equal legal rank with ordinary laws that the Assembly adopts by a simple majority vote. However, the Constitution provides for a different voting procedure for the laws of vital interest.[3]

The Constitution is "the highest legal act of the Republic of Kosovo" and "Laws and other legal acts shall be in accordance with this Constitution". These principles are known as the "Supremacy of the Constitution".[4] Yet, no provision defines what 'other legal acts' include. The Constitutional Court's practice leaves to understand that international law or, more specifically, international treaties are considered as 'other legal acts', including international legal acts. An international legal act would not cover customary international law, which is more of a process-based rule than an act.

The Constitution does not provide a systematic order of international law.

International human rights agreements listed in the Constitution represent an interesting case. Guaranteed by the Constitution, they are directly applicable to the legal order of Kosovo and take precedence over laws and other acts of institutions. It is questionable, though, whether these agreements may have acquired the status of constitutional law.[5]

Other international agreements must be ratified by law for their implementation. The Constitution provides that "Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo".[6] Furthermore, the Constitution foresees the delegation of sovereign powers -on specific matters- to international organizations.[7] This usually takes effect through the ratification of international agreements on membership in those organizations. That way, their norms gain superiority over the national laws.[8] Yet, uncertainties remain on the status of acts of international organizations and decisions of international courts.

In absence of clear and consistent terminology on the various types of legal acts, the normative hierarchy remains unclear. Future changes to the Constitution and/or the law need to address these gaps to ensure that authorities and individuals can easily navigate through the legal system.

1 European Commission for Democracy Through Law, Venice Commission, Kosovo Opinion on the Draft Law on Legal Acts adopted by the Venice Commission at its 120 plenary session, 11-12 October 2019, Opinion No. 958/2019, CDL-AD(2019)025, 14 October 2019, para. 1, 2, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)025-e
2 Constitution of Kosovo, Article 81.
3 Ibid., Article 81.
4 Ibid., Article 16 (1).
5 Ibid., Article 22.
6 Ibid., Article 19(2).
7 Ibid., Article 20(1).
8 Ibid., Article 20(2).

Relevant Provisions

Constitution of Kosovo

Article 16 [Supremacy of the Constitution]

1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.
2. The power to govern stems from the Constitution.
3. The Republic of Kosovo shall respect international law.
4. Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution.

Article 19 [Applicability of International Law]

1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied -except for cases when they are not self-applicable- and their implementation requires the promulgation of a law.
2. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.

Article 20 [Delegation of Sovereignty]

1. The Republic of Kosovo may on the basis of ratified international agreements delegate state powers for specific matters to international organizations.
2. If a membership agreement ratified by the Republic of Kosovo for its participation in an international organization explicitly contemplates the direct applicability of the norms of that organization, then the law ratifying the international agreement must be adopted by two thirds (2/3) vote of all deputies of the Assembly, and those norms have superiority over the laws of the Republic of Kosovo.

Article 65 [Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
(1) adopts laws, resolutions and other general acts;
(2) decides to amend the Constitution by two thirds (2/3) of all its deputies including two thirds (2/3) of all deputies holding seats reserved and guaranteed for representatives of communities that are not in the majority in Kosovo;
(3) announces referenda in accordance with the law;
(4) ratifies international treaties; […]

Article 76 [Rules of Procedure]

The Rules of Procedure of the Assembly are adopted by two thirds (2/3) vote of all its deputies and shall determine the internal organization and method of work for the Assembly.

Article 80 [Adoption of Laws]

1. Laws, decisions and other acts are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution.
[…]

Article 81 [Legislation of Vital Interest]

1. The following laws shall require for their adoption, amendment or repeal both the majority of the Assembly deputies present and voting and the majority of the Assembly deputies present and voting holding seats reserved or guaranteed for representatives of Communities that are not in the majority:
(1) Laws changing municipal boundaries, establishing or abolishing municipalities, defining the scope of powers of municipalities and their participation in inter-municipal and cross-border relations;
(2) Laws implementing the rights of Communities and their members, other than those set forth in the Constitution;
(3) Laws on the use of language;

(4) Laws on local elections;
(5) Laws on protection of cultural heritage;
(6) Laws on religious freedom or on agreements with religious communities;
(7) Laws on education;
(8) Laws on the use of symbols, including Community symbols and on public holidays.
2. None of the laws of vital interest may be submitted to a referendum.[9]

Relevant Case-law and Opinions

Case KO 95/13 addressed the relationship between international treaties, and the domestic constitutional and legal order.[10] The Court reviewed the constitutionality of Law No. 04/L-199 on the Ratification of the First Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia.

This case defined where international agreements fall in the domestic legal order. The Court acknowledged that after ratification by the Assembly an international agreement becomes binding in Kosovo and is part of its internal legal system. It found that self-executing provisions of international agreements may apply directly to the internal legal system of Kosovo, but their application remains subject to compliance with the Constitution.[11]

The self-executing provisions of an international agreement are superior to other legislation but inferior to the Constitution.

Yet, this case leaves several matters unaddressed about the normative hierarchy in Kosovo's legal order. The Draft Law on Legal Acts of 2019 attempted to provide more clarity and it was subject to the review and analysis of the European Commission for Democracy Through Law (the "Venice Commission"). The latter issued an opinion identifying the gaps in the law, guidance on the standards and principles of normative hierarchy and the drafting of laws, and suggestions on how the Constitution and/or the law should address these matters.

Opinion of the Venice Commission

The Venice Commission issued an Opinion about a Draft Law on Legal Acts (the "Opinion"), addressing the question of the hierarchy of norms in Kosovo's domestic legal order.[12] The significance of this Opinion is twofold: it deals with a Kosovo draft law - one that specifically addresses the issue of normative acts - and it provides for broader conceptual guidance and analysis of specific provisions of the Constitution dealing with the typology and hierarchy of norms in Kosovo's constitutional order.

In its Opinion, the Commission clarified that there is -across Europe- a wide spectrum of rule-making providing reference to the types, hierarchy, and mandatory forms of legal acts, including those governing the law-making process itself. It also specified that there is no mandatory international standard in this field.[13] Yet there are -in its view- several important international standards directly relevant to it.

At the same time, the Venice Commission argued that -in the absence of specific standards-there may be diversity in traditions and practices as long as it does not go against more general ones deriving from the three main principles expressed in the Preamble to the Statute of the Council of Europe: democracy, human rights and the rule of law.[14]

Additionally, the Venice Commission outlined that rule of law standards are crucial when dealing with formal aspects of the legislation. Therefore, it pointed out that the Rule of Law Checklist of the Venice Commission should

9 Constitution of Kosovo.
10 Constitutional review of Law No. 04/L-199 on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this agreement, Case No. KO95/13, 9 September 2013, at https:///gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_95_13_ang.pdf
11 Ibid., para. 52.
12 This draft law was part of the legislative agenda of the year 2019 and the result of a process involving private and public consultations, so as to make sure that it would adhere to international best practices, standards, and norms. Venice Commission Opinion No. 958/2019.
13 Ibid., para. 6.
14 Ibid.

be taken into account in this regard.[15]

The Venice Commission assessed, on this basis, the adherence of the draft law on legal acts to international best practices and norms on various issues, and among them - for the relevant case under consideration - the following are noteworthy:

- For the principle of drafting legal acts (Article 4) -the Commission welcomed the inclusion in the draft law of principles to guide the drafting of legal acts, as being a positive step in terms of implementation of legislative standards. Yet it acknowledged that there is room for improvement. Specifically, in the Commission's view, the principles could include compatibility with human rights and with international law. This is necessary for two reasons: 1) to help embedding respect for human rights and international law into the process of making legal acts, and 2) to make clear that these principles apply to the whole legislative process, that is from the initial drafting of legislation, through its review by the Assembly, to its correction and consolidation. In short, the Commission suggested constitutionalizing those principles (e.g. constitutionality, legality, proportionality), to prevent the legislature from adopting legislation going against them;[16]
- For the hierarchy of norms, the Venice Commission recommended clarity in the draft law in this regard. Article 6 of the draft law lists - in the Commission's view - the types of legal acts, but it does not clarify that the list defines the hierarchy of authorities. The Commission suggested, therefore, to include such specification in the law and the relevant article establishing the hierarchy of all legal acts, international and internal;[17]
- The Commission recognized that the draft law is silent on the constitutional values under Article 7 of the Constitution, specifically those under divisions 1 and 2. It also acknowledged that the draft law does not refer to the applicability of international law, the delegation of sovereignty, and the general principles relating to fundamental rights and freedoms.[18]

In short, the Commission noted that the Constitution should contain the most important rules on legislation.[19] The recognition of the principle of constitutionality in the drafting process will help legitimize and provide relevant material for ex ante legislative review of the constitutionality of legal acts (e.g., by specialized parliamentary committees). The same will be relevant for ex post judicial review of the constitutionality of legal acts, which are other important means of securing compliance with the principle of legality.

The Constitution should contain the most important rules on legislation, given that the duty to implement the law is one of the cornerstones of the principle of legality.

The law-making act should define which legal acts have priority and specify the different types of legal acts.

In fact, some constitutions provide examples of principles defining the law-making process. For instance, the Constitution of Slovenia states that "laws must conform with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified treaties."[20] In the case of Albania, when addressing the issue of local legal acts, the Constitution opts for the possibility of regulating -by law- the principles and procedures for the issuance of such acts.[21]

The Opinion also defines the types of legal acts and the relationship between them. It notes among others- that statutes must not contradict the Constitution, decrees may not contradict the Constitution and statutes in general, and internal normative acts (binding state institutions only) must not contradict external normative acts (binding all individuals, legal persons, or institutions).[22]

15 Ibid., para. 7.
16 Ibid., para. 81, 61.
17 Ibid., para 79.
18 Ibid., para. 69.
19 Ibid., para. 10.
20 Constitution of Slovenia, Article 153, at https://www.us-rs.si/legal-basis/constitution/?lang=en
21 Constitution of Albania, Article 120, at https://www.gjk.gov.al/web/Search_Result_84_2.php? search=constitution
22 Venice Commission Opinion No. 958/2019, para. 23-31.

In identifying gaps in the Draft Law on Legal Acts, the Commission noted the importance of clarifying the differences and hierarchies between legal acts, normative acts, and administrative acts.[23] It should also refer to constitutional principles enshrined in the Constitution and clarify whether they apply only to the drafting process, or if they shall govern the final legal act as well.[24]

Particularly to the typology and hierarchy of norms, and to the guiding constitutional principles for the drafting process of laws, the Commission observed the following:

- legal acts can be normative (general and abstract) or special (individual and concrete). Normative (general) acts can be either external (binding all individuals, legal persons, and institutions) or internal (binding only state institutions such as the legislative, the executive, or the judiciary including the Constitutional Courts). The highest external normative act is the Constitution, which should regulate the types of other external normative acts, including primary and secondary legislation;[25]
- the very concept of 'legal acts' is central to the idea of a state governed by the rule of law. A clear legal framework with an unambiguous definition of legal acts and the means for their adoption and amendment is essential. This would give effect to important rule of law principles such as accessibility, foreseeability, predictability, and consistency of the law;[26]
- resolutions that the Assembly adopts are not legal acts;[27]
- while the executive branch of the government (including the public administration) has to abide by parliamentary legislation, it is less certain whether supremacy of the law implies that the parliament is bound by the (ordinary) legislation it adopts. Yet, the national legal order might impose on the Assembly the application of the principle patere legem quem ipse fecisti ("obey the law that you yourself have forged"). Since the law on legal acts would be ordinary legislation, the question is therefore whether the Assembly has to abide by it. At any rate, the Assembly will always have the possibility to modify the law on legal acts if it does not wish to abide by its rules;[28]

Comparative Analysis and References

The Constitution of Albania regulates explicitly the types of legal acts, including international and national legal acts, and their hierarchy in Albania's legal system. The Bulgarian Constitution defines the legal status of the Constitution and international agreements. However, it is not as detailed as the Constitution of Albania which covers laws, legal acts issued by the Council of Ministers, and legal acts of local governments and other state institutions. The Constitution of Croatia defines the supremacy of the Constitution over all other legal acts. It provides that laws concerning minority rights and human rights must pass by a two-thirds majority of all members of the parliament. It also contains detailed provisions on the ratification of international agreements and their status within the Croatian legal system. The Croatian Constitution contains a specific provision on the status of EU law in Croatia. Additionally, the constitutions of Germany and Slovenia establish the principle of the supremacy of the Constitution and define the status of international law in their respective domestic legal systems. Both constitutions contain provisions on the transfer of sovereign powers to international organizations, specifically the European Union.

Albania

Article 116

1. Normative acts that are effective in the entire territory of the Republic of Albania are:
   a. the Constitution;
   b. ratified international agreements;

23 Ibid., para. 65.
24 Ibid., para. 69.
25 Ibid., para. 25, 26.
26 Ibid., para. 32.
27 Ibid., para. 53.
28 Ibid., para. 59.

c. the laws;
d. normative acts of the Council of Ministers.
2. Acts that are issued by the organs of local government are effective only within the territorial jurisdiction of these organs.
3. Normative acts of ministers and directors of other central institutions are effective within the sphere of their jurisdiction in the entire territory of the Republic of Albania.

Article 118

1. Substatutory acts are issued based on and for implementation of the laws by the organs provided in the Constitution.
2. A law shall authorize the issuance of substatutory acts, designate the competent organ, the issues that are to be regulated, and the principles on the basis of which the substatutory acts are issued.
3. The organ authorized by law to issue substatutory acts as is specified in paragraph 2 of this article may not delegate its power to another organ.

Article 119

1. The rules of the Council of Ministers, of the ministries and other central institutions, as well as orders of the Prime Minister, the ministers and the heads of central institutions, have an internal character and are binding only on their subordinate administrative entities.
2. These acts are issued on the basis of law and may not serve as a basis for taking decisions that affect individuals and other subjects.
3. Rules and orders are issued on the basis of and for the implementation of acts that have general legal effect.

Article 120

The principles and procedures for the issuance of local legal acts are provided by law.
[…]

Article 122

1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing, and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.
3. The norms issued by an international organization have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organization is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein.

Article 123

1. The Republic of Albania delegates to international organizations state powers for specific issues on the basis of international agreements.
2. The law that ratifies an international agreement as provided in paragraph 1 of this article is approved by a majority of all members of the Assembly.
3. The Assembly may decide that the ratification of such an agreement be done through a referendum.[29]

Bulgaria

Article 5

(1) The Constitution shall be the supreme law, and no other law may be in conflict therewith.
(2) The provisions of the Constitution shall operate directly.
(3) No one shall be convicted of any act or omission which was not declared to be a criminal offence by the law at the time of commission thereof.

[29] Constitution of Albania.

(4) Any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, shall be part of the domestic law of the land. Any such treaty shall take priority over any conflicting standards of domestic legislation.
(5) All statutory instruments shall be published. They shall enter into force three days after the date of the promulgation thereof unless otherwise provided by the instruments themselves.

Article 84

The National Assembly shall exercise the following powers:
1. pass, amend, supplement, and repeal the laws;
[…].

Article 85

(1) The National Assembly shall ratify or denounce by statute the international treaties which:
1. are of a political or military nature;
2. concern the participation of the Republic of Bulgaria in international organizations;
3. provide for a modification of the border of the Republic of Bulgaria;
4. impose financial obligations on the State;
5. provide for participation of the State in arbitral or court settlement of international disputes;
6. affect fundamental human rights;
7. affect the operation of the law or require measures of a legislative nature for the performance thereof;
8. expressly require ratification;
9. […] grant the European Union powers arising from this Constitution.

(2) […] The passage of an act to ratify any international treaty referred to in Item 9 of Paragraph (1) shall require a majority of two-thirds of all National Representatives.
(3) [...] Any treaties ratified by the National Assembly may be amended or denounced solely according to the procedure specified in the treaties themselves, or in accordance with the universally recognized standards of international law.
(4) […] The conclusion of international treaties, which require any amendments to the Constitution, shall be preceded by the adoption of the said amendments.

Article 86

(1) The National Assembly shall pass laws, resolutions, declarations, and addresses.
(2) The laws and resolutions passed by the National Assembly shall be binding on all state bodies, the organizations, and the citizens.

Article 114

Acting in pursuance and in implementation of the laws, the Council of Ministers shall adopt decrees, directives, and decisions. By decree, the Council of Ministers shall furthermore adopt regulations and ordinances.

Article 115

The individual government ministers shall issue regulations, ordinances, instructions, and orders.[30]

Croatia

Article 5

In the Republic of Croatia, laws shall comply with the Constitution. Other regulations shall comply with the Constitution and law.
All persons shall be obliged to abide by the Constitution and law and respect the legal order of the Republic of Croatia.

30 Constitution of Bulgaria, at https://constcourt.bg/en/LegalBasis

Article 20

Whosoever violates the provisions of the Constitution concerning human rights and fundamental freedoms shall be held personally liable and may not be exculpated by invoking a higher order.

Article 83

The Croatian Parliament shall adopt laws (organic laws) regulating the rights of national minorities by a two-thirds majority of all Members.
The Croatian Parliament shall adopt laws (organic laws) elaborating constitutionally established human rights and fundamental freedoms, the electoral system, the organisation, remit and operation of state bodies, and the organisation and remit of local and regional self-government by a majority vote of all Members.
The Croatian Parliament shall adopt the decision specified in Article 8 of the Constitution by a two- thirds majority of all Members.

Article 133

The Croatian Parliament shall ratify all international treaties which require the adoption of amendments to laws, international treaties of a military and political nature, and international treaties which give rise to financial commitments for the Republic of Croatia.
International treaties which grant an international organisation or alliance powers derived from the Constitution of the Republic of Croatia shall be ratified by the Croatian Parliament by a two-thirds majority of all Members of Parliament.
[…].

Article 134

International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.

Article 139

International agreements shall be concluded, in conformity with the Constitution, law and the rules of international law, depending on the nature and contents of the international agreement, within the authority of the Croatian Parliament, the President of the Republic and the Government of the Republic of Croatia.

Article 140

International agreements which entail the passage of amendment of laws, international agreements of military and political nature, and international agreements which financially commit the Republic of Croatia shall be subject to ratification by the Croatian Parliament.
International agreements which grant international organization or alliances powers derived from the Constitution of the Republic of Croatia, shall be subject to ratification by the Croatian Parliament by two-thirds majority vote of all representatives.
The President of the Republic shall sign the documents of ratification, admittance, approval or acceptance of international agreements ratified by the Croatian Parliament in conformity with sections 1 and 2 of this Article.
International agreements which are not subject to ratification by the Croatian Parliament are concluded by the President of the Republic at the proposal of the Government, or by the Government of the Republic of Croatia.

Article 141

International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects. Their provisions may be changed or repealed only under conditions and in the way specified in them or in accordance with the general rules of international law.

Article 145

The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law.

All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.
Croatian courts shall protect subjective rights based on the European Union acquis communautaire.

Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.[31]

Germany

Article 20

[…]
(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
[…]

Article 24

(1) The Federation may, by a law, transfer sovereign powers to international organisations.
[…]
(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.
(3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.

Article 25

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.[32]

Slovenia

Article 3a

Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organizations which work on human rights and fundamental freedoms, democracy, and the principles of the rule of law. These organizations may enter into a defensive alliance with states that respect these values.
Before ratifying a treaty, the National Assembly may call a referendum. A proposal passes in the referendum if the majority votes in favor of the same. The National Assembly is bound by the result of such referendum. In case of such referendum, the National Assembly may not call a referendum regarding the law on the ratification of the treaty.
Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations. In procedures for the adoption of such legal acts and decisions, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.

31 Constitution of Croatia, at https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf.
32 Constitution of Germany, at https://www.gesetze-im-internet.de/englisch_gg/

Article 8

Laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.

Article 153

Laws, regulations, and other general acts must be in conformity with the Constitution.
Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified treaties.
Regulations and other general acts must be in conformity with the Constitution and laws.
Individual acts and actions of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law.

Article 154

Regulations must be published prior to entering into force. A regulation enters into force on the fifteenth day after its publication unless otherwise determined in the regulation itself.
State regulations are published in the official gazette of the state, whereas local community regulations are published in the official publication determined by the local community.

Article 155

Laws and other regulations and general acts cannot have retroactive effect.
Only a law may establish that certain of its provisions have retroactive effect, if this is required in the public interest and provided that no acquired rights are infringed thereby.

Article 156

If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court.
The proceedings in the court may be continued after the Constitutional Court has issued its decision.[33]

Conclusion

The Constitution requires that laws and other legal acts must be in accordance with its text, without any specification as to what these other legal acts are. It is, nonetheless, clear that if any other law is inconsistent with the Constitution, that law is void to the extent of its inconsistency. The Constitution requires Kosovo to respect international law, with the assumption that this conforms with the country's highest legal act.[34] Yet, the Constitution's silence on other aspects of the hierarchy of norms leaves the status of acts of international organizations and decisions of international courts, unclear.

The lack of a clear terminology of legal acts, and the absence of a normative hierarchy have caused ambiguities and unclarities. This risks the violation of the Rule of Law and other principles that guide the process of law-making. Further, the present constitutional gaps in important rules on legislation may obstruct the conformity of laws with the Constitution, as well as the conformity of the acts of the executive branch with the Constitution and other laws.

Thus, the vague regulation of the hierarchy of legal acts brings up the need to ensure more consistency and harmony in the text of the Constitution. In line with the Venice Commission's opinion, the Constitution should include the principles of drafting legal acts (e.g., constitutionality, legality, proportionality), as well as other clear provisions on the types of legal acts (international and national) and their hierarchy within the domestic legal order.

33 Constitution of Slovenia.
34 Constitution of Kosovo, Article 16(3).

Recommendations

The following options could be discussed to address this issue:

- Better establish the relationship between the Constitution and international law (treaty and customary; the latter is nowhere expressly referred to in the Constitution), the status of acts of international organizations, and jurisdictional decisions of international courts;
- Include a new section with provisions on legal acts following the examples of the Constitutions of Albania (Normative Acts and International Agreements) and Slovenia (Constitutionality and Legality), which defines and clarifies the legal acts referred to in the Constitution;
- A further possibility would be to include a new provision prescribing the mandatory application of several fundamental constitutional principles during the law-making process (e.g., constitutionality, constitutional values of Kosovo, constitutional order, gender equality, compatibility with the human rights obligations, and compatibility with international law).

II

The Authority and Delegation of Competencies to Negotiate and Sign International Agreements (Treaties)

The Constitution lacks coherence in establishing the authority in charge of signing and ratifying international treaties. Three key questions were raised in practice:

1. Can the President ratify international agreements?

2. Can the Prime Minister sign international agreements?

3. Can the Assembly establish special bodies to conclude international agreements?

While the first two questions found answers in the Law on International Agreements, the third one proved to be more problematic. Future constitutional changes could provide more clarity in all three matters by reflecting the Court's interpretation and exploring new options that could work in practice.

Law No. 04/L-052 on International Agreements ("Law on International Agreements') provides that "the President, the Prime Minister, and the Minister of Foreign Affairs shall perform all acts relating to the conclusion of international agreements, in compliance with the Constitution and the Vienna Convention on the Law of Treaties."[35] Yet, there remains unclarity on the competencies of the President, the Government, and the Assembly to negotiate and conclude international agreements. It is also unclear whether the Assembly may establish - by legislation- special bodies which would have the authority to negotiate and sign international agreements. Due to these constitutional gaps, three main questions arise:

1. Can the President ratify international agreements?
2. Can the Prime Minister sign international agreements?
3. Can the Assembly establish special bodies to conclude international agreements?

There is inconsistency in constitutional and legal provisions as to whether the President has the competence to ratify international agreements.

The Constitution vests on the President the power to ratify certain international agreements.[36] Yet it does not list the power to ratify international agreements in Article 84 on the Competences of the President.[37] Article 84(7) gives the President the power to sign international agreements only.[38] On the other hand, according to Article 10(4) of the Law on International Agreements, international agreements -other than those that the Assembly ratifies by two-thirds (2/3) of all deputies- "shall be ratified upon signature of the President of the Republic of Kosovo."[39] It is confusing from that wording whether this provision refers to the "signing" of the international agreement before ratification, or to the "ratification" itself. Paragraph 5 of the same article seems to clarify it by providing that "Paragraph 4 […] shall not apply to International Agreements […] signed by the President of the Republic of Kosovo", thus differentiating the act of "signing" from that of "ratifying"[40]. It provides that the President shall not ratify those international agreements that he/she has signed.[41]

The Constitution does not expressly give the Prime Minister the power to sign international agreements.

It is also unclear who can sign international agreements, besides the President. The Constitution provides that the President or the Prime Minister notifies the Assembly whenever an international agreement is signed. This could imply that the Prime Minister can also sign international agreements. Yet, the Constitution does not list such responsibility in the competencies of the Prime Minister.[42] Further, the Vienna Convention on the Law of Treaties (VCLT) and the Law on International Agreements state that the Minister of Foreign Affairs can also sign international agreements.[43] The Court confirmed this in its case law.[44]

Another issue is whether the Assembly can establish and delegate the authority to negotiate and/or sign international agreements to an entirely new and different body. Case KO43/19 triggered the discussion as the Court decided on the constitutionality of the authority of a State Delegation of Kosovo in the Dialogue Process with Serbia, to negotiate and sign an agreement with a third country.

35 Law No. 04/L-052 on International Agreements, Article 6, at https://gzk.rks- gov.net/ActDocumentDetail.aspx?ActID=2789
36 Constitution of Kosovo, Article 18 (2).
37 Ibid., Article 84 (7).
38 Ibid.
39 Law on International Agreements, Article 10(4).
40 Ibid., Article 10(5).
41 Ibid.
42 Constitution of Kosovo, Article 18(3).
43 Vienna Convention on the Law of Treaties, Article 7(2), at https://legal.un.org/ilc/texts/instruments/ English/conventions/1_1_1969.pdf; Official Gazette of the Republic of Kosovo, Law No. 04/L-052 on International Agreements, Article 6, at https://president-ksgov.net/repository/docs/LAW?_No_04L_052 ON_INTERNATIONAL_AGREEMENTS.pdf.
44 Constitutional Court of Kosovo, Case No. KO95/13.

Relevant Provisions

Constitution of Kosovo

Article 4 [Form of Government and Separation of Powers]

1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.
2. The Assembly of the Republic of Kosovo exercises the legislative power.
3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.
4. The Government of the Republic of Kosovo is responsible for the implementation of laws and state policies and is subject to parliamentarian control.

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of the environment, social justice, pluralism, separation of state powers, and a market economy.

Article 18 [Ratification of International Agreements]

1. International agreements relating to the following subjects are ratified by two thirds (2/3) vote of all deputies of the Assembly:
   (1) territory, peace, alliances, political and military issues;
   (2) fundamental rights and freedoms;
   (3) membership of the Republic of Kosovo in international organizations;
   (4) the undertaking of financial obligations by the Republic of Kosovo.
2. International agreements other than those in paragraph 1 are ratified upon the signature of the President of the Republic of Kosovo.
3. The President of the Republic of Kosovo or the Prime Minister notifies the Assembly whenever an international agreement is signed.
4. Amendment of or withdrawal from international agreements follows the same decision-making process as the ratification of such international agreements.
5. The principles and procedures for ratifying and contesting international agreements are set forth by law.

Article 19 [Applicability of International Law]

1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.
2. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.

Article 20 [Delegation of Sovereignty]

1. The Republic of Kosovo may on the basis of ratified international agreements delegate state powers for specific matters to international organizations.
2. If a membership agreement ratified by the Republic of Kosovo for its participation in an international organization explicitly contemplates the direct applicability of the norms of that organization, then the law ratifying the international agreement must be adopted by two thirds (2/3) vote of all deputies of the Assembly, and those norms have superiority over the laws of the Republic of Kosovo.

Article 65 [Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
(1) adopts laws, resolutions and other general acts;
[...]
(4) ratifies international treaties;
[…]
(12) oversees foreign and security policies;

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
[…]
(7) signs international agreements in accordance with this Constitution;

Article 93 [Competencies of the Government]

The Government has the following competencies:
(1) proposes and implements the internal and foreign policies of the country;

Article 94 [Competencies of the Prime Minister]

The Prime Minister has the following competencies:
(1) represents and leads the Government; [...]
(9) consults with the President on the implementation of the foreign policy of the country.[45]

Relevant Case-law

Cases KO95/13, KO131/18, and KO43/19 are landmark cases on the negotiation of international agreements and the delegation of authority to negotiate and sign international agreements.[46] In Case KO95/13 the Court referred to the Law on International Agreements provisions on the institutions that are authorized to conclude international agreements. In Case KO43/19 the Court held that the Assembly cannot create a 'special mechanism' to conclude international agreements.

Case KO95/13

The domestic law of each state determines the competent authority issuing the 'full powers.'

This case is about the Law on the Ratification of the First Agreement of Principles between the Republic of Kosovo and the Republic of Serbia (Law No. 04/L-199) adopted by the Assembly on 27 June 2013 ("Law on Ratification"). The Court considered that the ratification of the Agreement falls within the scope of Article 18(1) of the Constitution, and, therefore, it requires a two-thirds majority vote in the Assembly for the adoption of the Law on Ratification.[47]

This case also addressed the question of the authority of a state to conclude international treaties. The Court referred to Article 2 (c) of VCLT of 1969, which defines 'full powers' as meaning "[…] a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other action concerning a treaty".[48]

45 Constitution of Kosovo.
46 Constitutional Court - Case No. KO95/13; Resolution on Inadmissibility on the Request for assessment of the conflict among the constitutional competencies of the President of the Republic of Kosovo and the Assembly of the Republic of Kosovo, as defined in Article 113.3 (1) of the Constitution, Case No. KO131/18, 25 March 2019, at https://gjk-ks.org/wp-content/uploads/2019/03/ko_131_18_av_ang.pdf; 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, Case No. KO43/19, 27 June 2019, at https://gjk- ks.org/wp-content/uploads/2019/06/ko_43_19_agj_ang.pdf
47 Case No. KO95/13, para. 76.
48 Ibid., para. 77.

The Court clarified that "usually, such documents emanate from the Head of State (or somebody to whom they have delegated the necessary powers), the head of government or the foreign minister and bear the official emblem and, in some cases, the seal of a country".[49]

Additionally, the Court noted that Article 6 of the Law on International Agreements regulates which institutions are authorized to conclude international agreements. This reads as follows:

1. The President and the Prime Minister and the Minister of Foreign Affairs shall be entitled to perform all acts relating to the conclusion of the International Agreements of the Republic of Kosovo, in compliance with the Constitution of the Republic of Kosovo and the Vienna Convention on the Law of Treaties.

2. The head of a diplomatic mission of the Republic of Kosovo or the authorized representative of the Republic of Kosovo at an international conference, international organization or one of its bodies shall be entitled to negotiate the conclusion of an International Agreement of the Republic of Kosovo or to approve its text with the State to which he is accredited or at the international conference, international organization or one of its bodies.

3. Other persons may perform acts relating to the conclusion of the International Agreements of the Republic of Kosovo only provided they possess powers granted to them on the basis of the laws in force and according to the procedure established in Article 6 of this Law.[50]

Case KO131/18

This case is about the authority to ratify an international agreement. The President alleged a conflict between his constitutional competencies and those of the Assembly to ratify an international agreement, namely an exchange of letters between the President and the High Representative of the European Union for Foreign Affairs and Security Policy (the "Agreement"). The Agreement was the fourth exchange of letters. Different from the previous three exchanges, this one 1) did not refer to Article 18(1) of the Constitution that enlists the international agreements that should be ratified by the Assembly, and 2) included a change of the role and executive mandate of the EU Rule of Law Mission in Kosovo, making it mainly an advisory and monitoring one.[51] Given these, the President raised the question of whether the Assembly or the President should ratify the international agreement.[52]

The Court found that the President neither submitted sufficient useful information about the 'assumed' or 'alleged conflict' nor did he accurately specify what conflict exists among the constitutional competencies of the President and the Assembly.[53] As a result, the Court declared the President's referral inadmissible for review.[54]

Case KO43/19

This is a unique case emerging from a particular institutional moment related to a very delicate political question concerning the dialogue with Serbia. The Court discussed the competencies between the Government and the Assembly concerning the negotiation and conclusion of an international agreement.[55] It dealt with the constitutionality of certain provisions of Law No. 06/L- 145 on the Duties, Responsibilities, and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with the Republic of Serbia ("the Law on the State Delegation").

The applicants claimed that some of the provisions of the Law on the State Delegation are incompatible with the Constitution, and they demanded that the law should be declared unconstitutional in its entirety.

49 Ibid., para. 78
50 Ibid., para. 79.
51 Case KO131/18, para. 57.
52 Ibid., para 64.
53 Ibid., para. 104.
54 Ibid., para. 108.
55 Case KO43/19.

Relevant articles of the challenged law read as follows:

Article 1 - Scope of the Law

1. This law determines the institutional hierarchy and the decision-making procedure in the Dialogue Process with the Republic of Serbia (the "Dialogue"). Furthermore, this law regulates the functioning of the State Delegation of the Republic of Kosovo in the Dialogue with Serbia (the " State Delegation") by determining the organizational structure, activities, competencies, and responsibilities of the State Delegation. The law clearly defines, inter alia, the relation that the State Delegation shall maintain with other constitutional institutions of the Republic of Kosovo.
2. This law shall have the statute of Lex Specialis. The Articles of this law shall prevail should there be any collision with other legal provisions.

Article 2 - Objective and Purpose

By this law, the State Delegation of the Republic of Kosovo for the Dialogue with Serbia is hereby authorized by the Assembly of the Republic of Kosovo to negotiate and enter an agreement under the Dialogue process, in consultation with Constitutional Institutions of the Republic of Kosovo.

Article 4 - Procedure for establishing the State Delegation

The State Delegation for the dialogue with the Republic of Serbia will be mandated by the Assembly of the Republic of Kosovo. The State Delegation shall be the sole body authorized to lead the Dialogue. In this regard, the Delegation shall consult with the Constitutional Institutions of the Republic of Kosovo.

Article 10 - Competencies of State Delegation

4. State Delegation shall
4.1. chair the process of dialogue with Serbia;
4.2. represent the Republic of Kosovo in dialogue;
[…].

Article 11 - Relation of State Delegation with Constitutional Institutions

Constitutional Institutions of the Republic of Kosovo shall engage in Dialogue according to their constitutional mandate and always in coordination and agreement between relevant institutions of the Republic of Kosovo and State Delegation.[56]

The Court observed that the challenged Law regulates the functioning of the State Delegation as a 'special mechanism' to reach an agreement with a third country. In the Court's view, this constituted a transfer of powers from the constitutional institutions to the 'special mechanism'. It, therefore, found that this transfer of powers represents an interference with the exercise of the powers of constitutional institutions in the sphere of foreign policy.[57]

The Court:
The transfer of powers to a state delegation for concluding an international agreement is unconstitutional.

Therefore, the Court finds that Article 1(1) of the Law on State Delegation is not in compliance with the general constitutional principles embodied in paragraphs 1, 2, 3, and 4 of Article 4 [Form of Government and Separation of Powers] and paragraph 1 of Article 7 [Values] of the Constitution.[58]

The applicants' second allegation was that the legal competencies of the State Delegation directly interfere with the constitutional competencies of the executive and legislative power, namely with the competencies of the Assembly, the Government, and the Prime Minister.[59]

56 Ibid., pages 11,12.
57 Ibid., para. 79.
58 Ibid., para. 80.
59 Ibid., section B.

The Court:
A 'special mechanism' would not be subject to parliamentary control and oversight and would therefore be unconstitutional.

The Court recalled that the Constitution lists concrete competencies for the constitutional institutions, including those in the sphere of foreign policy (e.g., the Government proposes and implements the internal and foreign policies of the country; the Prime Minister represents and leads the Government, as well as consults with the President on the implementation of the foreign policy of the country; the Assembly oversees the foreign policy).[60]

In this regard, the Court stated that the Constitution empowers the Assembly to oversee foreign and security policy, whereas, in this particular instance, the Assembly has established a 'special mechanism', which is not subject to parliamentary control and oversight as the Constitution foresees.[61]

Further, the Court considered that the authorization that the challenged law gives to the state delegation represents a direct intervention in the concrete powers of the Government and the Prime Minister.[62]

The applicants' third allegation was that Article 1(2) of the challenged Law gives the latter a lex specialis character so that its provisions may prevail in case of a collision with other laws. They argued that this undermines the principle of legal certainty.[63] The Court, however, having found constitutional violations in the essential provisions of the challenged Law, considered it unnecessary to address this allegation.[64] In conclusion, the Court declared that the challenged Law was incompatible with the Constitution in its entirety.[65]

The Court referred to the specific constitutional competencies of the two branches. The fundamental constitutional mandate of the Government is to propose and implement the internal and foreign policies of the country. With a look at international relations, the Constitution states that the Prime Minister consults with the President -leading the foreign policy- on the implementation of the foreign policy. This leads to the conclusion that -on the one hand- the Government's authority is limited to proposing and implementing foreign policy. On the other hand, the President's role is framed in the context of implementation rather than the adoption of foreign policy.

The Court did not clarify whether the President has the political lead in the foreign affairs.

A textual interpretation of the Constitution may suggest that the President is indeed the leader in foreign policy. Yet, a structural constitutional interpretation may suggest that the status of a President in parliamentary systems, such as in Kosovo, implies a somewhat narrower role in the area of foreign policy. As for the Assembly, the Constitution limits its role to overseeing the foreign policy of the country.[66]

The applicants stated that "the Constitution … clarified the institutional hierarchy, envisioning the Assembly as the highest representative and legislative power, which, among other things, defines foreign policy orientations (through the laws it adopts) and oversees that policy through parliamentary oversight instruments on the executive, that is, the Government, which builds and implements foreign policy".[67] This statement touches on the very essence of what the Constitution does not spell out, namely who sets out, adopts, or defines the foreign policy. The Constitution provides an answer to this by including a reference to a broad, unqualified competence of the Assembly to decide "regarding general interest issues as set forth by law".[68] Matters of foreign policy are by their very nature of 'general interest'. This could arguably justify the establishment of a special negotiation mechanism (State Delegation).[69] The applicants also alleged that "by establishing the State Delegation above the Assembly and the Government, this draft law violates the balance and control of powers and gives this unconstitutional body the right to control the actions

60 Ibid., para. 86, 87.
61 Ibid., para. 92.
62 Ibid., para. 93, 96, 99.
63 Ibid., para. 105.
64 Ibid., para. 106.
65 Ibid., para. 108.
66 Constitution of Kosovo, Article 65(12).
67 Case KO43/19, para. 37.
68 Constitution of Kosovo, Article 65(14).
69 Ibid.

of the Government and Assembly about other states and to represent the manner of representation contrary to the Constitution".[70] While the establishment of such a body could arguably interfere with the competence of the Government or even that of the President to implement and lead the foreign policy, the statement that the State Delegation was above the Assembly seems untenable.

This body's competence was limited to negotiating and potentially signing an international agreement, which would not only be subject to the Assembly's oversight but to the ultimate control of the Assembly as well. The latter would be the responsible body for ratification, given the political nature of the agreement.

The State Delegation's competence would be limited to negotiating and potentially signing of an international agreement.

In line with the international legal practice, heads of diplomatic missions or other authorized persons may negotiate and conclude international agreements. For instance, the Law on International Agreements provides that persons other than the President, the Prime Minister, the Minister of Foreign Affairs, and heads of diplomatic missions or authorized representatives of the Republic of Kosovo at an international conference, international organization, or one of its bodies "may perform acts relating to the conclusion of the International Agreements of the Republic of Kosovo only provided they possess powers granted to them on the basis of the laws in force".[71]

The Court did not address the role and the powers of the President.

Comparative Analysis and References

The Constitution of Albania defines the types of international agreements requiring ratification by domestic law. It also defines the legal status of international agreements within the Albanian legal system and its relationship with domestic law. Besides that, it regulates the delegation of sovereign powers to international organizations. The Constitution of Bulgaria contains similar provisions except for the delegation of sovereign powers to international organizations. The Constitution of Croatia specifically requires international agreements to be concluded in accordance with the Constitution. It distinguishes between agreements that ask for ratification by the parliament and those that can be concluded by the President or the Government. The provisions of the Constitution of North Macedonia are relatively short; they only distinguish between international agreements that can be concluded by the President and by the Government. In contrast to the above constitutions, the Constitution of Slovenia contains detailed provisions on the delegation of sovereign powers to international organizations and the status of legal acts of international organizations within the Slovenian legal system.

Albania

Article 121

1. The ratification and denunciation of international agreements by the Republic of Albania are done by law when they involve:
a. territory, peace, alliances, political and military issues;
b. human rights and freedoms, and obligations of citizens as provided in the Constitution;
c. the membership of the Republic of Albania in international organizations; ç. the assumption of financial obligations by the Republic of Albania;
d. the approval, amendment or repeal of laws.
2. The Assembly may, by a majority of all its members, ratify other international agreements that are not contemplated in paragraph 1 of this article.
3. The Prime Minister notifies the Assembly whenever the Council of Ministers signs an international agreement that is not ratified by law.
4. The principles and procedures for ratification and denunciation of international agreements are provided by law.

70 Case K043/19, para. 38.
71 Law on international agreements, Article 6 (3).

Article 122

1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.
3. The norms issued by an international organization have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organization is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein.

Article 123

1. The Republic of Albania delegates to international organizations state powers for specific issues on the basis of international agreements.
2. The law that ratifies an international agreement as provided in paragraph 1 of this article is approved by a majority of all members of the Assembly
3. The Assembly may decide that the ratification of such an agreement be done through a referendum.[72]

Bulgaria

Article 85

(1) The National Assembly shall ratify or denounce by law international treaties which:
1. are of a political or military nature;
2. concern the participation of the Republic of Bulgaria in international organizations;
3. provide for a modification of the border of the Republic of Bulgaria;
4. impose financial obligations on the State;
5. provide for participation of the State in arbitral or court settlement of international disputes;
6. affect fundamental human rights;
7. affect the operation of the law or require measures of a legislative nature for the performance thereof;
8. Expressly require ratification.
(3) Any treaties ratified by the National Assembly may be amended or denounced solely according to the procedure specified in the treaties themselves, or in accordance with the universally recognized standards of international law.
(4) The conclusion of international treaties, which require any amendments to the Constitution, shall be preceded by the passage of the said amendments.[73]

Croatia

Article 133

The Croatian Parliament shall ratify all international treaties which require the adoption of amendments to laws, international treaties of military and political nature, and international treaties which give rise to financial commitments for the Republic of Croatia.
International treaties which grant an international organization or alliance powers derived from the Constitution of the Republic of Croatia shall be ratified by the Croatian Parliament by a two-thirds majority of all Members of Parliament.
The President of the Republic shall sign the documents of ratification, accession, approval, or acceptance of international treaties ratified by the Croatian Parliament in conformity with paragraphs
(1) and (2) of this Article.
International treaties which are not subject to ratification by the Croatian Parliament shall be concluded by the President of the Republic, at the proposal of the Government, or by the Government of the Republic of Croatia.

72 Constitution of Albania.
73 Constitution of Bulgaria.

Article 134

International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.[74]

Republic of North Macedonia

Article 119

International agreements are concluded in the name of the Republic of Macedonia by the President of the Republic of Macedonia. International agreements may also be concluded by the Government of the Republic of Macedonia, when it is so determined by law.[75]

Slovenia

Article 3a

Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal is passed in the referendum if a majority of voters who have cast valid votes vote in favour of the same. The National Assembly is bound by the result of such referendum. If such a referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.

Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.

In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.

(Added by the Constitutional Act Amending Chapter I and Articles 47 and 68 of the Constitution of the Republic of Slovenia, 27 February 2003).

Article 86

The National Assembly may pass decisions if a majority of deputies are present at the session. The National Assembly adopts laws and other decisions and ratifies treaties by a majority of votes cast by those deputies present, except where a different type of majority is provided by the Constitution or by law.

Article 107

The President of the Republic:

[…]

issues instruments of ratification […].[76]

74 Constitution of Croatia.

75 Constitution of the Republic of North Macedonia, at https://www.sobranie.mk/the-constitution-of-the- republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx

76 Constitution of Slovenia.

Conclusion

The Constitution is unclear on the competencies of the President, the Government, and the Assembly to negottiate and conclude international agreements. It is uncertain whether the President can -along with the signature- ratify international agreements. Textual ambiguities brought issues into practice about who is in charge of signing international agreements; namely if it is only the President, or the Prime Minister too. The Court has brought some clarity to the issue by relying on the Law on International Agreements and concluding that the President, the Prime Minister, and the Minister of Foreign Affairs shall be entitled to perform all acts relating to the conclusion of the International Agreements. Yet, to avoid similar or new issues in the future, the Constitution needs to provide more clarity on these matters.

The main issue with the delegation of the power to negotiate and sign international agreements to a special body is the interference with the competencies of the Assembly and the Government. However, lawmakers could explore options that would not hinder the balance of powers between different branches. This would be possible for three main reasons: first, the agreement would be subject to parliamentary oversight; second, the Assembly will ultimately have control over it, in the sense of ratification; and third, it would clarify the constitutional ambiguity about who is in charge of negotiating and signing international treaties.

The real concern with the State Delegation was not so much about its power to negotiate, as it was about the power to sign or enter into an international agreement. Therefore, there is a distinction between the "negotiating" and the "signing" procedure, which should be taken into account.

Thus, the Assembly could establish a certain institutional mechanism, short of violating the Constitution, in the pursuit of matters of general interest, as the Constitution prescribes. Ad hoc negotiating bodies can be set up for the purpose of negotiating specific treaties or issues, whereas international treaties can be signed by targeted state functionaries only. Future amendments to the Constitution could regulate such options and fill the current gaps.

Recommendations

The following options could be discussed to address the above issues:

- If the Constitution is not amended, the relevant provisions on negotiating and signing international treaties must be interpreted by the reasoning of the Constitutional Court in Case KO43/19. The Assembly could clarify controversial issues, by adopting a new law as the Court suggests.
- The Constitution could expand the jurisdiction of the Court to review the scope of authority of constitutional bodies regarding international treaties.
- The Constitution could also allow the establishment of special groups/bodies to negotiate international treaties, without the authority to sign them.
- The Constitution should include a clear and comprehensive provision about who is authorized to negotiate and sign international agreements. A further option is to explicitly state in the Constitution that the President has the authority to ratify certain international treaties and that the Prime Minister has the authority to sign international treaties, by preferably aligning them with the Vienna Convention on the Law of Treaties. Concretely, this could be done by: (a) listing all state officials, who in virtue of their functions, are considered as representing the state to perform all acts relating to the conclusion of treaties, or (b) leaving it up to the law to set out details on the signing of international agreements.

III

The Parliamentary Group Entitled to Propose the President of the Assembly

The Constitution does not define the "largest parliamentary group" that is entitled to propose the candidate for President of the Assembly and its Deputy Presidents. Case law clarified the meaning by defining it as "the political entity, coalition, or citizens initiatives that won more seats in the Assembly" and established that election results are the main factor when determining the largest parliamentary group.

Yet, the text of the Constitution remains unclear, and many considered that the Court's interpretation could cause practical uncertainties in the future. Therefore, more clarity in the language of the Constitution remains a necessity.

The Constitution determines that the largest parliamentary group proposes the President of the Assembly[77] However, it does not define the largest parliamentary group, namely whether it is the political party or coalition that has won the majority of seats in the Assembly or the largest parliamentary group or coalition formed after the elections. The same goes for the appointment and the dismissal of the Deputy Presidents.

The Constitution does not define the term "largest parliamentary group"

The President of the Assembly and the Deputy Presidents have important tasks in ensuring the well-functioning of the Assembly. The President of the Assembly represents the Assembly, sets the agenda, convenes, and chairs the sessions, signs acts adopted by the Assembly, and exercises other functions by the Constitution and the Rules of Procedure of the Assembly.[78] They form the Presidency of the Assembly which oversees the administrative operation of the Assembly.[79] Considering such an important role, constitutional unclarities must not delay their election.

The Constitution ensures the representation of the different political parties and communities in the election process of the President and Deputy Presidents of the Assembly.

The majority vote of all deputies of the Assembly (at least 61 votes) elects the President and the five Deputy Presidents.[80] The 'largest parliamentary group' proposes the President of the Assembly; the three 'largest parliamentary groups' propose three deputy presidents; the deputies representing the Serb community propose one Deputy President, and deputies who represent other communities that are not in majority propose the last Deputy President.[81] In case of resignation by the President or Deputy Presidents of the Assembly, the same parliamentary group sponsoring the ones that resign will propose a replacement candidate. The President and Deputy Presidents are elected in the first constitutive meeting of the Assembly led by the oldest deputy and assisted by the youngest one.[82] Two-thirds (2/3) of all deputies of the Assembly may dismiss the President or Deputy Presidents.[83] One-third (1/3) of all deputies of the Assembly may propose the dismissal of the President of the Assembly.[84] The dismissal of a Deputy President of the Assembly, on the other hand, may be proposed by the parliamentary group that proposed him/her for that position.[85] Neither the Constitution nor the Rules of Procedure of the Assembly refer to the dismissal originating from another parliamentary group.

A post-elections parliamentary group may not always coincide with the party or coalition that has received the majority of seats in the Assembly.

In absence of constitutional provisions, case law provided for an interpretation of the term 'largest parliamentary group' in electing the President of the Assembly. Still, the Court's interpretation has been up for debate and could cause legal and practical uncertainties in the future. Therefore, more clarity in the Constitution's language remains a necessity.

77 Constitution of Kosovo, Article 67(2).
78 Ibid., Article 67(7). Rules of Procedure of the Assembly, Article 16, entered into force on 9 August 2022, at https://gzk.rks-gov.net/ActsByCategoryInst.aspx?Index=3&InstID=1&CatID=23. These Rules repealed the Rules of Procedure of the Assembly of 29 April 2010.
79 Constitution of Kosovo, Article 67(6).
80 Ibid., Article 67(2) and Article 67(3).
81 Ibid., Article 67.
82 Rules of Procedure of the Assembly, Article 9.
83 Constitution of Kosovo, Article 67(5).
84 Rules of Procedure of the Assembly, Article 15.1 & Article 15.2. The Rules of Procedure of the Assembly of 2010 established that the dismissal of both the President and the Deputy Presidents may be proposed by the parliamentary group that proposed them for those positions.
85 Ibid.

Relevant Provisions

Constitution of Kosovo

Article 67 [Election of the President and Deputy Presidents]

1. The Assembly of Kosovo elects the President of the Assembly and five (5) Deputy Presidents from among its deputies.
2. The President of the Assembly is proposed by the largest parliamentary group and is elected by a majority vote of all deputies of the Assembly.
3. Three (3) Deputy Presidents proposed by the three largest parliamentary groups are elected by a majority vote of all deputies of the Assembly.
4. Two (2) Deputy Presidents represent non-majority communities in the Assembly and are elected by a majority vote of all deputies of the Assembly. One (1) Deputy President shall belong to the deputies of the Assembly holding seats reserved or guaranteed for the Serb community, and one (1) Deputy shall belong to deputies of the Assembly holding seats reserved or guaranteed for other communities that are not in the majority.
5. The President and Deputy Presidents of the Assembly are dismissed by a vote of two-thirds (2/3) of all deputies of the Assembly.
6. The President and the Deputy Presidents form the Presidency of the Assembly. The Presidency is responsible for the administrative operation of the Assembly as provided in the Rules of Procedure of the Assembly.
7. The President of the Assembly:
(1) represents the Assembly;
(2) sets the agenda, convenes and chairs the sessions;
(3) signs acts adopted by the Assembly;
(4) exercises other functions in accordance with this Constitution and the Rules of Procedure of the Assembly.
8. When the President of the Assembly is absent or is unable to exercise the function, one of the Deputy Presidents will serve as President of the Assembly.[86]

Rules of Procedure of the Assembly of Kosovo

Chapter IV of the Rules of Procedure of the Assembly of Kosovo Inauguration of the Assembly

Article 7 [Inaugural session]

1. The inaugural session of the Assembly shall be convened by the President of the Republic of Kosovo within 30 (thirty) days from the day of official announcement of election results.
2. If the President of the Republic does not convene the inaugural session, the Assembly shall convene on its own on the 30th (thirtieth) day.

Article 8 [Preparation of the inaugural session]

1. The President of the previous term shall be responsible for preparations for the inaugural session of the Assembly.
2. The President of the previous term, not later than 5 (five) days before holding the inaugural session of the Assembly shall convene the joint meeting with the leaders of political entities which have won seats in the Assembly, to prepare the draft agenda and decide on the seating order of MPs in the plenary chamber. If the meeting does not convene within the deadline of 5 (five) days, the Assembly shall convene on its own, on the day set by the President.
3. Paragraph 2 of this article shall not be applicable if the Assembly convenes according to article 7 paragraph 2 of this Regulation.
4. The agenda for the inaugural session of the Assembly shall include:
   4.1. Establishment of the Temporary Committee for Verification of the Quorum and Mandates;
   4.2. Oath of MPs;
   4.3. Selection of the President of the Assembly, and
   4.4. Selection of the Deputy Presidents of the Assembly.
5. The report of the Temporary Committee for Verification of the Quorum and Mandates shall be voted on by the Assembly.

86 Constitution of Kosovo.

6. Designation of the seating order in the plenary chamber shall be done according to the size of political entities. If two or more political entities have the same number of MPs, their seating order shall be decided based on the number of votes received in parliamentary elections.

Article 9 [Chairing of the inaugural session]

1. Until the election of the President of the Assembly, the inaugural session of the Assembly shall be chaired by the MP the oldest in age, assisted by the youngest one.
2. If the MPs under paragraph 1 of this article, are absent in the inaugural session or refuse to chair the session, then MPs that meet the requirements set in paragraph 1 of this article shall take over.
3. There is no debate in the inaugural session.
4. After the opening of the session and after the agenda has been presented, the Chairperson of the inaugural session shall request from political parties represented in the Assembly, to appoint one deputy each in the ad-hoc Committee for verification of quorum and mandates. The Committee shall be chaired by the MP of the largest parliamentary political entity.
5. The ad hoc Committee for Verification of Quorum and Mandates shall review the relevant documentation of elections and shall present the Assembly a report on the validity of mandates of MPs and shall verify the presence and quorum in the inaugural session.

Article 11 [Selection of the President of the Assembly]

1. The President of the Assembly shall be elected in the inaugural session by majority of votes of all MPs.
2. The Chairperson of the inaugural session shall request from the largest political entity in the Assembly to propose a candidate for the President of the Assembly.[87]
3. The Chairperson of the inaugural session shall inform the Assembly on the voting results for election of the President of the Assembly, shall announce the election of the President and invite him to take his seat.

Article 12 [Election of the Deputy Presidents of the Assembly]

1. Deputy Presidents of the Assembly shall be elected by majority of votes of all MPs.
2. The President of the Assembly shall request the three largest parliamentary political entities to propose a candidate each for Deputy President of the Assembly. The candidate for deputy president of the largest parliamentary entity shall be of a different gender from that of the President.
3. If two or more political entities have the same number of MPs, the right to propose a candidate for deputy president shall belong to the entity which has received more votes in the general elections.
4. The Presidents of the Assembly shall request from the MPs holding seats guaranteed for the Serb community to propose a (1) candidate for deputy president of the Assembly, as well as from MPs holding guaranteed seats for other communities, which are not in a majority, to propose a candidate for deputy president of the Assembly, who shall be elected with a majority vote of all MPs.
5. The constitutive session shall end with the election of the President and deputy presidents of the Assembly. Interruptions during the constitutive session cannot be longer than 48 hours.
6. Proposals from paragraph 4 of this article shall be made in writing, according to the following procedure:
   6.1. The candidate for the deputy speaker of the Assembly from the ranks of the Serbian community is proposed by the majority of MPs of the Serbian community, and
   6.2. The candidate for the deputy president of the Assembly from among the MPs of other non-majority communities is proposed by the majority of the MPs of other non-majority communities.
7. In case of non-nomination of the candidates according to paragraph 6 of this article, the nomination of the candidates is done by lot, in the presence of the MPs of the respective communities. This procedure is administered by the President of the Assembly.[88]

87 The Rules of Procedure of the Assembly of 2010 used the term "largest parliamentary group" as the Constitution does. The new Rules of Procedure of the Assembly replaced the term 'largest parliamentary group' with "political entity".

88 Rules of Procedure of the Assembly.

Relevant Case-law

Case KO119/14 is the leading case in this matter. It deals with the election of the President of the Assembly. Specifically, it refers to the modalities for determining the largest parliamentary group having the right to propose a candidate for President of the Assembly.[89] The Court defined the 'largest parliamentary group' under Article 67(2) of the Constitution for the election of the President and the Deputy Presidents of the Assembly, as the party, coalition, citizens' initiatives, and independent candidates that have more seats in the Assembly as a result of the elections.[90]

The 'largest parliamentary group' is the political party, coalition, or citizens' initiatives that won more seats in the Assembly.

Following the June 2014 early parliamentary elections, the Central Election Commission (CEC) certified the result of the elections. Three of the parties (LDK, AAK, and Nisma) -that individually were not the winners of the elections- informed the former President of the Assembly that they formed a parliamentary group. This group would have more seats in the Assembly than the party winning the elections. In the constitutive session of 17 July 2014, after the deputies of the Assembly took their oath, the chairperson declared that she and the youngest deputy of the Assembly did not have the competence to act with regard to the formation of parliamentary groups. Therefore, the session proceeded with the request to PDK, the party with the most votes in the Assembly following the elections, to propose a candidate for President of the Assembly.[91]

The session was boycotted by the other parties (including those who had previously declared the formation of the LDK, AAK, and Nisma parliamentary group) and it was adjourned for lack of quorum. Afterward, the members of the LDK, AAK, and Nisma parliamentary group together with two more parties, convened a new session in the Assembly and voted for the replacement of the chairperson. The new chairperson asked the LDK, AAK, and Nisma parliamentary groups to propose a candidate who was ultimately elected as President of the Assembly. Several deputies of the Assembly challenged the Assembly's decision before the Court.

The deputies requested the Court to assess the constitutionality of the Decision of the Assembly of 17 July 2014 and -more specifically- to determine whether the President of the Assembly was proposed by the largest parliamentary group, as required by Article 67(2) of the Constitution. In addition, they asked the Court to clarify who is the largest parliamentary group according to the meaning of Article 67 of the Constitution. They also urged upon the Court to specify the competencies of the President of the Assembly from the previous legislature during the preparatory meetings taking place before the constitutive session of the Assembly, as well as to assess whether the constitutive session was conducted in line with the Constitution and the Rules of Procedure of the Assembly.[92]

The Court issued a judgment noting the following:

116. […]the largest parliamentary group according to Article 67 (2) of the Constitution is to be considered the party, coalition, citizens' initiatives, and independent candidates that have more seats in the Assembly, in the sense of Article 64 (1) of the Constitution, than any other party, coalition, citizens' initiatives and independent candidates that participated as such in the elections. This group is to propose the President of the Assembly following the provisions of Article 67 (2) of the Constitution. This is what the Constitution envisages as a parliamentary group and even more is de facto in accordance with the parliamentary practice in democratic states.

A parliamentary group, in the strictest sense of the word, can only be registered after the constitution of the Assembly.

118. At the moment of conveying the Constitutive Session of the Assembly, a parliamentary group is composed of the candidates that were elected as members of the Assembly on the ballot of the party, coalition, citizens' initiatives, and independent candidates that were registered in the election participated in them, passed the legal threshold and acquired seats in proportion

89 Constitutional review of Decision No.05-V-001 voted by 83 Deputies of the Assembly of the Republic of Kosovo on the election of the President of the Assembly of the Republic of Kosovo, dated 17 July 2014, Case No. KO119/14, 26 August 2014, at https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_119_14_ang. pdf.

90 Ibid., para. 116.

91 Ibid., paras. 27, 28, 29, 31, 38.

92 Ibid., para. 44.

to the number of valid votes received by them in the election to the Assembly.

119. In the current case, the Chairperson of the Constitutive Session rightly gave the possibility to the largest parliamentary group to propose a candidate for the President of the Assembly, since according to the list of the certified election results the party that was the first in order of ranking had 37 Deputies. Therefore, to have given the possibility to another party, coalition, citizens' initiatives, and independent candidates would have been unconstitutional.

120. The Court observes that, according to the Transcript, after the suspension of the Constitutive Session due to a lack of quorum, a group of Deputies conveyed a meeting to table a motion to replace the Chairperson and they elected a President and Deputy Presidents of the Assembly.

Post-election negotiations and post-election parliamentary groups are not determining factors for proposing the President of the Assembly.

121. The Court recalls that the Applicants challenge the constitutionality of this procedure and its outcome. Taking into account the above interpretation based on Articles 67 (2) in conjunction with 64 (1) and the Rules of Procedure of the Assembly, the Court finds that this challenged meeting is not in accordance with the constitutional requirements for a Constitutive Session to be considered as constitutional. Hence, this meeting is not to be considered a Constitutive Session.

122. In these circumstances, the Court concludes that the decision as a result of this meeting does not correspond to a decision taken, under Article 67 (2) of the Constitution, during a Constitutive Session and by the largest parliamentary group. Consequently, Decision No. 05-V-001 voted by 83 Deputies of the Assembly on the election of Mr. Isa Mustafa as the President of the Assembly, dated 17 July 2014, is null and void.[93]

The Court prioritized election results as the criterion for determining the parliamentary group entitled to propose the President of the Assembly.

The Court pointed out that the Constitution uses different expressions for the same reality, namely: *"the largest parliamentary group"* [Article 67.2], *"the political party or coalition holding the majority in the Assembly"* [Article 84.14], and *"the political party or coalition that has won the majority in the Assembly"* [Article 95].[94] In each of these expressions – according to the Court- political parties or coalitions reflect the election results. The Court read Article 67.2 on the Election of the President and Deputy Presidents of the Assembly in conjunction with Article 64.1 on the Structure of the Assembly which provides that *"the seats […] are distributed […] in proportion to the number of valid votes received […] in the election […]*.[95] Moreover, it noted that such interpretation is in accordance with the parliamentary practice in democratic states.[96]

The party or coalition that received the most votes in the elections, may not have the necessary votes for the election of the President of the Assembly.

This ruling may cause other legal challenges in practice. The Court did not take into account that the party or coalition that received the most votes in elections, may not have the necessary votes for the election of the President of the Assembly. Judge Carolan in his dissenting opinion pointed out the same concern. He argued that the difference between the wording of the Constitutional Framework and the Constitution reflects the drafter's intent different from the Court's interpretation.[97] Particularly, the Constitutional Framework provided that the President of the Assembly shall be a member of the party or coalition that obtained the highest number of votes in the elections. Article 67 of the Constitution, on the other hand, provides that the candidate for President of the Assembly may be proposed by the 'largest parliamentary group.' According to Judge Carolan, this change in the language means that the "largest parliamentary group" is not solely the party or coalition that has received the largest number of votes in the election, but the largest group that could successfully elect the President.[98] That is because the failure to elect the President of the Assembly could

93 Case KO119/14.
94 Ibid., para. 104.
95 Ibid., para 106.
96 Ibid., para 116.
97 Case KO119/14 – Dissenting Opinion of Judge Robert Carolan, at *gjkk_ko_119_14_mm_ang.pdf (gjk- ks.org)
98 Ibid., page 4.

cause the Government to dissolve simply by a successful vote of no confidence.[99]

The Court's view that the expressions used in Article 67.2 ("the largest parliamentary group") and Article 95 ("the political party or coalition that has won the majority in the Assembly") of the Constitution mean the same thing, is also debatable. It did not explain why then would the drafters use a different language to mean the same thing. Judge Carolan pointed out that, unlike parties and coalitions, parliamentary groups do not run in political elections but can be formed independently from the elections, by individual deputies of the Assembly.[100]

Considering present doubts and risks for practical issues in the future with the establishment of Kosovo's institutions, constitutional clarity is a necessity.

Comparative Analysis and References

Comparative research shows that other constitutions are very succinct and do not provide many details on the election of the President and Deputy Presidents of the Assembly. Rules of procedures of assemblies/parliaments complement constitutional provisions. Some constitutions are even silent about the number of votes required for such an election, such as the Constitution of Albania, Estonia, and Germany. As to the right of a proposal, there are different models. In the case of Albania, at least 15 Members of the Parliament (MPs) may propose a candidate for President of the Parliament; in Croatia, at least 1/3 of the MPs; in Estonia, any member of the Riigikogu; in Georgia, the majority, the minority, a faction or a group of at least 6 MPs. In the case of Kosovo, the Constitution aims at ensuring that the Presidency of the Assembly represents the different political parties or affiliations, and most importantly, the different communities.

Constitution of Albania

Article 75

1. The Assembly elects and discharges its Speaker.
2. The Assembly is organized and operates according to regulations approved by a majority of all its members.[101]

Rules of Procedure of the Assembly of Albania

Article 6

1. The candidate for Speaker of Assembly must be proposed by at least 15 MPs. One MP cannot support more than one candidate. The proposal must be made in a written form, signed with respective signatures, and submitted to the temporary secretary of the Assembly.
2. The Speaker of the Assembly is elected without debate by secret ballot, with the majority of votes in the presence of more than half of all the members of the Assembly. In the case when no one of the candidates has won the necessary number of votes, it is proceeded to the second round where is voted for two candidatures that received the highest number of votes.
3. The voting is organized publicly and is directed by a voting commission composed of 5 MPs that represent, as much as possible, the political composition of the Assembly. The oldest member in age accomplishes the duty of the Head of the Voting Commission and announces the voting results.
4. After the announcement of the voting results, the chairperson invites the Speaker of Assembly to take the chair.

Article 15

1. The MPs may form parliamentary groups according to the party affiliation or political orientation.
2. At least 7 MPs are needed to establish a parliamentary group. Each MP can be a member of only one parliamentary group. An MP that leaves his/her parliamentary group can join another parliamentary group only after six months after the departure date.

99 Ibid., page 5.
100 Ibid., page 5.
101 Constitution of Albania.

3. When the number of the MPs of a parliamentary group is less than the number predicted by item 2 of this article, the group does no longer exist.
4. Within 3 days from the election date of the Speaker of Parliament, each MP must declare in a written form which parliamentary group he belongs to. Only the MPs that do not make the above mentioned declaration or that do not belong to any parliamentary group, can form mixed group.
5. Each MP has the right to leave the parliamentary group. To do this, he must submit a written statement to his group chairperson and should inform in a written form the Bureau of Assembly.
6. MPs elected during the Legislature period of time, within three days of swearing the oath, must declare in a written form which parliamentary group they belong to.[102]

Croatia

Article 73

[…]
The Croatian Parliament shall be constituted by the selection of its Speaker at its first session attended by a majority of its Members.[103]

Rules of Procedure of the Assembly of Kosovo

Article 4

Parliament shall be summoned to its first, Constitutive Session by the President of the Republic.
Until the election of the Speaker of Parliament, the session shall be temporarily chaired by the Speaker of Parliament from the preceding term, or if he/she is prevented from attending, by the oldest present Member of Parliament.

Article 5

At its constitutive session, Parliament shall also elect the members to the Credentials and Privileges Commission.
In addition to the Speaker of Parliament and the Commission referred to in paragraph 1 hereof, the Deputy Speakers of Parliament, the Secretary of Parliament and the Secretary of the Session of Parliament, the Elections, Appointments and Administration Committee and other working bodies may also be elected at the Constitutive Session of Parliament.
A minimum of 1/3 of Members of Parliament shall be entitled to submit proposals for the election of the bodies referred to in this Article at the constitutive session.[104]

Estonia

Chapter IV

The Riigikogu

§ 69. From among its members the Riigikogu elects a president and two vice-presidents who preside over the work of the Riigikogu pursuant to the Riigikogu Rules of Procedure Act and the Riigikogu Standing Orders Act.[105]

Riigikogu Rules of Procedure Act (Estonia)

§ 7. Principles of and procedure for the elections of the President and Vice Presidents of the Riigikogu
(1) The President of the Riigikogu is elected first. The Vice Presidents of the Riigikogu are elected at the same time after the election of the President of the Riigikogu.
(2) Candidates may be nominated by members of the Riigikogu. Candidates for the office of the President of the Riigikogu

102 Rules of Procedure of the Assembly of Albania, at https://www.parlament.al/Files/sKuvendi/rregullorja.pdf
103 Constitution of Croatia.
104 The Standing Orders of the Croatian Parliament, at https://www.sabor.hr/sites/default/files/uploads/ inline-files/Croatian-Parliament-Standing-Orders_Consolidated-Text_November- 2020.pdf?msclkid=9babbbb0b0d711ecbe880d360d2c660c.
105 Constitution of the Republic of Estonia, at https://www.constituteproject.org/constitution/Estonia_2015.pdf?lang=en

are nominated first. After the election of the President of the Riigikogu, candidates for the office of the Vice President of the Riigikogu are nominated. The nominated candidates must consent to stand in the elections.
(3) Voting in the elections of the President and Vice Presidents of the Riigikogu takes place by secret ballot.
(4) Members of the Riigikogu have one vote in the election of the President of the Riigikogu and one vote in the election of the Vice president of the Riigikogu.
(5) The candidate who receives more than one half of valid votes becomes the President of the Riigikogu. If no candidate receives the required number of votes, an additional election round is held between the two candidates who received the greatest number of votes. In the event that two candidates receive an equal number of votes, the winner is selected by lot. Where a sole candidate is nominated for the election of the President of the Riigikogu, the sole candidate is elected if more votes are cast in favour of him or her than against.
(6) The candidate who receives the greatest number of votes becomes the First Vice President of the Riigikogu. The candidate who receives the second greatest number of votes becomes the Second Vice President of the Riigikogu. In the event that two candidates receive an equal number of votes, an additional election round is held between those two candidates.[106]

Georgia

Article 40

Chairperson and deputy chairpersons of the Parliament of Georgia
1. The Parliament of Georgia shall elect the Chairperson for its term by a majority of the total number of its members by secret ballot, in accordance with the procedures established by the Rules of Procedure. […]
2. The Parliament of Georgia shall elect a first deputy chairperson and deputy chairpersons for its term by a majority of the total number of its members in accordance with the procedures established by the Rules of Procedure.[107]

Rules of Procedure of the Parliament of Georgia

Article 17

1. At its first session, the Parliament elects the Chair (Speaker) of the Parliament by secret vote of its members for its term of authority.
2. The Majority, the Minority, a faction, which is not united in the Majority or the Minority, and a group of no fewer than six MPs who are not affiliated in any faction (hereinafter referred to as Group of six MPs), have a right to nominate a candidate for the position of the Chair (Speaker) of the Parliament.
6. A candidate shall be considered as elected to the position of Chair (Speaker) of the Parliament if s/he is supported by the majority of enlisted members.[108]

Germany

Article 40

(1) The Bundestag shall elect its President, Vice-Presidents and secretaries. It shall adopt rules of procedure.[109]

Rules of procedure of the German Bundestag

Rule 1

(1) The first meeting of the newly elected Bundestag shall be convened by the outgoing President and shall be held not later than the thirtieth day after the election (Article 39 of the Basic Law).
(2) Until the newly elected President or one of the Vice-Presidents assumes the office, the longest-serving Member of the Bundestag willing to do so shall take the Chair (President by seniority); where two or more Members have the same length of service, seniority in terms of age shall be decisive.

106 Riigikogu Rules of Procedure Act, at https://www.riigiteataja.ee/en/eli/518112014003/ consolide.
107 Constitution of Georgia, at https://matsne.gov.ge/en/document/view/30346?publication=36.
108 Rules of Procedure of the Parliament of Georgia, at https://www.legislationline.org/download/id/8869/file/Georgia%20-%20ROP_as_of_27_Dec_2018_ENG.pdf.
109 Constitution of Germany.

[…]
(4) After the presence of a quorum has been ascertained, the President, Vice-Presidents and Secretaries shall be elected.

Rule 2

(1) The Bundestag shall, in secret and separate ballots (Rule 49), elect the President and the Vice-Presidents for the duration of the electoral term. Every parliamentary group in the German Bundestag shall be represented on the Presidium by at least one Vice-President.
(2) The person receiving the votes of the majority of the Members of the Bundestag shall be elected. […]

Rule 10

(1) The parliamentary groups shall be associations of not less than five per cent of the Members of the Bundestag, and their members shall belong to the same party or to parties which, on account of similar political aims, do not compete with each other in any Land. Where Members of the Bundestag form such an association on grounds other than those set out in the first sentence of this paragraph, its recognition as a parliamentary group shall require the consent of the Bundestag.
(2) The formation of a parliamentary group, its designation, and the names of the chairpersons, member and guests shall be communicated to the President in writing. […].[110]

Republic of North Macedonia

Article 63

The Representatives in the Assembly are elected for a term of four years. The mandate of Representatives is verified by the Assembly. The length of the mandate is reckoned from the constitutive sitting of the Assembly. Each newly elected Assembly must hold a constitutive sitting 20 days at the latest after the election was held. The constitutive sitting is called by the President of the Assembly of the previous term. If a constitutive meeting is not called within the time laid down, the Representatives assemble and constitute the Assembly by themselves on the twenty-first day after the completion of the elections. […].

Article 67

The Assembly elects a President and one or more Vice-Presidents from the ranks of the Representatives by a majority vote of the total number of Representatives. [. . .].[111]

Rules of Procedure of the Assembly of North Macedonia

Article 20

At its constitutive session, the Assembly, upon the proposal of at least ten Members of the Assembly, shall elect a Committee on elections and appointments.
An adequate representation shall be ensured in the Committee of Members belonging to the political parties represented in the Assembly.

Article 21

The Assembly shall elect a President and Vice-Presidents of the Assembly from among its Members.
The number of vice-presidents shall be determined by the Assembly, upon a proposal by the President of the Assembly. The Vice-Presidents shall be elected from among Members belonging to various political parties represented in the Assembly.
One of the Vice-Presidents shall be elected from among the Members belonging to the biggest opposition party represented in the Assembly.

Article 22

Candidates for the President of the Assembly may be proposed by the Committee on elections and appointments, or by at least twenty Members of the Assembly.
A Member of the Assembly can propose only one candidate for President of the Assembly.

110 Rules of procedure of the German Bundestag, at https://www.btg-bestellservice.de/pdf/80060000.pdf.
111 Constitution of North Macedonia.

Article 23

The proposals for the candidates for President of the Assembly shall be submitted in a writing at the session of the Assembly and shall contain the name and surname of the candidate with biography data and an explanation, as well as the names and surnames of the Members of the Assembly that submit the proposal and their signatures.
The order of the candidates for President of the Assembly shall be determined in accordance with the alphabet order of their surnames.

Article 26

The candidate winning the majority of the votes out of the total number of Members of the Assembly shall be elected for President of the Assembly […].[112]

Conclusion

The lack of a definition in the Constitution of the 'largest parliamentary group' to propose the President of the Assembly triggered a constitutional conflict. Article 67(2) speaks of the right of the "largest parliamentary group" to propose the President of the Assembly. On the other hand, Articles 84(14) and 95(1) refer to the right of the political party or coalition that has won the majority of the seats in the Assembly.[113] The use of different terminologies in the constitutional text brings the need for clarity.

In line with the Court's textual and systematic interpretation of the Constitution, the term "largest parliamentary group" refers to the political party, coalition, citizens' initiatives, and independent candidates that have more seats in the Assembly. Elections results are the primary criteria for the distribution of seats in the Assembly."[114] This makes sense since a parliamentary group can be registered only after the constitution of the Assembly.[115]

Yet, many considered this interpretation to be challenging: first, in case two parties or coalitions have achieved the same election result; second, in case after the constitution of the Assembly, a new parliamentary group is created which -in the meantime- dismisses the President of the Assembly with a 2/3 majority. According to the current interpretation, this new parliamentary group would not be entitled to propose the new President of the Assembly. Rather, it should be the party or coalition receiving more votes in the election to do so. However, this party or coalition may not have the necessary votes for the election of the President of the Assembly.

Given these shortcomings, an amendment to the Constitution could bring more clarity in addition to the Court's interpretation. Improvement of the constitutional terminology would prevent future constitutional conflicts on this matter.

Recommendations

- Articles 67(2) and 67(3) should incorporate the interpretation provided by the Constitutional Court. In this case, Article 67(2) would read as follows: "The President of the Assembly is proposed by the party, coalition, citizens' initiatives, and independent candidates that have more seats in the Assembly and are elected by a majority vote of all deputies of the Assembly." Article 67(3) would read: "Three (3) Deputy Presidents proposed by the three parties, coalitions, citizens' initiatives and independent candidates that have more seats in the Assembly, are elected by a majority vote of all deputies of the Assembly";
- Alternatively, new provisions of the Constitution and the Rules of Procedure of the Assembly could establish that the largest post-election parliamentary group may propose the President of the Assembly.

112 Rules of Procedure of the Assembly of North Macedonia, at https://sobranie.mk/rules-procedures-of-the- assembly-ns_article-rules-of-procedure-of-the-assembly-of-the-republic-of-macedonia.nspx.
113 These provisions refer to the right of the political party or coalition holding the majority in the Assembly to propose the candidate for Prime Minister. For more, see Constitution of Kosovo, Article 84 (14) and Article 95 (1).
114 Case KO119/14, para. 113.a
115 Ibid., para. 117.

- Other options based on other countries' examples could be 1) at least 15 deputies (Albania); at least 1/3 of the deputies (Croatia); any member of the Riigikogu (Estonia); the majority, the minority, a faction, or a group of at least 6 deputies (Georgia). These options could be included either in the Constitution or in the Rules of Procedure of the Assembly.

IV

The Mandate of the President and the Deputy President of the Assembly after Leaving their Parliamentary Group

Constitutional gaps in the mandate of the President and the Deputy Presidents of the Assembly brought up the question before the Court of whether they should resign when they leave their parliamentary group. The Court concluded that leaving their parliamentary group does not automatically result in their dismissal. The Constitution's language needs to reflect this interpretation. It could also provide for a lower requirement than the 2/3 majority for the removal of the Deputy Presidents of the Assembly, in order to facilitate procedures.

The Constitution regulates the procedure of the appointment and dismissal of the President and Deputy Presidents of the Assembly. Yet, it does not clarify how the parliamentary groups that the President and the Deputy Presidents belong to, affect their mandate in the Assembly's presidency.

The Constitution does not regulate whether the President and the Deputy Presidents of the Assembly must resign when they leave the parliamentary group that nominated them.

The parliamentary groups are not necessarily limited to proposing candidates for Deputy President of the Assembly from among members of their parliamentary group. In case the President or the Deputy President is a member of the parliamentary group that proposed them, the question became whether they must leave office after they leave their parliamentary group. In absence of constitutional provisions, the Court brought some clarity to the issue and affirmed that the President or Deputy President retains their position unless the deputies vote on their removal.

The removal of the members of the Assembly's presidency requires the votes of two-thirds (2/3) of all deputies. Possible changes to the Constitution regarding their removal, while keeping the requirement of formal voting, may foresee a lower majority for a dismissal of Deputy Presidents of the Assembly, such as a majority of three-fifth (3/5) or a majority of all deputies of the Assembly.

Relevant Provisions

Constitution of Kosovo

Article 67 [Election of the President and Deputy Presidents]

1. The Assembly of Kosovo elects the President of the Assembly and five (5) Deputy Presidents from among its deputies.
2. The President of the Assembly is proposed by the largest parliamentary group and is elected by a majority vote of all deputies of the Assembly.
3. Three (3) Deputy Presidents proposed by the three largest parliamentary groups are elected by a majority vote of all deputies of the Assembly.
4. Two (2) Deputy Presidents represent non-majority communities in the Assembly and are elected by a majority vote of all deputies of the Assembly. One (1) Deputy President shall belong to the deputies of the Assembly holding seats reserved or guaranteed for the Serb community, and one
(1) Deputy shall belong to deputies of the Assembly holding seats reserved or guaranteed for other communities that are not in the majority.
5. The President and Deputy Presidents of the Assembly are dismissed by a vote of two-thirds (2/3) of all deputies of the Assembly.
6. The President and the Deputy Presidents form the Presidency of the Assembly. The Presidency is responsible for the administrative operation of the Assembly as provided in the Rules of Procedure of the Assembly.
7. The President of the Assembly: (1) represents the Assembly; (2) sets the agenda, convenes, and chairs the sessions; (3) signs acts adopted by the Assembly; (4) exercises other functions in accordance with this Constitution and the Rules of Procedure of the Assembly.
8. When the President of the Assembly is absent or is unable to exercise the function, one of the Deputy Presidents will serve as President of the Assembly.[116]

Rules of Procedure of the Assembly

Article 15 [Dismissal, resignation of the President and Deputy Presidents of the Assembly]

1. President and Deputy Presidents of the Assembly are dismissed with the majority vote of two thirds (2/3) of all MPs.
2. The proposal for the dismissal of the President of the Assembly can be made at the request of 1/3 of all the MPs of the Assembly.
3. The proposal for the dismissal of the President of the Assembly can be done at the request of the parliamentary group that proposed it.

116 Constitution of Kosovo.

4. The President of the Assembly and Deputy President of the Assembly may resign. The resignation act shall be submitted to the Assembly for notice.
5. In the case as per paragraphs 1 and 2 of this Article, the proposal for the new candidate shall be done by the parliamentary group proposing him/her.[117]

Relevant Case-law

Case KO84/18 is relevant in this matter.[118] The Court assessed the constitutional question of whether the Assembly must automatically dismiss a Deputy President if he/she leaves the parliamentary group that proposed them for that position.

Leaving their parliamentary group does not automatically result in the dismissal of the Assembly's President/ Deputy President(s).

Several deputies of the Assembly submitted the referral to the Court following the notification of one of the Deputy Presidents that she had left the parliamentary group -Vetëvendosje- which was the one initially proposing her for the position of Deputy President of the Assembly. The parliamentary group of Vetëvendosje initiated the removal of Deputy President Aida Dërguti. However, the proposal did not receive the necessary votes of two-thirds (2/3) of all deputies of the Assembly, as Article 67 of the Constitution requires. The deputies of the Assembly challenged the decision of the Assembly before the Court.

In issuing its judgment, the Court assessed 1) whether the position of the Deputy President of the Assembly is reserved exclusively for the three (3) largest parliamentary groups, and 2) whether the deputies of the Assembly abused their right to vote by voting on the non-dismissal.

The Assembly can vote on the non- dismissal of its President/Deputy President(s) even after the latter left the parliamentary group that proposed them.

The Court first noted that the Constitution provides that the right to nominate three (3) candidates for the positions of Deputy Presidents belongs exclusively to the three (3) largest parliamentary groups.[119] The Court further observed that the right of the three (3) largest parliamentary groups to nominate candidates for the position of Deputy President of the Assembly is essential for maintaining the foundations of effective, meaningful, and rule of law-based democracy in the constitution of the Assembly.[120] While the right of the proposal belongs to the three (3) largest parliamentary groups, these groups are not necessarily limited to proposing candidates from their parliamentary group. The Constitution allows for broad discretion of the candidate's proposal for the position of the Deputy President of the Assembly, without limiting the proposal to a certain parliamentary group.[121]

Second, the Court noted that the members of the Presidency of the Assembly are not representatives of parliamentary groups or political parties in this body.[122] They are not responsible for protecting the interests of parliamentary groups or political parties of the Assembly.[123] Therefore, the Court rejected the applicant's allegation that the deputies of the Assembly violated the Constitution by voting on the non-dismissal of the Deputy President.[124]

117 Rules of Procedure of the Assembly.
118 Constitutional review of Decision No. 06/V-145 of the Assembly of the Republic of Kosovo regarding the proposal of the Parliamentary Group of Vetëvendosje Movement on dismissal of Aida Dërguti from the position of Vice President of the Assembly of the Republic of Kosovo, Case No. KO84/18, 24 December 2018, at https://gjk-ks.org/en/decision/vleresim-kushtetutshmerise-se-vendimit-nr-06-v-145-te-kuvendit- te-republikes-se-kosoves-perkitazi-propozimin-e-grupit-parlamentar-te-levizjes-vetevendosje-per- shkarkimin-e-aida-dergutit-nga-poz/.
119 Ibid., para. 88.
120 Ibid., para. 94.
121 Ibid., para. 94.
122 Ibid., para. 98
123 Ibid.
124 Ibid., para. 126.

Comparative Analysis and References

There are different practices in democratic countries regarding the election and dismissal of the Deputy Presidents of the Assembly. However, in all the states that have submitted answers to the questions of the Court through the Venice Commission, the departure from a certain parliamentary group does not imply an automatic dismissal from the position of Deputy President. In these countries, the dismissal of Deputy Presidents of the Assembly requires a special vote and a certain number of votes.[125]

An exception to that is Bulgaria where the President and Deputy Presidents of the Parliament are automatically dismissed from their respective positions, in case they are no longer a member of the parliamentary group that proposed them for that same position. All the other countries stipulate that the removal of the President or Deputy President of the Assembly requires a formal voting process. In most of those countries, the dismissal is successful if the majority of deputies are in favor of such dismissal.

The constitutional practice in Kosovo is similar to most of other countries' constitutions that do not foresee an automatic dismissal of the members of the Assembly's presidency, after leaving their parliamentary groups.

Bulgaria

The Rules of Organization and Procedure of the National Assembly of Bulgaria foresee the legal consequences in the case when the President and the Deputy President of the Parliament leave the parliamentary group that proposed him/her for that position. In this regard, Article 5 of the above Rules provides that:

Article 5 (1)

[1] The President and the Vice-Presidents of the National Assembly may be dismissed ahead of the term:
[…]
(2) The President and the Vice-Presidents of the National Assembly shall be dismissed ahead of term at leaving of the Parliamentary Group or at expulsion from its memberships, as well as when the Parliamentary Group has ceased to exist.
(3) In the cases under paragraph 1, item 1 and paragraph 2 the dismissal shall be announced without debate and votes on it.[126]

Czech Republic

The Constitution of Czech Republic regulates the issue of appointment and removal of Chair and Deputy Chairs of the Assembly, as well as the appointment of the Chair and Deputy Chairs of the Senate. In this regard, Article 29 of the Constitution provides that:
(1) The Assembly of Deputies elects and recalls its Chairperson and Vice-Chairpersons.
2) The Senate elects and recalls its Chairperson and Vice-Chairpersons.127
In addition, the Rules of Procedure of the Chamber of Deputies of the Czech Republic detail the procedure for removal of Chair and Deputy Chair of the Assembly as follows:

§ 31

The President of the Chamber of Deputies or a vice-president may only be removed from office upon a written request of at least two-fifths of all Deputies.[128]
Similarly, the Standing Rules of the Senate of the Czech Republic provide that:

125 Ibid., para. 102.
126 Rules of Procedure of the National Assembly of Bulgaria, at https://www.parliament.bg/en/podns.
127 Constitution of Czech Republic, at https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/ Pravni_uprava/AJ/Ustava_EN_ve_zneni_zak_c._98-2013.pdf.
128 Rules of Procedure of the Chamber of Deputies of the Czech Republic, at https://www.psp.cz/en/docs/ laws/1995/90.html#s2.

Section 35

The removal of the President or Vice-Presidents of the Senate from their office during a term, shall be possible only upon a written motion carried by a minimum of one third of all Senators.[129]

Croatia

The Constitution of Croatia regulates the issue of appointment of the Speaker and Deputy Speakers of the Parliament of Croatia, as well as the procedure for taking decisions by the Parliament. The relevant provisions of the Constitution are outlined below:

Article 79

The Croatian Parliament shall have a Speaker and one or more Deputy Speakers.
The internal organization and operating method of the Croatian Parliament shall be regulated by its Standing Orders.
The Standing Orders shall be adopted by a majority vote of all deputies.

Article 82

Unless otherwise specified by the Constitution, the Croatian Parliament shall adopt decisions by a majority vote, provided that a majority of its Members are present at the session. Members of Parliament shall vote in person.[130]
In addition, the relevant provisions of the Standing Orders of the Croatian Parliament provide as follows:

Article 32

Parliament has a Speaker and three to five Deputy Speakers.
If three Deputy Speakers are elected, two are elected at the proposal of the parliamentary majority and one at the proposal of the parliamentary minority.
If four Deputy Speakers are elected, two are elected at the proposal of the parliamentary majority and two at the proposal of the parliamentary minority.
If five Deputy Speakers are elected, three are elected at the proposal of the parliamentary majority and two at the proposal of the parliamentary minority.

Article 272

[…]
The election, appointment and dismissal of the chairpersons, deputy chairpersons and members of working bodies of Parliament shall be conducted at the proposal of the Elections, Appointments and Administration Committee or at the proposal of at least 15 Members of Parliament.[131]

Latvia

The Constitution of Latvia regulates the issue of Chairperson and Deputy Chairs of the Parliament (Saeima). In this regard, it provides that:

16. The Saeima shall elect a Presidium that shall be composed of a Chairperson, two Deputies and Secretaries. The Presidium shall function continuously during the mandate of the Saeima.[132]
In addition, the Rules of Procedure of the Parliament of Latvia (Saeima) regulate the procedure for removal of the Chair and Deputy Chairs of the Saeima. The relevant provisions of the above Rules provide as follows:

129 Standing Rules of the Senate of the Czech Republic, at https://www.senat.cz/informace/zakon106/ zakony/zak107-eng.php?amp%3B0=9.
130 Constitution of Croatia.
131 Standing Orders of the Croatian Parliament, at https://www.sabor.hr/sites/default/files/uploads/inline- files/Croatian-Parliament-Standing-Orders_Consolidated-Text_November-2020.pdf.
132 Constitution of Latvia, at https://www.saty.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic- of-latvia/.

33. (1) A member of the Presidium or a vote counter may be recalled by a decision of the Saeima upon:
1) a written request from the said member of the Presidium or the said vote counter;
2) a proposal made by at least 10 Members.
[…]
34. For the decisions mentioned in Articles 31, 32 and 33 to be made, it is necessary to have the absolute majority of votes of the Members present.[133]

Slovakia

The Constitution of Slovakia regulates the issue of the election and dismissal of the Speaker and Deputy Speakers of the Parliament (National Council). In this regard, it provides as follow:

Article 89

(1) The Speaker of the National Council of the Slovak Republic is elected and recalled by the National Council of the Slovak Republic by secret ballot, by more than one-half of the votes of all Members of Parliament. The Speaker is accountable only to the National Council of the Slovak Republic.
[…].

Article 90

(1) The deputy speakers of the National Council of the Slovak Republic act as substitutes for the Speaker. They are elected and recalled by secret ballot by the National Council of the Slovak Republic, by the votes of more than one-half of all Members of Parliament. The deputy speaker of the National Council of the Slovak Republic is accountable to the National Council of the Slovak Republic. […].[134]

Conclusion

The Constitutional Court's interpretation filled in the gaps in the Constitution regarding the dismissal of the Assembly's presidency members, after they leave the parliamentary groups that proposed them for the position. Regardless of whether they remain members of the parliamentary group that proposed them for that position, their dismissal may occur only if there is a successful vote of two-thirds (2/3) of all deputies of the Assembly.

This approach is in line with the purpose of such a voting process because the President and the Deputy Presidents of the Assembly do not represent the interests of the parliamentary groups that have proposed them, but above all those of the Assembly as a whole, thus ensuring the functioning of the Assembly and its bodies.[135] This practice is also in line with those of other countries as well.

However, while the removal vote of two-thirds (2/3) of all deputies may be justifiable for the President of the Assembly, there are no convincing arguments for the need for such a majority to remove the Deputy Presidents of the Assembly. The Constitution could be amended in a way that it provides for a lower threshold, to facilitate procedures. Either way, the language of the Constitution needs to be clear on the rule it provides.

Recommendations

- The Constitution could incorporate in its text the Court's interpretation and expressively establish that the President and Deputy Presidents of the Assembly will remain in office even after leaving the parliamentary group that proposed them for those positions. The President and Deputy Presidents will only be dismissed by a vote of two-thirds (2/3) of the deputies of the Assembly.

133 Rules of Procedure of the Parliament of Latvia, at https://www.saeima.lv/en/legislative-process/rules-of- procedure/?phrase=rules%20of%20procedure.
134 Constitution of Slovakia, at https://www.ustavnysud.sk/en/ustava-slovenskej-republiky?msclkid=7b9a5 b2ab1bb11ec852f86e77a752726.
135 Case No. KO84/18, para. 98.

- An alternative amendment could be to allow for the dismissal of the President and Deputy Presidents by a lower threshold than a two-thirds (2/3) majority vote. This would require the amendment of the Constitution as well as of the Rules of Procedure of the Assembly.

V

The Invalidity of the Mandate of an Assembly's Deputy Because of a Criminal Offence

The Constitution is silent on how and when a conviction of a criminal offense affects the mandate of the deputies of the Assembly. The current constitutional practice and the Law on General Elections provide some answers, yet the need remains for concrete provisions on the procedures for establishing the invalidity of the mandate of an Assembly's deputy. It is also unclear whether the criteria for the in(validity) of the deputy's mandate extends to the Prime Minister and to the President of Kosovo as well. An equivalent standard for these positions could avoid normative contradictions and ensure constitutional integrity. New constitutional and/or legal provisions could clarify these matters.

The Constitution is silent on whether a deputy of the Assembly convicted of a criminal offense keeps their mandate. Neither does it state whether a person convicted of a criminal offense may or may not run for a deputy of the Assembly. This unclarity brings into question the validity of a vote cast by an Assembly's deputy following his conviction with imprisonment of more than one (1) year.

The Constitution does not foresee the consequences of a criminal offence conviction for the mandate of an Assembly's deputy.

Other questions related to this issue are: (i) when is the mandate of a deputy of the Assembly invalidated as a result of a criminal offense ruled by the court and, (ii) are the rules on the invalidity of the mandate applicable to other constitutional bodies, such as to the President and the Prime Minister?

Kosovo's legal framework sets legal restrictions for candidates for deputy with a criminal record, as well as for members of the public service.

The Constitution does not explicitly state that a person convicted of a criminal offense may not run for a deputy of the Assembly.[136] It does require though that a person wishing to stand for deputy would have to satisfy the legal criteria.[137] The criteria are set out in the Law on General Elections, which states that a person could not stand for deputy if, among others, they are found guilty of a criminal offense by a final court decision in the past three years.[138] The Law on General Elections sets, therefore, a justifiable restriction of the constitutionally guaranteed right to be elected. The restriction serves the primary purpose of preserving constitutional integrity and civil credibility in the legislature, which would be a general fundamental pillar of the democratic order.

The absence of constitutional provisions addressing this issue is a 'normative gap' that could be filled in by applying Article 71 of the Constitution in conjunction with Article 29(1) of the Law on General Elections. Since the Government, including the Prime Minister, is accountable to the Assembly, it would be normatively appropriate that the legal criteria under Article 71 of the Constitution apply to the Prime Minister as well.

The constitutional normative coherence is lacking when the same person cannot be elected as a member of the Assembly but they can be appointed as a Prime Minister.

Alternatively, a law on the government could include the criteria. This would mean that (i) a privation of the right to be a candidate in elections by a court decision; and (ii) being found guilty of a criminal offense by a final court decision in the past three (3) years, would also exclude a candidate to be proposed for -and elected as- a Prime Minister. The same approach would be applied to a candidate for the President of the country as well.

This would be consistent with the Court's interpretation and view that no constitutional norm can be taken out of context, interpreted mechanically, and independently from the Constitution.[139]

Relevant Provisions

Constitution of Kosovo

Article 70 [Mandate of the Deputies]

1. Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate.
2. The mandate of each deputy of the Assembly of Kosovo begins on the day of the certification of the election results.
3. The mandate of a deputy of the Assembly comes to an end or becomes invalid when:

(1) the deputy does not take the oath;

136 Constitution of Kosovo, Article 73.
137 Ibid., Article 71.
138 Law No. 03/L-073 on General Elections in the Republic of Kosovo, 15 June 2008, Article 29(q), at https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2544
139 Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020, Case No. KO72/20, 1 June 2020, at https://gjk-ks.org/wp-content/uploads/2020/06/ko_72_20_agj_ang.pdf.

(2) the deputy resigns;
(3) the deputy becomes a member of the Government of Kosovo;
(4) the mandate of the Assembly comes to an end;
(5) the deputy is absent from the Assembly for more than six (6) consecutive months. In special cases, the Assembly of Kosovo can decide otherwise;
(6) the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime;
(7) the deputy dies.
4. Vacancies in the Assembly will be filled immediately in a manner consistent with this Constitution and as provided by law.

Article 45 [Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.[140]

Law No. 03/L-073 on General Elections in the Republic of Kosovo

Article 29 [Candidate Eligibility]

29.1 Any person whose name appears on the Voters List is eligible to be certified as a candidate, except if he or she is:
p) deprived by a final court decision, including an ECAC decision, of the right to stand as a candidate;
q) found guilty of a criminal offense by a final court decision in the past three (3) years.[141]

Relevant Case-law and Opinions

The Court deals with this matter in Case No. KO95/20.[142] Other relevant sources are The Report of the Venice Commission on the Exclusion of Offenders from the Parliament, adopted by the Venice Commission at its 104th Plenary Meeting on 23-24 October 2015,[143] the Code of Good Practice in Electoral Matters of the Venice Commission,[144] and the Report of the Venice Commission on Electoral Law and Electoral Administration in Europe[145]. They all deal with the issue of the mandate's invalidity of a deputy of the Assembly because of a criminal offense.

The Court in Case KO95/20 held that the mandate of the deputy of the Assembly is lost or becomes invalid from the moment of the issuance of a final court decision sentencing the deputy with one (1) year or more imprisonment.

On 6 October 2019, there were early elections for the Assembly. The list of newly elected deputies -certified by the CEC- included Etem Arifi from the Ashkali Party for Integration, who was convicted of a criminal offense with imprisonment of more than one (1) year. On 3 June 2020, the Assembly elected the Government, and Etem Arifi also participated in the voting.[146]

The deputies of the Assembly challenged the Assembly's decision on the election of the Government arguing that it is not in compliance with Article 95(3) [Election of the Government], in conjunction with Article 70(3.6) [Mandate of Deputies] of the Constitution.[147]

The Court discussed (i) whether Etem Arifi had a valid mandate at the time of the issuance of the Assembly's

140 Constitution of Kosovo.
141 Law General Elections.
142 Constitutional review of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, of 3 June 2020, on the Election of the Government of the Republic of Kosovo, Case No. K095/20, at https://gjk-ks.org/wp- content/uploads/2021/01/ko_95_29_agj_ang..pdf.
143 European Commission for Democracy Through Law, Venice Commission, Report on exclusion of offenders from Parliament, adopted by the Council of Democratic Elections at its 52 meeting (Venice, 22 October 2015) and by the Venice Commission at its 104 plenary session (Venice, 23-24 October 2015),Opinion No. 807/2015, CDL-AD(2015)036cor, 23 November 2018, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)036cor-e
144 Venice Commission, Code of Good Practice in Electoral Matters, at https://venice.coe.int/images/SITE%20I MAGES/Publications/Code_conduite_PREMS%2006115%20GBR.pdf.
145 European Commission for Democracy Through Law, Venice Commission, Report on Electoral Law and Electoral Administration in Europe, adopted by the Council for democratic elections at its 17 meeting, (Venice, 8-9 June 2006) and of the Venice Commission at its 67 plenary session (Venice, 9-10 June 2006), Study No. 352,CDL-AD(2006)018, 12 June 2006, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)018-e.
146 Case No. K095/20, para. 66, 287.
147 Ibid., para.4.

decision, and, if not, (ii) whether the Assembly's decision is in accordance with the Constitution if a deputy who did not have a valid mandate participated in its adoption by casting a decisive vote.

The Court's Reasoning reads as follows:

Regarding the effect that the sentence for a criminal offense has on the candidacy, election, and exercise of the mandate of the Deputy of the Assembly

175. Regarding the effect of the conviction for committing a criminal offense on the election and exercise of the mandate of a deputy, the Court notes that the legislation applicable in the Republic of Kosovo provides for two situations, namely the situation of inability (ineligibility) to be a candidate for deputy of the Assembly of the Republic of Kosovo, as a result of a conviction for committing criminal offenses; as well as the situation of termination or invalidity of the mandate of the deputy, as a result of the sentence for committing criminal offenses.

181. […] the Court notes that Article 73 [Ineligibility], of the Constitution, does not explicitly stipulate that those convicted of criminal offenses may not run for a deputy of the Assembly of Kosovo.

182. However, the Court emphasizes Article 71 [Qualifications and Gender Equality] of the Constitution, which stipulates that "Every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the Assembly". In this respect, it is a constitutional requirement that each person must meet the "legal criteria" in addition to the criteria of age and citizenship. From this constitutional provision, it follows that the Assembly of Kosovo may establish additional criteria, in addition to law, for a person to run for a deputy. 84. According to this legal provision [Law on General Elections, Article 29], a person, in addition to having to meet other criteria provided by the Constitution and the law, cannot be a candidate for deputy in parliamentary elections if "by a court decision, including the ECAP decision, he has been deprived of the right to be a candidate", or if he has been found guilty of a criminal offense by a final court decision in the past three (3) years."

187. In this regard, the Court notes that Article 29 of the Law on General Elections attributes to the CEC the exclusive competence to assess the formal conditions of candidates when applying and certifying them to participate in elections. […].

190. The Court notes that Article 45 of the Constitution provides that: "Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected unless this right is limited by a court decision."

192. In light of this, the Court considers that, first, Article 45 of the Constitution deals with the "restrictions" of election rights, in general language; second, the term "court decision', within the meaning of this article, cannot be interpreted in such a way as to mean exclusively and only complementary court decisions of "deprivation of the right to be elected". […].

193. In addition, the Court notes that, about the issue of restriction of the conditional rights, reference to Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution is inevitable. […].

196. […] In accordance with Article 71 of the Constitution, any citizen of the Republic of Kosovo who is eighteen years or older and meets the legal criteria may be a candidate for deputy. Whereas according to Article 29.1 (q) of the Law on General Elections, no person can be a candidate for deputy for the elections to the Assembly if he has been convicted of a criminal offense by a final decision of the court in the last three years. […] Many democratic countries follow such practice, with some small differences.

The legal restrictions preserve constitutional integrity and civil credibility as fundamental pillars of the democratic order.

198. The Court notes that the Law on General Elections does not require persons convicted of criminal offenses to be sentenced to an accessory punishment of "deprivation of the right to be elected", so that they are not allowed to run in parliamentary elections. This is because, according to Article 29.1 of the Law on General Elections, the deprivation of the right to be a candidate in elections by decision of the ECAP and the court, as well as the inability to be a candidate due to conviction for a criminal offense by a final court decision in the last three years, present different/separate grounds that cause the inability/ineligibility to be a candidate. The Court thinks that this interpretation is also consistent with the systematic reading of Articles 45, 55, and 71 of the Constitution.

The invalidity of the mandate of the deputy of the Assembly as a result of a conviction for criminal offenses.

The mandate of a deputy of the Assembly ends or becomes invalid when they are imposed an imprisonment sentence to one (1) year or more, by a final court decision.

213. […] the Court finds that the relevant constitutional and legal framework clearly stipulates that the mandate of a deputy expires or becomes invalid if he/she, "is sentenced by the court decision"; "the sentence is for the criminal offense"; "the imprisonment sentence if for the period of one (1) and more years"; "the court decision is final". So, when four circumstances are cumulatively met against a deputy of the Assembly of the Republic of Kosovo, the deputy loses the mandate.

217. […] according to the abovementioned provisions of the Criminal Procedure Code, a court decision is final, if the appeal is not allowed.

On whether there is a special procedure to be followed for the abolition of the mandate of the deputy, after the sentence of imprisonment of one year or more by a final court decision.

222. […] neither Article 70 of the Constitution nor any other constitutional or legal provision sets out any special procedure to be followed to remove the mandate of a deputy, or to establish the termination or invalidity of the mandate of a deputy - after the circumstances provided in Article 70.3(6) of the Constitution have been created. The Court noted that this finding was reinforced by the arguments and interpretations of the parties presented at the hearing.

228 […] neither the Constitution of Kosovo nor the relevant laws and regulations, specifically define the procedure for determining the loss of the mandate, after the requirements for the termination or invalidity of the mandate of the deputy have been met, due to imprisonment of one year or more (as provided by Article 70.3.6. of the Constitution and the relevant articles of the Law on General Elections and the Law on the Rights and Responsibilities of the Deputy).

In the absence of a special procedure, the mandate of a deputy is lost or becomes invalid from the moment of issuing the final court decision of one (1) year or more imprisonment.

229. […] in the previous practice of the Assembly there is only one case of a termination of the deputy's mandate as a result of committing a criminal offense. In that case, according to the case file, there is no information that the Assembly followed any specific procedure for the removal of the mandate, except for the procedure for the replacement of the deputy whose mandate has ended. Consequently, after losing the mandate of the deputy in question, the President of the Assembly requested from the President the replacement of the deputy whose mandate had ended, according to the procedure defined in the Law on General Elections.

231. […] the Constitution has expressly provided for the case in which the loss of the mandate is not automatic, but is subject to a special procedure in the Assembly, namely in cases when a deputy is absent for six (6) months in the sessions of the Assembly, unless the Assembly decides otherwise, as expressly provided in item 5 of paragraph 3 of Article 70 of the Constitution.

232. […] even if the legislator would intend to remove the mandate of a deputy, after the issuance of a final decision for a sentence of one year or more imprisonment, it is to be subject to a certain procedure, whether through a formal vote by the Assembly or any other procedure in the Assembly, this procedure would have been defined either by constitutional provisions or by any of the relevant laws or by the Rules of Procedure of the Assembly.

233. The Constitutional Court cannot determine such procedure, unless it is provided for in any normative act and, moreover, in the absence of an established practice in the Assembly on this issue (as noted, from the responses of the Secretariat of the Assembly, it turns out that so far there has been only one such case).

Whether Etem Arifi had a valid mandate when the challenged decision was rendered.

260. In the Court's assessment, Article 70.3.6 of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of a Deputy and Article 112.1 (a) and (c) of the Law on General Elections should be read intertwined with Article 71.1 of the Constitution and Article 29.1.q of the Law on General Elections. The common purpose of these constitutional and legal

articles is that: a) persons convicted of criminal offenses by final court decisions, valid in the Republic of Kosovo, cannot run or be elected as deputies, if they have been convicted during the last three years before the elections; and b) they cannot exercise the mandate of deputy if they are sentenced to one or more years of imprisonment, by a final court decision, valid in the Republic of Kosovo.

261. As such, the abovementioned constitutional and legal provisions are coherent and complementary. In a general view, those provisions reveal the legislator's clear intention that persons criminally convicted of a violation of the law may not be elected as deputies for a term of certain time, nor will they be able to exercise the duty of representative of citizens in the legislative body of the country - the Assembly of the Republic of Kosovo.

262. The Court in Judgment of the Constitutional Court in Case KO98/11 outlines such approach, in terms of the effect of the sentence on the mandate of the deputy. The Court emphasized that the mandate of the deputy ends when a final court decision "exists" that sentences a deputy to one or more years of imprisonment. This is a reasonable interpretation, since the sentence of effective imprisonment, for a certain period, prevents the deputy from exercising his representative function. Accordingly, this disables the representation of voters who voted for the deputy in question and, moreover, undermines the integrity of the legislative body.

Etem Arifi did not have a valid mandate as a deputy in accordance with the Constitution, the Law on the Rights and Responsibilities of the Deputy and the Law on General Elections.

267. Based on the above, and in accordance with the principles and findings elaborated above, the Court finds that Etem Arifi has not won the mandate of the deputy in accordance with Article 71.1 of the Constitution and Article 29.1 (q) of the Law on General Elections, nor he may exercise it, in accordance with Article 70.3.6 of the Constitution, in conjunction with Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Article 112.1 (a) and (c) of the Law on General Elections.

268. In such circumstances, the Court cannot assign the constitutional legitimacy to the mandate of a deputy, for whom it has been confirmed that the conditions under the Constitution and relevant laws were not met, nor to be a candidate for deputy (when he run and was elected), nor to exercise the mandate of deputy.

On whether the challenged decision of the Assembly is in accordance with the Constitution, if a deputy who did not have a valid mandate participated in its voting procedure.

272. The Court notes that according to the abovementioned provisions of the Constitution, to elect the Government, it is required that a majority of all deputies of the Assembly vote "for" the proposed Government. Given that the Assembly of Kosovo, in accordance with Article 164, paragraph 1 of the Constitution, has 120 deputies, the Court notes that at least 61 deputies must vote "for" the election of the government.

276. […] in the case of Kosovo, this majority […] differ from the majority of votes of the deputies required to take other decisions in the Assembly. In this regard, the Constitution distinguishes between decision-making procedures where the decision-making requires a majority of votes of all members of the Assembly (for some very important decisions), and the decision-making procedures that require a majority of deputies present and voting.

The vote of a deputy with an invalid mandate will not be counted in the decision-making process in the Assembly.

279. The Court found above that the mandate of Etem Arifi was invalid before the voting of the challenged decision. Therefore, since the challenged decision received only 61 votes of the deputies of the Assembly, including the vote of Etem Arifi, the Court notes that without counting his vote, the challenged decision received only 60 votes of the deputies of the Assembly.

285. […] when a proposed Government, based on Article 95(4) of the Constitution, does not receive the necessary votes to be elected, the Constitution expressly stipulates that the President of the Republic of Kosovo announces elections, which must be held no later than forty (40) days from the day of their promulgation.

293. The Court emphasizes that the abovementioned constitutional and legal norms, which have to do with the impossibility (ineligibility) to run for deputy in the general elections, as well as with the termination or invalidity of the mandate of the deputy, as a consequence of the sentence with imprisonment for the commission of criminal offenses, should not be seen as an end in itself.

294. The Court considered that the civic credibility in the Assembly of the Republic of Kosovo is violated if -despite the prohibitions imposed by Article 71 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections- it is allowed that the mandate of a deputy is won and exercised by a person convicted of a criminal offense by a final court decision valid in the Republic of Kosovo.

296. In this spirit, the Court noted that it is a clear constitutional requirement under Article 71.1 in conjunction with Article 70.3 (6) of the Constitution, that it is incompatible with the Constitution for a person to win and hold the mandate of deputy if convicted for a criminal offense, by a final court decision. Articles 29 and 112 of the Law on General Elections, as well as Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy reinforce this requirement.[148]

Extract from Case KO95/20 citing the Venice Commission:

135. The standards on the issue of running in parliamentary elections and the loss/invalidity of the mandate of deputies are comprehensively elaborated in the Report of the Venice Commission on the Exclusion of Offenders from Parliament, adopted by the Venice Commission at its 104th Plenary Meeting of 23-24 October 2015, CDL-AD (2015) 036 and promulgated through Opinion No. 807/2015, of 23 November 2018 (hereinafter: Report of the Venice Commission on the Exclusion of Offenders from Parliament).

The exercise of political power by people who seriously infringed the law puts at risk the implementation of the rule of law principle and may therefore endanger the democratic nature of the state.

137. The report of the Venice Commission on the Exclusion of Offenders from Parliament made a comparative analysis, in the light of the restriction of the passive right to vote, namely the right to be elected, guaranteed by Article 3 of Protocol 1 [Right to free elections], of the European Convention on Human Rights (hereinafter: the ECHR). In this regard, the Report refers to the rich case law of the ECtHR, regarding the impossibility of running for a member of parliament. Thus, in its practice regarding the restriction of the passive right to vote, the ECtHR has pointed out that, in order to comply with the ECtHR, the law must provide for such restriction, pursue a legitimate aim and be proportional (see, inter alia: Hirst v. the United Kingdom, ECtHR judgment of 6 October 2005).

138. However, in the present case, the Court notes that the Referral does not raise allegations of individual election rights, but of an adopting decision by the Assembly. Thus, in this case we are not dealing with a referral submitted by an individual claiming to violate his constitutional rights, but with a request for so-called "abstract review" of constitutionality submitted by seventeen deputies, against a decision of Assembly. Therefore, the Court will emphasize the analysis and findings of the Venice Commission Report on the Exclusion of Offenders from Parliament, which reflects the practice of some Council of Europe member states regarding: 1) Inability to run in parliamentary elections; 2) Loss or invalidity of the mandate of a member of parliament.

139. With regard to the inability (ineligibility) to run in parliamentary elections, the above-mentioned Report of the Venice Commission notes that in most Council of Europe member states, the issue of inability (or ineligibility) to run in parliamentary elections is not determined by special constitutional provisions, but is regulated by relevant laws (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, pages 6-7).

140. In addition, as regards the legal basis for the inability (ineligibility) to run for a member of parliament, the report distinguishes the states where the impossibility of running depends on the nature of the criminal offense, as well as the states where the impossibility of running depends on the nature of the sentence.

141. Thus, in the countries such as the United Kingdom, France, and Cyprus, parliamentary elections are prohibited for persons convicted of a criminal election-related offense. In some countries (Iceland, Turkey, Denmark, etc.), the persons convicted of criminal offenses that violate moral values (honor, reputation, etc.) may not be candidates for parliamentary elections. In Canada (a non-Council of Europe country), for example, persons convicted of corrupt actions over the past five years, or serving prison sentences, cannot run for parliament. In Latvia, a person convicted of an intentional criminal offense may not run in the parliamentary elections. On the other hand, in some countries the impossibility of running in parliamentary elections depends on the nature (length) of the sentence for criminal offenses. This group includes countries such as: Austria,

More than 40% of the member states of the Council of Europe have constitutional provisions regarding the loss/invalidity of the mandate of members of parliament, while the rest of the states regulate this issue by legal provisions.

148 Case No. KO95/20.

Germany, Montenegro, Luxembourg, etc. In Germany, for example, the Criminal Code imposes an automatic ban (for a period of five years) on running in elections for persons sentenced to not less than one year in prison. A limited number of countries (Finland, Slovenia, USA) do not have specific constitutional or legal obstacles for persons convicted of criminal offenses to run in parliamentary elections (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, pages 11-13).

142. The Report points out that in countries where the right to run in parliamentary elections is restricted, this is done: 1) by law, in general, specifying the type of punishment or a criminal offense which prevents the exercise of the right to be elected; or 2) the restriction is imposed by court decisions, as a case-by-case sentence (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, page 13).

Three (3) determining factors: **first**, the nature of the criminal offense; **second**, the nature of the sentence; **third**, the circumstances that make it impossible to run in parliamentary elections.

144. According to the comparative analysis contained in the Report, the loss/invalidity of the parliamentary mandate is regulated in different ways, in the countries included in the analysis (including some non-member states of the Council of Europe). However, there are some general factors that every country takes into account. (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, page 15).

145. The first group of countries - where the loss/invalidity of the parliamentary mandate is related to the nature of the criminal offense - include Finland, France, Italy, Malta, Cyprus, Canada, Portugal, etc. The category of criminal offenses that lead to the loss/invalidity of the parliamentary mandate includes: criminal offenses related to the electoral process, criminal offenses that are considered particularly immoral, serious criminal offenses, intentional criminal offenses or other specific offenses.

146. The second group includes states where the loss/invalidity of the mandate of the deputy is related to the nature (length) of the sentence. In this context, in some countries, any conviction for a criminal offense by a court decision is the basis for the loss/invalidity of the mandate of the deputy (Albania, Azerbaijan, Estonia, Finland, etc.). In some other countries, the loss/invalidity of a deputy's mandate depends on the length of the sentence and other aspects related to the sentence. Thus, in Croatia and Ireland the deputy loses the mandate if he is sentenced to effective imprisonment of 6 months or more. In Greece, the deputy loses his/her mandate in the Parliament if he/she loses the general right to vote (the loss of the general right to vote is determined by the Constitution and a special law). In Canada, the deputies lose their mandate if they are sentenced to two or more years imprisonment. Whereas in some countries, such as Bulgaria, the loss/invalidity of the parliamentary mandate occurs if a prison sentence is imposed, the execution of which has not been suspended.

147. The third group belongs to the countries where the loss/invalidity of the mandate of the deputy is related to the fulfillment of the conditions for the inability (ineligibility) to run in the parliamentary elections. Thus, the deputy loses the parliamentary mandate if during the exercise of the mandate of the member of parliament the conditions and circumstances are met which would make it impossible for him/her to run in the parliamentary elections. This is done automatically or by a special decision of the parliament.

148. […] the Court notes that the above practices are not comprehensive and uniform. Thus, in countries such as the USA, Israel, etc., the loss/invalidity of the mandate of the deputy (or senator) occurs only in very rare cases. In the US, for example, there are no express constitutional provisions for losing a seat in Congress, except for acts of treason (see Venice Commission Report on Exclusion of Offenders from Parliament, p. 23).

149. With regard to the procedure for the loss/invalidity of the mandate of a deputy, the Report points out that different countries regulate this procedure in different ways. In some countries, a member of parliament automatically loses the mandate (is disqualified) after a court decision deprives them of their civil political rights (e.g., Belgium). In Estonia, the Constitution stipulates that the mandate of a deputy terminates as soon as the court decision takes effect, which would prevent him from running for a deputy.

150. In other countries, the loss/invalidity of the mandate (disqualification) is realized through a certain action in the parliament. Thus, in Denmark the parliament can take the mandate of a member who has been convicted of a criminal offence which renders him unworthy to hold a seat in the legislature. Germany and Hungary follow a similar practice. In France, the loss of civil rights leads to the loss of the parliamentary mandate of the deputy, and this is confirmed by a decision of the

Constitutional Council.[149]

Extract from Case KO95/20 citing the Code of Good Practice in Electoral Matters of the Venice Commission:

151. Through its Code of Good Practice in Electoral Matters, the Venice Commission clarifies the possibilities for restricting political rights, including the right to vote and to stand for election, through the provisions of electoral legislation. In the relevant part, this Code states that:

"[...] provision may be made for clauses suspending political rights. Such clauses must, however, comply with the usual conditions under which fundamental rights may be restricted; in other words, they must:

1. be provided for by law;

2. observe the principle of proportionality;

3. be based on mental incapacity or a criminal conviction for a serious offence.

152. […] in the case of the acquisition of rights on the basis of mental incapacity, such a decision may relate to the incapacity but also imply ipso jure the acquisition of civil rights. The conditions for denial of the right of individuals to be elected may be less strict than the deprivation of the right to elect (to vote), as in this case it is a question of holding a public position [...] (see: Venice Commission Code of Good Practice in Electoral Matters, p. 14).[150]

Extract from Case KO95/20 citing the Report of the Venice Commission on Electoral Law and Electoral Administration in Europe:

153. The report of the Venice Commission on Electoral Law and Electoral Administration in Europe addresses key issues concerning electoral legislation and the administration of elections in Europe. In the relevant part of this Report, regarding the loss of the mandate of the elected, the Venice Commission determines the following:

"[...]

78. It is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied based on any conviction, regardless of the nature of the underlying offence. As for the Law on Elections of People's Deputies of the Ukraine, for instance, the Venice Commission recommended that should provide greater protection for candidate rights, including removing the blanket and indiscriminate prohibition on candidacy for persons who have a criminal conviction (see CDL-AD(2006)002, paras 16 and 100). The OSCE/ODIHR recommendation that the right to be a candidate should be restored to those persons who were convicted and subsequently pardoned after the 2003 post-election disturbances in Azerbaijan goes in the same direction.

Denying the passive right of suffrage on the basis of any conviction, regardless of the nature of the underlying offense, might not be in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

79. On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all. For instance, the delegation of the Congress of Local and Regional Affairs of the Council of Europe was most concerned at the issue of the validity of the candidatures that were put forward in the 2005 local elections in the Former Yugoslav Republic of Macedonia. An elected mayor was able to run for Mayor there despite having being sentenced to four years imprisonment for large scale theft by the court. (see Report of the Venice Commission on Electoral Legislation and Electoral Administration in Europe, paragraphs 78 and 79).

154. As a conclusion regarding the position of the Venice Commission, in all three documents of the Venice Commission analyzed above, emphasis is placed on the general conclusion that the impossibility, namely the ineligibility to run in the parliamentary elections, as well as the loss of the parliamentary mandate, is a restriction of electoral rights, guaranteed by Article 3 of Protocol 1 to the ECHR. Therefore, they must be based on clear norms of law, pursue a legitimate aim and respect the principle of proportionality. But also, as the Venice Commission strongly emphasizes, it is in the general public interest to avoid the active role in political decision-making of serious violators of the law.[151]

149 Ibid.
150 Ibid.
151 Ibid.

The Court clarified the distinction between the inability of being a candidate for deputy in the Assembly because of a conviction for a criminal offense, and the termination of the mandate because of a conviction for a criminal offense.[152]

The Court also explained that the Law on General Elections would not require persons convicted of criminal offenses to be sentenced with an accessory punishment, thus depriving such a person of the right to be elected. A final sentence for a criminal offense -in the last three (3) years- would be sufficient to exclude a person from standing for deputy. A court decision is final when there are no further regular legal remedies available against the decision.[153]

The Court found that the Constitution does not set out a procedure for establishing that the mandate of a deputy is invalid.[154] There is also no procedure in any legislation or other legal norms.[155] The Court concluded that it would not have the authority to determine such a procedure because this would be the competence of the legislator.[156]

Yet the absence of a procedure set out in the law cannot go against the constitutional norm that a person cannot have a valid mandate as a deputy, if convicted of a criminal offense in the past three (3) years, because this would frustrate the purpose of this norm. This norm reflects the intention that persons criminally convicted of a violation of the law may not be elected -for a certain term- as deputies and exercise the duties of a representative of the citizens in the legislative body.

The Court ruled that the mandate of the deputy was invalid before the deputies of the Assembly voted on the election of the Government. Therefore, the vote cast by the same deputy could not be counted. Since the Government was elected with 61 votes, the one invalid vote meant that the Government did not get the necessary number of votes to be elected, and new elections were to be held.[157]

The Court's interpretation is just a gap- filler until the legislator sets out the procedure.

Yet the Court's interpretation does not preclude the legislator from setting out another procedure by law, by the Rules of Procedure of the Assembly, or even by established parliamentary practice.

While the legislator has the authority to activate another procedure, they cannot change the criteria that establish the ineligibility under the Constitution. A change of the criteria would require an amendment of the Constitution. The Court's interpretation referring to the ineligibility to stand for elections -when convicted of a criminal offense- triggers the question, if this interpretation should apply to other constitutional institutions as well, such as that of the Prime Minister. This question became relevant following the elections after the Court's judgment. The candidate for Prime Minister was not able to be elected as a member of the Assembly, because of ineligibility due to having committed a criminal offense according to the Court's interpretation. Despite this, he was proposed as Prime Minister.[158] Therefore, the Constitution and/or legislation could clarify the matter in line with constitutional principles, Venice Commission opinion(s), as well as other countries' practices.

Opinion of the Venice Commission

According to the Venice Commission, in most Council of Europe member states, it is the legislation, not the Constitution, that regulates the ineligibility to run in parliamentary elections.[159] There is also no uniform practice among Council of Europe member states as to the criteria for ineligibility due to criminal offenses. The criteria would range from election-related criminal offenses, criminal offenses that violate moral values, and intentional criminal offenses up to the length of the sentence for a criminal offense.[160]

152 Ibid.
153 Case No. KO95/20, para. 188, 217.
154 Ibid., para. 222.
155 Ibid., para. 224.
156 Ibid., para. 233.
157 Ibid., para. 279.
158 Ibid., para. 57.
159 Venice Commission, Opinion No. 807/2015, para. 79.
160 Ibid., para. 149, 76, 98, 151, 152.

The Venice Commission concluded that it is not uncommon to deprive individuals of their right to be voted. However, it would not be justified to deny such right based on any criminal conviction and regardless of the nature of the offense. It would also not be justified to exclude any restriction of the eligibility to be elected for criminals. It would be in the general public interest to avoid the active role in political decision-making of serious violators of the law.[161]

Any restriction would have to be based on clear norms of law, pursue a legitimate aim, and respect the principle of proportionality.

Comparative Analysis and References

Case KO95/20 provides an extensive amount of comparative analysis and references to other constitutions and cases. Some of those analyses are extracted and presented below.

Extract from Case KO95/20 citing the Venice Commission:

Sweden[162]

In Sweden, the law allows a person to run for member of the Assembly (Riksdag) if once convicted of a criminal offense.

Political parties in Sweden are presumed to have internal rules that prevent persons from running for office if they have committed a criminal offense. The deputy loses the mandate due to the commission of a criminal offense, while the court dealing with the criminal offence decides on the removal, in case of an imprisonment sentence of two (2) years or more.

In the event that a member of Parliament (Riksdag) is absent (or loses office), a deputy shall replace them. If the deputy member is also absent, then, until the appointment of their new replacement, the Parliament (Riksdag) is incomplete but continues to work and issue decisions.

There are no rules as to how many members must be present in Parliament to have a quorum, although there are certain cases where a certain number of deputies are required to make a decision. To make a decision, the majority of members present must vote 'for' the proposal.

A member of Parliament (Riksdag) has the right to vote until removed from office. The dismissal of the deputy does not make the previous decisions where they voted (before the dismissal) invalid. This is because in Sweden, the Parliament (Riksdag) can only repeal or amend the law that has been passed, and its decisions cannot be appealed or reviewed.

Slovakia[163]

The office term of a deputy of Parliament in Slovakia ends when the decision on imprisonment for a criminal offense becomes final and the sentence of imprisonment has not been suspended.

In Slovakia, a person may not be a candidate for elections if convicted of an intentional criminal offense and if the decision is final until the sentence has been removed from the criminal file.

There are no rules prohibiting the work of the Assembly due to the absence of a deputy as a result of the loss of his mandate. Decisions of the Assembly taken when a certain deputy has not had a valid mandate, and the latter's vote has been decisive for decision-making may be challenged in the Slovak Constitutional Court. The latter has stated that serious procedural errors by the Parliament can cause a decision to be unconstitutional.

161 Ibid., para. 170.
162 Ibid., para. 157.
163 Case No. KO95/20, para. 156.

Croatia[164]

In Croatia, the deputy loses its mandate if sentenced by a final decision to imprisonment of 6 months or more.

In Croatia, persons sentenced to effective imprisonment of 6 months or more, and if, at the time of the issuance of the decision on the announcement of the elections, the execution of the sentence is taking place or it is expected to take place, may not be candidates for deputy. Also, persons who have been convicted and have not been rehabilitated according to the law, may not be candidates for deputy. The candidate must prove the fulfillment of these conditions by a relevant certificate.

The office term of a deputy of Parliament shall expire on the day on which the Parliament decides to terminate it, in accordance with the procedure under Article 10 of the Rules of Procedure of the Croatian Parliament, and that decision of the Parliament is published in the Official Gazette.

The Parliament shall continue to function even when a deputy loses the mandate. The votes required for decision-making in the Parliament are calculated according to the total number of mandates/seats in Parliament, and not according to the total number of seats valid at the specific moment.

There is no case law of the Constitutional Court of Croatia that is relevant in the present case. However, the Constitutional Court decided on a case when the Parliament rendered a law with one vote less than required (76 instead of 77 votes), yet the deputies who decided had a valid mandate.

Czech Republic[165]

The legislation of the Czech Republic: a) does not restrict the right of a candidate for election as a result of criminal offenses; and b) it does not envisage a loss of mandate as a result of criminal offenses.

In case of loss of the mandate of a deputy, another deputy replaces them and the mandate of the new deputy begins on the day of the end of the mandate of the previous deputy. If there is no replacement, then the seat of the deputy will remain vacant even though such a situation has not yet occurred in practice.

The Constitution of the Czech Republic gives jurisdiction to the Constitutional Court to resolve doubts as to the loss of eligibility to hold office. However, the decision of the Constitutional Court is of a declaratory nature only, and the Czech Constitution or other legal acts do not regulate situations where a former deputy holds an invalid mandate at the time of voting.

Mexico[166]

Criminal proceedings against the deputies of the Parliament in Mexico who are exercising their mandate may take place after obtaining a "Declaration of Indictment" from (other) deputies." If the deputies agree, then the deputy in question loses the mandate.

There is no legal provision stipulating that the Parliament (Congress) does not function if a deputy resigns. If a deputy loses the mandate, the same is replaced.

In Mexico, the legal system does not allow persons who have been convicted of criminal offenses and are currently serving sentences to be candidates for election, but such a prohibition does not apply, in principle, in cases where a person has completed serving the sentence.

There is no practice similar to the circumstances of the case where a deputy without a valid mandate took part in

164 Ibid., para 158.
165 Ibid., para 159.
166 Ibid., para. 160.

the vote and the vote was decisive in the decision in question. However, the Supreme Court of Mexico may annul laws when it finds irregularities during the procedure for their approval.

Brazil[167]

in Brazil, a person who has committed a criminal offense may not be a candidate in election for Congress before eight (8) years pass from the time the candidate served the sentence.

For a deputy who is exercising their duty, the term of eight (8) years starts from the day they complete the duty, rather than from the date when the conditions are created for an ineligibility of candidacy.

A deputy (congressman, senator) loses their mandate if a final court decision suspended their political rights, or convicted them of a criminal offense. In cases of loss of political rights, the deputy loses the mandate if the House of Representatives or the Federal Senate decides by an absolute majority of votes. While there is also a special procedure to follow when a deputy (congressman or senator) loses their mandate, when convicted of a criminal offense, the deputy immediately leaves the position of deputy and another deputy replaces them.

Based on the principle of the presumption of innocence, the Federal Supreme Court decides whether the deputy has committed a criminal offense and then the Federal Senate, or the House of Representatives, decides definitively on the removal from office. Therefore, the deputy exercises his/her function until they leave the position. The effects of the removal are not retroactive and their vote so far remains valid.

The Netherlands[168]

A person whose voting rights have been restricted, or a person who has been convicted of a criminal offense with imprisonment of at least one (1) year, may not run for elections. Lastly. the deputies lose their mandate if convicted by an irrevocable decision. The exercise of the post-disqualification function is unlawful, but the disqualification does not result in a pre-disqualification vote being invalid.

Bulgaria[169]

The Parliament in Bulgaria continues to function despite the fact that a deputy lost their seat. The Constitution or other legislation do not provide for what happens when a deputy -who has lost a mandate- has taken part in a decision of the Assembly, and whose vote has been decisive for the decision.

One may not be a candidate for election in Bulgaria if they are serving a sentence.

The office term ends when the court imposes a sentence of imprisonment and there is no postponement of the serving of the sentence.

Poland[170]

No one with a sentence of imprisonment by a final judgment for an intentional criminal offence may be elected to the Sejm (Representative Chamber) and Senate of Poland.

The loss of the mandate of the deputy of the House of Representatives (Sejm) occurs when they lose the right to be a candidate for deputy, as a result of criminal offenses. The mandate ends by a decision of the Marshal of the House of Representatives.

167 Ibid., para. 161.
168 Ibid. para. 163.
169 Ibid. para. 164.
170 Ibid. para. 165.

The deputy who loses the mandate has the right to appeal this decision within 3 days to the Supreme Court of Poland, which evaluates it within 7 days. After a deputy has lost the mandate, the Marshal of the House of Representatives takes steps to fill the vacancy of the deputy.

Neither the Constitution nor the electoral legislation provide for the suspension of the legislative function of the House of Representatives of the Polish Parliament until the filling of the vacant position of the deputy. It may not occur -in practice- for a deputy, who has lost his/her mandate, to participate in decision- making due to the fact that, inter alia, there are brief procedures within which the President of the Marshal of the House of Representatives decides on replacement, and the Supreme Court of Poland decides regarding the appeal.

Conclusion

There are normative gaps in the Constitution regarding the (in)validity of the mandate of the Assembly's deputies. Yet in accordance with the current constitutional practice, the mandate of the deputy is lost or becomes invalid from the moment of the issuance of a final court decision sentencing the deputy with one (1) year or more imprisonment.

Moreover, the Law on General Elections prohibits a person from standing for deputy if found guilty of a criminal offense by a final court decision in the past three (3) years. Possible constitutional and/or legal amendments could include the procedures for establishing the invalidity of the mandate of a deputy. They would need to be in line with the case law and the Law on General Elections.

An unresolved issue remains whether the Court's interpretation extends to the Prime Minister and the President of the country. The criteria that apply for the deputies of the Assembly could also apply to the appointment of

the Prime Minister. It is not unusual in a parliamentary democracy for the Prime Minister to not be a member of the legislature. For example, the German Grundgesetz does not require the candidate for Bundeskanzler to be a member of the Bundestag. However, the criminal integrity of the candidate for Prime Minister requires a more detailed assessment.

A textual (literal) interpretation of the Constitution would lead to a conclusion contradictory to the idea of constitutional integrity and civil credibility of the state institutions, as the Court and the Venice Commission noted. It would be a normative contradiction if an individual with a criminal record could be appointed as a Prime Minister, while not being eligible to stand for election in the Assembly, or appointment in the public service.[171] Bearing in mind the significant powers of the Prime Minister, it would be necessary to ensure an equivalent standard of constitutional integrity and civil credibility for this position.

Recommendations

Given the constitutional shortcomings outlined above, the following options could be envisaged.

On the procedure for establishing that the mandate of a deputy of the Assembly is invalid:

- In case of no amendment to the Constitution, the Law 03/L-111 on Rights and Responsibilities of the Deputy could include a procedure for determining the invalidity of the mandate, by amending the existing version of this law, or by alternatively drafting a new Law on the Assembly with the procedure set out therein. The procedure must be consistent with the Law on General Elections;
- A further option is to set out the procedure for determining the invalidity of the mandate in the Rules of Procedure of the Assembly of Kosovo.

[171] Constitutional review of Decision No. 07-V-014 of the Assembly of the Republic of Kosovo, of 3 June 2020, on the Election of the Government of the Republic of Kosovo, Case No. KO95/20, 6 January 2021, at https://gjk-ks.org/wp-content/uploads/2021/01/ko_95_29_agj_ang..pdf.; Law No. 06/L-114 on Public Officials, Art. 8.1.5 prohibits admission to the public service to individuals, who have been convicted -with a final judgment- of a criminal offense. For more, see Law No. 06/L-114 on Public Officials, 11 March 2019, at https://gzk.rks-gov.net/ActDetail.aspx?ActID=25839.

On the extension of the interpretation of the Court to other state institutions, such as the Prime Minister and the President:

- In case of no amendment to the Constitution, the Court would have to address the consequences of a criminal conviction for the election of the Prime Minister and President;
- Another possibility would be to extend the Court's interpretation to the Prime Minister and the President while providing -in the relevant legislation- that a candidate who has been convicted of a criminal offense cannot be a candidate for Prime Minister or President.
- In case of a constitutional amendment, a new constitutional provision could better establish the rules and limitations for the nomination of a candidate for Prime Minister or President.

VI

The Scope of the Immunity of the Assembly's Deputies

The deputies of the Assembly have immunity for actions taken "within the scope of their activities as deputies" and cannot be arrested while they are "performing their duties" without the consent of the majority of all deputies. Yet, neither constitutional nor legal provisions define the circumstances in which the deputies are performing their duties, which sought a further interpretation from the Court and the Venice Commission. Moreover, neither constitutional and legal provisions nor case law has addressed the issue of freedom of expression of deputies and the exceptions to it. All these gaps call for constitutional clarity to avoid practical uncertainties and obstruction of the Assembly's work.

Parliamentary immunity is a fundamental principle in the functioning of parliamentary democracies. The rationale behind this concept is that the elected representatives of the people need certain guarantees to effectively fulfill their democratic mandate, without fear of harassment or undue charges from the executive, the courts, or political opponents.[172] Yet, some constitutional gaps raise questions regarding the scope of deputies' immunity and its conformity with international standards.

The deputies of the Assembly do not have immunity for the actions taken outside the scope of their responsibilities.

The Court has clarified important issues concerning the substantive scope of immunity, but also its temporal dimension. It gives deputies of the Assembly functional immunity or non-liability for actions taken within the scope of their activities as deputies of the Assembly.[173] This refers to immunity against any judicial proceedings for votes, opinions, and remarks related to the exercise of the parliamentary office, or in other words, wider freedom of speech than for ordinary citizens.[174] Law No. 03/L-111 on Rights and Responsibilities of the Deputy ("Law on Rights and Responsibilities of the Deputy") also provides rules on the immunity of the deputies of the Assembly and the Assembly's procedures on dismissing the immunity of its deputies.[175] The Rules of Procedure of the Assembly of 2010 included provisions on immunity and other procedures for detention or arrest of the deputies.[176] It also established the procedure for waiving the immunity of a deputy, subject to an Assembly's decision.[177] Comparatively, the new Rules of Procedure of the Assembly do not contain any provisions on immunity.

The deputies of the Assembly shall be immune from prosecution, civil lawsuit, and dismissal for actions or decisions that are within the scope of their responsibilities.[178] In case of criminal prosecution for actions taken outside the scope of their responsibilities as deputies of the Assembly, the Constitution provides that the arrest or detention cannot take place while the deputy is performing their duties without the consent of the majority of all deputies of the Assembly.[179] The arrest or detention can take place in all other situations when the deputy is not part of the plenary or committee meetings. In absence of a constitutional definition, the Court defined in which circumstances the deputies are performing their duties.

The Constitution does note address the situation when a deputy is caught committing the crime in flagrance, nor limitations on freedom of epression.

Besides that, the Constitution does not address the issue of arrest or detention when the deputy is caught in the act of committing a crime in flagrance. The Law on Rights and Responsibilities of the Deputy regulates it by allowing imprisonment to take place if the act is punishable with five (5) or more years of imprisonment.[180] In such a case, the imprisonment takes place even without any prior consent from the Assembly to dismiss the deputy's immunity.[181]

It is also unclear whether additional guarantees may be warranted, such as on freedom of expression of parliamentarians. The Constitution gives deputies the right to express their opinions in the Assembly.[182] Yet, neither the Constitution nor any other law provides for any limitations to such freedom of expression.

The lack of constitutional and legal provisions requires an analysis of the case law, Venice Commission interpretations, and the laws and practices of other countries.

172 European Commission for Democracy Through Law (Venice Commission), Report on the scope and lifting of parliamentary immunities, adopted by the Venice Commission at its 98 plenary session, Study No. 714/2013, CDL-AD(2014)011, 14 May 2014, pages 3, 4, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e.
173 Constitution of Kosovo, Article 75(1).
174 Venice Commission, Study No. 714/2013, para. 10.
175 Law No. 03/L-111 on Rights and Responsibilities of the Deputy, Articles 9 and 10, at https://gzk.rks- gov.net/ActDetail.aspx?ActID=2680
176 Rules of Procedure of the Assembly of 2010, Articles 22 and 24.
177 Ibid., Article 23.
178 Constitution of Kosovo, Article 75(1).
179 Ibid., Article 75(2).
180 Law No. 03/L-111 on Rights and Responsibilities of the Deputy, Article 9(9).
181 Ibid.; The Rules of Procedure of the Assembly of 2010 also addressed the matter and provided that the arrest or detention of the deputies of the Assembly may take place, even without waiving the immunity in advance.
182 The Rules of Procedure of the Assembly of 2010 also established the right of the deputies to express their opinions in the Assembly.

Relevant Provisions

Constitution of Kosovo

Article 75 [Immunity]

1. Deputies of the Assembly shall be immune from prosecution, civil lawsuit, and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly.
2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly.[183]

Law no. 03/L-111 on Rights and Responsibilities of the Deputy

Article 9 [The Immunity of the Deputy]

1. The deputies of the Assembly enjoy the immunity towards penal prosecution, civil action or towards dismissal for their actions within scope of their responsibilities as deputies of the Assembly. Immunity does not hinder penal prosecution of the deputies of the Assembly for actions undertaken outside their scope of responsibilities as deputies of the Assembly.
2. The deputy of the Assembly can not be arrested or stopped while he/she is performing his/her duties as deputy of the Assembly, without the consent of the majority of all deputies of the Assembly.
3. The request for dismissing the immunity of the deputy is to be done only by the Attorney General of Kosovo. Only in cases when the private indictment is raised against the deputy according to the Criminal Procedure Code of Kosovo, the request for suspending the immunity can be submitted only by the court that is investigating the case.
4. The request for dismissing the immunity is addressed to the President of the Assembly who immediately sends it to the Committee for Mandates and Immunities that reviews and prepares the recommendations for the next plenary session of the Assembly.
5. The Committee for Mandates and Immunities prepares the recommendation for the Assembly within thirty (30) days from the day of receiving the request by the President of the Assembly.
6. The Assembly without debate will bring a decision regarding the dismissal of the immunity however the deputy can put forward his views regarding the case.
7. For the dismissal of the immunity of the deputy the majority of votes by all deputies of the Assembly of the Republic of Kosovo are necessary.
8. The deputy which has a dismissed immunity has the right to complain to the Competent Court, in terms of thirty (30) days. The deputy's complaint shall not suspend the decision of the Assembly.
9. With exception from paragraph 3 of this Article, the measure of imprisonment can be undertaken towards a deputy without any prior consent from the Assembly in the case when he or she is caught while committing (in flagranti) a severe criminal act that is condemnable with five (5) or more years of imprisonment.

Article 10 [Beginning and respect of the Immunity]

1. The deputy shall enjoy parliamentary immunity from the date his mandate is certified.
2. The immunity of the deputy must be respected by all, regardless of the function.
3. The deputy may inform the President of the Assembly for any violation of his immunity. The President of the Assembly is obliged to undertake necessary measures without any delay.[184]

183 Constitution of Kosovo.
184 Law on the Rights and Responsibilities of the Deputy.

Relevant Case-law and Opinions

Case KO98/11 addresses this matter.[185] The Report on the scope and lifting of parliamentary immunities adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014) is also relevant. [186]

The functional immunity or non-liability of the deputies of the Assembly is of unlimited duration.

In Case KO98/11, the Court decided on the Government's referral for the interpretation of the matter of deputies' immunity, as well as the immunity of the President of Kosovo and members of the Government.[187] The Government argued that this was an important issue that needs clarification, considering that it "has a direct impact on the democratic functioning of the institutions of the Republic of Kosovo, according to the Constitution of the Republic of Kosovo".[188]

The applicants asked the Court to clarify if deputies are immune from prosecution, civil lawsuit, dismissal, and arrest or detention for their actions and decisions taken outside the scope of their responsibilities as deputies. In addition, the Court was asked to clarify the meaning of "while performing duties as a deputy of the Assembly".[189]

The deputy cannot be detained or arrested during plenary and committee meetings without the consent of the Assembly.

As regards arrest and detention, the Court interpreted the expression 'while performing her/his duties as a deputy of the Assembly'[190] in a restrictive way, by including the work of deputies in the Assembly during its plenary and committee meetings.'[191] Thus, apart from a situation when the Assembly gives its consent for the arrest or detention of deputies during the plenary sessions of the Assembly or its committee meetings, the deputy may also be arrested or detained in all the other situations, when they are not part of the plenary or committee meetings. This interpretation does not answer the question of whether a member of the Assembly may be arrested, for instance, when traveling in their official capacity during an activity taking place outside the Assembly's premises.

The Court also addressed the issue of arrest or detention when the deputy is caught in the act of committing a crime in flagrance. The Constitution does not regulate this, but the Law on the Rights and Responsibilities of Deputies provides that a deputy's imprisonment can take place without the Assembly's consent, if the deputy is caught committing a crime in flagrance, that is punishable with five (5) or more years of imprisonment.[192]

The relevant paragraphs of the Court's decision on parliamentary immunity state the following:

57. As far as acting within the scope of the responsibilities of deputies is concerned it should be stressed that the deputies of the Assembly of the Republic of Kosovo have functional immunity. This means that they shall be immune from prosecution, civil lawsuit, and dismissal for their actions and decisions. (See Article 75 (1), first sentence)

59. The Constitution clearly defines the scope of the responsibility of the deputies. Those are the actions taken and decisions made in order to perform the competencies of the Assembly of Kosovo prescribed in Article 65 of the Constitution. Consequently, the Deputies are immune for any action taken or decision made that is related to:

(1) adoption of laws, resolutions and other general acts;
(2) decision to amend the Constitution by two thirds (2/3) of all its deputies including two thirds (2/3) of all deputies holding seats reserved and guaranteed for representatives of communities that are not in the majority in Kosovo;
(3) announcement of referenda in accordance with the law;
(4) ratification of international treaties;

185 Judgment in Case No. KO98/11 concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, and Members of the Government of the Republic of Kosovo, 20 September 2011, at https://gjk-ks.org/wp-content/uploads/vendimet/KO98- 11_ANG_AKTGJYKIM.pdf.
186 Venice Commission, Study No. 714/2013.
187 Constitution of Kosovo, Article 93(10) and Article 113(3); Case No. KO98/11, para. 2.
188 Case No. KO98/11, para. 3.
189 Ibid., para. 39(2).
190 Ibid., para. 52(2).
191 Ibid., para. 94.
192 Law on Rights and Responsibilities of the Deputy, Article 9(9).

(5) approval of the budget of the Republic of Kosovo;
(6) election and dismissal of the President and Deputy Presidents of the Assembly;
(7) election and dismissal of the President of the Republic of Kosovo in accordance with this Constitution;
(8) election of the Government and expresses no confidence in it;
(9) overseeing the work of the Government and other public institutions that report to the Assembly in accordance with the Constitution and the law;
(10) election of members of the Kosovo Judicial Council and the Kosovo Prosecutorial Council in accordance with this Constitution;
(11) proposing the judges for the Constitutional Court;
(12) overseeing foreign and security policies;
(13) giving consent to the President's decree announcing a State of Emergency;
(14) ecision in regard to general interest issues as set forth by law.

Deputies of the Assembly are liable for their private acts and behavior that are outside the scope of their responsibilities as a deputy, as are all citizens.

61.Consequently, in order to ensure the separation of powers and independent functioning of the Assembly free from interfering of executive or judicial power into the legislative domain, deputies of the Assembly of Kosovo enjoy functional immunity and they are non-liable for the actions taken and decisions made within the scope of their responsibilities.

69. Since the Constitution does not grant inviolability with regard to criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities, they are not inviolable either with regard to prosecution for criminal acts allegedly committed prior to the beginning of their mandate as deputies or during the course of their mandate.

The public administration of justice cannot be stalled merely because there is an apprehension that at some stage of a criminal process a deputy might plead that they had immunity from prosecution.

95. Article 75 (2) stipulates that while a deputy is performing his/her duties, in order to be arrested or detained a decision to waive the immunity is required by a majority of all of the deputies of the Assembly. The purpose of this requirement is to ensure that the work of the Assembly must not be hindered. While the deputy is performing his/her duties it is for the benefit of the Assembly and the conduct of its work. A decision of the Assembly is required to remove the deputy because his/her physical presence is necessary at the meeting of the Assembly and its committees. During the work of the Assembly the deputy is there in his capacity as a representative of the people and as a constituent member of the Assembly. It is only the Assembly itself which can decide that arrest and detention of a deputy can occur while he/she is performing the work of the Assembly.

97. The situation of permitting arrest and detention while caught committing a serious crime (in flagrante) punishable by five or more years imprisonment is a standard that is recognized in the constitutional order of all countries, be it in their Constitutions or in their organic law. The public must have confidence that their interests are protected in these circumstances.[193]

Opinion of the Venice Commission

The Venice Commission gave a more detailed view of the freedom of expression of the Assembly's members and its possible limitations. According to its opinion, the purpose of functional immunity or non-liability is to protect deputies of the Assembly when discussing and deciding on political issues, thus fulfilling their tasks as representatives of the people.

The concept of functional liability or non-liability, as the Venice Commission interprets it, includes protection not only for 'ballots in which they [parliamentarians] participate', but it 'normally also extends to opinions expressed, whether orally or in writing, in parliament or a parliamentary committee, or for acts performed on business assigned by the parliament in connection with their mandate.'[194]

193 Ibid.
194 Venice Commission, Study No. 714/2013, para. 62.

Thus, the freedom of expression of parliamentarians in the exercise of their parliamentary mandate is an important aspect of their functional immunity. Constitutional practice on this issue seems to vary among different countries.

The Venice Commission notes as follows:

Any substantive limitations to the freedom of speech of parliamentarians should apply only to statements of a particularly grave nature and should always be weighed against the overriding requirement of ensuring free political debate in the parliament.

65. In countries such as Italy, the Netherlands, and Portugal, non-liability extends to political opinions expressed also outside parliament. The same goes for Argentina, Belarus, Bulgaria, Israel, Latvia, and Moldova, as well as other countries where non-liability protects parliamentary functions in a broad sense, such as Algeria, Andorra, Armenia, Bosnia and Herzegovina, Estonia, Finland, Georgia, Greece, Hungary, Portugal and Peru.

66. In other countries non-liability is only a special freedom of speech within the confines of the parliamentary buildings, including the plenary as well as committee rooms and other places of work. This is for example the case in Ireland and Norway, as well as in the UK, where the acts covered by non-liability are 'proceedings in Parliament' as defined over the years by parliamentary jurisprudence. In Spain, non- liability does not apply to statements made in the context of meetings of parties or with constituents, private encounters or journalistic activities.[195]

The Constitution is silent on the matter of the deputies' freedom of expression during the exercise of their functions. The Court has not dealt with the issue either. However, the Venice Commission notes that in some countries, (such as Brazil, Italy, Malta, Norway, Slovakia, Peru, Portugal and Switzerland) such freedom is absolute. In other countries, (such as Bulgaria, Germany, for defamation only Albania, Greece, Latvia) there are exceptions in cases of "hate speech and racist remarks, or threats, or incitement to violence or crime".[196]

Comparative Analysis and References

Comparatively, Kosovo's constitutional practice follows the same pattern as other countries in Europe, with deputies being not liable for their opinion - while in office - expressed in the Assembly (i.e., Albania, Armenia, Croatia, Czech Republic, Finland, Germany, Greece, Montenegro, North Macedonia, Serbia, Slovenia, Slovakia), and their arrest or detention is only allowed with prior consent of the Assembly. The Constitutions of Albania and Greece acknowledge though the possibility of parliamentarians' deprivation of liberty in case of defamation.

Albania

Article 5 (1)

1. The deputy is not held responsible for opinions expressed in the Assembly and votes cast by him in the exercise of the function. This provision is not applicable in the case of defamation.
2. A deputy cannot be arrested or deprive him of liberty in any form nor may a personal search or a search of the residence be exercised against him without the authorization of the Assembly.
3. A deputy can be arrested or detained without authorization when he is captured during or immediately after the commission of a crime. The General Prosecutor or Chief Special Prosecutor immediately notifies the Assembly, which, when it finds that there is no room for proceedings, orders the lifting of the measure.
4. For the cases provided in paragraphs 2 and 3 of this article, the Assembly may hold discussions in closed sessions for reasons of data protection. The decision is taken by open voting.[197]

195 Ibid.
196 Ibid., para. 69.
197 Constitution of Albania.

Armenia

Article 96

1. A Deputy may not, during his or her term of powers or thereafter, be prosecuted or held liable for an opinion expressed or voting within the framework of parliamentarian activities.
2. Criminal prosecution may be initiated against a Deputy only upon the consent of the National Assembly. A Deputy may not be deprived of liberty without the consent of the National Assembly, except for the case of having been caught at the time of committing a criminal offence or immediately thereafter. In such case, deprivation of liberty may not last more than seventy-two hours. The Chairperson of the National Assembly shall be immediately notified of the deprivation of liberty of the Deputy.[198]

Bulgaria

Article 69

National Representatives shall not incur criminal liability for any opinions expressed or for any vote in the National Assembly.

Article 70

(1) A National Representative may not be detained, and criminal prosecution may not be undertaken thereagainst, save for publicly prosecutable offences, and then solely on authorization from the National Assembly or, should the latter be in recess, from the Chairperson of the National Assembly. No authorization for detention shall be required where a National Representative is detained in the act of committing a serious criminal offence, but in such a case the National Assembly or, should the latter be in recess, the Chairperson of the National Assembly, shall be notified forthwith.
(2) Authorization for undertaking of criminal prosecution shall not be required if the National Representative concerned grants consent in writing.[199]

Croatia

Article 75

Members of the Croatian Parliament shall enjoy immunity.
No Member of Parliament shall be held criminally liable, detained or sentenced for an opinion expressed or a vote cast in the Croatian Parliament.
No Member of Parliament shall be detained nor shall any criminal proceeding be instigated against him/her without approval by the Croatian Parliament.
A Member of Parliament may be detained without approval by the Croatian Parliament only if he/she has been caught in the perpetration of a criminal offence carrying a sentence of imprisonment exceeding five years. In such a case, the Speaker of the Croatian Parliament shall be notified thereof.
If the Croatian Parliament is not in session, approval for the detention of a Member of Parliament or the continuation of criminal prosecution against him/her shall be given and the decision on his/her right to immunity shall be made by the Credentials and Privileges Commission, subject to its subsequent confirmation by the Croatian Parliament.[200]

Czech Republic

Article 27

(1) There shall be no legal recourse against Deputies or Senators for their votes in the Assembly of Deputies or Senate respectively, or in the bodies thereof.

198 Constitution of the Republic of Armenia, at https://concourt.am/en/normative-legal-bases/constitution- of-ra.
199 Constitution of Bulgaria.
200 Constitution of Croatia.

(2) Deputies and Senators may not be criminally prosecuted for speeches in the Assembly of Deputies or the Senate respectively, or in the bodies thereof. Deputies and Senators are subject only to the disciplinary authority of the chamber of which they are a member.
(3) In respect of administrative offenses, Deputies and Senators are subject only to the disciplinary authority of the chamber of which they are a member, unless a statute provides otherwise.
(4) Deputies and Senators may not be criminally prosecuted except with the consent of the chamber of which they are a member. If that chamber withholds its consent, such criminal prosecution shall be foreclosed for the duration of their mandate.
(5) Deputies and Senators may be arrested only if they are apprehended while committing a criminal act or immediately thereafter. The arresting authority must immediately announce such an arrest to the chairperson of the chamber of which the detainee is a member; if within twenty-four hours of the arrest, the chairperson of the chamber does not give her consent to hand the detainee over to a court, the arresting authority is obliged to release him. At the very next meeting of that chamber, it shall make the definitive decision as to whether he may be prosecuted.

Article 28

Deputies and Senators have the right to refuse to give evidence as to facts about which they learned in connection with the performance of their duties, and this privilege continues in effect even after they cease to be a Deputy or Senator.[201]

Finland

Section 30

A Representative shall not be prevented from carrying out his or her duties as a Representative.

A Representative shall not be charged in a court of law nor be deprived of liberty owing to opinions expressed by the Representative in the Parliament or owing to conduct in the consideration of a matter, unless the Parliament has consented to the same by a decision supported by at least five sixths of the votes cast.

If a Representative has been arrested or detained, the Speaker of the Parliament shall be immediately notified of this. A Representative shall not be arrested or detained before the commencement of a trial without the consent of the Parliament, unless he or she is for substantial reasons suspected of having committed a crime for which the minimum punishment is imprisonment for at least six months.

Section 31

Each Representative has the right to speak freely in the Parliament on all matters under consideration and on how they are dealt with.

A Representative shall conduct himself or herself with dignity and decorum, and not behave offensively to another person. If a Representative is in breach of such conduct, the Speaker may point this out or prohibit the Representative from continuing to speak. The Parliament may caution a Representative who has repeatedly breached the order or suspend him or her from sessions of the Parliament for a maximum of two weeks.[202]

Georgia

Article 39

1. A Member of the Parliament of Georgia is a representative of all Georgia. He/she shall enjoy a free mandate and shall not be recalled.
2. The arrest or detention of a Member of Parliament, or searches of his/her place of residence, place of work, vehicle or

201 Constitution of Czech Republic.
202 Constitution of Finland, at https://finlex.fi/en/laki/kaannokset/1999/en19990731.pdf.

person, shall be permitted only with the prior consent of Parliament, except when a Member of Parliament is caught at the crime scene, in which case Parliament shall be notified immediately. Unless Parliament consents to the detention within 48 hours, the arrested or detained Member of Parliament shall be released immediately.
3. A Member of Parliament shall have the right not to testify about facts disclosed to him/her in his/her capacity as a Member of Parliament. The seizure or extraction of written materials related to this issue shall be inadmissible. This right shall be retained by a Member of Parliament after his/her term of office expires. A Member of Parliament shall not be held liable for the views expressed inside or outside Parliament while performing his/her duties. The conditions of unhindered exercise of powers by a Member of Parliament shall be insured. A Member of Parliament shall receive remuneration prescribed by a legislative act. Respective state bodies shall ensure the personal safety of a Member of Parliament based on his/her application. Hindering the exercise of powers of a Member of Parliament shall be punishable by law.[203]

Greece

Article 60

1. Members of Parliament enjoy unrestricted freedom of opinion and right to vote according to their conscience.

Article 61

1. A Member of Parliament shall not be prosecuted or in any way interrogated for an opinion expressed or a vote cast by him in the discharge of his parliamentary duties.
2. A Member of Parliament may be prosecuted only for libel, according to the law, after leave has been granted by Parliament. The Court of Appeals shall be competent to hear the case. Such leave is deemed to be conclusively denied if Parliament does not decide within forty-five days from the date the charges have been submitted to the Speaker. In case of refusal to grant leave or if the time-limit lapses without action, no charge can be brought for the act committed by the Member of Parliament. This paragraph shall be applicable as of the next parliamentary session.
3. A Member of Parliament shall not be liable to testify on information given to him or supplied by him in the course of the discharge of his duties, or on the persons who entrusted the information to him or to whom he supplied such information.[204]

Montenegro

Article 85

Member of the Parliament shall decide and vote according to his/her own conviction. Member of the Parliament shall have the right to perform the duty of an MP as an occupation.

Article 86

Member of the Parliament shall enjoy immunity.

Member of the Parliament shall not be called to criminal or other account or detained because of the expressed opinion or vote in the performance of his/her duty as a Member of the Parliament.

No penal action shall be taken against and no detention shall be assigned to a Member of the Parliament, without the consent of the Parliament, unless the Member has been caught performing a criminal offense for which there is a prescribed sentence of over five years of imprisonment.

The President of Montenegro, the Prime Minister and members of the Government, the President of the Supreme Court, the President and the judges of the Constitutional Court, and the Supreme State Prosecutor shall enjoy the same immunity as the Member of the Parliament.[205]

203 Constitution of Georgia.
204 Constitution of Greece, at https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148- f24dce6a27c8/001-156%20aggliko.pdf.
205 Constitution of Montenegro, at https://www.skupstina.me/en/the-constitution-of-montenegro

Republic of North Macedonia

Article 64

A Representative cannot be held criminally liable offence or be detained owing for an opinion expressed or vote cast in the Assembly.
A Representative cannot be detained without the approval of the Assembly unless apprehended committing a criminal offence for which a prison sentence of at least five years is prescribed.
The Assembly can decide to grant immunity to a Representative, who has not claimed such immunity, should it be necessary for the performance of the Representative's office.
Representatives may not be called up for duties in the Armed Forces during the course of their term of office.
A Representative is entitled to remuneration determined by law.[206]

Serbia

Article 103

Deputies shall enjoy immunity.

Deputies may not accept criminal or other liability for the expressed opinion or cast vote in performing the deputy's function. Deputy who uses his/her immunity may not be detained, nor may he or she be involved in criminal or other proceedings in which prison sentence may be pronounced, without previous approval by the National Assembly.

Deputy found in the act of committing any criminal offence for which the prison sentence longer than five years is not envisaged, may be detained without previous approval by the National Assembly.

There shall be no deadlines stipulated for the criminal or other proceedings in which the immunity is established.

Failure to use the immunity shall not exclude the right of the National Assembly to establish the immunity.[207]

Slovenia

Article 83

No deputy of the National Assembly shall be criminally liable for any opinion expressed or vote cast at sessions of the National Assembly or its working bodies.
No deputy may be detained nor, where such deputy claims immunity, may criminal proceedings be initiated against him without the permission of the National Assembly, except where such deputy has been apprehended committing a criminal offence for which a prison sentence of over five years is prescribed.

The National Assembly may grant immunity to a deputy who has not claimed such immunity or who has been apprehended committing such criminal offence as referred to in the preceding paragraph.[208]

Slovakia

Article 78

(1) A Member of Parliament may not be prosecuted for his voting in the National Council of the Slovak Republic, or its bodies; this applies also after the termination of his mandate.

206 Constitution of North Macedonia.
207 Constitution of Serbia, at https://www.vk.sud.rs/sites/default/files/attachments/Constitution_%20of_Serbia_pdf.pdf.
208 Constitution of Slovenia.

(2) For statements made in the National Council of the Slovak Republic, or its body, while discharging the function of a Member of Parliament, a Member of Parliament may not be criminally prosecuted; this applies also after the termination of his mandate. A Member of Parliament is subject to the disciplinary powers of the National Council of the Slovak Republic.
(3) No Member of Parliament shall be taken into custody without the consent of the National Council of the Slovak Republic.
(4) If a Member of Parliament is caught and arrested while committing a criminal offence, the competent body shall be obliged to notify immediately the President of the National Council of the Slovak Republic and the Chairman of the Mandate and Immunity Committee of the National Council of the Slovak Republic. If the Mandate and Immunity Committee of the National Council of the Slovak Republic does not subsequently approve the arrest, the Member of Parliament must be released immediately.
(5) If a Member of Parliament is in custody, his mandate does not terminate, it is only not exercised.[209]

Conclusion

The Constitution and case law on parliamentarian immunity are in line with the main guidelines of the Venice Commission. They reflect common elements that can be found in other constitutions in Europe.

However, a few matters remain unclear e.g., the situation when a deputy might be arrested while traveling in their official capacities outside the Assembly's premises. That is why the Constitution needs to expressly foresee what "performance of duties" involves for deputies of the Assembly.

Issues in the future might also arise with the freedom of expression in the Assembly and exceptions to it, such as defamation or hate speech. Neither the Constitution nor the law regulates the issue.

The lack of constitutional clarity may cause practical uncertainty and conflict in the political scene. Even though the Court noted that issues of immunity should not hinder the Assembly's work, the risk remains for its obstruction. To reduce the risk, possible constitutional changes could fill in the gaps. They would have to take into account Venice Commission opinion(s), case law, and the practices and legal frameworks of other countries.

Recommendations

- The Constitution, the Rules of Procedure of the Assembly, or the Law on Rights and Responsibilities of the Deputy could explicitly state that parliamentary immunity applies to opinions that deputies express in their capacity as deputies of the Assembly, subject to limitations, such as defamation and hate speech;
- New constitutional provisions could explicitly permit the arrest or detention of deputies caught while committing a (serious) crime and when caught committing a crime in flagrance, in line with the Law on the Rights and Responsibilities of a Deputy.
- New constitutional or legal provisions could clearly define what situations the expression "while performing her/his duties as a deputy of the Assembly" involve.

209 Constitution of Slovakia.

VII

The Authority of the President to Return Laws to the Assembly

The Constitution does not clearly define the scope of the President's right to return laws to the Assembly. Particularly, the extent to which the President can review the law is uncertain. The Court's conclusion that the President cannot propose amendments to the law may reflect the limited authority of the President that does not go beyond the review of formal and substantive constitutionality of the law. Yet, the right to propose legislation and to refer laws to the Court could affect the scope and nature of the President's authority to return laws to the Assembly. A clear definition in the Constitution of the scope and nature of this power of the President would prevent future constitutional conflicts.

The Constitution is unclear on the extent to which the President can question and return laws to the Assembly. It does however provide certain limitations to it. The President can return the law only once, and the Assembly can overrule the President's suspensive veto right.[210] Moreover, the President has the right to return laws for reconsideration only when she/he believes the laws are harmful to the legitimate interests of Kosovo or one or more communities.[211] This implies that the President's authority is limited to strictly legal reasons concerning the compliance of the law with the formal and substantive provisions of the Constitution. The Constitution does not regulate whether the President may question the political content of the law or not, which led to a constitutional conflict addressed by the Court.

The Constitution does not establish the President's authority to question the political content of a law.

The Constitution authorizes the President to return a law to the Assembly and withhold its promulgation, after its adoption.

The adoption of the law requires a majority vote of all deputies present and voting.[212] The Assembly has the authority to adopt the law returned by the President by a majority vote of all deputies. In that case, the law is also considered promulgated.[213] The President's legislative review function is limited to a suspensive veto right, which -according to the Venice Commission- is a significant legislative tool. Different from the old ones, the Rules of Procedure of the Assembly in force refer to this President's authority as "veto". Although the Constitution does not employ the specific term 'veto', it suggests that the President has the right to temporarily prevent the entry into force of a law enacted by the Assembly. In addition to the suspensive veto right, the Constitution authorizes the President to refer to the Court the question of the compatibility of law with the Constitution.[214]

The suspensive veto right provides for a provisional suspension of the promulgation of the adopted law for a strict time limit (eight days) from receiving the adopted law.[215] The Constitution follows the same example as other constitutions in the region in terms of the time frame for avoiding delays and reviewing the legislation. The question however remains whether the eight (8) days period is sufficient to conduct a thorough legislative review. The same period, i.e., eight (8) days, is also given to ten (10) or more deputies of the Assembly to contest the constitutionality of any law or decision of the Assembly.

The Assembly may overrule the President's suspensive veto right by a majority vote of all deputies, which means at least 61 out 120 deputies. The one-time-only presidential veto is typical for power-sharing democracies to ensure that it does not prevent parliaments from discharging their legislative powers. The Constitution however does not provide for the right of the President to propose amendments to the law when returning it to the Assembly and does not address whether the President can second-guess the political content of the adopted law.

These gaps left the matter open for the Court's interpretation and raised the need for more clarity in the Constitution.

Relevant Provisions

Constitution of Kosovo

Article 80 [Adoption of Laws]

1. Laws, decisions and other acts are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution.
2. Laws adopted by the Assembly are signed by the President of the Assembly of Kosovo and promulgated by the President of the Republic of Kosovo upon her/his signature within eight (8) days from receipt.

210 Ibid.
211 Constitution of Kosovo, Article 84(6).
212 Ibid., Article 80(1).
213 Ibid., Article 80(4).
214 Ibid., Article 84 (9).
215 Ibid., Article 80 (2). The Rules of Procedure of the Assembly do not set any time limit for the President to promulgate the law. They do however oblige the President of the Assembly to send the adopted law to the President for promulgation, no earlier than eight (8) days from its adoption.

3. If the President of the Republic of Kosovo returns a law to the Assembly, he/she should state the reasons of return. The President of the Republic of Kosovo may exercise this right of return only once per law.
4. The Assembly decides to adopt a law returned by the President of the Republic of Kosovo by a majority vote of all its deputies and such a law shall be considered promulgated.
5. If the President of the Republic of Kosovo does not make any decision for the promulgation or return of a law within eight (8) days from its receipt, such a law shall be considered promulgated without her/his signature and shall be published in the Official Gazette.
6. A law enters into force fifteen (15) days after its publication in the Official Gazette of the Republic of Kosovo, except when otherwise specified by the law itself.

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
(6) has the right to return adopted laws for re-consideration, when he/she considers them to be harmful to the legitimate interests of the Republic of Kosovo or one or more Communities. This right can be exercised only once per law.[216]

Rules of Procedure of the Assembly

Article 84 [Promulgation of a law and Decree of the President of the Republic of Kosovo on revision of a law]

1. Laws adopted by the Assembly shall be signed by the President of Assembly and submitted to the President of the Republic of Kosovo for promulgation, not earlier than eight (8) days from the date of adoption.
2. […]
3. […]
4. In order to overturn the President's veto, at least 61 MPs need to vote for the adopted law which was returned by the President of the Republic and the law is considered promulgated. If the Assembly does not overturn the President's veto, it is considered that there is no law.[217]

Relevant Case-law and Opinions

The Constitutional Court Case KO57/12 is relevant for this matter.[218] There are also Opinions of the Venice Commission which apply to this issue:

1. The Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017 (Turkey);[219]

2. the Opinion on Four Constitutional Draft Bills on the Protection of the Environment, on Natural Resources, on Referendums and the President of Iceland, the Government, the Functions of the Executive and other Institutional Matters (Iceland);[220]

3. the Interim Opinion on Constitutional Amendments and the Procedure for their Adoption (Russia).[221]

In Case KO57/12, the Court decided on the President's referral, contesting the constitutionality of the voting for the approval of the Law no. 04/L-0B4 on 'Pensions of Kosovo Security Force Members', which the President had

216 Constitution of Kosovo.
217 Rules of Procedure of the Assembly.
218 The Referral of the President of the Republic of Kosovo, Her Excellency, Atifete Jahjaga, Contesting the Voting for the Approval of the Law no. 04/l-084 'On Pensions of Kosovo Security Forces Members', Case No. KO57/12, 9 September 2012, at https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_57_ 12_ang.pdf.
219 European Commission for Democracy Through Law, Venice Commission, Turkey Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted by the Venice Commission at its 110 Plenary Session (Venice, 10-11 March 2017), Opinion No. 875/2017, CDL-AD(2017)005, 13 March 2017, at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-e.
220 11 European Commission for Democracy Through law, Venice Commission, Ireland, Opinion on four constitutional draft bills on the protection of the environment, on natural resources, on referendums and on the president of Iceland, the government, the functions of the executive and other institutional matters, adopted by the Venice Commission at its 124 online Plenary session (8-9 October 2020), Opinion No. 997/2020, CDL-AD(2020)020, 9 October 2020, at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020) 020-e.
221 European Commission for Democracy Through Law, Venice Commission, Russian Federation, Interim Opinion on constitutional amendments and the procedure for their adoption, adopted by the Venice Commission at its 126 plenary session (19-20 March 2021), Opinion No. 992/2020, CDL-AD(2020)005, 23 March 2021, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)005-e.

returned for review to the Assembly.[222] The President asked the Court to consider whether there has been a violation of the Constitution, respectively of Article 80(4), during the vote in the Assembly regarding the Decision of the President for the return of the law for review.[223] In its Decision, the President also proposed to add a new provision to the law. The Assembly did not vote on such a proposal for amendment.[224] Therefore, the Court was to address the question, of whether the competence of the President to return the law for reconsideration was violated.[225]

The Court noted that the President's right to propose laws to the Assembly implies that this would be sufficient for the President to influence the legislative process.

The President's suspensive veto right does not include the right to propose amendments to the law, when returning it to the Assembly.

The Court seems to have applied a strictly literal interpretation of the relevant constitutional provision authorizing the President to temporarily suspend the promulgation of a law. It based its interpretation on the principle of separation of powers without elaborating on the exact scope of this principle about the function of the President. The Court could have pointed to the President's right to refer a law to the Court to review its compliance with the Constitution, as an argument to preclude the President from proposing amendments when exercising the suspensive veto right.[226] It could have also explored in more detail the reason why the President does not have the right to propose amendments when returning a law, whereas he/she can propose new legislation for matters that are within their competencies. Yet, the Court does not address these questions.

The Court reasoned as follows:

The President can provisionally suspend the promulgation of the law after the adoption of the law by the Assembly.

42. The Constitution thus prescribes that the President of the Republic has the right to exercise the so-called 'suspensive veto' to provisionally suspend the promulgation of the law.

43. In this way, the President of the Republic is the head of the State that represents the unity of the people (as defined by Article 83 of the Constitution) and is guarantor of the democratic functioning of the institutions of the Republic of Kosovo, and exercises certain legislative review function.

44. The Court considers that this function of the President, as prescribed by the Constitution, is of a rather limited nature for, inter alia, the reasons that follow.

47. […] the President has to set out the reasons of returning the law at issue.

48. These reasons can only be related to the consideration of the President that promulgation of the law is harmful either to the legitimate interests of the Republic of Kosovo or one or more Communities (see Articles 80(3) and 84(6) of the Constitution).

The President can intervene within eight (8) days from the receipt of the adopted law, otherwise it should be considered promulgated.

49. […] the President may exercise this right to return a law only once per law (see Article 80(3) of the Constitution).

62. The Court is mindful that Article 79 of the Constitution prescribes that the President has the initiative to propose laws from his/her scope of authority.

76. […] in order to overturn that Presidential veto, it would be necessary that at least 61 deputies vote in favor of the adoptedlaw that was returned by the President of the Republic.[227]

222 Case No. KO57/12.
223 Ibid., para. 9.
224 Ibid., para.11, 13, 22.
225 Ibid., para. 31(1).
226 Constitution of Kosovo, Article 113(2).
227 Case No. KO57/12.

Opinions of the Venice Commission

Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017 (Turkey) - Adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

The veto power gives the President a significant legislative tool.

If the President sends a law back to the Assembly for reconsideration, the Assembly can only adopt the law with the absolute majority of the total number of its deputies. The Constitution does not require such a majority. It is true that similar or significantly higher majorities for overriding the presidential veto are foreseen in other countries with the presidential or semi-presidential system as well (absolute majority of all members – Portugal, two-thirds majority in both chambers – the U.S., two-third majority – Ukraine). Yet, in most of these countries, the President does not have the autonomous power to legislate and when s/he does, as in the United States, this power is subject to strict judicial control.[228]

Opinion on Four Constitutional Draft Bills on the Protection of the Environment, on Natural Resources, on Referendums and on the President of Iceland, the Government, the Functions of the Executive and other Institutional Matters (Iceland) - Adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020)

33. Article 26 of the Constitution provides for one of the major powers of the President: vetoing a bill. According to this provision, "If the Althing has passed a bill, it shall be submitted to the President for confirmation not later than two weeks after it has been passed. Such confirmation gives it force of law. If the President rejects a bill, it shall nevertheless become valid but shall, as soon as the circumstances permit, be submitted to a vote by secret ballot of all those eligible to vote, for approval or rejection. The law shall become void if rejected, but otherwise retains its force." In Iceland, this power seems to be put in use very rarely but remains important, not only by its use but also by the mere possibility that it could be used.

34. The draft bill proposes to introduce a new sentence at the end of the provision that "(…) no vote is to take place if the Althing repeals the act of law within five days of the President's rejection." It appears from the Explanatory Notes that this draft provision puts an end to a controversy in the political and legal circles about the possibility for the Althing of repealing the law after a presidential veto, and whether this repeal results in the cancellation of the popular referendum provided in Article 26. The draft amendments aims -therefore- at removing all doubt on this issue and the solution adopted seems quite efficient and fair.[229]

Interim Opinion on Constitutional Amendments and the Procedure for their Adoption (Russia) - Adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021)

99. With regard to Parliament, beyond the unchecked appointment of 30 Senators, the President's veto power is reinforced by his/her new possibility to appeal to the Constitutional Court (Article 107 (3)). Already under the previous wording, a presidential veto had to be overridden by a two thirds majority of the total number of Deputies of the State Duma and members of the Federation Council. The additional possibility of a recourse to the Constitutional Court is positive as it can lead to a judicial settlement of an otherwise only political conflict.

178. The Venice Commission welcomes that the Amendments bring about a number of positive changes, inter alia, the possibility for the President to refer to the Constitutional Court the use of a presidential veto.[230]

228 Venice Commission Opinion No. 875/2017, para. 92.
229 Venice Commission Opinion No. 997/2020.
230 Venice Commission Opinion No. 992/2020.

Comparative Analysis and References

The responsibility for the political, economic, and moral content of a law is within the scope of the legislative body representing the people, and the President has no authority to interfere with such a duty.

In Albania, Montenegro, and Serbia, the President has the right to return a law for reconsideration by the Parliament. In contrast, in Croatia, the President may institute proceedings to review the constitutionality of such a law before the Constitutional Court of the Republic of Croatia, if they consider that a promulgated law does not conform with the Constitution. In Slovenia, the National Council, which is a representative body for social, economic, professional, and local interests may -within seven days of the passing of a law and before its promulgation- require the National Assembly to decide again on that law. The German Constitution (Basic Law - Grundgesetz) does not explicitly authorize the President to withhold the promulgation of a law. It only states that the Federal President shall -after countersignature- certify laws enacted in accordance with the provisions of this Basic Law. However, the constitutional practice, case law, and literature confirm that the President has the right to veto a law passed by the federal legislative bodies when the President considers that the law violates the Constitution as to the formal process of its adoption (formally unconstitutional), or as to the substantive provisions of the Constitution (materially unconstitutional), such as human rights, constitutional principles, and other substantive norms. The President's refusal to promulgate a law would terminate the legislative process, and the legislative bodies could only challenge the President's refusal to promulgate the law before the Constitutional Court. Yet the President does not have the authority to withhold the promulgation of law for other than legal reasons, such as political, economic, or moral considerations.

Albania

Article 85

1. The President of the Republic has the right to return a law for re-consideration only once.
2. The decree of the President for the re-consideration of a law loses its effect when a majority of all the members of the Assembly vote against it.[231]

Croatia

Article 89

Laws shall be promulgated by the President of the Republic within eight days from the date of their enactment by the Croatian Parliament.

If the President of the Republic holds that a promulgated law does not conform with the Constitution, he/she may institute proceedings to review the constitutionality of such law before the Constitutional Court of the Republic of Croatia.[232]

Montenegro

Article 94

The President of Montenegro shall proclaim the law within seven days from the day of adoption of the law, that is, within three days if the law has been adopted under a speedy procedure or send the law back to the Parliament for new decision-making process.

The President of Montenegro shall proclaim the re-adopted law.[233]

231 Constitution of Albania.
232 Constitution of Croatia.
233 Constitution of Montenegro.

Serbia

Article 113

The President of the Republic shall be obliged to issue a decree on promulgation of laws or to return the law for reconsideration with a written explanation to the National Assembly, within maximum 15 days from the day of adoption of the law, that is, not later than within seven days, if the law has been adopted by emergency procedure.

If the National Assembly decides to vote again on the law, which has been returned for reconsideration by the President of the Republic, the law shall be adopted by the majority vote from the total number of deputies.
The President of the Republic shall be obliged to promulgate the newly adopted Law.

If the President of the Republic fails to issue a decree on promulgation of the law within the deadline stipulated by the Constitution, the decree shall be issued by the Chairman of the National Assembly.[234]

Slovenia

Article 91

Laws are promulgated by the President of the Republic no later than eight days after they have been passed.
The National Council may within seven days of the passing of a law and prior to its promulgation require the National Assembly to decide again on such law. In deciding again, a majority of all deputies must vote for such law to be passed unless the Constitution envisages a higher majority for the passing of the law under consideration. Such new decision by the National Assembly is final.[235]

Conclusion

The President can temporarily prevent the entry into force of a law enacted by the Assembly ("suspensive veto right"). This power of the President ensures that a law is not harmful to the legitimate interests of Kosovo or one or more communities. It allows the Assembly to ensure that it adopts a law addressing the President's constitutional concerns, and it reduces the chances of challenging the law before the Court. The President's limited authority to only review the formal and substantive constitutionality of the law, makes sense considering that the exercise of the suspensive veto right does not include the possibility to propose amendments to the law when returning it to the Assembly. Yet, there remains uncertainty and risk for future constitutional conflict. That is due to gaps in the Constitution's text and the Court's strictly textual interpretation of constitutional provisions on this matter. The Court did not address or take into consideration the right of the President to propose legislation and the right to refer laws to the Constitutional Court. These rights could impact the scope of the President's suspensive veto right. This power of the President is an important tool for ensuring compliance with the Constitution, which is why it is critical to clearly define its scope and nature.

Recommendations

The following options could be discussed for possible future amendments:

- The Constitution should expressively refer to the President's power to temporarily prevent the entry into force of a law enacted by the Assembly - 'suspensive veto right'.

- The Constitution should better clarify the scope and limitations of the veto right of the President and establish to what extent can the President review the content of the law. It could also firmly state, in line with the Court's interpretation, that the exercise of the suspensive veto right does not include the right to propose amendments to the law when returning it to the Assembly.

234 Constitution of Serbia.
235 Constitution of Slovenia.

VIII

The Quorum and Voting for the Election of the President

The uncertainties in the procedure for the election of Kosovo's President in 2011 reflected constitutional gaps in the quorum and voting requirements. The absence of a clear definition of the terms "quorum" & "voting" and the ambiguous constitutional and legal language created doubts in practice and called for the Court's interpretation. The latter affirmed the 2/3 majority requirement for a quorum for the election of the President. Even with this interpretation in place, the Constitution remains contradictory throughout its text and lacks clarity. Its future amendment shall reflect the best comparative examples and should meet Kosovo's needs.

The Constitution provides that the Assembly elects the President of Kosovo in a secret ballot by two-thirds (2/3) of all deputies of the Assembly.[236] However, it is silent on the quorum required for the voting to take place. Law No. 03/L-094 on the President of the Republic of Kosovo ("Law on the President") does not specify a quorum either.[237] These gaps left it for the Court to address the necessary quorum requirements during voting and the responsibilities of the Assembly's deputies during the election process.

The Constitution does not define the quorum needed for the election of the President of Kosovo.

The Constitution foresees three rounds of voting. If no candidate reaches the two-thirds majority in the first two voting rounds, then the voting proceeds to the third round.[238] In the third round, the Assembly elects the President between the two candidates who have obtained the highest number of votes in the second round.[239] In the third and last round, the majority of votes of all deputies of the Assembly elect the President.[240] If the election fails in the third round, the Assembly dissolves, and new elections must take place within forty-five days.[241] The election of the President should occur no later than thirty days before the end of the term of the sitting president.[242]

Quorum → number of deputies present and voting
Voting → number of votes needed for election

The term "quorum" indicates the presence and participation in the voting process of a minimum number of deputies of the Assembly for the voting to begin, whereas "voting" refers to the number of votes that are needed for a decision to be adopted. The absence of clear constitutional provisions on such distinguishment brought the need for interpretation. Particularly, whether the Constitution requires a quorum of 2/3 of all deputies of the Assembly to be present for the voting rounds to be valid, or whether the 2/3 majority requirement indicates the minimum votes necessary for the election of the President in the first two rounds. The Court's majority affirmed the former. The Rules of Procedure of the Assembly of 2022 reflected the Court's interpretation by providing that in order for the first and second rounds of voting to be valid, at least 80 MPs shall attend and participate in the voting.[243]

A high quorum requirement normally reflects a high level of legitimacy; it may also increase the probability of a 'correct decision'.[244] At the same time, high quorum requirements "make the Assembly highly vulnerable to obstruction. Small groups of legislators may be able to block decisions and protect the status quo simply by being absent".[245]

The threshold of a two-thirds majority for the election of the President reflects the intention of the drafters of the Constitution to ensure a larger consensus.

The Constitution requires a broad consensus for the election of the President, as the Head of the State who "represents the unity of the people of the Republic of Kosovo".[246] In short, it aims at a cross-party consensus for its election.[247]

Different from the Court's interpretation, and in line with some other countries as well, under Article 69(3) of the Constitution, the Assembly has its quorum when more than one-half of all deputies of the Assembly are present for the election of the President.[248] The application of such a quorum would have the advantage of avoiding obstruction from the opposition. It would not allow a minority of parliamentarians to block the election of the

236 Constitution of Kosovo, Article 86.
237 Law No. 03/L-094 on the President of the Republic of Kosovo, Article 4.
238 Constitution of Kosovo, Article 86.
239 Ibid.
240 Ibid.
241 Ibid.
242 Ibid.
243 Rules of Procedure of the Assembly, Article 106 (5). The Rules of Procedure of the Assembly of 2010 did not address the quorum requirement for the election of the President.
244 Bjørn Erik Rasch, 'Parliamentary Voting Procedures', in Herbert Döring (ed), Parliaments and Majority Rule in Western Europe, Mannheim Centre for European Social Research (MZES), University of Mannheim, page 497, at https://www.uni-potsdam.de/fileadmin/projects/vergleichende-politikwissenschaft/D%C3%B6ring/PMR-W-Europe.pdf.
245 Ibid., page 497.
246 Constitution of Kosovo, Article 83.
247 European Commission for Democracy Through law (Venice Commission), CDL-AD (2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, Venice, 24 June 2019, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)015-e .
248 Constitution of Kosovo, Article 69 (3).

President, by simply not being present or by not voting in the first and second rounds. However, the application of this rule would mean that the governing majority would be able to quickly move to the third round of voting in which it would be able to elect the President with its votes (assuming that the governing majority enjoys a definite majority).

The language of the Constitution and the practices of other countries support a standard quorum of more than one-half of all deputies of the Assembly.

A systematic reading of the Constitution supports the application of the standard quorum (i.e., when more than one-half of all Assembly deputies are present). Article 86 of the Constitution does not refer to the "presence" of the deputies when requiring that "the President shall be elected by a 2/3 majority of all deputies." Different from these, there are several provisions including a different and explicit requirement for the presence of the deputies in the Assembly. For example, according to Article 68 of the Constitution, meetings of the Assembly may be closed to the public based on a decision "by two-thirds (2/3) vote of the deputies of Assembly present and voting".[249] Also, according to Article 114 (3) "The decision to propose seven (7) judges requires a two-thirds (2/3) majority of the deputies of the Assembly present and voting. The decision on the proposals of the other two (2) judges shall require the majority vote of the deputies of the Assembly present and voting, but only upon the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of the communities not in the majority in Kosovo".[250] Similarly, Article 131 of the Constitution enables the Assembly to give its consent -by a two-thirds vote of the deputies present and voting- to the decree of the President declaring a state of emergency.[251]

Thus, it would be rational to think that the drafters of the Constitution should have used the expression "present and voting" for the election of the President as they did for other situations. Nevertheless, amendments to the Constitution could clarify its language to avoid doubts in practice.

Relevant Provisions

Constitution of Kosovo

Article 86 [Election of the President]

1. The President of the Republic of Kosovo shall be elected by the Assembly by a secret ballot.
2. The election of the President of the Republic of Kosovo shall take place no later than thirty (30) days before the end of the current president's term of office.
3. Every eligible citizen of the Republic of Kosovo may be nominated as a candidate for President of the Republic of Kosovo, provided he/she presents the signatures of at least thirty (30) deputies of the Assembly of Kosovo. Deputies of the Assembly can only sign for one candidate for the President of the Republic.
4. The President of the Republic of Kosovo shall be elected by a two thirds (2/3) majority of all deputies of the Assembly.
5. If a two thirds (2/3) majority is not reached by any candidate in the first two ballots, a third ballot takes place between the two candidates who received the highest number of votes in the second ballot, and the candidate who receives the majority of all deputies of the Assembly shall be elected as President of the Republic of Kosovo.
6. If none of the candidates is elected as President of the Republic of Kosovo in the third ballot, the Assembly shall dissolve and new elections shall take place within forty five (45) days.

Article 70 [Mandate of the Deputies]

1. Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate.
2. The mandate of each deputy of the Assembly of Kosovo begins on the day of the certification of the election results.
3. The mandate of a deputy of the Assembly comes to an end or becomes invalid when:
(1) the deputy does not take the oath;
(2) the deputy resigns;

249 Constitution of Kosovo.
250 Ibid.
251 Ibid.

(3) the deputy becomes a member of the Government of Kosovo;
(4) the mandate of the Assembly comes to an end;
(5) the deputy is absent from the Assembly for more than six (6) consecutive months. In special cases, the Assembly of Kosovo can decide otherwise;
(6) the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime;
(7) the deputy dies.
4. Vacancies in the Assembly will be filled immediately in a manner consistent with this Constitution and as provided by law.

Article 74 [Exercise of Function]

Deputies of the Assembly of Kosovo shall exercise their function in best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly.

Article 69 [Schedule of Sessions and Quorum]

[…]
3. The Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present.[252]

Law on the President of the Republic of Kosovo

Article 4 [Election of the President]

1. President of Republic of Kosovo shall be elected through secret votes by the Assembly of Kosovo, according to the procedure provided for by the Constitution of Republic of Kosovo
2. The election of the President of Republic of Kosovo shall be made no later than thirty (30) days prior to the end of the mandate of an actual President.
3. Any citizen of Republic of Kosovo, fulfilling criteria provided for in Article 3 of the present law, may be nominated as a candidate for the President of Republic of Kosovo, provided that he/she gathers the signatures of, at least, thirty (30) deputies of the Assembly of Kosovo. Deputies of the Assembly of Kosovo may only sign for one candidate for the President of Republic of Kosovo.

Rules of Procedure of the Assembly

Article 106 [Election of the President of Kosovo]

[…]
3. For the election of the President of the Republic of Kosovo, in three rounds of voting, there shall be at least two (2) candidates.
[…]
5. For the first and second round of voting, at least 80 MPs shall attend, while for the third round, there shall be at least 61 MPs attending. In order the first and second round of voting to be valid, at least 80 MPs must participate in the voting, while in the third round of voting, at least 61 MPs must participate.

Relevant Case-law and Opinions

Cases KO29/11 and KO47/16 are relevant to the matter at hand. In Case KO29/11, the deputies of the Assembly challenged the constitutionality of the election of the President of Kosovo before the Court on three grounds: lack of an opposing candidate, interruption of voting during the procedure, and lack of quorum in the Assembly.[253]

A procedure for the President's election with only one candidate would be unconstitutional.

Concerning the absence of at least two candidates for the post, the deputies argued that references to 'candidates' in Articles 86(5) and 86(6) of the Constitution were framed in the plural, thus indicating the need of having more than one candidate. The Court supported the view of the applicants. In concrete, it stated that one of the formal conditions for starting the election procedure

252 Constitution of Kosovo.
253 Judgment on the Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of Kosovo, dated 25 February 2011, Case No. KO29/11, 30 March 2011, para. 33, at https://gjk-ks.org/wp- content/uploads/vendimet/gjkk_ko_29_11_eng.pdf.

for the President is the nomination - by the deputies of the Assembly - of more than one candidate.[254]

The Court affirmed the quorum requirement of 2/3 majority for the election of the President.

Concerning the lack of quorum, the deputies argued that the quorum of 2/3 of all deputies of the Assembly was not reached in any of the three rounds of voting.[255] In their view, the lack of such a quorum would prevent the voting from starting, and voting without such a quorum was unconstitutional. The Court stated that there is a constitutional duty for all deputies of the Assembly unless excused by the President of the Assembly, to participate in the procedure for the election of the President of the country. According to the Court, all 120 deputies of the Assembly must vote and a minimum of 80 votes (i.e., 2/3 of all deputies) is necessary for the election of the President in the first and second rounds.

In the extraordinary session of the Assembly on 26 February 2011, 67 deputies participated in the voting and the President was elected in the third round with 62 votes. In the words of the Court:

83. In these circumstances, all 120 deputies of the Assembly should feel obliged, by virtue of the Constitution, the Law on Deputies, the Rules of Procedure of the Assembly and the Code of Conduct, to participate in the plenary sessions of the Assembly and to adhere to the procedures laid down therein, but most of all an obligation vis-a-vis the people of Kosovo that elected them.

84. The election of the President of Kosovo who, pursuant to Article 83 [Status of the President], is the Head of State and represents the unity of the people of the Republic of Kosovo, is of such importance, that all deputies, as the representatives of the people of Kosovo, should consider it their constitutional duty, unless excused by the President of the Assembly, to participate in the procedure for the election of the President as laid down in Article 86 [Election of the President] of the Constitution.[256]

The Court noted that initially, 81 deputies of the Assembly were present, but when the voting started, they were only 67 participating in the voting procedure. Accordingly, the voting process was unconstitutional because the quorum or the number of deputies of the Assembly that participated in the vote in the first and second rounds was less than 2/3. [257]

Judge Carolan and Judge Rodrigues in their dissenting Opinions disagreed with the majority on both issues, namely the necessary quorum and the number of candidates. In their view, the 2/3 majority requirement indicates the minimum votes necessary for the election of the President in the first and second rounds of voting, but not the quorum or number of deputies of the Assembly who should be present for those rounds to be valid. According to them, Article 69(3) of the Constitution determines the quorum of the Assembly, and that is 61 deputies of the Assembly.

The dissenting opinions noted that the Constitution determines the quorum of the Assembly with more than one-half of all deputies present.

According to the dissenting judges, the Court's interpretation enables "a small minority in parliament to prevent the majority of parliamentarians from doing the business and will of the majority by simply refusing to meet and do the work they took an oath of office to do. […] It would also prevent the Assembly from acting under Article 86(4) of the Constitution and elect a President on a simple majority vote of the deputies of the Assembly."[258]

A 2/3 majority quorum in the first two rounds would render the unblocking mechanism of the third round of voting meaningless.

They also noted that if the quorum of presence and the votes of 2/3 of the deputies of the Assembly are not reached in the first and second round, these rounds would be considered void; with the result that it would not be possible

254 Ibid.
255 Ibid, para. 23.
256 Ibid. para 83, 84.
257 Ibid., para. 86, 87.
258 Ibid., Dissenting Opinion of Judges Robert Carolan and Almiro Rodrigues, 30 March 2011, page 3, at https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_29_11_mm_eng.pdf

to move to the third round of voting. The dissenting judges differed from the majority also concerning the number of candidates. In their view, the drafters of the Constitution and its text cannot be interpreted as meaning that there shall be more than one candidate for the post of the President.[259]

In Case KO47/16, the applicants alleged that not all deputies of the Assembly had voted as the Constitution requires and as per the Court's interpretation. The Court clarified this point, by stating that:

"[…] it is neither a constitutional prerequisite nor a requirement for the validity of the decision for the election of the President of the Republic of Kosovo under Article 86, paragraphs 4 and 5 that all hundred and twenty (120) Deputies be present and voting, as stipulated by the Applicants' Referral". The Court reiterated "[…] that for the process for the election of the President of the Republic of Kosovo to be valid, in the first and second rounds of voting, at least two thirds (2/3) of all Deputies must be present and voting, whereas in the third round, at least the majority of all Deputies must be present and voting, in accordance with paragraphs 4 and 5 of Article 86 of the Constitution."[260]

Thus, in the Court's interpretation, a special quorum applies to the session for the election of the President, that is 2/3 of the deputies of the Assembly for the first and second round to be valid, and a majority of deputies of the Assembly for the third round.

Venice Commission Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy

The Venice Commission clearly stated that "quorum rules should not […] be unrealistically high – otherwise the normal functioning of Parliament may be disturbed".[261] Besides that, it argued that procedural mechanisms should be in place, to ascertain the quorum and record the results of voting -as a general rule- or upon request of a minority group.[262]

2. How many MPs and party groups should participate in the debate and in the voting?

66. The decision-making process should be inclusive, i.e. involve all political groups in Parliament. Rules on quorums give additional legitimacy to the decisions taken by Parliament. Quorum rules should not, however, be unrealistically high – otherwise the normal functioning of Parliament may be disturbed (CDL-AD(2008)015, § 47

3. How are the votes in Parliament counted?

68. It is important to ensure that the process of counting of votes is fair and transparent, that the procedure cannot be manipulated by the majority,40 and that the opposition has a possibility of controlling the process of counting.

69. There should be procedural mechanisms in place to ascertain the quorum and record the results of the voting, as a general rule, or at the request of a minority group (CPA Benchmarks,

§ 2.6.2).41 This does not exclude the possibility of relying on the oral vote in some other, less controversial, situations.42

Comparative Analysis and References

In all Western Balkans countries, except Albania, the President of the country is elected through direct and general elections. This is the case in Croatia, Slovenia, Serbia, Montenegro, North Macedonia, and Bosnia and Herzegovina. In Albania, the President is elected by the Assembly. Its Constitution is silent with regards to the quorum needed for this procedure. Article 78 of the Albanian Constitution provides that the Parliament carries out its work in the presence of more than half of its members and decides with the majority of votes of its members unless a supermajority is provided for in the Constitution. Article 55(2) of the Regulation of the Albanian Parliament states

259 Ibid.
260 Case KO47/16, para. 63.
261 Venice Commission's Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy.
262 Ibid., para. 69.

that the necessary quorum for voting in a plenary session is at least 71 members of the parliament, thus more than half of the members of parliament. The Regulation does not provide for any special quorum for the election of the President of the Republic.

In Armenia, Estonia, Greece, Hungary, Italy, and Malta, the President is elected by the Assembly. In Germany, the President is elected by the Federal Convention, which consists of the Members of the Bundestag and an equal number of members elected by the parliaments in each of the 16 Länder. In all these countries, the Constitution is silent with regards to the quorum required for the voting of the President.

By contrast, Article 50(4) of the Georgian Constitution states that "The first or the second round of the elections shall be considered valid if more than half of the total number of the members of the Electoral College have participated".[263] It is to be noted that the President in Georgia is elected by an Electoral College which consists of all members of the Parliament of Georgia and the supreme representative bodies of the Autonomous Republics of Abkhazia and Ajara. Additionally, the members nominated by political parties among the representative bodies of local self-governments partake in the Electoral College. Despite this difference, the formulation of the quorum is a valid example.

A similar constitutional issue concerning the quorum during voting for the election of the President emerged in the constitutional practice in Turkey and Lebanon. In April 2007, the Turkish Grand National Assembly voted for the election of the new President of the Republic. According to the Turkish Constitution in force at the time, the President was elected by two-thirds of the Grand National Assembly in two rounds of voting; in a third and fourth rounds, a simple majority was required. In the first round of voting, the candidate of the ruling party was supported by members of parliament from the governing party, whereas the opposition boycotted the round to render it invalid for lack of quorum.[264] In the first round of voting, the governing majority candidate obtained 357 votes of the 367 required (2/3 majority) and 361 members of parliament were present. The opposition party argued that a quorum of 367 members of parliament was required and as a result challenged the validity of the procedure before the Turkish Constitutional Court. The Court -in its ruling- declared invalid the first round of election due to the lack of quorum.[265] Following this, early national elections were called for by the then prime minister Erdogan and his Justice and Development Party who won the majority in the Assembly. Afterward, constitutional amendments were introduced, which changed the Turkish constitutional landscape by electing the President through direct elections.

Similarly, the Lebanese Parliament voted in 2007 for the election of the President of the Republic. The two-thirds constitutional requirement was not reached, and the Speaker of Parliament did not declare the session valid and called for a new round of voting.[266] Thus, the two-thirds requirement was considered not only as the necessary number of votes for the election of the President, but also as the quorum for the validity of the parliamentary session.

Albania

Article 87

1. A candidate for President is proposed to the Assembly by a group of no fewer than 20 deputies. A deputy is not permitted to propose more than one candidate at the same time.
2. The President of the Republic is elected by secret voting and without debate by the Assembly. The Assembly holds up to five votes for the election of the President.

The first vote is held no later than seven days from the beginning of the procedure for the election of the President. Each of the other votes is held no later than seven days from the unsuccessful end of the previous vote. The voting is considered performed even when no candidate is presented in the competition. New candidates may be presented in the second, third and fourth voting, according to the conditions of point 1 of this article.

263 Constitution of Georgia.
264 Esin Örücü, 'Turkey. Whither the Presidency of the Republic of Turkey?', European Public Law, Volume 14, Issue 1, 2008, pages 35-54.
265 Carol Migdalovitz, 'Turkey's 2007 Elections: Crisis of Identity and Power', 10 September 2007, at https://www.files.ethz.ch/isn/118489/2007-09-10_Turkey_Elections.pdf.
266 Issam Michael Saliba, 'Lebanon: Presidential Election and the Conflicting Constitutional Interpretations https://tile.loc.gov/storage-services/service/ll/llglrd/2019670432/2019670432.pdf , pg. 3.

3. The President is elected in the first, second or third vote when a candidate receives no less than three fifths of the votes of all the members of the Assembly. In the fourth and fifth vote, the candidate who obtains more than half of the votes of all the members of the Assembly is elected President.
4. The fifth vote is held when in the fourth vote, no candidate has obtained the required majority of votes. The fifth vote is held between the two candidates who have received the most votes in the fourth vote. If there are more than two candidates with the same number of votes, the candidate who takes part in the voting is determined by lot.
If after the fourth vote no candidate has remained in competition, new candidates may be presented for this vote according to the conditions of point 1 of this article. When more than two candidates are presented, the voting is held between the two candidates who have obtained the largest number of proposing deputies.
5. If even after the fifth vote, no candidate obtains the required majority, or when after the fourth unsuccessful vote, no new candidacy is presented, the Assembly dissolves. New elections are held within 45 days from its dissolution.
6. The succeeding Assembly elects the President of the Republic with a majority of all its members.[267]

Armenia

Article 125

1. The President of the Republic shall be elected by the National Assembly.
2. Regular elections of the President of the Republic shall be held no earlier than 40 and no later than 30 days prior to the expiry of the powers of the President of the Republic.
3. At least one fourth of the total number of Deputies shall have the right to nominate a candidate of the President of the Republic.
4. The candidate having received at least three fourths of votes of the total number of Deputies shall be elected as President of the Republic. In case President of the Republic is not elected, a second round of elections shall be held wherein all the candidates having taken part in the first round may participate. In the second round, the candidate having received at least three fifths of votes of the total number of Deputies shall be elected as President of the Republic. In case President of the Republic is not elected, a third round of elections shall be held wherein the two candidates having received a greater number of votes in the second round may participate. In the third round, the candidate having received the majority of votes of the total number of Deputies shall be elected as President of the Republic.
5. In case President of the Republic is not elected, a new election for the President of the Republic shall be held within a period of 10 days.
6. The details related to the procedure for electing the President of the Republic shall be prescribed by the Rules of Procedure of the National Assembly.

Article 126.

In the event of removal from office of the President of the Republic, impossibility to exercise the powers thereby, resignation or death thereof, an extraordinary election of the President of the Republic shall be held not earlier than twenty-five and not later than thirty-five days after the office of the President of the Republic becomes vacant.[268]

Estonia

§ 79.

The President is elected by the Riigikogu or, in the case provided by paragraph four of this section, by the Electoral College. The right to nominate a candidate for the election of the President rests with not less than one- fifth of all members of the Riigikogu.

Nominations of candidates for President may be made from among citizens of Estonia by birth who have attained at least forty years of age.
The President is elected by secret ballot. Each member of the Riigikogu has one vote. The candidate who receives the votes of two thirds of the members of the Riigikogu is deemed elected. If no candidate receives the required majority, a new round of voting is held on the next day. Before the new round of voting, a new nomination of candidates takes place. If no candidate

267 Constitution of Albania.
268 Constitution of Armenia.

receives the required majority in the second round of voting, a third round of voting is held on the same day between the two candidates who received the greatest number of votes in the second round. If the President is not selected in the third round of voting, the Electoral College is convened by the President of the Riigikogu within one month to select the President.

The Electoral College comprises members of the Riigikogu and representatives of local authority councils. Each local authority council elects at least one representative, who must be citizen of Estonia, to the Electoral College.

The Riigikogu nominates the two candidates who received the most votes in the Riigikogu to the Electoral College as candidates for President. The right to nominate a candidate for President may also be exercised by not less than twenty-one members of the Electoral College.
The Electoral College selects the President by a majority of its entire membership. If no candidate is selected in the first round, a second round of voting is held on the same day between the two candidates who received the greatest number of votes.

The details of the procedure for election of the President is provided in the President of the Republic Election Act.[269]

Georgia

Article 50

1. The President of Georgia shall be elected for a term of 5 years by the Electoral College, without debates and by open ballot. The same person may be elected President of Georgia only twice.
2. Any citizen of Georgia having the electoral right, who has attained the age of 40 and who has lived in Georgia for at least 15 years, may be elected President of Georgia.
3. The Electoral College shall consist of 300 members and shall include all members of the Parliament of Georgia and of the supreme representative bodies of the Autonomous Republics of Abkhazia and Ajara. Other members of the Electoral College shall be nominated by the respective political parties from among the representative bodies of local self-governments on the basis of quotas defined by the Central Election Commission of Georgia in accordance with the organic law. The quotas are defined in compliance with the principle of proportional geographical representation and in accordance with the results of the elections of local self-governments held under the proportional system. The composition of the Electoral College shall be approved by the Central Election Commission of Georgia.
4. The election of the President of Georgia shall be held in the House of Parliament. No less than 30 members of the Electoral College shall have the right to nominate a candidate for the President of Georgia. One member of the Electoral College may support the nomination of only one candidate. One member of the Electoral College shall have the right to vote for only one candidate. In the first round of elections, a candidate who receives at least two thirds of the votes of the total number of the members of the Electoral College shall be considered elected. If the President of Georgia is not elected in the first round, the second round shall be held between the two candidates who received the most votes in the first round. The candidate who receives the most votes in the second round shall be considered elected. The first or the second round of the elections shall be considered valid if more than half of the total number of the members of the Electoral College have participated. If the elections fail, or if the Electoral College does not elect the President of Georgia, a re-run of election of the President of Georgia shall be held within 30 days.[270]

Germany

Article 54

(1) The Federal President shall be elected by the Federal Convention without debate. Any German who is entitled to vote in Bundestag elections and has attained the age of forty may be elected.
(2) The term of office of the Federal President shall be five years. Re-election for a consecutive term shall be permitted only once.
(3) The Federal Convention shall consist of the Members of the Bundestag and an equal number of members elected by the parliamentary assemblies of the Länder on the basis of proportional representation.

269 Constitution of Estonia.
270 Constitution of Georgia.

(4) The Federal Convention shall meet not later than thirty days before the term of office of the Federal President expires or, in the case of premature termination, not later than thirty days after that date. It shall be convened by the President of the Bundestag.
(5) After the expiry of an electoral term, the period specified in the first sentence of paragraph (4) of this Article shall begin when the Bundestag first convenes.
(6) The person receiving the votes of a majority of the members of the Federal Convention shall be elected. If, after two ballots, no candidate has obtained such a majority, the person who receives the largest number of votes on the next ballot shall be elected.
(7) Details shall be regulated a federal law.[271]

Greece

Article 32

1. The President of the Republic shall be elected by the Parliament through vote by roll call in a special sitting called for this purpose by the Speaker at least one month before the expiration of the tenure of the incumbent President, as specified by the Standing Orders.
In case of permanent incapacity of the President of the Republic to discharge his duties, as specified in paragraph 2 of article 34, as well as in case of his resignation, demise, or removal from office in accordance with the provisions of the Constitution, the sitting of Parliament in order to elect a new President is called within ten days at the latest from the premature termination of the tenure of office by the previous President.
2. In all cases, the election of a President shall be made for a full term.
3. The person receiving a two-thirds majority of the total number of Members of Parliament shall be elected President of the Republic. Should the said majority not be attained, the ballot shall be repeated after five days. Should the second ballot fail to produce the required majority, the ballot shall once more be repeated after five days; the person receiving a three-fifths majority of the total number of Members of Parliament shall be elected President of the Republic.
4. Should the third ballot fail to produce the said qualified majority, Parliament shall be dissolved within ten days of the ballot, and elections for a new Parliament shall be called.
As soon as the Parliament thus elected shall have constituted itself as a body, it shall proceed through vote by roll call to elect the president of the Republic by a three-fifths majority of the total number of Members of Parliament.
Should the said majority not be attained, the ballot shall be repeated within five days and the person receiving an absolute majority of the votes of the total number of Members of Parliament shall be elected President of the Republic. Should this majority also not be attained, the ballot shall once more be repeated after five days between the two persons with the highest number of votes, and the person receiving a relative majority shall be deemed elected President of the Republic.
5. Should the Parliament be absent, a special session shall be convoked to elect the President of the Republic, as specified in paragraph 4. If the Parliament has been dissolved in any way whatsoever, the election of the President of the Republic shall be postponed until the new Parliament shall have constituted itself as a body and within twenty days at the latest thereof, as specified in paragraphs 3 and 4 and in adherence with the provisions of paragraph 1 of article 34.
6. Should the procedure specified under the preceding paragraphs for the election of a new President not be completed in time, the incumbent President of the Republic shall continue to discharge his duties even after his term of office has expired, until a new President of the Republic is elected.
Interpretative clause: A President of the Republic who has resigned prior to the expiration of his tenure may not be a candidate in the elections resulting from his resignation.[272]

Hungary

Article 11 […]

(3) The President of the Republic elected in the first round of voting shall be the candidate who received a two-thirds majority of the votes of the Members of Parliament.
(4) If the first round of voting is inconclusive, a second round shall be held. In the second round of voting, votes may be cast for the two candidates receiving the highest and second highest numbers of votes respectively in the first round. In the

271 Constitution of Germany.
272 Constitution of Greece.

event of a tied vote for first place in the first round of voting, votes may be cast for the candidates who have received the highest number of votes. In the event of a tied vote only for second place in the first round of voting, votes may be cast for all candidates who have received the highest and second highest numbers of votes. The President of the Republic, elected in the second round of voting, shall be the candidate who has received the majority of valid votes, irrespective of the number of voters. If the second round of voting is also inconclusive, a new election shall be held after repeated nomination.
(5) The elections procedure shall be completed within two consecutive days at most.
(6) The President-elect of the Republic shall swear an oath before Parliament and take office on expiry of the mandate of the previous President of the Republic or, in the event of the early termination of such mandate, eight days after the announcement of the result of the election.[273]

Italy

Article 83

The President of the Republic is elected by Parliament in joint session. Three delegates from every Region elected by the Regional Council so as to ensure that minorities are represented shall participate in the election. Valle d'Aosta has one delegate only. The election of the President of the Republic is by secret ballot with a majority of two thirds of the assembly. After the third ballot an absolute majority shall suffice.[274]

Malta

48.

(1) There shall be a President of Malta who shall be appointed by Resolution supported by the votes of not less than two-thirds of all the members of the House:
Provided that notwithstanding the provisions of sub-article (3)(a), if the Resolution is not supported by the votes of not less than two-thirds of all the members of the House, the person occupying the office of the President of Malta shall, in any circumstance, remain in office until the Resolution is supported by the votes of not less than two-thirds of all the members of the House.[275]

Conclusion

In line with the Court's interpretation, and according to the new Rules of Procedure of the Assembly, the 2/3 majority requirement for the election of the President applies to the quorum as well as to the voting. This is a fairly high quorum requirement that could ensure a high level of legitimacy. However, it could risk the obstruction of the Assembly. Despite the responsibility that deputies should feel to be present for the voting, nothing directly stops them from not participating. This could keep creating problems in practice whenever the election of the President takes place and it would hinder the constructive work of the Assembly.

A 2/3 majority requirement for a quorum could also be in contradiction with Article 69(3) of the Constitution which requires one-half of all deputies to be present for the Assembly's quorum. The choice of words throughout the Constitution could also reflect the intention for a quorum of one-half of all deputies. Otherwise, the drafters would explicitly use the expression "present and voting" for the election of the President if they meant to set such a high quorum requirement.

Constitutional amendments may best clarify the matter by adding to the Constitution explicit and clear language on the quorum and voting procedures for the election of the President. The constitutional changes shall reflect other countries' practices on quorum requirements. It shall also address conflicts that have emerged in practice due to this unclarity, current concerns, as well as future possible needs for interpretation.

273 Constitution of Hungary, at http://www.parliament.am/library/sahmandrutyunner/hungaria.pdf? msclkid=b99543adb19411ecaac6441ca96237e9.
274 Constitution of Italy, at https://www.senato.it/sites/default/files/media-documents/COST_INGLESE. pdf?msclkid=295b4370b19611ecba1707263c0d9720.
275 Constitution of Malta, at https://legislation.mt/eli/const/eng.

Recommendations

To address the constitutional gaps on this issue, the following options could be considered:

- In case of no amendment, relevant provisions of the Constitution must be applied in accordance with the Court's interpretation. In addition, the interpretation given by the Court could be on the Law on the President as well;

- The Constitution could be amended to provide for more precise wording concerning both the quorum and the voting process for the election of the President. New provisions could require a parliamentary consensus to establish a clear and acceptable formula for the quorum and the voting process. The new rules may follow the best examples and should meet Kosovo's needs.

IX

The (In)Compatibility of the President's Mandate with Other Public and Political Functions

The Constitution does not address the incompatibility of the President's mandate with private, social, and/or philanthropic activities. Even though this gap did not lead to a case before the Court yet, it sure does leave the matter open for future conflicts and needs for interpretation. Considering the significant role of the President as the head of state, clear constitutional provisions need to provide answers.

The President cannot exercise other political and public functions.

The Constitution sets forth the scope and types of functions incompatible with the President's mandate, involving political and public functions. However, it is silent on the (in)compatibility of the President's mandate with other types of employment (i.e., private, social, and/or philanthropic activities).[276]

The President's competencies include representing the country internally and externally, guaranteeing the constitutional functioning of the institutions, and promulgating laws. The President is also the Commander-in-Chief of the Kosovo Security Force and appoints the candidate for Prime Minister. Therefore, the President must not exercise other functions that could interfere with his/her important role as the head of State.

The incompatibility of the President's mandate with other political party functions starts with the election of the President.[277] The Constitution provides more clarity on this than the preceding Constitutional Framework for Provisional Self-Government in Kosovo (the "Constitutional Framework") and the Court addressed the matter as well. However, under the Constitutional Framework, any other employment was incompatible with the President's functions, something that the Constitution today does not address.[278]

With no constitutional provisions and no Court's interpretation on that specific matter, the emergent need for clarity calls for improvement of the Constitution.

Relevant Provisions

Constitution of Kosovo

Article 88 [Incompatibility]

1. The President shall not exercise any other public function.
2. After election, the President cannot exercise any political party functions.[279]

Relevant Case-law and Opinions

So far, the Court has not addressed the issue of incompatibility of the President's mandate with other private, social, economic, or other professional activities. However, it does provide a more thorough insight into the incompatibility of the President's mandate with other political party functions and its seriousness. Case No. KI47/10 applies to this matter.[280] The Venice Commission Report on Democracy, Limitation of Mandates, and Incompatibility of Political Functions is also of partial relevance.[281] While it does not address the matter at hand specifically, it does provide a better understanding of the effects of ineligibility and incompatibility, and the difference between them.

In Case No. KI47/10, the deputies of the Assembly submitted a referral to the Court, based on Article 113(6) of the Constitution, requesting an assessment of whether the President had committed a serious violation of the Constitution by continuing to hold simultaneously the function of the president of his political party.[282] The President had publicly declared that he had suspended the political party function once in office as President of the Republic.[283]

276 Constitution of Kosovo, Article 88.
277 Ibid, Article 88(2).
278 Constitutional Framework for Provisional Self-Government in Kosovo, Regulation No. 2001/9, para. 9.2.7, 15 May 2001, at https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001regs/RE2001_09.pdf.
279 Constitution of Kosovo.
280 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, Case No. KI47/10, 28 September 2010, at https://gjk- ks.org/wp-content/uploads/vendimet/ki_47_10_eng_2.pdf.
281 European Commission for Democracy Through Law, Venice Commission, Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions, adopted by the Venice Commission at its 93 plenary session, 14-15 December 2012, Study No. 646/2011, CDL-AD(2012)027rev, 31 January 2013, at https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2012)027rev-e.
282 Case No. KI47/10., para. 4, 18.
283 Ibid., para. 26.

In its relevant parts, the judgment on Case KI47/10 reads as follows:

63. The LDK is well represented in the Assembly of Kosovo. It participated actively in the Local Elections held in Kosovo on 17 November 2009. Its members are engaged on political discourse, discussion and disputes on a daily basis. The party has its political aims and is entitled to aspire to political office to advance those aims. In a democracy such as that of Kosovo political parties are given special recognition in the law. They are entitled to appeal to the citizens to vote for them and their selected candidates at election time. They are entitled to negotiate coalitions at the national level in the Assembly and in Municipalities in all parts of the Country.

64.Political parties advance their aims not just by being active in discourse in the political sphere but also by supporting candidates aspiring to political office. One of the ways that they persuade the electorate to vote for them is by the publication of their parties' aims and manifestos. They also do so by choosing candidates for election and by electing to office in their parties, persons who will influence the electorate to vote for their candidates and their lists.

If one concludes that the President of the Republic has 'frozen' the exercising of the function of their party's presidency, the Court must consider what the reality of this freezing is.

65. It is not the same as a Civil Servant of the Government taking a 'leave of absence' from his or her technical civil service position to pursue an elected political career. It is the President of the Republic attempting to take a 'leave of absence' from his or her position as Chairman of a major political party while still holding the official title of Chairman/President of that political party.

66. Political parties as their principal function wish to win support from citizens and influence people with respect to political issues and to win elections. One of the fundamental ways of winning the hearts and minds of the citizens who will vote in elections is the ability of a political party to be able to assert who is supportive of and will endorse the parties' positions and candidates. If a political party has the endorsement of the President of the Republic, it has a substantial political asset to further its political agenda and the election of its candidates for public office.[284]

The Court considered that "[w]hen the President of the Republic allows a political party to claim that he or she is the Chairman of that political party even under circumstances where he or she as a Chairman will not make any active decisions on behalf of the party, he or she is exercising a political activity or at least allowing the political party to 'make use' of his name and position as President of the Republic".[285] In the present case, the Court observed that the President had continued to allow the association of his name with his political party, LDK and that LDK has enabled him to remain as their president by 'freezing' the exercise of functions in that party.

According to the Court, the President and LDK wish to benefit from their association with each other. The President may be able to resume his/her exercise of the functions if and when they leave the office of the President. The party - in its turn - might seek political advantage, by being associated with a powerful constitutional officer like the President of the Republic.[286]

While the Court considers that the facts of this case constitute a violation of the Constitution, the next fundamental question is whether this is a mere technical violation or a serious violation of the Constitution. In this context, the Court offered the following analysis and reaches this conclusion:

The President of the Republic committed a serious violation of the Constitution by continuing to be recorded as president of his political party, LDK.

69. In considering whether this violation is merely a technical violation of the Constitution or rather a serious violation the Court should assess the impact of the President's decision on the confidence of the public in the office of President of the Republic of Kosovo. Bearing in mind the considerable powers granted to the President under the Constitution is it reasonable for the public to assume that their President, 'representing the unity of the people' and not a sectional or political party interest, will represent them all. Every citizen of the Republic is entitled to be assured of the impartiality, integrity and independence of their President. This is particularly so when he exercises political

284 Case No. KI47/10.
285 Ibid., para. 67.
286 Ibid., para. 68.

choices such as choosing competing candidates from possible coalitions to become Prime Minister.

70. The Court is of the view that this cannot be said when the President still holds high office in one of the most prominent political parties in the country.

Opinion of the Venice Commission

The Venice Commission Report on Democracy, Limitation of Mandates, and Incompatibility of Political Functions (the "Report") relates -in some parts- to this case. The Report does not confine itself to the issue of the incompatibility of the President's functions, as it looks more broadly into the issue of incompatibility of other high state officials, considering that it has historically evolved and applied across different jurisdictions. However, it does offer an interesting remark on incompatibility, noting that: "The primary purpose of incompatibility has been to ensure that public or private occupations do not influence their role as representatives of the nation."[287]

Unlike ineligibility, incompatibility does not prevent the election of the same person, nor does it influence the legal quality of the election results.

Incompatibility is different from ineligibility. As the Report notes "[…] [w]hile ineligibility is defined as a principle which prevents the holders of certain public or private functions from running at parliamentary elections or elections for other levels of government, incompatibility is a much broader principle and refers to the holders of political functions who are already elected."[288]

Comparative Analysis and References

The constitutional concept of incompatibility is narrow under Kosovo's constitution, in comparison to other countries' constitutions.

Incompatibility under Kosovo's constitution does not include - as in some other countries' constitutions - the President's engagement in private activity (e.g., Albania) or economic activity (e.g., Bulgaria); or having any other occupation (e.g., Austria) or professional duty (e.g., Croatia). In other words, it does not prohibit the President to hold any other salaried office, engage in any trade or profession, or belong to the management or supervisory board of any enterprise conducted for profit, as expressed in Germany's Basic Law.

Albania

Article 89

The President of the Republic may not hold any other public position, may not be a member of a party and may not carry out other private activity.[289]

Austria

Article 61

1. During his tenure of office the Federal President may not belong to any general representative body nor exercise any other occupation.
2. The title "Federal President" may not - even with an addition or in the context of another designation -be used by anyone else. It is safeguarded by law.[290]

287 Venice Commission, Study No. 646/2011.
288 Ibid., para. 121.
289 Constitution of Albania.
290 Constitution of Austria.

Croatia

Article 96

The President of the Republic shall not perform any other public or professional duty.
Once elected, the President of the Republic shall resign from membership of any political party and shall notify the Croatian Parliament thereof.[291]

Estonia

Article 84

Upon assuming the office of the President, the authority and duties of the incumbent in all elected or appointed offices previously held by him or her are terminated, and he or she suspends his or her membership in any political party for the duration of his or her term of office.[292]

Germany

Article 55

1. The Federal President may not be a member of the government or of a legislative body of the Federation or of a Land.
2. The Federal President may not hold any other salaried office or engage in any trade or profession, or belong to the management or supervisory board of any enterprise conducted for profit.[293]

Hungary

Article 12

1. The person of the President of the Republic shall be inviolable.
2. The office of President of the Republic shall be incompatible with any other state, social, economic and political office or assignment. The President of the Republic may not pursue any other remunerated occupation, and may not receive a fee for any other activity, except for an activity subject to copyright protection.[294]

Lithuania

Article 83

The President of the Republic may not be a Member of the Seimas, may not hold any other office, and may not receive any remuneration other than the remuneration established for the President of the Republic and the remuneration for creative activities.
A person elected President of the Republic must suspend his activities in political parties and political organizations until the beginning of a new campaign for the election of the President of the Republic.[295]

North Macedonia

Article 83

The duty of the President of the Republic is incompatible with the performance of any other public office, profession, or position in a political party. The President of the Republic is granted immunity. The Constitutional Court decides by a two-thirds majority vote of the total number of judges on any case for withholding immunity from the President of the Republic.[296]

291 Constitution of Croatia.
292 Constitution of Estonia.
293 Constitution of Germany.
294 Constitution of Hungary.
295 Constitution of Lithuania, at https://www.lrkt.lt/en/about-the-court/legal-information/the-consti tuition/192.
296 Constitution of North Macedonia.

Poland

Article 132

The President of the Republic shall hold no other offices nor discharge any public functions, with the exception of those connected with the duties of his office.[297]

Serbia

Article 115

The President of the Republic may not perform another public function or professional duty.[298]

Slovenia

Article 105

The office of President of the Republic is incompatible with any other public office or occupation.[299]

Ukraine

Article 103

The President of Ukraine is elected by the citizens of Ukraine, on the basis of universal, equal and direct suffrage, by secret ballot for a five-year term.
[…]
The President of Ukraine shall not have another representative mandate, hold office in bodies of state power or in associations of citizens, as well as engage in other paid or entrepreneurial activity, or enter a governing body or a supervisory board of enterprise that is aimed at making a profit.[300]

Conclusion

The President must refrain from exercising any other public function while in office, including the exercise of any political party functions. The latter would amount to a serious violation of the Constitution.

Yet, the question of the incompatibility of the President's mandate with other activities (i.e., private, philanthropic, and social) remains unanswered. The issue of such a constitutional gap has not yet been raised as an issue in practice but it surely does leave room for future conflicts and needs for interpretation.

Addressing the matter through clear constitutional provisions would prevent the influence of other public or private functions on the President's role as the nation's representative. Changes to the Constitution may broaden its narrow provisions on this matter, following the example of other countries and considering the significance of the President's mandate.

Recommendations

Taking into account the constitutions of other countries, Kosovo's Constitution could address the incompatibility of any private and/or economic activity, as well as any other occupation or professional duty while in office as President.

297 Constitution of the Republic of Poland, at https://trybunal.gov.pl/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-Poland.
298 Constitution of Serbia.
299 Constitution of Slovenia.
300 Constitution of Ukraine, at https://ccu.gov.ua/en/storinka/legal-acts.

- An amendment to the Constitution might also expand the notion of incompatibility beyond the public functions and political party functions, to include any private activity, economic activity, or any other occupation or professional duty, or even the belonging to management or supervisory bodies of for-profit institutions or enterprises, in line with the majority of the constitutions in Europe.

X

What Happens When the President is Absent?

The Acting President exercises the functions of the President when the latter is temporarily unable to. The Constitution does not address what happens when the President is absent for other reasons, such as (i) when the term of the President ends and the Assembly has not elected the new President; (ii) when the President resigns; (iii) when the President is dismissed form position; (iv) in case of death; or (v) when the position remains vacant for other reasons. The absence of clear constitutional provisions also creates uncertainties on the scope of the powers of the Acting President. The current gaps may raise new issues in the future which is why new constitutional and/or legal provisions could clarify these matters.

The President of the Assembly takes over the responsibilities of the President of Kosovo if the latter is absent due to an inability to exercise her/his functions.[301] The Constitution however is silent on two matters: 1) the scope of powers of the Acting President, and 2) what happens with the position in cases other than the temporary inability to act as President.

The Acting President temporarily exercises the function of the President with no limitations to its power.

The Constitution does not provide for any limits to the competencies of the President under Article 84, regardless of whether the President or an Acting President exercises those competencies. The Court has addressed the gap by holding that the absence of limitations implies that the Acting President exercises all competencies of the President for as long as they remain in this position. Certain limitations, if applied in the future, would diminish the rights and freedoms under Chapter II of the Constitution.

The Constitution does not address what happens in case of permanent absence of the President.

With no constitutional provisions or Court's interpretation, the matter of the Acting President remains uncertain in the following cases: (i) when the term of the President ends, and the Assembly has not elected the new President; (ii) when the President resigns; (iii) when the President is dismissed from position; (iv) in case of their death; (v) or when the position remains vacant for other reasons. Most countries regulate the issue of the Acting President both in terms of temporary absence of the President and permanent absence when the position of the President remains vacant for reasons such as resignation, dismissal, inability to fulfill the duty, or death. In practice, the President of the Assembly served as Acting President even when the position of the President remained vacant for reasons other than a temporary inability to fulfill responsibilities.

The mandate of the Acting President is not a fixed or standard six (6) month mandate of the President.

This transfer of powers may be voluntary and lasts until the President can resume his/her duties but no longer than six (6) months.[302] Otherwise, the Assembly determines by a two- thirds (2/3) vote of all deputies that the President is temporarily unable to fulfill her/his responsibilities.[303] The Constitution further provides that the election of the President must take place no later than thirty (30) days before the end of the current President's term of office.[304] Yet, in case of vacancy, one may argue that the election procedure must begin immediately. This is because the thirty days (30) deadline applies when the current President is exercising her/his function. The maximum period of six (6) months is valid in the case of 'temporary absence' of the President only, meaning that there is a President in place, who is temporarily unable to fulfill their responsibilities. The Assembly should not wait six (6) months to elect the new President.

Future possible scenarios may raise new issues and clear constitutional rules will be necessary to prevent the violation of the Constitution.

Relevant Provisions

Constitution of Kosovo

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
(1) represents the Republic of Kosovo, internally and externally;
(2) guarantees the constitutional functioning of the institutions set forth by this Constitution;
(3) announces elections for the Assembly of Kosovo and convenes its first meeting;
(4) issues decrees in accordance with this Constitution;

301 Constitution of Kosovo, Article 90.
302 Ibid., Article 90(1).
303 Ibid., Article 90(2).
304 Ibid., Article 86(2).

(5) promulgates laws approved by the Assembly of Kosovo;
(6) has the right to return adopted laws for re-consideration, when he/she considers them to be harmful to the legitimate interests of the Republic of Kosovo or one or more Communities. This right can be exercised only once per law;
(7) signs international agreements in accordance with this Constitution;
(8) proposes amendments to this Constitution;
(9) may refer constitutional questions to the Constitutional Court;
(10) leads the foreign policy of the country;
(11) receives credentials of heads of diplomatic missions accredited to the Republic of Kosovo;
(12) is the Commander-in-Chief of the Kosovo Security Force;
(13) leads the Consultative Council for Communities;
(14) appoints the candidate for Prime Minister for the establishment of the Government after proposal by the political party or coalition holding the majority in the Assembly;
(15) appoints and dismisses the President of the Supreme Court of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;
(16) appoints and dismisses judges of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;
(17) appoints and dismisses the Chief Prosecutor of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council;
(18) appoints and dismisses prosecutors of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council;
(19) appoints judges to the Constitutional Court upon the proposal of the Assembly;
(20) appoints the Commander of the Kosovo Security Force upon recommendation of the Government;
(21) with the Prime Minister, jointly appoints the Director, Deputy Director and Inspector General of the Kosovo Intelligence Agency;
(22) decides to declare a State of Emergency in consultation with the Prime Minister;
(23) may request meetings of the Kosovo Security Council and chairs them during a State of Emergency;
(24) decides on the establishment of diplomatic and consular missions of the Republic of Kosovo in consultation with the Prime Minister;
(25) appoints and dismisses heads of diplomatic missions of the Republic of Kosovo upon the proposal of the Government;
(26) appoints the Chair of the Central Election Commission;
(27) appoints the Governor of the Central Bank of the Republic of Kosovo who will also act as its Managing Director, and appoints the other members of the Bank's Board;
(28) grants medals, titles of gratitude, and awards in accordance with the law;
(29) grants individual pardons in accordance with the law;
(30) addresses the Assembly of Kosovo at least once a year in regard to her/his scope of authority.

Article 88 [Incompatibility]

1. The President shall not exercise any other public function.
2. After election, the President cannot exercise any political party functions

Article 90 [Temporary Absence of the President]

1. If the President of the Republic of Kosovo is temporarily unable to fulfill her/his responsibilities, he/she may voluntarily transfer the duties of the position to the President of the Assembly who shall then serve as Acting President of the Republic of Kosovo. The President's order of transfer shall state in particular the reason for the transfer and the duration of the transfer if known. The President of the Republic of Kosovo shall resume exercise of the duties of the position when she/he is able to do so and the President of the Assembly shall relinquish the position as Acting President.
2. When there is no voluntary transfer of power, the Assembly of the Republic of Kosovo determines by two thirds (2/3) vote of all deputies, after consultation with the medical consultants team, that the President of the Republic of Kosovo is temporarily unable to fulfill his/her responsibilities. The President of the Assembly shall serve as Acting President until the President of the Republic of Kosovo is able to resume carrying out her/his duties as President.
3. The position of Acting President of the Republic of Kosovo may not be exercised for a period longer than six (6) months.[305]

305 Constitution of Kosovo.

Relevant Case-law

Cases KO97/10, KO29/12, and KO48/12 are relevant in this matter.[306] The first case deals with the incompatibility between serving as Acting President and exercising political party functions. The other two cases further clarify the scope of powers of the Acting President.

Case KO97/10

The Court clarified the scope and limitations of the Acting President's competencies. It held that "[t]he Acting President is not an elected President and there may be questions as to the powers of an Acting President raised from time to time."[307] The Court concluded that the Acting President enjoys the rights of the office of the presidency of the Assembly, including the right to hold a political position in a political party."

The Acting President shall not cease the exercising of any political party function merely because of becoming Acting President.

The relevant paragraphs of the Judgment state the following:

19. The deputies of the Assembly of Kosovo in secret ballot elect the President of Kosovo. Article 86.1 states that 'The President of the Republic of Kosovo shall be elected by the Assembly in secret ballot.' The President acts as head of state and he or she represents the unity of the people of the Republic of Kosovo. The principle of representative democracy which underpins the institutions and decision making in the Republic of Kosovo gives the choice of President to the elected representatives of the citizens. The limited period of six months provided by Article 90 of the Constitution beyond which an Acting President may not exercise the position of President is there to ensure that it is the Assembly of Kosovo that chooses who occupies that important position on behalf of the people of Kosovo.

20. Article 90 of the Constitution provides that an Acting President shall be the President of the Assembly of Kosovo. The President of the Assembly is elected by the deputies of the Assembly from amongst their own numbers. Article 67 provides for the election of the President of the Assembly […].

21. The functions of the President of the Assembly as provided for in the above Article are solely in relation to the internal workings of the Assembly and do not have the much more substantive functions and competences of the President of the Republic. Their roles are different.

22. The deputies of Assembly elect the President of the Assembly in an election that is entirely separate to the election of the President of the Republic. Article 88 of the Constitution, in its entirety, provides as follows:

Article 88 [Incompatibility]

1. The President shall not exercise any other public function.
2. After election, the President cannot exercise any political party functions.[308]

In the Court's view, the prohibition of exercising any political party function applies only to a President who has been elected by the Assembly. In the present case, Dr. Jakup Krasniqi was not elected as President. He was elected as President of the Assembly only. For this reason, the Court concluded that there is no prohibition in the Constitution on the exercise of political party functions on the President of the Assembly.[309]

306 6 Judgment in the matter of the Referral submitted by Acting President of the Republic of Kosovo, Dr. Jakup Krasniqi, concerning the holding of the office of Acting President and at the same time the position of Secretary-General of the Democratic Party of Kosovo, Case No. KO97/10, 22 December 2010, at https://gjk- ks.org/wp-content/uploads/vendimet/ko_97_10_eng.pdf; Cases KO29/12 and KO48/12.

307 Case KO97/10, para. 25.

308 Ibid.

309 Ibid., para. 23.

Cases KO29/12 and KO48/12

Any limitations to the competences of the Acting President concerning:
(i) the declaration of a state of emergency; (ii) appointment and dismissal of judges, the Chief State Prosecutor and prosecutors; and
(iii) granting of Individual pardon, are not in compliance with the Constitution.

These cases refer to the scope of powers of the Acting President. Deputies of the Assembly proposed a new Article of the Constitution to restrict the ability of an Acting President to exercise all the powers and functions of the President. It read as follows: "Except if stated otherwise in this Constitution, the position of Acting President of the Republic of Kosovo may not be exercised for a period longer than 6 (six) months. The Acting President of the Republic of Kosovo shall exercise all powers of the President except (1) Proposing Constitutional amendments; (2) Declaring a state of emergency, without the approval of the Prime minister; (3) Appointment and dismissal of judges of the Republic of Kosovo, the Chief State Prosecutor and prosecutors of the Republic of Kosovo; (4) Appointment and dismissal of heads of diplomatic missions of the Republic of Kosovo; (5) Granting of medals, awards and prices, pursuant to the law; and (6) Granting of Individual Pardon".[310]

The Court concluded that the restriction of the power of an Acting President to propose constitutional amendments, appoint and dismiss heads of Diplomatic Missions, and the granting of medals, awards, and prizes would not diminish the rights and freedoms outlined in Chapter II of the Constitution.[311] Any other limitation is not in compliance with the Constitution, as they could diminish the rights and freedoms guaranteed by Chapter II of the Constitution.[312]

Comparative Analysis and References

Most constitutions do not specify any limits to the competences of an Acting President, except for the Czech Republic and Estonia.

The Constitution of the Czech Republic enumerates specific competencies that the Prime Minister and the President of the Parliament can exercise in the absence of the President of the Republic. Estonia provides another example; its Constitution specifies the competencies that the President of the Parliament cannot exercise as an Acting President, namely "The Speaker of the Riigikogu, acting for the President, may not, without the consent of the Supreme Court, call an extraordinary election of the Riigikogu or refuse to promulgate a law".[313]

Albania

Article 91

1. When the President of the Republic is temporarily unable to exercise his functions or his place is vacant, the Speaker of the Assembly takes his place and exercises his powers.
2. If the President cannot exercise his duties for more than 60 days, the Assembly decides by two/thirds of all its members to send the issue to the Constitutional Court, which determines conclusively the fact of his incapacity. In case of determination of incapacity, the place of the President remains vacant and the election of a new President begins within 10 days from the date of determination of incapacity.[314]

310 Case KO29/12 (and KO48/12), para. 4, 5
311 Ibid., para. 172.
312 Ibid., para. 161.
313 Constitution of Estonia, Article 83.
314 Constitution of Albania.

Czech Republic

Article 66

If the office of the Presidency becomes vacant and before a new President of the Republic has been elected or has taken the oath of office, likewise if the President of the Republic is, for serious reasons, incapable of performing his duties and if the Assembly of Deputies and the Senate adopt a resolution to this effect, the performance of the presidential duties under Article 63 paragraph 1, letters a) to e) and h) to k), and Article 63, paragraph 2 shall devolve upon the Prime Minister. In any period in which the Prime Minister is performing the above specified presidential duties, the performance of the duties under Article 62 letters a) to e) and k) and further Article 63 paragraph 1 letter f) if the announcement of the election for the Senate is concerned shall devolve upon the Chairperson of the Assembly of Deputies; if the office of the Presidency becomes vacant during a period in which the Assembly of Deputies is dissolved, the performance of these functions shall devolve upon the Chairperson of the Senate who is also in charge of the office of the Presidency at the time when the Prime Minister is in charge of the designated functions of the President of the Republic pursuant to Article 63 paragraph 1 letter f), if the announcement of the election for the Chamber of Deputies of the Parliament is concerned.[315]

Estonia

§ 83

If the Supreme Court finds that the President is incapable of performing his or her duties for an indeterminate period or if he or she is temporarily unable to perform them in the cases specified by law, or if his or her authority has terminated before the end of his or her term of office, his or her duties are temporarily assumed by the Speaker of the Riigikogu.
During the time that the Speaker of the Riigikogu performs the duties of the President, his or her authority as a member of the Riigikogu is suspended.
The President of the Riigikogu, acting for the President, may not, without the consent of the Supreme Court, call an extraordinary election of the Riigikogu or refuse to promulgate a law.
If the President has been unable to perform his or her official duties for more than three consecutive months, or if his or her authority has terminated before the end of his or her term of office, the Riigikogu elects a new President within fourteen days pursuant to §79 of the Constitution.[316]

Malta

49. Whenever the office of President is temporarily vacant, and until a new President is appointed, and whenever the holder of the office is absent from Malta or on vacation or is for any reason unable to perform the functions conferred upon him by this Constitution, those functions shall be performed by such person as the Prime Minister, after consultation with the Leader of the Opposition, may appoint or, if there is no person in Malta so appointed and able to perform those functions, by the Speaker of the House of Representatives.[317]

Montenegro

Article 99

In case of cessation of mandate of the President of Montenegro, until the election of the new President, as well as in the case of temporary impediment of the President to discharge his/her duties, the Speaker of the Parliament shall discharge this duty.[318]

315 Constitution of Czech Republic.
316 Constitution of Estonia.
317 Constitution of Malta.
318 Constitution of Montenegro.

Poland

Article 131

1. If the President of the Republic is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. If the President of the Republic is not in a position to inform the Marshal of the Sejm of his incapacity to discharge the duties of the office, then the Constitutional Tribunal shall, on request of the Marshal of the Sejm, determine whether or not there exists an impediment to the exercise of the office by the President of the Republic. If the Constitutional Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic.
2. The Marshal of the Sejm shall, until the time of election of a new President of the Republic, temporarily discharge the duties of the President of the Republic in the following instances:
1. the death of the President of the Republic;
2. the President's resignation from office;
3. judicial declaration of the invalidity of the election to the Presidency or other reasons for not assuming office following the election;
4. a declaration by the National Assembly of the President's permanent incapacity to exercise his duties due to the state of his health; such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly;
5. dismissal of the President of the Republic from office by a judgment of the Tribunal of State.
6. If the Marshal of the Sejm is unable to discharge the duties of the President of the Republic, such duties shall be discharged by the Marshal of the Senate.
7. A person discharging the duties of the President of the Republic shall not shorten the term of office of the Sejm.[319]

Portugal

Article 132 [Acting President]

1. While the President of the Republic is temporarily unable to perform his functions, or while the office is vacant and until the new President elect is installed, his functions are performed by the President of the Assembly of the Republic, or, in the event that the latter is unable to do so, by his substitute.
2. While he exercises the functions of President of the Republic in an acting capacity, the President of the Assembly of the Republic or his substitute's mandate as Member of the Assembly is automatically be suspended.
3. While he is temporarily unable to perform his functions, the President of the Republic retains the rights and privileges inherent to his office.
4. An acting President of the Republic enjoys all the honours and prerogatives of the office, but his rights shall be those of the office to which he was elected.[320]

Slovenia

Article 106

In the event of permanent absence, death, resignation, or other cessation of performing the office of President, the President of the National Assembly shall temporarily perform the duties of the office of President of the Republic until the election of a new President of the Republic. In such event, elections for a new President of the Republic must be called no later than fifteen days after the cessation of office of the previous President of the Republic.
The President of the National Assembly also temporarily performs the duties of the office of President of the Republic during any absence of the President of the Republic.[321]

319 Constitution of Poland.
320 Constitution of Portugal, at https://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf.
321 Constitution of Slovenia

Conclusion

The Constitution does not limit the powers of the Acting President. The latter may also enjoy the rights of the office of the Presidency of the Assembly, including the right to hold a political position in a political party. He/she can exercise all competencies of the President for as long as they remain in this position. Certain limitations to the competencies may even violate the Constitution. Some others could be possible in case of future constitutional amendments. The absence of explicit constitutional provisions thus leaves room for interpretation.

Therefore, questions might still arise on the scope and limitations of the Acting President's powers on certain occasions. Kosovo's constitutional practice is in line with international standards, whereas most constitutions do not specify any limits to the competencies of an Acting President except for the Czech Republic and Estonia. Yet, the Constitution leaves several matters unaddressed and needs improvement. It should involve clear provisions reflecting the Court's view on the scope of powers of the Acting President, practical provisions on the timeframe for the election of the new President, and regulate other cases of the President's absence, other than the temporary inability to exercise the competences.

Recommendations

Considering the constitutional gaps, the options would be as follows:

(1) Discharge of duties in case of temporary absence or cessation of the mandate of the President

- A new constitutional provision could expressly provide that the President of the Assembly will be the Acting President in the following cases:

  - when the President is temporarily unable to fulfill his/her duties;
  - when the term of the President ends and the Assembly has not elected the new President;
  - when the President resigns;
  - when the President is dismissed from their position;
  - in case of death; or
  - when for other reasons the position remains vacant.

This could be complemented with the following rules:

a) In case of temporary absence of the President if the President is unable to resume their duties within six (6) months, the Assembly must begin the procedure for the election of a new President immediately;

b) If the mandate of the President remains vacant, the Assembly must begin the procedures for the election of a new President immediately.

(2) The responsibilities and powers of the Acting President

- In case of no amendment, the Acting President will exercise the responsibilities and powers of the President, but the Acting President's rights will be those of the office they were elected to (President of the Assembly);
- A new constitutional provision may provide: 'An Acting President has the responsibilities, powers, and functions of the President. Additionally, it could demand that the President of the Assembly takes an oath before assuming the role of Acting President;
- An alternative amendment could be to list the responsibilities and powers of the Acting President, while the President is temporarily unable to exercise their duties, or in case of vacancy.

These options could be set in the Constitution, or in the relevant legislation i.e. The Law on the President and the Rules of Procedure of the Assembly.

XI

What constitutes a Serious Violation of the Constitution by the President?

The Constitution lists the "serious violation" of the Constitution as one of the reasons for the dismissal of the President, yet it does not define what the term means. Rather, it depends on the Court's interpretation as it evaluates the facts of each case, finds whether there has been a violation, and determines whether that violation was serious. While many other countries follow the same pattern, some kind of threshold or criteria could be helpful and either the Constitution or the law could establish it.

The Assembly may dismiss the President in the following scenarios:

The Constitution does not define a "serious" violation of the Constitution.

(i) if the President has been convicted of a serious crime; (ii) if the President is unable to exercise the responsibilities of office due to serious illness; or (iii) if the Court has determined that the President has committed a serious violation of the Constitution.[322] The deputies of the Assembly must submit a petition to the Court for the dismissal of the President. If the Court determines that the President has seriously violated the Constitution, then the Assembly may dismiss the President by a two/thirds (2/3) vote of all its deputies.[323]

The Constitution is silent on what constitutes a serious violation. Rather, it depends on the Court's interpretation of whether a violation of the Constitution was serious, based on the facts of each case.[324] The Constitution does not recognize upon the Assembly the authority to define the term by law either.[325]

This constitutional gap brings the need for constitutional changes that would address the following questions:

(i) should a serious violation committed by the President refer only to the role of the President and her/his constitutional competencies?

(ii) should the Constitution set forth the criteria or provide for an elaborate definition of a serious violation committed by the President?

Relevant Provisions

Constitution of Kosovo

Article 91 [Dismissal of the President]

1. The President of the Republic of Kosovo may be dismissed by the Assembly if he/she has been convicted of a serious crime or if she/he is unable to exercise the responsibilities of office due to serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution.
2. The procedure for dismissal of the President of the Republic of Kosovo may be initiated by one- third (1/3) of the deputies of the Assembly who shall sign a petition explaining the reasons for dismissal. If the petition alleges serious illness, the Assembly shall consult the medical consultants team on the status of the President's health. If the petition alleges serious violation of the Constitution, the petition shall be immediately submitted to the Constitutional Court, which shall decide the matter within seven (7) days from the receipt of the petition.
3. If the President of the Republic of Kosovo has been convicted of a serious crime or if the Assembly in compliance with this article determines that the President is unable to exercise her/his responsibilities due to serious illness, or if the Constitutional Court has determined that he/she has seriously violated the Constitution, the Assembly may dismiss the President by two thirds (2/3) vote of all its deputies.

Article 113 [Jurisdiction and Authorized Parties]

6. Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.[326]

Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo

Article 44 [Accuracy of the Referral]

1. In a referral made pursuant to Article 113, paragraph 6 of the Constitution, the following information shall, inter alia, be submitted:
1.1. description of facts of the alleged violation;
1.2. concrete provisions of the Constitution allegedly violated by the President; and

322 Constitution of Kosovo, Article 91.
323 Further details are set out in Article 113(6) of the Constitution, Articles 44 and 45 of the Law No. 03/L-121 on the Constitutional Court, at https://gjk-ks.org/wp-content/uploads/2017/11/LAW-ON-THE- CONSTITUTIONAL-COURT-OF-THE-REPUBLIC-OF-KOSOVO.pdf; and Rule 75 [Referral pursuant to Article 113 (6) of the Constitution and Articles 44 and 45 of the Law] of the Rules of Procedure of the Constitutional Court No. 01/2018, 13 June 2018, at https://gjk-ks.org/wp-content/uploads/2018/06/rregullo re_e-_punes_gjkk_ang_2018.pdf.
324 Constitution of Kosovo, Article 91.
325 Ibid.
326 Constitution of Kosovo.

1.3. presentation of evidence that supports the allegation for serious violation of the Constitution by the President of the Republic.

Article 45 [Deadlines]

The referral should be filed within a period of thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.[327]

Rules of Procedure of the Constitutional Court Nr. 01/2018

Rule 75

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.6 of the Constitution and Articles 44 and 45 of the Law.
(2) In a referral pursuant to this Rule the following information shall, inter alia, be submitted: (a) description of facts of the alleged violation; (b) concrete provisions of the Constitution allegedly violated by the President of the Republic of Kosovo; and (c) presentation of evidence that supports the allegation for serious violation of the Constitution by the President of the Republic of Kosovo.
(3) Following the filing of a referral pursuant to this Rule, the Court shall immediately notify the President of the Republic and send a copy of the referral no later than three (3) days from its filing with the Court.
(4) The Court shall request the President of the Republic to reply to the referral within fifteen (15) days from date the referral is served on the President of the Republic, unless good cause is shown for a later reply and the respective permission is granted.
(5) The Court shall order stay of proceedings initiated pursuant to this Rule in the event that before issuing its decision, the President of the Republic has resigned or has otherwise terminated his/her mandate.
(6) In the event that the authorized party withdraws the referral, the President of the Republic may request the Court to continue with the proceedings and issue a decision. Such request shall be determined by the Court upon by a majority of Judges.
(7) The referral under this Rule must be filed within thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.[328]

Relevant Case-law and Opinions

Case KI47/10 applies to this matter.8 The Court assessed whether the President of the Republic had committed a serious violation of the Constitution, by continuing to hold simultaneously the function of the President of LDK. The Venice Commission Opinion No. 959/2019 on whether the actions of the President of Albania constitute a serious violation of the Constitution, is also of relevance.

In Case KI47/10, the Court held that holding a political party function while being President constitutes a serious violation of the Constitution. However, it did not set out a specific criterion to evaluate if a violation of the Constitution is serious.9 Rather, it is evaluated based on the facts at its disposal.

The Court did not provide a concrete definition of serious violation of the Constituion.

The Court's approach is in line with the in-depth reasoning of the Constitutional Court of Lithuania in the case of former President Rolandas Paksas. The Lithuanian Court made it clear that the legal evaluation of the facts of the case, the determination of whether those facts substantiate a violation and, further, whether that violation constitutes a gross or serious one, is part and parcel of the exclusive competence of the Constitutional Court. It further noted that neither the Assembly nor any other organ or official is constitutionally authorized to determine what constitutes a serious violation.

327 Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, at https://gzk.rks- gov.net/ActDocumentDetail.aspx?ActID=2614.
328 Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2018, 13 June 2018., at https://gjk-ks.org/wp-content/uploads/2018/06/rregullore_e-_punes_gjkk_ang_2018.pdf

The impeachment of the President of the Republic of Korea (Park Geun-Hye) is also relevant to this matter. The court there concluded that the President did commit a grave violation of the Constitution, by being involved in political corruption activities. The impeachment was - therefore- necessary to preserve the country's constitutional order.[329]

Despite not providing a concrete definition, the Court distinguishes between a serious violation and a technical violation of the Constitution. It further reads:

In considering whether a violation of the Constitution is merely technical or rather serious, the Court should assess the impact of the President's decision on the confidence of the public in the President.

69. […] Bearing in mind the considerable powers granted to the President under the Constitution it is reasonable for the public to assume that their President, 'representing the unity of the people' and not a sectional or political party interest, will represent them all. Every citizen of the Republic is entitled to be assured of the impartiality, integrity and independence of their President. This is particularly so when he exercises political choices such as choosing competing candidates from possible coalitions to become Prime Minister.[330]

70. The Court is of the view that this cannot be said when the President still holds high office in one of the most prominent political parties in the country and it concludes that the President has committed a serious violation of the Constitution under Article 88.2 of the Constitution by continuing to permit himself to be recorded as President of the LDK.[331]

Rolandas Paksas's Case:

On 23 December 2003, the parliament (Seimas) of Lithuania passed a resolution 'On the Formation of the Special Investigation Commission, establishing a Special Investigation Commission to investigate the reasonableness and seriousness of the charges brought against the President of the Republic, Rolandas Paksas, and to reach a conclusion regarding the proposal to institute impeachment proceedings.[332]

On 19 February 2004, the Special Investigation Commission concluded that the charges brought against the President of the Republic Rolandas Paksas are grounded and serious enough to initiate the impeachment proceedings.[333]

On 19 February 2004, the Seimas adopted the Resolution 'On the Beginning of the Impeachment Proceedings Against the President of the Republic Rolandas Paksas' whereby it decided to institute impeachment proceedings against the President.[334] The charges were the following:

(i) Rolandas Paksas, while holding the office of President of the Republic and having no right to undertake or have any commitments incompatible with the interests of the Nation and the State of Lithuania in favor of private persons, undertook such commitments in favor of Jurij Borisov, and was, while in the office of the President of the Republic of Lithuania, influenced by the latter and acted not in the interests of the Nation and the State of Lithuania, but in the interests of that private person;

(ii) Rolandas Paksas, while holding the office of President of the Republic, did not safeguard the protection of state secret;

(iii) Rolandas Paksas, while holding the office of President of the Republic, made use of his status by giving unlawful orders to his advisors and by other actions to exert unlawful influence on decisions of private persons and private economic entities in the area of property relations;

329 Case on the impeachment of the President (Park Geun-hye), at http://search.ccourt.go.kr/xmlFile/0/010400/2017/pdf/e2016n1_1.pdf?msclkid=2d21c562b4c211ecbf04e9563aaabe1d.
330 Case No. KI47/10.
331 Ibid.
332 The Constitutional Court of the Republic of Lithuania, on the compliance of actions of President Rolandas Paksas of the Republic of Lithuania against whom an impeachment case has been instituted with the Constitution of the Republic of Lithuania, Case No. 14/04, 31 March 2004, at https://lrkt.lt/en/court- acts/search/170/ta1263/content.
333 Case No. 14/04, para. 4.
334 Ibid., para. 5

(iv) Rolandas Paksas, while holding the office of President of the Republic, did not coordinate public and private interests in his activities;

(v) Rolandas Paksas, while holding the office of President of the Republic, discredited public authority;

(vi) Rolandas Paksas, while holding the office of President of the Republic, gave unlawful orders to his advisors and did not take any action to prevent abuses by some of his advisors in the discharge of their duties.[335]

Article 74 of the Constitution of Lithuania regulates the impeachment procedure and it stipulates that "For a gross violation of the Constitution, a breach of the oath, or upon disclosure of the commission of a crime, the Seimas may, by a 3/5 majority vote of all the members of the Seimas, remove from office the President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, as well as members of the Seimas, or may revoke the mandate of a member of the Seimas.

This shall be performed in accordance with the procedure for impeachment proceedings which shall be established by the Statute of the Seimas."[336]

The Constitutional Court of Lithuania concluded that:

(i) The actions of President Rolandas Paksas of the Republic of Lithuania, when he, by Decree no. 40 of 11 April 2003, unlawfully granted citizenship of the Republic of Lithuania to Jurij Borisov in exchange for financial and other notably support rendered by the latter are in conflict with the Constitution of Lithuania. By the said actions, President Rolandas Paksas of Lithuania grossly violated the Constitution;[337]

(ii) The actions of President Rolandas Paksas of the Repubcli fo Lithuania by which he knowingly dropped a hint to Jurij Borisov that in his regard institutions of law and order were conducting an operational investigation and tapping his telephone conversations are in conflict with the Constitution of Lithuania. By the said actions, President Rolandas Paksas of Lithuania grossly violated the Constitution of the Republic of Lithuania;[338]

(iii) The actions of President Rolandas Paksas of the Republic of Lithuania, by which he, seeking to implement property interests of private persons close to him, by making use of his status, gave orders to his advisor, Visvaldas Rackauskas, to seek to influence, by making use of his official position, through institutions of law and order, decisions of heads and shareholders of the company 'žemaitijos keliai' UAB concerning transfer of shares to persons close to Rolandas Paksas, also the actions of Rolandas Paksas of the Republic of Lithuania, by which he, in 2003 seeking to implement property interests of private persons close to him and making use of his status, exerted influence on decisions of heads and shareholders of the company "žemaitijos keliai" UAB concerning transfer of shares to persons close to Rolandas Paksas, are in cocnlfict with the Constitution of Lithuania. By the said actions, President Rolandas Paksas of the Republic of Lithuania grossly violated the Constitution of the Republic of Lithuania;[339]

(iv) The statements publicly made by President Rolandas Paksas of the Republic of Lithuania during his meetings with residents on 26 November 2003 in Kretinga, on 1 December 2003 in Alytus, and on 15 December 2003 in Telšiai concerning conclusions of the Seimas Provisional Commission for Investigation into into Possible Threats to Lithuanian National Security are not in conflict with the Constitution of the Republic of Lithuania.[340]

The Relevant passages of this Judgment state:

8. By the actions of the President of the Republic, the Constitution would be violated grossly in cases when the President of the Republic held its office in bad faith, acted not in the interests of the Nation and the state but his personal interests, those of individual persons or their groups, acted with purposes and in the interests that are incompatible with the Constitution

335 Ibid., para. 7.
336 Ibid., section II.
337 Case No. 14/04, conclusion (1).
338 Ibid., conclusion (2).
339 Ibid., conclusion (3).
340 Ibid., conclusion (4).

and laws, with public interests, knowingly failed to discharge the duties established for the President of the Republic in the Constitution and laws.

Only the Constitutional Court can establish the fact of a serious violation of the Constitution.

9. As mentioned before, under the Constitution only the Constitutional Court enjoys the powers to decide whether concrete actions of the President of the Republic are in conflict with the Constitution, thus, whether the President of the Republic violated the Constitution; the Constitution does not provide for such powers for the Seimas. The Seimas, having no powers to adopt a decision on whether the President of the Republic violated the Constitution, does not have constitutional powers to decide whether the President of the Republic grossly violated the Constitution. The establishment of a violation of the Constitution is a matter of a legal but not political assessment, therefore, legal issues, the fact of violation of the Constitution, thus, also that of a gross violation of the Constitution, can only be established by an institution of judicial power, the Constitutional Court. The interpretation that, purportedly, the Seimas might establish the fact of a gross violation of the Constitution, would constitutionally be groundless, since this would mean that the legal issue whether the President of the Republic violated the Constitution, whether the Constitution has been violated grossly, might be decided not by an institution of judicial power, the Constitutional Court, which, as all other courts, is formed on professional basis, but by the Seimas, an institution of state power, which in its nature and essence is an institution of a political character, in whose decisions the political will of the majority of Seimas members is reflected, whose decisions are based on political agreements, various political compromises etc.

It is evident that the Seimas, an institution of a political character, may not decide whether the President of the Republic violated the Constitution, whether the violation of the Constitution is a gross one, i.e. it may not decide an issue of law. Otherwise, the statement of the fact of violation of the Constitution as well as that of a gross violation of the Constitution might be grounded upon political arguments, while the constitutional liability of the President of the Republic might arise from the statement that the Constitution has grossly been violated, which would be based upon political arguments. The Constitution contains only the legal regulation whereby it is only the Constitutional Court that has the powers to decide whether the President of the Republic violated the Constitution, whether the violation of the Constitution is a gross one. The Constitution provides for such powers for neither the Seimas, nor any other state institution, nor any state official.

It needs to be noted that the constitutional regulation under which only the Constitutional Court enjoys the powers to decide whether the President of the Republic grossly violated the Constitution is a constitutional guarantee for the President of the Republic that the constitutional liability, removal from office for a gross violation of the Constitution, will not be applied against him unreasonably.[341]

Impeachment of the Korean President Park Geun-hye;

The court in this case concluded that the President's conduct represented a grave violation of the Constitution.

Selected paragraphs of the Judgment:

B. Gravity of the Violation of the Constitution or Law

The benefits of removing the President from office should overwhelmingly outweigh the national loss incurred by the removal.

Article 53 Section 1 of the Constitutional Court Act provides that the Constitutional Court shall pronounce a decision that the respondent be removed from office 'when there is a valid ground for the petition for impeachment adjudication.' As the decision to remove a President from office would deprive the democratic legitimacy delegated to the President by the national constituents through an election during his or her term in office, it may bring about significant national loss such as an interruption in state affairs and political chaos, which is why the decision must be made with discretion. 'The existence of a valid ground for the petition for impeachment adjudication' means the existence of a grave violation of the Constitution or law sufficient to justify

341 Ibid., Chapter III.

the removal of the President from office.

The decision as to whether the gravity of a violation of the Constitution or law is sufficient to justify the removal of the President from office can be made from the perspective that impeachment adjudication proceedings are a system designed to protect the Constitution, and that the decision to remove a President from office deprives that President of the public trust vested in him or her. From the standpoint that the impeachment adjudication proceedings are a procedure ultimately dedicated to protecting the Constitution, a decision to remove the President from office may be justified only when the President's violation of the law holds such significance in terms of safeguarding the Constitution to the extent that a removal from office is requested to restore the impaired constitutional order. Meanwhile, from the standpoint that the President is a representative institution in which the public has directly vested democratic legitimacy, a valid ground for impeaching the President can only be found when the President, by violating the law, has betrayed the public's trust to the extent that such public trust vested in the President should be forfeited before the presidential term ends.

C. In conclusion, the respondent's acts of violating the Constitution and law are a betrayal of the people's confidence, and should be deemed as grave violations of the law that are unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the respondent's violations of the law are serious, we believe that the benefits of protecting the Constitution by removing the respondent from office, who has been directly vested with democratic legitimacy by the people, overwhelmingly outweigh the national loss that would be incurred by the removal of the President.

D. Opinion on the Claims Regarding the Impeachment Adjudication

[…] (1) The Constitution currently in force prescribes that the Constitutional Court, not the National Assembly, has jurisdiction over impeachment proceedings (Article 111 Section 1 Item 2), which can be interpreted as an emphasis on the rule of law. The purpose of the impeachment system lies in establishing the constitutional order by removing from office public officials that have violated the law. The Constitutional Court pronounces the decision to remove the President from office when the President has violated the Constitution or law to such a grave extent that it is no longer permissible from the standpoint of protecting the Constitution for the President to remain in office, or when the President has lost the right to administrate state affairs for having betrayed the trust of the people (see also 2004Hun-Na1, May 14, 2004). Whether there has been a 'violation of law of a gravity sufficient to justify removing the President from office' is not a readily conclusive, definitive matter, and is decided based on the overall consideration of not only the details and content of the 'President's violations of the law' in a specific case and the meaning and content of the constitutional order being violated thereby, but also the times in which the impeachment adjudication is taking place; the future constitutional value and order that we seek to establish; the history of democracy and the political, economic, social, cultural environment; and the people's legal sentiment regarding the protection of the Constitution.

E. Conclusion.

[…] As mentioned in the Court's opinion, the respondent's criminal conduct constitutes grave violations of the Constitution and law committed by the President, notwithstanding her position as a 'symbolic existence personifying the rule of law and observance of law' toward the entire public. Dismissing this impeachment adjudication would give rise to concerns over political corruption, including government collusion with business, further spreading and taking root. Not only does this negatively influence the current constitutional order, but it also goes against the ideological values pursued by the Constitution of the Republic of Korea, and runs contrary to the 'public desire for a fair and ethical society' reflected in the enactment of the Improper Solicitation and Graft Act.

Considering these facts, as a Justice of the Constitutional Court summoned to review this impeachment trial, there was no choice but to decide in favor of removing the respondent from office. This decision was made to safeguard the constitutional order founded on the basic order of liberal democracy, and to set justice right and put an end to

political corruption, such as the intervention of unofficial aides in state affairs, abuse of authority by the President and government collusion with business conglomerates, for the people of Korea and our future generations.[342]

Opinion of the Venice Commission

The Venice Commission discussed whether particular actions of a President would amount to a serious violation of the Constitution. Specifically, in its Opinion No. 959/2019, the Commission's task was to examine the powers of the President of Albania to set the dates of elections and to assess whether his actions in discharging these powers would amount to a serious violation calling for impeachment.[343]

The Speaker of the Albanian Assembly requested the opinion, seeking advice in the context of an ongoing procedure of impeachment against the President of Albania because he canceled/postponed local elections. In assessing the scope of a serious violation of the Constitution the Venice Commission followed these criteria: (i) whether the presidential indictment is in the service of the unity of the people; (ii) if the circumstances of the case are of a serious nature to justify the initiation of the presidential impeachment or dismissal; and (iii) even in cases where a serious violation is confirmed, this should not necessarily result in a request for his/her impeachment or dismissal.[344]

The following passages from this opinion are of special significance:

The key question is: Would the pursuit of impeachment serve the unity of the people?

93. Thus, even if 'serious violations of the Constitution' (the Constitution uses the plural) were established, the Plenary Session also takes into account the opportunity of impeaching the President and can refrain from doing so. The Venice Commission cannot advise on this issue, but it will be for the Plenary Session of the Assembly to decide whether impeachment would reduce or increase tensions and ultimately serve or frustrate the goal of mutual checks and balances in a situation where Parliament and all municipalities are dominated by one party.

94. In response to the request for an Opinion by the Speaker of the Albanian Assembly, the Venice Commission comes to the conclusion that, in the absence of a statutory provision on the issue, the President can only cancel elections for local government bodies in a situation which meets the criteria for taking emergency measures. Even then the President needs a specific – ad hoc – legal basis to postpone elections.

95. This conclusion is supported by the general interpretative rule, according to which express regulation of emergency powers in the Constitution and laws restricts recourse to any complementary unwritten emergency powers to very exceptional situations; primarily to situations of factual or legal impossibility which are not explicitly provided for by written emergency law. Cancelling elections is possible only in situations which meet the requirement for declaring a state of emergency. However, the applicable constitutional rules for emergency situations were not followed in this case. Neither was there a political consensus, which would have allowed for the establishment of an ad hoc legal basis.

96. Cancelling elections also affects electoral rights recognised by international human rights instruments and the mere application of actus contrarius is prevented by the requirement of proportionality of any interference.

97. The absence of a legal basis and the availability of alternatives (postponing the elections according to emergency measures under Article 170 of the Constitution or the resumption of political dialogue after the elections) render the interference with the electoral rights non-proportionate.

98. The electoral boycott by political parties, even if they represent an important share of the electorate, cannot prevent regular elections from taking place. Otherwise, these parties would obtain leverage to completely forestall any elections.

99. It will be for the Assembly and finally the Constitutional Court to establish whether cancelling, then postponing the local elections amounts to a violation of the Constitution and whether the violation is of a serious character, which would allow for an impeachment of the President.

342 Case on the impeachment of the President (Park Geun-hye).

343 European Commission for Democracy Through Law, Venice Commission. Albania, Opinion on the scope of the power of the President to set the dates of elections, adopted by the Venice Commission at its 120 plenary session, Venice, 11-12 October 2019, Opinion No. 959/2019, CDL-AD(2019)019, 14 October 2019, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)019-e

344 Ibid.

A serious violation of the Constitution will not necessarily lead to impeachment. Constitutional goals, such as checks and balances are important factors.

100. As set out in this Opinion, a number of factors indicate that may not have been of such a character necessary to substantiate a serious violation. This concerns, notably, the President's calls for dialogue, the expectation that postponing the election would contribute to the pursuit of a compromise between the parties, the lack of a direct challenge of the President's Decrees before a court and the constitutional status of local elections as compared to parliamentary elections.

101. […] although the President may have exceeded his constitutional competences by cancelling and postponing the local elections beyond the electoral mandate of the local authorities without a specific legal basis, these acts might not meet the requisite criteria of sufficient seriousness in the circumstances to warrant an impeachment of the President.

Comparative Analysis and References

The constitutions of Albania, Austria, Croatia, and Montenegro do not specify what a serious violation is. A number of constitutions such as that of Bulgaria partly indicate the grounds, referring to 'high treason and violation of the Constitution'. The Constitution of the Czech Republic is more elaborate, referring to 'high treason, gross violation of the Constitution or other segment of the constitutional order'. It also defines treason as any conduct of the President of the Republic directed against the sovereignty and integrity of the country, as well as against its democratic order. The Constitution of Lithuania lists the grounds that would constitute a serious violation by the President of the Constitution including gross violation of the Constitution, the breach of oath, or the commission of a crime. The German Constitution -in its turn- limits the reasons to the 'willful violation of the Basic Law or any other federal law' only, a solution essentially adopted by the Constitution of Hungary.

Albania

Article 90

1. The President of the Republic is not responsible for actions carried out in the exercise of his duty.
2. The President of the Republic may be dismissed for serious violations of the Constitution and for the commission of a serious crime. In these cases, a proposal for the dismissal of the President may be made by not less than one-fourth of the members of the Assembly and shall be supported by not less than two-thirds of all its members.
3. The decision of the Assembly is sent to the Constitutional Court, which, when it verifies the guilt of the President of the Republic, declares his dismissal from duty.[345]

Austria

Article 60

(6) Before expiry of his term of office, the Federal President can be impeached by referendum. The referendum shall be held if the Federal Assembly so demands. The Federal Assembly shall be convoked by the Federal Chancellor for this purpose if the National Council has passed such a motion. The National Council vote requires the presence of at least half the members and a majority of two thirds of the votes cast. By such a National Council vote the Federal President is prevented from the further exercise of his office. Rejection of the impeachment by the referendum holds good as a new election and entails the dissolution of the National Council (Art. 29 para 1). In this instance too the Federal President's total term of office may not exceed twelve years.[346]

345 Constitution of Albania.
346 Constitution of Austria.

Bulgaria

Article 103

(1) The President and the Vice President shall not incur liability for any actions performed in the discharge of the functions thereof, with the exception of high treason and violation of the Constitution.
(2) Impeachment shall require a motion by at least one-fourth of the National Representatives and shall be pursued by the National Assembly if more than two-thirds of the National Representatives have voted in favor.
(3) The Constitutional Court shall consider an impeachment of the President or Vice President within one month after the impeachment has been entered. Should it be established that the President or Vice President have committed high treason or have violated the Constitution, the credentials of the President or Vice President shall terminate.[347]

Croatia

Article 105

The President of the Republic shall be impeachable for any violation of the Constitution that he/she has committed while discharging his/her duties.

Proceedings for the impeachment of the President of the Republic may be instituted by the Croatian Parliament by a two-thirds majority of all members of Parliament.

The Constitutional Court of the Republic of Croatia shall decide on the impeachment of the President of the Republic by a two-thirds majority of all of its judges.

The Constitutional Court shall make its decision on the impeachment of the President of the Republic within 30 days from the date on which it receives the proposal to impeach the President of the Republic for a violation of the Constitution.

If the Constitutional Court of the Republic of Croatia sustains the impeachment, the President of the Republic shall be relieved of his/her duty by virtue of the Constitution.[348]

Czech Republic

Article 65

(2) The Senate of the Parliament may with the Consent of the Chamber of Deputies of the Parliament lodge a constitutional charge against the President of the Republic for high treason, gross violation of the Constitution, or other segment of the constitutional order before the Constitutional Court; treason is deemed to mean any conduct of the President of the Republic directed against the sovereignty and integrality of the Republic as well as against the democratic order of the republic. Based on the constitutional action the Constitutional Court may hold that the President shall lose the Presidency office and any further eligibility for the office.
(3) For the Senate to admit the proposal for constitutional action the consent of three-fifths majority of the votes of the present senators is required. For the Chamber of Deputies of the Parliament to issue the consent with the filing of constitutional action a three-fifths majority of the votes of all deputies is required: shall the Chamber of Deputies of the Parliament fail to grant the consent within three months from the day when the Senate seeks the consent the consent shall be deemed withheld.[349]

347 Constitution of Bulgaria.
348 Constitution of Croatia.
349 Constitution of Czech Republic.

Germany

Article 61

(1) The Bundestag of the Bundesrat may impeach the Federal President before the Federal Constitutional Court for wilful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority if two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body.
(2) If the Federal Constitutional Court finds the Federal President guilty of a wilful violation of this Basic Law or any other federal law, it may declare he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from executing his functions.[350]

Hungary

Article 13

(1) Criminal proceedings against the President of the Republic may be instituted only after the termination of his or her mandate.
(2) If the President of the Republic wilfully violates the Fundamental Law or, in connection with performing his or her office, any Act, or if he or she commits a wilful criminal offence, one-fifth of the Members of the National Assembly may propose his or her removal from office.
(3) For the impeachment procedure to be instituted, the votes of two thirds of the Members of the National Assembly shall be required. Voting shall be held by secret ballot.
(4) As from the adoption of the decision of the National Assembly, the President of the Republic may not exercise his or her powers until the impeachment procedure is concluded.
(5) The Constitutional Court shall have the power to conduct the impeachment procedure.
(6) If, as a result of the procedure, the Constitutional Court establishes the responsibility of the President of the Republic under public law, it may remove the President of the Republic from office.[351]

Lithuania

Article 74

The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, as well as any Members of the Seimas, who grossly violate the Constitution or breach their oath, or are found to have committed a crime, may be removed from office or have the mandate of a Member of the Seimas revoked by a 3/5 majority vote of all the Members of the Seimas. This shall be performed according to the procedure for impeachment proceedings, which shall be established by the Statute of the Seimas.[352]

Montenegro

Article 98

The mandate of the President of Montenegro shall end with the expiry of time for which he/she was elected, by resignation, if he/she is permanently unable to perform the duty of the President and by impeachment.
The President shall be held responsible for the violation of the Constitution.
The procedure to determine whether the President of Montenegro has violated the Constitution shall be initiated by the Parliament, at the proposal of minimum 25 Members of the Parliament.
The Parliament shall submit the proposal to initiate the procedure to the President of Montenegro for plead.
The Constitutional Court shall decide on existence or non-existence of violation of the Constitution and shall publish the

350 Constitution of Germany.
351 Constitution of Hungary.
352 Constitution of Lithuania.

decision and submit it to the Parliament and the President of Montenegro without delay.
The Parliament may impeach the President of Montenegro when the Constitutional Court finds that he/she has violated the Constitution.[353]

Poland

Article 145

1. The President of the Republic may be held accountable before the Tribunal of State for an infringement of the Constitution or statute, or for commission of an offence.
2. Bringing an indictment against the President of the Republic shall be done by resolution of the National Assembly passed by a majority of at least two-thirds of the statutory number of members of the National Assembly, on the motion of at least 140 members of the Assembly.
3. On the day on which an indictment, to be heard before the Tribunal of State, is brought against the President of the Republic, he shall be suspended from discharging all functions of his office. The provisions of Article 131 shall apply as appropriate.[354]

Serbia

Article 118

The President of the Republic shall be dismissed for the violation of the Constitution, upon the decision of the National Assembly, by the votes of at least two thirds of deputies.
Procedure for the dismissal may be initiated by the National Assembly, upon the proposal of at least two thirds of deputies.
The Constitutional Court shall have the obligation to decide on the violation of the Constitution, upon the initiated procedurefor dismissal, not later than within 45 days.[355]

Slovenia

Article 109

If in the course of carrying out his office, the President of the Republic acts in a manner contrary to this Constitution or commits a serious breach of the law, he may be brought before the Constitutional Court upon the complaint of the National Assembly.
The Constitutional Court shall determine whether the complaint of the National Assembly is well- founded and, if not, shall dismiss the same. If the complaint is determined to be well-founded, the President of the Republic may be dismissed from office upon the vote of no less than two-thirds of all of the judges of the Constitutional Court.
As soon as the Constitutional Court is advised of a reference by the National Assembly of a complaint to it, the Constitutional Court may determine that the President of the Republic shall not carry out the duties of his office until the Constitutional Court decides upon the complaint.[356]

Conclusion

Neither the Constitution nor the Court defines a serious violation of the Constitution. Looking at other constitutional practices, different countries follow various paths, some of them not specifying what a serious violation is (i.e., Austria, Croatia, and Montenegro), others partly indicating the reasons thereof (Bulgaria), some being more elaborate (i.e., Czech Republic), or in need of factual proof of the violation (Lithuania), and others limiting the serious violation to a willful violation of the Constitution or a law (Germany, Hungary). In absence of rules, the seriousness of a violation will be subject to the Court's interpretation on a case-by-case basis. The Court will evaluate the facts

353 Constitution of Montenegro.
354 Constitution of Poland.
355 Constitution of Serbia.
356 Constitution of Slovenia.

of each case, find whether there has been a violation, and determine whether the violation is serious.

However, some threshold or criteria as to what would constitute a serious violation would be helpful. The Court could build one by identifying key determining factors for such criteria in each case. Another option would be for the Constitution to directly include some criteria in its provisions. Since the latter is not practiced a lot in other countries either, foreseeing a criterion by law would also be an alternative.

A definition of the term would allow for a better understanding of the weight of the President's actions regarding the Constitution. It would also help create more certainty when constitutional questions come up in the future.

Recommendations

To address the constitutional gaps, the following options could be considered:

- With no amendments to the Constitution, the Court will have to determine by interpretation -on a case-by-case basis- what a 'serious violation' means;
- A new constitutional provision could expressly define the circumstances or acts and omissions of the President that constitute a serious violation of the Constitution;
- Alternatively, the Constitution could be amended to authorize the Assembly to define - by law- the situations or acts and omissions of the President that constitute 'serious violations of the Constitution.

XII

The Interference of the Government with the Powers of the Assembly in Regulating the Salaries of Specific Government Positions, Senior State Functionaries, and Subordinates

In the absence of a special law on salaries in the public sector and clear constitutional provisions, the question arises whether, and, if so, to what extent can the Government regulate and/or increase the salaries of specific government positions. It is also questionable to what extent can the Assembly entrust the Government, by law, to exercise such function. The Venice Commission's opinion on the draft law on salaries in the public sector and the examples of other countries that regulate salaries by constitutional laws and regulations should form the basis for future constitutional changes.

Kosovo lacks a clear legal basis recognizing the Government's authority to regulate the salaries of specific government positions. At present, there is no special law on salaries in the public sector.

Public officials have a duty to act within the limits of their conferred powers.

The constitutional order of Kosovo is based upon the principles of democracy, respect for human rights and freedoms, and rule of law.[357] Kosovo is a democratic republic based on the principle of separation of powers and checks and balances.[358] The power to govern stems from the Constitution.[359] The Assembly exercises legislative power, which includes the adoption of laws, resolutions, and other general acts.[360] The Government is responsible for the implementation of laws and state policies and is subject to parliamentary control; it has the competence to make decisions and issue legal acts or regulations necessary for the implementation of laws.[361]

Considering these constitutional principles, the question arises whether and, if so, to what extent can the Government regulate and/or increase the salaries of specific government positions, in the absence of a clear legal basis to do so. It is also questionable to which extent can the Assembly entrust the Government, by law, to regulate the salaries of specific government positions.

Relevant Provisions

Constitution of Kosovo

Article 4 [Form of Government and Separation of Power]

1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.
2. The Assembly of the Republic of Kosovo exercises the legislative power.
[…]
4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control.

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

Article 16 [Supremacy of the Constitution]

1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.
2. The power to govern stems from the Constitution.

Article 65 [Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
(1) adopts laws, resolutions and other general acts;

Article 92 [General Principles]

1. The Government consists of the Prime Minister, deputy prime minister(s) and ministers.
2. The Government of Kosovo exercises the executive power in compliance with the Constitution and the law.
3. The Government implements laws and other acts adopted by the Assembly of Kosovo and exercises other activities within

357 Constitution of Kosovo, Article 7 (1).
358 Ibid., Article 4.
359 Ibid, Article 16 (2).
360 Ibid, Article 65 (1).
361 Ibid, Article 92 (3, 4).

the scope of responsibilities set forth by the Constitution and the law.
4. The Government makes decisions in accordance with this Constitution and the laws, proposes draft laws, proposes amendments to existing laws or other acts and may give its opinion on draft laws that are not proposed by it.

Article 93 [Competencies of the Government]

The Government has the following competencies:
[…]
(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws.[362]

Relevant Case-law and options

Cases KO12/18 and KO219/19 are relevant to this matter.[363] The Venice Commission's Rule of Law Checklist,[364] its Opinion on draft Amendments and Additions to the Law on Constitutional Court of Serbia,[365] and the Amicus Curiae Brief for the Constitutional Court of 'The Former Yugoslav Republic of Macedonia' on Amendments to Several Laws Relating to the System of Salaries and Remunerations of Elected and Appointed Officials[366] are also relevant.

Case KO12/18

The Court reviewed the issue of salaries of specific government positions. The Government had changed and raised the gross salaries of a specific list of Government positions. In addition, under specific laws regulating the status of judges and prosecutors (i.e., Law No. 03/L-199 on Courts and Law No. 03/L-225 on State Prosecutor), the increase in salaries of the Prime Minister and Ministers was automatically reflected in the salaries of judges and prosecutors.[367]

Yet, neither the Constitution nor any law authorized the Government to regulate the salaries of specific government positions. Thus, the applicants alleged that through the challenged decision to raise the salaries, the Government had exceeded its constitutional authorizations as well as infringed upon the constitutional competencies of the Assembly.

Concerning the respective competencies of the Government and the Assembly, the Court observed that neither party questions the constitutionally guaranteed competence of the Assembly to adopt the state budget and to exercise its oversight function over the Government.

In this connection, it also noted that Kosovo "does not yet have a law or other special act regulating comprehensively the issue of the salaries in the public sector".[368]

The Court focused on the responses received from member states of the Venice Commission Forum, making it clear that in those states the issue of salaries in the public sector is regulated by law, that is by special normative acts.[369]

The Court emphasized that "in order to avoid such situations whereby the Government makes decisions in a legal vacuum, it is necessary that the issue of salaries in the public sector be regulated comprehensively through an act,

362 Constitution of Kosovo.
363 Constitutional review of the Decision No. 04/20 of the Government of the Republic of Kosovo, of 20 December 2017, Case No. KO12/18, 11 June 2018, at https://gjk-ks.org/wp- content/uploads/2018/06/ko_12_18_mm_ar-gs_ang.pdf; Constitutional review of Law No. 06/L-111 on Salaries in Public Sector, Judgment, Case No. KO219/19, 9 July 2020, at https://gjk-ks.org/wp- content/uploads/2020/07/gjk_ko_219_19_agj_ang.pdf.
364 European Commission for Democracy Through Law, Venice Commission, Rule of Law Checklist adopted by the Venice Commission at its 106 plenary session, Venice, 11-12 March 2016, endorsed by the Ministers' Deputies at the 1263 meeting (6-7 September 2016), Study No. 711/2013, CDL-AD(2016)007rev, 18 March 2016, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e
365 European Commission for Democracy Through Law, Venice Commission, Draft Opinion on Draft Amendments and Additions to the Law on the Constitutional Court of Serbia, Opinion No. 647/2011, CDL- (2011)097, 2 December 2011, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)050cor-e
366 European Commission for Democracy Through Law, Venice Commission, Amicus Curiae Brief for the Constitutional Court of 'the Former Yugoslav Republic of Macedonia' on amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, adopted by the Venice Commission at its 85 plenary session, Venice, 17-18 December 2010, Opinion No. 598/2010, CDL- AD(2010)038, 20 December 2010, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)038-e
367 Case No. KO12/18, para 25.
368 Ibid., para. 98.
369 Ibid., para. 99.

namely a special law (as is the practice in the countries of Venice Commission Forum)."[370]

The Court considered "that in accordance with the executive nature of the Government's competences, the functioning of the Government is closely related to the process of the adoption and implementation of the state budget".[371] In this regard, the Court noted that "one of the main constitutional functions of the Government, as provided in Article 92.3, is the implementation of laws and other acts adopted by the Assembly of Kosovo".[372] The Court recalled that the state institutions must exercise their authorizations based on the Constitution and the law.[373] Also, it reminded that "[t]he Assembly is the institution that has the responsibility to exercise the legislative power, whereas the Government exercises executive power based on the Constitution and the laws adopted by the Assembly."[374]

As to the main allegation that the Government through the challenged decision infringed upon the competencies of the Assembly, the Court recalled that on 22 December 2017 the Assembly adopted the Law on Budget for 2018 thereby exercising its constitutional function as regards the adoption of the state budget.[375]

In addition, the Court noted that the Government proposed the draft budget for 2018, which was approved by the Assembly.[376] Further, the Court noted, "that it is not its role to make hypothetical assessments regarding the way how the state budget is implemented by the Government, including the implementation of the challenged decision".[377] This way, it considered "that the Applicants did not prove how the Government has violated the constitutional competencies of the Assembly regarding the approval of the state budget or any other constitutional competence".

Consequently, the Court was not convinced that the decision to raise the salaries constitutes a matter of the constitutional level."[378] More specifically, it stated as follows:

111. In the light of the allegations and arguments presented above, the Court considers that the Assembly was not infringed upon or prevented from exercising its constitutional competencies regarding the approval and implementation of the state budget.

112. However the Court also notes that the sublegal acts of Government should be in compliance with the Constitution and the laws. Moreover, the Court emphasizes that, in compliance with the executive nature of its constitutional powers, the Government is obliged to implement the state budget approved by the Assembly. Therefore, it is the obligation of the Government to support the implementation of the challenged decision in the budget allocations determined in the Budget for 2018 and in the relevant laws.[379]

The Court underlined the constitutional function of the Government -pursuant to Article 92(3) of the Constitution- for the implementation of laws and other acts adopted by the Assembly.24 It also underlined that there is no law or other special act in place regulating comprehensively the issue of the salaries in the public sector.[380]

However, the Court was satisfied with the fact that despite the lack of a legal basis in any law for the government to regulate the salaries of senior public officials, the practice established in Kosovo, since 2004, is to increase salaries by administrative decisions of the Government.[381]

In addition, it also pointed out that there might be enough budget to accommodate the salaries of the affected officials at that moment or at a later stage.[382]

370 Ibid., para. 101.
371 Ibid., para. 102.
372 Ibid., para. 103.
373 Ibid.
374 Ibid., para. 27.
375 Ibid., para. 106.
376 Ibid., para. 108.
377 Ibid., para. 110.
378 Case No. KO12/18.
379 Ibid., para. 103.
380 Ibid., para. 98.
381 Ibid., para. 100.
382 Ibid.

Yet, it needs to be taken into account that salaries and remuneration of judges cannot be subject to regulation directly and indirectly by the Government. Rather, these should be regulated in a specific law on the Assembly and, as specified by the Venice Commission, not through the Law on Budget, which is subject to annual approval and amendments.

Case No. KO219/19

The Ombudsperson and thirty-five (35) other institutions in Kosovo challenged the constitutionality of Law No. 06/L-111 on Salaries ("Law on Salaries") in the public sector.[383] They questioned the compatibility of the law with the key constitutional principles such as Separation of powers as set forth under article 4 of the Constitution,[384] Equality before the law; with the challenged law creating a divergent situation for equivalent positions, which have been assessed with different salary levels,[385] The Protection of Property rights; with the law violating the property of individuals or groups in the public sector, whereas a reduction of salaries in several entities in the public sector has to be carried out in conformity with Article 55 of the Constitution,[386] and rule of law.[387]

In the final judgment, the Court declared the law unconstitutional in terms of violation of the principles of 'separation of powers' and 'legal certainty.'[388]

There is no single possible system of salary regulation in the public sector.

The Court concluded that most countries regulate salaries through different laws and at the same time apply different methods by regulating this issue either through specific laws or specific sectors or with some more concentrated regulation. The Assembly –as a legislative body- has the competence and right to issue any kind of legislation on the regulation of salaries in the public sector, provided that it is in accordance with the Constitution and constitutional principles; the reduction of salaries of the judiciary can only occur under conditions of a pronounced economic and financial crisis to be recognized as such.[389]

Under Article 1 of the challenged law, its scope and purpose are to determine "the system of salaries and remunerations for Public Officials and Functionaries paid from the state budget, excluding the Kosovo Intelligence Agency (KIA) and Kosovo Security Force (KSF) setting forth the rules for determining the salaries for employees of publicly owned enterprises in Kosovo, and defining the criteria for transitional salary and other benefits after the end of the function of the public functionary with special status, as well as for former high officials."[390]

As for the harmonization of the system of salaries and remunerations for all those paid from the state budget, the Court noted that the exceptions for KIA and KFS were not suggested by the Government but were added as amendments to the Assembly. In the meantime, the legislator has determined that even though KIA and KSF are paid from the state budget, their salaries won't be defined by the Law on Salaries but through other legislation applicable to them. However, no reason for this exception has been provided.[391]

Moreover, it is unknown to the Court the reason why the Central Bank of Kosovo -as one of the independent institutions listed under Chapter XII of the Constitution- does not appear anywhere in the challenged law. Therefore, it is unclear to the Court how these exemptions provided for in this law have contributed to the primary purpose of the law to regulate the system of salaries and remuneration for all public officials and functionaries, paid from the state's budget. This does not mean -in the Court's view- that the Assembly cannot make exemptions. Yet, the

383 The Ministry of Public Administration (MPA) started the drafting of the Law in 2018, and this was approved - with Decision No. 08/63- the Draft Law on Salaries- on 3 September 2018 by the Government.
384 Case No. KO219/19, para. 58.
385 Ibid., para. 66.
386 Ibid., para. 68. This provides for the limitation of fundamental rights and freedoms, the essence of the limited right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and the goal to be achieved, along with the possibility of achieving that goal with less limitation.
387 Ibid., para. 92.
388 Ibid., para. 308.
389 Ibid., para. 233.
390 Ibid., para. 262.
391 Ibid., para. 263.

Assembly cannot undertake arbitrary and unreasonable exemptions leading to confusion and unequal treatment among those paid from the state budget.[392]

Opinion of the Venice Commission

According to the Rule of Law Checklist of the Venice Commission, which -among others- refers to the jurisprudence of the Court of Justice of the European Union, "rule of law includes supremacy of law, the institutional balance, judicial review, (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality".[393]

A basic requirement of the rule of law is that the powers of the public authorities are defined by law.

According to the Venice Commission, the principle of rule of law requires that public officials have authority to act and that they subsequently do so within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law.[394]

To ensure that the principle of rule of law is observed, state actions must be by and authorized by law.[395] It is contrary to the rule of law, according to the Venice Commission, for executive discretion to be unfettered power. Otherwise said, the law must indicate the scope of any such discretion, to protect against arbitrariness.[396]

The actions of the Government, including the regulation of salaries of public officials, must have a clear legal basis in the Constitution and/or a law emanating from the Assembly.

The budget of the judiciary needs special attention, including the salaries and remuneration of judges and prosecutors, whereby the actions of the Government must not only be lawful but must also ensure that the independence of the judiciary is respected. In this regard, the Venice Commission has specified -in the Rule of Law Checklist- that sufficient resources are essential to ensuring judicial independence from state institutions.

Accordingly, executive power to reduce the judiciary's budget is one example of how the resources of the judiciary may be placed under undue pressure.[397]

On the salaries of judges, the Venice Commission specified that "in order to protect their independence, the salaries of the president and the judges of the Constitutional Court (and the ordinary judges) should be determined by the law and not be submitted to an annual vote in Parliament on the budget". It also pointed out that "the coefficient applied should be fixed in the law on the Constitutional Court itself".[398]

Furthermore, the Venice Commission's Amicus Curiae Brief for the Constitutional Court of 'The Former Yugoslav Republic of Macedonia' on Amendments to Several Laws Relating to the System of Salaries and Remunerations of Elected and Appointed Officials specifies that the prohibition to decrease the remuneration of judges is expressly set out in the constitution.[399]

However, "in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary".[400]

392 Ibid., para. 264.
393 Venice Commission, Study No. 711 / 2013, para. 41.
394 Ibid., para. 45.
395 Ibid., para. 44.
396 Ibid., para. 65.
397 Ibid., para. 83.
398 Venice Commission, Opinion No. 647/2011, para. 18.
399 Venice Commission, Opinion No. 598/2010, para. 16.
400 Ibid., para. 20.

Otherwise said, "[…] it is not compatible with the position of the Constitutional Court that it is considered as anything other than a court to which the principle of judicial independence is applicable. The conclusion must be, therefore, that if the legislator was guided by the principle of judicial independence as implying that the salaries of judges may not even be reduced in the situation of crises, [then] that same principle must likewise be applied to the members of the Constitutional Court".[401]

In short, the actions of the Government regarding the regulation of salaries of specific government positions must be authorized by a law emanating from the Assembly. In addition, further guarantees must be provided when it comes to the salaries of the judges, as public officials, to protect the independence of the judiciary. In this regard, firstly, their remuneration must be commensurate with the dignity of a judge's profession and their burden of responsibility. Secondly, and more importantly, the salaries and remuneration of judges cannot be subject to regulation by the Government, even if the law provides for such competence. This implies that the parliament cannot delegate to the Government the competence to regulate the salaries of judges. Therefore, it is a requirement of the rule of law principle that a specific law regulates the salaries and remuneration of judges, except for the Law on Budget which is subject to annual approval and amendments.

The **Rule of Law Checklist** states explicitly as follows:

41. [...] According to the case law of the Court of Justice of the European Union, the Rule of Law includes the supremacy of law, the institutional balance, judicial review, (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality.

44. State action must be in accordance with and authorised by the law […].

49. Unlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature. […]

53. Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced. The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers. […]

65. It is contrary to the Rule of Law for executive discretion to be unfettered power. Consequently, the law must indicate the scope of any such discretion, to protect against arbitrariness.

74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. […].

75. The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial.

83. Sufficient resources are essential to ensuring judicial independence from State institutions, and private parties, so that the judiciary can perform its duties with integrity and efficiency, thereby fostering public confidence in justice and the Rule of Law. Executive power to reduce the judiciary's budget is one example of how the resources of the judiciary may be placed under undue pressure.

85. […] Finally, fair and sufficient salaries are a concrete aspect of financial autonomy of the judiciary. They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals.[402]

401 Ibid., para. 27.
402 Venice Commission, Study No. 711 / 2013.

Opinion on draft Amendments and Additions to the Law on Constitutional Court of Serbia, Adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011)

17. […] In order to protect their independence, the salaries of the president and the judges of the Constitutional Court (and the ordinary judges) should be determined by law and not be submitted to an annual vote in Parliament on the budget. The coefficient applied should be fixed in the Constitutional Court Law itself.[403]

Amicus Curiae Brief for the Constitutional Court of 'The Former Yugoslav Republic of Macedonia' on Amendments to Several Laws Relating to the System of Salaries and Remunerations of Elected and Appointed Officials (Opinion No. 598/2010 of 20 December 2010)

11. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria […].

16. In some countries, the prohibition to decrease the remuneration of judges is expressly set out in the constitution. For example, Article 3, Section I of the Constitution of the United States of America contains a direct prohibition to diminish a judges' remuneration during his or her term in office.

17. Some constitutional courts have decided that even in a situation when a state experiences financial difficulties, the judges' salaries must be especially protected against excessive and adverse fluctuations; see for instance the Judgment of 18 February, 2004 by the Constitutional Tribunal of Poland. The Constitutional Court of the Republic of Lithuania has ruled that any attempt to decrease judges' remuneration or social guarantees or decrease the budget for the courts should be interpreted as an infringement upon the independence of the judiciary (Judgment of 6 December, 1995). The Constitutional Court of the Czech Republic was of the opinion that the judge has inalienable rights to an unreduced salary (Judgment of 15 September 1999), but a temporary, justified freeze of judges' gross salaries cannot be considered as interfering with their independence (Judgment of 2 March 2010). And the Slovenian Constitutional Court has declared that "[p]rotection against a reduction of the salary of an individual judge, if such is intended to ensure its stability and consequently the judge's independence, must namely be understood as protection against any interference which might cause a reduction of the judge's salary which the judge justifiably expected upon assuming office." (Judgment of 7 December, 2006).

20. […] in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges' salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge's profession and his or her burden of responsibility. If the reduction does not comply with the requirement of the adequacy of remuneration, the essence of the guarantee of the stability of conditions of judge's remuneration is infringed to a degree that the basic aim, pursued by that guarantee, i.e. a proper, qualified and impartial administration of justice is threatened, even leading to a danger of corruption.

21. As several constitutional courts (see paras. 18 and 19) have argued, an exceptional situation justifying a reduction of the salaries of judges may exist when for good reasons the legislature finds it necessary to cut the salaries of all state officials. In such a situation, a general reduction of salaries funded by the state budget may include the judiciary and cannot be qualified as a breach of the principle of the independence of judges […].

An exceptional situation justifying a reduction of the salaries of judges may exist when a country suffers considerably from the consequences of an economic crisis.

27. […] it is not compatible with the position of the Constitutional Court that it is considered as anything other than a court to which the principle of judicial independence is applicable. The conclusion must be, therefore, that if the legislator was guided by the principle of judicial independence as implying that salaries of judges may not even be reduced in the situation of crises, then that same principle must likewise be applied to the members of the Constitutional Court.[404]

403 Venice Commission, Opinion No. 647/2011.
404 Venice Commission, Opinion No.598/2010.

Conclusion

The Government may regulate the salaries of specific government positions only upon authorization by a law emanating from the Assembly. Yet, Kosovo has followed a questionable pattern in practice so far, especially with the Law on Salaries in the public sector being challenged before the court and declared invalid for violating serious constitutional principles of separation of powers and legal certainty.

Kosovo should follow the example of other countries the majority of which regulate salaries by law and regulations. This modus operandi is in line with the Venice Commission's recommendations on preserving rule of law and unfettered power upon the Executive.

To prevent similar practices and confusion in the future, some changes to the Constitution could provide for more explicit provisions on the legal basis and the scope of the Government's authority to regulate public salaries.

Recommendations

To address the gaps outlined above, the following options for an amendment could be considered:

- A new constitutional provision could explicitly state that any government action and decision must have a specific legal basis in the Constitution or the law.
- Alternatively, a new constitutional provision could specify that the salaries and remuneration of judges and prosecutors must be regulated by a law adopted by the Assembly and not become subject to regulation, directly or indirectly, by the Government.

XIII

The Political Party or Coalition of Political Parties Entitled to Form the Government

The Constitution provides that the "political party or coalition that has won the majority in the Assembly" may propose a candidate for Prime Minister, without clarifying whether it should be an absolute or relative majority. It does not define the role of the President in determining that, either. The Court brought some clarity to these matters, yet the procedure needs further constitutional clarity. Amendments to the Constitution could avoid delays and obstructions in the functioning of institutions.

The Constitution is unclear on which political party or coalition of political parties may propose a candidate for Prime Minister, and what role the President plays in determining that.

It is unclear whether the Constitution refers to an absolute or relative majority for the nomination of a candidate for Prime Minister.

Articles 84(14) and Article 95(1) refer to the "political party or coalition that has won the majority in the Assembly" without specifying whether that should be an absolute or a relative majority. Article 95(3) on the other hand provides that the new government should receive "the majority of all deputies of the Assembly of Kosovo," thus referring to an absolute majority. Moreover, the Constitution is silent on what party or coalition proposes the new candidate for Prime Minister if the first round of the Government's election fails, and what discretion the President has in deciding that. Such ambiguities created uncertainties in practice and were brought to the Court for interpretation.

The power of the President to appoint the Prime Minister, in consultation with the winning party or coalition in the Assembly, is a common feature of parliamentarian systems.

The procedure for the election of the Government begins with the President's proposal for a candidate for a Prime Minister, in consultation with the political party or coalition that has won the majority."[405] The President then "appoints the candidate for Prime Minister for the establishment of the Government after a proposal by the political party or coalition holding the majority in the Assembly."[406] The nominated candidate for Prime Minister presents -not later than 15 days from his/her appointment- the composition of the Government to the Assembly for a vote.[407] In case the proposed Government does not receive the necessary votes from the Assembly, then the President nominates another candidate for Prime Minister. If the newly proposed Government does not obtain support from the Assembly, then the President announces general elections.[408]

When there is a clear parliamentary majority, the power to appoint the Prime Minister is exercised as a formality by the President.[409] The political party or coalition that has obtained an absolute majority will also be able to obtain the votes for the formation of the government.

Otherwise, the party or coalition with a relative majority is entitled to form the government. In cases of fragmented political systems or a multi-party system operating with a proportional representation in which no party or coalition has obtained an absolute majority, the party or coalition that has obtained a relative majority should propose the candidate for Prime Minister. This was also the view of the Court in Case KO103/14,[410] regarding the obligation of the President to consult with the political party or coalition winning the majority in the Assembly -be it absolute or relative- for appointing a candidate as a Prime Minister.

Relevant Provisions

Constitution of Kosovo

Article 95 [Election of the Government]

1. After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.
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.

405 Constitution of Kosovo, Article 95(1).
406 Ibid., Article 84(14).
407 Ibid., Article 95(2).
408 Ibid., Article 95(4).
409 Anthony W. Bradley and Cesare Pinelli, Parliamentarism, in Michel Rosenfeld and András Sajó, The Oxford Handbook of Comparative Constitutional Law 2012, page 580.
410 Judgment concerning the assessment of the compatibility of Article 84(14) [Competencies of the President] with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo, Case No. KO103/14, 1 July 2014, at https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_103_14_ang.pdf.

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.

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
[….]
(14) appoints the candidate for Prime Minister for the establishment of the Government after proposal by the political party or coalition holding the majority in the Assembly […].[411]

Relevant Case-law

Case KO103/14 is relevant in this matter. It determined the party or coalition entitled to form the Government following the (early) parliamentary elections of 8 June 2014, as well as the procedure to follow in case the first proposed Government does not obtain the necessary majority in the Assembly. The Court answered two questions: 1) which political party or coalition may propose to the President the candidate for Prime Minister, and 2) what the President's discretion is in determining that in each of the Government's election rounds.

It is the party or coalition that has secured a majority, be it absolute or relative, that has the right to propose the Prime Minister to the President of the Republic.

The Court considered that the words "necessary to establish the Government" mean the political party or coalition that has enough seats in the Assembly to constitute the majority.[412] The Court also gave a wide interpretation of 'majority' by ruling that 'the President of the Republic can only consult with the political party or coalition that has won the majority in the Assembly be it absolute or relative.'[413]. In case of a relative majority, that party or coalition will then have to proceed with negotiations with other political parties in the Assembly to form the Government.[414] The President does not have the discretion to approve or disapprove the nomination of the candidate for Prime Minister by the political party or coalition.[415]

The President has no discretion on the appointment of the Prime Minister on the first round.

The President has discretion to determine which political party or coalition will nominate another candidate for Prime Minister on the second round.

If the election of the Government fails the first time, the President appoints another candidate through the same procedure. The main question here is which party or coalition would have the right to propose the new candidate for Prime Minister because as the Court stated, the Constitution is silent in this regard.[416] The Court's interpretation gives some discretion to the President to decide which party or coalition will have the mandate to propose another candidate for Prime Minister, after consultation with parties or coalitions.[417] The President may also decide to give the same party or coalition

411 Constitution of Kosovo.
412 Case No. KO103/14, para. 85.
413 Ibid., para. 84.
414 Ibid.
415 Ibid., para 88.
416 Ibid., para. 90.
417 Ibid., para. 90.

another chance to propose another candidate.[418]

The President must preserve the stability of the country and avoid elections.

Yet, the President does not have unfettered discretion. When deciding, the President must keep in mind the stability of the country and efficiency in the establishment of the institutions.[419]

Comparative Analysis and References

In parliamentary systems, the head of state is involved in the designation of the Prime Minister, who is then mandated to form a government. In Albania, Bulgaria, Croatia, Slovenia, and North Macedonia, the President appoints the Prime Minister subject to voting by the Assembly.

As for the scenario of relative majority, this is explicitly provided for in Article 37(2) of the Greek Constitution which states that "[...] [i]f no party has the absolute majority, the President of the Republic shall give the leader of the party with a relative majority an exploratory mandate to ascertain the possibility of forming a Government enjoying the confidence of the Parliament."[420] In case the designated prime minister with this exploratory mandate fails to form the Government, the President will give the exploratory mandate to the leader of the second- largest party in Parliament, and in case s/he fails, to the leader of the third-largest party in Parliament.[421] Clearly, the Constitution limits the discretion of the President.

Similarly, the Constitution of Bulgaria gives explicit guidance to the President of the Republic to initially form a government with the coalition or the party that holds the highest number of seats in the National Assembly.[422]

In case this attempt fails, the task of Government formation is entrusted to a Prime Minister designate nominated by the second largest parliamentary group. Should this Prime Minister- designate also fail to form a government within seven days, then the President will entrust the task to a Prime minister designate nominated by one of the minor parliamentary groups. In case this fails, then the President of Bulgaria shall appoint a caretaker government, by dissolving the National Assembly and scheduling new elections.[423]

Albania

Article 96

1. At the beginning of a legislature, as well as when the position of Prime Minister is vacant, the President of the Republic appoints the Prime Minister on the proposal of the party or coalition of parties that has the majority of seats in the Assembly.
2. If the Prime Minister appointed is not approved by the Assembly, the President appoints a new Prime Minister within 10 days.
3. If the newly appointed Prime Minister is not approved by the Assembly, the Assembly elects another Prime Minister within 10 days. In this case, the President appoints the new Prime Minister.
4. If the Assembly fails to elect a new Prime Minister, the President of the Republic dissolves the Assembly.[424]

Bulgaria

Article 99

1. Following consultations with the parliamentary groups, the President shall ask a Prime Minister- designate, nominated by the numerically largest parliamentary group, to form a government.

418 Ibid. para. 91.
419 Ibid. para. 94.
420 Constitution of Greece, Article 37(2).
421 Ibid., Article 37(3).
422 Case No. KO103/14, para. 32(1); Constitution of Bulgaria Article 99 (1).
423 Case No. KO103/14, para. 32; Constitution of Bulgaria, Article 99 (2-5).
424 Constitution of Albania.

2. Should the Prime Minister-designate fail to propose a list of members of the Council of Ministers within seven days, the President shall entrust this task to a Prime Minister-designate nominated by the numerically second largest parliamentary group.
3. Should a list of members of the Council of Ministers be not proposed in this case, either, the President shall ask some of the next largest parliamentary groups to nominate a Prime Minister- designate within the time limit established in the foregoing Paragraph.
4. Should the exploratory mandate have been successfully fulfilled, the President shall propose to the National Assembly to elect the Prime Minister-designate.
5. Should no agreement be reached on the formation of a government, the President shall appoint a caretaker cabinet, shall dissolve the National Assembly, and shall schedule new elections within the time limit established by Article 64 (3) herein. The act whereby the President shall dissolve the National Assembly shall furthermore appoint a date for elections of a new National Assembly.[425]

Croatia

Article 98

The President of the Republic shall:
[…]
entrust the mandate to form the Government to a person who, based on the distribution of seats in the Croatian Parliament and completed consultations, enjoys the confidence of the majority of all Members of Parliament [...].

Article 109

Members of the Government shall be proposed by the person to whom the President of the Republic has entrusted the mandate to form a Government.
Immediately upon forming the Government, or 30 days after accepting the mandate at the latest, the Prime Minister-Designate shall present the Government and its policies to the Croatian Parliament and seek a vote of confidence.
The Government shall assume office when a vote of confidence is passed by a majority of all Members of the Croatian Parliament.

Article 109a

If the Prime Minister-Designate fails to form a government within 30 days of accepting the mandate, the President of the Republic may extend such mandate for a maximum of an additional 30 days.
If the Prime Minister-Designate fails to form a Government in such an extended period or if the proposed Government fails to secure a vote of confidence from the Croatian Parliament, the President of the Republic shall confer the mandate to form a Government to another person.

Article 109b

If no Government is formed in accordance with Articles 109 and 109a of the Constitution, the President of the Republic shall appoint an interim non-partisan Government and simultaneously call an early election for the Croatian Parliament.[426]

Greece

Article 37

1. The President of the Republic shall appoint the Prime Minister and on his recommendation shall appoint and dismiss the other members of the Cabinet and the Undersecretaries.
2. The leader of the party having the absolute majority of seats in Parliament shall be appointed Prime Minister. If no party has the absolute majority, the President of the Republic shall give the leader of the party with a relative majority an exploratory

425 Constitution of Bulgaria.
426 Constitution of Croatia.

mandate in order to ascertain the possibility of forming a Government enjoying the confidence of the Parliament.
3. If this possibility cannot be ascertained, the President of the Republic shall give the exploratory mandate to the leader of the second largest party in Parliament, and if this proves to be unsuccessful, to the leader of the third largest party in Parliament. Each exploratory mandate shall be in force for three days. If all exploratory mandates prove to be unsuccessful, the President of the Republic summons all party leaders, and if the impossibility to form a Cabinet enjoying the confidence of the Parliament is confirmed, he shall attempt to form a Cabinet composed of all parties in Parliament for the purpose of holding parliamentary elections. If this fails, he shall entrust the President of the Supreme Administrative Court or of the Supreme Civil and Criminal Court or of the Court of Auditors to form a Cabinet as widely accepted as possible to carry out elections and dissolves Parliament.[427]

Republic of North Macedonia

Article 84

The President of the Republic of Macedonia nominates a mandatary to constitute the Government of the Republic of Macedonia.

Article 90

Within 10 days of the establishment of the Assembly, the President of the Republic of Macedonia shall entrust the mandate for constituting the Government to a candidate belonging to the party or the parties which has/have a majority in the Assembly. Within 20 days from the day of being entrusted with the mandate, the mandatary submits a programme to the Assembly and proposes the composition of the Government. Upon the proposal of the mandatary and on the basis of the submitted programme the Government is appointed by the Assembly by a majority vote of the total number of Representatives.[428]

Montenegro

Article 95: Responsibility

The President of Montenegro:
[…]
5. Proposes to the Parliament: candidate for the Prime Minister, after consultations with the representatives of the political parties represented in the Parliament; President and judges of the Constitutional Court; Protector of Human rights and Liberties;

Article 102: Composition of the Government

The Government shall consist of the Prime Minister, one or more Deputy Prime Ministers and the ministers.
The Prime Minister represents the Government and manages its work.

Article 103: Election

The President of Montenegro proposes the mandator within 30 days from the day of constitution of the Parliament. The candidate for the position of the Prime Minister presents to the Parliament his/her program and proposes composition of the Government.
The Parliament shall decide simultaneously on the program of the mandator and the proposal for the composition of the Government.[429]

427 Constitution of Greece.
428 Constitution of North Macedonia.
429 Constitution of Montenegro.

Slovenia

Article 111 (Election of the President of the Government)

After consultation with the leaders of deputy groups the President of the Republic proposes to the National Assembly a candidate for President of the Government.
The President of the Government is elected by the National Assembly by a majority vote of all deputies unless otherwise provided by this Constitution. Voting is by secret ballot.
If such candidate does not receive the necessary majority of votes, the President of the Republic may after renewed consultation propose within fourteen days a new candidate, or the same candidate again, and candidates may also be proposed by deputy groups or a minimum of ten deputies. If within this period several candidates have been proposed, each one is voted on separately beginning with the candidate proposed by the President of the Republic, and if this candidate is not elected, a vote is taken on the other candidates in the order in which they were proposed.
If no candidate is elected, the President of the Republic dissolves the National Assembly and calls new elections, unless within forty-eight hours the National Assembly decides by a majority of votes cast by those deputies present to hold new elections for President of the Government, whereby a majority of votes cast by those deputies present is sufficient for the election of the candidate. In such new elections a vote is taken on candidates individually in order of the number of votes received in the earlier voting and then on the new candidates proposed prior to the new vote, wherein any candidate proposed by the President of the Republic takes precedence.
If in such elections no candidate receives the necessary number of votes, the President of the Republic dissolves the National Assembly and calls new elections.[430]

Conclusion

The Court brought some clarity to the ambiguous text of the Constitution. In line with its interpretation, the political party or coalition that won either the absolute or relative majority may propose a candidate for Prime Minister to the President. The latter must assure the appointment of that candidate. If this round fails, the procedure repeats but with more discretion of the President in determining the political party or coalition that will propose the new candidate.

This is practical in a country with a fragmented political spectrum such as Kosovo, where it may be a bit more difficult for one party or coalition to obtain an absolute majority in the Assembly. Yet, this procedure needs more constitutional clarity to prevent similar or other political and procedural conflicts in the future, and to avoid delays in the formation and functioning of the institutions.

Recommendations

To provide further clarity on this matter, the following options could be discussed:

- Article 95(1) could be reformulated as follows: "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 highest number of seats in the Assembly". This formulation would reflect the interpretation of the Court and would make clear that a relative majority is enough to entitle a party or coalition to propose the candidate for the Prime Minister;
- Article 95(4) of the Constitution could remain as it is, but it has to be applied in light of the Court's interpretation;
- Alternatively, the Constitution could be amended following the model employed by the Greek or Bulgarian Constitution. Thus, Article 95(4) could state: "If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo, within ten (10) days, appoints another candidate for Prime Minister from the second-largest party in the Assembly with the same procedure. If the Government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held no later than forty (40) days from the date of the announcement".

430 Constitution of Slovenia.

XIV

The Procedure and Scope of the President's Power to Nominate a New Candidate for Prime Minister after a Successful Vote of No-Confidence

Kosovo follows a destructive model of a vote of no-confidence with the simultaneous election of a new Government, and this is in line with the practice of other countries such as Austria, Croatia, Montenegro, and Serbia. Yet, the Constitution leaves a few matters unclear, including (i) the authority of the President to nominate a candidate for Prime Minister after a successful vote of no-confidence; (ii) the procedure for the formation of a new government; and (iii) whether the President must dissolve the Assembly after the successful vote of no-confidence. Possible constitutional changes could fill in the gaps and ensure efficient proceedings.

The Constitution needs more clarity on three issues with regards to the election of the Government after a motion of no-confidence: 1) the authority of the President to nominate a candidate for Prime Minister after a successful vote of no-confidence, 2) the procedure to be followed for the election of a new government, and 3) if the President must dissolve the Assembly after a successful vote of no-confidence.

The destructive model of a vote of no-confidence foresees the failure of the previous executive to get enough votes in the secret ballot, independently from the prospect of a positive majority for a successor.[431] This way, it is in line with the practice of some other countries (i.e., Austria, Croatia, Montenegro, and Serbia).

Kosovo follows the destructive model of a vote of no-confidence without the simultaneous election of a new Government.

The Court's case law and the Venice Commission address the role of the President to propose to the Assembly the candidate for Prime Minister. The President must act in coordination with the Assembly in case of a motion of no-confidence against the Government. The President's duty to represent the state relates to her/his responsibility to maintain the stability of the country and to find prevailing criteria for the formation of the new government, to avoid elections.

As the Venice Commission recognizes, the dissolution of the Assembly by the President and the formation of a new government should be looked at as an ultima ratio, when no other option is available. On the contrary, if other possibilities do exist, parties representing a parliamentary majority agree to the formation of a government.

The Constitution does not provide for specific time limits for the election of the new Government, either. All these gaps call for improvement of the Constitution.

Relevant Provisions

Constitution of Kosovo

Article 65 [Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
(8) elects the Government and expresses no confidence in it;

Article 82 [Dissolution of the Assembly]

2. The Assembly may be dissolved by the President of the Republic of Kosovo following a successful vote of no confidence against the Government.

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
(14) appoints the candidate for Prime Minister for the establishment of the Government after proposal by the political party or coalition holding the majority in the Assembly.

Article 95 [Election of the Government]

1. After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.
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

431 On the contrary, a constructive vote of no-confidence -a variation on the motion of confidence- allows the parliament to withdraw confidence from a head of government only if there is a positive majority for a prospective successor. The principle is intended to ensure governments' stability, by making sure that a replacement has enough parliamentary support to govern.

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.

Article 100 [Motion of No Confidence]

1. A motion of no confidence may be presented against the Government on the proposal of one-third (1/3) of all the deputies of the Assembly.
2. A vote of confidence for the Government may be requested by the Prime Minister.
3. The motion of no confidence shall be placed on the Assembly agenda no later than five (5) days nor earlier than two (2) days from the date it was presented.
4. The motion of no confidence is considered accepted when adopted by a majority vote of all deputies of the Assembly of Kosovo.
5. If a motion of no confidence fails, a subsequent motion for no confidence may not be raised during the next ninety (90) days. 6. If a motion of no confidence against the Government prevails, the Government is considered dismissed.[432]

Relevant Case-law and Opinions

Case KO72/20 is applicable in this matter.[433] The Venice Commission's Opinion on the Constitutional Situation with Particular Reference to the Possibility of Dissolving Parliament (Republic of Moldova) is also of relevance.[434]

In Case KO72/20, on 25 March 2020, the Assembly passed a vote of no-confidence against the Government.[435] Following the successful vote, the President requested Vetevendosje (VV), the political party with the relative majority in the Assembly of Kosovo, to nominate a new candidate for Prime Minister. VV insisted that the Assembly should be dissolved, and new elections are held.[436] The President invited VV -on several further occasions- to propose a candidate for Prime Minister, but no candidate was put forward. On 29 April 2020, the President asked the LDK (second largest party) to propose a candidate for the formation of the Government.[437] On 30 April 2020, LDK proposed Avdullah Hoti for Prime Minister and the President nominated Hoti to form the new government on the same day.[438] The decree was challenged as being in violation of several provisions of the Constitution. The Court assessed the following:

- whether after the successful vote of no confidence against the Government, as defined in Article 100 of the Constitution, the President, pursuant to Article 82(2) of the Constitution, is obliged to dissolve the Assembly, namely if the successful vote of no confidence prevents the election of a new Government;[439]
- what is the procedure to be followed for the formation of a new government, after a successful vote of no confidence by the Assembly, and more precisely the interconnection of Article 100 of the Constitution regarding the Motion of No Confidence in Article 95 of the Constitution referring to the Election of the Government;[440]
- whether under the circumstances of the present case, that is after the motion of no confidence vote by two-thirds (2/3) of all the deputies of the Assembly on 25 March 2020, the procedure followed for the formation of the new

432 Constitution of Kosovo.
433 Constitutional review of decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020, Case No. KO72/20, 1 June 2020, at https://gjk-ks.org/wp-content/uploads/2020/06/ko_72_20_agj_ang.pdf.
434 European Commission for Democracy Through Law, Venice Commission, Republic of Moldova Opinion on the Constitutional situation with particular reference to the possibility of dissolving Parliament adopted by the Venice Commission at its 119 plenary session, Venice, 21-22 June 2019, Opinion No. 954/2019, CDL- AD(2019)012, 24 June 2019, at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)012-e.
435 Case No. KO72/20, para. 39.
436 Ibid., para. 42.
437 Ibid., para. 56.
438 Ibid., para. 512.
439 Ibid., para. 268.
440 Ibid.

government and the appointment of the candidate for Prime Minister, has resulted in a constitutional Decree or not.[441]

The relevant passages of the Court's reasoning are as follows:

353. All powers without exception, be they part of the classical triangle of separation of powers, or other important part of the structure of the state, have a constitutional obligation to co-operate with each other for the common good and in the best interest of all citizens of the Republic of Kosovo. All these powers have the obligation to perform their public duties in order to implement the values and principles on which the Republic of Kosovo is built to function. In this respect, the loyal cooperation between constitutional / public institutions is a constitutional obligation and loyalty to the formal and public oath on the occasion of assuming constitutional responsibilities by each holder of the relevant public function.

358. The President, as the head of state, inter alia, represents the unity of the people and is a guarantor of the democratic functioning of the institutions of the Republic of Kosovo. (See Articles 4 and 83 of the Constitution).

Among the main competencies of the President are 1) the competence to propose to the Assembly the candidate for Prime Minister and 2) the possibility to dissolve the Assembly in case of a motion of no-confidence against the Government.

359. The President has a range of competencies which are specifically defined in the Constitution. The Court has already stated that, in addition to the powers of the President set out in Article 84 of the Constitution, 'there are a large number of references to the President in the Constitution" and that "power, functions, duties and competencies' of the President are set out also in other articles of the Constitution, '4, 18, 60, 66, 69, 79, 80, 82, 82, 93, 94, 95, 104, 109, 113, 114, 118, 126, 127, 129, 131, 136, 139, 144, 150 and 158.' (See, the case KO47 / 10, Applicant Naim Rrustemi and 31 other members of the Assembly, Judgment of 28 September 2010, paragraph 52).

360. […] Within the interaction of constitutional institutions in order to implement their responsibilities, the basic principle of interdependent exercise of constitutional competencies should always be taken into account. Therefore, from this point of view, not all the powers of the President defined by the Constitution are competencies that he can exercise as the sole decision-making actor. For the exercise of certain constitutional powers or authorizations, the President also depends on other constitutional institutions, in the manner prescribed by the Constitution.

361. […] in practice the President exercises his constitutional obligation to represent the unity of the people and to help ensure the democratic functioning of the institutions of the Republic of Kosovo.

The President is required to act in coordination with the Assembly.

362. According to the case law of this Court: 'some of the powers of the President touch very clearly upon the political life of the country.' (See Judgment of the Court KO103 / 14, paragraph 62). A concrete example is paragraph 2 of Article 82 of the Constitution. […].

363. Having in mind Article 83 of the Constitution, according to which the President is the head of state and represents the unity of the people and the considerable powers given to the President of the Republic under the Constitution, the Court has also previously stated that *'it is reasonable for the public to assume that their President, who 'represents the unity of the people' and 'not group interests or political party interests, will represent them all.'* […].

364. In this respect, the Court has already emphasized that every citizen of the Republic *'has the right to be assured of the impartiality, integrity and independence of their President.' Such a thing becomes even more important in situations when 'the President of the Republic exercises political powers like when he chooses between competing candidates from possible coalitions to become Prime Minister.'* Equally important is the exercise of the powers of the President, according to which he can dissolve the Assembly, which is composed of the elected representatives of the people for a four (4) year constitutional term.

381. Paragraph 1 of Article 82 of the Constitution presents three specific situations, provided for in points (1), (2) and (3), when the Assembly is compulsorily dissolved. The first situation is when the Assembly fails to elect the Government within sixty (60) days from the day of the appointment of the mandate holder by the President. If such a situation occurs, the Assembly must be dissolved.

441 Ibid.

382. The second situation is when the elected representatives of the people decide themselves, by two thirds (2/3) of the votes of all deputies, for the Assembly to be dissolved. The Court recalls that the two-thirds (2/3) of votes of all members of the Assembly, except for the request for amendment of the Constitution, which requires also the two-thirds (2/3) of all deputies holding seats guaranteed to community representatives which are not a majority in Kosovo, is the highest threshold required for a successful vote in the Assembly determined by the Constitution, only for decisions of great importance, among other things, equal to the number of deputies required to give consent to the transfer of sovereignty (see Article 20.2 of the Constitution). The number of votes required for the dissolution of the Assembly, by the elected representatives of the people, reflects the weight of the respective decision. After such a vote, the Assembly must be compulsorily dissolved. The President's decree only formally seals the will of two-thirds (2/3) of the Assembly. (See Article 82.1 (2) of the Constitution).

383. The third situation is when the Assembly fails to elect the President within sixty (60) days from the day of the beginning of the election procedure. If such a situation occurs, the Assembly must be compulsorily dissolved. (See Article 82.1 (3) of the Constitution).

387. On the other hand, and in contrast, paragraph 2 of Article 82 of the Constitution, clearly and deliberately separated from paragraph 1 of Article 82 of the Constitution, presents the situation when the Assembly may be dissolved by the President of the Republic, but not necessarily. This competence of the President is closely related to the fact whether there is a will of the legislature which has overthrown a Government with a motion of no confidence to continue with the election of a new Government. If there is a will and if such a will is expressed, the President cannot dissolve the Assembly. Such dissolution of the Assembly, contrary to the declaratively expressed will of the people's representatives, would be an arbitrary interference of the President with the legislative power.

The President shall not dissolve the Assembly voluntarily and ignore the declared will of the deputies of the Assembly.

A successful vote of no- confidence does not result in the automatic termination of the Assembly's mandate.

389. [If a vote of no confidence against a Government would effectively dissolve the Assembly itself] …this would mean that Article 82(2) of the Constitution would be meaningless and without any constitutional effect. In this case, if this were the solution provided by the Constitution, item (2) of paragraph 1 of Article 82, according to which deputies can dissolve the Assembly, would not make sense, because despite their will, the President could dissolve the Assembly, after a successful motion of no confidence. Effectively, the President, after each no-confidence motion, would have the power equal to two-thirds (2/3) of the votes of the people's representatives. Furthermore, the mandatory dissolution of the Assembly by the President after a successful no-confidence motion for which sixty-one (61) votes are sufficient based on paragraph 4 of Article 100 of the Constitution, would reduce the number of necessary votes of the deputies by two thirds (2/3) of all the deputies to dissolve the Assembly, in only half of the deputies of the Assembly, contrary to item (2) of paragraph 1 of Article 82 of the Constitution. Such an allegation and interpretation is ungrounded.

395. According to this Court, it would be in full contradiction with the Constitution if the President himself decides, on the basis of Article 82.2 of the Constitution, to dissolve the Assembly against the will of the Assembly. The Constitution clearly does not provide for such a competence for the President. Moreover, in the circumstances of the present case, it is two thirds (2/3) of the deputies of the Assembly who have voted the motion of no confidence. The latter do not need the President's help to dissolve the Assembly. Based on item 2 of paragraph 1 of Article 82 of the Constitution, they may dissolve the Assembly themselves.

409. The Court finds that paragraph 1 of Article 82 of the Constitution presents the conditions and circumstances when the Assembly is mandatorily dissolved. The Court also finds that paragraph 2 of Article 82 of the Constitution presents the condition and circumstance when the President has the opportunity, but is not obliged to dissolve the Assembly. This opportunity cannot be exercised independently and contrary to the will of the Assembly. Practically, a typical situation of the possible exercise of this discretionary authorization by the President, would find its expression in a situation conditioned by two factors: (i) when a new majority needed to form a government cannot be formed after the vote of no confidence; and, (ii) when no political consensus can be reached within the parties represented in the Assembly to dissolve the Assembly on the basis of Article 82.1 (2). In these circumstances, the dissolution of the Assembly remains the only possibility to overcome the constitutional crisis, therefore, the President, in order to unblock a parliamentary crisis, where the Assembly would not be able to exercise its constitutional functions, may exercise its discretion laid down in Article 82.2 of the Constitution, always in

consultation and based on the consent of the required majority of parties and coalitions represented in the Assembly.

Election of Government after vote of no-confidence

411. The Court recalls that the constitutional issue regarding Articles 95 and 100 of the Constitution relates to the final interpretation of whether after a successful vote of no confidence, as defined in Article 100 of the Constitution and in the absence of the will of a sufficient majority of political parties and coalitions represented in the Assembly for the dissolution of the Assembly after this motion, preventing the President from dissolving the Assembly, as established in paragraph 2 of Article 82 of the Constitution, Article 95 of the Constitution regarding the election of the new Government may be activated.

423. The Court initially emphasizes that these two articles, Articles 95 and 100 of the Constitution, implement one of the most essential tasks of the Assembly of the Republic, namely that of exercising parliamentary control over the Government, as established in paragraph 4 of Article 4 of the Constitution, through exercise of the competence defined in paragraph 8 of Article 65 of the Constitution, based on which, the Assembly elects but also expresses no confidence in the Government.

The power of the President to dissolve the Assembly depends on the Assembly's will to do so.

424. The election and expression of no confidence by the legislative power against the holder of executive power is one of the essential premises of the separation and balance of powers, as defined in Article 4 of the Constitution and among the fundamental values of the Republic of Kosovo, as established in Article 7 of Constitution. Consequently, pursuant to paragraph 8 of Article 65 of the Constitution, Articles 95 and 100 of the Constitution must be read together, especially given the fact that it has already been found that paragraph 2 of Article 82 of the Constitution does not necessarily result in the dissolution of the Assembly, and that a successful vote of no confidence motion before it results in the dissolution of the Assembly enables the election of a new Government.

427. The consequence of a resigned Government as a result of the successful vote of no confidence motion based on paragraph 6 of Article 100 of the Constitution and the impossibility of dissolving the Assembly based on paragraph 2 of Article 82 of the Constitution, activates Article 95 of the Constitution regarding the election of the Government.

430. In this case, the Court decided that: (i) Articles 84 (14) and 95 of the Constitution are in compatible with each other; (ii) the use of the terms 'political party or coalition' when referred to in conjunction with Article 84 (14) and Article 95, paragraphs 1 and 4 of the Constitution, means the political party or coalition registered under the Law on General Elections, participates as an electoral entity, is included in the ballot paper, passes the threshold and, consequently, wins seats in the Assembly; (iii) the party or coalition that has won the majority in the Assembly, as established in Article 95, paragraph 1, of the Constitution, means the party or coalition that has the majority of seats in the Assembly, whether absolute or relative; (iv) the President of the Republic, pursuant to Article 95, paragraph 1, of the Constitution, proposes to the Assembly the candidate for Prime Minister nominated by the political party or by the coalition that has the largest number of seats in the Assembly; (v) the President of the Republic has no discretion to refuse the appointment of the proposed candidate for Prime Minister; (vi) in case the candidate nominated for Prime Minister does not receive the necessary votes, the President of the Republic, at his/her discretion, in accordance with Article 95, paragraph 4, of the Constitution, appoints the other candidate for Prime Minister, after consulting with the parties or the coalitions (registered in accordance with the Law on General Elections) that have met the abovementioned criteria, thus, with a party or coalition that is registered as an electoral entity in accordance with the Law on General Elections, has its name on the ballot paper, participated in the elections and passed the threshold; and (vii) it is not excluded that the President of the Republic decides to give the party or the first coalition, in accordance with Article 95, paragraph 1, of the Constitution, the possibility to propose the other candidate for Prime Minister (see the Enacting Clause of the Judgment KO103/14).

434. In this context, the Court initially notes that in order to activate paragraph 5 of Article 95, the Prime Minister: (i) must have resigned; or, (ii) 'for other reasons, his/her post remains vacant'. This article refers to the Prime Minister as an individual and his/her position, and for whatever other reasons, on the basis of which, this post remains vacant. These reasons may include illness, death, inability to perform the duty, or other reasons which are not expressly defined in the Constitution. Having said that, based on this paragraph, the effect of the resignation of the Prime Minister or the remainder of his/her free post vacant also includes the effect of 'the fall of the Government'. The same effect follows if the no-confidence motion is successfully voted for 'the Government as a whole', after which 'the Government is considered resigned', as established in paragraph 6 of

Article 100 of the Constitution.

435. More precisely, the legal effect of the resignation of the Prime Minister is the fall of the Government, and consequently, the resigned Government. The legal effect of a successful vote of no confidence in 'the Government as a whole' in the Assembly, the Government is also the resigned Government. This finding is further based on (i) Article 92 of the Constitution, according to which the Government of Kosovo consists of the Prime Minister, Deputy Prime Ministers and Ministers, while the latter, namely the Government exercises executive power in accordance with the Constitution and law; and in (ii) Article 94 of the Constitution, according to which the Prime Minister represents and leads the Government. Therefore, the legal consequences for 'the Government as a whole' are the same as in the circumstances of paragraph 5 of Article 95 of the Constitution, when the Prime Minister has resigned or when for other reason his/her position has remained vacant, as well as in the circumstances of paragraph 6 of Article 100 of the Constitution when 'the motion of no confidence in the Government as a whole' was voted. The Court notes that the reference to 'the motion of no confidence in the Government as a whole', implies that the Constitution also allows for a no-confidence vote for only one individual member of the governing Cabinet, however, given that such a case is not before the Court, the latter will not analyze the constitutional possibilities and legal effects of a successful vote of no confidence which does not include 'the Government as a whole'.

453. The Court recalls that the remaining constitutional issue related to the assessment of the constitutionality of the challenged and issued Decree pursuant to paragraph 14 of Article 84 in conjunction with paragraph 4 of Article 95 of the Constitution relates to the assessment of the procedure followed in the application of paragraph 14 of Article 84 in conjunction with paragraph 5 of Article 95 of the Constitution. More precisely, the Court must assess whether the issuance of the challenged Decree under paragraph 4 of Article 95 of the Constitution has followed the exhaustion of the right of 'the political party or coalition that has won the required majority in the Assembly to form the Government', in the circumstances of the present case LVV, for: (i) to propose the candidate for the Prime Minister based on paragraph 5 of Article 95 of the Constitution; and (ii) to present the composition of his/her Government before the Assembly and to request his/her approval by a majority vote of all deputies, as established in paragraphs 2 and 3 of Article 95 of the Constitution.

455. In this respect, there are two issues that need to be interpreted by the Court. The first issue has to do with the deadline within which 'the political party or coalition that has won the required majority in the Assembly to form the Government', must propose the candidate for Prime Minister to the President, who is mandated by the latter, as established in paragraph 14 of Article 84 in conjunction with paragraph 5 of Article 95 of the Constitution. Whereas, the second issue has to do with the assessment if, in the circumstances of the present case, the acceptance of the mandate has been rejected, as a result of not proposing the name, namely the candidate for Prime Minister by 'the political party or coalition that has won the required majority in the Assembly to form the Government', namely the LVV.

479. The Court recalls that the essence of the dispute regarding the constitutionality of the challenged Decree is related to the lack of clarification of a time limit in the Constitution, regarding the appointment of a candidate for Prime Minister. The Court recalls that: (i) paragraph 14 of Article 84 of the Constitution; and (ii) paragraphs 1 and 5 of Article 95 of the Constitution define the duty of the President to appoint a candidate for Prime Minister for the formation of the Government from among the 'the political party or coalition that has won the required majority in the Assembly to form the Government', 'after the proposal' of the latter 'in consultation' with it.

480. In this regard, the Court emphasizes that the lack of such specification in the abovementioned provisions of the Constitution should be analyzed in terms of: (i) the constitutional deadlines set by the Constitution for the establishment of post-election institutions, with particular emphasis on those are set for the purposes of establishing the Government; and, (ii) the content of expressions *'proposal'* and *'consultations'* for the purpose of appointing a candidate for Prime Minister.

487. The Court found that a deadline regarding the appointment of a candidate for Prime Minister was not specified in the Constitution only pertaining to: (i) the first candidate for Prime Minister, namely the candidate for Prime Minister proposed by *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, after elections based on paragraph 1 of Article 95 of the Constitution; and (ii) the first candidate for Prime Minister, namely the candidate proposed by *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, after the resignation of the Prime Minister/Government, including the situation after the successful vote of a no-confidence motion, based on paragraph 5 of Article 95 of the Constitution.

493. In this context, Article 95 of the Constitution read in its entirety cannot be construed to imply that this article provides for an indefinite period in the appointment of the first candidate for Prime Minister based on paragraphs 1 and 5 of Article 95 of

the Constitution, as for the political party or coalition with the right to propose to the President, in the light of a *'consultation'* process completely formal and technical, without any discretion or ambiguity; whereas, the same article has precisely limited the period to ten (10) days within which the second candidate for Prime Minister is proposed and determined, based on paragraph 4 of Article 95 of the Constitution, which includes a much more complicated 'consultation' process regarding the determination of the candidate for Prime Minister. The setting of this ten (10) day deadline in the Constitution regarding the second mandate also reflects its purpose for concluding the *'consultation'* process for the purposes of appointing a candidate for Prime Minister in the short term.

497. In fact, the Constitution did not specify this deadline based on the clear and implicit premise that: (i) the President, as the guarantor of the constitutional functioning of the institutions stipulated by the Constitution, immediately after the constitution of the Assembly must begin the process of forming the Government through the appointment of a candidate for Prime Minister, so that the Assembly can exercise the fundamental constitutional responsibility of electing the Government; and (ii) the primary goal of the election winner is to immediately start the process of forming a new Government and gain the confidence of the Assembly. The holder of the right to propose, in addition to the right given by the Constitution for the formation of the Government, at the same time has the obligation to exercise this right in good faith and to show the clear intention that it is taking all necessary actions to create as quick as possible the executive body, and to start the implementation of the governing plan.

500. Consequently, the Court notes that taking into account that the process of 'consultation' in determining the first candidate for Prime Minister, in the absence of discretion of the President and with full clarity as to what political party or coalition is entitled to this proposal, is quite formal and technical. It encompasses only the reciprocal obligation between the President and the winning political party or coalition in the elections to appoint a candidate for Prime Minister, after the proposal of the winning political party or coalition. This *'consultation'* should be concluded as soon as possible through a quick dynamic interaction, taking into account: (i) the completely formal and technical nature of this 'consultation'; (ii) the system and structure of constitutional deadlines regarding the formation of the Government; (iii) the limitation of ten (10) days set by the Constitution in the event of the appointment of a second candidate for Prime Minister based on paragraph 4 of Article 95 of the Constitution, and in which in contrast, the *'consultation'* is much more complex; and (iv) the fact that the Constitution has set the exact fifteen (15) day deadlines available to candidates for Prime Minister to reach the necessary political agreements and to propose the Government to the Assembly.

501. In addition, the Court must assess whether, in the circumstances of the present case, 'the political party or coalition that has won the required majority in the Assembly to form the Government', namely the LVV, has proposed or refused to propose, the candidate for Prime Minister. In this regard, in the following, the Court will first recall the procedure followed by the President of the Republic and the winning political party, namely the LVV, after the successful vote of no confidence against the Government led by the latter, in the Assembly of Kosovo.

The President guarantees the constitutional functioning of institutions.

515. The competence [of the President] defined in paragraph 14 of Article 84 of the Constitution, regarding the appointment of a candidate for Prime Minister for the formation of the Government in relation to the relevant paragraphs of Article 95 of the Constitution, must always be exercised together with the competence of the President, established in paragraph 2 of Article 84 of the Constitution, according to which the President guarantees the constitutional functioning of the institutions set forth by this Constitution. This is because the determination of the candidate for Prime Minister includes not only the relationship between the President and *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, but also the relationship between the President and the Assembly of the Republic, regarding the exercise of the competence of the latter for the election and expression of no confidence in the Government, as set out in paragraph 8 of Article 65 of the Constitution.

516. More precisely, the exercise of the competence of the Assembly regarding the election of the Government is dependent on the exercise of the competence of the President established through paragraph 14 of Article 84 of the Constitution for the appointment of the candidate for Prime Minister. The President is obliged to exercise this competence in the light of his obligation to guarantee the constitutional functioning of the institutions defined by the Constitution, starting the procedures of 'consultations' with the political party or the relevant coalition for the formation of the Government, immediately after the constitution of the Assembly after the elections or immediately after the resignation of the Prime Minister/Government,

including cases of successful vote of no confidence in the Government in the Assembly. Otherwise, the President would prevent the Assembly from exercising its right to elect the Government effectively. Therefore, the President in exercising the competence established through paragraph 14 of Article 84 of the Constitution, is also in the role of mediator between the political party or coalition that has the necessary majority to form the Government and the Assembly. The appointment of the candidate for Prime Minister begins the constitutional procedures for the formation of a new Government, which is submitted to the Assembly for voting, enabling him to exercise one of his most essential competencies, that of electing the Government.

517. Second, regarding the interdependence and mutual obligations of the President and *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, the Court recalls that the competence of the President set out in paragraph 14 of Article 84 of the Constitution is exercised *'in consultation'* with the political party or coalition having the necessary majority to form the Government. Thus, this paragraph, read together with Article 95 of the Constitution, includes not only the obligation of the President to appoint a candidate for Prime Minister, but also the obligation of *'the political party or coalition that has won the required majority in the Assembly to form the Government'* to propose the candidate for Prime Minister. In the absence of such a reciprocal obligation, the constitutional norm could not be realized, and would remain at the full discretion of *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, which, by not proposing the candidate for the Prime Minister, would make it impossible not only to exercise the powers of the President, but also the right of the Assembly to elect the Government.

518. The right to propose a candidate for Prime Minister is also a responsibility and a privilege. The proposal of this name encompasses the highest point of success of a political party or coalition towards and within an election cycle. The first right to propose a candidate for Prime Minister is guaranteed to the winning party or coalition by the Constitution of Kosovo. The exercise of this right is not vested with the authority to block the formation of a Government within an election cycle. Such an attitude would hold the entire most essential state institutions a hostage to the winning political party or coalition. On the contrary, and for this reason, the Constitution has provided for the unblocking mechanism, through which it is passed to another candidate for Prime Minister, whose eventual failure would result in the announcement of early elections.

519. In the end, the need to form a new Government after a successful vote of no confidence motion is immediate. This is because, as explained above, a Government elected by the Assembly does not continue to have the same legitimacy, at a time when the people's representatives are taking away their confidence by voting for a successful motion of no confidence.

522. This constitutional right can in no way be transformed into a mechanism through which the political party or the winning coalition can prevent the formation of a new Government, by not proposing the name of the new candidate for Prime Minister, nor by expressly rejecting the mandate, and holding a Government led by the same political party or winning coalition, which has already lost the confidence of the Assembly. On the contrary, the task of a winning political party or coalition whose government has lost confidence in the Assembly through a successful vote of no confidence is to exercise the right to nominate a candidate for Prime Minister in order to form a government, taking back the confidence of the Assembly, or in order to allow the space for the formation of a Government by political parties or other coalitions, which have the necessary numbers in the Assembly to form the Government.

531. In this regard, the Court emphasizes that the interpretation that the right to propose a candidate for the Prime Minister should be explicitly rejected is not acceptable. This is because the possibility of a refusal on the condition that it is made only explicitly, combined with the circumstances related to the allegations of uncertainty about the deadline within which the proposal of the candidate for Prime Minister should be made by *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, as in the application of paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 1 of Article 95 of the Constitution, after the elections; as well as the application of paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 5 of Article 95 of the Constitution, after the resignation of the Prime Minister/Government, including the case of successful vote of no confidence motion, would result in full discretion of *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, regarding the formation of the Government, either by not proposing a name for the candidate, or by not expressly rejecting this right.

532. Therefore, rejection does not necessarily mean that it has been explicitly done. […].

533. The right to propose the candidate for the Prime Minister is the right of *'the political party or coalition that has won the required majority in the Assembly to form the Government'*, namely the winning party or coalition, and also incorporates the responsibility and obligation to act, respectively to propose this candidate and to propose the Government to the Assembly. This right also includes the obligation and responsibility to reject the proposal and to unblock the constitutional procedure for

the election of the Government, if the political party or the winning coalition considers that it does not have the necessary votes in the Assembly to form the Government. That said, (i) failure to take concrete action towards the proposal and lack of proposal of the name of the candidate for Prime Minister; (ii) neither the refusal to accept this mandate, but at the same time requesting the (iii) dissolution of the Assembly and the announcement of early elections, can be conditioned only by the express declaration of the political party or the winning coalition for the rejection of the mandate for Prime Minister, to be considered a rejection. On the contrary, in such circumstances, the conditioning of the refusal to make an express statement regarding the refusal of the political party or the respective coalition would hold the establishment of state institutions a hostage only to the absence of refusal formally expressed by the political party or the winning coalition.

535. Lack of a proposal of a candidate for the Prime Minister, namely the inaction regarding the only necessary obligation and taking any concrete step in this direction, especially in the circumstances when against the Government that was led by 'the political party or coalition that has won the required majority in the Assembly to form the Government', a motion of no confidence with two-thirds (2/3) of all deputies of the Assembly has been successfully voted, it is sufficient to ascertain this refusal. The very lack of performance of an action which is required to be performed, in spite of the right, possibility and intermediary invitations, consists *de facto* in the opposition or refusal to perform a certain action".[442]

Case KO72/20 addresses a number of important constitutional issues that will be explored in more detail as follows.

Interpretation

The Court establishes an elaborate methodology for the interpretation of the Constitution. Compared to the previous case law, which was very often based on textual interpretation, the Court's methodology is very advanced. The Court emphasized a contextual interpretation by stressing the interdependence of the principles, values, and norms of the Constitution.[443] As the Court states, "no constitutional norm can be taken out of context and interpreted mechanically and independently of the rest of the Constitution". Otherwise said, the Constitution has an internal normative coherence within which each principle and norm must be interpreted.[444]

Loyal Cooperation

The purpose of loyal cooperation is to act in the common good and in the best interest of all citizens of Kosovo. However, the Court does not elaborate on where this principle derives from.[445]

Loyal cooperation between constitutional bodies is a constitutional obligation.

President

When exercising political powers, the President must not create the perception of representing the interests of a group or political party.

The Court provides a very elaborate interpretation of the President's role within the constitutional order. The President would be required to respect the principle of loyal cooperation because the President alone cannot exercise all powers vested in the President. Their exercise would require cooperation with other constitutional bodies, to represent the unity of the people and ensure the democratic functioning of the state institutions.[446]

The Court also clarified that the President has political powers which would touch upon the political life of the country, especially when required to propose to the Assembly a candidate for Prime Minister. The President would also have the responsibility to maintain the stability of the country and to avoid elections as much as possible when forming a new government.[447]

The Court thus clarified that the President has not only ceremonial functions and does not act only as a 'notary public' formally endorsing decisions. The President has political powers that have a political impact and that must

442 Case No. KO72/20.
443 Ibid., para. 345.
444 Ibid.
445 Ibid., para. 353.
446 Ibid.
447 Ibid., para. 363, 364.

be exercised under the principle of loyal cooperation. The stability of the country and its institutions seem to be a guiding principle for the exercise of the President's powers.[448]

Dissolution of the Assembly

The Court explained that the dissolution is mandatory in only three situations, i.e., (i) when the Assembly fails to elect the Government within 60 days from the appointment of the candidate by the President, (ii) when the Assembly dissolves itself using a vote of 2/3 of all members of the Assembly, and (iii) when the Assembly fails to elect the President within 60 days from the day that the election procedure begins.[449]

In the event of a successful vote of no-confidence, the Assembly may be dissolved but this is not mandatory.[450] It is important to note that the President does not have unfettered discretion in dissolving or not the Assembly after a successful vote of no-confidence. If there is Assembly's will and the necessary majority to elect the new government, the President must initiate the new proceedings. As the Court confirmed, if there is such a will and if such will be expressed, the President cannot dissolve the Assembly.[451]

The arbitrary dissolution of the Assembly against the Assembly's will would interfere in the authority of the Assembly.

The President could decide on the dissolution of the Assembly following a successful vote of no- confidence (i) when the majority needed to form the Government cannot be formed, and (ii) when there is no political consensus within the Assembly to dissolve it. In these two situations, the President could decide to dissolve the Assembly to overcome a constitutional and parliamentary crisis but still in consultation and with the consent of the majority parties and coalitions represented in the Assembly.[452]

The Court's reasoning is in line with the Venice Commission's view on the dissolution of the Assembly. The Venice Commission emphasized that the dissolution of an assembly, elected in free and fair elections in an expression of the will of the people, is not something that should be tackled in an arithmetical way but the result of good and wise judgment. The dissolution would be an ultima ratio to solve a constitutional crisis caused by the impossibility of forming a government.

Election of New Government after Vote of No-Confidence

The Court stressed that the expression of no confidence by the legislative power against the Government is one of the essential premises of the separation and balance of powers. A vote of no-confidence would enable the election of a new Government. The relevant constitutional provision for this is Article 95(5) of the Constitution. This provision applies (i) when the Prime Minister resigns, or (ii) when the post of the Prime Minister is vacant.23 The post is also vacant as a consequence of a vote of no-confidence of the Government as a whole.[453]

The Court mentioned that the Constitution would allow for a vote of no-confidence for only one member of the Government but refrained from further discussing this matter.[454]

The President and the Assembly must conclude their consultations without delays.

The Constitution lacks clear and explicit deadlines for the nomination of the new candidate for Prime Minister.

As regards the procedure for the election of a new Government following a successful vote of no-confidence, the Court discussed the deadline within which the political party or coalition that has won the majority in the Assembly must propose to the President a candidate for Prime Minister. A deadline is not stipulated in the Constitution

448 Ibid., para. 170.
449 Ibid., para. 309.
450 Ibid., para. 400.
451 Ibid., Para. 387.
452 Ibid., para. 409.
453 Ibid., para. 78.
454 Ibid., para. 435.

and is therefore subject to controversy.[455] However, the Court explained that the absence of a deadline specified in the Constitution is built on two premises: (i) the President is required to immediately begin the process of appointing

a candidate for Prime Minister, and (ii) the election winner has to start instantaneously the process of forming a new Government.[456] Timely progress for the nomination of a candidate for Prime Minister and election of the new Government would be essential for the functioning of the institutions.

Opinion of the Venice Commission

In addition, the Venice Commission's Opinion on the Constitutional Situation with Particular reference to the possibility of dissolving the Parliament (Republic of Moldova) is also of relevance for the matter under consideration. The Opinion states:

40. That case however, differing from the present situation, concerned the formation of a new government after a vote of no- confidence. It should also be noted that the Court linked the right of dissolution to the President's task 'to help overcome the political crisis and the conflict between the powers and not to perpetuate the crisis for an indefinite period, which would not be in the general interests of citizens, holders of national sovereignty'. Moreover, the Court related the right to ensuring the functioning of the constitutional bodies and avoiding obstruction of the activity of one of the state powers. The Constitutional Court limited the President's obligation to dissolve parliament to the repeated failure to form a government in the investiture phase of government formation, and not in the preceding phase of negotiations as in the present case. This approach is logical: unless more than one formal vote of confidence has been made in the Parliament, there is no way of objectively deciding on whether or not it is impossible to form a government. As for the phase of negotiations preceding the investiture, the Constitutional Court emphasized in par. 73 that Article 85 has the function of a balancing mechanism to avoid or overcome an institutional crisis. This purpose of Article 85 explains why the President's powers to dissolve the Parliament are discretionary as this discretion is intended to prevent deadlock and to prevent institutional crisis by political negotiation.

It is clear that the dissolution of the Parliament is a last resort in case repeated attempts to form a government have failed.

The spirit and wording of the Constitution provides the Head of State with the necessary discretion to exercise good and wise judgment.

41.On the other hand, as concerns the wording of Article 85 § that the President 'may' and not 'shall dissolve parliament, the Commission stresses that the distinction between 'may' and 'shall' is well-established in law and is undoubtedly intended to provide the President with leeway to exercise his own judgment and discretion taking into account the circumstances of a particular situation in the interest of the country as a whole. […] In the light of the purpose of Art. 85 of the Constitution, the duty of the President to have consultations with parliamentary factions should be seen as a means to exhaust all the possibilities to form the Government or unblock the procedure of adopting the laws after the expiration of the 3 months term, before deciding on the dissolution of the Parliament.

42. If no other means exists, dissolving the Parliament can even be considered a constitutional obligation of the President. On the other hand, if other means do exist, if, for instance, parties representing a parliamentary majority have come to an agreement of forming a government, no such obligation can exist. Dissolving the Parliament in such a situation and deepening the constitutional crisis or even creating a new crisis might even be considered a violation of the constitutional duties of the President as a pouvoir neutre. As subsequent events have shown, in the present case, the dissolution of the Parliament by the President would have contradicted the ratio of Art. 85(1), such as it was summarized in the Constitutional Court's 2013 ruling.

43. In the light of these arguments, the Venice Commission is of the view that a rule prescribing the automatic dissolution of the Parliament after three months regardless of whether or not formal votes of confidence have been made is incoherent with both the wording of Article 85 and with its purpose as established by the Constitutional Court of Moldova in its 2013 ruling".[457]

455 Ibid., para. 480.
456 Ibid., para. 497.
457 Venice Commission, Opinion No. 954/2019.

Comparative Analysis and References

Countries like Austria, Croatia, Montenegro, and Serbia follow the model of a destructive vote of no-confidence. In contrast, the German Basic Law (Grundgesetz) provides for a constructive vote of no-confidence. The 'Bundestag' (Federal Parliament) may express its distrust in the Chancellor only if it elects with a majority of its members a successor and requests the President to dismiss the Chancellor.[458]

In short, the election of a new Chancellor leads to the dismissal of the current Chancellor. Countries like Spain, Albania, Hungary, and Slovenia follow this model. Interestingly, the 2001 Constitutional Framework for Provisional Self-Government in Kosovo contained a constructive vote of no-confidence. It provided that "[t]he Assembly may express its lack of confidence in the Government only if, by a majority of its members, it elects simultaneously a new Prime Minister together with a list of Ministers proposed by him".[459]

The purpose of the constructive vote of no-confidence under the Grundgesetz is to avoid a situation where majorities agree on the dismissal of the Government but are unable or unwilling to agree on a new Government. The result would be governmental instability. A constructive vote of no-confidence was first written into the 1949 Grundgesetz and was 'meant as a safety-valve against the destruction of governments through negative majorities' and later several countries adopted it. The constructive vote of no-confidence is a reaction to the German experience with the Constitution of Weimar, which provided for a destructive vote of no-confidence. Extremist left and right-wing political parties, notably the Communists and National-Socialists parties, rejected more moderate Governments and used the destructive vote of no-confidence to cause political instability and to -thereby- increase their political power and influence. This eventually contributed to the breakdown of the Weimar constitutional order and the rise of the totalitarian Nationalist-Socialist regime. The destructive vote of no-confidence, an instrument of democratic control and accountability, was thus abused by anti-democratic political parties to undermine Germany's first democratic regime.

In countries that apply a destructive vote of no-confidence, a failure to elect a new government results in the dissolution of the Parliament. In Croatia, if a new Prime Minister is not elected within 30 days from a successful vote of no-confidence, the President must dissolve the Assembly. Serbia follows a similar rule.

Among those countries that apply the destructive model of no-confidence, Austria presents a more sophisticated approach. Upon a successful vote of no-confidence, the Federal President must appoint a 'transitional Government' composed of members of the dismissed Government, state secretaries of a dismissed Minister, or senior officials of Ministries and must designate one of them to lead the transitional Government (Article 71 of the Federal Constitutional Law). The Federal President has full discretion in appointing the members of the transitional Government. It is controversial how quickly the President must appoint such a transitional Government, but this seems to be at the President's discretion. The transitional Government remains in power until a new Federal Government is formed; there is no deadline. This means that the transitional Government may stay in power until after new regular elections or if the National Council decides to dissolve itself and snap elections are held.

Albania

Article 105(Amended with Law Nr. 9404, dated 21.4.2008)

1. One fifth of the deputies have the right to submit for voting in the Assembly a motion of no confidence in the Prime Minister in office, proposing a new Prime Minister.
2. The Assembly may vote a motion of no confidence against the Prime Minister only by electing a new Prime Minister with the votes of more than half of all its members.
3. The President of the Republic decrees the discharge of the Prime Minister in office and the appointment of the elected Prime Minister no later than 10 days from the voting on the motion in the Assembly.[460]

458 Constitution of Germany, Article 67.
459 Constitutional Framework, Article 9.3.10.
460 Constitution of Albania.

Croatia

Article 113

A vote of confidence in the Prime Minister, a specific member of the Government or the entire Government may be called following a motion of not less than one fifth of the Members of the Croatian Parliament.
A vote of confidence in the Government may also be requested by the Prime Minister. No vote of confidence, or debate thereon, may be conducted before the expiry of seven days following the date on which the motion was submitted to the Croatian Parliament.
Debate and a vote of confidence shall be conducted not later than 30 days after the day on which the motion was submitted to the Croatian Parliament.
A vote of no confidence shall be carried if supported by a majority of the total number of Members of the Croatian Parliament.
If a vote of no confidence is not carried by the Croatian Parliament, the Members of Parliament who submitted the motion may not resubmit the same motion before the end of six months.
If a vote of no confidence in the Prime Minister or in the entire Government is carried, the Prime Minister and the Government shall resign. If a vote of confidence in the new Prime Minister- Designate and the members put forward as members of the Government is not carried within 30 days, the Speaker of the Croatian Parliament shall notify the President of the Republic of Croatia of the same. Upon such notification from the Speaker of the Croatian Parliament, the President of the Republic shall immediately dissolve Parliament and simultaneously call a parliamentary election.
If a vote of no confidence is carried with respect to a Government member, the Prime Minister may put forward to the Croatian Parliament another member for a vote of confidence, or the Prime Minister and the Government may resign.
In all cases in which the Prime Minister or Government resigns, the provisions of paragraph (7) of this Article shall apply. [461]

Montenegro

Article 107

The Parliament may vote no confidence in the Government. The proposal for no confidence ballot regarding the Government may be submitted by minimum 27 Members of the Parliament. If the Government gained confidence, the signatories of the proposal shall not submit a new proposal for no confidence ballot prior to the expiry of the 90 days deadline.

Article 110

The Government mandate shall cease: with the expiry of the Parliament mandate, by resignation, when it loses confidence and if it fails to propose the Budget by March 31 of the budgetary year. The Government whose mandate has ceased shall continue with its work until the election of the new composition of the Government.[462]

Serbia

Article 130

A vote of no confidence in the Government or the particular member of the Government may be requested by at least 60 deputies.
The proposal for the vote of no confidence in the Government or the particular member of the Government shall be discussed by the National Assembly at the next first session, not later than five days after the submission of the proposal.
After the discussion is concluded, they shall vote on the proposal.
The proposal for the vote of no confidence in the Government or the member of the Government shall be accepted by the National Assembly, if more than a half of the total number of deputies votes for it. If the National Assembly passes a vote of no confidence in the Government, the President of the Republic shall be obliged to initiate proceedings for election of the new Government.

461 Constitution of Croatia.
462 Constitution of Montenegro.

If the National Assembly fails to elect the new Government within 30 days from the passing of a vote of no confidence, the President of the Republic shall be obliged to dissolve the National Assembly and schedule elections.
If the National Assembly passes a vote of no confidence in the member of the Government, the President of the Republic shall be obliged to initiate proceedings for election of a new member of the Government, in accordance with the Law.
If the National Assembly fails to pass a vote of no confidence in the Government or the member of the Government, signatories of the proposal may not submit a new proposal for a vote of no confidence before the expiry of the 180-day deadline.[463]

Slovenia

Article 116

The National Assembly may pass a vote of no confidence in the Government only by electing a new President of the Government on the proposal of at least ten deputies and by a majority vote of all deputies. The incumbent President of the Government is thereby dismissed, but together with his ministers he must continue to perform his regular duties until the swearing in of a new Government. No less than forty-eight hours must elapse between the lodging of a proposal to elect a new President of the Government and the vote itself, unless the National Assembly decides otherwise by a two- thirds majority vote of all deputies, or if the country is at war or in a state of emergency. Where the President of the Government has been elected on the basis of the fourth paragraph of Article 111, a vote of no confidence is expressed in him if on the proposal of at least ten deputies, the National Assembly elects a new President of the Government by a majority of votes cast.[464]

Germany

Article 67

(1) The Bundestag may express lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.
(2) Forty-eight hours shall elapse between the motion and the election.[465]

Conclusion

Kosovo's destructive model of a vote of no-confidence ends the mandate of the Government but does not automatically lead to new elections. Yet, it creates institutional gaps and uncertainty about the prospects of forming a new government, and it can often lead to a new wave of political and institutional crises. Preferably, Kosovo could apply a system of a constructive vote of no- confidence which would allow for more certainty and efficiency in the establishment of new institutions.

The President does not have unfettered power to dissolve the Assembly after a successful vote of no-confidence. He/she must seek support for the formation of a new government and avoid elections. This is in line with the loyal cooperation principle, as the Court affirmed, while the Constitution is silent on this matter.

The absence of a time limit in the Constitution for the nomination of a first candidate for Prime Minister may continue to create uncertainty and constitutional controversy. This vacuum relies on two premises following the Court's reasoning: the President is required to immediately begin the process of nomination of the candidate for Prime Minister, and the election winner needs to promptly start the process of forming a new government.

Possible amendments to the Constitution may fill the current gaps and provide for more efficient proceedings.

463 Constitution of Serbia.
464 Constitution of Slovenia.
465 Constitution of Germany.

Recommendations

To address those issues and gaps the following options could be considered in case of an amendment of the Constitution.

(1) Principle of loyal cooperation

- A new constitutional provision could explicitly set out the principle of loyal cooperation, in accordance with the Court's interpretation.

(2) Deadlines for the nomination and appointment of a candidate for Prime Minister following a successful vote of no-confidence

- With no amendment to the Constitution, the Court's interpretation should apply as guidance (i.e., a formation of the government to ensure effective functioning of the institutions with no delay);
- New constitutional provisions could establish clear deadlines for the nomination of a candidate for Prime Minister.

(3) Reform the vote of no-confidence

- With no amendments to the Constitution, the model of a destructive vote of no-confidence will continue to apply;
- In case of amendment, new constitutional provisions could provide a timeframe/limit, mandate, and responsibilities of the outgoing government in the office, until the Assembly elects a new Government.
- Preferably, the destructive vote of no-confidence could be replaced with a constructive vote of no-confidence, which would secure a new majority and enable a swift formation of the new government.

XV

Gender Equality and Gender Quotas for Members of the Government

The Constitution contains internationally recognized standards for gender equality but does not provide quotas for gender representation in Kosovo's institutions. Even with a quite solid constitutional and institutional framework on gender equality, women's representation in decision-making positions remains a key challenge, which is why the Constitution and/or the law should establish explicit rules and push forward a quota of at least 40% for a wide institutional balanced representation between women and men. Alternatively, strong affirmative measures should be put in place to increase women's representation in Kosovo's institutions, especially where major gaps remain.

The constitutional provisions on gender equality are not fully implemented in practice. In recent years there has been some progress, yet, men dominate most of the political and institutional leading positions. Thus, gender equality in higher decision-making positions at the national and local levels remains a target.[466]

There is lack of implementation of the Constitution and laws on gender equality.

Political representation of women in legislative assemblies or decision-making positions remains lower compared to men's representation. Women's political representation in decision-making positions is a key challenge at the central, as well as the municipal level, despite the 30% quota guaranteed in the Law on General Elections, and Law No. 003/L-072 on Local Elections ("Law on General Elections").[467] Political parties and their representatives need to look at the legislation with a gender-sensitive outlook to address the lack of equality at the national -and more critically- at the local level of governance.[468]

The principle of gender equality is a fundamental value for the democratic development of the society.

The Constitution provides that the exercise of public authority must be based upon the principles of equality and on the internationally recognized fundamental human rights and freedoms.[469] Gender equality is pivotal to the democratic development of society, providing equal participation for both women and men, in the political, economic, social, cultural, and other areas of societal life. It regulates the issue of gender equality from a general perspective -as any other constitution in Europe and worldwide does- while narrowing down to women's composition of the National Assembly. Other important articles refer to the principle of gender equality in various public sectors too. This constitutional comprehensive approach displays Kosovo's firm commitment -as a young country- to guarantee and protect the principle of gender equality in line with its legislation and internationally recognized standards.

The Constitution allows the application of affirmative measures.

The Constitution guarantees the principle of non- discrimination based on gender.[470] It provides for the possibility of imposing affirmative legal methods necessary to protect and advance the rights of individuals and groups in unequal positions.[471] Besides that "such measures shall apply only until their purpose has been fulfilled".[472] The first authoritative example of a gender quota in Kosovo dates back to the United Nations Interim Administration Mission in Kosovo (UNMIK) with Law Nr. 2004/12 - Section 21- on the elections for the Assembly of Kosovo. This refers to Gender Rules, claiming that no gender can be represented with less than 33% of the seats.[473] In 2014, a significant number of deputies of the Assembly initiated an amendment to the Constitution, according to which none of the genders could represent less than 40% in the positions of ministers and deputy ministers of the Government.

Besides the Constitution and the legislation in force, certain international human rights treaties and instruments are directly applicable in Kosovo's domestic legal order. One of them is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[474] Article 4(1) of CEDAW provides that:

CEDAW encourages temporary measures to accelarate *de facto* equality between men and women akin to the Constitution.

466 Balkans Group, Women in Politics III – Gender Representation at Local Level, 18 March 2021, page 4, at https://balkansgroup.org/en/women-in-politics/

467 Law on General Elections; Law No. 03/L-072 on Local Elections in the Republic of Kosovo, at https://mapl.rks-gov.net/wp-content/uploads/2017/10/Law-On-Local-Elections-In-The-Republic-Of- Kosovo.pdf?msclkid=99a54719bbff11ec942090240c843ba9; Kosovo Program for Gender Equality 2020-2024, June 2020, page 45, at https://abgj.rks- gov.net/assets/cms/uploads/files/AGE%20Kosovo%20Program%20for%20Gender%20Equality%202020-2024.pdf. For the local level, see also Balkans Group, Women in Politics III Gender Representation at Local Level, 18 March 2021, page 4.

468 Balkans Group, Women in Politics II - Gender responsive policy-making at the local and national level, 25 August 2020, at https://balkansgroup.org/en/women-in-politics-ii-gender-responsive-policy-making-at- the-local-and-national-level/

469 Constitution of Kosovo, Article 3(2).

470 Ibid., Article 24 (2).

471 Ibid., Article 24(3).

472 Ibid.

473 UNMIK Regulation N. 2004/12 on Elections for the Assembly of Kosovo, https://unmik.unmissions.org/sites/default/files/regulations/02english/E2004regs/RE2004_12.pdf.

474 In total 206 country worldwide -and the European Union as regional organization- have ratified CEDAW. Kosovo is represented under UNMIK. Yet CEDAW's ratification date is unknown. CEDAW's progress reports database, at https://www.ohchr.org/en/treaty-bodies/cedaw?msclkid=3d0d16beb71511ecb87dbd10 3f8ffd9e.

"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved".[475]

CEDAW clarified that the term 'measures' encompasses a wide variety of legislative, executive, administrative, and other regulatory instruments, policies, and practices, including preferential treatment; targeted recruitment, hiring, and promotion; numerical goals connected with time frames; and quota systems.[476] The Constitution of Kosovo, the Law on Gender Equality, and Law No. 05/L-021 on the Protection from Discrimination ("Law on the Protection from Discrimination") contain such measures as well.

The CEDAW Committee noted that the choice of a particular 'measure' will depend on the context in which the provision is applied and on the specific goal it aims to achieve.[477] In another general comment, it also provided various options to address gender equality in political and public life, including equal participation of women in senior cabinet positions (i.e., in the government). One of them was the adoption of a rule that neither sex should constitute less than 40 percent of the members of a public body or a quota for women members of the cabinet and appointment to public office.[478]

Along with international agreements such as CEDAW, Kosovo has adopted the necessary legislation for the promotion of gender equality, as well as for guaranteeing gender quotas in the Assembly, such as the Law on Gender Equality. The purpose of the adoption of this law was to ensure the institutional framework necessary for the implementation of international agreements at all levels of governance. This law also establishes the creation of an institutional mechanism pursuing gender equality, namely the Agency for Gender Equality (AGE) - under the Office of the Prime Minister (OPM) - which shall, among others, prepare reports for CEDAW.[479]

The Constitution provides for the direct applicability of CEDAW to Kosovo's legal order. Paradoxically, Kosovo is not a party to the treaty due to its non-recognition by the UN. As a consequence, the reporting procedure from AGE to CEDAW has not worked in practice.

How the reporting goes is that AGE should receive a formal note from CEDAW. Once that formal note is collected, AGE undertakes all the steps of the coordination process involving both state institutions, Civil Society Organizations (CSOs), and international partners. Based on the information gathered, the report is then compiled under CEDAW's reporting requirements.[480]

CEDAW's committee sent via UNMIK an invitation for the submission of Kosovo's CEDAW report -only once- in February 2008. Concretely, the request asked upon drafter to cover the period 1999-2007. Kosovo - in turn - prepared the report under AGE's leadership.[481]

When the draft was ready to be presented to CEDAW via UNMIK - under United Nations Security Council (UNSC) Resolution 1244 - issues have been raised concerning the logo of Kosovo's Government. At that time, Kosovo declared its independence, and UNMIK kept insisting that the logo should have been removed.[482]

In addition to that, and as per CEDAW's reporting procedure, the delegation of Kosovo should have submitted the

475 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, at https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf.
476 General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, at https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20%28English%29.pdf.
477 Ibid.
478 General recommendation No. 23: Political and public life, of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), para. 29 at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4736_ E.pdf
479 Law No. 05/L -020 on Gender Equality, at https://abgj.rks-gov.net/assets/cms/uploads/files/LAW%20%20ON%20GENDER%20EQUALITY(1).pdf.
480 Balkans Group, interview with AGE expert, 22 April 2022
481 Ibid.
482 Ibid.

report. Unfortunately, there has been no readiness to have the delegation present in front of CEDAW's Committee, if not represented under 1244. In the end, no progress has been recorded in this regard, and the report was never submitted.[483]

Kosovo should opt for a quota of at least 40%

This issue stems from Article 25 of CEDAW, which establishes that the convention should be open for accession by all States and effected after being deposited by the Secretary-General of the United Nations; making it impossible for Kosovo to become party to the treaty officially due to non-recognition by the UN.[484]

Article 8 of CEDAW provides that "State Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent the Government, at the international level". This could be interpreted as a possible target for the ratifiers in Kosovo to attain, to move towards a 50% representation of women in the composition of political international representation for positions such as diplomats, ambassadors, members of international organizations like the UN, or even as part of the military personnel.

The Organization for Economic Cooperation and Development (OECD) acknowledged that gender equality is the pillar of inclusive growth. "Women's full involvement in decision-making and agenda-setting are crucial for adequately reflecting the priorities and needs of all members of society. It also contributes to generating greater trust of citizens in public institutions."[485] Yet disparities between men and women do persist while climbing the organizational ladder. Women are still underrepresented in decision-making and leadership positions.[486] OCED's average for women participating in politics and governance is thirty-two percent (32%).[487]

Even though women represent almost half of the population in Kosovo, they do not hold an equal share of power in the public sphere.[488] A clear representation of this is reflected in the low percentage of women representation in the Assembly.[489]

There are only 9 women involved in the diplomatic sector as Ambassadors-Charge d'affaires from Kosovo.[490]As the report of the Advisory Committee of the Human Rights Council of the UN: "Current levels of representation of women in human rights organs and mechanisms: ensuring gender balance" states, women's underrepresentation in international bodies and mechanisms significantly undermines their human rights to equality and non-discrimination.[491]

Gender equality is central to democracy and good governance. Therefore, it is important to ensure it through constitutional changes and better implementation of laws by applying proper measures.

Relevant Provisions

Constitution of Kosovo

Article 3 [Equality Before the Law]

2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals

483 Ibid.
484 Ibid.
485 Organization for Economic Cooperation and Development (OECD), 2015 OECD Recommendation of the Council on Gender Equality in Public Life, 2016, page 5, at https://www.oecd-ilibrary.org/docserver/978926 4252820-en.pdf?expires=1650103009&id=&accname=guest&checksum=2A6F67A5E 5287188DADB31A53F9 72A39.
486 Ibid.
487 OECD Governance. Women in politics, 2021, at https://www.oecd.org/gender/data/.
488 Kosovo Agency, of Statistics, Women and Men in Kosovo, 2018/2019 https://ask.rks-gov.net/en/kosovo- agency-of-statistics/add-news/women-and-men-in-kosovo-20182019.
489 International Institute for Democracy and Electoral Assistance (IDEA), Gender Quota Database, Kosovo, at https://www.idea.int/data-tools/data/gender-quotas/country-view/164/35.
490 Misionet Diplomatike - Ministry of Foreign Affairs - Republic of Kosovo, at https://mfa-ks.net/en/misionet/493/ambasadat-e-republiks-s-kosovs/493.
491 United Nations Human Rights Council (OHCHR) - Current Levels of Representation of Women in Human Rights Organs and Mechanisms: Ensuring Gender Balance Report of the Human Rights Council Advisory Committee, at https://www.ohchr.org/en/documents/reports/ahrc4751-current-levels-representation-women-human-rights-organs-and-mechanisms.

before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

Article 7 [Values]

2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural, and other areas of societal life.

Article 22 [Direct Applicability of International Agreements and Instruments]

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:
[…]
(6) Convention on the Elimination of All Forms of Discrimination Against Women;

Article 24 [Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability, or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

Article 71 [Qualification and Gender Equality]

2. The composition of the Assembly of Kosovo shall respect internationally recognized principles of gender equality.

Article 101 [Civil Service]

1. The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.
Article 104 [Appointment and Removal of Judges]
2. The composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality.

Article 108 [Kosovo Judicial Council]

2. The Kosovo Judicial Council is a fully independent institution in the performance of its functions. The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and […]follow the principles of gender equality […].
4. Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality […].

Article 109 [State Prosecutor]

4. The State Prosecutor […] shall respect the principles of gender equality.

Article 110 [Kosovo Prosecutorial Council]

1. The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law. The Kosovo Prosecutorial Council shall ensure that all persons have equal access to justice. The Kosovo Prosecutorial Council shall ensure that the State Prosecutor is independent, professional and impartial and reflects the multiethnic nature of Kosovo and the principles of gender equality.
3. Proposals for appointments of prosecutors must be made on the basis of an open appointment process, on the basis of

the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the relevant territorial jurisdiction.

Article 114 [Composition and Mandate of the Constitutional Court]

1. The Constitutional Court shall be composed of nine (9) judges who shall be distinguished jurists of the highest moral character, with not less than ten (10) years of relevant professional experience. Other relevant qualifications shall be provided by law. Principles of gender equality shall be respected.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
[…]
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
[...]
(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

Law No. 05/L -020 on Gender Equality

Article 6 [Special measures]

1. Public institutions shall take temporary special measures in order to accelerate the realization of actual equality between women and men in areas where inequities exist.
2. Special measures could include:
2.1. quotas to achieve equal representation of women and men;
2.2. support programs to increase participation of less represented sex in decision making and public life;
2.3. economic empowerment and steps to improve the position of women or men in the field of labour improvement of equality in education, health, culture and allocation and/or reallocation of resources;
2.4. preferential treatment, recruitment, hiring and promotion, and other measures in each area where inequalities exist.
3. The candidate of underrepresented gender must have the same qualifications against his/her candidate in terms of meeting conditions.
4. The application of each candidate shall undergo an objective assessment which must take into account all the criteria that are typical to each individual candidate.
5. Priority given to the candidate of underrepresented gender cannot be automatic and unconditional but, can be ignored if the specific reasons for an individual candidate may be in his/her favour.
6. Do not constitute gender discrimination when public institutions take special measures, including legal provisions, aimed at accelerating the deployment of actual equality between women and men. These measures should cease to exist once they

achieve gender equality objectives, for which are created.
7. Legislative, executive, judicial bodies at all levels and other public institutions shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved.
8. Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies.[492]

Law No. 03/L-073 on General Elections in the Republic of Kosovo

Article 27 [Gender Requirement]

27.1 In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female, with one candidate from each gender included at least once in each group of three candidates, counting from the first candidate in the list.
27.2 This article has no application to lists consisting of one or two candidates.

Article 110 [General Provisions]

110.2 A Political Entity shall submit a list of candidates based on procedures established by this law and CEC rules. Each candidate list shall comprise at least 30% of candidates from the other gender according to the table attached as Annex 1.

Article 111 [Distribution of Seats]

111.6. If, after the allocation of seats as set out in paragraph 5 of this Article, the candidates of the minority gender within a Political Entity have not been allocated at least 30% of the total seats for that Political Entity, the last elected candidate of the majority gender will be replaced by the next candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender is at least 30%.

Article 112 [Replacement of Assembly Members]

112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows: a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election; b) if there is no other eligible candidate of the same gender on the candidate list, by the next eligible candidate who won the highest number of votes from the candidate list.[493]
Apart from the quota under the Law on General Elections, additional laws aim at the prevention and fight against discrimination based on gender, beyond governmental positions. These pieces of legislation foresee affirmative actions to prevent or compensate discrimination based on gender. They also require the commitment of all municipal organs to ensure that the citizens of the municipality enjoy their rights and freedoms without discrimination of any kind, including gender.

Law No. 05/L-021 on the Protection from Discrimination

Article 1 [Purpose]

1. The purpose of this law is to establish a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.
2. This law is in accordance with […] Council Directive 2000/78/EC of 17 November on establishing a general framework for equal treatment in employment and occupation of the Council of the European Union […] [and] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on implementation of the principles of equal opportunities and equal treatment of men and women related to employment and occupation [amended] of the European Parliament and the Council of the European Union.

492 Law No. 05/L-020 on Gender Equality, 26 June 2015.
493 Law No. 03/L-073 on General Elections in the Republic of Kosovo.

Article 2 [Scope]

1. This law applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life, especially related to:
1.1. conditions for access to employment, self-employment and occupation, including employment conditions and selection criteria, regardless of the activity and at all levels of the professional hierarchy, including promotions;
1.2. access to all types and levels of vocational guidance, vocational training, advanced vocational training and re-qualifications, including internship experience;
1.3. conditions of employment and working conditions, including discharge or termination of the contract and salary;
1.4. membership and involvement in organizations of workers or employers or any organization whose members exercise a particular profession, including the benefits provided for by such organizations;
[…]
1.14. participation in public affairs, including the right to vote and the right to be elected […].

Article 7 [Affirmative actions]

1. Affirmative actions are undertaken measures in order to prevent or compensate unfavourably groups or persons related to any of the grounds specified in Article 1 of this Law.
2. Affirmative actions may apply, including but not limited to:
2.1. targeted group shall be underrepresented in the corresponding position;
2.2. underrepresented group candidate must have the same qualifications as those of his/her counter candidate in terms of eligibility, ability and professional performance;
[…]
3. Affirmative actions are not considered discrimination under this law and shall apply only until the achievement of the purposes for which those measures are set.

Article 8 [Responsibilities of institutions of the Republic of Kosovo]

All institutions should act in accordance with the principles of this Law during the exercise of their duties and drafting policies and legislation.

Article 10

1. The Office for Good Governance within the Office of the Prime Minister, for implementation of this law, is responsible to:
1.1. provide advices to the Government, on issues related to protection from discrimination and the promotion of gender equality;
1.2. monitor implementation of the Ombudsperson's recommendations;
1.3. shall draft policies and action plans on issues of protection from discrimination; […]
1.6. cooperate with respective governmental bodies from other countries, and international organizations on issues of protection from discrimination; […]
1.8. cooperate and support other institutions of the Republic of Kosovo to draft and implement action plans for equality and non-discrimination, equality integration and initiatives to promote equality and combat discrimination; […].

Article 11

Institutional mechanisms for protection from discrimination in the Ministries and Municipalities
1. All ministries and municipalities are obliged to assign the appropriate unit or official to coordinate and report on the implementation of the Law; […].[494]

Law NR. 03/L-040 on Local Self-Government

Article 4 [General]

4.2. All municipal organs shall ensure that the citizens of the municipality enjoy the rights and freedoms without distinction of any kind, such as race, ethnicity, color, sex, language, religion, political or other opinion, national or social origin, property,

494 Law No. 05/L-021 on the Protection from Discrimination, 26 June 2015, at https://equineteurope.org/wp- content/uploads/2019/10/Annex-LAW_NO.05_L-021_ON_THE_PROTECTION_FROM_DISCRIMINA TION.pdf.

birth, or other status, and that they have fair and equal opportunities in municipality service at all levels.[495]

Relevant Case-law and Opinions

The Constitutional Court Case KO13/15 is relevant to this matter.[496] Cases KI45/20 and KI46/20 of 26 March 2021 on a constitutional review of Decisions AA. No. 4/2020 of 19 February 2020 and AA. No. 3/2020 of 19 February 2020 of the Supreme Court of Kosovo are also applicable.[497] The following opinions of the Venice Commission and international documents are important as well.

Case KO13/15

On 29 December 2014, deputies of the Assembly proposed to the President of the Assembly one constitutional amendment.[498] On 6 February 2015, the Assembly asked the Court to assess whether the proposed amendment diminishes any of the rights and freedoms as set forth under Chapter II of the Constitution.[499] The amendment read:

8. "None of the genders can be represented less than 40% in the positions of ministers and deputy ministers of the Government of the Republic of Kosovo."[500]

The deputies proposed that such wording is added as a new paragraph after paragraph 7 of Article 96 on Ministries and Representation of Communities, of the Constitution.[501] They alleged that women were not represented more than 10-15% in ministerial positions, even though the women/men ratio of the population is 50% to 50%. Following these circumstances, they found it necessary to introduce a gender quota in the executive branch as an affirmative mechanism for overcoming factual discrimination. In their view, the Constitution acknowledges the imposition of affirmative measures to protect and advance the rights of individuals and groups being in an unequal position, as set forth under Article 24 [Equality Before the Law].[502]

The deputies noted that the imposition of a gender quota in the Constitution is an obligation the Government cannot disregard. Also, it is similar to the guarantees provided to minorities.[503] Besides that, the non-implementation of Law No. 2004/2 on gender Equality of 19 February 2004 - referring to institutions and leading bodies - is a further motive for constitutionalizing such a norm.[504]

In addition, the deputies argued that their proposed amendment is in line with the objectives of Resolution No. 04-R-09 of the Assembly of Kosovo: "Prishtina Principles emerging from the International Women's Summit: "Partnership for Change: Empowering Women", adopted on 20 December 2012. Paragraph 4 " […] Encourages the institutions of the Republic of Kosovo to undertake concrete measures and establish local and international partnerships with relevant institutions to fulfill the objective of women's participation in civil service by fifty percent until 2050."[505]

The Court acknowledged that the proposed amendment to Article 96 of the Constitution refers to two key aspects: 1) to introduce a gender quota (40%), which – according to the deputies - is equivalent to proportional representation of the population; and 2) the 40% quota applicable to the Ministerial and Deputy Ministerial positions in the Government only.[506]

495 Law NR. 03/L-040, Law on Local Self Government, at https://gzk.rks-gov.net/ActDetail.aspx?ActID=2530
496 Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by fifty five Deputies of the Assembly of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 6 February 2015 by letter No. 05-259/00-179, Case No. KO13/15, 16 March 2015, at https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_13_15_ang.pdf.
497 Constitutional review of Decisions AA. No. 4/2020 of 19 February 2020 and AA. No. 03/2020 of 19 February 2020 of the Supreme Court of Kosovo, cases KI45/20 and KI46/20, 29 March 2021, at https://gjk- ks.org/wp-content/uploads/2021/03/ki_45_46_20_agj_ang.pdf.
498 Case No. KO13/15, para. 14.
499 Ibid., para. 15.
500 Ibid., para. 25.
501 Ibid., para. 22.
502 Ibid., para. 26.
503 Ibid., para. 27.
504 Ibid., para. 28.
505 Ibid., para. 29.
506 Ibid., para. 31.

The Court also recognized that the scope of Article 96 of the Constitution extends to the non- majority communities (e.g., Serb, Roma, Ashkali, Egyptian, Bosnian, Turkish, and Goran) including both women and men. In the Court's view, the proposed amendment needs to be considered in the context of the rights of these communities as set forth under the Constitution.[507]

In providing a comprehensive assessment of the proposed Amendment, the Court considered the international instruments under Article 22 of the Constitution [Direct Applicability of International Agreements and Instruments].[508] It noted that by introducing a gender-related quota for Ministerial and Deputy Ministerial positions, the proposed amendment narrows the applicability of the constitutional safeguards for gender equality. In short, it diminishes the right to gender-balanced participation in public bodies.[509]

The Court confirmed that the government reflects the political will of the Assembly, notwithstanding whether the Ministers and Deputy Ministers are public figures or qualified professionals.[510] It considers that: "A constitutional regulation of a gender quota for Ministerial and Deputy Ministerial positions may further, in practice, turn into a formal replacement of a person of the same gender that could diminish the rights of the other people being Deputies or qualified persons to become part of the government".[511]

Further, the Court observed: "that it is not a common practice to have constitutional provisions regulating the participation in public bodies through gender quotas".[512] Instead, the Court stated that the principle of equal opportunities for both women and men should be applied. At the very core of the argument was the Court's consideration that "the constitutional practice does not establish a qualified form of positive discrimination whereby preference is automatically and unconditionally based on a gender, notwithstanding the requirement of professional merit".[513]

The Court was concerned that the quota would compromise the professional merit and political will of the Assembly.

The Court's line of thinking is subject to discussion. It suggests that a certain specific quota (e.g., a minimum of 40% of female members in the Government) is incapable of implementing or ensuring a merit-based policy that reflects the will of the Assembly. The Court could have explored the option of the interim applicability of the proposed measure and, in particular, looked at the provisions of CEDAW and the practice of its treaty.

The Court referred to Article 96(6) of the Constitution, which states that the Ministers may be elected amongst deputies of the Assembly. Therefore, in the Court's view, the deputies of the Assembly may apply the principle of gender equality and proportional representation while voting for Ministerial positions.[514]

Additionally, the Court observed that Article 96 of the Constitution envisages the possibility for Ministers to be elected from among qualified people who are not deputies of the Assembly, i.e., merits-based nominations.[515] In this respect, the Court notes that the composition of the government reflects the political will of the Assembly, regardless of whether the Ministers and Deputy Ministers are public figures or qualified professionals.[516]

In the case under consideration, the Court acknowledges that "the Deputies have not submitted any supporting evidence showing that the current constitutional safeguards of the principle of gender equality are insufficient to guarantee the gender equality […].[517]

507 Ibid., para. 35.
508 Ibid., para. 40.
509 Ibid., para. 54.
510 Ibid., para. 56.
511 Ibid., para. 57.
512 Ibid., para. 60.
513 Ibid.
514 Ibid., para. 55.
515 Ibid.
516 Ibid., para. 56.
517 Ibid., para. 61.

In this connection, the Court referred to Article 4(4) of the Constitution, which states: "The Government of the Republic of Kosovo is responsible for the implementation of laws and state policies and is subject to parliamentarian control".[518] On this basis, the Court notes that "the responsibility for implementing Law No. 2004/2 on Gender Equality lies with the Government, which is subject to the Assembly's control, but it reiterates that it is the Assembly itself that votes and elects the government".[519]

The Court also dismissed the argument advanced on the basis of Article 24(3), which provides that "principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled".[520] The Court considered the reference to this constitutional provision as unsubstantiated, as the Deputies have not justified that the proposed amendment would be necessary to protect and advance gender equality in the Government.[521]

The Court ultimately concluded that the Constitution provides sufficient safeguards for genders to be represented and participate in public life equally. It found that the proposed amendment diminishes the constitutional rights guaranteed by Chapter II of the Constitution as well as under Chapter III, and its letter and spirit as established in the Court's case law.[522]

The Court held that the proposed constitutional amendment for a 40% gender quota in ministerial and deputy ministerial positions in the Government, is not in compliance with the Constitution.

Cases KI45/20 & KI46/20

Both cases deal with disputes over the elections for the Assembly of 6 October 2019. After the constitution of the Assembly, some deputies of Vetevendosje (LVV), who were elected to Government/municipal positions, vacated their positions and had to be replaced by candidates on the list for deputies. The Law on General Elections specifies the way deputies are replaced:

"112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:

a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election; […]".[523]

The deputies who vacated their seats were replaced by candidates of the same gender. The Applicants alleged that, despite reaching and exceeding the quota of 30% by women candidates, replacements for deputies were not made based on the election result but on gender.[524]According to them, this constituted unequal treatment and a violation of their right to be elected.

The Court relied on the interpretation of the Law on General Elections by the Supreme Court and noted that all replacements were made on the criterion of gender to achieve the goal of the 30% quota, irrespective of the result reached by the candidates for deputy.[525]

According to the Supreme Court, this manner of replacement could not be avoided because there is an assumption that the laws are compatible with the Constitution and that they should apply as such until the Constitutional Court finds that a law or any of its legal provisions is contrary to the Constitution.[526]

518 Ibid., para. 63.
519 Ibid., para. 64.
520 Ibid., para. 65; Constitution of Kosovo.
521 Case No. K013/15., para. 65.
522 Ibid., page 12
523 Law on General Elections.
524 Case No. KI45/20 and KI46/20, para. 103.
525 Ibid.
526 Ibid., para. 157.

Tinka Kurti and Drita Millaku were discriminated against based on gender after losing to their men counter-candidates despite gaining more votes than them in the elections.

The Court found that Tinka Kurti's right to be elected was violated. Despite the minimum quota of 30% reached - within the political entity VV through the election result- Kurti was not elected as a deputy at the time of the deputies' replacements, even though she had more votes than the men candidates for deputies, Fitim Haziri and Eman Rrahmani.[527]

As the judgment was delivered after the Assembly was dissolved, the Court had to consider its effects. The Court noted that "for objective reasons and in the interest of legal certainty, this Judgment cannot produce a retroactive legal effect in respect to the mandate of the deputies [and would also] not affect the rights acquired by third parties based on the decisions annulled by this Judgment. [In the Court's view,] [h]owever, this [would not render] […] the Judgment merely […] declaratory and without any effect".[528]

As for "[t]he first effect of the Judgment [,] [this was] the repealing of the challenged decisions of the Supreme Court, the ECAP and the CEC, as being incompatible with the Constitution and the ECHR in terms of interpretation of Article 112.2 a) of the Law on General Elections".[529]

The Judgment clarifies that based on an accurate and contextual reading of Article 112.2(a) of the Law on General Elections, the replacement of candidates for deputies should be done in such a way that: first, ensures a minimum representation of 30% of the underrepresented gender (minority gender) not to be questioned at any time; and second, in cases where the gender quota of 30% has been met based on the election result (as in the present case), the replacement of candidates for deputy should be carried out based on the election result and not limited in terms of replacement based on the same gender.[530]

The second effect of this Judgment concerns the right emerging for the Applicants or other parties that may be affected by this Judgment, from the moment of its entry into force.[531]

It is also interesting to observe the Court's reading of Article 6(8) of the Law on Gender Equality as relevant for equal gender representation in all legislative, executive, and judiciary bodies. For this purpose, the Court, notes that Article 6(8) provides that "Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies",[532] and it declares as follows:

142. […] The Assembly as a legislator has not formulated this percentage as a mandatory legal quota, but has formulated it more in the form of a constitutional, legal and factual ideal that the democratic society of the Republic of Kosovo must achieve and that only after its achievement true factual equality is ensured. Thus, the 50% regulated in Article 6.8 of the Law on Gender Equality is not a legal quota for mandatory representation as is the 30% regulated in Article 27 of the Law on General Elections which specifically presents the obligation: "In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female [...]".

The Constitutional Court cannot set new public policies, nor asses whether a public policy is good or appropriate.

143. […] It is [also] not up to the Court to re-establish new legal quotas or increase the percentage of legal gender representation quotas in favor of either gender. The legislators of the Republic of Kosovo are the ones who have set the 30% quota as the only applicable legal quota, which should be maintained in any circumstance until the competent authorities decide to make legal changes in this regard, if they deem it necessary. It is also the legislators who have set 50% as the constitutional ideal of equal gender representation, emphasizing that equal gender representation is achieved only when 50-50 representation is provided for each gender.

527 Ibid., para.139.
528 Ibid., para. 170.
529 Ibid., para. 171.
530 Ibid.
531 Ibid., para. 172.
532 Ibid., para. 142.

144. However, all these important discussions fall into the domain of public policy-making issues, a domain that belongs to the Government and the Assembly on how they consider it to be the best way to achieve the ideal of 50-50 representation. For example, the Venice Commission states that if states decide to adopt legal quotas, then they "should provide for at least 30 percent of women on party lists, while 40 or 50 are preferable" in order for quotas to be effective.[533]

Another key document further clarifying the issue under consideration is the following:

Gender Equality Strategy 2018-2023, adopted by the Committee of Ministers of the Council of Europe (March 2018), which reads -in its relevant parts- as follows:

35. The overall goal of the new Strategy is to achieve the effective realisation of gender equality and to empower women and men in the Council of Europe member States, by supporting the implementation of existing instruments and strengthening the Council of Europe acquis in the field of gender equality, under the guidance of the Gender Equality Commission (GEC). The focus for the period 2018-2023 will be on six strategic areas:

1) Prevent and combat gender stereotypes and sexism.
2) Prevent and combat violence against women and domestic violence.
3) Ensure the equal access of women to justice.
4) Achieve a balanced participation of women and men in political and public decision-making.
5) Protect the rights of migrant, refugee and asylum-seeking women and girls.
6) Achieve gender mainstreaming in all policies and measures.

36. These priority areas build on and further develop the existing body of work carried out by the Council of Europe and the member States, bringing added value to actions taken by other regional and international organisations. In addition, they will sustain the Council of Europe and member States' activities in the field of gender equality in order to achieve tangible results during the period covered by the new Strategy.

37. The beneficiaries of the new Strategy are women and men, girls and boys, living in the 47 Council of Europe member States and society as a whole. The governments of member States drive the implementation of the new Strategy at national and local levels, in close co-operation with gender equality institutions, equality bodies and civil society".[534]

Recommendation Rec (2003) 3 adopted by the Committee of Ministers of the Council of Europe on 12 March 2003 and explanatory memorandum, Balanced participation of women and men in political and public decision-making:

Mindful of the high priority the Council of Europe gives to the promotion of democracy and human rights, it recommends that the governments of member states:

Equal sharing of decision-making power between women and men of different background and ages strengthens and enriches democracy.

I. commit themselves to promote balanced representation of women and men.

II. protect and promote the equal civil and political rights of women and men, including running for office and freedom of association;

III. ensure that women and men can exercise their individual voting rights and, to this end, take all the necessary measures to eliminate the practice of family voting;

IV. review their legislation and practice, with the aim of ensuring that the strategies and measures described in this recommendation are applied and implemented;

V. promote and encourage special measures to stimulate and support women's will to participate in political and public decision-making;

VI. consider setting targets linked to a time scale with a view to reaching balanced participation of women and men in political and public decision-making;

VII. ensure that this recommendation is brought to the attention of all relevant political institutions and to public and private bodies, in particular national parliaments, local and regional authorities, political parties, civil service, public and semi-public

533 Case No. KI45/20 and KI46/20.
534 Council of Europe, Council of Europe Gender Equality Strategy 2018-2023, adopted by the Committee of Ministers of the Council of Europe (March 2018), at https://rm.coe.int/prems-093618-gbr-gender-equality- strategy-2023-web-a5/16808b47e1.

organisations, enterprises, trade unions, employers' organisations and non-governmental organisations;

VIII. monitor and evaluate progress in achieving balanced participation of women and men in political and public life, and report regularly to the Committee of Ministers on the measures taken and progress made in this field

Appendix to Recommendation Rec (2003) 3

For the purpose of this recommendation, balanced participation of women and men is taken to mean that the representation of either women or men in any decision-making body in political or public life should not fall below 40%.

On this basis, the governments of member states are invited to consider the following measures:

A. Legislative and administrative measures – Member states should:

1. "consider possible constitutional and/or legislative changes including positive action measures, which would facilitate a more balanced participation of women and men in political and public decision-making."

2. adopt administrative measures so that official language reflects a balanced sharing of power between women and men;

3. consider adopting legislative reforms to introduce parity thresholds for candidates in elections at local, regional, national and supra-national levels. Where proportional lists exist, consider the introduction of zipper systems;

4. consider action through the public funding of political parties in order to encourage them to promote gender equality;

5. where electoral systems are shown to have a negative impact on the political representation of women in elected bodies, adjust or reform those systems to promote gender-balanced representation;

6. consider adopting appropriate legislative measures aimed at restricting the concurrent holding of several elected political offices simultaneously;

7. adopt appropriate legislation and/or administrative measures to improve the working conditions of elected representatives at the local, regional, national and supra-national levels to ensure more democratic access to elected bodies;

8. adopt appropriate legislative and/or administrative measures to support elected representatives in reconciliation of their family and public responsibilities and, in particular, encourage parliaments and local and regional authorities to ensure that their time tables and working methods enable elected representatives of both sexes to reconcile their work and family life;

9. consider adopting appropriate legislative and/or administrative measures to ensure that there is gender-balanced representation in all appointments made by a minister or government to public committees;

10. ensure that there is a gender-balanced representation in posts or functions whose holders are nominated by government and other public authorities;

11. ensure that the selection, recruitment and appointment processes for leading positions in public decision-making are gender sensitive and transparent;

12. make the public administration exemplary both in terms of a gender-balanced distribution of decision-making positions and in equal career development for women and men;

13. consider adopting appropriate legislative and/or administrative measures to ensure that there is gender-balanced representation in all national delegations to international organisations and fora;

14. take due account of gender balance when appointing representatives to international mediation and negotiating committees, particularly in the peace process or the settlement of conflicts;

15. consider taking legislative and/or administrative measures aiming at encouraging and supporting employers to allow those participating in political and public decision-making to have the right to take time off from their employment without being penalised;

16. set up, where necessary, support and strengthen the work of the national equality machinery in bringing about balanced participation in political and public life;

17. encourage parliaments at all levels to set up parliamentary committees or delegations for women's rights and equal opportunities and to implement gender mainstreaming in all their work […].[535]

Opinions of the Venice Commission

Report on the Impact of Electoral Systems on Women's Representation in Politics (2009)

"In order to be effective, gender quotas should provide for at least 30% of women on party lists, while 40% or 50% is preferable."

110. While it is difficult to make general recommendations on list forms, closed lists seem to be slightly preferable, especially if gender quotas are used.

116. Reserved seats for women are not considered as a viable and legitimate option in Europe.[536]

Armenia – Joint Opinion on the draft electoral code as of 18 April 2016 (2016)

121. The Venice Commission and the OSCE/ODIHR have stated, on several occasions, that 'the small number of women in politics remains a critical issue which undermines the full functioning of democratic processes'. In line with the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Report on the Method of Nomination of Candidates within Political Parties, electoral quotas are regarded as temporary special measures that can act as an 'appropriate and legitimate measure to increase women's parliamentary representation. It is for each country to decide how to improve gender equality. However, the Venice Commission considers that, if legislative quotas are imposed, they 'should provide for at least 30 percent of women on party lists, while 40 or 50 is preferable, in order to be effective.

122. It is therefore recommended that the draft code provide a more effective quota for women's representation on candidate lists, such as placing women among every two or three candidates. The draft code should also ensure that the chosen quota is effective not only for the registration of the candidate list, but also when distributing mandates.[537]

Report on the method of nomination of candidates within political parties (2015)

69. Among those countries that have regulated this issue, there are two main elements of 'substantive' intra-party democracy, which can be identified:

- There is a growing majority of countries that have included gender quotas in their legislation. Quotas within candidates' lists are preferred, as opposed to reserved seats in constituencies.

- As to the rules on the representation of minority, ethnic and vulnerable groups, there seems to be an opposite trend: there are reserved seats or special constituencies, resulting in 'guaranteed mandates' as a way of ensuring such groups' representation".[538]

Opinion on the electoral legislation of Mexico (2013)

54. There is a discussion underway concerning the introduction of gender quotas on political party leaders (Article 38.s of the COFIPE), in order to ensure a higher proportion of women among the higher positions inside political parties. There are no international standards that establish an obligation in this respect; however, it would be a positive further step to consolidate

535 Council of Europe, Balanced participation of women and men in political and public decision-making, Recommendation Rec (2003) 3 of the Committee of Ministers and explanatory memorandum, adopted by the Committee of Ministers of the Council of Europe on 12 March 2003, at https://rm.coe.int/1680519084?msclkid=897b92b4a69d11ecbd1df68ff531467d.

536 European Commission for Democracy Through Law, Venice Commission, Draft Report on the impact of electoral systems on women's representation in politics, Study No. 482/2008, CDL-EL(2009)004, 23 February 2009, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL(2009)004-e

537 European Commission for Democracy Through Law, Venice Commission, Office for Democratic Institutions and Human Rights (OSCE/ODHIR), Armenia Joint Opinion on the electoral draft code as of 18 April 2016 endorsed by the Council of Democratic Elections at its 55 meeting, Venice, 9 June 2016, and by the Venice Commission at its 107 plenary session, Venice, 10-11 June 2016, Opinion No. 835/2016, CDL- AD(2016)019, 13 June 2016, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)019-e

538 European Commission for Democracy Through Law, Venice Commission, Draft Report on the method of nomination of candidates within political parties,Study No. 721/2013, CDL-AD(2015)006, 5 March 2015, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL(2015)006-e

an already progressive legislation in this field.539

Joint Opinion on the Draft Amendments to the Laws on election of people's deputies and on the Central Election Commission and on the Draft Law on repeat elections of Ukraine (2013)

17. The draft electoral law does not contain any affirmative measures to increase the participation of women in elections. In its final report on the 2012 parliamentary elections, the OSCE/ODIHR recommended to consider the introduction of a gender requirement for nomination of party lists as a temporary measure to increase the participation of women in elections. This recommendation is consistent with the provisions of Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women […] and the principles of the Council of Europe. *The Venice Commission and the OSCE/ODIHR recommend that consideration be given to adding appropriate text in the draft electoral law for mandatory gender quotas for party lists presenting candidates for the proportional representation component of the parliamentary elections.*

18. Consideration should also be given to encouraging political parties to promote women's participation in elections through legal provisions for campaign and political party finance. Allocation of public funds for campaigns based on party support for women candidates is an appropriate mechanism for encouraging political parties to nominate more women candidates in light of the requirement for special measures as stated in Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women.[540]

Joint Opinion on the draft election code of Georgia (2011)

34. […] Although neither the Council of Europe nor OSCE require gender quotas, both recognise that legislative measures are effective mechanisms for promoting women's participation in political and public life. […].[541]

Report on Electoral Law and Electoral Administration in Europe, Synthesis study on recurrent challenges and problematic issues (2006)

Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage.

180. […] there might be gender quotas for the composition of or the candidacies for Parliament. In a number of Council of Europe member states, such a minimum percentage of women in the list of candidates is required by law. In the 2004 municipal elections in Kosovo, for example, a third of the candidates had to be women, otherwise political entities would have been disqualified […] In Armenia, the required minimum percentage of women in a list of candidates has recently been increased from 5% to 15% [...] In addition to a minimum gender balance, the election law may also stipulate a detailed order to ensure balance throughout the list (as for Bosnia and Herzegovina …). A composition of the candidates' lists with alternating men and women might be considered. Even with elections in single-member constituencies, a minimal percentage of members of each gender among candidates might be possible".[542]

General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004)

22. The term 'measures' encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential

539 European Commission for Democracy Through Law, Venice Commission, Opinion on the electoral legislation of Mexico adopted by the Council for Democratic Elections at its 45 meeting, Venice, 13 June 2013 and by the Venice Commission at its 95 plenary session, Venice, 14-15 June 2013, Opinion No. 680/2012, CDL-AD(2013)021, 18 June 2013, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)021-e

540 European Commission for Democracy Through Law, Venice Commission and OSCE/Office for Democratic Institutions and Human Rights (OSCE/ODHIR), Joint Opinion on the Draft amendments to the laws on election of people's deputies and on the central election commission and on the draft law on repeat elections of Ukraine, Opinion No. 727/2013, CDL-AD(2013)016, 17 June 2013, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)016-e

541 European Commission for Democracy Through Law, Venice Commission and OSCE/Office for Democratic Institutions and Human Rights (OSCE/ODHIR), Joint Opinion on the Draft Election Code of Georgia, Opinion No. 617/2011, CDL-AD(2011)043, 19 December 2011, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)043-e

542 European Commission for Democracy Through Law, Venice Commission Report on electoral law and electoral administration in Europe, Study No. 355/2005, CDL-AD(2006)018, 12 June 2006, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)018-e

treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems. The choice of a particular "measure" will depend on the context in which article 4, paragraph 1, is applied and on the specific goal it aims to achieve".[543]

General recommendation No. 23: Political and public life (1997)

29. Measures that have been adopted by a number of States parties in order to ensure equal participation by women in senior cabinet and administrative positions and as members of government advisory bodies include: adoption of a rule whereby, when potential appointees are equally qualified, preference will be given to a woman nominee; the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body; a quota for women members of cabinet and for appointment to public office; and consultation with women's organizations to ensure that qualified women are nominated for membership in public bodies and offices and the development and maintenance of registers of such women in order to facilitate the nomination of women for appointment to public bodies and posts. Where members are appointed to advisory bodies upon the nomination of private organizations, States parties should encourage these organizations to nominate qualified and suitable women for membership in these bodies.[544]

Comparative Analysis and References

Kosovo's constitutional practice on gender quotas follows the same patterns as those of various European countries. Equality before the law and non-discrimination are key constitutional principles. Yet some other constitutions are more elaborated, like the Constitution of Burundi specifying the composition of the National Assembly and the 30% minimum gender quota. The same quota is guaranteed for women's representation in the Senate. France's constitution requires that statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions; political parties and groups shall implement these principles. The Constitution of Rwanda explicitly spells out that 24 women -each from every province and the capital- shall be elected as deputies.

Older constitutions than the ones above, like Greek, German and Argentinian do not foresee gender quotas in decision-making positions. Yet they recognize upon the state the need of adopting the necessary measures to guarantee equality between women and men, by removing the disadvantages that might exist. Specifically, the Argentinian Constitution refers to political parties. The relatively new Constitution of Montenegro also mentions the state's intervention in guaranteeing gender equality, by developing the policy of equal opportunities. On the contrary, the Constitution of Poland limits itself to recognize equal rights upon women and men especially regarding employment and promotion.

In older countries where constitutions do not refer to gender quotas in the composition of the Parliament, the quotas are usually set forth by law and under the Rules of Procedures of the Assembly.

Albania

Article 116

1. All are equal before the law.
2. No one may be discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.
3. No one may be discriminated against for reasons nominated in paragraph 2 without reasonsable and objective grounds.[545]

543 General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, at https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20 (English).pdf
544 CEDAW General recommendation No. 23: Political and public life (1997), at https://www.refworld.org/ docid/453882a622.html
545 Constitution of Albania.

Electoral Code

4. For each electoral zone, at least thirty percent of the multi name list and 7 or one of the first three names on the multi name list must be from each gender. [….].[546]

Argentinian Constitution

Section 37

[…] Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system.[547]

Electoral Law

Article 60 of the Argentinian Electoral Law establishes that the lists of candidates for the National Congress and the Parliament must be placing interspersed women and men from the first titular candidate to the last alternate candidate. Hence, the Argentinian electoral law, enforces a 50 percent equality between the candidates in the electoral lists. Additionally, the Electoral Code warns the political parties to comply with the gender quotas or their lists will not be approved for election.[548]

Burundi

Article 169

The National Assembly is composed of at least 100 deputies in rates of 60% Hutu and 40% Tutsi, of which a minimum of 30% must be women, elected by direct universal suffrage for a term of 5 years and 3 deputies issuing from the Twa ethnicity co-opted according to the electoral code.
In the case that the results of an election do not reflect the percentages outlined above, it proceeds to the rectification of corresponding imbalances by means of cooptation provided for in the Electoral Code.

Article 173

The elections of deputies occur following the ballot of bloc lists by proportional representation. These lists must have a multiethnic character and take into account the balance between men and women. For three candidates registered on a list, only two can belong to the same ethnic group, and at least one of three must be a woman.

Article 185

The Senate is composed of: […] a minimum rate of 30% women is guaranteed. Electoral law determines practical ways and, with cooptation in due case.[549]

Electoral Law

The Electoral Code of 2014 in Burundi, affirms that lists should take gender balance into account and that one in four candidates must be female.[550]

Electoral Code

Article 108

The national Assembly is made up […] [of] a minimum of 30% women elected by direct universal suffrage […].

546 Electoral Code of Albania, at https://www.refworld.org/pdfid/4c1f93e32.pdf.
547 Constitution of Argentina, at http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf.
548 International IDEA, at https://www.idea.int/data-tools/data/gender-quotas/country-view/51/35.
549 Constitution of Burundi, at https://www.constituteproject.org/constitution/Burundi_2018.pdf?lang=en.
550 Burundi Electoral Code 2014 https://www.presidence.gov.bi/2014/06/03/loi-n120-du-3-juin-2014-portant- revision-de-la-loi-n122-du-18-septembre-2009-portant-code-electoral/.

Article 127

[…] the lists have to have a multiethnic character and take gender balance into account.[551]

France

Article 1

[…] Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.

Article 3

[…] Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret.

Article 4

[Political parties and groups] shall contribute to the implementation of the principle set out in the second paragraph of article 1 as provided for by statute.
Statutes shall guarantee the expression of diverse opinions and the equitable participation of political parties and groups in the democratic life of the Nation.[552]

Electoral Law

According to the French electoral law, the gender difference between the total number of the candidates that a party or group of parties present for cannot be greater more than 2%. Financial penalties can be given to political parties for non-compliance to the law. In the French Senate, each list of candidates presented must have a difference between the number of candidates of each gender no bigger than 1, while maintaining an alternation of male and female candidates. Whereas for the candidate lists in majoritarian districts, the main candidate and the alternate candidate presented must be of the opposite sex.[553]

Germany

Article 3

1. All persons shall be equal before the Law.
2. Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
3. No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland, origin, faith, or religious or political opinion. […].

Article 33

1. Every German shall have in every Land the same political rights and duties.
2. Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements […].[554]

Constitution of Rwanda

Article 10 (4)

The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof:

551 Electoral Code of Burundi, at https://www.droit-afrique.com/uploads/Burundi-Code-2019-electoral.pdf.
552 Constitution of France, at https://www.constituteproject.org/constitution/France_2008.pdf?lang=en
553 Electoral Code, Section on Legislative Elections, at https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070239/.
554 Constitution of Germany.

[…]
that women are granted at least 30 per cent of posts in decision making organs. […].

Article 75

The Chambers of deputies shall be composed of 80 members as follows:
1. fifty-three (53) are elected in accordance with the provisions of article 77 of this Constitution;
2. twenty four (24) women; that is : two from each Province and the City of Kigali. These shall be elected by a joint assembly composed of members of the respective District, Municipality, Town or Kigali City Councils and members of the Executive Committees of women's organizations at the Province, Kigali City, District, Municipalities, Towns and Sector levels. […].[555]

Greece

Article 116

[…]
Adoption of positive measures for promoting equality between men and women does not constitute discrimination on grounds of sex. The State shall take measures for the elimination of inequalities actually existing, in particular to the detriment of women.[556]

Montenegro

Article 17

Rights and liberties shall be exercised on the basis of the Constitution and the confirmed international agreements.
All shall be deemed equal before the law, regardless of any particularity or personal feature.

Article 18

The state shall guarantee the equality of women and men and shall develop the policy of equal opportunities.[557]

Poland

Article 32

1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Article 33

[…]
2. Men and women shall have equal rights, in particular, regarding […] employment and promotion […].[558]

Conclusion

The Constitution remains silent on gender quotas. It does contain, however, internationally recognized standards for gender equality. Among others, it guarantees non-discrimination based on gender. It also provides for the possibility of imposing affirmative legal methods necessary to protect and advance the rights of individuals and groups in unequal positions.

555 Constitution of Rwanda.
556 Constitution of Greece.
557 Constitution of Montenegro.
558 Constitution of Poland.

While the majority of constitutions do not include gender quotas, especially the older ones, it is becoming recurrent in some other relatively young ones such as those of Burundi and Rwanda. The incorporation of gender quotas for members of the Government into the Constitution would not solely be about framing on paper a certain percentage of women for governmental positions. Rather, it would firmly signal where the country stands in this specific endeavor. It would also provide for a solid skeleton to the legislation in place, and more clarity.

Besides the Constitution, various laws guarantee gender equality in general terms, as well as gender quotas (30%) for members of the Government. Thus, there exists a quite solid and valid constitutional and institutional framework aiming to guarantee gender equality and gender quotas. Yet, women's political representation in legislative assemblies or decision-making positions remains a key challenge at the central, as well as the municipal level.

International Conventions on the other hand, such as CEDAW, are directly applicable to Kosovo. Yet the implementation of international standards -under CEDAW- is disputable. Kosovo is still represented under UNMIK, and the reporting that the AGE is due to submit to the CEDAW for implementing gender equality has been stalling for quite a while.

The case law followed a dichotomous pattern. On the one hand, it acknowledged that the introduction of a 40% quota for Ministerial and Deputy Ministerial positions would have diminished the rights to gender-balanced participation in public bodies. The Court appeared concerned about compromising the professional merit and political will of the Assembly by inserting the quota. On the other hand, it acknowledged discrimination based on gender, where the election results prevailed. Court's case law is a case-by-case based process and -in absence of constitutional provisions- it remains the only institutional authority to decide whether there has been discrimination based on gender. This practice may create unclarities and misunderstandings.

Various conventions and opinions provide for at least 30% of women on political party lists, while 40% or 50% would be preferable. Others even foresee the introduction of gender quotas for political party leaders. In the absence of international standards establishing an obligation in this regard, the introduction of such quotas could be a progressive step to consolidate legislation. Even if the Council of Europe and the OSCE do not require gender quotas, they acknowledge that these are effective mechanisms for promoting women's participation in political and public life. Other international documents refer to 'measures' mentioning a wide variety of legislative, executive, administrative, and other regulatory instruments, policies, and practices.

The 30% gender quota is an old one. The situation has not improved to this day; in some aspects, it has only gotten worse. Thus, in absence of fully explicit constitutional provisions on gender quotas, the language of the Constitution needs to be stronger. The country also needs to establish better laws and other internal rules to push forward a quota of at least 40%.

Recommendations

The following options could be considered:

- The Constitution or the law could provide for at least a 40% gender quota for a wide institutional balanced representation between women and men, including the composition of the Government, namely its ministers and deputy ministers. The legislative and executive bodies should aim to adopt Venice Commission's recommendations on the gender quota.
- The Law on General Elections and the Law on Political Parties should be amended to conform to the possible constitutional amendment with a new quota of 40%, moving forward to a 50% quota, in line with the Venice Commission's recommendations. This could be a positive step to consolidate the legislation in the field. In fact, there is no need to wait for constitutional changes. The laws could be amended nevertheless.
- In absence of amendments to the Constitution or relevant laws, strong affirmative measures should be put in place. Their efficient implementation would increase women's participation in Kosovo's institutions, especially where major gaps in equal gender representation remain.

XVI

The Composition of the Government and Competencies of the Outgoing Government

The numerical composition of the Government and the powers of the outgoing government remain uncertain in absence of clear constitutional provisions. Once in 2020, and then again in 2021, a new law on the government was drafted in an attempt to address these issues but to no avail. The Venice Commission analyzed them both and provided guidelines to follow when regulating these matters. Either the Constitution or the law should (i) explicitly name the criteria for the size of the Government; and (ii) clearly define the scope of work of the outgoing Government.

The composition and competencies of the Government are important segments of Kosovo's institutional framework. Two main issues that arise due to constitutional gaps are the number of ministries and the powers of the outgoing Government.

The Constitution leaves it to the executive to determine the Government's size by an internal act.[559] However, the number of members of the Government has increased over time and has been considered largely to be disproportionate to the country's needs. This has engendered a vivid public debate while giving birth to a widely embraced opinion -among policymakers and civil society- to limit the number of members of the Government by law.

The Constitution does not set any limitations to the numerical composition of the Government.

With regards to the competencies of Government ministries, the Constitution provides that they perform functions within the powers of the Government.[560] Yet it is silent on the powers of the outgoing government and restrictions on its power if any.

To address these issues, a law on the government was drafted in 2020 and then once again in 2021. The drafts attempted to regulate the matter of the outgoing government, providing for some restrictions on its power but without clarifying its scope of power. They also referred to a "criterion of necessity" to determine the size of the Government, leaving it unclear what that criterion involves.

The Venice Commission provided an analysis of both draft laws and some important guidelines to follow when regulating the matters at issue. In line with its opinion, the laws and the Constitution need to provide more clarity to avoid uncertainties in practice.

Relevant Provisions

Constitution of Kosovo

Article 96 [Ministries and Representation of Communities]

1. Ministries and other executive bodies are established as necessary to perform functions within the powers of the Government.
2. The number of members of Government is determined by an internal act of the Government.
3. There shall be at least one (1) Minister from the Kosovo Serb Community and one (1) Minister from another Kosovo non-majority Community. If there are more than twelve (12) Ministers, the Government shall have a third Minister representing a Kosovo non-majority Community.
4. There shall be at least two (2) Deputy Ministers from the Kosovo Serb Community and two (2) Deputy Ministers from other Kosovo non-majority Communities. If there are more than twelve (12) Ministers, the Government shall have a third Deputy Minister representing the Kosovo Serb Community and a third Deputy Minister representing another Kosovo non-majority Community.
5. The selection of these Ministers and Deputy Ministers shall be determined after consultations with parties, coalitions or groups representing Communities that are not in the majority in Kosovo. If appointed from outside the membership of the Kosovo Assembly, these Ministers and Deputy Ministers shall require the formal endorsement of the majority of Assembly deputies belonging to parties, coalitions, citizens' initiatives and independent candidates having declared themselves to represent the Community concerned.
6. The Prime Minister, Deputy Prime Minister(s) and Ministers of the Government may be elected from the deputies of the Assembly of Kosovo or may be qualified people who are not deputies of the Assembly.
7. The incompatibilities of the members of the Government as to their functions shall be regulated by law.[561]

559 Constitution of Kosovo, Article 96(2).
560 Ibid, Article 96(1).
561 Ibid.

Opinion of the Venice Commission

The Venice Commission's Opinion No. 1005/2020 on Kosovo's Draft Law on the Government (the "Opinion") focused on two particularly sensitive issues: 1) the constitutionality of setting out the maximum number of ministers in the draft Law; and 2) the extent to which the powers of the outgoing Government may be restricted until a new government is elected.[562] In assessing this draft Law, the Commission considered not only the Constitution but also Kosovo's internal and external situation as a country, including a period of governmental instability involving for some time tensions between the Head of State and the Prime Minister, unstable parliamentary coalitions and a particularly difficult geopolitical situation.

1. Number of ministries

The law should set the criteria that the Government should apply when deciding about the number of ministries.

The Venice Commission concludes that "the number of members of the Government is determined by an internal act of the Government".[563] The Opinion addresses several issues of content and also the procedure followed in the law-making process.

The Venice Commission noted that "the Law's policy objective of limiting the number of ministers in the Government could be achieved by replacing the numerical limit in the draft Law with explicit criteria of necessity which must be objectively satisfied before there can be any increase in the number of ministers beyond the number outlined in the relevant internal act of the government".[564]

Alternatively, Article 96(2) of the Constitution could be amended in ways that could either expressly authorize the determination of the number of members of the Government by law or set the number in the Constitution itself.[565]

The majority of countries disfavor the option of constitutionally limiting the members of the government, the exceptions being Belgium (setting a maximum limit of fifteen ministers), Ireland (setting a minimum of seven and a maximum of fifteen),[566] and Switzerland (providing for a seven- member Federal Council).

The exceptions can also be explained by somewhat unique and contextual, if not exceptional, factors. For example, when setting the maximum number of ministers, the Constitution of Belgium seeks to address the delicate balance between the Dutch-speaking members and French- speaking members, requiring that it should be of an equal number.

Referring to Ireland, the Venice Commission notes that the constitutional "[…] limitation of [members of the Government with a minimum of seven and a maximum of fifteen members] is a problem as the complexity of government increases, with the result that law provides for many 'junior ministers'-although not members of the cabinet itself- to attend cabinet meetings without the right to vote".[567] In the case of Switzerland, one should note the particular traditional and constitutional characteristics of the Swiss confederal system and the status and powers vested in the Cantons.

Therefore, the Venice Commission observes that, in general, "[…] while the number of members of parliament is often fixed by the constitution, this is rarely the case for the members of the government. Rather, the constitutional and legislative tradition seems to allow for a maximum amount of flexibility to be able to adapt to new developments".[568]

562 European Commission for Democracy Through Law, Venice Commission, Kosovo Opinion on the Draft Law on the Government, adopted by the Venice Commission at its 125 plenary session, 11-12 December 2020, Opinion No. 1005/2020, CDL-AD(2020)034, 14 December 2020, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)034-e.
563 Venice Commission, Opinion No. 1005/2020, para. 35.
564 Ibid., para. 62 (2).
565 Ibid., para. 62(3).
566 Ibid., para. 33.
567 Ibid.
568 Ibid., para. 32.

In the case of Kosovo, Article 4 of the draft Law[569] deals with the composition of the Government. It prescribes that the Government shall be composed of the Prime Minister and Ministers, and not more than three Deputy Prime Ministers. Article 4(3) of the same draft imposes a numerical limit on the number of ministers, subject to the possibility of extension. It states that the Government shall be composed of not more than 15 ministries, but that exceptionally the person forming the Government can propose two or more ministries.

Yet, the Venice Commission foresees a constitutional obstacle in the draft law. Specifically, the problem of the draft law -prescribing a numerical limit (15+2) in the number of ministries as set forth under Article 4(3)- collides with Article 96(2) of the Constitution. The latter is clear about what it requires, namely that the number of members of the Government is established by an internal act of the Government. In the Commission's view, this is not defined by using permissive language (e.g., the number of ministers 'may be determined by an internal act of the Government'); it is categorical (the number of members is determined by an internal act of the Government). In short, Article 96(2) recognizes the government's constitutional competence of determining the number of ministers.[570] The Commission concludes that "If enacted in its present form, Article 4[(3)] of the draft Law would seem to constitute an encroachment by the Assembly on this competence".[571]

While noting that it is up to the Court to deal with such constitutional issues, for its part, the Venice Commission is concerned with the principle of legality recognized as an aspect of the Rule of Law by the Venice Commission's Rule of Law Checklist and is also reflected in the Constitution under Article 16 (i.e., the supremacy of the Constitution must be recognized and requires legislation to be compatible with the Constitution).[572]

The Venice Commission then explores alternative ways to achieve the policy objective of limiting the number of ministers. In this regard, it recalls Article 96(1) of the Constitution acknowledging that ministries perform functions within the power of Government. In the view of the Commission- it would be the Assembly to guide the executive in the performance of its constitutional competence, namely abiding by the principle of the separation of powers.[573] As to what these criteria could be, the Commission declares:

A new law on the criteria on the number of ministries would not infringe on the Government's constitutional competence to determine the number of ministers by an internal act.

"The criteria of necessity could reflect the rationales that lie behind the policy objective, which Article 4.3 is meant to achieve. They could include, for example, a rational connection between what the ministry proposed, and the functions the Government's work program requires it to perform; economic efficiency; value for money; effectiveness; prevention of redundancy; and proportionality. The inclusion of such criteria in the law would be compatible with Article 96.2, because it would leave the determination of the number of ministers to the government, applying the criteria stipulated by the Assembly".[574]

According to this line of reasoning, any future government proposing to increase the number of ministries beyond that limit would have to justify that by referencing the criteria of necessity as established in the Law on Government.[575] In the Commission's view, this would appear to be the only way to achieve the Government's policy objective compatibly with the principle of legality and the supremacy of the Constitution. The only other alternative to the option above seems to be an amendment of Article 96(2) of the Constitution.[576]

If compared to the cases above, Slovenia offers the only other alternative, namely containing an express constitutional provision authorizing the regulation of, among others, the number of ministries by law. Yet according to the

569 This was part of Kosovo's legislative Agenda for 2020.
570 Venice Commission, Opinion No. 1005/2020, para. 35.
571 Ibid, para. 36.
572 Ibid., 37.
573 Ibid., para. 39.
574 Ibid., para. 40.
575 Ibid., para. 41.
576 Ibid., para. 43.

Slovenian Constitution, ministers are appointed and dismissed by the National Assembly.

The law needs to expressively name and list the criteria for the number of Government ministries.

In 2021 the Government drafted a new law taking into account the Venice Commission's recommendations concerning the limitations of members and size. Concretely, Chapter II, Article 4 of the draft law clearly stipulates that communities should be represented in the Government under the Constitution and that the number of members of the Government and their appointees -along with the areas of administrative responsibility of the ministries- are determined by regulations. Yet the draft law is very broad in specifying the limitation of the number of ministers, by stating that this is justified by meeting the criteria of necessity. The Venice Commission's Opinion No. 1005/2020,[577] though, had asked for explicitly naming them- including the program of the Government and its complexity. The draft law does not clearly define those criteria.[578]

2. The powers of the outgoing government

The Constitution does not set any limitations to the numerical composition of the Government.

The Venice Commission notes that there appear to be few applicable international standards to the specific questions of both the composition of a government or the powers of an 'outgoing' Government. Therefore, there is "Little […] for the Venice Commission to opine on about compatibility of the substance of the relevant provisions in Articles 4.3 and 31 of the draft Law with international standards. There are nonetheless issues of compliance with domestic law, which translate into matters of respect for the Rule of Law".[579]

In the Venice Commission's view, "the international standards most relevant to the issues raised by the draft Law are (1) the standards which apply to democratic law-making, particularly the principle of transparency; (2) the principle of legality which, amongst other things, requires laws to be in accordance with the Constitution; and (3) the principle of the separation of powers, which addresses the respective functions of the executive and the legislature and the relationship between them".[580]

When it comes to the principle of transparency applied in the context of law-making procedure, the Venice Commission notes the lack of sufficiently detailed explanatory material from the Government, which is likely to hinder effective participation by the public and civil society in the law-making process. The Commission observes that "providing sufficiently detailed explanatory material to accompany draft laws is very much in the interest of the government proposing the law. It is an opportunity to make clear why the law is considered necessary and to demonstrate that the policy-making process has properly considered alternative ways of achieving the principal policy objectives of the proposed law […] ".[581]

The restrictions on the 'outgoing' executive are specified in Article 31 of the draft Law. The Commission concludes that such restrictions do not appear to raise any issues of compatibility with international standards:"[…] The exceptions to the limitations appear to be justified by the consideration that (a) the orderly approval of the Budget by the Parliament should ideally be ensured also in phases of political transition and (b) the incumbent government, even if outgoing, must be possessed of the legal powers necessary to overcome national emergencies – the principle of necessity being explicitly recalled in Article 31.3 of the draft Law".[582]

The new draft law of 2021 also does not express itself in identifying the power of the outgoing government, apart from stating the circumstances in which a government should be considered as outgoing, and that it shall carry out

577 Venice Commission, Opinion No. 1005/2020.
578 Draft Law on Government of the Republic of Kosovo, 30 December 2021, at https://kryeministri.rks- gov.net/wp-content/uploads/2021/12/Projektligji-per-Qeverine-e-Republikes-se-Kosoves.pdf.
579 Ibid., para. 18.
580 Ibid., para. 20.
581 Ibid. para. 31.
582 Ibid., para. 49.

the necessary activities in the Government Annual Work Plan and Annual Budget Law only.[583]

In short, the draft law mentions the outgoing government's restrictions, rather than assertively framing its sphere of maneuver, while still in office.

Comparative Analysis and References

Comparatively, few countries like Belgium and Ireland foresee limitations to the number of members of the government. Yet the constitutional practice is about flexibility in this regard. Countries like Albania, Bulgaria, France, Germany, and Slovenia do not name the number of ministers in their respective constitutions.

Albania

Article 95

1. The Council of Ministers consists of the Prime Minister, the deputy prime minister, and the ministers.
2. The Council of Ministers exercises every state function that is not given to the organs of other state powers or of local government.[584]

Belgium

Article 99

The Council of Ministers is composed of no more than fifteen members. With the possible exception of the prime minister, the Council of Ministers is composed of an equal number of Dutch-speaking members and French-speaking members.[585]

Bulgaria

Article 108

(1) The Council of Ministers shall consist of a Prime Minister, Deputy Prime Ministers, and ministers.
(2) The Prime Minister shall direct and coordinate the general policy of the Government and shall bear responsibility for the said policy. The Prime Minister shall appoint and release from office the deputy ministers.
(3) The government ministers shall head individual ministries, unless the National Assembly shall resolve otherwise. The government ministers shall bear responsibility for the actions thereof.

Article 109

The members of the Council of Ministers shall take the oath of office, referred to in Article 76 (2) herein, before the National Assembly.

Article 110

Eligibility for membership of the Council of Ministers shall be limited to Bulgarian citizen who possess the electoral qualifications requisite for National Representatives.[586]

583 Draft Law on the Government of the Republic of Kosovo, Articles 30 and 31.
584 Constitution of Albania.
585 Constitution of Belgium, at https://www.const-court.be/en/court/basic-text#1-la-constitution-de-la- belgique-federale.
586 Constitution of Bulgaria.

Croatia

Article 109

The Government of the Republic of Croatia shall consist of a Prime Minster, one or more Deputy Prime Ministers and ministers.
The Prime Minister and other members of the Government may not perform any other public or professional duty without consent of the Government.

Article 1147

The organization, responsibilities, and the operation of state administration shall be regulated by law.
Certain responsibilities of state administration may be entrusted by law to the bodies of local and regional self-government and legal persons vested with public authority.
The status of civil servants and the labour-law status of government employees shall be regulated by law and other regulations.[587]

France

Article 8

The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.
On the recommendation of the Prime Minister, he shall appoint the other members of the Government and terminate their appointments.[588]

Germany

Article 62

The Federal Government shall consist of the Federal Chancellor and the Federal Ministers.

Article 64

(1) Federal Ministers shall be appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor.
(2) On taking office the Federal Chancellor and the Federal Ministers shall take the oath provided for in Article 56 before the Bundestag.[589]

Ireland

Article 28

1. The Government shall consist of not less than seven and not more than fifteen members who shall be appointed by the President in accordance with the provisions of this Constitution.[590]

587 Constitution of Croatia.
588 Constitution of France.
589 Constitution of Germany.
590 Constitution of Ireland.

Slovenia

Article 110

The Government is composed of the president and ministers. Within the scope of their powers, the Government and individual ministers are independent and accountable to the National Assembly.

Article 114

The President of the Government is responsible for ensuring the unity of the political and administrative direction of the Government and coordinates the work of ministers. Ministers are collectively accountable for the work of the Government, and each minister is accountable for the work of his ministry. The composition and functioning of the Government, and the number, competencies, and organization of ministries shall be regulated by law.[591]

Conclusion

The Constitution does not set any firm limitations to the numerical composition of the Government. The increase in the number of ministries has caused a debate on whether that would be efficient in practice. In absence of any limits, the risk would be for the number to keep increasing with no criteria to support it. Among others, that could hinder the accountability of ministers of the Assembly, if the number of deputies does not grow in the same proportion. The Government would also need to justify it to ensure public accountability.

The mandate and the competencies of the outgoing Government remain unclear as well. Neither the Constitution nor the law frame its scope of work. This could become a problem in practice and would most likely bring the need for interpretation by the Constitutional Court. Having an outgoing government is a fragile situation itself and institutions need to be efficient in overcoming it and building a regular government. Uncertainties regarding the outgoing's government competencies would cause damaging delays in the process.

Constitutional and/or legal clear provisions would prevent future issues in the functioning of the institutions. In making amendments to the current provisions, lawmakers must make sure they fill in the gaps of the previous draft laws. They should follow the guidelines of the Venice Commission and be more specific when regulating these matters. Either the Constitution or the law should 1) explicitly name the criteria for the size of the Government and 2) clearly define the scope of work of the outgoing Government.

Recommendations

- With no changes to the constitutional provisions, the Government should fully implement the Venice Commission's recommendations to first establish clear criteria by law, and then via an internal act, for determining the size and structure of the Government.
- Alternatively, Article 96 (2) of the Constitution could be amended to allow the Government to establish its size and composition by law.
- Another possibility would be that the size of the Government shall be set by following a clear formula (X+/ 3). Yet any nominee for prime minister shall have the liberty to increase or decrease the number of ministers in line with the policy objectives, the Government's program, and its agendas, pending the Assembly's approval. Besides that, important objective criteria for setting the size of the Government should cover and govern all sectorial needs of Kosovo and the program of the winning candidate, or the one forming the Government;
- The law -or an internal rule- should limit the number of deputy prime ministers and assign them clear tasks and mandates.
- Any new law or regulation shall guarantee a full and satisfactory representation of communities in line with the spirit of the Constitution;
- Any new law on the government should spell out the outgoing Government's mandate and powers.

591 Constitution of Slovenia.

XVII

The Appointment of Central Election Commission Members

The issue with the term "largest parliamentary group" came up for the second time with regard to the appointment of the Central Election Commission (CEC) members. According to the Constitution, six members of the CEC are appointed based on the proposal of the six largest parliamentary groups without specifying what those groups are in practice. Despite the Court's re-confirmation that the largest parliamentary groups are those that won more seats in the elections, clear constitutional provisions are still needed to avoid future repeated doubts. The Constitution is also unclear on what happens in practice when less than six parliamentary groups are represented in the Assembly. It also leaves unaddressed the risk for overrepresentation of either the governing parties or the opposition parties in the CEC, as long as its composition takes into account the representation of parliamentary groups only. Thus, different options could be considered in addressing these matters through future constitutional changes.

The Constitution and the Law on General Elections regulate the composition of the CEC as well as the appointment of its members.[592] Yet, the Constitution is unclear on some important matters e.g., not specifying the authority that formally appoints CEC members, other than the Chair. The Law on General Elections fills the gap by explicitly giving such power to the President.[593]

The Constitution and the law do not define the 'largest parliamentary group' for the appointment of CEC members.

The President appoints six (6) members of the CEC based on the proposal of the six (6) largest parliamentary groups. Each group appoints one member. Yet, the meaning of "largest parliamentary groups" became an issue in practice when it came to the CEC composition. Particularly, whether "the largest parliamentary groups" are: (a) parliamentary groups/political entities based on the results of elections for the Assembly, or (b) those established after the constitution of the Assembly. The question arose for the second time after the Court's ruling in 2014 with regard to the election of the President of the Assembly. The interpretation then was that the 'largest parliamentary group' is the one that has more seats in the Assembly, based on the election results. However, there were concerns about whether it would have the same meaning for the composition of CEC, considering legal and factual differences in both cases.

Another issue arises when there are less than six (6) parliamentary groups. The Constitution provides that "if fewer groups are represented in the Assembly, the largest group or groups may appoint additional members".[594] Yet, it does not clearly define the procedure in practice. It is unclear from the wording of the Constitution how the 'largest group or groups' appoint 'additional members' in case there is more than one (1) additional member to be appointed.

The Constitution does not clarify what happens in practice when less parliamentary groups are represented in the Assembly.

Particularly, would the criteria be: (a) only the listing of the parliamentary groups in the final election results, whereby two (2) largest parliamentary groups appoint one (1) additional member each; or (b) the number of seats of the parliamentary groups may lead to the largest parliamentary group appointing more than one (1) additional members.

The other four (4) CEC members are appointed by the Assembly deputies holding seats reserved or guaranteed for non-majority communities. The question that may arise is linked to the scenario when two or more parties, coalitions, or citizens' initiatives from the same community have secured seats in the Assembly. The Constitution needs to clarify which one of them gets the right to appoint a member of the CEC.

The current structure of CEC may undermine the representation balance between the governing parties and opposition parties.

In addition, the current composition of the CEC takes into account the representation of the parliamentary groups in CEC only, but not the composition of governing parties and those in opposition. This may lead to a situation, whereby either the opposition parties or governing parties may be overrepresented in CEC depending on the number of parties/coalitions that form the Government.

CEC is a permanent body preparing, supervising, directing, and verifying all activities related to the process of elections and referenda and announcing their results.[595] It is entrusted to carry out its functions professionally and impartially, without any political interest and influence. It is a sole and independent authority to control and confirm

592 Constitution of Kosovo, Article 139; Law on General Elections, Articles 59, 61. In terms of composition, CEC comprises eleven (11) members, among which, the Chair is appointed by the President from among the judges of the Supreme Court and courts exercising appellate jurisdiction.1 Six (6) members are appointed from six (6) largest parliamentary groups, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, one (1) member shall be appointed by the Assembly deputies holding seats reserved for the Kosovo Serb Community, and three (3) other members are appointed from the Assembly deputies that are not in majority in Kosovo.

593 Law on General Elections, Article 61.3 (a).

594 Constitution of Kosovo, Article 139(4).

595 Ibid., Article 139 (1).

the mandate of representative institutions such as the Assembly of Kosovo. Considering this important role, the Constitution and the law should provide more clarity to ensure the institutional stability of the CEC functioning.

Relevant Provisions

Constitution of Kosovo

Article 139 [Central Election Commission]

1. The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results.
2. The Commission is composed of eleven (11) members.
3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.
4. Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo.

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
[…]
(26) appoints the Chair of the Central Election Commission […].[596]

Relevant Case-law and Opinions

The relevant case in this matter is Case KO58/19.[597] The Venice Commission's Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52nd Plenary Session, held on 18-19 October 2002,[598] is also of significance. They both addressed the meaning of the "largest parliamentary groups" for the appointment of CEC members. The case law has not yet addressed the constitutional gaps with regards to the appointment of 'additional members' in case there are less than six (6) parliamentary groups, nor the balance in representation between the governing and opposition parties in CEC. Thus, unclarities remain and constitutional changes should resolve them based on the practices of other countries.

The CEC composition must reflect the Assembly's composition based on the election results.

In Case KO58/19, deputies of the Assembly challenged various decisions of the President of Kosovo on the appointment of CEC members.[599] The Court -once again- defined the "largest parliamentary groups" as those directly deriving from political parties, coalitions or citizen's initiatives as a result of general elections and consequently won the largest number of seats in the Assembly."[600]

After the establishment of the Assembly on 7 September 2017, several deputies informed the President of the Assembly about the establishment of a new parliamentary group -the Social Democratic Initiative, the Alliance for the Future of Kosovo, the Group of Independent Deputies- subsequently registered as a group, the Social Democratic Party (SDM).[601]

596 Constitution of Kosovo.
597 Constitutional review of decisions No. 57/2019, No. 58/2019, No. 59/2019, No. 60/2019, No.61/2019, No.62/2019, No. 63/2019 and No. 65/2019 of the President of the Republic of Kosovo of 28 March 2019, Case No. K058/19, 13 August 2019, at https://gjk-ks.org/wp- content/uploads/2019/08/ko_58_19_agj_ang.pdf.
598 Venice Commission Opinion No. 190/200 – Code of Good Practice in Electoral Matters, Guidelines and Explanatory report, 30 October 2002, at https://rm.coe.int/090000168092af01
599 Case No. K058/19, para. 3.
600 Ibid., para 117
601 Ibid., para. 25, 26, 27, 28.

On 14 December 2018, the President addressed the parliamentary groups in the Assembly to nominate candidates as CEC members.[602] Later on, the President appointed CEC members proposed by the political parties, pre-election coalitions, and citizen initiatives that won the majority seats as a result of the elections, relying on the Court's interpretation of the „largest parliamentary group" in 2014. Deputies of the Assembly challenged such interpretation and the decisions that resulted from it.

The applicants' first objection concerned the form of appointment of the CEC members from the parliamentary groups emerging from the political entities winning the elections for the Assembly of Kosovo. They outlined the need of emphasizing the terminology under Article 139(4) of the Constitution reading as follows "Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly." According to them, the word "represented" does have a post-festum character, thus implying that it is not necessary that a political entity that has won certain seats in the Assembly be represented at the level of a parliamentary group with that number of deputies with a mandate."[603]

The deputies of the Assembly worried that the Court's interpretation of 'the largest parliamentary group' denies free political initiatives of deputies to form parliamentary groups.

The applicants argued that representation is a dynamic and changeable concept. These aspects are, in their view, one of the basic advantages of representative democracy promoting the dynamism of representation beyond the time limit of the mandate. According to the applicants -as for the appointment of CEC's members- the structure of parliamentary groups as per the result of the election of political entities would maintain political freedom of representation in the Assembly of Kosovo and neglect political initiatives in the form of parliamentary groups of deputies.[604]

Lastly, the applicants argued that the method of appointment of the CEC members based on the identification of parliamentary groups resulting from the election result is nonsensical. Concretely, this *modus operandi* is not a solution in cases of dissolution of a parliamentary group or political entity nominally winning seats in the Assembly, and which, notwithstanding the deputies winning seats under the candidate list of the relevant political entity, ceased to exist.[605] They argued that the President's interpretation of the term 'largest parliamentary group' is not only in contradiction with Article 139(4) of the Constitution, but it also denies free political initiatives of deputies to form parliamentary groups.[606]

The mandate of CEC members begins no later than 60 days after confirmation of election results.

The SDM parliamentary group submitted its comments by stating that Kosovo opted for a purely political-party model, except the CEC chairman coming from the judicial system. The appointment of the latter falls within the sole responsibility of the President of Kosovo. In its view, the role of the President in appointing CEC members is that of confirming nominations of political entities after the President is satisfied with the fulfillment of the criteria and conditions for eligibility of candidates.[607] Moreover, SDM pointed out that Article 61(4) of the Law on General Elections establishes a deadline for the beginning of the term of office of the CEC members, which refers to the date of confirmation of the election results and not to the date of the constitution of the Assembly. In short, in its view, the election of CEC members is not related to the constitution of the Assembly.[608] To conclude, the SDM parliamentary group emphasized that when it comes to the composition of the CEC, the spirit of Article 139(4) of the Constitution implies parliamentary groups in terms of political entities passing the electoral threshold, which applies only to political parties that participated in the elections and whose name is in the ballot.

602 Ibid., para. 32.
603 Ibid., para. 40.
604 Ibid., para. 42.
605 Ibid., para. 48.
606 Ibid., para. 82.
607 Ibid., para. 51.
608 Ibid., para. 52.

The President of Kosovo submitted comments as well, referring to the applicable legislation for the election of CEC members, namely Article 139(4) of the Constitution, as well as articles 61 and 62 of the Law on General Elections.[609]

Shifts and changes in the structure and organization of parliamentary groups in the Assembly does not affect the CEC structure.

The Court issued a judgment and acknowledged the constitutional gaps.[610] It recalled its 2014 ruling and therefore gave the same interpretation to the term „largest parliamentary group.“[611] It also recalled that members of CEC are not mandated for a fixed term. Rather, their mandate is related to the mandate of the election cycle, which -in principle- begins no later than 60 days after the election results are confirmed.

The Court interpreted this as the legislator's intention to Appoint the CEC members as soon as possible, after the establishment of the Assembly.

Thus, the appointment of CEC members is associated with the date of confirmation of the elections, and not with the constitution of the Assembly or the organization of parliamentary groups in the narrow sense for the work of the Assembly.[612]

The Court also referred to the comparative practice of other countries, where “members of election commissions are mainly proposed by the political parties or coalitions emerging from elections, and such proposals are submitted by political parties or coalitions representing position and opposition. This is the practice in countries like Croatia, Slovakia, and Bulgaria.[613]

The practice of changing the composition of CEC every time the parliamentary groups in the Assembly change lacks basis in the Constitution and in the law.

In conclusion, the composition of the CEC aims at reflecting the composition of the Assembly according to the election results. This implies that political entities that have participated in the elections and which won the largest number of seats for the Assembly have the right to nominate CEC members appointed by the President.[614] In short, CEC members cannot change all the time as the composition or membership of parliamentary groups changes within the same legislature, as is the case with the composition of parliamentary committees reflecting the changes which occurred in parliamentary groups during a single legislature.[615] Such practice would undermine CEC's institutional stability as outlined in the Constitution. Also, such a continuous change is not supported by the CEC's previous institutional practice, as well as the practice of other countries such as Slovakia, Bulgaria, Albania, Montenegro, and Croatia.[616]

The CEC must have a permanent character and institutional stability.

The Venice Commission does not support such practice either. It outlines that the CEC must have a permanent character. The rationale is of not having an institutional *vacuum* in the CEC, regardless of the time of the establishment of the Assembly.[617]

The Court finally concluded that the largest parliamentary groups are those six parties, coalitions, and citizens‘ initiatives having more seats in the Assembly than those that participated in the elections for the Assembly as such. Thus, the Court held that the challenged acts do not violate Article 139(4) of the Constitution.[618]

609 Ibid., para. 58.
610 Ibid., para. 84.
611 Case No. KO119/14
612 Case No. KO58/19., para. 104.
613 Ibid., para. 107.
614 Ibid., para. 109.
615 Ibid., para. 110.
616 Ibid., para. 111.
617 Ibid., para. 112, 113.
618 Ibid., para. 114, 115.

In the case at hand, the Court defined the parliamentary groups of the Assembly by having regard to the following criteria: (i) the constitutional role of the CEC as an independent institution for the management of elections and referenda, (ii) the manner of procedure for appointing CEC members; (iii) the duration of a mandate, and (iv) the time of their appointment.[619] The latter is neither connected with the time of the constitution of the Assembly, nor with how the Assembly functions, but with the date of confirmation of the election results.[620]

The Court's interpretation does not leave any ambiguity as to what constitutes a 'parliamentary group' to appoint the CEC members.

Accordingly, the Court considers that:

116. …Considering the role of the CEC as defined by the Constitution as a permanent election management institution, the fact that the mandate of the CEC members is related to the cycle of elections for the Assembly, the specific manner of their appointment, and especially the time of appointment of CEC members, which is not connected with time of the constitution of the Assembly, nor with the manner in which the Assembly functions, but with the date of confirmation of the election results.

Following the constitution of the Assembly, six largest parliamentary groups nominate CEC members and the President of the country formally appoints them.

117. Therefore, the Court finds that the largest parliamentary groups represented in the Assembly, for the purposes of Article 139 paragraph 4 of the Constitution, are those 6 (six) parties, coalitions, citizens' initiatives, which have more seats in the Assembly than any other party, the coalition, citizens' initiatives that participated in the elections for the Assembly as such.[621]

Opinion of the Venice Commission

The Code of Good Practice in Electoral Matters of the Venice Commission provides for the minimum guarantees that must be observed in the case of an authority vested with the power to organize elections such as the CEC, which include:

- being permanent in nature;
- containing at least one member of the judiciary;
- being represented also by representatives of parties already in parliament or having scored at least a given percentage of the vote, provided that these persons are qualified in electoral matters;
- ensuring that political parties are equally represented or be able to observe the work of the impartial body (equality may be construed strictly or on a proportional basis); and
- the bodies appointing members of electoral commissions must not be free to dismiss them at will.622

The Code of Good Practice in Electoral Matters contains -in the relevant parts- the following minimum procedural guarantees for the body organizing elections:

"3.1. Organization of elections by an impartial body

a. An impartial body must be in charge of applying electoral law.

b. Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c. The central electoral commission must be permanent in nature.

d. It should include:

i. at least one member of the judiciary;

ii. representatives of parties already in parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.

It may include:

iii. representative of the Ministry of the Interior;

619 Ibid., para. 117, 118.
620 Ibid., para. 98.
621 Ibid.
622 Case No. K058/19.

iv. representatives of national minorities.
e. Political parties must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality may be construed strictly or on a proportional basis (see point I.2.3.b).
f. The bodies appointing members of electoral commissions must not be free to dismiss them at will.
g. Members of electoral commissions must receive standard training.
h. It is desirable that electoral commissions take decisions by a qualified majority or by consensus".[623]

Comparative Analysis and References

Other countries have different methods for appointing independent bodies entrusted to govern the elections.

In most countries, political parties are represented in the election bodies, albeit with different formulas for representation. Some countries opted for the option whereby political parties forming the government as well as opposition parties have been given a balanced number of representatives in election bodies. There are examples where some members of election bodies are proposed jointly by the governing and opposition parties, while some members are proposed by political parties representing national minorities. There are also countries where members of election bodies are proposed by civil society organizations.

Croatia

The Act on Election of Representatives to the Croatian Parliament regulates the composition and manner of selection of members of the National Election Commission. The relevant provisions of the above Law provide the following:

Article 45

The National Election Commission has a permanent and expanded membership.
The permanent membership of the National Election Commission consists of a president and four members, and their deputies.
The President of the Supreme Court of the Republic of Croatia is by his/her position the president of the National Election Commission.
Members of the Commission, deputy president and deputies of the members of the permanent membership of the National Election Commission shall be appointed by the Constitutional Court of the Republic of Croatia from judges of the Supreme Court of the Republic of Croatia and other prominent lawyers who must not be members of political parties.

Article 46

The expanded membership of the National Election Commission shall be determined upon accepting, determining and proclaiming of the constituencies.
Members of the expanded membership of the National Election Commission have all the rights and obligations as permanent members of the National Election Commission.

Article 47

The expanded membership of the National Election Commission consists of three representatives of the majority party or coalition and three representatives of the political parties of the opposition or coalition proposed by agreement, consistent to the structure of the Parliament, and their deputies.
If no agreement can be achieved on the three opposition representatives, that by the structure of the Parliament are considered opposition, the election of the three members of the expanded membership and their deputies shall be decided by lot, at the Constitutional Court of the Republic of Croatia, among the candidates and their deputies."[624]

623 Venice Commission - Code of Good Practices in Electoral Matters.
624 Act on election of representatives to the Croatian Parliament, at file://C:/Users?DELL/Downloads/ Croatia-Act-on-Election-of-Representatives.pdf.

Estonia

The Riigikogu Election Act regulates the composition and manner of selection of members of National Election Committee. Article 10 of the above Law provides the following:

§ 10. Formation of National Electoral Committee
(1) The term of authority of the National Electoral Committee is four years.
(2) The National Electoral Committee comprises the following members:
1) a judge of a court of first instance appointed by the Chief Justice of the Supreme Court;
2) a judge of a court of second instance appointed by the Chief Justice of the Supreme Court;
3) an adviser to the Chancellor of Justice appointed by the Chancellor of Justice;
4) an official of the State Audit Office appointed by the Auditor General;
5) a public prosecutor appointed by the Chief Public Prosecutor;
6) an official of the Government Office appointed by the State Secretary.
7) an information systems auditor appointed by the management board of the Estonians" Auditors' Association.
(3) The members of the National Electoral Committee are appointed not later than on the 10th day before the term of authority of the National Electoral Committee expires.
(4) The chair and deputy chair of the National Electoral Committee are elected by the National Electoral Committee from among its members at the first meeting of the National Electoral Committee. The first meeting of the National Electoral Committee is convened by the chair or deputy chair of the previous National Electoral Committee not later than on the seventh day after the beginning of the term of authority of the National Electoral Committee.
(5) The person who appoints a member of the National Electoral Committee to office, appoints also an alternate member for the member.
(6) The Chief Justice of the Supreme Court may appoint a judge as a member of the National Electoral Committee only with the consent of the judge and after hearing the opinion of the chief judge of the court[625]."

Lithuania

The Law on Elections to the Seimas regulates the composition and manner of selection of members of National Electoral Committee. The relevant provisions of the above Law provide the following:

Article 11

The Central Electoral Committee shall be the supreme institution for the organization of elections.
The Seimas shall form the Central Electoral Committee no later than 90 days before the day of the general elections to the Seimas.
The Central Electoral Committee shall be formed for a four-year period and shall be composed of: a Committee Chairperson; three persons having higher legal education and who are chosen by lot from the six candidates proposed by the Minister of Justice; and three persons having higher legal education and who are chosen by lot from the six candidates proposed by the Lithuanian Lawyers' Society.
The Minister of Justice and the Lithuanian Lawyers' Society may propose more candidates to the Central Electoral Committee.
The drawing of lots during a Seimas sitting shall be organized by the Chairperson or deputy chairperson of the Seimas.
Political parties and political organizations which have received mandates of Seimas members in multi-candidate electoral areas shall each have the right to propose one representative to the Central Electoral Committee from the one list of candidates (joint list) presented in the multi- candidate electoral area prior to the formation of the Committee.
The Seimas may not reject proposed candidates.[626]

625 Riigikogu Election Act, at https://www.riigitetaja.ee/en/eli/ee/514112013015/consolide/ current.
626 Law on elections to Seimas, at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21164.

Montenegro

The Law on Election of Councilors and Members of Parliament of Montenegro regulates the composition and manner of selection of members of State Election Commission of Montenegro.
In this regard, Article 30 of the above Law provides that:

The State Election Commission shall be composed of: the chairperson and ten permanent members and one empowered representative of each candidate list submitting entity.
The State Election Commission chairperson shall be appointed by the Parliament, at the proposal of Parliamentary working body in charge of elections and appointments, after a previously conducted open competition.
Four members of the permanent State Election Commission composition shall be appointed at the proposal of the parliamentary majority.
Four members of the permanent State Election Commission composition, one of whom shall perform the office of a secretary, shall be appointed at the proposal of parliamentary opposition.
One representative of a political party or candidate list submitting entity for authentic representation of members of national minorities or minority ethnic communities which received the highest number of votes in previous elections shall also be appointed member of the permanent State Election Commission, while his deputy should be a member of another national minority or minority ethnic community.
One member of the permanent State Election Commission composition who is familiar with electoral legislation shall be appointed by the Parliament from among the representatives of civil society, non-governmental sector and university, at the proposal of the Parliamentary working body competent for appointments and elections, after a previously conducted open competition.[627]

Republic of North Macedonia

The Electoral Code of North Macedonia regulates the composition and manner of selection of members of State Election Commission in Macedonia.
In this regard, Article 26 of the above Law provides that "The State Election Commission shall consist of a president, vice-president and seven members. The president and the vice-president shall be members of the State Election Commission."
Article 27 of the Electoral Law of North Macedonia prescribes the criteria to be fulfilled for persons to be considered for membership in the State Election Commission, namely that a person:

-is a citizen of Republic of Macedonia and has a permanent residence in the Republic of Macedonia;
- is a law school graduate with at least 8 years of work experience in legal affairs;
- is not a member of an organ of a political party. According to paragraph 5 of Article 27 of the above Law:

"From the candidates on the draft list for members of the State Election Commission, the opposition political parties shall propose the President and two members of the State Election Commission, whereas the ruling political parties shall propose the Vice President and three members of the State Election Commission. The President, the Vice President and the members of the State Election Commission shall be elected by the Parliament, with a two-thirds majority of the votes of the total number of MPs. The President, the Vice President and the members of the State Election Commission shall have their previous employment suspended temporarily, as of the day of their election."

Finally, based on paragraph 6 of Article 27: "The members of the State Election Commission shall be elected by the Parliament, with 2/3 majority of votes from the total number of MPs".[628]

Conclusion

The Court's case law filled in some constitutional gaps in the appointment of CEC members. While the Constitution remains unclear on the term "largest parliamentary group(s)", the Court's definition in two different cases leaves no ambiguity to it; the largest parliamentary groups are those who have more seats in the Assembly based on the

627 The Law on Election of Councilors and Members of Parliament of Montenegro, at Montenegro-Law- elections-councillors-members-of-parliament-1998-am2016-en.pdf.
628 Electoral Code of North Macedonia, at https://aceproject.org/ero-en/regions/europe/MK/ macedonia-electoral-code-consolidated-version/view.

election results.

Yet, the fact that the Court needed to give the same interpretation twice already, illustrates that constitutional gaps may continue to cause uncertainties in practice. Thus, concerns may appear again about whether the term "largest parliamentary group(s)" would mean something else in a different factual and legal situation. This could hinder the efficiency in establishing institutions, and their stability. To avoid the need for another interpretation of the term, the Constitution must clarify its meaning for every situation.

There are still matters related to the CEC composition that neither the Constitution nor the case law addresses. This vacuum will most likely cause issues in the future when there are less than six (6) parliamentary groups presenting the majority in the Assembly. The Constitution needs to be more concrete on the procedure for the appointment of CEC members in that case. Otherwise, the uncertainties on how to move on in that situation will delay the establishment of the CEC.

Another issue could arise if two or more parties, coalitions, or initiatives from the non-majority community have secured seats in the Assembly, as the Constitution does not foresee such a scenario. Therefore, it needs to provide a criterion that would determine which one of those groups would have the right to appoint the CEC member.

Lastly, the independence of the CEC remains fragile as long as its composition takes into account the representation of parliamentary groups only. The risk would be the overrepresentation of either the governing parties or the opposition parties. The Constitution could therefore provide clarity by providing for a rule that would enable a balanced number of representatives in the CEC.

Recommendations

To address the present constitutional gaps, the following options could be considered in case of a constitutional amendment:

- A new provision could specify that the President of the country formally appoints CEC members, besides the Chair, upon the appointment of the members by the largest parliamentary groups.
- A new constitutional provision could specify the meaning of 'largest parliamentary group' in line with the Court's interpretation.
- New constitutional or legal provisions could clarify more in detail the procedure for the appointment of CEC members in case there are less than six (6) parliamentary groups represented in the Assembly. Alternatively, the Constitution could establish that the procedure will be regulated by law, i.e. the Rules of Procedure of the Assembly, or the Law on General Elections.
- A new provision could clarify that in case there are two or more parties, coalitions, or citizens' initiatives from a non-majority community with secured seats in the Assembly, the one with the highest election result has the right to appoint the CEC member.
- New constitutional provisions should address the balance in representation of governing and opposition parties in CEC, in line with examples of other countries.

XVIII

The Court's Authority to Address "Constitutional Questions" for the Interpretation of the Constitution.

Both the President and the Government have the right to refer "constitutional questions" to the Court. In absence of a constitutional definition of this term, the President and the Government interpreted it in a way that would allow them to ask the court to interpret constitutional provisions without a concrete dispute or conflict. There was an increased tendency to exploit the Court's authority for acquiring advisory opinions and the Court's practice has been inconsistent with the admissibility of such requests. After years of allowing their review, the Court suddenly changed its approach ten years later and concluded that it cannot interpret the Constitution if there is no concrete dispute. This sudden shift in the Court's practice, however, creates uncertainties. Thus, Article 113 of the Constitution needs to provide more clarity on the scope of the Court's jurisdiction.

The Constitution does not clearly define the scope of the Court's jurisdiction. Article 113 lists the matters that the Court can decide on and the parties that can refer matters to it.[629] Additionally, Articles 84(9) and 93(10) allow the President and the Government to refer 'constitutional questions' before the Court, which Article 113 does not foresee.[630] The Constitution does not define what 'constitutional questions' means and the case law on this matter has been diverse and inconsistent. The question, therefore, arises whether these norms can be considered separate, or as an additional jurisdiction independent from that of Article 113 of the Constitution.

The Constitution does not define 'constitutional questions.'

The Court can conduct an 'abstract review' of the constitutionality of laws even if there is no dispute yet.

The Court can review the constitutionality of laws in the absence of a concrete dispute. This is known as 'abstract review' and it allows the Court to rule in matters that are not strictly cases or conflicts. Authorized parties can request from the Court the abstract review of laws, decrees of the President or Prime Minister, and regulations of the Government.[631]

On the other hand, the Court does not have jurisdiction to interpret constitutional provisions without a concrete dispute or conflict. Yet, the President and the Government attempted -in several cases- to seek from the Court an interpretation of such nature, which would require the Court to issue an 'advisory opinion'. They relied on their competence to refer 'constitutional questions' to the Court. Their view was that 'constitutional questions' involve hypothetical questions on constitutional provisions, without an actual issue in practice. The Court gave the same broad interpretation for almost a decade, without addressing the scope of its jurisdiction.

The Court cannot interpret the Constitution if there is no concrete dispute.

The parties who can refer matters to the Court are the Assembly, the President, the Government, and the Ombudsperson. Municipalities, ten (10) or more deputies or thirty (30) or more deputies of the Assembly of Kosovo, respectively, as well as individuals and ordinary courts, can also refer questions to the Court.[632] Additionally, the Vice President of a Municipal Assembly, representing the non-majority community in the municipality, can submit matters to the Court, in case the Assembly allegedly violates a constitutionally guaranteed right of the non-majority community members.[633]

The President may submit cases to the Court on the constitutionality of laws, acts of the Government, decrees of the President or the Prime Minister, and the regulations of the Government.[634] The President can also refer matters related to situations of conflict among constitutional competencies of the Assembly, the President, and the Government; compatibility of the referendum with the Constitution; the compatibility of the declaration of the state of emergency, and the actions taken during this state with the Constitution; the compatibility of the proposed constitutional amendments with binding international agreements and the review of the constitutionality of the procedure followed therein; as well as the constitutionality of the process for the election of the Assembly.[635]

The Government has the exact same authorizations as the President under Article 113. They also both have the same competence to refer 'constitutional questions' to the Court. The Constitution does not give the same competence to the Ombudsperson or the Assembly.[636]

Both the President and the Government can refer 'constitutional questions' to the Court.

629 Constitution of Kosovo, Article 113.
630 Ibid., Article 84(9) & Article 93(10)
631 Ibid., Article 113.2(1)
632 Ibid., Article 113.4, Article 113.5, Article 113.6, Article 113.7.
633 Even with respect to this exemption, when the case is brought before the Constitutional Court on this ground, it is at the discretion of the Court to decide whether to accept to consider the case (See, the Judgment of the Constitutional Court in case KO01/09, Applicant: Qemajl Kurtishi, Deputy President of the Municipality of Prizren, of 18 March 2010).
634 Constitution of Kosovo, Article 113.2, 113.2(1), 113.2(2).
635 Ibid, Article 113(3).
636 Ibid., Article 65 & Article 132.

Therefore, it became uncertain whether it is meant to be an additional competence to those under Article 113 for the President and the Government. If so, that would expand the Court's jurisdiction.

The Court is the final authority for the interpretation of the Constitution.[637] However, the understanding of the exact scope of the Court's jurisdiction was inconsistent since the beginning of the Court's work. As the referral numbers increased and the jurisprudence developed, along with the changes in the Court's composition, so did the decisions and interpretations in this matter.

The Court admitted requests for 'advisory opinions' until 2018.

The Court's admissibility threshold for the President or the Government was less scrutinizing. Case law up until 2018 confirmed this approach. The President submitted successive requests for advisory opinions from the Court, rather than raising contentious issues or requiring decisions over controversies of constitutional nature. The Prime Minister did the same, twice. There was an increased tendency to exploit the Court's authority for acquiring advisory opinions. This situation produced a new momentum for the Court. Even when declaring such requests inadmissible, the Court provided thorough, precise, yet different interpretations of the Court's scope of jurisdiction.

The Court managed to prevent repetitive requests for hypothetical questions or advisory opinions. Yet, this new practice of the Court is quite recent, and the sudden change in its practice could cause legal uncertainty. Thus, it is uncertain whether, in the future, the Court would exceptionally admit hypothetical questions and interpret the Constitution without an actual dispute or conflict.

Changes to the Constitution must address these ambiguities. They should clarify whether the President or the Government has any possibility to refer before the Court questions or issues outside the scope of Article 113 of the Constitution.[638]

Relevant Provisions

Constitution of Kosovo

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
[…]
(9) may refer constitutional questions to the Constitutional Court.

Article 93 [Competencies of the Government]

The Government of Kosovo has the following competencies:
[…]
(10) may refer Constitutional questions to the Constitutional Court;

Article 112 [General Principles]

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.
2. The Constitutional Court is fully independent in the performance of its responsibilities.

Article 113 [Jurisdiction and Authorized Parties]

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

637 Constitution of Kosovo, Article 112 (1).
638 Constitution of Kosovo, Article 93(10).

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;
(2) the compatibility with the Constitution of municipal statutes.
3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:
(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
(2) compatibility with the Constitution of a proposed referendum;
(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;
(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;
(5) questions whether violations of the Constitution occurred during the election of the Assembly.[639]

Relevant Case-law

Kosovo declared its independence and adopted a massive number of laws within a very short period of time. This expedited process brought the need to consult the Court on the constitutionality of the draft laws. The President and the Government took advantage of this practice and misused it by raising hypothetical questions and indirectly asking the Court to issue advisory opinions. The Court put an end to these requests in 2018 by interpreting its jurisdiction more strictly. While the President utilized the authority to refer hypothetical constitutional questions more frequently, the Government used this capacity twice. The Government brought such questions to the Court in the timing of opposite approaches of the Court regarding its jurisdiction for advisory opinions.

The right of the President and the Government to refer constitutional questions used to be complementary to Article 113.

Cases KO79/18, KO131/18, KO103/14, and KO130/15 referred by the President and cases KO98/11 and KO124/19 referred by the Government, are the relevant cases in this matter.[640] In all cases, the Court concluded that Article 113 of the Constitution prescribes its jurisdiction to admit referrals. However, in its earlier decisions, it held that the President and the Government have the authority to refer questions to the Court based on articles 84 and 90 as a complimentary jurisdiction. Later on, it changed the approach and limited its jurisdiction to Article 113 only.

The Court used to interpret 'constitutional questions' broadly.

At an earlier stage, the Court did not face the dilemma as to the scope and limits of its jurisdiction for issuing advisory opinions. It did not interpret the interplay between Article 84(9), Article 90(10), and Article 113 of the Constitution, since it was primarily focused on whether the nature of the questions was constitutional and whether they are referred by the authorized parties.

At the time, the Court applied a broader understanding of the notion of "constitutional questions." It considered a question to be constitutional if it was important for

Kosovo's constitutional order. Thus, it admitted referrals that are not explicitly included within Article 113 of the Constitution. The Court's position was that if the question was constitutional "it is therefore not necessary to consider the Referral in the context of Article 113 of the Constitution."[641]

639 Constitution of Kosovo.
640 Resolution on inadmissibility of the Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo, Case No. KO79/18, 3 December 2018, at https://gjk-ks.org/wp- content/uploads/2018/12/ko_79_18_av_ang.pdf; Case No. KO131/18, 25 March 2009, at ko_131_18_av_ang.pdf (gjk-ks.org); Case No. KO103/14, 1 July 2014, at https://gjk-ks.org/wp- content/uploads/vendimet/gjkk_ko_103_14_ang.pdf; Judgment Concerning the assessment of the compatibility of the principles contained in the document entitled "Association/Community of Serb majority municipalities in Kosovo – general principles/main elements" with the spirit of the Constitution, Case No. KO130/15, 23 December 2015, at https://gjk-ks.org/wp- content/uploads/vendimet/gjk_ko_130_15_ang.pdf; Case No. KO98/11, 20 September 2011, at https://gjk- ks.org/wp-content/uploads/vendimet/KO98-11_ANG_AKTGJYKIM.pdf; Resolution on Inadmissibility of the Request of the Prime Minister of the Republic of Kosovo for interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and definition of the competencies and functioning of the Government after the resignation of the Prime Minister, Case KO124/19, 16 September 2019, at https://gjk- ks.org/wp-content/uploads/2019/09/ko_124_19_av_ang.pdf
641 Case KO98/11, para 50.

This proves that the Court had recognized the importance of the constitutional mandate of public authorities to raise questions of constitutional nature. This activated the Court to interpret the Constitution to ensure the compatibility and consistency of its provisions.

In 2018, the Court's composition switched from a mixed one with national and international judges, to one consisting of only national judges. In the meantime, political changes and social developments in the country resulted in changes in the presidency, and societal challenges, including numerous constitutional issues that required legal attention.

The changes in the Court's composition affected the new approach on its jurisdiction.

With its new majority composition, the Court decided to reconsider its previous practice on the scope of jurisdiction to interpret constitutional provisions when there is no contentious issue involved. The Court changed its approach initially through Case KO79/18, followed by Case KO131/18, both submitted by the President, and shortly after, in Case KO124/19 submitted by the Government.

Recent practice

Case KO79/18

The President asked the Court for an interpretation of Article 139(4) of the Constitution, on the appointment of the members of the Central Election Commission (CEC). He asked which parliamentary groups have the right to nominate/appoint CEC members.

The Court does not have a consultative or advisory jurisdiction.

Article 113 is the sole basis for the scope of the Court's jurisdiction.

The Court declared the referral inadmissible.[642] It recalled that the question does not fall within the Court's jurisdiction under Article 113(3)(4) of the Constitution. The Court noted that it "has jurisdiction only on cases brought before it in a legal manner by an authorized party."[643] Otherwise said, "The Court does not deal with interpretations of matters falling outside the scope of Article 113 of the Constitution."[644]

Before issuing the decision, the Court sent questions to the Venice Commission which shows its doubt about the direction it was going. This procedural step could also imply the Court's initial intention to review the merits of the referral. Nevertheless, the Court explicitly stated that it is changing and diverting from the existing practice while reviewing the admissibility of the referral.

The Court must retain its decision-making role.

The Court noted that the broad meaning of the notion of "constitutional question" in its earlier case law should be understood in the spirit of the establishment of the constitutional judiciary's foundation, and of the need for the Court in its beginnings to interpret specific articles of the Constitution. At that time, it was particularly important to address questions related to the exercise of the President's competencies; questions affecting the separation of powers; preserving the constitutional order, and when the issues raised had fundamental implications for the functioning of the constitutional system of the country.[645]

In light of the new circumstances and after almost a decade, the Court noted that taking a consultative or advisory role would run counter to its fundamental role to decide on the cases.

642 Ibid., Proceedings before the Court, page 3.
643 Ibid., para. 66.
644 Ibid., para. 67.
645 Ibid., para. 67.

The relevant paragraphs of the Resolution on Inadmissability (KO79/18) provide the following reasoning:

71. The Court's earlier case law regarding the consideration of referrals submitted under a broad meaning of the notion 'constitutional question' should be understood in the spirit of the process of establishing the foundations of the constitutional judiciary and of the social need for the Court in its beginnings to be included in interpretations of specific articles of the Constitution, in particular when the questions raised were related to the exercise of the competencies of the President, as established by the Constitution; when the issues raised affected the separation of powers; in preserving the constitutional order; as well as when the issues raised had fundamental implications for the functioning of the constitutional system of the country (See Judgment in case K0130/15, the President of the Republic of Kosovo, cited above, paras 104,107 and 109. See also case No. K0103/14, the President of the Republic of Kosovo, mentioned above, Judgment of 1 July 2014, paragraphs 27, 57, and 61).

72. However, the Court in its present composition considers that, in full compliance with the explicit, exhaustive and restrictive language of Article 113 [Jurisdiction and the Authorized Parties] of the Constitution, all other references in the Constitution related to the referring of constitutional questions to the Constitutional Court stem from Article 113.

73. Based on this, the Court finds that the submitted Referral does not fall within the limits of Article 113, because pursuant to Article 113, paragraph 2, the President may raise questions related to the compatibility with the Constitution of laws, acts of the Government and of the Prime Minister, as defined in 113.2 (1) and the Statute of the Municipality, as defined in Article 113.2 (2) of the Constitution.

74. Whereas, pursuant to Article 113, paragraph 3, the President is authorized to refer matters related to situations of conflict among constitutional competencies of the Assembly, the President and the Government; compatibility of the referendum with the Constitution; the compatibility of the declaration of the state of emergency and the actions taken during this state with the Constitution; the compatibility of the proposed constitutional amendments with international agreements and the review of the constitutionality of the procedure followed; as well as the constitutionality of the process of election of the Assembly.

75. Therefore, the Applicant's competence under Article 84 (9) of the Constitution, must also relate to the jurisdiction of the Court set forth in Article 113, paragraphs 2 and 3 of the Constitution, which explicitly and exhaustively define the questions that the President of the Republic may refer to the Constitutional Court.

"[…] the possibility of the Court to take a consultative or advisory role is limited, as it would run counter to its fundamental role to decide on the cases brought before it."

77. The Court reiterates that the content of the provision of Article 113 of the Constitution, taken in its entirety, is clear and concrete with regard to the competencies of the President deriving from the context of an authorized party before the Constitutional Court.

78. Therefore, it follows that Article 113 represents the basic and sole jurisdictional foundation of the Court with respect to the authorizations of the President as an authorized party before the Constitutional Court".[646]

This is the first decision through which the Court changed an earlier praxis. It is also interesting to note that the Court did that through an inadmissibility decision. This means that the Court does not consider the merits of the case, but lays down the reasons why procedurally such referral does not meet the criteria for admissibility. Another fact that makes this decision interesting is that the Court examined and interpreted the limits of its jurisdiction by analyzing and interpreting Articles 113 and 84(9) of the Constitution separately and afterward in conjunction.

The referral will be inadmissible if it contains hypothetical constitutional questions.

This shift in constitutional justice interpretation marked a shift in the Court's practice. Changes in the courts' practice (when their decisions serve as precedents), are a rare phenomenon everywhere and are usually accompanied by many discussions, disagreements, and rich legal propositions. Thus, it merits a judgment with a thorough and detailed analysis, instead of merely a Resolution on Inadmissability. The Rules do not allow judges to file dissenting opinions on inadmissibility decisions.[647] Considering that this decision was not unanimous, it would

646 Case KO79/18.
647 Rules of Procedure of the Constitutional Court of the Republic of Kosovo, No. 01/2018, 13 June 2018, Rule 61 (2).

be professionally appropriate for the individual judges to have the opportunity to submit concurring or dissenting opinions, as this would clarify the individual reasoning behind each vote of the judge. Moreover, such separate opinions would enhance and enrich the young constitutional jurisprudence of the country.

However, the Court could not carry out such a change in its jurisprudence through a decision on the merits of the case, as that would have meant declaring the referral admissible. That would contradict the entire purpose behind the new approach of not admitting referrals containing hypothetical constitutional questions.

The Court cannot issue a judgment on the merits of the case if it decides on the inadmissibility of the referral.

This case is a milestone in the Court's interpretation of the limits to its jurisdiction and the authority of the President to refer matters to the Court. It confirms that Article 113 of the Constitution is the basic and sole jurisdictional foundation of the Court. The latter will admit the President's referrals filed based on Article 84(9) of the Constitution, only within the regular jurisdiction of the Court, clearly and explicitly established in Article 113(2)(3).[648]

The Court considered its advisory role as "limited".

Yet, the language in the Court's reasoning leaves the matter ambiguous. Despite confirming its change of practice and reiterating its position on the future hypothetical constitutional questions, the Court noted that "…the possibility for the Court to take a consultative or advisory role is limited [Emphasis added] …"[649] This could imply for the authorized parties that there is still some – limited – possibility for the Court to issue advisory opinions.

Case KO131/18

The President had originally filed this referral prior to the Court's resolution on inadmissibility in Case KO79/18. Consequently, he based the original request on the same arguments and used identical constitutional and legal basis to argue the admissibility of this referral before the Court.

The President raised the issue of the competent authority for the ratification of the Exchange of Letters between Kosovo and the European Union.[650] He relied on Article 84(9) of the Constitution, claiming a broad and unlimited authority of the President to ask the Court for interpretation of constitutional norms related to the President's functions.[651]

The Court duly noted the alternation in its practice and notified the parties about the change. This way, it provided them with sufficient time to clarify and reason the admissibility of the referral. It guided the parties to use Article 113 of the Constitution as the sole constitutional provision for the Court's jurisdiction.[652]

The President reconsidered and submitted his explanations to the Court. He raised allegations of a conflict in the constitutional competencies of the President and the Assembly, based on Article 113(3.1) of the Constitution.[653] The Court then provided additional time for the parties involved to read and submit their comments on the clarifications.

The Court found the President's referral inadmissible because he did not provide evidence and useful information to raise a conflict between the constitutional competencies of the President and the Assembly.

The applicant must prove that a conflict exists under Article 113.

The Court noted that the President did not specify the conflict existing between his constitutional competencies

648 Ibid., para. 68.
649 Ibid., at 76.
650 Ibid.
651 Case KO131/18, para. 5
652 Ibid., para. 14.
653 Ibid., para. 15.

and those of the Assembly, despite the Court's request to clarify this in the referral. The President merely stated that the case "has to do with the conflict of constitutional competences between the President and the Assembly" with no evidence to support it.[654] In the Court's view, this might have not been sufficient to raise a claim of a conflict among constitutional competencies.[655]

Explaining its jurisdiction, the Court recalls that Article 113.3 (1) of the Constitution mentions three requirements: 1) the conflict should be brought by one of the three authorized parties, 2) the conflict is raised for a constitutional competence outlined in the Constitution for one of the three authorized parties, and 3) a conflict exists.[656] It declared – once again – that it does not deal with interpretations of matters that fall outside the scope of Article 113 of the Constitution.[657]

The Court stated that this is the first case with a request for an assessment of the allegation of 'conflict' among constitutional competencies. It also clarified that it would decide each case in the light of the circumstances, yet based on the constitutional requirements and limits.[658]

The Court needs evidence that there is a conflict of competences, to admit the referral.

The Court noted that the President submitted his referral in the form of a question, while not presenting a relevant argument and evidence as to where the conflict exists.[659] The Court needs explicit arguments or claims that there is a conflict of competencies, to admit the referral. A hypothetical question with no proven conflict in practice is insufficient.

The relevant paragraphs of the Resolution on Inadmissability in this case state the following:

101. Turning to the first two legal requirements, the Court notes that the first legal requirement of Article 31 of the Law is that the case filed under Article 113.3 (1) of the Constitution should be submitted by either: (i) the authorized party in conflict; or (ii) by the party directly affected by the conflict. Thus, it is sufficient to have a referral filed with the Court by an authorized party that assumes or claims to be in conflict or by a party which assumes or claims to be directly affected by the conflict. This request is supplemented as the President, in the capacity of the Applicant, is a party that claims to be or may be in conflict. The second legal requirement of Article 31 of the Law is that any useful information regarding 'assumed' or 'alleged conflict' should be submitted to the Court. Referring to this item, the Court will refer to the following two additional requirements defined in paragraphs (2) and

(3) of Rule 68 of the Rules of Procedure, which specify this legal provision even further and as such should be assessed jointly and in a succinct manner, namely:

(2) When filing a referral pursuant to this Rule, an authorized party shall state precisely what conflict exists between the constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo or the Government of Kosovo. (3) The authorized party shall identify the act which violates its competence and the relevant provision of the Constitution which has been violated by such act. […]

102. In this regard, the Court notes that the third constitutional requirement of Article 113.3 (1) with regard to the second legal requirement of Article 31 of the Law, read closely with paragraphs (2) and (3) of the Rules of Procedure, have not been met in the present case.

103. This is because, according to the Court, the Applicant did not submit sufficient useful information about the *'assumed'* or *'alleged conflict'* as required by Article 31 of the Law nor did he accurately specify *'what conflict exists among the constitutional competencies'* of the President and the Assembly, as required by item (2) of Rule 68. Accordingly, finally he failed to prove the violation of his competence provided by the Constitution, with regard to the ratification of international agreements, as provided for in paragraph (3) of Rule 68 of the Rules of Procedure".[660]

654 Ibid., para. 104.
655 Ibid.
656 Ibid., para. 92.
657 Ibid., para. 87, 101.
658 Ibid., para. 96.
659 Ibid., para. 105.
660 Case No. K0131/18.

In this case, the Court confirmed its determination to follow the new precedent related to its scope of jurisdiction. It -once again- affirmed that the President must rely on Article 113 of the Constitution to submit referrals.[661]

The conceptual foundations of this approach correspond – to a certain degree – to those of the US legal system requiring from the referring party that the case must be justifiable, meaning that: the parties are not seeking an advisory opinion, the issues in the case are neither unripe nor moot, and that the resolution of the case does not require a judgment on a political question. As for the rule against advisory opinions, this derives from the constitutional authority of the federal courts to adjudicate 'cases' and 'controversies.' Thus, the courts may not issue opinions that are merely 'advisory', meaning that they respond to hypothetical questions or requests for advice in the drafting of legislation.

Case KO124/19

The Prime Minister requested the Court the interpretation of the "Act of the resignation of the Prime Minister and definition of the competencies and functioning of the Government after the resignation of the Prime Minister."[662]

The Prime Minister claimed a broad competence of the Government to refer questions to the Court, despite the change in the Court's practice.

This was after the Court changed its approach to the interpretation of the limits of its jurisdiction, in Case KO79/18 and later in Case KO131/18. At the time, the Court had diverted from its earlier praxis and limited its jurisdiction only to Article 113 of the Constitution.

Despite the Court's recent change of practice, the Prime Minister invoked Article 93(10) of the Constitution. He claimed that the Government has a broad competence to refer questions to the Court, not limited to Article 113 of the Constitution.[663]

The Prime Minister claimed that the Court's view could change when its composition changes.

The Prime Minister also addressed the Court's change of practice and argued that the Court's interpretation may vary based on each case and the Court's composition. To illustrate, he recalled that the Court in Case KO79/18 referred to the Court's composition at the time, when reasoning its view. This, according to him, meant that the Court has the discretion to define constitutional questions. He, therefore, claimed that the Court should define that his referral falls within the range of constitutional issues affecting the separation of powers, the maintenance of constitutional order, and state-building.

The Court initially reminded the Prime Minister that under Article 113(1) of the Constitution, it has jurisdiction to decide only on cases brought before it legally by authorized parties.[664] Further, the Court's recent case law made it clear that it does not deal with interpretations of issues that fall outside the scope of Article 113.[665] Additionally, the Court mentioned all recent resolutions on inadmissibility and reminded the Prime Minister that he was well aware of such practice because in his responses he used the arguments deriving from the new praxis.[666]

The Court held that requests based on Article 93(10), similar to those under Article 84(9) may be admissible only within the scope of the Court's jurisdiction under Article 113.[667] It used stronger language in its reasoning to reinforce its new practice. Thus, it committed to maintaining this position notwithstanding any future situation.[668]

The Court confirmed that Article 113 limits the Court's jurisdiction.

661 Ibid., 14.
662 Case KO124/19
663 Ibid., at para. 19.
664 Ibid., at para. 44.
665 Ibid., at para. 45.
666 Ibid., at para. 49.
667 Ibid., at para. 46.
668 Ibid., at para. 50.

Finally, the Court confirmed that Article 113 represents the basic and sole jurisdictional foundation of the Court concerning the Government's authorization to submit requests.[669]It also confirms that it no longer responds to the requests for interpretation of the constitutional provisions outside the scope of Article 113 of the Constitution.

Yet, it provides for an indirect "advice," or lead for the Prime Minister, as to under what circumstances the Court could review the matter of the legal status of the Government, following the resignation of the Prime Minister.[670] This could happen, as the Court notes, by challenging the constitutionality of the decrees of the Prime Minister, regulations of the Government, or questions related to situations of conflict among constitutional competencies of the Assembly, the President, and the Government.[671]

The Court cannot answer questions that may arise in the future.

Recognizing the importance and legitimate dilemmas that may arise in different situations, the Court concluded that it cannot answer the questions until they are submitted to the Court as per the Constitution.[672]

The relevant paragraphs of the Resolution on Admissibility in Case KO124/19 state the following:

44. In this respect, as it is rightly specified in the content of the Applicant's Referral, the Constitutional Court, under Article 113, paragraph 1 of the Constitution, has jurisdiction to decide only on cases brought before it in a legal manner by authorized parties.

45. In this regard, the Court is the final authority for the interpretation of the Constitution, in accordance with Article 113, paragraph 1 of the Constitution, in relation to the cases before it as established in Article

113. In this respect, the Court has made it clear that it does not deal with interpretations of issues relating to legal actions or inactions of the constitutional institutions for which it is not authorized under Article of the Constitution (see the case of the Constitutional Court, K 79/18, the President of the Republic of Kosovo, Resolution on Inadmissibility of 21 November 2018).

46. With regard to the meaning and limits of Article 93, paragraph (10) of the Constitution, which states that the Government may refer constitutional questions to the Constitutional Court, which the Applicant refers to, the Court notes that the referrals submitted on this basis may be admissible only within the jurisdiction of the Court, expressly and clearly set out in Article 113. paragraph 2 and 3.

50. Therefore, the Court reiterates that the content of the provision of Article 113 of the Constitution, taken in its entirety, is clear and concrete as to the competencies of the Government deriving from the context of an authorized party before the Constitutional Court. Consequently, despite the need that may appear in practice for interpretation regarding other matters relevant to the competences of the Government, it follows that Article 113 of the Constitution represents the basic and sole jurisdictional foundation of the Constitutional Court with respect to the authorizations of the Government as an authorized party before the Constitutional Court (see, mutatis mutandis, the case of the Constitutional Court, KO79/18, cited above, paragraph 78).

54. The Court notes that the question of the legal status of the Government, following the resignation of the Prime Minister, can be brought before the Court only if it is referred under Article 113, paragraph 2, where the authorized parties may challenge before the Court the questions relating to the compatibility with the Constitution of the decrees of the Prime Minister, as well as of the regulations of the Government, or based on Article 113, paragraph 3 as questions related to situations of conflict among constitutional competences of the Assembly, the President and the Government.

55. Therefore, based on the foregoing, the Court concludes that the issues raised by the Applicant before the Court do not fall within the scope of the jurisdiction of the Constitutional Court, as set out in Article 113 of the Constitution, and therefore despite their importance and legitimate dilemmas that may arise, the Court cannot answer the questions raised until they have been submitted to the Court under the procedures provided for by the Constitution.

669 Ibid.
670 Ibid., at para. 54.
671 Ibid.
672 Ibid., at para. 55.

This is the last request for an advisory opinion submitted to the Court by the Government or the President. The Court recognizes the importance of the questions that may arise in different practical situations. Yet, it made it clear that it would not consider any referral which would embark the Court in a consultative or advisory role. The Court's additional justification for such a stance is that consultative or advisory mandate is incompatible with the decision-making nature of constitutional courts.

The Court made it clear that based on the new practice, it would interpret constitutional provisions only if there is a controversy or a contentious matter to decide on.

Previous practice

Case KO103/14

The President requested the Court for the assessment of the compatibility of Article 84(14) [Competencies of the President] with Article 95 [Election of the Government] of the Constitution, on the appointment of a candidate for Prime Minister.[673] The Court, based on Article 84(9) of the Constitution, found that the questions submitted by the President are of a constitutional nature.[674] In the Court's view, "They aim at ensuring the consistent application of the President of the Republic's mandated constitutional competencies in accordance with the letter and spirit of the Constitution".[675]

The Court did not limit its jurisdiction to Article 113 in its previous case-law.

The relevant paragraphs of the Judgement in Case KO103/14, state the following:

The Court found that the President's questions are "constitutional questions" because they seek to ensure compliance with the Constitution.

15. In this respect, the Court refers to Article 113.1 of the Constitution which provides: "The Constitutional Court decides only on matters referred to the Court in a legal manner by authorized parties."

19. Thus, pursuant to Article 84 (9) of the Constitution, the President of the Republic of Kosovo is authorized to refer constitutional questions to the Court. 20. The Court has, therefore, to consider whether the raised questions are "constitutional questions" in line with Article 84 (9) of the Constitution.

26. It is not the task of the Court to evaluate the facts of the particular case, but the above-mentioned facts appear to have raised constitutional questions under two constitutional provisions, i.e., Article 84 (14) and Article 95 of the Constitution.

27. Consequently, based on Article 84 (9) of the Constitution, the Court finds that the questions submitted by the Applicant are of a constitutional nature. They aim at ensuring the consistent application of the President of the Republic's mandated constitutional competences in accordance with the letter and spirit of the Constitution.

28. Taking these considerations into account, the Court considers that there is no ground to declare the Referral, which raises important constitutional questions, inadmissible or to go into the additional admissibility grounds submitted by the Applicant.

The Court refers to Article 113(1) only to consider whether the authorizing party submitted the question and whether the submission was legal. It does not refer to, nor consider the jurisdictional competence of the President in the light of other paragraphs of Article 113. The Court determines that Article 84(9) is the ground that empowers the President as an authorized party to refer constitutional questions. Further, it determined that the President's questions are "constitutional questions" and declared the referral admissible.[676]

Case KO103/15

The President submitted the referral based on Article 84(9), in conjunction with Article 113(2) of the Constitution. She requested an assessment of the constitutionality of the "Association/Community of Serb majority municipalities in Kosovo – general principles/main elements" (the "Principles"). Article 113(2) provides for the constitutional

673 Case KO103/14, para. 57.
674 Ibid., para. 27.
675 Ibid.
676 Ibid., at 19 and 20.

basis to initiate a constitutional action challenging a particular legal document, or an act in terms of its compatibility with the Constitution.

The President requested the Court to interpret whether the Principles are constitutional, namely compatible with Article 3(1) (Multi-Ethnic Nature), Chapter II (Basic Rights and Freedoms), and Chapter III (Rights of Communities and their Members).[677] She argued that this document is to be considered either as a legal act approved by the Prime Minister or as a document signed by the Prime Minister.[678]

The assessment of the admissibility, in this case, was lengthier compared to previous cases due to the nature of the request. That is because the President did not seek the interpretation of a particular constitutional provision, but requested the assessment of the constitutionality of the alleged document.

The Court will not review the constitutionality of documents that do not fall under Article 113.

While reviewing the admissibility of the referral, the Court held that this document was neither law, nor a decree of the President or Prime Minister, nor a regulation of the Government, within the meaning of Article 113.2(1) of the Constitution, or a municipal statute, within the meaning of Article 113.2(2) of the Constitution. Therefore, the Court concluded that the Principles do not fall within the scope of its jurisdiction under Article 113.2 of the Constitution.[679]

The Court admitted the referral because of 1) the importance of the question; and 2) the lack of other institutions that can provide interpretation, disregarding Article 113.

However, for the first time, the Court in this decision has clearly stated that not every request claiming to raise a constitutional question may be such a matter per se, and it is a matter for the Court to decide whether that constitutes a "constitutional question" or not, on a case-by-case basis.[680] In this case, it held that the questions are of utmost importance and relevance to the constitutional order of Kosovo. It also noted that there is no other institution in the country that could address them.[681] Consequently, the Court concluded that Article 112(1) provides the appropriate constitutional basis for the assessment of the Principles' constitutionality.[682]

The relevant paragraphs of the Judgment in Case KO130/15, state the following:

89. In general, the authority of the President of the Republic under Article 84 (9) of the Constitution to refer constitutional questions to the Court must be understood in conjunction with the provisions of the Constitution regarding the jurisdiction of the Court contained in Article 113 [Jurisdiction and Authorized Parties] of the Constitution.

95. The Court notes that this document (hereinafter: the Principles) is neither law, nor a decree of the President or Prime Minister, nor a regulation of the Government, within the meaning of Article 113.2, under

(1) of the Constitution. Furthermore, it is also not a municipal statute, within the meaning of Article 113.2, under (2) of the Constitution. 96. Therefore the Principles do not come within the scope of the jurisdiction of the Constitutional Court as provided by Article 113.2 of the Constitution. Accordingly, the Court cannot review the Principles as a legal act enlisted under Article 113.2 of the Constitution.

97. In this regard, the Court recalls that it has case law where it has been called upon by the President of the Republic to interpret the meaning of specific provisions of the Constitution. This was done to provide guidance to the President in the execution of her tasks (see, e.g., Case no. K0103/14, the President of the Republic of Kosovo: Concerning the assessment of the compatibility of Article 84(14) [Competencies of the President] with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo, Judgment of 1 July 2014).

677 Para. 85.
678 Para. 92.
679 Ibid., at para. 96
680 Ibid., at para. 101.
681 Ibid. para. 104
682 Ibid. para. 104

98. The Court notes that the President of the Republic submitted a Referral to the Court seeking an interpretation of the meaning of provisions of the Constitution. The Court has determined that such questions are of a constitutional nature and come within the scope of constitutional questions, within the meaning of Article 84(9) of the Constitution (see, Judgment in the above Case K0103/14, paragraphs 26 and 27).

100. To the extent that the scope of the Applicant's present Referral encompasses a request for the Court to interpret specific provisions of the Constitution in assessing the constitutionality or the compatibility of the Principles, the Court has jurisdiction to deal with the referral. Thus, the Court is the final authority to provide an interpretation within the meaning of Article 112.1 of the Constitution.

Not every question that relates to the Constitution is a 'constitutional question'

101. When an issue is raised by an authorized party who considers that it constitutes a "constitutional question" this is a matter for the Court to decide. The Court itself decides whether the raised issue is a "constitutional question" and decides this on a case-by-case basis.

102. In this respect, the Court recalls its jurisprudence when it was asked to provide an interpretation based on Article 112.1 of the Constitution. Namely, in Referral K097/10 the Court considered a question raised under Article 84 (9) which required an interpretation based on Article 112.1 of possible actions of the Acting President of the Republic.

104. The Court considers that the questions raised in the present Referral are of utmost importance and relevant to the constitutional order of Kosovo. Moreover, there is no other institution in the Republic of Kosovo whereto the Applicant could address them. Consequently, the Court concludes that Article 112.1 provides the appropriate constitutional basis for the assessment of the Principles for compatibility with relevant constitutional provisions.

Through this decision, the Court set for the first time some limits to the broad notion and interpretation of the meaning of the constitutional questions. It acknowledged that not every issue claiming to raise a constitutional question may be such a matter per se.

This approach was different from the Court's earlier view that "there [was] no need…to elaborate admissibility grounds provided by Article 113.1.2 of the Constitution," which meant that a constitutional question was any question related to a particular constitutional provision.

Case KO98/11

The Government asked the Court to interpret and clarify the immunities of the deputies of the Assembly, the President, and members of the Government. It argued that "this issue has a direct impact on the democratic functioning of the institutions of the Republic of Kosovo, under the Constitution of the Republic of Kosovo.[683]

The Court broadened the Government's authorities outside the scope of Article 113.

The Court held that "(i)f the questions are constitutional questions then the Government will be an authorized party and the (r)eferral will be admissible."[684]

The relevant paragraphs of the Judgment in Case KO130/15, state the following:

40. The Government bases its Referral to the Constitutional Court under Article 93 (10) and Article 113 (3)

(1) of the Constitution. According to Article 93 (10) the Government may refer Constitutional questions to the Constitutional Court. If the questions are constitutional questions, then the Government will be an authorized party and the Referral will be admissible. The Court will look at the questions closely to see if the Referral contains constitutional questions.

The Court considered the question constitutional because it was linked to the State's governance.

44. The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of the separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees

683 Case KO98/11, para. 3.
684 Ibid., para. 40

the democratic functioning of a State. The essence of the independence and effective functioning of these branches is the immunity provided to the persons embodying these powers.

45. As the Prime Minister states, the immunity questions raised affect the democratic functioning of the state.

46. They [the questions] concern the mechanisms of the exercise of the division of power in the Republic of Kosovo.

49. For a Referral to be declared admissible the Constitution requires that the matter be referred to the Court in a legal manner by an authorized party, according to Article 113 (1) of the Constitution. The Court finds that the questions of the Applicant are raised in a legal manner. The Constitutional Court, as the final authority for the interpretation of the Constitution, considers that these questions relating to immunity are of a constitutional nature. Therefore, the Government, has raised constitutional questions and it is an authorized party.

50. The questions raised are constitutional questions as contemplated by Article 93 (10) of the Constitution, It is therefore not necessary to consider the Referral in the context of Article 113 (3) (1) of the Constitution. Furthermore, whereas there are time restrictions provided for in Chapter III, Special Procedures, of the Law on the Constitutional Court for bringing Referrals under Article 113 of the Constitution, there are no time restrictions in the bringing of such Referrals under Article 93 (10).

This decision shows that the Court's focus was to consider whether the questions are of constitutional nature. It did not question at all the authority of the Government to address a request for interpretation of the constitutional provisions, nor whether there is any limit to it, or what is the scope of the Court's jurisdiction.

The Court did not question the authority of the Government nor the Court's jurisdiction.

The Court's broad interpretation implied that the Court would review the merits of any question raised legally by the Government concerning the democratic functioning of the state.

Comparative Analysis and References

Various constitutions in Europe contain detailed provisions, which clearly and exhaustively set out the jurisdiction of a constitutional court.

Most constitutional courts have the power to provide an abstract review of the constitutionality of laws in the absence of a concrete dispute.[685] Most of them allow certain political actors, like the President, the President of Parliament, several members of Parliament, or the Government, to ask for abstract review. Some countries like Hungary, allow even individuals to request an abstract review.[686]Similarly, the Constitutional Court of Kosovo can provide an abstract review of the constitutionality of laws, acts, and regulations, both before and after their adoption.

On the other hand, there is not one constitution across Europe that foresees the possibility for the President or the Government to request interpretation of a certain constitutional provision hypothetically and without controversy. Constitutional courts do not have jurisdiction to issue advisory opinions. The Constitutional Court of Germany was an exception for a while. At the outset of its existence, the Act on the Federal Constitutional Court provided that the Constitutional Court of Germany can issue advisory opinions[687]. A few years later, this provision was repealed due to the mandatory nature of the "advisory opinions".[688]

685 Exchange of Views Between the Southern African Judges Commission and the Venice Commission on Constitutional Review In Common Law Countries And Countries with Specialized Constitutional Courts: The European Model of Constitutional Review of Legislation, Report by Ján Mazák, Venice, 17 March 2006, CDL-JU(2006)016.

686 A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 32A(3) (Hung.) [hereinafter HUNGARIAN CONSTITUTION], available at http://www.oefre.unibe.ch/law/ icl/hu00000_.html ("Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law.")

687 Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz – BVerfGG), 12 March 1951, at https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf? blob=pu blicationFile&v=1#:~:text=The%20Federal%20Constitutional%20Court%20may,for%20 other%20constituti onal%20court%20proceedings.&text=Applications%20for%20a%20decision%20pursuant,or%20by%20a% 20Land%20government.

688 Case K079/18, para. 76.

Conclusion

The Court's interpretation of its scope of jurisdiction has been inconsistent. After almost a decade of jurisprudence, along with the changes in its composition, the Court changed and recently developed its interpretation of the matter. It shifted from a broad understanding of 'constitutional questions' to a limited interpretation that does not expand beyond Article 113 of the Constitution.

The President and the Government have an important function of guaranteeing the constitutional functioning of institutions. Yet, their competence does not imply broad and unlimited authority to refer questions to the Court. This is in line with the practice of other countries in Europe that do not foresee the Court's jurisdiction to deliver advisory opinions. This approach also protects the Court's fundamental decision-making role.

Yet, uncertainties remain. One reason for that is the wording "[…] the possibility for the Court to take a consultative or advisory role is limited…" in one of the Court's reasonings. The word "limited" could imply that there could still be some room for the authorized parties to ask for advisory opinions. Though the Court confirms its new approach in subsequent recent cases, the choice of such ambiguous words could lead to future misunderstandings. The Prime Minister did request an advisory opinion once, despite the Court's change of practice in 2018. The authorized parties could follow the same pattern in the future in absence of more constitutional clarity.

The Court's justification behind the change of practice is also confusing. It implies that the composition of the Court is a determining factor for the new approach to its jurisdiction, by writing that the decision comes from "… the Court in its present composition." This could indicate that once the judges change, the Court could change its interpretation. It implies that the Court will no longer be bound by its previous case law once the composition changes. This way, it sets a dangerous precedent that goes against the principle of legal certainty. It could also lead to future repeated attempts from the authorized parties to request advisory opinions.

These uncertainties call for the urgent need to address this issue through clear constitutional provisions. This is especially due to the case-by-case nature of the Court's case law. Provisions on the competencies of the President and the Government need a more specific language than "may refer constitutional questions to the Constitutional Court" to define the correlation with Article 113. More clarity in the Court's jurisdiction for other matters outside Article 113, would avoid confusion and set the basis for certainty.

Recommendations

- A new constitutional provision could explicitly provide that the President and the Government can submit referrals to the Court solely under Article 113.
- New provisions could also allow the President and the Government to refer matters to the Court outside the scope of Article 113, in specific circumstances, and this rule could expand to the other authorized parties as well. However, they would need to be precise in what could be an exception. This can be reasonable considering the evolution of case law and the Court's jurisprudence over time. The Constitution would need to establish the criteria when there can be a deviation from the norm.
- As a basic prerequisite, the Court's response could be discretionary, in that it decides based on constitutional criteria whether to render an advisory opinion. Such criteria could – as a minimum – include the following: (i) if they are of a constitutional nature; (ii) if they fall outside the scope of Article 113 of the Constitution; (iii) if they could endanger the constitutional order if not addressed; and (iv) if there is no other institution in the country that could give address it.

XIX

The Court's Jurisdiction on the Constitutionality of International Agreements

The Constitution provides for the **ex-post** review of the constitutionality of international agreements. In this case, the subject of the review is not the substance of the agreement itself, but rather the act of its ratification. Some other countries allow for an **ex-ante** review as well, which allows for the review of the constitutionality of the substance of the international agreement, prior to its ratification. Discussions on future constitutional amendments could explore options for possible changes in the Constitution or the Court's practice to allow for an ex-ante review as well, in line with the practices of some other countries such as Germany and Ireland.

Ex ante review → substance of the agreement
Ex post review → ratification procedure

The Constitutional Court is "the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution".[689] However, the Constitution does not expressly give the Court jurisdiction to review the substance of an international agreement prior to its ratification. This is known as the *ex-ante* review of the international agreement and the case law is conflicted as to whether it falls within the Court's jurisdiction under Article 113 of the Constitution.[690] By Constitution, the Court merely reviews whether the procedure and the laws adopted for its ratification are in accordance with the Constitution. This is known as an ex-post review of the ratification of international agreements.

There exist three main models of constitutional systems; 1) those providing for *ex-ante* and *ex-post* review of treaties; 2) those expressly referring to either one or the other of these types of review, and 3) others with no possibility for either *ex-ante* or *ex-post* review of treaties. In an *ex-ante* review of the international agreement, the object of constitutional review is the treaty itself, and not its act of assent. The results of this procedure would be the following: suspension of ratification until the Court's decision, and, in case of non-compliance with the Constitution, the ratification would not happen until the Constitution is amended.

The ex-ante review of treaties would be advantageous due to its preventive nature.

The ex-ante review allows the Court to identify any contradiction between the international treaty and the Constitution, before its ratification. As for the ex-post constitutional review, this might -to a certain extent- provide for a remedy too.[691] Parliamentary control through ratification of certain treaties and the constitutional review of international treaties by a constitutional court are important methods of ensuring control of the treaty-making power exercised by the executive.[692] Besides that, an ex-ante review would eliminate any uncertainty that Kosovo representatives may face during the negotiation and signing of international agreements, especially on sensitive issues. A constitutional review before the ratification of an international agreement would reduce the room for contestation by other parties.

Given the importance of treaty-making powers and the proliferation of international treaties covering a wide range of areas, a case could be made in favor of reviewing the constitutionality of international treaties. However, as the Venice Commission notes, a constitutional review of treaties should not be used as a political weapon to block the ratification of these treaties. Thus, an ex-ante review would call for other protective measures against this risk, especially since Kosovo still fights for integration into international organizations.

Relevant Provisions

Constitution of Kosovo

Article 112 [General Principles]

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.
2. The Constitutional Court is fully independent in the performance of its responsibilities.

Article 113 [Jurisdiction and Authorized Parties]

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

689 Constitution of Kosovo, Article 112 (1).
690 European Commission for Democracy Through Law, Venice Commission, Seminar on the role of the Constitutional court in the implementation of international law, CDL-JU(98), 8 January 1999, page 3, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(1998)031-e. Case K095/13.
691 Mario Mendez, Constitutional review of treaties: Lessons for comparative constitutional designs and practice, International Journal of Constitutional Law, Volume 15, Issue 1, 1 January 2015, page 97, at https://academic.oup.com/icon/article/15/1/84/3068322.
692 Ibid., page 85-96.

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;
(2) the compatibility with the Constitution of municipal statutes.
3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:
(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
(2) compatibility with the Constitution of a proposed referendum;
(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;
(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;
(5) questions whether violations of the Constitution occurred during the election of the Assembly.
4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.
5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed.
6. Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.
8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.
9. The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.
10. Additional jurisdiction may be determined by law.[693]

Relevant Case-law and Opinions

Cases K095/13 and K0130/15 are the relevant cases in the matter.[694] The Venice Commission Opinion No. 405/2006 on the Constitution of Serbia is of relevance as well.

Case KO95/13

This case refers to Law on the Ratification of the First International Agreement on the Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this agreement, adopted by the Assembly on 27 June 2013. Deputies of the Assembly, as applicants, argued that the Law on Ratification and the International Agreement were not adopted according to legislative procedures provided for in the Law on International Agreements and the Rules of Procedure of the Assembly of 2010.[695]

Allegations:

The deputies of the Assembly alleged the following procedural violations:

1) The procedure followed for adopting the draft law on ratification by the Government violated Articles 5 and 11.1 of the Law on International Agreements, considering that the law was not submitted to other relevant agencies and ministries for review.

693 Constitution of Kosovo, Article 112 (1).
694 Case No. K095/13; Case K0130/15.
695 Case No. K095/13, para. 21

2) the procedure followed for submission by the Government of the draft law to the Assembly violated Articles 54.1b and 60.2 of the Rules of Procedure of the Assembly because the draft law was not accompanied -among others- by a Declaration on budgetary implications; and

3) The procedure followed for adoption of the draft law by the Assembly violated Articles 60.3 and 54.1 of the Rules of Procedure of the Assembly, along with specific rules referred to in Annex 2 of the Rules of Procedure, considering that the draft law was never submitted to various Assembly Committees for review.[696]

As for the first allegation, the applicants argued that every agreement between the Republic of Kosovo and any international subject must take into account Article 11 of the Law on International Agreements. It provides that in those cases with an international agreement having implications for the internal legislation, the responsible institution must prepare a document explaining those implications.[697] Therefore, in the applicants' view, the text of the draft First International Agreement should have been sent to the agencies or ministries in the relevant field, in conformity with Article 5 of the Law on International Agreement on the procedural review of the draft international agreements.[698]

Further, the applicants argued that the draft law submitted to the Assembly should have contained the following: an explanatory note on the objectives aimed to be achieved by the Law, its harmonization with the applicable legislation and reasoning of the provisions of the law; a declaration on the budgetary implications in the first year and subsequent years, and a declaration on the approximation with EU legislation and the comparable table of acts it refers to.[699] They note that the draft law on ratification contains the explanatory memorandum only. Yet it does not refer to the declaration on budgetary implications as provided by Article 54.1b and a financial statement as set forth under 60.2 of the Rules of Procedure of the Assembly. In their view, considering that items 7 and 10 of the Agreement foresee the integration of parallel security and judicial structures, there is no doubt that the Agreement has budgetary implications.[700]

As for the third allegation, the applicants argue that the procedure followed for the adoption of the draft law on Ratification by the Assembly violates Articles 60.3 and 54.1 of the Rules of Procedure of the Assembly. Specifically, they remind that a draft law on ratification of international agreements is special and shall be subject to one review only. Otherwise said, considering that it is a special procedure and it excludes a second review of the draft law, the procedure at the permanent and functional committees must be developed, prior to the vote in the plenary session of the Assembly where the draft law on Ratification should be adopted.[701]

The applicants also claimed that the draft law on ratification did not go through the review procedures at the permanent committees for Budget and Finances and Foreign Affairs, as set forth under Article 54.1 of the Rules of Procedure of the Assembly. Therefore, it should have also been reviewed by the Functional Committee as the lead committee, as well as the Committees for Legislation and Judiciary, Budget and Finance, European Integration, Human Rights, Gender Equality, Missing Persons and Petitions, Rights and Interests of Communities and Returns.[702] They argued that the Legislation Committee of the Assembly did not review the constitutionality and legality of what is ratified in the law.[703]

The applicants also refer to Annex 2, Item 5 [Committee on Foreign Relations] of the Rules of Procedure of the Assembly with two items -in particular- defining the duties of the Committee: ratifying existing treaties en bloc or separately that Kosovo wants to sign, and following the ongoing negotiations for participation in new treaties led by the Government and initiating the debate on ratification of these two treaties. With a look at the first item, the applicants argue that the opinion of the Committee on Foreign Relations is to be always obtained prior to the conclusion of an agreement by Kosovo. Concerning the second item, the applicants state that the Committee on

696 Ibid.
697 Ibid., para. 22.
698 Ibid., para. 24.
699 Ibid., para. 25 (a, b, c).
700 Ibid., para. 26.
701 Ibid., para. 27.
702 Ibid., para. 28.
703 Ibid., para. 29.

Foreign Relations is in charge of initiating debates by the Assembly on the pre-ratification procedure being, in their opinion, similar to the Anglo-Saxon system of checks and balances, whereby the legislative and executive powers are -in the decision-making process- balanced against the state actions in international relations. In brief, they conclude that the Rules of Procedure of the Assembly are rules of a special legal classification in the legal hierarchy, considering that they are a formal source of the Constitution and, therefore, supersede the law.

To conclude, the Applicants believe that the Government has ignored the Committee on Foreign Relations, thus contravening the Rules of Procedure of the Assembly.[704]

The referral was based on Article 113(5) of the Constitution enabling members of the Assembly to contest the constitutionality of any law or decision of the Assembly before the Court, based on claims on substance or procedure.[705]

Court's judgment

The Court first reviewed the procedural aspect of the request, on the compatibility of the Law on Ratification at hand with the legal framework on the adoption of international agreements and with the Rules of Procedure of the Assembly.[706] The Court reiterated that it would review the actions of the Assembly and the Government from a constitutional perspective as opposed to a review of legality, by reminding us that the complaint under consideration falls outside the jurisdiction of the Court. As to the review of constitutionality, the Court concluded that the actions of the Government and the Assembly conformed with the Constitution, more specifically with Article 65 [Competencies of the Assembly], Article 80 [Adoption of Laws], Article 18 [Ratification of International Agreements].[707]

As to the compatibility of the First International Agreement itself with the Constitution, the Court noted that:

"[…] under the Constitution the Court has jurisdiction to review the Law on Ratification but is not empowered to review whether the international agreement as such is in conformity with the Constitution".[708]

The Constitutional Court needs to ensure that no law violates human rights and fundamental freedoms.

Judge Carolan, in his concurring opinion, argued that the Court had jurisdiction to review the compatibility of the international agreement with the Constitution. He inferred this jurisdiction of the Court from the fact that the Assembly ratifies international agreements through law and the Court reviews such laws upon requests by the deputies of the Assembly. Specifically, he referred to Article 19 of the Constitution according to which 'International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo'. In addition, he argued that this jurisdiction of the Court would be inferred from Article 21 of the Constitution which requires the protection of human rights and fundamental freedoms. According to the Carolan:

"For example, if the Assembly were to adopt a treaty that violated the human rights of citizens or members of certain communities, then the Constitution would be meaningless if the Constitutional Court could not review and enforce the human rights that are protected by the Constitution. Therefore, the Court does have the authority to review the substantive provisions of this law and the decision of the Assembly in enacting this law."[709]

Case KO 130/15

The review of international agreements reappeared before the Court on the occasion of the adoption by Kosovo

704 Ibid., para. 30, 31, 32, 33.
705 Ibid., para. 4.
706 Ibid., para. 2,3.
707 Ibid., para. 73-75.
708 Ibid., para. 99-100.
709 Ibid., (Dissenting Opinion), page 2.

and Serbia of the document 'Association/Community of Serb majority municipalities in Kosovo – general principles/main elements, on 25 August 2015 ("General Principles").[710] The President asked the Court to review the compatibility of these principles with the Constitution.[711]

As regards admissibility, the Court concluded that the document agreed between Kosovo and Serbia was "neither law, nor a decree of the President or Prime Minister, nor regulation of the Government, within the meaning of Article 113.2 under (1) of the Constitution. Furthermore, it is not a municipal statute, within the meaning of Article 113.2, under (2) of the Constitution."[712]

As a result, the Court concluded that it could not review the General Principles based on its jurisdiction under Article 113(2) of the Constitution. The Court, however, decided to review the document based on a joint reading of Article 84(9) of the Constitution with Article 112.[713] Based on these provisions, the Court considered itself competent to decide on cases related to 'constitutional issues.' These are cases parties address to the Court for an interpretation of provisions in the Constitution.[714] Thus, despite the sui generis character of the document, the Court found itself competent to review it in light of the Constitution.

Opinion of the Venice Commission

The Venice Commission, in an opinion on the Constitution of Serbia, noted:

The ex-ante review would have effect not only on internal but also on international level.

"In the system of sources of law with the supreme position of the Constitution, ratified international treaties being a part of legal system of the state, can be controlled by Constitutional Court. And this is a case in Serbia, because Art. 194 of the Serbian Constitution states that 'the Constitution shall be the supreme legal act of the Republic of Serbia.' The result of the decision of the Constitutional Court, declaring non-conformity between Constitution and international treaty, involves effect not only on internal but also on international level. In such a situation international treaty should be renounced. It must be however taken into consideration that in a concrete political situation this provision (allowing for the Constitutional Court to decide on the conformity of ratified international treaties with the Constitution) could be used as political weapon to cancel by the decision of a state organ, the international agreement. For that reason, it is very important to create in the law the system of guarantees which help to avoid this danger".[715]

Comparative Analysis

Constitutions that expressly provide for *ex-post* review are rare.

A review of several constitutional texts yields a mixed picture concerning the power of the constitutional courts to review the constitutionality of international treaties; those allowing the constitutional review after the signature but before the ratification of the international treaty *(ex-ante review)*, and those allowing constitutional review after the ratification of the international treaty *(ex-post review)*.

The Constitutions of Albania, Armenia, Bulgaria, Czech Republic, France, Georgia, Slovakia, Poland, Portugal, and Romania expressly recognize the ex-ante review of international treaties.

Examples of ex-ante review are for instance, the two judgments by the Czech Constitutional Court regarding the compatibility of the Lisbon Treaty with the Czech constitutional order. The Czech Senate argued before the Czech Constitutional Court that the changes brought about by the Lisbon Treaty would affect statehood and the constitutional characteristics of the Czech Republic. In both cases, the Czech Constitutional Court did not find any

710 Case No. KO130/15, para. 84.
711 Ibid., para. 2.
712 Ibid., para. 95.
713 Ibid., para. 5.
714 Ibid., para. 98, 100 and 101.
715 European Commission for Democracy Through Law, Venice Commission, Comments on the Constitution of Serbia (Parts V, 7-9, VI and VIII), Opinion No. 405/2006, 6 March 2007, at https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL(2007)005rev-e.

incompatibility between the two.

According to the Slovenian Constitutional Court, an ex-ante review of international agreements has a preventive aim, in so far as it would prevent the State from failing to comply with international obligations because they disagreed with constitutional provisions.[716]

In the case concerning the ex-ante review of the Europe Agreement between Slovenia and the European Union, the Court found that certain provisions, related to the acquisition of real estate (especially land) by EU citizens or companies, were in contradiction with the Slovenian Constitution. Ultimately, the Court suggested the amendment of those constitutional provisions.

There are also cases in which such ex-ante review is not explicitly mentioned in the Constitution, but it is a result of the case law and interpretation by the highest courts, as constitutional practice in Germany and Ireland shows.[717]

In other cases, constitutional courts may review the constitutionality of international agreements after their ratification, by performing an ex-post review.[718]

For instance, according to Article 167 (2) of the Serbian Constitution, the Constitutional Court may decide on "compliance of ratified international treaties with the Constitution".[719] The Polish Constitutional Tribunal reviewed the constitutionality of provisions of the EU Accession Treaty signed on 16th April 2003, which was already in force in Poland. In its view, the Tribunal was competent to review the constitutionality of the Accession treaty based on Article 188(1) of the Constitution.[720] According to the Tribunal, such jurisdiction includes agreements ratified via statutory consent and those ratified through a referendum.[721]

According to the case law of the Bulgarian Constitutional Court, international treaties that have been ratified, promulgated, and have come into force, concerning the Republic of Bulgaria, are part of the national legislation, and therefore are subject to control for compliance with the Constitution just like all pieces of national legislation. Later on, the Court in Bulgaria stated that in reviewing a law, enacted to ratify an international agreement, it could also rule on the constitutionality of the treaty itself. International treaties ratified according to constitutional requirements acquire the force of law and may be regarded as law. Assessment of such provisions and certification, as regards their possible incompatibility with the Constitution, are within the jurisdiction of the Constitutional Court.[722]

The Croatian Constitution does not give to the Constitutional Court the power to review the constitutionality of international treaties. Rather, it carries out an indirect review of treaties. Otherwise said, it assesses the constitutionality of the ratification act. Yet, the Croatian Constitutional Court has ruled, in a decision concerning the compatibility of several treaties with the Holy See with the Croatian Constitution, that it is not competent to review the direct compliance of international treaties with the Constitution.[723]

Albania

Article 131

The Constitutional Court decides on:

b) compatibility of international agreements with the Constitution, prior to their ratification.[724]

716 Constitutional Court of Czech Republic, Decisions 2008/11/26 -Pl. ÚS 19/08: Treaty of Lisbon, at https://www.usoud.cz/en/decisions/2008-11-26-pl-us-19-08-treaty-of-lisbon-i.

717 Slovenian Constitutional Court, Opinion Rm-1/97, 5 June 1997, para. 13, at http://www.us- rs.si/documents/96/61/rm-1-97-an2.pdf

718 Mario Mendez, page 95.

719 Ibid., page 109.

720 Constitution of Serbia.

721 According to Article 188(1) of the Polish Constitution "The Constitutional Tribunal shall adjudicate regarding the following matters: the conformity of statutes and international agreements to the Constitution [...]". Whereas the ex ante review by the Tribunal is clear from Article 133 of the Constitution, the ex post review jurisdiction is not entirely clearly from the wording of the Constitution. Nevertheless, the Tribunal did not refrain from inferring it.

722 Poland's membership in the European Union (the Accession Treaty), K18/04, at https://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf. The signature of the Accession Treaty in April 2003 was then followed by a referendum held on 7th and 8th of June 2003. The positive result of the referendum was followed by ratification of the Treaty by the Polish President and its publication in the Polish Journal of Laws dated 30 April 2004. Despite that Poland entered the EU in May 2004, a group of deputies of the Polish Sejm addressed the Constitutional Tribunal with a complaint -based on article 188(1) of the Constitution- on the review of constitutionality of international treaties by the constitutional court.

723 Bulgarian Constitutional Court, Decision no.6, 16 April 2002, at http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm

724 Constitution of Albania.

Armenia

Article 168

The Constitutional Court as prescribed by the Law on the Constitutional Court, shall : […]
3) Prior to the ratification of an international treaty, determine the compliance of the commitments enshrined therein with the Constitution.[725]

Bulgaria

Article 149

(1) The Constitutional Court shall:
[….]
4. pronounce on the consistency of any international treaties concluded by the Republic of Bulgaria with the Constitution prior to the ratification of any such treaties, as well as on the consistency of any [domestic] laws with the universally recognized standards of international law and with the international treaties whereto Bulgaria is a party.[726]

Czech Republic

Article 87

(1) The Constitutional Court has jurisdiction:
[…].
(2) Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.

France

Article 54

If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.[727]

Georgia

Article 60

4. The Constitutional Court of Georgia shall exercise judicial power through constitutional legal proceedings.
[…]
e) review the constitutionality of international treaties on the basis of a claim submitted by the President of Georgia, the Government, or by at least one fifth of the Members of Parliament.[728]

725 Constitution of Armenia.
726 Constitution of Bulgaria.
727 Constitution of France.
728 Constitution of Georgia.

Slovakia

Article 125

(1)The Constitutional Court decides on the compatibility of
a) laws with the Constitution, constitutional laws and international treaties to which a consent was given by the National Council of the Slovak Republic and which were ratified and promulgated in a manner laid down by law.[729]

Poland

Article 133[…]

2. The President of the Republic, before ratifying an international agreement may refer it to the Constitutional Tribunal with a request to adjudicate upon its conformity to the Constitution.

Portugal

Article 278

1.The President of the Republic may ask the Constitutional Court to undertake the prior consideration of the constitutionality of any norm contained in an international treaty that is submitted to him for ratification, in any decree that is sent to him for enactment as a law or executive law, or in any international agreement, the decree approving which is sent to him for signature[730].

Romania

Article 146

The Constitutional Court shall have the following powers:
[…]
b) to adjudicate on the constitutionality of treaties or other international agreements, upon referral by the President of either of the Chambers, at least 50 Deputies or at least 25 Senators.[731]

Slovenia

Article 160

[…]
In the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court.[732]

Spain

Article 95

1. The conclusion of any international treaty containing stipulations contrary to the Constitution shall require prior

729 Constitution of Slovakia.
730 Constitution of Portugal.
731 Constitution of Romania.
732 Constitution of Slovenia.

Constitutional amendment.[733]

2. The Government, or either of the Houses may request the Constitutional Court to declare whether or not there is a contradiction.[734]

Conclusion

The Constitution foresees the direct applicability of some international agreements while others need ratification. All international agreements nonetheless become internal laws and have superiority over national laws. All laws must comply with the Constitution and the Constitutional Court has the power to ensure that. Yet, the Constitution does not spell out the power of the Court to review the constitutionality of the substance of international agreements (ex-ante review). The Court can only ensure that the ratification procedure does not violate the Constitution (ex-post review). Case law does not provide much clarity either and was perceived to be contradictory.

The current practice favors an ex-post review by the Court of ratified international agreements. This way, the international agreement itself becomes subject to parliamentary control as the Assembly votes on its ratification. This system could be sufficient and some countries apply the same. However, in most other countries the constitutional court does not limit its jurisdiction to an ex-post review. In Kosovo, an ex-ante review would have the advantage of preventing any non- compliance with the Constitution from early on.

Thus, there is a need for an amendment of the Constitution in this regard. The rationale -and the advantage thereof- are two-fold: setting the basis for clarity in the country's highest legal act, and downsizing the space for contestation by other parties, when ambiguities might arise. In case of no constitutional amendment, the Court could still change the current practice in its case law. This way, it would follow the example of other countries such as Germany and Ireland. However, in order to avoid the political use of the ex-ante review to cancel an international agreement, a system of guarantees involving certain limitations would be necessary.

Recommendations

The Constitution could be amended as follows:

- A new provision could spell out the jurisdiction of the Court to review the constitutionality -that is the substance- of international agreements. Article 113 of the Constitution would need to be amended, to recognize the jurisdiction of the Court to review the constitutionality of international agreements before their ratification.
- For agreements that need ratification, another possibility would be to provide for constitutional review even before the signature of the international agreement itself. This would have the advantage of setting the basis for more political and legal certainty, given that the Court would have pronounced itself before political representatives signed the international treaty.
- In case of the establishment of an ex-ante review, certain limitations would be necessary i.e. a limited number of subjects or a representative number of deputies of the Assembly that may file a request for review by the Constitutional Court or a review that is limited only to the core provisions of the Constitution.

733 Constitution of Spain, at https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf
734 Ibid.

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The Criteria for the Interpretation of the Constitution

The Court uses different interpretation methods on a case-by-case basis, in absence of established criteria for the interpretation of the Constitution. The latter only generally provides that the Court must interpret human rights and freedoms in accordance with the case law of the European Court of Human Rights (ECtHR). The current practice avoids the risk of over-limiting the Court's discretion in interpreting the Constitution. On the other hand, an improper interpretation may have far-reaching legal and political consequences not intended by the Constitution. Hence, the Court must be diligent in interpreting the Constitution by looking into the ECtHR case law and examining the methods of interpretations that ECtHR used in each of them, appropriately to the case before it. The Constitution could also explicitly include general basic principles of the Council of Europe for interpretation, such as democracy, the protection of human rights, and the rule of law.

The Constitution lacks criteria for its interpretation.

In absence of set criteria, the Constitutional Court applies an interpretation method of the Constitution as it sees fit, on a case-by-case basis. A general constitutional rule is that the Court must interpret human rights and freedoms in accordance with the case law of the European Court of Human Rights (ECtHR).735 Besides that, the Constitution does not refer to any general or specific criteria for the interpretation of other constitutional provisions. Thus, the Court's interpretation methods remain discretionary. The question, therefore, remains whether there is a need for a specific criterion of interpretation that would guide the Court in its analyses of constitutional matters brought before the Court.

The much-debated Court decision of 2015, on the constitutionality of the Association/Community of Serb Majority Municipalities in Kosovo – General Principles/Main Elements ('Principles') best illustrates the issue. The relevance of an interpretation method became apparent when, among others, the Court needed to give an interpretation to the terms "Association", "Community" and "Inhabitants" and the meaning they were given under the Constitution. It also needed to give an interpretation to the term "exercise full overview", particularly its meaning under three different language versions, and decide which one prevails.

These tasks raised the question of whether a criterion for interpretation is needed, especially when it comes to more sensitive constitutional issues. Some sort of criterion could serve as guidance for the Court in reading constitutional provisions and giving meaning to disputable terms, while still allowing room for interpreting the Constitution appropriately to each case.

Relevant Provisions

Constitution of Kosovo

Article 12 [Local Government]

1. Municipalities are the basic territorial unit of local self-governance in the Republic of Kosovo.
2. The organization and powers of units of local self-government are provided by law.

Article 123 [General Principles]

1. The right to local self-government is guaranteed and is regulated by law.
2. Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.
3. The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the European Charter on Local Self Government to the same extent as that required of a signatory state.
4. Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services having due regard for the specific needs and interests of the Communities not in the majority and their members.

Article 124 [Local Self-Government Organization and Operation]

1. The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies.
2. Establishment of municipalities, municipal boundaries, competencies and method of organization and operation shall be regulated by law.
3. Municipalities have their own, extended and delegated competencies in accordance with the law. The state authority which delegates competencies shall cover the expenditures incurred for the exercise of delegation.
4. Municipalities have the right of inter-municipal cooperation and cross-border cooperation in accordance with the law.
5. Municipalities have the right to decide, collect and spend municipal revenues and receive appropriate funding from the central government in accordance with the law.

735 Constitution of Kosovo, Article 53.

6. Municipalities are bound to respect the Constitution and laws and to apply court decisions.
7. The administrative review of acts of municipalities by the central authorities in the area of their own competencies shall be limited to ensuring compatibility with the Constitution of the Republic of Kosovo and the law.[736]

European Charter of Local Self-Government

Article 10 – Local authorities' right to associate

1. Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.
2. The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.
3. Local authorities shall be entitled, under such conditions as may be provided for by the law, to co- operate with their counterparts in other States.[737]

Relevant Case-law and Opinions

Case KO130/15 is relevant in this matter. It refers to the signing of the 'First Agreement on the Principles that Regulate the Normalization of the Relations between the Republic of Kosovo and the Republic of Serbia" (the 'First Agreement').[738] This agreement, ratified by Kosovo as an international agreement in 2013, provided for the establishment of an Association/Community of Serb majority municipalities in Kosovo.[739]

In 2015, Kosovo and Serbia convened on the 'Association/Community of Serb Majority Municipalities in Kosovo – General Principles/Main Elements' ('Principles'), which set out details for the establishment and functioning of the Association/Community.[740] Yet the Principles were not ratified as an international agreement. Rather, they are about applicable legislation deriving from an international agreement. In short, they are an intermediary legal act for the implementation of the provisions of the First Agreement.[741]

The President of Kosovo at the time, Atifete Jahjaga asked for an assessment of the compatibility of the principles contained in the document entitled "Association/Community of Serb municipalities in Kosovo -general principles/ main elements" (the "Principles") with the spirit of the Constitution, Article 3 [Equality Before the Law], Paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo (the "Constitution").[742]

For assessing the case under consideration, the Court invited for submission of Amicus Curiae briefs to address key questions: does the Association Community comply with the Constitution of Kosovo? Concretely, the Court asked the following: what is the legal nature of an association of municipalities?; Related to the association of municipalities, what is usually normatively regulated and to what extent? What is the status of such Associations?[743]

Also, the Court was interested to know if such arrangements comply with the Constitution. Besides that, it raised the question of whether the 'General Principles' grant the Association/Community executive competencies, and if yes, what is an executive competence vis- à-vis an association of municipalities?[744]

Further, the Court assessed whether the procedures set out in the 'General Principles/Main Elements of the Association/Community of Serb majority municipalities' could be implemented into a statute through a government decree.[745]

Amicus Curiae briefs

Istrefi and Pallaska submitted their respective *Amicus Curiae* briefs to the Court.[746]

736 Constitution of Kosovo.
737 European Charter of Local Self-Government, at https://rm.coe.int/168007a088.
738 Case KO130/15., para. 78.
739 Ibid., para. 108.
740 Ibid., para. 84.
741 Ibid., para. 86, 105.
742 Ibid., para. 2.
743 Ibid., para. 23 (1, 2 a.b.c.).
744 Ibid., para. 23 (3, 4).
745 Ibid., para. 23 (5).
746 Ibid., para. 24, 50.

Istrefi *Amicus Curiae Brief* recalls Law No. 03/L-040 on Local Self-Government ("Law on Local Self Government") regulating the issue of associations of municipalities. In concrete, this may offer its members several services, including training, capacity-building, technical assistance as well as research on municipal competencies and policy recommendations in accordance with the law.[747] It also reminds that the activities of the association of municipalities neither reduce nor substitute the constitutional and legal arrangements of cooperation and supervision of municipalities by the central authority.[748]

As for the issue of inter-municipal cooperation, Istrefi *Amicus Curiae* brief recalls Article 10(1) of the European Charter of Local Self-Government stating that local authorities shall be entitled to cooperate within the framework of the law, to form consortia with other local authorities, to carry out tasks of common interest.[749] It argues that a body established for inter-municipal cooperation is set up by -and operates- for municipalities. Otherwise said, municipalities delegate their competencies and resources to this body. And since inter-municipal bodies are formed to perform certain municipal functions or services, the central government continues to monitor and review the work of such bodies via the laws and the principles of local self-government.[750]

On the same issue, Pallaska *Amicus Curiae* brief states that the right of municipalities to have inter- municipal and cross-border cooperation is guaranteed under Article 124 (4) of the Constitution.[751] It also mentions the provisions set forth under the European Charter of Local Self-Government, specifically Article 10 (1) referred to above.[752] Yet -in his view- the use of the phrase 'Serbian majority municipalities' in the title and the text of the General Principles should be declared incompatible with Article 3(1), and Article 124(4) of the Constitution, as well as Article 10(1) of the European Charter of Local-Self Government.[753] Despite this, Pallaska Amicus Curiae brief notes that the Constitution and the relevant applicable law, namely the Law on Local Self-Government "…offers sufficient basis for the establishment of an association of municipalities that have a set of competences that distinguish them from other municipalities"[754]

On whether the Association/Community complies with the Constitution, Istrefi *Amicus Curiae* brief states that the country's highest legal act recognizes the right of inter-municipal cooperation, as guaranteed under Article 123(3) of the Constitution, which -among others- requires upon the Republic of Kosovo to observe and implement the European Charter on Local-Self Government.[755] At the same time, it spells out that the right to inter-municipal cooperation does not include a permanent transfer or loss of municipality competencies.[756] In concrete, Istrefi points out that the term 'legal entity of 'distinct character' -as set forth under Point 2 of the General Principles- might also imply recognition of a distinct unit of self-government empowered to exercise public functions. This would -therefore- exceed the limits of the concept of inter-municipal association or cooperation as established in the Constitution.[757] What's more, Istrefi argues that Points 2 and 15 of the General Principles can be incompatible with Article 124 (4) and 12(2) of the Constitution, considering that under these provisions "…only a law can govern the matters of inter-municipal cooperation."[758]

In addition, he mentions that point 8 of the General Principles placing the Association/Community in a horizontal level of cooperation with the central government might be problematic. In concrete, this would resemble a form of confederation where territorial units cooperate on a horizontal level based on cooperation and information-sharing. Yet no form of local self-government or even regional self-government recognizes such a horizontal relationship with central authorities. Therefore, point 8 above, could -in his view- be incompatible with Article 93(6) granting the mandate to the government of Kosovo in guiding and overseeing the work of administration bodies.[759] A similar concern has been raised by Pallaska arguing that Article 4 of the General Principles is incompatible with Article 124 (1) of the Constitution, as it establishes the Association/Community as an additional unit of local-self-government, above the municipalities.[760]

747 Ibid., para. 28
748 Ibid., para. 30.
749 Ibid., para. 31.
750 Ibid., para. 34.
751 Ibid., para. 59.
752 Ibid., para. 60.
753 Ibid., para. 61.
754 Ibid., para. 62.
755 Ibid., para. 36.
756 Ibid., para. 39.
757 Ibid., para. 42.
758 Ibid., para. 43.
759 Ibid., para. 45.
760 Ibid., para. 65.

As for the delegation of additional functions to the Association/Community by the central authorities, as stipulated in Article 5 of the General Principles, this is -in Istrefi's view- a violation of Articles 123 and 124 of the Constitution.[761] Additionally, he argues that the granting of the right to undertake legal initiative and having stood before the Court -as set forth under Sections 10 and 11 of the General Principles- raises constitutional concerns. Specifically, he reminds that Article 79 of the Constitution does not recognize the Association/Community as one of the parties that can undertake a legislative initiative. Besides that, the application of such a principle would require an amendment to the Constitution. What's more, Article 113 of the Constitution does not recognize the Association/Community as an authorized party to submit referrals before the Court. In short -he argues- that Section 11 of the General Principles is not only incompatible with the Constitution. Rather, its application would require an amendment to the Constitution.[762] Additionally, he also envisages constitutional and legal implications for the Association/Community to own companies and provide local services.[763]

On the same issue, Pallaska Amicus Curiae brief argued that the Association/Community -as foreseen under the General Principles- is an additional unit of government empowered not only to supervise the municipalities in the exercise of their constitutionally mandate powers, but may also offer public functions and services to residents of the municipalities which joined. This said Pallaska considers Article 4 and Article 7 (f) of the Association as incompatible with Articles 123 and 124 of the Constitution.[764]

As for the relation of the association with the central authorities, Pallaska is of the view that the wording under Section 8 of the General Principles – 'the Association/Community will work with central authorities based on cooperation and information sharing'- suggests that the central authority has horizontal relations with the central authorities, including the Government of Kosovo. In short, the wording used under Article 8 of the General Principles is conducive to viewing the organization on an equal standing to the central authorities of Kosovo. He -thus- concludes that Sections 8 and 9 are incompatible with the Constitution.[765] Pallaska also raises concerns about the ambiguous language used in the text of the General Principles, especially when referring to Albanian and Serbian language versions of the word 'constituent assembly', which – in his view- are inaccurate and misleading.[766]

When analyzing the executive character of the powers and competencies of the Association/Community, Pallaska argues that the Association/Community's delivery of public functions and services, as provided for under Article 4 of the General Principles, constitutes a direct violation of Article 123 of the Constitution setting forth under paragraph 2 that "Local self- government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections".[767]

As for the possibility of leaving the community, Istrefi finds Point 17 of the General Principles - inability to leave the Association/Community- problematic. Specifically, this "may raise a constitutional concern of a regional self-government in that certain municipalities may have a pre-determined belonging to such an edifice."[768] The same worry has been raised by Pallaska. According to him, the non-recognition of the right of municipalities to leave the Association/Community represents a violation of Article 44 of the Constitution, as implemented by the Law on the Freedom of Association. Moreover, the fact that the General Principles do not explicitly give its members the right to leave the Association/Community suggests that this organization is a mandatory executive body. Otherwise said, it would represent another layer of self-government in Kosovo, above the municipalities.[769]

On the issue of authorized parties to submit referrals to the Court, Istrefi recognizes that Point 11 of the General Principles is in contradiction with Article 113 of the Constitution regulating the issue of authorized parties for submitting referrals to the Constitutional Court. In short, the Association/Community -as a body exercising public functions- does not qualify as an individual to initiate cases before the Constitutional Court under Article 113(7) of the Constitution.[770]

761 Ibid., para. 67.
762 Ibid., para. 68.
763 Ibid., para. 69.
764 Ibid., para. 71.
765 Ibid., para. 75.
766 Ibid., para. 77.
767 Ibid., para. 64.
768 Ibid., para. 47.
769 Ibid., para. 66.
770 Ibid., para. 46.

On the review of the general principles, Istrefi Amicus Curiae brief argues that the Constitutional Court should keep in mind that the review of the General Principles may amount to an indirect review of the Agreement. This -in turn- may lead to a violation of the ratified treaty obligations by Kosovo.[771] Also, it underlines the differences between the First Agreement and the General Principles. In concrete, it states that the Agreement -unlike the General Principles- does not define the Association/Community as a 'legal entity' of a 'distinct character'. Besides that, it does not provide for its establishment by a Governmental decree. Moreover, it does not specify its resources, budget, administration, and competencies as these are contained in the General Principles. Rather, it recalls that the competence of the Association/Community shall be exercised in accordance with the European Charter of Local Self-Government and that its structures shall be set up on the same basis as the existing statute of the Association of Kosovo Municipalities.[772]

Court's judgment

This case clearly illustrates the relevance of the interpretation of the Constitution. The Court determined that the Association/Community, which is composed of municipalities, is an organization within the meaning of Article 44 of the Constitution, which guarantees freedom of association.[773] The ECtHR has determined that an association that is covered by the freedom of association must have a private law character.[774] A public law institution -founded by the legislature- is not an association within the meaning of Article 11.[775]

According to the ECtHR, elements in determining whether an association is to be considered private or public are the following: (i) whether it was founded by individuals or by the legislature;

(ii) whether it remained integrated within the structures of the State; whether it was invested with administrative, rule-making and disciplinary power; and (iii) whether it pursued an aim which was in the general interest.[776]

As for municipalities, these are public law bodies exercising public authority. An association composed of such public law bodies cannot have a private law character, but it would reflect the legal nature of its component elements. Nevertheless, the Court concluded that the Association/Community is an association for the purpose of Article 44 of the Constitution, is correct.

The Court also confirmed that the Association/Community is a form of inter-municipal cooperation and concludes that its statute may not replace or undermine the status of the participating municipalities as the basic units of democratic local self-government within the meaning of Article 12 of the Constitution.[777]

The Association/Community would also come within the meaning of a community according to Article 57(1) of the Constitution.[778] This defines a community as "inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo".[779]

Given that the Association/Community is composed of municipalities as public bodies, it is difficult to reconcile this with the Court's interpretation that the Association/Community is within the meaning of 'inhabitants.'

The Court states that the General Principles do not meet entirely the constitutional standards.[780] Also, it takes into account the fact that the objectives of the Association/Community -as set forth under the legal act and the Statute- shall guarantee constitutional standards for local-self- government with a look at the responsibility of the participating municipalities and their relations with central authorities, within the meaning of Articles 124.6 and 125.7 of the Constitution. The Court states that the objectives of the Association/Community -under the First Agreement- raise

771 Ibid., para. 48.
772 Ibid., para. 49.
773 Ibid., para. 132.
774 European Court of Human Rights, Case of Chassagnou and Others v. France, 29 April 1999, para. 99, at at Chassagnou and Others v France | UNEP Law and Environment Assistance Platform; Case Schneider v. Luxembourg, 10 July 2007, para. 72, 74.
775 European Court of Human Rights, Slavic University in Bulgaria and Others v. Bulgaria, 18 November 2004, at ECHR (legislationline.org); European Court of Human Rights, Köll v. Austria, 2002, at Strada lex
776 European Court of Human Rights, Mytilinaios and Kostakis v. Greece, 2015 at https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-5244058-6506962%22]}; Herrmann v. Germany, 2011, at HERRMANN v. GERMANY (coe.int);
777 Case No. K0130/15, para. 140, 148.
778 Ibid., para. 151.
779 Ibid., page 29; Constitution of Kosovo, Article 57(1).
780 Case No. K0130/15, para. 136, 149, 160.

issues under Article 12 [Local government] and Chapter X [Local Government and Territorial Organization] of the Constitution.[781]

The Court notes that the setup of the Association/Community comes within the scope of inter- municipal cooperation within the meaning of Articles 12 and 124.4 of the Constitution. These provisions foresee that any inter-municipal cooperation must be carried out in accordance with the law.[782] Moreover, it acknowledges that "when the principles are elaborated into a legal act and the Statute, they shall respect the provisions of the legislation of vital interest within the meaning of Article 81 of the Constitution."[783]

The Court also realizes the ambiguous and unclear meaning of the term 'exercise full overview' - specifically in the areas of the development of local economy, education, local primary and secondary health care and social care, and urban and rural planning- when referring to the objectives of the Association/Community- between the English (exercise full overview), Albanian (exercise of full view) and Serbian version (conduct a full review).[784]

In his letter of November 2015, the Prime Minister stated that even though the signed version of the Principles was the English version, the Albanian version was considered and accepted as the first official language of Kosovo.[785]

The Court clearly stated -by recalling the ECtHR case-law[786]- that when elaborating the First Agreement, and the chapter on Objectives of Principles into a legal act and the Statute, all ambiguities -in the definition of the objectives of the organization itself- shall be clarified. This also implies that each version is reconciled with the other and that their meanings are identical, as much as possible.[787]

The Court also reminds that whenever the Objectives of the Association/Community are elaborated into a legal act and the Statute, they shall consider Articles 12, 81, 123, and 124 of the Constitution. In concrete, the legal act and the Statute of the Association/Community shall not replace or undermine the status of the participating municipalities as the basic units of democratic self-government within the meaning of Article 12 and Chapter X of the Constitution.[788] The Court concludes that the objectives do not entirely meet the constitutional standards. Otherwise said, they should set forth that, constitutional standards -when referring to the responsibility of the participating municipalities and their relations with the central authorities- are guaranteed for local self-government within the meaning of Articles 124.6 and 124.7 of the Constitution. In short, the objectives shall make sure that the responsibility of the participating municipalities respects the Constitution and the laws.[789]

The Court is also concerned with the respect for diversity of the communities in the participating municipalities[790]. It spells out that when the Principles on the organizational structure of the Association/Community are elaborated into a legal act and the Statute, they shall guarantee respect for the diversity of communities, pursuant to Articles 3, 7, 57.1, 61, and 62 of the Constitution.[791]

Also, as for the employment in the civil service of the staff members in the administration of the Association/ Community, the Court considers that the Principles laid down in the Chapter on Organizational structure do not meet entirely the constitutional standards.[792] Concretely, it considers that the staff of the administration of the Association/Community shall not be considered part of the Civil Service per se. They may only benefit from the status of the Law on Civil Service when employed in a position for a public body of the government administration, pursuant to the meaning of Article 101 of the Constitution.[793]

The Court further finds that the Association/Community cannot be endowed with full and exclusive authority to promote the interests of the Kosovo Serb community in its relations with the central authorities. Besides that, it

781 Ibid., para. 137, 138.
782 Ibid., para. 140.
783 Ibid., para. 141.
784 Ibid., para. 142, 143.
785 Ibid., para. 145.
786 Ibid., para. 147. This must be sufficiently accessible, precise and foreseeable for it to qualify as a law.
787 Ibid., para. 147.
788 Ibid., para. 148.
789 Ibid., para. 149.
790 Ibid., para. 153.
791 Ibid., para. 155.
792 Ibid., para. 160.
793 Ibid., para. 159.

clarifies -once again- that the Association/Community falls within the scope of the meaning of the definition of a community as set forth under Article 57.1 of the Constitution.[794]

Furthermore, the Court is of the opinion that whenever the Principles on relations with central authorities of the Association/Community are elaborated into a legal act and the Statute, they have to guarantee that the Association/Community shall comply with the provisions as set forth under Chapter III of the Constitution and shall not replace or undermine the authority of any association of communities set up within the meaning of Articles 57, 59(14) and 60.2 of the Constitution.[795]

The Court further notes that the Association/Community may become a member of the Consultative Council for Communities under Article 60.2 of the Constitution and the First Agreement.[796] What's more, as a member of the Consultative Council for Communities the Association/Community may benefit from the right of suggesting initiatives for legislation -in consultation with other communities- within the scope of the Consultative Council's mandate and the meaning of Article 60.3 of the Constitution.[797] Yet the Court explicitly states that the Association/Community cannot propose amendments to legislation or other regulations, as set forth under Principle #10 of the Principles.[798]

As for the right to referrals of the Association/Community before the Constitutional Court, this clearly outlines that this power must be understood under the meaning of Article 113 of the Constitution.[799] Besides that, the Court recognizes the power of the Association/Community to initiate proceedings before the Constitutional Court -as an entity having a legal personality- when it can claim to be a victim of a violation of its fundamental rights and freedoms as guaranteed by the Constitution within the meaning of Article 133.7.[800]

With a look at the budget and support of the Principles, the Court notes that these are to be assessed under Articles 124.5 and 137 of the Constitution[801] Additionally, the Court acknowledges that Article 124.5 of the Constitution provides for financial transfers from central government to municipalities and allocates to municipalities the right to decide on their expenditures. Yet the Constitution remains silent on the transfers to other entities or bodies connected with local self- government. As such, these rights belong to the municipalities only.[802] Therefore, the Court is of the opinion that when elaborating the Principles on the financing, budget, and expenditures of the Association/Community in a legal act and the Statute, they shall ensure that financing and expenditure of the

Association/Community are to be compatible with Article 124.5 of the Constitution. Besides that, they shall not replace or undermine the rights of the participating municipalities to receive and decide on the spending of municipal revenues and appropriate funding from the central government.[803] In addition, the Court finds that the authority of the Auditor-General to carry out audits of the economic activity and the use of public funds by the Association/Community complies with the Constitution, within the meaning of Article 137 of the Constitution.[804]

The Court is of the view that the procedural principles contained in the chapter 'General and final provisions' must be harmonized with the procedural principles outlined in the chapter on 'Legal framework'. Based on these considerations, the Court found that the Principles laid down in the chapter on Legal Capacity, Budget, and Support, and General and Final Provisions do not meet entirely the constitutional standards.[805]

What's more, the Court recalls that when the procedural rules to amend the Statute are elaborated into a legal act and the Statute, they must comply with the competencies of the Government as set forth under Article 93 [Competences of the Government], point (4) of the Constitution.[806]

794 Ibid., para. 166.
795 Ibid., para. 167.
796 Ibid., para. 170.
797 Ibid, para. 171.
798 Ibid., para 173.
799 Ibid., para. 174.
800 Ibid., para. 176.
801 Ibid., para. 179.
802 Ibid., para. 180.
803 Ibid., para. 181.
804 Ibid., para. 183.
805 Ibid., para. 186.
806 Ibid., para. 187.

As for Principle #21 'General and final provisions, the Court reminds that this details how the Statute shall be

drafted and negotiated, that the Statute shall not be endorsed by a decree, and how amendments to the Statute shall be proposed, adopted by decree and be subject to review by the Court.[807] To sum up, for these legal acts to be submitted for review by the Court -as set forth by the Principles- they have to come within the scope of Article 113 [Jurisdiction and Authorized Parties], paragraph 2(1) of the Constitution.[808]

In its conclusion, the Court clearly states that Principles elaborated in the 'Association/Community of Serb majority municipalities in Kosovo-general principles/main elements' do not entirely conform with the spirit of the Constitution, Article 3 [Equality before the Law], paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo.[809]

Conclusion

Currently, there is no specific criterion for the interpretation of the Constitution, while many constitutional terms and principles are left for interpretation by the Court. The case law of ECtHR also does not provide for specific standards of constitutional interpretation, as the court is flexible in the way it interprets the European Convention on Human Rights. There are no examples of specifically listed principles of interpretation in other countries' constitutions either. Therefore, Kosovo's Constitutional Court interpretation methods remain discretionary as well.

However, different methods of interpretation may bring different results for the same provision or term. The Court may also apply different interpretation methods for different provisions or terms, which may question the accuracy of the interpretations. This is concerning especially when it comes to sensitive constitutional issues, such as the Association/Community of Serb-majority municipalities.

An improper interpretation may have far-reaching legal and political consequences not intended by the Constitution. Yet, too many limitations to the Court's discretion in interpreting the Constitution, would not leave sufficient space for the Court to accord its interpretation with the specific facts of the case and the societal, political, or institutional situation at the time. Therefore, a more general methodology of interpretation would be helpful and ensure more certainty, while not hindering the flexibility of the Court in interpreting the Constitution based on the facts of each case. The Court must be diligent in interpreting the Constitution and apply generally accepted interpretation methods. For this, the Court needs to look into the ECtHR case law by analyzing various similar cases and their specific factual circumstances and examining the methods of interpretation that ECtHR used in each of them.

Recommendations

- If there will be no amendments to the Constitution, the Court will apply the interpretation methods it deems fitting while ensuring compliance with general principles that define the constitutional order of Kosovo.
- In case of an amendment, a new constitutional provision could expressively include standards of constitutional interpretation that would mitigate the risk of misleading interpretation and that would set a standard to evaluate the Court's decisions in the public policy process. These would include the specific methods applied by the ECtHR in similar cases, as well as the general basic principles of the Council of Europe, enshrined in the Constitution, including democracy, the protection of human rights, and the rule of law.

807 Ibid., para, 184.
808 Ibid., para 188.
809 Ibid., para. 189 (4).

XXI

The Limits to Amending the Constitution

There is a lack of specific and clear values, principles, criteria, or norms that would prohibit certain changes or modifications to the Constitution. While the Constitution refers to Chapter II on Fundamental Rights and Freedoms, the Court also looked at Chapters I and III on Basic Provisions and on the Rights of Communities and their Members when assessing a proposed constitutional amendment. Due to these gaps, possible constitutional changes could bring more clarity and prevent future perplexity.

The scope of constitutional principles and values that set limits to constitutional amendments is unclear.

The Constitution contains provisions on the procedure for its amendment. Yet, it does not specify the constitutional values, principles, or norms that would prohibit certain changes or modifications. It only generally provides that the proposed amendment shall not diminish any of the Fundamental Rights and Freedoms under Chapter II of the Constitution. In practice, it remains uncertain how to assess whether an amendment violates such rights and freedoms, as the case in 2011 on the election of the President illustrates. The question in 2011 arose regarding the constitutional provisions on the election of the President of Kosovo by the Assembly. The leaders of the New Kosova Alliance (AKR), the Democratic League of Kosovo (LDK), and the Democratic Party of Kosovo (PDK) signed an agreement to form a 'Commission for Presidential Elections Reforms'. This Commission would draft -on the one hand- constitutional amendments and any related legislation necessary to provide a direct election of the President of Kosovo by the people. On the other hand, it would establish that direct presidential elections in the country should take place no later than six months from the day when these changes and necessary amendments to the Constitution and the legislation would enter into force.

The agreement has not been implemented. Discussions continued about a possible direct election of the President by the people, instead of by the Assembly.[810] In absence of an expressive limitation to constitutional amendments, it remains questionable whether matters like this one are subject to certain constitutional principles that do not allow changes to the Constitution.

Relevant Provisions

Constitution of Kosovo

Article 144 [Amendments]

1. The Government, the President or one-fourth (1/4) of the deputies of the Assembly of Kosovo as set forth in the Rules of Procedure of the Assembly may propose changes and amendments to this Constitution.
2. Any amendment shall require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo.
3. Amendments to this Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution.
4. Amendments to the Constitution enter into force immediately after their adoption in the Assembly of the Republic of Kosovo.

Article 4 [Form of Government and Separation of Power]

1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.
2. The Assembly of the Republic of Kosovo exercises the legislative power.
3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.
4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control.

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.
2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society,

810 Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, Case No. KO29/12 (and KO 48/12), 20 July 2012, para. 19, 21, at https://gjk-ks.org/wp-content/uploads/vendimet/Aktgjykim%20Anex%20A&B%20KO29_48_12_ ANG.pdf.

providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.[811]

Relevant Case-law and Opinions

Cases KO29/12/KO48/12 and KO162/18 are relevant in this matter.[812] The Venice Commission and OSCE/ODIHR Joint Opinion on the Draft Constitution of the Kyrgyz Republic is also important.[813]

Constitutional amendments must be in harmony with Chapters I, II and III of the Constitution.

Case KO29/12-KO48/12

The leaders of the AKR (New Kosova Alliance), the Democratic League of Kosovo (LDK), and the Democratic Party of Kosovo (PDK), respectively Mr. Behxhet Pacolli, Mr. Isa Mustafa, and Mr. Hashim Thaci signed a Memorandum of Agreement on 6 April 2011.[814] According to the Agreement, "Mrs. Atifete Jahjaga would be nominated as a candidate for President and the respective parties would give their full support for her candidacy".[815] The Agreement further stated that the leaders shared the opinion to immediately form a 'Commission for Presidential Elections Reforms'.[816]

This Commission "would draft constitutional amendments and any related legislation necessary to provide for a direct election of the President of Kosovo by the people, and that direct presidential elections in Kosovo should be held not later than six months from the day when these changes and necessary amendments to the Constitution and the legislation would enter into force".[817]

On 23 March 2012, the President of the Assembly referred a set of proposed amendments to the Court for a prior review, as to whether they would diminish any of the rights and freedoms outlined in Chapter II of the Constitution.[818]

The Court issued a judgment and considered that the proposed amendment to the Constitution must be assessed in light of Chapter II [Fundamental Rights and Freedoms] of the Constitution, which consists of human rights and fundamental freedoms being the basis of the legal order of the Republic of Kosovo.[819]

The Court also considered that "Chapter III [Rights of Communities and Their Members] and other rights may be applicable in this process as an extension of the human rights and freedoms provided in Chapter II of the Constitution, in particular, of those laid down in Article 24 [Equality before the Law]."[820] This would be particularly so as the Constitution provides that Kosovo must protect and guarantee human rights and fundamental freedoms as provided by the Constitution, not necessarily those contained in Chapter II alone.[821]

The election of the President directly by the citizens and the election of the new President six months before the end of the regular mandate of the President, do not violate Chapter II of the Constitution.

The Court's reasoning reads as follows:

128. The Court considers that the proposed amendment of the Constitution providing for the election of the President of the Republic by the citizens eligible to vote is an enhancement of the rights of the citizens. For that reason, the Court does not deem it necessary to further review the

811 Constitution of Kosovo.
812 Constitutional Court Judgment on Cases No. KO29/12 (and KO 48/12) on the Proposed Amendments of the Constitution, 20 July 2012, at https://gjk-ks.org/wp- content/uploads/vendimet/Aktgjykim%20Anex%20A&B%20KO29_48_12_ANG.pdf; Constitutional Court Judgment on Case No. KO162/18 on the Confirmation of the proposed constitutional amendment, 7 February 2019, at https://gjk-ks.org/wp-content/uploads/2019/02/ko_162_18_agj_ang.pdf
813 European Commission for Democracy Through Law, Venice Commission, Office for Democratic Institutions and Human Rights (OSCE/ODHIR), Kyrgyzstan, Joint Opinion on the Draft Constitution of the Kyrgyz Republic adopted by the Venice Commission at its 126 plenary session, Opinion No. 1021/2021, CDL-AD(2021) 007, 19-20 March 2021, at https://www.venice.coe.int/webforms/documents/defa ult.aspx?pdffile=CDL-AD(2021)007-e.
814 Ibid., para. 19.
815 Ibid., para. 20.
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818 Ibid., para. 5.
819 Ibid., para. 61.
820 Ibid., para. 62.
821 Ibid., para. 63.

constitutionality of the proposed amendment.

129. The Court considers that the provision for announcing the election of a new President of the Republic six months before the end of the regular mandate of the President does not affect human rights and fundamental freedoms under the Constitution. For that reason, the Court does not deem it necessary to further review the constitutionality of the proposed amendment.

130. The new paragraph in Article 86(3) proposes the nomination criteria for candidates to the office of President of the Republic when the citizens elect the President directly. At present, because it is only the deputies of the Assembly that elect the President the requirement for nomination is that he/she can present the signature of at least 30 deputies. As each deputy may nominate only one candidate it means that, at most, four candidates can compete under the present system. There is, in theory, no reason why there cannot be a much greater number of candidates when the system changes to direct election by the citizens.

131. It is now proposed that parliamentary political entities which, in accordance with law, have passed the electoral threshold may nominate candidates for the office of President, and political entities holding guaranteed seats in the Assembly and, at least, 15,000 qualified voters, through a petition submitted with their signatures. Time limits and other procedures are to be prescribed by law.

132. There would seem to be a justification for the right of political entities holding guaranteed seats in the Assembly to have the right to nominate, particularly, bearing in mind the values of the multiethnic and other diversities protected by the Constitution, as provided for in Article 3 [Equality before the Law].

133. Similarly, the nomination by public petition of the proposed figure of 15,000 qualified voters meets a standard that is present in many democratic states. However, the proposal denies the rights of political entities who have not yet passed the electoral threshold to nominate their candidate for the office of the Presidency.

134. Thus, a political party which is legitimately registered and entitled to participate in elections like any other political party is denied the right to put forward a candidate of their choice.

135. The Court considers that such a restriction discriminates against lawful entities that one would expect to be entitled to participate in public life. It would deny the members and the supporters of such political entities to put forward their proposed candidate for the office of Presidency. Such a prohibition does not meet the test of proportionality that would be expected to be passed for their exclusion from this aspect of participation in the political life of the State.

136. In fact, Article 24 of the Constitution prohibits discrimination against a person on a great many grounds. One of these is 'political or other opinion'. Persons who wish to express political opinion have a clear right to do so as a member of a lawfully established political party. Political parties have a special protected status in the law. Political parties may be formed according to criteria determined by laws and when established must be treated in a non-discriminatory manner.

Political parties are entitled to nominate candidates for the Presidency.

138. The Court, therefore, concludes that the proposed new Article 86(3), in so far as it does not allow nomination by all registered political entities, diminishes the rights and freedoms set forth in Chapter II of the Constitution.

139. The Court notes that nomination for President of the Republic can only be secured by the involvement of either political parties or by petition and support of 15.000 citizens. No one can predict how many candidates may be nominated by petition of the citizens. This leaves the political parties having a great say in who may be nominated for the office of President.

140. The Court further notes that Article 88 [Incompatibility] of the Constitution, both as to their present form and as to what is proposed in the amendment to Article 88, prohibits exercising any function in a political party. The balance to be achieved by any future incumbent President exercising the office of President and seeking support from political parties should be borne in mind if that incumbent President wishes to seek to be re-elected. The difficulty of steering a path between ensuring that Article 88 is not infringed and engaging with the political process will need careful thought.

141. The Court considers that the provision for holding a second round of voting, in the event that no candidate receives an absolute majority of votes in the first round, does not affect human rights and fundamental freedoms under the Constitution. For that reason, the Court does not deem it necessary to further review the constitutionality of the proposed amendment. The Court, therefore, concludes that the proposed new Article 86.4 does not diminish any of the rights and freedoms set forth in

Chapter II of the Constitution.[822]

The Court concluded that a direct election of the President would enhance the rights of the citizens.[823] It only found that limiting the right to nominate a candidate for President to political entities passing the electoral threshold would be unjustified discrimination, as it would not meet the proportionality test.[824] However, the Court does not provide for an assessment of proportionality.

A change to a presidential system must take into account
(i) the powers of the President,
(ii) how broad they are,
(iii) if they are effective and
(iv) if sufficient mechanisms are in place.

The Court did not analyze, if in view of the President's powers -under the Constitution- there are possible interferences with human rights and freedoms.

In short, citizens' rights will not enhance if the direct election of the President would result in unchecked powers, threatening the rule of law, the separation of powers, an independent judiciary, and fundamental rights and freedoms. Any proposal to amend the Constitution allowing for the direct election of the President would, therefore, have to ensure the preservation of constitutional principles.

The Court's reasoning must be viewed against the background of its limited authority -under the Constitution- to review amendments to the country's highest legal text concerning the respect of human rights and fundamental freedoms only. Yet it is difficult to assess in the abstract if an amendment would violate such rights. A literal interpretation of the Constitution would not authorize the Court to assess amendments against the fundamental principles of the Constitution, under Chapter I. The conclusion could be that any amendment to the Constitution would be allowed except for those interfering with human rights and freedoms.

Case KO162/18

An amendment cannot alter the fundamental principles of the Constitution.

The Court extended the scope of review of a constitutional amendment to include the fundamental principles set out in Chapter I. It confirmed that "the constitutional review under Article 144.3 of any proposed amendment to the Constitution must be considered in light of Chapter II [Fundamental Rights and Freedoms], including the legal order of the Republic of Kosovo, the very basis of which - by Article 21 [General Principles] of Chapter II of the Constitution - consists of human rights and freedoms mentioned in that Chapter".[825]

The Court specifically referred to the values of the constitutional order of Kosovo which include the "principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of the environment, social justice, pluralism, separation of state powers and a market economy."[826]

Opinion of the Venice Commission

Participatory democratic governance, rule of law, fundamental rights and freedoms must be preserved, and **separation of powers** must be maintained with checks and balances among different institutions.

The Court's assessment of the proportionality test appears very superficial, in comparison to the Venice Commission's opinion."[827] The Venice Commission and OSCE/ODIHR Joint Opinion on the Draft Constitution of the Kyrgyz Republic sets out the following:

822 Case No. KO29/12.
823 Ibid., para. 76.
824 Ibid., para. 135.
825 Case No. KO162/18, para. 24.
826 Ibid., para. 49.
827 Venice Commission, Opinion No. 1021/2021, para. 15.

15. Throughout the OSCE region countries have adopted different systems of government. While in Europe the parliamentary system is the predominant choice, there are also countries in the OSCE region that have opted for a semi-presidential or presidential system.

50. Article 66 (together with subsequent provisions) establishes a presidential system and the President's powers are overwhelmingly broad. They are spelled out in Section III, Chapter I of the Draft Constitution but also appear in a number of provisions of other chapters. The strongest available check on the power of the President is found in Article 67(2), which states that 'the same person cannot be elected President for more than two terms. This provision is an essential one, as it is one of the few which keeps presidential powers in check, provided that it is not later amended, should the Draft Constitution indeed be adopted in this form.

51. The powers of the President are limited by Article 73 which provides the reasons and procedure for removal from office. The process of removal is complex, as it involves 'two-thirds vote of the total number of deputies of the Jogorku Kenesh as initiated by at least half of the total number of deputies on a motion made by at least half of the total number of deputies on the basis of the conclusion of a special commission formed by the Jogorku Kenesh, which shall be sent to the Prosecutor General and the Constitutional Court' (Article 73(3)). This must be then confirmed by the Prosecutor General, the Constitutional Court and again go to the 2/3 majority vote in parliament. It is therefore recommended that further features of keeping the President's power in check are entrenched in the Constitution, in particular, in the carrying out of his/her mandate through the terms of office and not only in the form of an election once every five years, limited to two terms and a difficult removal procedure. The process for removal should be more realistic, so as to provide an important check on presidential power in the extreme cases. Proposals on how this may be achieved follow in the paragraphs below.

52. In opting for the presidential model, Article 66 (1) of the Draft Constitution places the President as not only the Head of State, but also the 'highest official' and 'head of executive power of the Kyrgyz Republic'. Article 66 (2) provides that the President 'ensures the unity of the people and the state power'. This is repeated once more in Article 66 (4) - he 'provides unity of state power, coordination and interaction of governmental bodies'. While similar descriptions are found in other constitutions as well, it is obvious that there is a certain tension with the idea of separation of powers. Such a characterization might be read as an interpretation of the position of the President above the other powers and not as an integral part of the executive power. This reading is reinforced by the structure of the Constitution defining the executive branch in Chapter III, while dedicating a separate chapter to the President.

53. According to Article 70(1) the President 'determines the structure and composition' of the Cabinet of Ministers (albeit, according to paragraph 1 point 2, with 'consent of the parliament' for some appointments), appoints and dismisses the heads of other executive authorities and heads of local state administration, forms the Presidential Administration, forms the Security Council, appoints and dismisses the Secretary of State and appoints and dismisses the Ombudsman for Children's Rights (Article 70 of the Draft Constitution). It should be mentioned, however, that the Draft Constitution does not specify the functions or powers of these public bodies. For the most part, this is a re-instatement of the powers of the President from the Constitution of the Kyrgyz Republic of 2007. These broad powers of the President raised concerns then, in the same way as they do now. The power of the President to single-handedly appoint and dismiss almost the entire administration of the State may lead to the lack of accountability, undermine healthy democratic political processes, is prone to abuse, and thus is recommended to be significantly revised in the Draft Constitution.

54. Furthermore, the kind of 'consent' of the Parliament which the President must receive for appointment of the Chairperson of the Cabinet of Ministers, his/her deputies, and other members of the Cabinet of Ministers, stipulated in Article 70(1) (2), needs further elaboration. This is also repeated in Article 80(1)(6), in Chapter II on the Legislative Power of the Kyrgyz Republic. The Draft Constitution should clearly specify that 'consent' means a vote and by what majority.

55. Another issue of concern relates to Article 66(3) of the Draft Constitution which states that the President is the "guarantor of the Constitution, human and civil rights and freedoms. While it is true that some constitutions of countries in Central and Eastern Europe or Central Asia contain similar provisions, this function has to be exercised by courts through constitutional or judicial review. As noted by ODIHR and the Venice Commission's previous opinions – 'the judiciary is considered to be the guarantor of human rights and freedoms and the constitutional order as a whole.' The provision giving the President the title

Calling the President a 'guarantor' may place him or her beyond the constitutional order and constitute an interference with the judiciary's task to secure rights and freedoms.

of a 'guarantor' was rightly excluded from the current Constitution as it risks blurring the competencies of the President and other state bodies. It is recommended to remove this provision.

56. Article 70(4) and Article 95(7) and (8) give the President a strong role both in the appointment of judges and in their dismissal. Further, the same provisions also give the President powers related to the internal organisation of the highest courts in that the President has a role in the selection and dismissal of the Presidents and Vice Presidents of the Constitutional Court and the Supreme Court (discussed in detail in the section below on the Judiciary). In combination, these features are extraordinary even in comparison to other presidential constitutional systems.

57. According to Article 85(2) (Chapter II on the 'Legislative Power of the Kyrgyz Republic') of the Draft Constitution, the President is given legislative initiative powers. Article 86 further stipulates that any bills that the President (or his/her Chairperson of the Cabinet of Ministers) initiates that he/she deems urgent, skip the line and must be considered by the parliament in extraordinary order (Article 86(2)). Crucially, Article 116 allows the President to initiate constitutional amendments. This is in addition to the power of the President to initiate a referendum (Article 70(2)(1)), which is a tool of direct democracy capable of shaping the legal order on a wide palette of issues.

58. The Venice Commission has previously said that '[t]he principle of separation of power shapes primarily the regulation of legislative initiative. It implies the division of the institutions of government into three branches: legislative, executive and judicial. The legislature makes the laws; the executive puts the laws into operation; and the judiciary interprets the laws. Power thus divided should prevent absolutism and dictatorship where all branches are concentrated in a single authority.'

The President may initiate a law and retain separation of powers if there is:
1) a strong Government,
2) strong parliamentary oversight,
3) an independent judiciary.

59. In this respect, it is true that many constitutions do not feature a purist approach where only the legislature holds law- making initiative powers. In the OSCE and the Council of Europe space, constitutions also grant the executive, or even the President, the right to legislative initiative, which is a political reality even in parliamentary systems. Giving legislative initiative powers to a Head of State and retaining proper separation of powers is only possible where there is a strong executive (Government) separate from the President, strong parliamentary oversight of bills, and rules securing a truly independent judiciary. In the case of the Draft Constitution under review, when the powers of the President are taken together with his/her exclusive executive powers, legislative initiative powers, the overreach into the judiciary (discussed below) as well as a weakened role for the parliament (discussed below) the principle of separation of powers is not achieved. Therefore, it is advised to re- consider the overall institutional setting, significantly revising relevant provisions of the Draft Constitution.

60. According to Article 70(1)(7), the President 'shall form the Presidential Administration'. Article 89 further states that the 'the Chairman of the Cabinet of Ministers is the head of the Presidential Administration. This may result in the creation of separate but de facto overlapping bodies, with redundant or even duplicating structures. The risk of overlap is further increased by the fact that the Draft Constitution does not define the powers and functions of these officials. It is thus recommended to clearly separate the position of the Chairman of the Cabinet of Ministers and of the Head of the Presidential Administration, as well as to ensure that there are no overlaps between these bodies.

61. Finally, the President's power to declare a state of emergency (Article 70 (9) is entirely unchecked since it requires no prior approval or subsequent ratification by the Jogorku Kenesh (only a notification), nor has it any other limitations specified, such as being temporary or established by law. The Venice Commission has recommended in its documents on emergency situations that any emergency measures are 'subject to the triple, general conditions of necessity, proportionality, and temporariness.' This and other related provisions of the Draft Constitution on states of emergency should be revised".[828]

Comparative Analysis and References

The German Constitution (Grundgesetz) contains the Ewigkeitsgarantie (eternal guarantee) providing, under Article 79, that certain key features of the German Constitution cannot be altered.[829] The rationale of this principle is that any amendment to the Constitution is based on the Constitution itself and that, therefore, a change cannot get rid of the fundamental constitutional principles. The historical experience with Hitler -overriding democratic and constitutional principles and turning Germany into a dictatorship via legitimate constitutional means- is the reason why Germany's highest legal text has established substantive

828 Venice Commission, Opinion No. 1021/2021.
829 Constitution of Germany.

barriers to constitutional amendments.

The German 'eternal guarantee' is limited to human dignity, but it does not include specific human rights. The guarantee includes the federal character of Germany, that the country is a democratic republic and a social state based on the rule of law. The German Constitutional Court provides a restrictive interpretation of this guarantee, as it requires only that the core of these principles is not affected. The eternal guarantee is also without effect if the Constitution is removed by a new 'pouvoir constituant'[830] due to changed political circumstances paving the way to the adoption of a completely new Constitution.

In comparison, the wording of the Constitution of Kosovo (Article 144) limits the review of the constitutionality of amendments to an assessment of a violation of Chapter II (human rights and freedoms) of the Constitution.[831]

Conclusion

The constitutional framework must ensure effective protection of the Fundamental Rights and Freedoms as a key principle of the Constitution. The citizen -with their constitutionally guaranteed human rights and freedoms- is at the heart of the Constitution, and the remaining constitutional principles are meant to supplement and be conducive to this fundamental principle.

In its Declaration of Independence, Kosovo has committed itself to adopting a constitution that enshrines a "commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights."23 This is essentially a commitment to the principles under Chapter I [Basic Provisions] of the Constitution.

However, Article 144(3) of the Constitution limits the Court's review of constitutional amendments to Fundamental Rights and Freedoms [Chapter II] only. It does not cover the Court's extensive interpretation to include Chapter I on the Basic Provisions and Chapter III on the Rights of Communities and their Members when assessing a proposed amendment. It remains unclear from the constitutional gaps and the Court's interpretation to what extent may the Court consider Chapters I and III. Constitutional changes can ensure more clarity and prevent future perplexity.

Recommendations

To address the gaps, the following options could be considered:

- There shall be no limits to amendments to the Constitution except those under Chapter II of the Constitution and those defined by the Court's interpretation;
- A new constitutional provision could codify the Court's interpretation of containing the Constitution's basic provisions and rights of communities when assessing the constitutionality of an amendment to the Constitution.
- Alternatively, it would be possible to include an explicit list of values and principles that cannot be altered by an amendment to the Constitution or by explicitly stating that the values set out in the Constitution define limits to any amendment to the Constitution.

830 The power to establish the constitutional order of a nation.
831 Constitution of Kosovo.

ANNEX

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The Balkans Policy Research Group is an independent, regional think-tank based in Pristina, Kosovo. We provide timely policy analysis and recommendations on a wide array of state building issues; institutional and democratic consolidation; minority integration and good neighborly relations; European integration and policy change. We have decades of experience in policy reporting and development, strategic thinking, and advocacy with governmental, international and non-governmental organizations. Our rigorous, detailed, impartial reporting, always based on-depth fieldwork, is the core of our work. We go beyond mainstream positions and seek to make change through creative, feasible, well-measured and forward-looking policy recommendations with the aim of helping develop strong, vibrant democracies, prosperous states and societies based on rule of law in the Western Balkans.

We engage in high-level advocacy, domestically, regionally and internationally, impacting policy discussions and options with regard to the home affairs and European policies toward the Western Balkans.

Balkans Group has developed other tools and platforms to achieve this change:

The Policy Dialogue promotes Kosovo's domestic dialogue, cohesion and reform-making agenda.

The Policy Forum (a Think-Tankers High-level Advocacy Forum) committed to enhancing the dialogue between the civil society and the institutions.

The Kosovo Serbia Policy Advocacy Group (a forum for Cross-Border Civil Society Cooperation) that aims to communicate, promote and enhance dialogue toward full normalization between Kosovo and Serbia, and their societies.

Women in Politics promotes the empowerment of women and girls; their security and inclusiveness; and is committed to strengthen the Women Caucus impact and reach throughout Kosovo.

Youth in Politics promotes an active participation from youth from different political parties in the institutions. The component helps in developing a culture of dialogue and cooperation, by providing capacity building trainings on key policy areas and skills and leadership.

The Dialogue Platform promotes the dialogue process between Kosovo and Serbia, by informing the wider public and generating debate about the agreements, benefits and challenges of the Dialogue.

Expert Support component provides policy support to the government and key institutions on key policy areas, peace and state- building agenda.

Norwegian Embassy