

### Kosovar Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses

By Dren Doli\* & Fisnik Korenica\*\*

#### A. Introduction

Having gone through an international process on status settlement, in the aftermath of the proclamation of independence, the Kosovo Assembly adopted a Constitution and a range of essential laws.<sup>1</sup> One of the very basic laws adopted in the aftermath of independence is the Law on the Constitutional Court. The Ahtisaari Commission had given a singular importance to the latter, having seen the Kosovan Constitutional Court as one of the most important guarantors of democracy in constitutional terms. In an Ahtisaarian view, the Kosovan Constitutional Court is, *inter alia*, thought of as a guarantor of the ethnic communities' constitutional rights. As a result, the law concerned along with the Constitution of Kosovo determined the organization and functioning of the Kosovo Constitutional Court.

For many, the question of why it is important to stick to the analysis of the jurisdiction of a Constitutional Court is almost not sensible. The explanation, no doubt, lies in the fact that many do not evaluate the Constitutional Court's influence on the predetermined principles upon which the latter exercises its influence. Therefore, though it is not an objective of this paper, it is worth-noting that in Kelsen's view, the Constitutional Court should be a product of a wide political compromise, and its composition should enjoy high qualified judges whose practical and professional experience would guarantee a greatly influential

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\* Dren Doli is a Senior Researcher of Law and Politics, and a Senior Lecturer of *Law Principles* at the Universum University College, having served earlier as a Senior Legal Executive for Integration at the Kosovo Prime Minister. Email: dren.doli@universum-ks.org.

\*\*Fisnik Korenica is a Lecturer of *Public Law* at the Universum University College. In addition, Korenica lectures the *Theory of State and Law* at the University of Prishtina. The authors want to thank the anonymous peer-reviewers and the Editor-in-Chief of the German Law Journal, whose help to improve the standard of this article has been indispensable. Email: fisnik.korenica@universum-ks.org.

<sup>1</sup> A multiethnic commission has drafted the Constitution of Kosovo, adding that a huge international presence has been apparent in the drafting process. The same presence has been observed in the process of drafting the very essential laws of the new polity as well. See, e.g., Joseph Marko, *The New Constitution of Kosovo from the Regional Perspective*, 33 REV. CENT. & E. EUR. L. 437 (2008); see also John Tunheim, *Rule of Law and the Kosovo Constitution*, 18 MINN. J. INT'L L. 371 (2009).

and just product in the final case.<sup>2</sup> From a very brief analysis, one would have said that the law concerned preconditions such features for the Kosovo Constitutional Court. The aim of the paper, however, is not to speak about the organization of the latter, but rather it is to discuss and analyze the limits and sources of the Constitutional Court's jurisdiction. As a result, our discussions and analyses will be aimed at finding ways to sharpen the Constitutional Court's jurisdiction, which in the end will further the influence and importance of the latter vis-à-vis the public order.

The Kosovan Constitutional Court, therefore, is rather important for the just-established polity. From the perspective of the performance of a post-communist constitutional court, one would argue that the latter should play a very rigid role in determining and banning the unconstitutional laws,<sup>3</sup> which can directly interfere with the democratic development of a fragile polity. This is a common benchmark that one would seek to evaluate while reviewing constitutional courts' laws. On the other side, a constitutional court should be able to subordinate the governmental policies to law and constitution.<sup>4</sup> Hence, the jurisdiction of a Constitutional Court should be sufficiently capable of delivering powerful rulings whose influence vis-à-vis the politics of the day would be constant.

Thus, the establishment of constitutional jurisdiction is linked with the desire to guarantee democratic constitutional stability in the light of past and present dangers and to prevent constitutional mandates from being eroded and eventually suppressed by a parliamentary majority which disregards the Constitution. The objective of constitutional jurisdiction is to defend the Constitution from possible situations which might threaten its integrity.<sup>5</sup>

Preliminarily, it is important to note that the Constitutional Court is the institution that should ensure the "rule of the constitution," which of course is subject to the Constitution only. In the meantime, it is of a great interest to argue that the role of the Constitutional

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<sup>2</sup> Pablo Santolaya, *The Procedure at the Spanish Constitutional Court in Cases Concerning Conflict Between Certain Authorities of Autonomous Regions*, in SEMINAR ON "CASES OF CONFLICTS OF COMPETENCE BETWEEN STATE POWERS BEFORE THE CONSTITUTIONAL COURT", European Commission for Democracy Through Law (Venice Commission), 28 September 2000, CDL-JU (2000) 29, available at [http://www.venice.coe.int/docs/2000/CDL-JU\(2000\)029-e.asp](http://www.venice.coe.int/docs/2000/CDL-JU(2000)029-e.asp).

<sup>3</sup> Herman Schwartz, *Eastern Europe's Constitutional Courts*, 9 J. DEMOCRACY 100 (1998).

<sup>4</sup> See Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MOD. L. REV. 1 (2001).

<sup>5</sup> Luis Lopez-Guerra, *The Role and Competences of the Constitutional Court*, in THE ROLE OF THE CONSTITUTIONAL COURT IN THE CONSOLIDATION OF THE RULE OF LAW, European Commission for Democracy Through Law (Venice Commission), UniDem Seminar Bucharest, 8–10 June 1994, CDL-STD (1994) 010, available at [http://www.venice.coe.int/docs/1994/CDL-STD\(1994\)010-e.asp](http://www.venice.coe.int/docs/1994/CDL-STD(1994)010-e.asp).

Court is not only to defend the constitutionality of laws, but also to interpret the Constitution. As such, the *interpretative role* of the constitutional courts is highly influential vis-à-vis the public life, given that it practically explains and prescribes the constitutional rules, and makes rules which in the view of the Constitution should be concretized. The rules concerned, then, become legally effective and binding. This, of course, can show no political bias, meaning that political questions, as opposed to the constitutional interpretations, do not fall within the jurisdiction of a constitutional court.<sup>6,7</sup>

Following that, let us then show the target of the paper. We aim to review the Constitutional Court's jurisdictional framework both at the Kosovo Constitution and at the Kosovo Law on Constitutional Court while discussing their strengths and weaknesses. Hence, the paper will show the gaps within the Constitutional Court's jurisdictional framework as a way for facilitating the legislative reform on the framework concerned. To meet this end, we provide analyses for assessing whether the weaknesses and strengths concerned stand in harmony with the Venice Commission's benchmarks and many other widely accepted benchmarks. Having done so, we then make a comparison between the legal choices followed by the framework concerned, and the choices adopted by most of the Western Balkans countries' constitutional court laws. At that point, we intend to enrich the paper with choices which in fact have been accepted by the western Balkans countries' laws but ignored by the Kosovo Law on Constitutional Court. This paper, as a result, mainly reviews articles 29 to 54 of the Kosovo's Law on Constitutional Court, which govern and regulate the jurisdictional and functioning matters of the court.

Hence, if asked why it is important to discuss the weaknesses of the framework, given that the Constitutional Court itself might provide solutions for such challenges; or, if it is in the Constitutional Court's competence to provide solutions for such jurisdictional challenges (weaknesses), why then should one fuss about it? In fact, this paper will search for the principle weaknesses, which of course, cannot be counteracted by the Constitutional Court itself, unless the law concerned explicitly provides certain amendments.

Let us then explain what these articles are exactly about. The most common function of a constitutional court is the control of the constitutionality of legal acts. This is in fact a matter of a given court's jurisdiction. However, the jurisdiction of a given court upon a specific issue is conditioned from certain legal procedures. As such, many procedures define the way through which the jurisdiction of a given court can be performed. In the light of that, the Constitution and the Law on the Constitutional Court of Kosovo determine the Constitutional Court's jurisdiction based on procedural and substantive mechanisms.

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<sup>6</sup> *Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova*, European Commission for Democracy Through Law (Venice Commission), Opinion no. 200/2002, 15 July 2002, CDL-AD (2002) 16.

<sup>7</sup> Lopez-Guerra, *supra* note 5.

From that perspective, articles 29–54 of the law concerned define the way which the jurisdiction of the Kosovo Constitutional Court can be specifically performed, thus showing the legal steps to be taken in every procedure when determining the constitutionality of acts, having comprehended that the Court’s jurisdiction is principally set by the Constitution.

What we will argue, while reviewing the law and the constitutional provisions concerned, is that the simplicity of the jurisdictional framework of the Kosovo Constitutional Court is not common-sensical in the logic of other Western Balkans countries. Having provided so, both the Constitution and the law concerned deliver insufficient regulation towards the Constitutional Court’s jurisdiction, which is in the meantime the argument that we hold in the paper.

### **B. The Jurisdiction of the Constitutional Court of Kosovo According to the Constitution**

The Kosovo Constitution establishes the Kosovo Constitutional Court as the “final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.”<sup>8</sup> In addition, the Constitutional Court is “fully independent in the performance of its responsibilities.”<sup>9</sup> Therefore, it is easily observed that the Constitutional Court is the final interpreter of the Constitution, meaning that its decisions cannot be legally appealed, while their enforcement is compulsory for every state institution. However, the first paragraph of article 112 does not mention the power of the Constitutional Court to control the compliance of sub-legislative acts, such as an administrative decision, with the Constitution. In that context, the general principles of the Kosovo Constitution do not describe the wide-range of powers that the Constitutional Court has, which might mislead the efforts for a straightforward interpretation of its powers.

Having shown the general principles of the Kosovo Constitution upon the Constitutional Court, let us then embark on the jurisdiction that the former assigns to the latter. Therefore, in order to better organize this paper, we will be dividing the latter into subchapters corresponding to how the provisions on the Constitutional Court of the Kosovo Constitution have been positioned. The Kosovo Constitution provides thirteen types of jurisdictional powers for the Constitutional Court, as following: first, the power to decide upon “questions of compatibility with the Constitution of laws, of decrees of President or Prime Minister, and of regulations of the Government;”<sup>10</sup> second, the power

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<sup>8</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 112, para. 1.

<sup>9</sup> *Id.* at para. 2.

<sup>10</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 2(1).

to decide upon the “compatibility with the Constitution of municipal statutes;”<sup>11</sup> third, the power to resolve “conflicts among constitutional competences of the Assembly of Kosovo, the President of Republic of Kosovo and the Government of Kosovo;”<sup>12</sup> fourth, the power to decide upon the “compatibility with the Constitution of a proposed referendum;”<sup>13</sup> fifth, the power to decide upon the “compatibility with the Constitution of a State of Emergency and the actions undertaken during the State of Emergency;”<sup>14</sup> sixth, the power to decide upon the “compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of constitutionality of the procedure followed;”<sup>15</sup> seventh, the power to decide upon “questions whether violations of the Constitution occurred during the election of the Assembly;”<sup>16</sup> eighth, the power to decide upon questions when “a municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities affected by such law or act;”<sup>17</sup> ninth, the power to decide upon questions about the contestation of “the constitutionality of decisions adopted by the Assembly;”<sup>18</sup> tenth, the power to decide upon questions of “whether the President of the Republic of Kosovo has committed a serious violation of the Constitution;”<sup>19</sup> eleventh, the power to decide upon questions about the violations undertaken by public authorities “for individual rights and freedoms guaranteed by the Constitution;”<sup>20</sup> twelfth, the power to decide upon questions arising from the regular “courts which can refer questions to the Constitutional Court on the constitutional compatibility of a law when it is raised in a judicial proceedings and the referring court is uncertain as to the compatibility of the contested law with the Constitution;”<sup>21</sup> and thirteenth, the power to decide upon questions arising from the “proposed constitutional amendments before approval by the Assembly.”

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<sup>11</sup> *Id.* at para. 2(2).

<sup>12</sup> *Id.* at para. 3(1).

<sup>13</sup> *Id.* at para. 3(2).

<sup>14</sup> *Id.* at para. 3(3).

<sup>15</sup> *Id.* at para. 3(4).

<sup>16</sup> *Id.* at para. 3(5).

<sup>17</sup> *Id.* at para. 3(4).

<sup>18</sup> *Id.* at para. 3(5).

<sup>19</sup> *Id.* at para. 3(6).

<sup>20</sup> *Id.* at para. 3(7).

<sup>21</sup> *Id.* at para. 3(8).

Apart from the specific jurisdictions provided for the Constitutional Court, the Kosovo Constitution determines that “additional jurisdiction [for the Constitutional Court] may be determined by law.”<sup>22</sup> Therefore, prior to embarking on the specific jurisdictions’ analyses, let us scrutinize the latter paragraph of the Constitution. It is common sense that the Constitution should determine the exact powers which a state body might hold. Apart from that, it is logically argued that the Constitution should not leave “open gates” for delivering more powers to a top state body from a given parliament. In that context, the “additional jurisdiction” provided by the Kosovo Constitution allows the parliament to give extra powers to the Constitutional Court. Such powers, according to the Constitution, might be delivered by law. In that perspective, “additional jurisdiction” would in fact allow the Kosovo Assembly to attach more powers to the Constitutional Court, as opposed to those that have been specifically determined by the Constitution. Therefore, in the light of this paragraph, the “additional jurisdiction” opens the possibility to disturb the institutional balances, given that the Assembly would be constitutionally able to allow more powers to the Constitutional Court than those granted by the Constitution *per se*. In that perspective, with a view to the institutional balances provided by the Constitution, the constitutional provision on the “additional jurisdiction” seems to be unclear and illogical, given that the powers delivered by the Constitution for the Constitutional Court should be clearly determined and not left opened for the Assembly. It is therefore argued that, the “additional jurisdiction” would, *inter alia*, open the risk for a conflict of interest between the Assembly and the Constitutional Court. As a result, since the Constitutional Court should check the constitutionality of Assembly’s laws, then the “additional jurisdiction”—provided by the Assembly for the Constitutional Court—would assume a prejudiced position of the latter towards the laws of an Assembly which “allows more powers” to the Constitutional Court. Having said so, this paragraph stands illogically with the constitutional spirit, given that “open gates” for delivering more powers to a top state institution such as the Constitutional Court should have been closed by the adoption of the Constitution. If not, then, from a legal-rational point of view one would say that the Constitution is not the only “limit and source” of powers for the top institutions of the state, adding that this would misbalance the constitutional model of separation of powers. Moreover, from the Venice Commission’s view, there are several fundamental questions relating to the Constitutional Court that require “constitutional rather than only statutory regulation,” and as such the jurisdiction of the Constitutional Court is one of the fundamental questions for the Court itself.<sup>23</sup> In this context, the argument that the

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<sup>22</sup> *Id.* at para. 10.

<sup>23</sup> See *supra* note 6 (reporting on the issue of certainty in terms of jurisdiction and other fundamental issues relating to the Constitutional Court of the Republic of Moldova). “The list of subjects entitled to bring a case before the Constitutional Court should be provided for directly in the Constitution and not be left to the Law on the Constitutional Court (as set out in Article 135.3). The same is true for other fundamental questions relating to the Constitutional Court as immunities of the constitutional judges, guarantees of their independence, the termination of their mandates etc. Such issues require a constitutional rather than only statutory regulation.”

*additional jurisdiction delivered through law* can lead to a lower standard for the law concerned is within the explicit views and benchmarks of the Venice Commission.

*I. Jurisdiction on Controlling the Constitutionality of Laws, Decrees, Regulations and Municipality Statutes*

The Kosovo Constitution determines that the Constitutional Court has jurisdiction to control the constitutionality of laws, decrees of the President and the Prime Minister and regulations of the Government. At this point, one can question whether the power to review the constitutionality of laws stands as the key authority of the Kosovan Constitutional Court. Being led by the latter, Luis López Guerra acknowledges that the very justification of the Constitutional Court's *existence* is exactly the competence to review the compatibility of laws with the constitution. Additionally, within the Kelsenian logic, the monopoly to annul the acts of parliament if they are considered unconstitutional would be the *raison d'être* of the constitutional court.<sup>24</sup> Hence, seen from this perspective, the competence to rule upon the constitutionality of laws adopted by the Assembly is a common benchmark for all Constitutional Courts. However, in Helmut Steinberger's argument, normally there are two different procedures of the judicial review of laws. First, the preventive control is a control of the constitutionality of the law exercised prior to its adoption, and second, the repressive control is a control of the constitutionality of laws that have already been adopted by the Assembly.<sup>25</sup> To this extent, the Kosovan Constitutional Court is vested with the power to exercise repressive control of the constitutionality of laws. However, as one could observe in the last part of this article, the preventive control of the Court is exercised only in cases of the review of the compatibility of constitutional amendments with binding international agreements.<sup>26</sup>

In the light of this specialized jurisdiction of the Constitutional Court, it is worth-stressing that, excluding laws and decrees, the Government issues not only regulations. In fact, the Government issues regulations, administrative instructions and executive decisions. The administrative instructions issued by the Government stand as abstract acts, and therefore

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<sup>24</sup> Lopez-Guerra, *supra* note 5; see also *supra* note 6.

<sup>25</sup> Helmut Steinberger, *Models of Constitutional Jurisdiction*, European Commission for Democracy Through Law (Venice Commission), 1993, CDL-STD (1993) 002. Accordingly, Guerra argues that although the procedure to review the constitutionality of laws is a common standard for all constitutional courts, there are differences as regards the procedures followed. In his argument there are mainly three types of procedures for review of constitutionality of laws: (1) preventive control, (2) control by action, and (3) incidental control. See Lopez-Guerra *supra* note 5.

<sup>26</sup> For example, the French Constitution provides that legal acts of both houses of the parliament, before coming into force, should be referred to the Constitutional Council, which shall review the compatibility of the legal act concerned with the constitution. See LA CONSTITUTION DU 4 OCTOBRE 1958 [CONST.] art. 61 (Fr.). An English version of the French Constitution is also available at <http://www.assemblee-nationale.fr/english/8ab.asp>. Therefore, such a procedure is purely a preventive review exercised by the court.

they do not deal with individual cases. In that prism, the Constitution does not specifically assign to the Constitutional Court the jurisdiction to control the constitutionality of administrative instructions of the Government and ministries, thus leaving an unclear situation towards this category of legal acts. If this is the case, then the Constitutional Court should either interpret the word “regulation” as everything that might be considered an abstract legal act, inside the framework of the government’s legal acts, or should reserve itself from judging the administrative instructions’ constitutionality.<sup>27</sup> Moreover, the Government conducts its activity by issuing executive decisions. In that prism, executive decisions are legal acts that deal with individual and concrete cases, and therefore they have no abstract content. In that context, the Constitution does not assign any jurisdiction to the Constitutional Court to check the governmental executive decisions’ constitutionality. From that perspective, the decrees of the Prime Minister worded in this paragraph of the Constitution do not consist of the executive decisions of the Government, given that these are two dissimilar acts. Therefore, the Constitution and the Law on Constitutional Court do not specifically show what the powers of the Constitutional Court are vis-à-vis the executive decisions of the Government, having understood that the *law in force* of Kosovo provides procedures where the Government as a collective body is assigned with the power to issue executive decisions.<sup>28</sup> Of course, however, in the Venice Commission’s argument, the review of constitutionality of sub-legislative acts by the Constitutional Court is not a logical benchmark. In this view, Steinberger considers that it is an appropriate competence for constitutional courts to review only the constitutionality of laws, since the review of other sub-legislative acts might very well be undertaken by ordinary courts. Moreover, Steinberger, with a more restrictive approach, considers that this monopoly should be extended also to the laws amending the constitution.<sup>29</sup> Hence, with a view to the Kosovo’s Constitutional Court, one can argue that the power to control the constitutionality of decrees of the President and the Prime Minister does not stand in harmony with the Venice Commission’s standards, though the power to control the constitutionality of sub-laws is far from being clear.

On the other side, it is important to search whether the Constitutional Court can ban the whole legal act which it reviews or no more than the contested provisions. The

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<sup>27</sup> Such an example is the “Administrative Instruction No. 14/2008 for the Composition of draft-laws and sub-legislative acts.” This Administrative Instruction was adopted on the 30 July 2008 under the Kosovo Constitution’s authority. This Administrative Instruction determines the legal techniques to be followed during the composition of legal acts. As such, its content is general and abstract; therefore, administrative instructions can be considered lower-than-law legal acts, with a general content.

<sup>28</sup> An example of an executive decision of the Government, as opposed to the decree of the Prime Minister, is the “Executive Decision No. 03/41 of 23/October/2008 for *Appointment of the Temporary Auditing Commission for the KEC*.” The legal authority issuing this decision is the Government of Kosovo, as opposed to the Prime Minister decrees.

<sup>29</sup> Steinberger, *supra* note 25.

Constitution of Kosovo and the Law on Constitutional Court do not specify whether the Court should review the law in its entirety or should be bound to the request of the party involved, thus delivering its decision for compatibility only as regard the specific provision of the law. Therefore, in the Venice Commission's view, the law on Constitutional Court should specify whether the court should review the law in its entirety or whether the Court should limit itself only within the request of the appellant. However, in the opinion of the Venice Commission, the right of the Constitutional Court to review the law in its entirety regardless of the request of the appellant would provide to the Court additional discretion.<sup>30</sup> This would of course lead to an arbitrary power for the latter. Therefore, in view of the Venice Commission's benchmarks, the law on constitutional court of Kosovo should have strictly clarified this, so as to leave no place for potential judicial arbitrariness. On the other side, one would question whether the issue of *res judicata* must be prescribed by the law governing with the Constitutional Court. In light of this question, in its advisory opinion, the Venice Commission has considered that it is against the logic of *res judicata* if the constitutional court would review the constitutionality of the law or the legality of an act if it has already been reviewed by the Court.<sup>31</sup> This stands also unspecified by the Law on Constitutional Court of Kosovo, meaning that a lowered benchmark is observed.

Concerning the jurisdiction of the Constitutional Court, article 113 paragraph 2 of the Constitution of Kosovo defines that:

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: (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; [and] (2) the compatibility with the Constitution of municipal statutes.

So, let us deeply review each segment of this paragraph. In the first instance, as seen, the Assembly of Kosovo is assigned with the power to contest before the Constitutional Court the constitutionality of laws, decrees and regulations (as specified above). The referral concerned "shall be filed by . . . one fourth (¼) of the deputies of the Assembly of the

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<sup>30</sup> *Opinion on the Draft Law on the Constitutional Court of Montenegro*, European Commission for Democracy Through Law (Venice Commission), Opinion no. 479/2008, 24 October 2008, CDL-AD (2008) 030. However, in the case of Austrian Constitutional Court, the latter is bound by the request of the appellant, and therefore the court is not authorized to act upon its discretion.

<sup>31</sup> *Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia*, European Commission for Democracy Through Law (Venice Commission), 22 January 2001, CDL-INF (2001) 2.

Republic of Kosovo.”<sup>32</sup> At this point, it can be argued that just twenty-five percent of the Members of Parliament (MP) of the Kosovo Assembly might initiate the procedure of constitutional review before the Constitutional Court of Kosovo. As this law determines, it is pretty easy for any small political party to start the constitutional review procedure against a contested law, decree or regulation in the Constitutional Court, thus showing that no law of Assembly, decree of President and Prime Minister or regulation of Government can stand untouchable by the Constitutional Court. The paragraph concerned gives the possibility of a small group of MPs (at minimum twenty-five percent), such as an oppositional party, to contest the constitutionality of the acts concerned, therefore leading to the suggestion that the Constitutional Court’s jurisdiction on controlling the constitutionality is easily initiated from a parliamentary perspective. Furthermore, the jurisdiction of the Constitutional Court is exercised upon the substance of laws and the procedure followed for their adoption, as provided by the Constitution: “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.”<sup>33</sup> As a result, being based in the above provision, one can argue that, except the right to challenge the constitutionality of laws, the Constitutional Court is also authorized to control the constitutionality of Assembly’s decision if raised by a qualified number of MPs. Still, the term decision is to be qualified, meaning that the exact edge of what a decision is should have been determined (for example, is the adoption of a law in the Assembly a decision?).

However, as far as the number of deputies required to initiate the dispute before the Constitutional Court is concerned, the Venice Commission held that it is not an ordinary standard to allow a small number of deputies to challenge before the Constitutional Court the constitutionality of a law. Therefore, in the report concerning the Constitutional Court Act of the Republic of Moldova, the Venice Commission argued that the law should increase the number of deputies required to challenge an act of the parliament to the Constitutional Court.<sup>34</sup> In addition, the Commission argued that the rationale for such a limitation is to allow the initiation of procedures only for more serious cases which might endanger the “supremacy of the constitution.”<sup>35</sup> To further root this, we take the example of a former judge of the Constitutional Court of Russia, who asserted that:

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<sup>32</sup> Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 29, para. 1.

<sup>33</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 5.

<sup>34</sup> *Supra* note 6. In this case, the report of the Venice Commission stipulates that the number of deputies (5 deputies, roughly 10% of the total number of the deputies) needed to initiate a procedure before the constitutional court is too low (it should be noted that the Parliament of the Republic of Moldova is composed of 101 members), and therefore, such a threshold might overburden the constitutional court.

<sup>35</sup> *Supra* note 28.

When in December 1995, before the Duma elections and in the very heat of the electoral campaign, we received a petition signed by a group of deputies concerning the constitutional validity of the five percent barrier for party lists, we refused to consider it. I opposed considering this request, because I believe that the Court should not be itching for a political fight.<sup>36</sup>

Therefore, one can argue that the small number of MPs required to bring a case before the Constitutional Court of Kosovo, on the one side, advances the oppositional vibrancy in the parliament. However, as by the benchmark of the Venice Commission, it does engage the Constitutional Court in political fights, which is of course not appreciated. On the other side, one would argue that the provision that allows a small number of MPs to bring a question before the Constitutional Court is made to enable the ethnic minority MPs in the parliament to contest the constitutionality of an act before the Constitutional Court, thus increasing the presence and capacity of ethnic minorities' vibrancy in the constitutional justice.

Accordingly, being based in the Venice Commission's benchmarks, it seems that there are three generally accepted categories of applicants that might initiate the procedure for constitutional review of a legal act: first, central state institutions and municipal institutions; second, regular courts; and third, private persons and the constitutional court itself.<sup>37</sup> Moreover, the Venice Commission Report on the Constitutional Court Act of the Republic of Serbia argues that it is not appropriate to provide a right to certain categories of institutions to be engaged in the Constitutional Court's proceedings in any time<sup>38</sup> - say in the hearing procedure - which, as a benchmark, is well rooted in the Kosovo's jurisdictional framework. Therefore, "this technique could also strengthen the judicial character of the

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<sup>36</sup> Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 153 (2001) (quoting Interview by Leonid Nikitinsky with Boris Ebzeev, Justice of the Constitutional Court of the Russian Federation at WINTER E. EUR. CONST. REV. 83-85, 87 (1997).

<sup>37</sup> Steinberger, *supra* note 25. As regards the competence of the Constitutional Court to initiate the review procedure ex-officio, Steinberger considers that this type of procedure is quite unusual for a Constitutional Court. Also, regarding the latter see *supra* note 30; *Comments on the Draft Law on the Constitutional Court of the Republic of Serbia*, European Commission for Democracy Through Law (Venice Commission), Opinion no. 445/2007, 7 November 2007, CDL-AD (2007) 039.

<sup>38</sup> *Comments on the Draft Law on the Constitutional Court of the Republic of Serbia*, European Commission for Democracy Through Law (Venice Commission), Opinion no. 445/2007, 7 November 2007, CDL-AD (2007) 039. In this regard, Constitutional Court Act of the Republic of Serbia provides for a special categories of participants described as "authorized propounders," which attributes to the latter a right to engage in proceedings of the court at any time.

proceedings vis-à-vis the political character of many questions to be decided by a Constitutional Court.”<sup>39</sup> Hence, the Kosovan law on Constitutional Court has very well embraced the Venice Commission’s benchmark, which has avoided some evidenced problems as regards the participation and the position of certain categories of persons or institutions in the Court’s proceedings.

What seems a deep weakness in the latter paragraph is the lack of the Constitutional Court’s *advisory jurisdiction*. In fact, the Kosovo Assembly might need, when it comes to laws’ constitutionality, an advisory opinion prior to adopting a given law. Admittedly, the Assembly might need to know whether a given draft-law, prior to being adopted, is constitutional. If this would be the case, the Constitutional Court has no jurisdiction to give an advisory opinion for the constitutionality of a draft-law prior to being adopted, thus leading into a situation where only after the adoption of law has taken place can the latter’s constitutionality be checked. If that would happen, then the Law on Constitutional Court seems to have a proper weakness, whose consequences would be seen in cases when the Assembly might seem unsafe upon the constitutionality of a draft-law.<sup>40</sup> This, as argued earlier, leads to the argument that the Kosovo’s Constitutional Court has generally no *preventive control* powers, and instead it is mainly assigned with repressive powers. As a result, many would argue that the lack of preventive constitutional-control powers over the constitutionality of laws is unwise, since it would produce some sort of legal uncertainty.

As regulated by the abovementioned provision, the President, the Government, the Ombudsperson, and the Assembly have the right to contest the constitutionality of the acts concerned before the Constitutional Court.<sup>41</sup> However, in the very first observation,

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<sup>39</sup> *Comments by Mr. Grabenwarter, in COMMENTS ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SERBIA*, European Commission for Democracy Through Law (Venice Commission), Opinion no. 445/2007, 7 November 2007, CDL-AD (2007) 039, p. 4.

<sup>40</sup> See Law on the Constitutional Court of the Republic of Serbia, art. 66, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.html> (accessed on 1 October 2009). Unlike the Kosovo Law on Constitutional Court, the Serbian Law on Constitutional Court establishes the possibility of the Serbian Constitutional Court to review the constitutionality of laws before their promulgation, thus giving to the Court the possibility of issuing a decision upon the constitutionality of the draft-law concerned prior to adoption from the parliament.

<sup>41</sup> In the light of Albanian Constitutional Court jurisdiction, by contrast to the Kosovo Constitutional Court jurisdiction, there are four institutional actors that might proceed the constitutional review of a law: the President of Republic, the Prime Minister, less than 1/5 of the Assembly, and the Chairman of the High State Audit. See Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, L. No. 8577 of 10 February 2000. Contrary to Albania, the Croatian Constitutional Court might be activated when a law’s constitutionality is to be checked by these institutional actors: 1/5 of the Parliament, any committee of the Parliament, the President of Republic, the Government, the Supreme Court (or any court, with exceptions), and the Ombudsman. See The Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne Novine No. 49/02 of 3 May 2002, art. 35. With the broadest range of institutions, Serbian Law on Constitutional Court allows these institutional actors to proceed files at the Constitutional Court: the enactor of a law, statute of

the lack of the ability to make this intervention does not belong to the Prime Minister. Since the Government has the right to raise this procedure in the Constitutional Court, it seems illogical that the right to do so is not granted to the Prime Minister also. In fact, even though the Prime Minister's aim to contest the acts concerned can be put in place through the Government, this might not be the usual circumstance when it comes to broad-coalition governments or technical governments. The argument follows, because it is not said that in the latter cases the Prime Minister should have the majority of votes in the Government for making such a contestation before the Constitutional Court. Hence, it is suggested that, given these circumstances, the Prime Minister alone should have been granted the right to raise the procedure of constitutional review.<sup>42</sup>

What seems to some extent illogical is that the Government is capable to contest the constitutionality of laws, decrees and regulations. Excepting laws adopted by the Assembly and decrees issued by the President, it seems illogical for a Law on Constitutional Court to permit the Government to contest the constitutionality of Prime Minister's decrees and Government regulations, given that the Government itself is the author of such regulations and its Prime Minister is the adopter of the decrees concerned. If there would be a contestation for the Prime Minister's decrees and Government regulations' constitutionality, the Government could just abrogate them, without needing to do that through the Constitutional Court's jurisdiction.<sup>43</sup>

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an autonomous province, or local self-government entity; political parties, trade union organizations or citizens' associations whose statute or other general act is being assessed for constitutionality and legality or whose prohibition of activity is being decided upon, etc. See Law on the Constitutional Court of the Republic of Serbia, art. 66, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.html> (accessed on 1 October 2009). Similarly, the Slovenian law allows these institutions to raise constitutional review procedures: the National Assembly; the National Council; the Government; the Ombudsman for human rights; the Information Commissioner; the Bank of Slovenia or the Court of Audit; the State Attorney General; representative bodies of local communities; representative associations of local communities; national representative trade unions. See The Constitutional Court Act, Official Gazette of the Republic of Slovenia, Nos. 15/94, 15/07, and 64/07, art. 21.

<sup>42</sup> During the Kosovo's Ceku Government, for instance, the Prime Minister Agim Ceku faced essential problems as regards the direction of the cabinet of ministers. Since the Prime Minister Ceku came from a party that had only seven parliamentary votes—though it was a part of the coalition of parties holding the government—he was not able to direct the ministers and the cabinet as a whole. As a result, in such circumstances, the Prime Minister alone would not be able to represent the whole cabinet of ministers as most of the ministers would disobey his directions and would practically dismiss his rulings. To this extent, the lack of the right of Prime Minister to contest or to bring a question before the Constitutional Court is very significant, given that the Prime Minister's aim to bring a question before the Court is not likely to be achieved through the cabinet of ministers, since the majority of them could refuse it.

<sup>43</sup> Slovenian Law does not permit any authorized institution or individual to initiate the constitutional review proceedings at the Constitutional Court if the law or legal act concerned has been adopted by the "initiator" itself. See The Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 15/94, 15/07 and 64/07, art. 23(a), para. 2.

The Ombudsperson's ability to contest the constitutionality of laws, decrees and regulations (as specified above) seems to be of a high democratic standard, given that the Ombudsperson's position in protecting the human rights and freedoms is crucial. As a result, the referral that might come from the Ombudsperson can represent the abused needs and concerns, therefore making the Constitutional Court's jurisdiction enriched by the Ombudsperson's capacity to penetrate in the contestation of constitutionality of such acts.

Another important issue that the paragraph concerned sets forth is the range of institutions sanctioned to challenge the constitutionality of municipal statutes. This dispute can come into place only if raised by the Assembly, President of Republic, Government or Ombudsperson. All of these four institutions can in fact proceed the contestation of a given municipality statute's constitutionality. What is the rationale of this jurisdiction of the Constitutional Court then? It is worth noting that the *statute* of a given municipality is the highest local government act, meaning that the statutes concerned regulate the organization and functioning of the municipal institutions. However, there is a limit to the powers that the municipalities have, according to the Constitution. At that point, the rationality of the Constitutional Court's jurisdiction to control the constitutionality of municipal statutes, if requested by the above bodies, stands on the idea of *controlling the constitutional extent of powers* which have been guaranteed by the Constitution to a given municipality, and in the meantime have been extended by a local municipal assembly through its statute. In this context, the prescribed jurisdiction protects the local government's constitutional limited powers from being overridden by an unconstitutional statute.<sup>44</sup>

Still, the constitutionality of acts might not be challenged by central bodies merely, but also by the local institutions. Therefore, the question of the centralization of competences, halted by constitutional guarantees, can be put into the Constitutional Court's filter also. The Constitution provides that "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."<sup>45</sup> Building upon this article leads to the argument that the Constitutional Court has the jurisdiction to "save" municipalities from infringements that might come from the central institutions. At that point, the municipal bodies themselves can proceed with such questions to the Constitutional Court,

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<sup>44</sup> Serbian law uses the same logic regarding the possibility of central institutions, in this case the Government of Serbia, to request from the Constitutional Court to review the constitutionality or legality of local governments' decisions. Moreover, the Serbian law goes further when stating that any decision of autonomous provinces may be assessed for its compliance with the constitution and laws. See Law on the Constitutional Court of the Republic of Serbia, art. 67, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.html> (accessed on 1 October 2009).

<sup>45</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 4.

by contesting given laws or acts.<sup>46</sup> In the light of that, the jurisdiction of the Constitutional Court is an assurance that the constitutional guarantees for the local governance rights cannot be overridden by a central institution's act. Moreover, this stands as a benchmark in the view of Stienberger,<sup>47</sup> in addition to the support that the latter provides for the constitutional certainty. The jurisdiction concerned is not fully apparent however, meaning that the bodies that can utter this question on behalf of a given municipality have not been specified.<sup>48</sup>

What will be the amount of penalty that the Constitutional Court might put forth, if a law, regulation or decree of the President of Republic and the Prime Minister is found unconstitutional? The Law on Constitutional Court settles the question concerned by prescribing that, "[a] referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution."<sup>49</sup> Within the words of article 29 paragraph 2 of the Law on Constitutional Court, and in the light of article 113 of the Constitution, it is considered that the Constitutional Court should act only on behalf of the proceeded petition's request, thus making either a nullification of a segment of the contested act (if inquired so), or nullifying the whole legal act (as inquired), if unconstitutionality has been verified. Following this interpretation, though not strictly determined, one could argue that the latter stands in harmony with the Venice Commission's benchmarks,<sup>50</sup> thus leaving no place for arbitrary powers. On the other side, the Constitutional Court might put an *interim measure* upon the implementation of a given contested act, until the decision is reached.<sup>51</sup>

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<sup>46</sup> Unlike the Kosovo Constitution, the Slovenian law does specify that representative bodies of local communities may initiate the procedure in the Constitutional Court to review the constitutionality of a law, thus holding a safer environment of constitutional protection for local communities constitutional rights than in the Kosovo case. See The Constitutional Court Act art. 23(a), para. 1.

<sup>47</sup> Steinberger, *supra* note 25.

<sup>48</sup> "Municipality" is not the term used to specify the local institution, but the local administrative territory. As such, municipalities are governed by a major and an assembly, elected separately. Therefore, neither the Constitution nor the Law on Constitutional Court does specify which of these bodies has the right to initiate such a procedure. The argument follows because there might be a situation where a major contests the constitutionality of a given act in the Constitutional Court whereas the local assembly disagrees with the major's referral. At those potential cases, the jurisdiction of the Constitutional Court might be then perplexed towards the two different inquiries coming from the same municipality.

<sup>49</sup> Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 29, para. 2.

<sup>50</sup> See *supra* note 30. However, in the case of Austrian Constitutional Court, the latter is bound by the request of the appellant. Therefore, the court is not authorized to act upon its discretion.

<sup>51</sup> See Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 27.

Another important matter to be discussed here is whether the Constitutional Court's jurisdiction sets the border of dependability of the judicial decision to be taken with the petitioner's referral. In other words, can the jurisdiction of the Kosovan Constitutional Court go beyond the petitioner's request, when a withdrawal of referral takes place? Finding such an answer in the Law concerned is not viable, given that there are no signs for such an answer. Therefore, the Constitutional Court can either stand *inside the borders* of the request of petitioner, or *go beyond the borders*. Whatever the behaviour of the Constitutional Court will be, the Law on the Constitutional Court should have determined the paths that *might be followed* by the Court in these cases.<sup>52</sup> Therefore, whether the Court should close the procedure if the petitioner has been voluntarily withdrawn from the request is a question that finds no answer in the acts concerned.

*II. Jurisdiction on Resolving Conflicts of Constitutional Competences Between the President of Republic, the Assembly and the Government of Kosovo*

The Constitutional Court is authorized to resolve the potential conflict of constitutional competences between the President of Kosovo, the Assembly and the Government. As such, the President of Republic, the Assembly and the Government can refer questions of a potential "conflict among constitutional competences of the Assembly of Kosovo, the President of Republic of Kosovo and the Government of Kosovo"<sup>53</sup> to the Constitutional Court. In those cases, the referral "shall be filed by any authorized party in conflict or from any authorized party directly affected from the said conflict."<sup>54, 55, 56</sup> It is worth noting that, as a matter of benchmark, the competence of the Constitutional Court to decide upon the conflicts of competence should be limited to the "substantive legality" of the legal act of an institution. Thus, the Constitutional Court should review whether the

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<sup>52</sup> The Serbian Constitutional Court's jurisdiction is more tangible when it comes to the extent of jurisdiction exercised towards the petitioner's request. As such, "in the procedure of assessing constitutionality and legality, the Constitutional Court is not constrained by the request of the authorized propounder, i.e. initiator. Where the authorized propounder, or initiator, abandons the request, i.e. initiative, the Constitutional Court shall continue the procedure of assessing constitutionality or legality if it finds grounds for doing so." See Law on the Constitutional Court of the Republic of Serbia, art. 54, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.html> (accessed on 1 October 2009).

<sup>53</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 3(1).

<sup>54</sup> Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 31.

<sup>55</sup> Another important issue qualified as a conflict of competence is the case where none of the state authorities accept to retain or exercise a specific competence. Nonetheless, the Slovenian Constitutional Court Act has determined the Constitutional Court's jurisdiction to review even such disputes. See The Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 15/94, 15/07, and 64/07, art. 61, para. 2.

<sup>56</sup> The Montenegro Constitutional Court is authorized to resolve the conflict of competences from three institutional categories: (1) central institutions' conflicts; (2) local institutions' conflicts of competences; and (3) conflict of competences between central and local institutions. See CONSTITUTION OF THE REPUBLIC OF MONTENEGRO art. 149, para. 5.

institution concerned is competent to adopt legal acts in that specific circumstance and regarding that specific field. As such, in the Venice Commission's view, the Kosovan Constitutional Court should not enter into the merit of the case, or in other words, should not decide upon the substance of the legal act concerned.<sup>57</sup> This should have been clarified by the law *per se*, given its importance in the Venice Commission's view.

Admittedly, this type of jurisdiction is pretty substantial, given that it concerns substantive matters during the use of a constitutional competence from the given institutions. It is therefore clear that the jurisdiction to determine where the constitutional borders of a branch's competences rely is a very powerful tool of the Constitutional Court. In the view of the latter, Stainberger argues that there are several points that make the jurisdiction concerned recommendable. First, it is argued that the resolution of conflicts of competence is guided by constitutional principles and by an impartial institution (in this case the Constitutional Court). Second, it is argued that the outcomes will not be *predetermined* by the political influence of the incumbents or the opposition. Similarly, one would ask whether the conflict of constitutional competences could only happen between the President of Republic, the Assembly and the Government. Certainly, on the one hand, the potentiality of conflict for constitutional competences stands greater between these institutions, however not everything that might have been provided at this context is in place. We consider that, in the light of constitutional competences' conflict, the Constitutional Court is not vested with the power to solve a potential conflict between the judiciary and the President of Republic, Assembly and Government. From that perspective, provided the importance of the judiciary's independency, and having comprehended the usual attacks that the judiciary endures, the Constitution does not establish a jurisdiction to resolve the latter conflict. Following that, it is hard to consider that the jurisdiction of the Constitutional Court to resolve conflicts of constitutional competences is accurate, given the lack of the judiciary's existence in this bunch. Moreover, a common conflict of constitutional competences that might be raised is the conflict of constitutional competences between the President of Republic, the Assembly, the Kosovo Judicial Council and the Kosovo Prosecutorial Council. It is therefore understandable that this is a weakness in the Constitution of Kosovo, given that the judiciary's independence has not been well-protected in the light of the Constitutional Court's jurisdiction in the field of constitutional competences' conflict.

Another gap that this specific jurisdiction does not fill up is the potential conflict between the Prime Minister, the ministries of his Government, the Assembly and the President of Kosovo. As a consequence, the constitutional competences that the Prime Minister possesses, as opposed to those held by the Government, can alone enter into a conflict

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<sup>57</sup> Reinhold Huppmann, *The procedure at the Austrian Constitutional Court in Cases Concerning Disputes Between Different Powers*, in SEMINAR ON "CASES OF CONFLICTS OF COMPETENCE BETWEEN STATE POWERS BEFORE THE CONSTITUTIONAL COURT", European Commission for Democracy Through Law (Venice Commission), 8 June 2000, CDL-JU (2000) 31.

with the ministries', Assembly's and President's constitutional competences. From that prism, the Constitutional Court cannot accept a file from the Prime Minister who assumes that his constitutional competences have been harmed either by the President of the Republic or by the Assembly, or his Government's ministries. It is therefore seen that this is a weakness of the Constitution also, provided that the Prime Minister has been given individual competences by the Constitution. Thus the Prime Minister alone, as opposed to the Government as a collective, should have had a place in the procedure to request resolving of constitutional competences' conflict also.<sup>58</sup>

Another substantive issue that serves as a benchmark for Constitutional Court laws is whether the latter has determined the types of the conflicts of competence that the Constitutional Court might decide upon. Therefore, it is recommendable that the Constitutional Court Act should make a difference between first, positive conflicts of competence, which is the case when two or more institutions assert their competence over a certain field, and second, the negative conflicts of competence, which is the case when two or more institutions deny competence upon a certain field.<sup>59</sup> By contrast to the latter, the Kosovo's Law of Constitutional Court has not clarified well the term *conflict of competence*, which in the Venice Commission's view would not be seen as a logical rationale.

In addition, the Constitution provides no jurisdiction for the Constitutional Court to deal with conflict of competences between central and local institutions. Moreover, the former establishes no right for the latter to initiate such an issue. This is in fact a gap in the Constitutional Court's jurisdiction, given that it would deliver an illogical situation where the Constitutional Court's jurisdiction does not map the conflicts between two main levels of governance.<sup>60</sup> As explained above, the jurisdiction of the Constitutional Court to resolve the conflict of competence between local and central institutions, in the view of the Venice Commission, is a common benchmark. Therefore, the latter would have preconditioned a

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<sup>58</sup> The possibility of local governments to initiate a procedure to contest the constitutionality of laws in cases where their interest or competence is diminished is foreseen in the Albanian Law, Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, L. No. 8577 of 10 February 2000, art. 49, para. 2, Slovenian Law, The Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 15/94, 15/07, and 64/07, art. 23(a), para. 1, and Croatian Law, The Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne Novine No. 49/02 of 3 May 2002, art. 36.

<sup>59</sup> See *supra* notes 30, 38.

<sup>60</sup> It should be noted that, in the cases of Albanian Constitutional Court, Montenegro Constitutional Court, Serbian Constitutional Court and Slovenian Constitutional Court, the jurisdiction is not limited only to the conflict of competencies between the branches of government but is extended to the conflict of competences between central and local authorities also. See CONSTITUTION OF THE REPUBLIC OF MONTENEGRO art. 149, para. 5; CONSTITUTION OF THE REPUBLIC OF SERBIA art. 167, paras. 2–3; CONSTITUTION OF THE REPUBLIC OF SLOVENIA art. 160; Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, L. No. 8577 of 10 February 2000, art. 54, para. 1.

more distributive role for the Constitutional Court and would safeguard the vertical allocation of competencies and guarantee the local-self-government autonomy.<sup>61</sup> In this regard, the Kosovo's Law on the Constitutional Court has neglected and dismissed the jurisdiction to untie potential disputes between the local and central institutions. This, in our view, has not only neglected a Venice Commission standard, but has also neglected the potential problems that might grow up due to the heavy, and sometimes perplexed, territorial decentralization that the Ahtisaari Plan has set in Kosovo. On the other hand, though the law on the Constitutional Court of Kosovo does not explicitly refer to the conflict of competence between central and local institutions, in Steinberger's view the latter would help ease the tensions between ethnic-based territorial divisions and will provide an acceptable distribution of competences.<sup>62</sup> Therefore, here again, Guerra acknowledges that the significance and the characteristics of this jurisdiction vary according to the territorial organization of a given country. Hence, in the case of Spain, it was precisely this type of jurisdiction that helped shape the perception for the Constitutional Court as a "mediator among the autonomous regions" and the central government.<sup>63</sup> This would have therefore provided a smoother flow of authority between the central and local institutions from an Ahtisaarian decentralization perspective, whose central argument has an ethnic-based ground.

### *III. Jurisdiction upon the Constitutionality of Proposed Referenda*

Among the particular jurisdictions, the Constitutional Court also possesses the capacity to judge the "compatibility with the Constitution of a proposed referendum."<sup>64</sup> This, in the view of Guerra, has two reasons, which are of great importance. First, it is in the role of the Constitutional Court to assure "the stability of the constitutional system," where in most of the cases the Court's role is a determinant factor. Second, given the Constitutional Court's institutional position as an impartial and neutral authority, this type of jurisdiction would give to the court the possibility to "directly influence the political debate at a given moment",<sup>65</sup> though the latter would be seen by many as not desirable.

Among parties worn with the capability to demand this procedure, the Constitution determines that such requests "shall be filed by either the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo or the Government,"<sup>66</sup> and as a result the

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<sup>61</sup> Steinberger, *supra* note 25.

<sup>62</sup> *Id.*

<sup>63</sup> Lopez-Guerra, *supra* note 5.

<sup>64</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 3(2).

<sup>65</sup> Lopez-Guerra, *supra* note 5.

<sup>66</sup> Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 33.

proposed referendum “shall be held only after the Constitutional Court decides on the constitutionality of the proposed referendum.”<sup>67, 68</sup>

In the light of this specialized jurisdiction, is it important to see what the Constitutional Court can really do while judging the constitutionality of a proposed referendum? The Constitution has only two provisions that sanction the ‘referendum’ matters. First, the Constitution sets that “none of the laws of vital interest may be submitted to a referendum,”<sup>69</sup> and second, the Assembly “announces referenda in accordance with the law.”<sup>70</sup> Following these provisions of the Constitution, it is argued that the scope of the Constitutional Court’s jurisdiction for controlling the constitutionality of proposed-referenda is first, to check whether the proposed-referendum concerns a law that is in the list of vital laws determined by the Constitution, and second, to check whether the Assembly only has announced the referendum. Apart from these two obligations, the jurisdiction of the Constitutional Court in the field of referendum’s constitutionality is inexistent.

What might seem problematic for this provision, which is concerned with the Constitutional Court’s jurisdiction in the field of referendum’s constitutionality, are the standards upon which a law will be qualified as a vital interest.<sup>71</sup> In fact, the Constitution sets the names of the laws that are of vital interest; however, the laws proposed to be brought into a referendum might use a different name but still regulate the concerned substantial area. That might then cause perplexity for the Constitutional Court’s jurisdiction in the field. Moreover, if the law aimed to be put into a referendum concerns a judicial issue, then the judiciary should have also have the capability of filing the potential constitutional contestation into the Constitutional Court, given the judiciary’s independence complexity.

#### *IV. Jurisdiction upon State-of-Emergency Declaration, and the Actions Conducted During the State-of-Emergency*

An additional particular jurisdiction possessed by the Constitutional Court is the jurisdiction to rule upon the state-of-emergency cases. The Constitution establishes that

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<sup>67</sup> Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 34.

<sup>68</sup> It should be noted that the competence of Constitutional Court to review the compatibility of proposed referendum with the Constitution is also foreseen at the Constitutional Court Act of Croatia. See The Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne Novine No. 49/02 of 3 May 2002, art. 87–96.

<sup>69</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 81, para. 2.

<sup>70</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 65, para. 3.

<sup>71</sup> See CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 81.

the Constitutional Court has a jurisdiction to check the “compatibility with the Constitution of a State of Emergency and the actions undertaken during the State of Emergency.”<sup>72</sup> Following this provision, the Constitution sets that the Assembly, the President of Republic and the Government can proceed with a potential constitutional violation believed to have been caused in a state-of-emergency or actions taken during it before the Constitutional Court.<sup>73</sup> The power concerned of the Constitutional Court is highly authoritative. For that reason, also in the Steinberger’s view, the exclusion of certain categories of legal acts (in this case the emergency laws) from constitutional review would precondition the abuse of these instruments and might be inconsistent with the idea of “the legislator’s having to comply with the Constitution.”<sup>74</sup> Therefore, we argue that Kosovo’s Constitution provides a very safe subordination of laws to the Constitution, even though emergency situations might appear.

In fact, the Constitutional Court should address specific questions during the decision of issues in this category. If following the state-of-emergency provisions in the Constitution, it is stated that the state-of-emergency can only be declared when: “(1) there is a need for emergency defence measures; (2) there is [an] internal danger to the constitutional order or to public security; or (3) there is a natural disaster affecting all or part of the territory of the Republic of Kosovo.”<sup>75</sup> Only in the light of these provisions should the jurisdiction of the Constitutional Court be exercised, meaning that the very first substantial matter that the latter can judge are the above three circumstances, one of which should happen in order for the state-of-emergency to be declared. What is of a great importance also is the jurisdiction of the Constitutional Court to judge the constitutionality of “actions taken during the state-of-emergency.”<sup>76</sup> At this stance, this particular jurisdiction should be referred to article 131 paragraph 2 of the Constitution which establishes that “during the State of Emergency, the Constitution of the Republic of Kosovo shall not be suspended.” It is argued therefore that the Constitutional Court’s jurisdiction to judge the constitutionality of actions during the state-of-emergency is legally related with the impossibility to suspend any constitutional provision, or harm its existence, during state-of-

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<sup>72</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 3(3).

<sup>73</sup> This type of jurisdiction is unique among Western Balkans constitutional courts’ jurisdictions, notwithstanding a small exception in the Montenegro Constitutional Court jurisdiction. See CONSTITUTION OF THE REPUBLIC OF MONTENEGRO art. 149, para. 8. The Kosovo Constitution provides this authorization in light of making the suspension of the Constitution during the state-of-emergency impossible. From that perspective, the Constitutional Court of Kosovo stands as the “saver” of the Constitution during a potential state-of-emergency.

<sup>74</sup> Steinberger, *supra* note 25.

<sup>75</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 131, para. 1.

<sup>76</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 3(3).

emergency circumstances. Moreover, given the impossibility of suspending constitutional provisions during the state-of-emergency, the Constitutional Court's jurisdiction in this context enriches the strength of the constitutional system, meaning that not only that the constitutional order is invulnerable but also that the Constitutional Court stands as a protector of its potential impairment.

*V. Jurisdiction on Controlling the Compatibility of Proposed Constitutional Amendments with Binding International Agreements*

The Constitution provides an attention-grabbing jurisdiction for the Constitutional Court, that of controlling the "compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of constitutionality of the procedure followed."<sup>77</sup> We consider that there is a general accord about the large consequences that this particular jurisdiction brings to the Kosovo constitutional system. Prior to embarking on the most influential side of this jurisdiction, let us make a simple review upon the latter. Firstly, it is easily seen that the Constitution assigns the Constitutional Court with the capacity to control the proposed constitutional amendments compatibility with binding international agreements. What is a "binding international agreement" one might ask? It is generally considered that a "binding" international agreement is one ratified under the authority of this Constitution. Accordingly, the Constitutional Court has the capacity of nullifying a proposed constitutional amendment if the latter conflicts with an international binding agreement. Moreover, the concerned amendment-building process can be an object of the ruling of the Constitutional Court. In terms of the subjects that might raise this procedure, the Constitution determines that the Assembly, the President of Republic and the Government hold the right to proceed with this question in the Constitutional Court.

There is an enormous consequence that the abovementioned provision brings to the constitutional system of Kosovo. To put it simply, the hierarchy of legal acts according to the Constitution should be led by the Constitution, followed by the international binding agreements, below which come laws, so on and so forth. This is in fact a common standard in the hierarchy of acts in any national law, and moreover, many national laws in the world put the international agreements in the same line with laws, when placed in the hierarchy of legal acts. It is therefore argued that the top position of the Constitution in the hierarchy of law in Kosovo, and in most of the world states, is rarely contested. By contrast to this standard, also assumed to have been accepted by the Kosovo Constitution, the jurisdiction of the Constitutional Court to nullify a proposed constitutional amendment that contradicts with a binding international agreement shows the contrary. In fact, given this particular jurisdiction of the Constitutional Court, the impossibility to make a constitutional amendment if the latter contradicts with an international binding agreement

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<sup>77</sup> *Id.* at para. 3(4).

(a ratified agreement) is equal with *diminishing the Constitution's position as the peak of the legal system*. The argument follows, if the Constitution would be the peak of the legal system, then there would be no international agreement constraining the amendment of the Constitution.

A very basic question would be, whether such a jurisdiction for the Constitutional Court can make changes in the hierarchy of norms in the Kosovo law? In fact, the jurisdiction concerned requires the Constitutional Court to nullify a proposed constitutional amendment if the latter contradicts with international binding agreements, therefore implying that the constitutional amendments should not contradict with the international binding agreements. In that perspective, the jurisdiction concerned is producing larger consequences, therefore producing an inert situation. Still, one might ask whether there is any provision in the Constitution that positions the Constitution as the highest legal act, whose supremacy cannot be contested by other legal acts? In fact, the Constitution in its legal principles part determines that "the Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution."<sup>78</sup> Moreover, the Constitution established that "the power to govern stems from the Constitution."<sup>79</sup> Following these constitutional determinations, the authority to check the compatibility of the constitutional amendments with the international binding agreements stands unsound, provided that the Constitution's prescribed position cannot be held so if the concerned jurisdiction of the Constitutional Court takes place. Still, the jurisdiction could have had rationality if it would limit itself in *checking the compliance of the constitutional amendments with international binding agreements, whose duties cannot be omitted unilaterally by Kosovo*. Only in that case would the jurisdiction have made sense, as otherwise the consequence is unreasonable.

In this case, however, the Constitution and the Law on the Constitutional Court of Kosovo has applied the principle defined by the Vienna Convention on the Law of Treaties, which stipulates that a given country may not invoke internal measures to exclude the application of international treaty obligations.<sup>80</sup> Therefore, this is also the approach of the Venice Commission, where in the report regarding the Constitutional Court Act of the Republic of Serbia it concluded that it would not be advisable to provide for the Constitutional Court the competence to review the international binding agreement's compliance with the constitution after the international agreements are already into force. In this case, however, the latter might precondition two outcomes. First, the international liability of a given state might be questioned, and second, the competence of the

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<sup>78</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 16, para. 1.

<sup>79</sup> *Id.* at para. 2.

<sup>80</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* 27 January 1980, Art. 56, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

Constitutional Court might be used as a political tool to cancel the international obligations by a state institution pending the Constitutional Court's decision.<sup>81</sup> To this end, though largely unclear, the above jurisdiction of the Kosovan Constitutional Court materializes a Viennese legal principle whose influence will shape the international liability of the Kosovan polity.

*VI. Jurisdiction upon Violations of the Constitution Occurred During the Election of the Assembly*

Amid those shown above, the Constitutional Court is also authorized to solve "questions [of] whether violations of the Constitution occurred during the election of the Assembly."<sup>82</sup> In those cases, the procedure can be initiated only if the Assembly, the President of Republic or the Government file the presumed infringement. In this type of jurisdiction, the Constitutional Court will have to examine substantial issues also, meaning that the assessment of procedural aspects only would be insufficient. Following that, it can be said that this type of jurisdiction falls upon parliamentary elections only, meaning that the constitutionality of local elections is not in the jurisdiction of the Constitutional Court. That might lead to an illogical understanding also, given that the Constitution provides rules for both the parliamentary and local elections. Therefore, the unconstitutionality of local elections could have been included in the jurisdiction of the Constitutional Court, when local authorities would have claimed that such contestations exist.

Steinberger, however, argues that the Constitutional Court should not be assigned with the power to rule substantial disputes of electoral processes. This, in the view of Steinberger, would engage the Constitutional Court in political debates and fights, excluding the authorizations of the latter to decide very supreme questions with an electoral character.<sup>83</sup> Thus, the legal framework does offer likeliness for the engagement of the Kosovan Constitutional Court in electoral questions, whose nature can be politically biased and coloured.

One of the main arguments to be addressed in this context is related to the subjects that have the right to contest the constitutionality of parliamentary elections in the Constitutional Court. As seen from above, only three subjects are capable of doing that (the Assembly, President of Republic, and Government). In the light of the latter, one can argue that the candidate who has participated in elections should have been given the

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<sup>81</sup> *Supra* note 38.

<sup>82</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 3(5).

<sup>83</sup> Steinberger, *supra* note 25.

right to contest the final result of elections before the Kosovan Constitutional Court, or at least so it is in the Steinberger's view.<sup>84</sup>

From a broader perspective, the right to demand the assessment of parliamentary elections' constitutionality in the Constitutional Court should have been most of all opened to the political parties which participated in elections. It is quite logical that political parties, as opposed to institutions which are the subjects that participate in parliamentary elections, possess the right to refer to the Constitutional Court the challenge concerned. Hence, political parties themselves should have been equipped with the right to demand the constitutional review of parliamentary elections, since their impossibility of doing so might leave the contestation unsolved. Why? It is quite common that the President, the Assembly and the Government are held by a coalition of parties or one party at all. Therefore, an oppositional party, which holds no majority in the Assembly, whose voice is not heard by the President of Republic, and who has no place in the Government, is practically unable to contest the constitutionality of parliamentary elections. Moreover, it logically follows that it is exactly this presumed party which might have reasons to demand the Constitutional Court's action. From that perspective, the subjects that have the right to file the contestation of the parliamentary elections' constitutionality might in reality totally bias the smaller oppositional parties, hence prohibiting the potential constitutional breach to come into the Constitutional Court's judgement. As a result, the problem concerned shows limited signs of protection for smaller political parties, which hold no majority in the main institutions of the country.<sup>85</sup>

#### *VII. Jurisdiction upon the President of Republic's Constitutional Violation*

A further jurisdiction of the Constitutional Court relies upon the violations of the President of Republic over the Constitution. As determined by the Constitution, "thirty (30) or more deputies of the Assembly are authorized to refer [to the Constitutional Court] the question

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<sup>84</sup> See Lopez-Guerra, *supra* note 5; Steinberger, *supra* note 25.

<sup>85</sup> The jurisdiction of the Croatian Constitutional Court allows a broader range of actors to be involved in the process of judging the constitutionality of elections. As such, "political parties, candidates, not less than 100 voters or not less than 5 percent of voters of the constituency in which the elections are held . . ." can initiate the concerned procedure in the Constitutional Court of Croatia. The Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne Novine No. 49/02 of 3 May 2002, art. 88. Meanwhile, in the Slovenian case, "political parties, candidates, not less than 100 voters or not less than 5 percent of voters of the constituency in which the elections are held, have the right to submit an appeal against the ruling of the competent electoral commission to the Constitutional Court." See The Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 15/94, 15/07, and 64/07, art. 91, para. 1. In addition, a "motion [to the Constitutional Court of Serbia] for deciding on electoral disputes for which jurisdiction of a court is not defined by law may be submitted by: any elector, candidate for President of the Republic, candidate for the member of Parliament or Municipality Council member, as well as those who nominate candidates." See Law on the Constitutional Court of the Republic of Serbia, art. 75, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.html> (accessed on 1 October 2009).

of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.”<sup>86</sup>

Following the picture of the jurisdiction concerned, one might ask whether there is any hole to be observed. In our opinion, there are two basic things that should be contested: first, why the President’s violations only should be included in the jurisdiction of the Constitutional Court; and second, what happens if the alleged violation is proved to be true? To give an answer to the first question, which is easier than the second one, we are of the opinion that the Prime Minister should have been included into this category of institutions as well. Hence, there is no rationality that “the President of Republic only” can make constitutional violations, adding that the Prime Minister can do the same thing (or a mayor for instance).<sup>87</sup> Concerning the second question, it is quite clear that the Constitution shows no specification for the jurisdiction of the Constitutional Court upon the President of Republic constitutional violations. With a view to that, neither the Constitution nor the Law on Constitutional Court determines *what the penalty of the Constitutional Court might be towards a constitution-violating President of Republic*. In such circumstances, there are two possible consequences that might follow a proven constitutional violation undertaken by the President of Republic: first, the Constitutional Court can either revoke the President from his/her mandate, or second, the Constitutional Court can nullify the President’s violation through restitution. This would seem very challenging, however, it is within the Venice Commission’s benchmarks.

Moreover, the minimum number of MPs capable to deliver this potential infringement to the Constitutional Court is ten, therefore suggesting that the parliamentary control over the President of Republic through filing potential infringements of President to the Constitutional Court is relatively straightforward and accessible for almost every political party (by contrast to the constitutional breaches during parliamentary elections).

#### *VIII. Jurisdiction upon the Violations of Public Authorities over Individual Rights and Freedoms Guaranteed by Constitution*

From a different perspective, the Constitutional Court’s jurisdictional framework provides only one route for individuals, as opposed to institutional actors, to bring issues of unconstitutionality before the Constitutional Court. In view of that, the jurisdiction of the Constitutional Court falls upon individuals’ requests also, therefore leading to a jurisdiction activated not only by institutional actors. As such, the questions about the violations undertaken by public authorities “for individual rights and freedoms guaranteed by the

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<sup>86</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 6.

<sup>87</sup> Many, if not all, would find the rationale after this within the argument that the President of Republic is the Head of State, and not just another political contender or actor.

Constitution”<sup>88</sup> can be judged by the Constitutional Court, provided that all legal remedies have been consumed prior to filing the case in the Constitutional Court. Following that, the Law on Constitutional Court determines that “every individual is entitled to request from the Constitutional Court legal protection when he/she considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority . . . [and] the individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.”<sup>89, 90</sup> It is worth noting, however, that the protection of the fundamental rights by means of constitutional complaint mechanism is widely acceptable. However, the distinctive feature of this procedure is that it does not seek to review general legislative norms or sub-legislative acts, but rather that it intends to review the individual acts of the institutional authorities.<sup>91</sup>

The ability of individuals to seek constitutional protection in the Constitutional Court is highly appreciated, at least as a standard. Therefore, Steinberger argues that a similar jurisdiction vested upon the Constitutional Court should intensify the protection of the fundamental rights and freedoms and “emphasize their constitutional rank.”<sup>92</sup> By contrast, however, Guerra acknowledges that this type of jurisdiction has two main disadvantages. First, it constrains the work of the Constitutional Court (considering the number of the complaints submitted each year); and second, considering that an individual has to exhaust all legal remedies before his/her right to constitutional complaint would be applicable, the Constitutional Court is usually obliged to review the rulings of the previous courts and thus “is placed in a position in which it must be the ‘judge of judges,’ and not the judge of norms provided for in the Kelsenian formula.”<sup>93</sup>

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<sup>88</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 7.

<sup>89</sup> Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 47, paras. 1–2.

<sup>90</sup> It should be noted that Serbian Law on Constitutional Court, the Constitutional Act on Constitutional Court of Croatia and Constitutional Court Act of Slovenia have determined that individuals may contest not only the decision of public authorities but also the decisions of organizations vested with public authority.

<sup>91</sup> Aivars Endziņš, *The Principle of Separation of Powers and the Experience of the Constitutional Court of the Republic of Latvia*, in SEMINAR ON “CASES OF CONFLICTS OF COMPETENCE BETWEEN STATE POWERS BEFORE THE CONSTITUTIONAL COURT”, European Commission for Democracy Through Law (Venice Commission), 8 June 2000, CDL-JU (2000) 30; Lopez-Guerra, *supra* note 5. Therefore, Guerra (above) considers that “[i]n the constitutional complaint in Spain and Germany, it is not the constitutionality of a law applied by a judge or by the Administration which is under consideration, but rather if the fundamental rights of one or various individuals have been violated by such application. Thus, it is an act which is being judged, rather than a norm.”

<sup>92</sup> Steinberger, *supra* note 25.

<sup>93</sup> Lopez-Guerra, *supra* note 5.

In more specific terms, many things concerning this specific jurisdiction remain unclear. The first thing - that the Constitution might have provided - is that individuals could have filed contestations in the Constitutional Court even if not a right or freedom deriving from the Constitution is concerned. Still, the capacity of the individuals to request the constitutional review procedure on behalf of their constitutional rights is not clarified. Firstly, the term *individual* might mean a Kosovo citizen but also a Kosovo resident (foreigner), given that the Constitution provides human rights and freedom guarantees for resident foreigners also. At this point, the jurisdiction of the Constitutional Court might be confused, if a Kosovo resident, as opposed to a citizen, files a constitutional right or freedom violation in the Constitutional Court. Secondly, the law does not clarify the process of "exhausting the legal remedies" either. In such terms, legal remedies might be exhausted in an administrative procedure alone, however the administrative decision might be appealed in a regular court, thus leading to a situation where the exhausting of legal remedies is not well-qualified. Thirdly, the idea of exhausting the legal remedies prior to embarking in the Constitutional Court appears confusing, having argued that not all of the violations can interfere directly upon the petitioner's rights and freedoms. For instance, a potential petitioner might see that his/her constitutional right or freedom is being interfered indirectly by a law, however if the interference has not been direct, then the regular court would not deal with this violation. Still, the situation can be resolved, even if the petitioner's proceeding in a regular court is declared inadmissible, by considering the refused remedy an "exhausted" matter, therefore tracing the jurisdiction of the Constitutional Court to deal with the case concerned. Ultimately, it is unclear from the today's perspective whether every violation of constitutional rights and freedoms might be procedurally heard in a regular court, given that the procedural laws do not prescribe the ways through which the constitutional rights and duties can be defended (they only trace the defense of rights and duties over the laws issued under the Constitution). Therefore, it is still vague whether and what type of legal acts should be subject to the constitutional complaint mechanism. However, the latter should have been clearly developed in the Law on Constitutional Court, thus providing a clearer view as to what legal acts might an individual invoke before the Constitutional Court,<sup>94</sup> given that this sounds like a benchmark.

*IX. Jurisdiction on Controlling the Constitutionality of Law Reported by a Given Court, as Part of Its Proceedings Within that Law*

The right to request the review of the constitutionality of laws is vested to the regular courts also. In that context, the Constitutional Court is competent to judge upon requests

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<sup>94</sup> Steinberger posits that "[s]olutions vary from country to country, from including all acts of domestic public power unto limitations to specific kinds of acts (norms of various categories, court decisions, administrative acts). It may appear appropriate, to extend jurisdiction on constitutional complaints to all acts of public authority, i.e. administrative acts, decisions and injunctions of the judiciary and even legislative acts including statutes, sub-legislative norms and ordinances of autonomous bodies." Steinberger, *supra* note 25.

coming from regular "courts which can refer questions to the Constitutional Court on the constitutional compatibility of a law when it is raised in a judicial proceedings and the referring court is uncertain as to the compatibility of the contested law with the Constitution,"<sup>95</sup> provided that "only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court."<sup>96</sup> Excepting everything else, two basic conflicts are observed between the Constitution and the Law on Constitutional Court, regarding the jurisdiction in question: first, the Constitution determines that a given court might request the control of constitutionality of a law, if the petitioning court is processing a matter inside the contested law; second, the Law on Constitutional Court determines that the Constitutional Court can accept the file from a given court only if the "lawfulness of the contested law is a precondition for the decision regarding the case pending with the court."<sup>97</sup> It is therefore arguable that the control of lawfulness of a law is not a matter of the Constitutional Court, and that only the review of constitutionality can be so. Therefore, the Law on Constitutional Court contradicts with the Constitution when it comes to the jurisdiction concerned. Still, one very minor argument is that the jurisdiction of the Constitutional Court upon the courts' pretences can only be exercised if the petitioning court is judging a case inside the contested law. With the lack of the latter fact, even though a given court might observe that there is a contradiction between a law and the Constitution, it might not bring the contestation before the Constitutional Court.

*X. Jurisdiction upon the Constitutionality of Proposed Constitutional Amendments Before Approval by the Assembly*

Finally, as by the Constitution, the Constitutional Court is authorized to judge upon questions arising from the proposed constitutional amendments before approval by the Assembly. Following the Constitution, "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."<sup>98</sup> At those cases, the Constitutional Court holds the jurisdiction to check whether the rights and freedoms guaranteed by chapter II of the Constitution have been harmed by the proposed constitutional amendment. Still, there is no practical rationality for the President of Assembly's sole position in this procedure, given that other actors, such as the Ombudsman, could have been authorized to file such claims during the

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<sup>95</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 8.

<sup>96</sup> Law on the Constitutional Court of the Republic of Kosovo, L. No. 03/L-121 of 16 December 2008, art. 51, para. 1.

<sup>97</sup> *Id.*

<sup>98</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO art. 113, para. 9.

amendment procedures. Moreover, this prescribed jurisdiction implies that “chapter II of the Constitution” is unchangeable. On the other side, the limited jurisdiction of the Constitutional Court in controlling the constitutionality of constitutional amendments – it is limited because it can be raised only by the President of Assembly and the jurisdiction can be exercised only on basis of the constitutionality with chapter II - directs to an *unfounded idea*, given that the control of the constitutional amendment process is meant as a control of constitutionality even against the parliament.<sup>99</sup> From this context, one can speak for a neglected benchmark from the law concerned, given that the Constitutional Court’s jurisdiction against the constitutional amendments of the Assembly is not fully provided.

### C. What Else Could the Kosovar Constitutional Court Jurisdictional Framework Have Provided?

As noticed during the course of this paper, we have made very brief comparisons between the jurisdiction of the Kosovo Constitutional Court and most of the Western Balkans countries constitutional courts’ jurisdictions. By doing so, we intended to further show, through a comparative route, the strengths and weaknesses that the Kosovo Constitutional Court jurisdiction might have. However, at this part, we will only show how other laws on constitutional court jurisdictions of the Western Balkans countries regulate jurisdictional principles that have not been discussed here. To reach this objective, we reviewed the laws on constitutional court jurisdiction of Albania, Croatia, Serbia, Montenegro and Slovenia.

One of the very basic distinctions between the Kosovo Constitutional Court jurisdictional framework and other Western Balkans constitutional court laws is the “object” of power that the courts concerned have. The Kosovo Constitutional Court as determined by the Constitution of Kosovo is authorized to check the *constitutionality* only, with some very minor exceptions. It means that, in the Kosovo case, the jurisdiction of the Constitutional Court cannot exceed the border of *constitutional review*. However, by contrast to the Kosovo case, most of the Western Balkans constitutional courts have a fairly different object of jurisdiction. In the latter cases, the constitutional courts are not only authorized to control the constitutionality but also the lawfulness of legal acts.<sup>100</sup> From that

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<sup>99</sup> Steinberger, *supra* note 25.

<sup>100</sup> The Croatian Constitution authorizes its Constitutional Court to “evaluate the constitutionality of laws and constitutionality and legality of other regulations . . . .” CONSTITUTION OF THE REPUBLIC OF CROATIA art. 125. In addition, the Constitutional Court of Montenegro is authorized to check the “conformity of laws with the Constitution and . . . conformity of other regulations and general acts with the Constitution and the law.” CONSTITUTION OF THE REPUBLIC OF MONTENEGRO art. 149, para. 1(2). Similarly, the Constitutional Court of Serbia has the jurisdiction to check the “compliance of other general acts with the law.” CONSTITUTION OF THE REPUBLIC OF SERBIA art. 167, paras. 3–5. Moreover, Slovenian Constitutional Court jurisdiction consists of the same right. The Slovenian Constitution establishes that Constitutional Court shall have the jurisdiction on “matters related to the conformity of regulations with this Constitution and with statute.” CONSTITUTION OF THE REPUBLIC OF SERBIA art. 160.

perspective, the Constitutional Court of Kosovo, in the light of the jurisdiction specified by the Constitution and the Law on Constitutional Court, has no power to judge the lawfulness of acts, meaning that the power to check whether a sub-law is in compliance with a given law is not established. With a view to that, the Kosovo Constitutional Court seems to have a pure *constitutionality checking* jurisdiction, meaning that the compliance of acts with the law adopted by the Assembly does not pertain to its jurisdiction.

Another important distinction easily observed in the Kosovo Constitutional Court is the lack of the *ex-officio* jurisdiction. In fact, as prescribed by the Constitution of Kosovo and the Law on Constitutional Court, there is absolutely no *ex-officio* route to be followed by the Constitutional Court of Kosovo. It means that, even though there might be an obvious unconstitutional circumstance observed in the Kosovo legal order, the Constitutional Court would be unable to intervene if a procedurally legitimate party does not file an appeal. Admittedly, the *ex-officio* power has been established by some constitutions in the Western Balkans, such as that of Croatia and Serbia.<sup>101</sup> However, it is worth noting that, though the *ex officio* powers would have strengthened the role of the Constitutional Court, the latter, as by the Venice Commission's benchmarks, is not recommendable. Therefore, the competence of the Constitutional Court to start a review proceeding through its own initiative would endanger the latter's independent position and "would make the Court a political actor."<sup>102</sup> Furthermore, as by the Venice benchmarks, every choice or ruling of the Court would be prejudiced as selective and politically motivated. Thus, the Court should be limited to make use of its power "only in cases when it has to apply a norm of which it doubts the constitutionality" and only as far as the implementation and the supervision of the "execution of its own decisions" is concerned.<sup>103</sup> Hence, the Venice Commission would see the lack of the *ex officio* powers in the Kosovo's case as an appreciated standard.

On the other hand, the Kosovo Constitutional Court lacks the power to assess the constitutionality of a law before its promulgation (preemptive constitutional control).<sup>104</sup> In

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<sup>101</sup> The *ex-officio* powers of constitutional courts have been observed in the Croatia, Serbia and Montenegro cases. Constitutional Court Act of Croatia determines that the "Constitutional Court itself may decide to institute proceedings to review the constitutionality of the law and the review of constitutionality and legality of other regulations." The Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne Novine No. 49/02 of 3 May 2002, art. 38, para. 2. Similarly, Serbian Law on Constitutional Court establishes that "procedure for assessing the constitutionality or legality of general act may be initiated by the Constitutional Court itself. . . ." Law on the Constitutional Court of the Republic of Serbia, art. 50, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.htm> (accessed on 1 October 2009). For the Montenegro case, see CONSTITUTION OF THE REPUBLIC OF MONTENEGRO art. 150.

<sup>102</sup> See *supra* notes 30 and 38 for more upon the comments on the constitutional courts' *ex-officio* powers.

<sup>103</sup> *Supra* note 30.

<sup>104</sup> The Serbian Constitutional Court is empowered with the right to check the constitutionality of a law before its promulgation. See Law on the Constitutional Court of the Republic of Serbia, art. 50,

the same route, but with a different approach, the Kosovo Constitutional Court has no jurisdiction to check an international agreement's constitutionality. Though we have argued that the latter would be in line with the requirements of the Vienna Convention of the Law on Treaties, it would, however, prejudice the position of the Constitution vis-à-vis international law and would avoid an agreement becoming binding (internationally) if the constitutional problems would prevent its application domestically.<sup>105</sup> This, however, might sound as an unfounded deficiency, from an Albanian constitutional law perspective.<sup>106</sup> Following that, by contrast to most of the constitutional courts' jurisdictions in the Western Balkans, the Constitutional Court of Kosovo has no power to check the constitutionality of political parties and organizations, as well as their activities' constitutionality.<sup>107</sup> The lack of the power to review the constitutionality of political parties, in terms of the Venice Commission's benchmarks, would leave too much room to the discretionary power of the executive.<sup>108</sup> Therefore, it is advisable that the monopoly to declare a given political party unconstitutional should rest with the Constitutional Court.<sup>109</sup> This, as a result, can be seen as a neglected benchmark by the jurisdiction

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<http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.htm> (accessed on 1 October 2009).

<sup>105</sup> See Steinberger, *supra* note 25; see also *supra* note 38.

<sup>106</sup> The Albanian Constitutional Court possesses the jurisdiction to deal with the international agreements constitutionality. As such, "the Constitutional Court considers the compatibility of the International Agreement with the Constitution before they are rectified." Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, L. No. 8577 of 10 February 2000, art. 52. Similarly, the Slovenian case shows that "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 Constitutional Court adopts such opinion at a closed session." See The Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 15/94, 15/07, and 64/07, art. 70.

<sup>107</sup> All of the Western Balkans constitutions provide this power for their constitutional courts. Just as a point of reference, the Albanian Constitutional Court has a jurisdiction to decide on The Constitutional Court reviews and decides: "a. whether the political party or organization is founded in accordance with the constitutional provisions, and b. whether the activity of the political party or organization is in conformity with the Constitution." Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, L. No. 8577 of 10 February 2000, art. 58; ALBANIAN CONSTITUTION art. 131, para. 2. Moreover, the Serbian Constitution goes too far by prescribing that "the Constitutional Court decides on the prohibition of the activity of political parties, trade union organizations, citizens' associations or religious communities on the basis of a proposal of the Government, the Republican Public Prosecutor or authority in charge of the registration of political parties, trade union organizations, citizens' associations or religious communities." See Law on the Constitutional Court of the Republic of Serbia, art. 80, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.htm> (accessed on 1 October 2009); see also CONSTITUTION OF THE REPUBLIC OF SERBIA art. 167, para. 5.

<sup>108</sup> See *supra* note 6; *Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues*, European Commission for Democracy Through Law (Venice Commission), Study no. 247/2004, 15 March 2004, CDL-AD (2004) 007.

<sup>109</sup> Steinberger, *supra* note 25.

concerned, thus leaving no place for such questions to the Kosovo Constitutional Court. On the other side, it is still debatable whether the Kosovo Constitutional Court can review all electoral complaints. In the light of that, Schwartz acknowledges that "there is no reason why the Constitutional Court should resolve electoral decisions raising no constitutional issue," which could lead into a Constitutional Court that is "the most partisan of politics."<sup>110</sup> To this extent, the Kosovo's Constitutional Court Law should have specified which types of complaints could be brought before the Constitutional Court.

The Kosovo Constitutional Court also lacks the jurisdiction to assess the eligibility of members of the parliament and to review their mandate.<sup>111</sup> Next, the Kosovo Constitutional Court has no jurisdiction to control the constitutionality of judges and prosecutors' dismissal, which is in fact a clear deficiency.<sup>112</sup> Ultimately, the Kosovo Constitutional Court is authorized neither to monitor the implementation of the constitution nor to report for such findings, as opposed to some of the Western Balkans constitutional courts.<sup>113</sup> Nevertheless, the Hungarian Constitutional Court's jurisdiction is an example in this regard, given that the latter "may determine whether a state authority has neglected to fulfill a legal required lawmaking mandate and has thus promoted an unconstitutional situation."<sup>114</sup> The lack of this power by the Kosovan Constitutional Court does, however, protect the latter from potential arbitrary power that might lead to pure political questions.

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<sup>110</sup> HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 244 (2000).

<sup>111</sup> To refer to this jurisdiction in the Albanian Constitutional Court case, see Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania, L. No. 8577 of 10 February 2000, art. 66. To refer to this jurisdiction in the Serbian Constitutional Court case, see Law on the Constitutional Court of the Republic of Serbia, art. 79, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.htm> (accessed on 1 October 2009). See also The Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 15/94, 15/07, and 64/07, art. 69.

<sup>112</sup> For comparison reasons, it is noted that in the Serbian case, "judges, public prosecutors and deputy public prosecutors may file appeals to the Constitutional Court against decisions on termination of office within 30 days of the day of being served the decision." Law on the Constitutional Court of the Republic of Serbia, art. 99, <http://www.ustavni.sud.rs/page/100030/cnt/law-on-the-constitutional-court.en-GB.htm> (accessed on 1 October 2009). Similarly, in the Croatian case, "a judge (hereinafter: the appellant) may appeal to the Constitutional Court against the decision to relieve him of office within a term of 15 days after the disputed decision has been delivered." The Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne Novine No. 49/02 of 3 May 2002, art. 97.

<sup>113</sup> The Croatian "Constitutional Court shall monitor the execution of constitutionality and legality and report to the Croatian Parliament about any kind of unconstitutionality and illegality it has observed." The Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne Novine No. 49/02 of 3 May 2002, art. 104. The Montenegro Constitutional Court has the same power. CONSTITUTION OF THE REPUBLIC OF MONTENEGRO art. 149.

<sup>114</sup> LASZLO SOLYOM & GEORG BRUNNER, *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* 85 (2000).

#### **D. Conclusion**

The review showed most of the important issues that were found within the Kosovo Constitutional Court's jurisdictional framework. In fact, our analysis upon most of the choices set forth by the jurisdictional framework of the Constitutional Court was critical, however the criticism came mainly as a result of well-explained challenges and widely approved benchmarks, therefore leading to a paper that might help further the legal advancements in the Kosovan constitutional justice.

Preliminarily, the paper showed the general jurisdiction which the Kosovan Constitutional Court is granted, mainly based in the Constitution but also in the Law on Constitutional Court. Having done so, we then embarked in the most important part of the paper, the particular jurisdictions of the Constitutional Court. Consequently, we reviewed each particular jurisdiction, according to the rank that the latter had in the Constitution. In addition, while making the review of each particular jurisdiction, we showed our criticism towards either lacking provisions, or illogical ones, mainly based on the Venice Commission's benchmarks and other academic arguments. By doing so, we held that the legislative reform in the Constitutional Court's jurisdictional framework is a need, in order to reach an even more democratic and rational jurisdiction for the latter. In almost every paragraph, we introduced reviews done upon legislations of Albania, Croatia, Serbia, Montenegro and Slovenia concerning their constitutional courts' jurisdictions. Hopefully, the comparisons used during the course of this paper have made the view of the reader more grounded and rational than if the paper would have included the Kosovo experience only.

Ultimately, we consider that the Kosovo's Constitutional Court's jurisdiction is democratic, however legally misshapen. To this extent, we are of the opinion that addressing the weaknesses found in the legal framework that regulates the Kosovo Constitutional Court's jurisdiction might lead to a reformed jurisdiction for the latter. Still, comparatively, as the frameworks in the region illustrate, the Kosovo Constitutional Court jurisdictional framework lacks many principles and significant elements that would have facilitated and eased the work of the Court and would have increased the legal certainty of the Kosovan constitutional justice. Therefore, the latter should, if the legislators will not, shape its jurisdiction on its own, by smoothly interpreting the Constitution in a way which functionalizes and repairs the deficiencies found in this paper.