

TOWARDS EUROPEAN INTEGRATION: A COMPARATIVE ANALYSIS OF THE CONSTITUTIONAL COURTS OF KOSOVO AND ALBANIA

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Abstract: The constitutions and lower-level legislation of Kosovo and Albania were established with strong Western influence since both countries are striving to meet the rule of law requirements of the international community in order to become full members of the European Union in the future. This shared ambition has created similar legal frameworks, with European standards for the functioning of the constitutional courts of the two countries. Although they differ in some elements, both the Kosovo and the Albanian legislation stand out among the constitutional courts of Southeast Europe as a result of the progressive regulations of the countries. Although constitutional courts are independent institutions, their decisions have a strong impact on the internal political relations of a country, making them a significant political factor.

Keywords: Albania, Kosovo, constitutional courts, European standards

Introduction

The countries of Southeast Europe follow the European/continental¹ model of constitutional courts (CC) (Kelsen, 2009; Kelsen, 1942), with the same rules defining the legal framework of these institutes and constitutional

¹ Two main organisational models can be distinguished in constitutional adjudication: the American decentralized model and the European continental model. Austrian jurist Hans Kelsen is considered to be the father of European constitutional adjudication, since his Steps and stairs theory has become the guiding principle of continental constitutional adjudication.

adjudication. My hypothesis is that we can systematise the laws and practices (i.e. the European standards) that govern the functioning of constitutional courts. In Kosovo and Albania, in addition to legislation, the similarities in customary law as well as power factors both have an impact on how constitutional courts function in practice.

The rules, competences, and authority of the Kosovo and Albanian Constitutional Courts may be analogous for two reasons. First, both countries followed the European standards when they adopted their constitution and the lower-level legislation that created the legal framework for their constitutional court. In addition, both drafted their constitution and established its guardian, the constitutional court, with strong international, Western influence (Manhertz, 2020). In this sense, both their constitutions and the institutions sworn to protect them are among the most modern in Europe, as the two countries have made a strong effort to ensure positive international reception.

This article compares the Constitutional Courts of Albania and Kosovo on five different levels: 1) their legal basis; 2) the appointment of judges; 3) the legal status of judges; 4) the termination of a judicial mandate; and 5) the competence and jurisdiction of the constitutional court. This multi-level analysis shows that there are strong parallels between the two constitutional courts at all five levels, and therefore they can be well categorised (Harding, Leyland & Groppi, 2009).

A Brief History of Constitutional Processes and the Legal Basis of Constitutional Courts

The legal regulation of the organisation and functioning of constitutional courts is mainly laid down in the written constitution of the particular country. Alongside the constitution, which is at the top of the legal hierarchy, lower-level legislation provides the framework for the operation of the constitutional court. In Southeast Europe, in addition to these legal provisions, customary law and the power factors prevailing in the country are also of particular importance.

During the early 1990s, the countries of Southeast Europe embarked on a path of democratic change, albeit at different paces and with varying degrees of effectiveness. Every country adopted a new constitution or amended the previous one, establishing its constitutional courts as autonomous legal institutions along the European continental model. Constitutions and constitutional court legislation are the primary source of practice for the organisation and functioning of constitutional courts.

The Legal Framework of the Albanian Constitutional Court

The Albanian constitutional process, which started in 1991, was an intensely complex period in Albania's history. The 1976 Constitution remained in force until 1998, and it was adapted to the needs of the democratisation process through the amendment of decrees, and additional sets of laws (Alihmehmeti, 2011). The Albanian National Assembly (Kuvendi), in cooperation with the European Union, the OSCE, and the Council of Europe, drafted the new Constitution, which was adopted on 21 October, 1998 (Albanian National Assembly, 1998). The Law on the Organisation and Functioning of the Constitutional Court was adopted by the National Assembly on 10 February, 2000, and it has only been amended once to date, in 2016 (Albanian National Assembly, 2000).

The Legal Framework of the Kosovo Constitutional Court

Although Albania started the democratisation process with many internal tensions and political controversies (Peshkopia, 2014; Réti, 2000), it represented a relatively peaceful and non-violent transition² in Southeast Europe. This was not the case in Kosovo, and the break-up of Yugoslavia and the Kosovo War (1998-99) had a strong impact on the history of constitutionalism in this new state. Following the Kosovo

² Compared to the break-up of Yugoslavia and the subsequent wars, it was a peaceful transition. However, the collapse of the pyramid scheme, a period of anarchy and civil war, led to a serious crisis in Albania (Jarvis, 2000).

War, United Nations Security Council (UN SC) Resolution 1244 of 10 June, 1999 (UN SC, 1999), which is still in force today, placed Kosovo under international administration on a provisional basis. On 15 May, 2001, the UN-led peacekeeping mission in Kosovo, (United Nations Mission in Kosovo, UNMIK), issued the Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK, 2001), which effectively became the highest legal document of the entity under international administration until Kosovo's unilateral declaration of independence in 2008 (Heka, 2013). The "UNMIK constitution" provided for the establishment of a so-called Special Chamber of the Supreme Court to discuss issues of constitutional law. However, this body was never established, so a constitutional court did not exist in internationally administered Kosovo.

The constitutional process and the organisation of the CC started after the creation of the state of Kosovo. The members of the Kosovo National Assembly (*Kuvendi*) declared Kosovo's independence on 17 February, 2008 (Kosovo National Assembly, 2008a), subsequently adopting the first constitution of an autonomous Kosovo on 9 April, which has been amended three times to date (Kosovo National Assembly, 2008b). Chapter VIII of the Constitution lays down the detailed framework for the organisation and functioning of the Constitutional Court. The Law on the Constitutional Court was adopted by the Kuvendi on 22 December, 2008 (Kosovo National Assembly, 2008c).

The Composition of the Constitutional Court and the Appointment of Judges

The Composition of the Constitutional Court

The number of judges, the way they are elected, and the length of their terms of office are governed by the constitution of each country. Albania and Kosovo have constitutional courts with nine members each, but the way in which the judges are appointed differs. Although the election of judges is structured differently, the constitutions seek to give some form of effect to the principle of the separation of powers (De Visser, 2019).

The Composition of the Constitutional Court of Kosovo

There are three systems for appointing constitutional judges: direct appointment, the elective system, and the most common mixed/hybrid system (Venice Commission, 1997). The elective system is the closest to democratic legitimacy, since the electing authorities are most often the unicameral parliaments of the countries. Of the two countries examined in this paper, Kosovo uses a pure elective system to appoint the members of the CC, although this has not always been the case. Until the end of the international supervision of the implementation of the Comprehensive Proposal for Kosovo Status Settlement (United Nations Security Council, 2007), three of the nine members of the CC were appointed by the international community through the International Civilian Office (ICO). Between 2008 and 2013, the Constitutional Court of Kosovo had three international members under the provisional article of the Constitution: Almiro Rodrigues (a Portuguese judge in the field of criminal law), Snezhana Botusharova-Doicheva (a Bulgarian judge in the field of human rights), and Rober Carolan (an American judge in the field of constitutional law). The main purpose of the provision was to transfer the experience of the West in the field of constitutional adjudication, since Kosovo was inexperienced in terms of state organisation, in fact, it only had a few years' experience in the organisation of ordinary courts in the first place.

In accordance with the model of an elective system, the members of the CC are elected by the Kosovo Parliament based on a qualified list drawn up by the Special Committee for the Review of Candidates for Appointment to the Constitutional Court (hereinafter referred to as the "Committee"). The members of the Committee include the President of the Assembly and the leaders of each Parliamentary Group, the President of the Judicial Council, the Ombudsperson, a representative of the Consultative Committee of the Communities, and a representative (judge) of the Constitutional Court. The Committee is convened by the President of the National Assembly, who is also the President of the Committee. The Committee publishes a call for applications for the position, and after the deadline for nominations, it holds interviews with qualified individuals. After the interview, the

Committee ranks the candidates by a simple majority (the President decides in case of a tie) and submits the list of candidates, with its reasons for its ranking, to the Kuvendi. The Law on the Constitutional Court makes the nomination procedure plural: essentially anyone can express a preference, and individuals can also nominate themselves.

The way constitutional judges are elected in Kosovo may seem rather complicated. Seven of the nine members are elected by the National Assembly with a two-thirds majority of the members present, while the remaining two members require the approval of an absolute majority of the community members present, with the support of an absolute majority of all members of the Assembly present.

The Composition of the Constitutional Court of Albania

In Albania, the Constitution and the Constitutional Court Act were amended in 2016 to ensure plurality, the separation of powers, and professionalism in the election of constitutional judges. The Constitutional Court used to consist of nine judges appointed by the President of the Republic, with the approval of the National Assembly. Since 2016, Albania, unlike Kosovo, has had a mixed model for the election of judges, which is effectively a hybrid between a direct appointment and an electoral system, where the appointing authorities usually have a direct appointment function. In this system, several actors within the separation of powers have a say in the process of electing judges, and the appointment of constitutional judges is shared equally among three authorities. One third of the judges are directly appointed by the President of the Republic and the Supreme Court each, while the National Assembly elects the remaining third of Constitutional Court members through an elective system. This quota system is accompanied by the principle of rotation, whereby one third of the judges of the Constitutional Court are renewed every three years.

Article 7 of the Law on the Albanian Constitutional Court regulates the nomination procedure. The first two stages of the procedure are identical for all three authorities. A call for applications for the position

of constitutional judge is publicly published on various platforms, after which the authorities forward the list of candidates with the relevant documentation to the Judicial Appointments Council (JAC). JAC discusses the candidates in a public meeting, and within ten days after the meeting, it prepares a ranked list, explaining the basis of its ranking. During the third stage of the nomination procedure, the President of the Republic appoints the new member of the Constitutional Court within thirty days from the first three candidates of the list drawn up by JAC and gives reasons for their choice. If the President of the Republic does not decide within thirty days on the person to be appointed, the person at the top of the JAC list is appointed as Constitutional Judge. For members elected by the National Assembly, the Committee of Legal Affairs, Public Administration and Human Rights organises a hearing for the candidates on the JAC list. The Committee then submits three candidates to parliament, which elects the new constitutional judge by a three-fifths majority of all members.

During the third stage of the nomination procedure, when the High Court appoints a new member, the President of the High Court shall convene an extraordinary meeting once the JAC's list of candidates is ready. The meeting is valid if at least three-quarters of the judges are present. The judges may vote for the first three persons on the JAC list, and a three-fifths majority of those present is required for a decision. Furthermore, Article 129 of the Constitution stipulates that all judges appointed from each of the three quotas shall take office after taking an oath before the President of the Republic

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Constitutional Crisis in Albania

Albania introduced comprehensive reforms in its judiciary in 2016 to meet the rule of law criteria. The most significant change was the introduction of a two-stage vetting process, which has been incorporated into the selection process for constitutional judges. During the course of the proceedings, five of the nine currently serving constitutional judges were dismissed (Fatos Lulo, Fatmir Hoxha, Altina Xhoxhaj, and Bashkim Dedja in

2018, Gani Dizdari in 2019), while two judges resigned (Sokol Berberi in 2016, Vladimir Kristo in 2017), rendering the Constitutional Court completely inoperable for two years (2018–2020).

The constitutional crisis was not caused solely by the vetting process, but also by the rigid Albanian Constitution, which regulates in detail the way judges are appointed (Venice Commission, 2020). JAC, which compiles the list of candidates, and the High Court have also faced an institutional crisis due to the vetting procedure. In addition, tensions between the two other appointing authorities, Ilir Meta, former President of the Republic, and the Socialist-majority parliament have also hampered the appointment of new judges.

Under pressure from the United States, the Constitutional Court was made quorate by December 2020 (at least five judges are required for it to be operational), when the Kuvendi appointed Altin Binajas Constitutional Judge (Tirana Times, 2020). The last vacant seat of the Constitutional Court was filled in December 2022, and with nine judges for the first time since 2016, the Court is now able to meet the expectations of the Venice Commission and the international community (Kote, 2022).

Although the two-step vetting procedure made the constitutional court dysfunctional in the short term, in the long term it has had a positive impact on the institutional system of the judiciary (Šemić, 2022). This is evidenced by the 2021 decision of the European Court of Human Rights (ECtHR) in the case *Xhoxhaj v. Albania* (European Court of Human Rights, 2021). Altina Xhoxhaj, a former Constitutional Judge, turned to the ECtHR because she claims her rights were violated when she was dismissed from her position as she could not prove her assets (Erebara, 2021). The ECtHR declared that the dismissal from office of a judge of the Albanian CC following the vetting process, and the ban on her rejoining the judicial system in the future did not breach the European Convention on Human Rights (ECHR).

The Election of the President of the Constitutional Court

Regarding the position of the president of the constitutional court, the judges of the constitutional court elect their president by secret ballot in both countries with a majority vote of all the judges. The main advantage

of the corporative election of the president is that it is independent of the balance of power in parliament, and thus it does not limit the organisational autonomy of constitutional courts. In Kosovo, only the Constitution provides for the election of the president, the Constitutional Court Law only reinforces the provisions. In Albania, the constitution does not regulate the way in which the president is elected, only the relevant article of the Constitutional Court Law provides guidance on this issue.

The countries studied here also regulate in their constitutions the period for which their constitutional judges are elected. In both Albania and Kosovo, the term of office for judges is nine years, after which they cannot be re-elected.

The Legitimacy of the Elective and Hybrid Models of Judicial Appointment

The Constitutional Court in Kosovo has the stronger legitimacy of the two countries, as it is the highest institution of representative democracy, parliament, that elects its members by a two-thirds majority of all seats held. In real democracies (Hansen, 2013), the governing party rarely has a two-thirds majority in parliament, so the opposition must also agree to elect the constitutional judges. However, this also raises professional concerns, as the representatives elected by the citizens may not have the necessary competence to decide which jurists are truly qualified to be constitutional judges. Of course, the committee set up under the nomination procedure submits its list to parliament, stating its reasons, so Members of Parliament are aware of the professional merits of the candidates. However, there is no obligation for the legislature to choose the candidate ranked at the top of the list (i.e. the candidate considered by the committee to be the most professionally qualified) for the vacant post of constitutional judge. Parliament is therefore a strong power that can easily influence the composition of the Constitutional Court, and it makes it questionable to what extent constitutional judges elected by a qualified majority in parliament can be independent of the branch of power that has placed them in their position.

1. Table:
Comparison of the Constitutional Courts,
the procedure for appointing judges.³

	Electoral System	Hybrid System
Country	Kosovo	Albania
Number of members	9	9
Nominating judges' authority	Special Committee for the Review of Candidates for Appointment to the Constitutional Court	Judicial Appointments Council
Selector/appointor authority (number of judges appointed)	National Assembly	President (3) National Assembly (3) High Court (3)
Mandate Duration (in years)	9	9

As far as the election of judges is concerned, the Albanian regulation can be seen as the more balanced, as it combines democratic principles, the importance of professionalism (the meritocratic principle), and a strengthening of the position of the President of the Republic. The hybrid system for the appointment of judges is best suited to the legal and political nature of the constitutional court and constitutional administration. Since no one branch of power has the exclusive right to elect constitutional judges, the independence of the constitutional court is guaranteed the most.

The Representation of Minorities in the Constitutional Court

The Representation of Minorities in the Constitutional Court of Kosovo

It is worth looking at the representation of minority groups in the constitutional courts of Kosovo and Albania. In Kosovo, the Constitution guarantees 20 out of 120 seats for the representation of various communities. Of the 20 guaranteed seats, ten are for the Serb community,

³ The table is edited by the author.

while the distribution of the ten remaining seats is as follows: the Roma community (1); the Ashkali community (1); the Egyptian community (1); one seat awarded to either the Roma, the Ashkali, or the Egyptian community with the highest overall votes (1); the Bosnian community (3); the Turkish community (2); and the Gorani community (1). Even though in Kosovo an absolute majority of the community members of parliament is required to elect two constitutional judges, there is no legal norm that guarantees the presence of at least one constitutional judge representing a certain community in the Constitutional Court.

However, the decision of an absolute majority of the communities is a kind of fixity, without which the absolute majority of parliament cannot appoint the two judges. Thus, the compliance of an absolute majority of the communities is a necessary precondition for the election of two judges. As a result of this two-staged elective system, two judges were delegated by the Kosovo communities to the Constitutional Court between 2008 and 2018: Altin Suroy from the Turkish and Ivan Čukalović from the Serb community. Čukalović was a professor of international law at Kragujevac Law University, who stated the following about his appointment: “I accepted the appointment because I want to defend the rights of 240,000 Serbs, Muslims and Gorani in the southern province. I will try to correct all the unjust decisions of the Kosovo authorities” (Division of Public Information of UNMIK). Despite his statement, Serbian Minister for Kosovo and Metohija Goran Bogdanović reacted fiercely to the appointment of Professor Čukalović: “Individuals who accept, despite the official stand of the Serbian state, engagement in illegal Kosovo institutions do not have credibility, so they can only represent themselves in these institutions” (Division of Public Information of UNMIK, 2009).

In the current Constitutional Court, the communities are represented by ethnic Serb judge Radomir Laban. Laban was recommended to become a judge by Srpska Lista, after a Serbian court had sentenced him to six years in prison in 2011 for being a member of the so-called customs mafia. Despite the verdict, Laban fled to Kosovo, where he was appointed constitutional judge in 2018 (Reuters, 2018).

The Representation of Minorities in the Constitutional Court of Albania

Positive discrimination could be justified in Albania to represent minorities in the Albanian Constitutional Court as well. According to the latest Albanian census of 2011, 0.87% (24,243) of the population belongs to the Greek minority and 0.3% (8,301) belongs to the Roma minority (INSTAT, 2011). Considering the fact that the Greek minority boycotted the census (see Likmeta, 2011), and the Roma traditionally identify as a different ethnicity (Minority Rights Group International, 1995, 10), the data from the statistical office are not sufficiently representative. It is generally believed that there are 45-50,000 Greeks living in Albania today (Vickers, 2010), making up around 2% of the total population and making the Greek ethnic group the largest national minority in Albania. However, this claim is called into question by the estimate of the Albanian Helsinki Committee (Koinova, 2000), according to which there could be as many as 120,000 Roma living in Albania, which is an extraordinary figure compared to the total population of 2,876,591.

However, the Albanian Constitutional Court does not have a single declared minority member. Therefore, there is no *de iure* guaranteed seat for minorities in the constitutional courts of Albania and Kosovo, although this does not mean that a minority candidate cannot *de facto* be elected to the constitutional court of the country in question. As demonstrated above, the two-stage elective system in Kosovo necessarily – but not *expressis verbis* – provides for community judge(s) in the Constitutional Court. In Albania, however, there is no positive discrimination concerning minorities due to the absence of legislation in this regard.

The Legal Status of Constitutional Judges

In both countries, the status of constitutional judges is governed by the Constitution and the relevant articles of the Constitutional Court Act. In most cases, the constitutions are rather vague on the position of constitutional judge, and the provisions on their legal status are set out in lower-level legislation. However, regarding their legal status, the two countries have an immensely detailed constitution, in some cases almost like a code.

Objective Criteria

Without exception, Albania and Kosovo apply national censor to the status of constitutional judges. Although it is not required by the regulations, Albania only accepts exclusive citizenship based on customary law (and therefore dual citizenship is not allowed). In the case of Kosovo, as a result of the international presence and the young constitutionalism of the state, exclusive citizenship is not even a criterion according to customary law.

In addition to citizenship, a law degree is also a mandatory criterion in Kosovo and Albania. In the legislation governing the status of constitutional judges throughout Europe,⁴ a law degree is a fundamental criterion as a professional censor, and it may also be a guarantee for the judge's independence. However, one wonders whether an all-lawyer composition of the constitutional court might not reduce the powers of the court, and there are serious concerns as to how the CC's lawyer membership is able to express itself with sufficient professionalism on health or economic issues.

Constitutional judges must also have a specific period of professional experience, although experience as a lawyer is not exclusively defined as judicial experience in the regulations, and excellent lawyers, prosecutors, or law professors may also meet this criterion. The practical significance of this is that lawyers can be appointed to a decision-making position in the Constitutional Court without any prior judicial experience. In Kosovo, a person nominated as a constitutional judge must have at least ten years of professional experience, in Albania at least fifteen years.

Both the Albanian and the Kosovo legislation specify full capacity as a criterion, which means that a candidate for the position of constitutional judge must have no disqualifying medical factors and is not disqualified from public office and therefore has legal capacity.

⁴ However, there are also countries where a law degree is not a definite condition: for example, in Belgium, half of the constitutional judges must be former members of parliament. It is another matter that the Belgian parliament is largely composed of lawyers.

This is where active suffrage appears as a criterion, since active suffrage contains content that is formulated in the Albanian and Kosovo legislation *expressis verbis*.

The laws of both countries contain provisions on conflicts of interest for the constitutional judge position. These prohibit the judge from being a member of a political party, movement, or any other political organisation. Nor may he or she be a member of a pressure group according to customary law. In Albania, the rules also apply for the ten years preceding the nomination, so even as a lawyer, one cannot hold a senior position in the administration, as it is a disqualifying factor when electing a constitutional judge.

In Kosovo, the law also stipulates that, although a constitutional judge may not hold public or professional office for remuneration, an exception is made for teaching and unpaid academic work. In addition, the judge may be a member of humanitarian, sporting, cultural and/or legal organisations, provided that they are not remunerated, and that the organisation is not associated with any political party. The conflict of interest between a political or public role and a judgeship is intended to ensure that the judge can remain impartial and independent. The rule that a constitutional judge may not be paid for other activities is common practice in Europe, as it is expected that the judge cannot be bribed or be suspected of being bribed.

In Southeast Europe, there is no provision for gender balance in any Constitutional Court Act. However, the principle of gender equality is a declared aim of the legislation of Constitutional Court in Kosovo and Albania alike. In Kosovo, three of the eight seats on the Constitutional Court are held by women judges, while in Albania five of the nine seats are held by women judges. In both Kosovo and Albania, the Constitutional Court is currently chaired by a woman. The fact that gender equality is present might derive from the international presence in Kosovo's and Albania's legislation because both states drafted their constitutions and laws with strong international support. The democratic principle of gender equality was included in the legislation because the countries sought to create a democratic constitution and law that was widely and positively received internationally.

Subjective Criteria

Albania and Kosovo have also formulated moral criteria for the status of judges. While the criteria mentioned above are objective, moral integrity is a highly subjective element. However, the Constitutional Court laws of Albania recite the criteria in detail, which Kosovo follows under customary law.

The Albanian legislation is extremely strict, stipulating that only persons who have not been sentenced to imprisonment for a criminal offence and who are not or have not been previously prosecuted or subject to criminal, misdemeanour, or disciplinary proceedings may be constitutional judges. This provision violates an important human rights principle, the presumption of innocence. Thus, if a person was subject to disciplinary proceedings in the past, but there is no disciplinary decision against them (i.e. no disciplinary offence was committed), they cannot be elected as a constitutional judge under customary law. Customary law in practice also shows that a person who has been sentenced to a financial punishment is not elected as a constitutional judge by the institutions empowered to do so.

The Albanian legislation thus lists a strict and detailed agenda of requirements concerning the status of judges. Candidates for the position of constitutional judge and their families must undergo a full vetting process, after which the competent authorities make a professional and moral assessment of the candidates. Neither the Constitution nor the Law on the Constitutional Court specify the criteria based on which the evaluation is carried out, leaving room for subjectivity.

In contrast with the Albanian laws, Kosovo legislation is rather brief on the moral criterion. According to the Law on the Constitutional Court, constitutional judges can be persons with excellent moral reputations, who can act in full capacity and who have not been convicted of any criminal offence. Moral integrity is a particularly interesting criterion in Kosovo, as Radomir Laban was elected in 2018 with a final verdict against him in Serbia (Jeremić, 2018).

Termination of the Mandate of a Constitutional Judge

The termination of the mandate of a constitutional judge is regulated by the constitution and the constitutional court law of the countries under review. There are two types of termination: automatic termination and dismissal.

Automatic Termination of a Mandate

One of the basic reasons for the automatic termination of a mandate is the expiry of the term of office, which is set in the constitution of the respective countries, and which is nine years for both countries. In Albania, in addition to the nine-year constitutional term, the mandate of a constitutional judge automatically ends when the judge reaches the age of 70.

Of the laws examined, only in the Kosovo legislation does death appear as one of the basic cases of an automatic termination of a judge's mandate. In Albania, the automatic termination of judicial office by reason of death is based on customary law, since the position of constitutional judge cannot be inherited. In addition, judges of the Constitutional Court will lose their mandate if they so request, i.e. if they resign. In both Albania and Kosovo, the mandate of a constitutional court judge automatically ends after their resignation. Interestingly, in neither country does the judge need the approval of the appointing authority to resign. The judge simply notifies Parliament and the President of the Republic.

The Dismissal of a Constitutional Judge

If the judge has been convicted of a (private or public) criminal offence or sentenced to imprisonment, the mandate is not automatically terminated, but the judge may be relieved of their duties. Under the Constitution, two-thirds of the judges in Kosovo may propose to the President of the Republic that the judge be removed from office. However, it is the

President of the Republic who decides on the matter, and the President is not obliged to take the Constitutional Court's proposal into account. Unlike in Kosovo, in Albania the Constitutional Court decides as a body whether to dismiss a constitutional judge in such a case.

The judges may also be dismissed if it is established that they have permanently or definitively lost their capacity to act. In both Albania and Kosovo, it is up to the Constitutional Court to declare incapacity, and a two-thirds majority is required to disqualify a judge. Both countries' legislation includes professional or ethical misconduct as a possible ground for dismissal. In Kosovo, if the Constitutional Court considers that a member of the CC has seriously neglected their professional duties, it may, by a two-thirds majority, propose to the President of the Republic that the judge be dismissed.

In Albania, the CC itself decides whether to dismiss its constitutional judge. However, it should be noted that both professional and ethical misconduct are highly subjective factors. For example, constitutional judges may be discredited professionally in the eyes of their peers if they deliver a separate opinion in a particular case because they disagree with the other members of the panel. This does not in itself mean that they are professionally unfit to be a constitutional judge, but if they repeatedly append a separate opinion to the decisions of the constitutional court, and the other judges object, there is nothing to stop them from relieving their fellow judges of their duties on the grounds of professional or moral incompetence. This assumption is hypothetical because there is no relevant precedent in the history of the constitutional courts in either Kosovo or Albania.

The Competence and Jurisdiction of the Constitutional Courts

An important objective of the constitutions of Albania and Kosovo was to move the political system towards democracy and to change the internal structure of the state accordingly. For this reason, the Constitutions

updated the constitutional status of the CC to make it compatible with the norms of constitutional justice (Ahmed, 2022). Thus, the CC has become the “guardian of the constitution” (Ginsburg, 2003) and the institutional guarantee of the protection of human rights and freedoms. The protection of the supremacy of the Constitution is the supreme task of the constitutional judiciary at all times.

The main functions of the Constitutional Court are described below, and they are united by the fact that their performance requires constitutional interpretation. Authentic constitutional interpretation is the task of all constitutional protection bodies under customary law, but the Albanian Constitution declares the constitutional interpretation function of the CC *expressis verbis*.

Preliminary Norm Control

The main function of the constitutional judiciary is norm control, i.e. the examination of the constitutionality of laws and other legislation. The practice of preliminary norm control appears in the legal systems of Albania and Kosovo. Preventive review means that legal norms are examined in abstracto before they enter into force. The most frequent occasion for prior review is when constitutional courts exercise their function in relation to international treaties. The unity of the constitutional legal order requires harmonisation, i.e. that domestic law is in line with international law.

In the case of Kosovo, the President of the Republic may request a constitutional review by the CC in the context of a preliminary normative review before signing a law adopted by Parliament. The Constitutional Court, acting in a consultative role, can defend the prestige of the legislator, i.e. Parliament, on the motion of the President of the Republic. Although the CC has to rule on the matter within a short period of time, a major disadvantage of the preliminary norm control of the rules initiated by the President of the Republic is that it prevents effective intervention by the legislator in the event of an acute social problem.

In Albania, the President of the Republic, the Prime Minister, not less than one-fifths of the Members of Parliament, and the Ombudsman may initiate proceedings to review the compatibility of laws and other normative acts with the Constitution and international agreements. In other cases, the powers of the President of the Republic do not provide for the possibility of a preliminary norm control of the law. Because of the community practices and traditions, in such a highly patriarchal country like Albania, it could be reasonable for the state to have a more empowered President. However, attempts to extend presidential powers have not been successful due to the experience of Enver Hoxha's dictatorial regime. Since the President has no prior right of preliminary review, they only refer a constitutionally problematic law back to Parliament. An example for this was when former President Ilir Meta vetoed the Media Laws in 2020, but Parliament overruled Meta's veto and approved the law with a sufficient majority (Kostreci & Picari, 2020).

Posterior Norm Control

In Albania and Kosovo, the constitutional courts are competent to practice posterior norm control. In this case, the constitutional court checks the constitutionality of published legal norms that have already entered into force or have been promulgated. The constitutional courts may *de iure* examine the compatibility of any law with the constitution in the course of repressive review.

A posterior abstract review can be initiated if there is no individual legal dispute, and the problem is merely a question of the constitutionality of a legal norm. The initiator of the abstract review acts in the public interest, without personal involvement, and not to remedy their own violation of the law. The CC then usually examines questions of constitutional law theory. In some countries, anyone can initiate a posterior review of an abstract norm, in Kosovo and Albania only specific public bodies and officials can do so.

In both countries, the President of the Republic, the Ombudsman, and Parliament can initiate constitutional reviews. In Albania, at least one-fifth of the Members of Parliament, in Kosovo one quarter of the

Members of the Kuvendi can initiate a review. The government of the day in Kosovo and the Prime Minister in Albania may also initiate a constitutional review. An illustrative example of posterior abstract norm control is former Kosovo President Atifete Jahjaga's request to the Constitutional Court in 2014 to clarify several constitutional issues relating to her powers. The request came against a background of rival claims to the prerogative to form a cabinet after Kosovo's elections (The Sofia Globe, 2014).

In both countries, the competence of the Constitutional Court includes adjudication, whereby the decision of the CC aims to resolve conflicts of jurisdiction between the central government and regional and local government bodies. In this function of the Constitutional Court, it is clear that the CC is not only the guardian of the Constitution but also that of the balance of state power in a democracy. Therefore, in both countries local authorities can initiate posterior specific norm control of the law if they consider that a law or other legislation infringes their interests and rights.

A typical case of posterior specific review is the judicial initiative, which is also a competence of the constitutional court of every country. In this case, the constitutional court proceedings are initiated by the ordinary courts, and the proceedings pending before them are suspended pending the decision of the CC. This is done when the judge is called upon to apply a legal rule that he considers unconstitutional to decide the case.

In Albania, the broadest range of initiatives are posterior specific norm controls. In addition to the above-mentioned bodies and officials, the Head of High State Audit, the Commissioner for Fundamental Rights, forums of religious communities, political parties, and other organisations can initiate a specific constitutional review. Since the powers of the Constitutional Court can only be interpreted in terms of the scope of petitioners, it is advantageous if the range of persons and bodies that can initiate a review of the norm is quite wide. In Albania, Edi Rama and the Socialist Party (*Partia Socialiste e Shqipërisë*, PS) initiated a constitutional review of the "Agreement for the Delimitation of the Albanian-Greek Continental Shelf and Maritime Zones" (known

by the public as the “Sea Agreement”) under the posterior specific norm control in 2009. Opposition party PS argued that the arrangement was unfair because it deprived Albania of 225 km² of its territorial waters (Ndoj, 2015). The CC found that the Convention was contrary to the Albanian Constitution and the UN Convention on the Law of the Sea and annulled the Albanian-Greek agreement (Albanian Constitutional Court, 2010). There have also been examples of posterior concrete norm control in Kosovo. Albin Kurti, Prime Minister of the Vetevendosje, asked the Constitutional Court to examine the constitutionality of President Hashim Thaçi’s decision to ask Avdullah Hoti to form a new government in 2020, after the Kurti government had failed in a parliamentary no-confidence vote in March (Bami, 2020a). Thaçi took this action after Vetevendosje, the outgoing ruling party, did not nominate anyone for the role. Hoti was put forward for the role of prime minister by the Democratic League of Kosovo (*Lidhja Demokratike e Kosovës*, LDK), the party that was part of the Vetevendosje-led administration under Albin Kurti (Bami, 2020b). The Kurti cabinet continued as a caretaker government until 3 June, 2020, when Avdullah Hoti was elected as the next Prime Minister, resulting from the CC decision that Thaçi’s request to form a government was not unconstitutional (Kosovo Gazeta Express, 2020).

Individuals who believe that the public authorities have violated their fundamental rights and freedoms guaranteed by the Constitution can also initiate a specific posterior review of the law after they have exhausted all effective remedies to protect these rights. In the case of a constitutional complaint against an individual act, individuals have the right to apply directly to the Constitutional Court to defend their private interests.

Both countries’ constitutional courts also have a state judiciary function, which includes the removal of the head of state from office. If the President of the Republic in Albania or Kosovo commits a serious breach of the Constitution or a serious crime, Parliament may propose to the CC that the President be removed from office. In Albania, a quarter of the members of the Kuvendi may make a proposal, and two-thirds of the

members must support it before the CC. In June 2021, for the first time in Albanian history, Parliament voted to remove a president from office (Euractiv, 2021). The Kuvendi then asked the Constitutional Court to take a decision on the dismissal of President Ilir Meta because the Albanian CC has exclusive jurisdiction to dismiss the President and is not bound in any way by the proposal of the National Assembly. It was claimed that the comments and actions of the President during the 2021 electoral campaign violated various laws and incited violence. The Constitutional Court struck down all claims in 2022, stating that it did not find any evidence of a violation of the law (Euronews, 2022). The decision allowed Meta to complete the full term of his five-year mandate.

In Kosovo, the Kuvendi can also take the initiative to impeach the President. At least 30 Members of Parliament (i.e. one quarter of the MPs) can refer the matter to the Constitutional Court, but the CC only gives a technical interpretation, i.e. it determines whether or not there is a violation of the Constitution. The Constitutional Court then refers the decision back to Parliament, which, by a two-thirds majority of all the deputies, decides on the fate of the President. In Kosovo, there is no precedent of the Constitutional Court examining the constitutionality of the removal of the President of the Republic. When Hashim Thaçi was indicted by the Kosovo Specialist Chamber in The Hague, Parliament could have asked the CC for its opinion on the matter. However, the President of the Republic immediately resigned of his own volition, thus rendering any constitutional review pointless (Trkanjec, 2020).

Constitutional courts have the power to annul the legal norm under review *ex tunc* (retroactively) or *ex nunc* (from the date of promulgation) in the case of unconstitutional laws and other legal norms (Prahmani, 2021). For example, in 2010 the Albanian Constitutional Court terminated the Sea Agreement *ex tunc*. A good example of an *ex nunc* proceeding is the decision to remove the President of the Republic from office. The removal of the President is effective from the date of promulgation.

One of the advantages of preliminary review over posterior review is that during the review, the legal norm deemed unconstitutional does not have to be annulled, as it has not been promulgated. This avoids

prejudice to legal certainty, and the predictability of law is an important element of the rule of law. According to Hans Kelsen's interpretation, the Constitutional Court, although it has no legislative power, is a negative legislator in the sense that it annuls a legal norm that is deemed unconstitutional, whereas the legislature creates law in a positive sense (Kelsen, 2009).

On the question of the procedure of the constitutional courts, the CC is quorate in Albania and Kosovo if at least two-thirds of all members are present. Since in both countries the constitutional court ideally consists of nine members, at least six judges must be present for the CC to be quorate. As regards decision-making, the Albanian and Kosovo rules are again similar, with both constitutional courts requiring the agreement of an absolute majority of the members present to take a decision.

Conclusions

The courts that exercise the power of constitutional review (in Kosovo and Albania these are invariably constitutional courts) have a strong and prominent role in the democratic political systems of the world. From defining human freedoms to the financing of political competition, the elimination of electoral disputes, the appointment of members of parliament, or even the removal of the president of the republic, constitutional courts have a significant influence in political life (Vanberg, 2015).

The present article sought to support the hypothesis that Kosovo and Albania have related arrangements for constitutional courts and constitutional adjudication. The many similarities in the regulations may be due to the fact that the new democracies that emerged during the third wave of democratisation (Huntington, 1993) benefited greatly from the constitutional experience of Western countries, and in the spirit of catching up with Western Europe, they tried to meet the rule of law requirements of democratic Europe. In addition to democratic constitutions, the new democracies wanted to make it known to

the international community that they were fully committed to the democratic system, and this was ensured by the establishment of a constitutional court.

There are definite international trends in constitutional courts and constitutional adjudication, which serve as a model for newly emerging democracies and to which the countries of Southeast Europe are also adapting (Manhertz, 2020). This study has shown that these European directives are identical in the case of the Kosovo and Albanian Constitutional Courts, the main reason being their desire to benefit from Euro-Atlantic integration. Hence, with Western assistance, these two countries have set up modern constitutional courts to meet the requirements of the rule of law and justice.

Bibliography

- Ahmed, A. (2022). *A Theory of Constitutional Norms*. Michigan Law Review. Retrieved on 08/01/2023: <https://michiganlawreview.org/journal/a-theory-of-constitutional-norms/>
- Albanian Constitutional Court. (2010). Object: The examination of the compatibility with the Constitution of Albania of the Agreement between the Hellenic Republic and the Republic of Albania “On the delimitation of their respective continental shelf areas and other maritime zones to which they are entitled under international law.”
- Albanian National Assembly. (1998). Albania’s Constitution of 1998 with Amendments through 2016. Retrieved on 08/01/2023: https://www.constituteproject.org/constitution/Albania_2016.pdf?lang=en
- Albanian National Assembly. (2000). On the Organisation and Functioning of the Constitutional Court of the Republic of Albania. Retrieved on 08/01/2023: https://www.gjk.gov.al/web/constitutional_court_law_2016_2021_2156.pdf
- Alihmehmeti, E. (2011). The Evolution of the Constitutional System in Albania. *Academicus International Scientific Journal*, 2011(3).

- Bami, X. (2020a). Kosovo Mulls its Choices After Fall of Kurti Govt. Balkan Insight. Retrieved on 08/01/2023: <https://balkaninsight.com/2020/03/26/kosovo-mulls-its-choices-after-fall-of-kurti-govt/>
- Bami, X. (2020b). Kosovo Courts Says Govt Can be Formed Without Elections. Balkan Insight. Retrieved on 08/01/2023: <https://balkaninsight.com/2020/05/29/new-kosovo-govt-can-be-formed-without-elections-court-rules/>
- De Visser, M. (2019). Constitutional Judges as Agents for Development. *Law and Development Review*, 2019(3).
- Division of Public Administration of UNMIK. (2009). *Media Monitoring Headlines*. Division of Public Administration of UNMIK.
- Erebara, G. (2021). European Court Rejects Albanian Ex-Judge's Appeal Against Sacking. Balkan Insight. Retrieved on 08/01/2023: <https://balkaninsight.com/2021/02/09/echr-dismisses-albania-former-judge-claims-against-justice-reform/>
- EURACTIV. (2021). *Constitutional court to review dismissal of president*. EURACTIV. Retrieved on 08/01/2023: https://www.euractiv.com/section/politics/short_news/constitutional-court-to-review-dismissal-of-president/
- Euronews. (2022). *Ilir Meta: Constitutional court overturns impeachment of Albania's president*. Euronews. Retrieved on 08/01/2023: <https://www.euronews.com/2022/02/17/ilir-meta-constitutional-court-overturns-impeachment-of-albania-s-president>
- European Court of Human Rights. (2021). Vetting proceedings leading to dismissal of Constitutional Court judge were fair and dismissal proportionate. Retrieved on 08/01/2023: <https://rm.coe.int/judgment-xhoxhaj-v-albania-en/1680a15d81>
- Gazeta Express. (2020). *Avdullah Hoti kryeministër i ri, koalicioni arriti të sigurojë 61 vota*. Gazeta Express. Retrieved on 08/01/2023: <https://www.gazetaexpress.com/avdullah-hoti-kryeministert-i-ri-61-deputete-japin-voten-pro/>
- Ginsburg, T. (2003). *Judicial Review in New Democracies: Constitutional Court in Asian Cases*. London: Cambridge University Press.
- Hansen, C. (2013). *What Would Real Democracy Look Like?* New Compass Press.

Retrieved on 08/01/2023: <http://new-compass.net/articles/what-would-real-democracy-look>

Harding, A., Leyland, P. & Groppi, T. (2009). Constitutional Courts: Forms, Functions and Practice in Comparative Perspective. In Harding, P. & Leyland, P. (Ed.): *Constitutional Courts: A Comparative Study*. Wildy, Simmonds and Hill.

Huntington, S. P. (1993). *The Third Wave: Democratization in the Late Twentieth Century*. University of Oklahoma Press.

INSTAT. (2011). Population and Householding Census. Retrieved on 08/01/2023: https://web.archive.org/web/20170808015849/http://www.instat.gov.al/media/177354/main_results_population_and_housing_census_2011.pdf

Jarvis, C. (2000). The Rise and Fall of Albania's Pyramid Schemes, *Finance & Development*, 37(1).

Jeremić, V. (2018). *Radomir Laban: Osuđeni sudija*. Danas. Retrieved on 08/01/2023: <https://www.danas.rs/vesti/drustvo/radomir-laban-osudjeni-sudija/>

Kelsen, H. (1942). Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution. *The Journal of Politics*, 1942(2).

Kelsen, H. (2009). *Pure Theory of Law*. New Jersey: The Lawbook Exchange Ltd.

Koinova, M. (2000). *Roma of Albania*. Center for Documentation and Information on Minorities in Europe - Southeast Europe.

Kosovo National Assembly. (2008). Kosovo's Constitution of 2008 with Amendments through 2016. Retrieved on 08/01/2023: https://www.constituteproject.org/constitution/Kosovo_2016.pdf?lang=en

Kosovo National Assembly. (2008). On the Constitutional Court of the Republic of Kosovo. Retrieved on 08/01/2023: <https://gjk-ks.org/wp-content/uploads/2017/11/LAW-ON-THE-CONSTITUTIONAL-COURT-OF-THE-REPUBLIC-OF-KOSOVO.pdf>

Kostreci, K. & Picari, M. (2020). *Albanian Parliament Poised to Overrule Veto on Controversial Media Laws*. Voanews. Retrieved on 08/01/2023: <https://www.voanews.com/a/press-freedom-albanian-parliament-poised-overrule-veto-controversial-media-laws/6182680.html>

- Kote, K. (2022). *US Ambassador Hails Ibrahimi's Appointment as C. Court Judge*. Albanian Daily News. Retrieved on 08/01/2023: <https://albaniadailynews.com/news/us-ambassador-hails-ibrahimi-s-appointment-as-c-court-judge>
- Likmeta, B. (2011). *Rightists and Greeks Denounce Albania Census*. Balkan Insight. Retrieved on 08/01/2023: <https://balkaninsight.com/2011/10/05/albania-population-census-stirs-calls-for-boycott/>
- Manhertz, T. (2020). *Alkotmánybíróági hatáskörök jogösszehasonlításban történő vizsgálata*. PhD Thesis. Doctoral School of Law and Political Sciences of the Pázmány Péter Catholic University.
- Ndoj, D. (2015). The Political Discourse on the Albanian-Greek 'Sea Agreement' Dispute, *International Journal of Academic Research and Reflection*, 7(3). Retrieved on 08/01/2023: <https://www.idpublications.org/wp-content/uploads/2015/09/THE-POLITICAL-DISOURSE-ON-THE-ALBANIAN-GREEK-%E2%80%99SEA-AGREEMENT%E2%80%99-DISPUTE.pdf>
- Peshkopia, R. (2014). *Conditioning Democratization: Institutional Reforms and EU Membership Conditionality in Albania and Macedonia*. London–New York: Anthem Press.
- Prahmani, B. (2021). Judicial review and political (in)stability in Kosovo, *Eastern Journal of European Studies*, 12(2).
- Réti, Gy. (2000): *Albánia sorsfordulói*. Budapest, Aula Kiadó.
- Reuters. (2018). *Kosovo appoints fugitive from Serbia as constitutional court judge*. Reuters. Retrieved on 08/01/2023: <https://www.reuters.com/article/us-kosovo-judge-idUSKBN1KU246?fbclid=IwAR00RwbmYOSoKM8-6E1Nn302WKIO9ZORqLTepgKoRAwknkj5b2ewQEIZYc0>
- Šemić, A. (2022). Despite its weaknesses the vetting process remains the reform of paramount importance in Albania. *European Western Balkans*. Retrieved on 08/01/2023: <https://europeanwesternbalkans.com/2022/06/16/despite-its-weaknesses-the-vetting-process-remains-the-reform-of-paramount-importance-in-albania/>
- The Sofia Globe. (2014). *Kosovo president asks constitutional court for clarity on nomination of prime minister*. The Sofia Globe. Retrieved on 08/01/2023: <https://sofiaglobe.com/2014/06/19/kosovo-president-asks-constitutional->

[court-for-clarity-on-nomination-of-prime-minister/](#)

Tirana Times. (2020). The Parliament Approves Altin Binaj as the new judge of the Constitutional Court. *Tirana Times*. Retrieved on 08/01/2023: <https://www.tiranatimes.com/?p=148408?p=148408>

Trkanjec, Z. (2020). Kosovo's President Thaci resigns after war crimes indictment confirmed. Euractiv. Retrieved on 08/01/2023: <https://www.euractiv.com/section/enlargement/news/kosovos-president-thaci-resigns-after-war-crimes-indictment-confirmed/>

United Nations Mission in Kosovo. (2001). Constitutional Framework for Provisional Self-Government in Kosovo. Retrieved on 08/01/2023: http://www.comparativeconstitutionsproject.org/files/Kosovo_2001.pdf

United Nations Security Council. (1999). Resolution 1244. Retrieved on 08/01/2023: https://peacemaker.un.org/sites/peacemaker.un.org/files/990610_SCR1244%281999%29.pdf

United Nations Security Council. (2007). Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council. Retrieved in 24/01/2023: <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20168.pdf>

Vanberg, G. (2015). Constitutional Courts in Comparative Perspective: A Theoretical Assessment, *Annual Review of Political Science*, 2015(18). Venice Commission. (1997). The Composition of Constitutional Courts. European Commission for Democracy Through Law. Retrieved on 08/01/2023: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e)

Venice Commission. (2020). On the Appointment of Judges to the Constitutional Court. Retrieved on 08/01/2023: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)010-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)010-e)

Vickers, M. (2010). *The Greek Minority in Albania – Current Tensions*. Shrivenham: Defence Academy of the United Kingdom.