

“Judicial Activism” or Constitutional Interpretation?: An Analysis of the Workings of the Constitutional Court of Kosovo

Xhafer Tahiri

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review



Part of the [Law Commons](#)

Recommended Citation

Tahiri, Xhafer () "“Judicial Activism” or Constitutional Interpretation?: An Analysis of the Workings of the Constitutional Court of Kosovo," *Ohio Northern University Law Review*. Vol. 42: Iss. 3, Article 5.
Available at: https://digitalcommons.onu.edu/onu_law_review/vol42/iss3/5

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

"Judicial Activism" or Constitutional Interpretation?: An Analysis of the Workings of the Constitutional Court of Kosovo

XHAFER TAHIRI*

I. INTRODUCTION

This article analyzes the workings of the Constitutional Court of Kosovo and investigates the judicial activism of the Court in its role as the final authority for constitutional interpretation. In 2008, Kosovo became an independent country, a democracy functioning under the supreme law—the Constitution.¹ The Constitution of the Republic of Kosovo establishes a separate Constitutional Court that is empowered as the final authority for both the interpretation of the Constitution itself and the compliance of the laws with the Constitution.² As a new democracy facing the pressing question of how to enforce the Constitution, the political elites and political parties agreed on the need for a separate judicial body to interpret the Constitution.³ Consequently, the Constitutional Court was established and empowered with the legal authority to review decisions and laws adopted by the Assembly of Kosovo in order to determine the constitutionality of laws or acts of the Assembly, the Government, and local authorities.⁴ Besides that, the Court has broad legal authority to protect rights under the Constitution through wide ranging instruments that protect the human rights guaranteed to all in Kosovo, including those related to the protection of ethnic minorities.⁵ In certain cases the Court has acted as a replacement for the legislature by changing the letter of the Constitution, thus introducing new constitutional standards into Kosovo's constitutional system.⁶ These

* Xhafer Tahiri is a Ph.D Candidate at the Law Faculty, University of Graz, Austria. He is a lecturer at the Law Faculty, University of Prishtina, and at the Law Faculty, University of Peja. He is the former Director for Legal and International Affairs at the Office of the President of the Republic of Kosovo. He is a former Member of the Parliament of the Republic of Kosovo. I would like to thank Prof. Aidan Hehir for his reading and comments at the early stages of this paper.

1. *Kosovo MPs Proclaim Independence*, BBC NEWS (Feb. 17, 2008, 10:45 PM), <http://news.bbc.co.uk/2/hi/europe/7249034.stm> [hereinafter *Kosovo MPs Proclaim Independence*].

2. *See* CONST. OF THE REPUBLIC OF KOS. art. 112 (General Principles).

3. *See id.*

4. *See* CONST. OF THE REPUBLIC OF KOS. art. 112-13.

5. *See id.*

6. *See, e.g.*, Case No. KO 29/11, [2015] (Kos.), available at http://www.gjk-ks.org/repository/docs/ko_29_11_agj_om_ang.pdf [hereinafter Case No. KO 29/11]; *see also* Case No. KO 57/12, [2012] (Kos.), available at http://www.gjk-ks.org/repository/docs/gjkk_ko_57_12_ang.pdf [hereinafter Case No. KO 57/12].

cases are presented in the fourth part of this article.⁷ In this article I use the terms “judicial review” and “constitutional interpretation” synonymously.

The objective of this article is to analyze the workings of the Constitutional Court of Kosovo and to spot judicial activism in the Court’s decisions.. For this purpose I shall analyze—in the fourth section of this paper—the decisions of the Constitutional Court that, in my opinion, constitute judicial activism.⁸ In the conclusion, I argue that the final judgment on the effect of the Court’s judicial activism should be based on: (1) the impact that those decisions have on transitional societies—such as Kosovo; and (2) the extent to which those decisions help transform these societies into societies governed by principles of rule of law, democracy, and the protection of human rights.⁹

Through its prerogative of judicial review, and by acting as the final authority to interpret the Constitution, the Court has played a decisive role in achieving the standards set for the rule of law and implementing strong foundations for both human rights protections and the protection of minority rights.¹⁰ While the Court’s record has been widely lauded, the Court was presented with cases of a more political nature that have been the subject of dispute, as these cases have actually changed the very letter of the Constitution.¹¹

Some of the Constitutional Court’s decisions have actually set new standards, while others have redefined the relevant constitutional norms.¹² The latter decisions in particular were not always welcomed by all concerned parties; some decisions have even caused public disputes and are the subject of public debate in everyday life in Kosovo.¹³ The involved political parties have especially disagreed with the outcome in certain cases before the Constitutional Court.¹⁴ Fortunately, Kosovo has developed a working norm that allows the decisions of the Constitutional Court to be

7. See *infra* Part IV.

8. See *infra* Part IV.

9. See *infra* Part V.

10. See, e.g., Case No. KI 41/12, [2013] (Kos.), available at http://www.gjk-ks.org/repository/docs/gjkk_ki_41_12_ang.pdf [hereinafter the Diana Kastrati case].

11. See Andrea Lorenzo Capussela, *A Critique of Kosovo’s Internationalized Constitutional Court*, EUR. DIVERSITY AND AUTONOMY PAPERS (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425178 [hereinafter Capussela] (arguing that the Constitutional Court of Kosovo “gravely lacks independence and is subject to heavy political interference.”).

12. See Capussela, *supra* note 11.

13. See Case No. KI 47/10, [2010] (Kos.), available at http://www.gjk-ks.org/repository/docs/ki_47_10_eng_2.pdf [hereinafter Case No. KI 47/10]. In this case, Freedom House referred to the decision as “independent” and “groundbreaking.” See *Nations in Transit 2011: Kosovo*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/nations-transit/2011/kosovo> (last visited Aug. 20, 2015). The impact of the Court’s decision was almost immediate: within three days of its release, President Sejdiu tendered his resignation from office, so as to retain his role as Chairman of the DLK. *Id.*

14. See Capussela, *supra* note 11.

implemented fully despite disputes or disagreements with their outcomes; this should be regarded as a contribution both by the Court and by the parties involved to the broader commitment of building a Kosovar society that rests on the principles of the rule of law.

The Court decisions that have set new standards and changed the letter of the Constitution will be the subject of the following analysis. This article has three objectives: (1) analyze the workings of the Constitutional Court of Kosovo and track judicial activism; (2) identify the jurisdiction of the Court and clarify its legal authority as the final interpreter of the Constitution; and (3) examine the jurisprudence of the Court more precisely to undertake an analytical review of the cases that have changed the letter of the Constitution and thus set new standards and new norms of constitutional law in Kosovo. If judged only by its jurisdiction and the cases it has decided upon, one might view the Constitutional Court of Kosovo as one of the most activist courts in the world.¹⁵

This article is one of the first to discuss the judicial activism of the Constitutional Court of Kosovo. Ginsburg argues that "constitutional review is now a norm among democratic constitution drafters."¹⁶ A constitutional court's jurisdiction in a new democracy such as Kosovo—formerly part of the communist country Yugoslavia—should be viewed in the context of constitutional reform in Western Europe and the post-Soviet world. Its study is therefore especially useful for comparative studies of constitutional transformation and judicial empowerment in transitioning democracies.

II. CONSTITUTIONAL INTERPRETATION OR JUDICIAL ACTIVISM BY THE COURT

Speaking at the 5th anniversary of the founding of Kosovo's Constitutional Court, Mr. Fejzullah Hasani, President of the Supreme Court of Kosovo, said, "*based on the spirit of constitutional activism within only five years of its operation[,] the Constitutional Court of Kosovo[] has managed to help the development and exercise of democracy and the protection of human rights in Kosovo.*"¹⁷ This is the first time the term "activism" was used by a judge or scholar in Kosovo to describe the Constitutional Court's activity. In Kosovar legal circles, there is not much

15. See Capussela, *supra* note 11.

16. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 6 (2003).

17. *Ceremony of the Year 5*, CONST. CT. OF KOS., http://www.gjk-ks.org/repository/docs/Fjalimi_i_kryetarit_te_Gjykates_Supreme_te_Kosoves_Fejzullah_Hasani.pdf (last visited July 23, 2016) (emphasis added).

discussion about, or research explaining, the concept of judicial activism, which is better known around the world (especially in the United States).¹⁸

Instituting a separate judicial body with the power of constitutional review—which allows the entity to determine whether government actions comply with the constitution’s provisions—is a standard component of a democracy.¹⁹ It is increasingly common to entrust the power of constitutional review to a specialized constitutional court that can interpret the constitution’s provisions and subsequently issue authoritative decisions on the constitutionality of laws and government actions.²⁰

The methods by which the Court ascertains constitutional meaning are of the utmost legal and political importance. Different methods of constitutional interpretation lead to different outcomes. Most legal scholars recognize seven main methods of interpretation: textual, historical, functional, doctrinal, prudential, equitable, and natural, although there is some overlap among the methods, and the legal scholars may differ on what each approach includes.²¹ Literalism, known also as textualism, is a method of constitutional interpretation that relies on the ability of the constitution’s text to provide answers to all matters.²² The theory of original intent is concerned with what the framers intended the constitution to mean.²³ Originalism is a method of constitutional interpretation where judges attempt to apply the “original” meanings of various constitutional provisions.²⁴ Doctrinal approach, as a method of constitutional interpretation, proceeds from principles of *stare decisis*, thus following previous precedents.²⁵ The functional approach, which is also called structuralism, is a method of constitutional interpretation that uses larger relationships within the constitution and does not limit itself to specific provisions of the constitution.²⁶ It is an abstract approach of constitutional

18. See Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CALIF. L. REV. 1441, 1444 (2004) [hereinafter Kmiec] (“The idea of judicial activism has been around far longer than the term.”) (citing Michael Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585 (2002)).

19. See Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001) (“In the broadest terms, the rule of law requires that the state only subject the citizenry to publicly promulgated laws, that the state’s legislative function be separate from the adjudicative function, and that no one within the polity be above the law.”).

20. See Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT. J. CON. LAW 44, 44 (2007) (“Today, constitutional courts exist in most of the countries of Western Europe that have civil law legal systems, with the Netherlands and the Nordic countries [being] the major exceptions.”).

21. See *Principles of Constitutional Interpretation*, FEDERALIST PAPERS PROJECT, <http://www.thefederalistpapers.org/principles-of-constitutional-interpretation> (last visited Aug. 22, 2015) [hereinafter THE FEDERALIST PAPERS].

22. See THE FEDERALIST PAPERS, *supra* note 21.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

interpretation, and it creates the possibility of multiple interpretations (and even subjective interpretations) as to the meaning of the constitutional norm.²⁷

Under the Constitution of Kosovo, "[t]he Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution."²⁸ The key phrases here are "final authority," "interpretation of the Constitution," and "compliance of laws with the Constitution." What does "the final authority for the interpretation of the Constitution" imply? The answer depends very much on the respective understandings of the Constitutional Court judges—and more specifically, their beliefs and understanding with respect to their role and the role of the Court. The judges should apply accepted standards and rules of

27. See THE FEDERALIST PAPERS, *supra* note 21.

28. See CONST. OF THE REPUBLIC OF KOS art 113. Since Article 113 is determinant to the jurisdiction and the limits of judicial review by the Constitutional Court, I will repeat it in full as it is written in the Constitution:

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties. 2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court: (1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government; (2) the compatibility with the Constitution of municipal statutes. 3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court: (1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo; (2) compatibility with the Constitution of a proposed referendum; (3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency; (4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed; (5) questions whether violations of the Constitution occurred during the election of the Assembly. 4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act. 5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed. Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution. 7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law. 8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue. 9. The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution. 10. Additional jurisdiction may be determined by law.

Id.

constitutional interpretation while exercising judicial review of the government's laws and acts.

The Constitutional Court of Kosovo exercises abstract and preventive control over the government's laws and acts.²⁹ In fact, the preventive control is a distinctive feature of this Court.³⁰ In a comparative analysis of the courts in the region, none of them is empowered with preventive control.³¹ However, it is precisely this feature of the Court that opens the door to judicial activism. The analysis of the jurisdiction that is given to a court, along with its jurisprudence, demonstrates whether or not the court will be referred to as activist. Judging only by the legal authority that it is empowered with, the Constitutional Court of Kosovo is activist in nature.

On the other hand, judicial activism refers to judicial rulings that are suspected of being based on the judge's personal or political considerations rather than existing law.³² The term "judicial activism" was first presented by Arthur M. Schlesinger, Jr. in a 1947 *Fortune* magazine article in which he described the justices of the Supreme Court of the United States.³³ Though Schlesinger himself did not give a clear definition for the term, the term "judicial activism" has been used since that time by different authors, either to: (1) describe judges; or (2) explain their decisions.³⁴ The concept of judicial activism is more frequently found in debates over American legal science than in legal theory and in Europe.³⁵ Keenan Kmiec offers five core meanings of judicial activism: "(1) invalidation of arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial 'legislation,' (4) departures from accepted interpretive methodology, and (5) result-oriented judging."³⁶ Perhaps the clearest conclusion one can draw from the various attempts to understand and define judicial activism is that the concept is "multidimensional."³⁷

In the case of the Constitutional Court of Kosovo, the line between constitutional interpretation and judicial activism by the Court is somewhat

29. See CONST. OF THE REPUBLIC OF KOS art. 112.

30. See *id.*

31. See, e.g., CONST. OF THE REPUBLIC OF MACED. art. 108-13.

32. See Kmiec, *supra* note 18, at 1463-64.

33. See *id.* at 1446 (citing Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73, 74-76) ("Schlesinger's article profiled all nine Supreme Court justices on the Court at the time and explained the alliances and divisions among them.")

34. *Id.* at 1463-64. The term is often used by judges themselves in their legal opinions.

35. See, e.g., Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 3 (2011) (discussing the rate at which individual U.S. Supreme Court justices substitute their own judgment for those of U.S. District Court judges).

36. Kmiec, *supra* note 18, at 1444.

37. See Yung, *supra* note 35, at 10 ("Perhaps the clearest conclusion one can draw from the various attempts to understand and define judicial activism is that the concept of judicial activism is 'multidimensional.' As such, it makes little sense to define 'activism' and 'restrain' as part of a binary construction.").

blurred; it is difficult to identify where constitutional interpretation ends and judicial activism begins. This is due to the historical context and positioning of the constitutional courts in Europe—including Kosovo—and differences between the American and European concepts of judicial review.³⁸ Given the legal framework within which the Court operates, perhaps the easiest way to trace judicial activism is by analyzing the Court's decisions in light of the actual constitutional norms. In this article, I will compare the text of the particular constitutional provision with the Court's decision regarding this provision and will further examine the effect that the Court's decision has had on implementing the constitutional provision.

The Court has occasionally shown that it is eager to be actively engaged in political life by intervening to resolve political disputes amongst the country's political parties.³⁹ The Court has done this by: (1) adjudicating politically charged cases and issuing a "Clarification of Judgment" beyond the Court's jurisdiction;⁴⁰ and (2) issuing judgments that are advisory opinions instead of full adjudications.⁴¹ While the judgment and the clarification arguably helped resolve the political stalemates at the time,⁴² this has led the Court down a path that may be dangerous in the future. The Constitutional Court is not an advisory body to the other branches of the

38. For more insight into the differences between the American and the European concepts of judicial review, see generally John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2002).

39. See, e.g., Case No. KO 29/11; Case No. KO103/14, [2014] (Kos.), available at http://www.gjkk-ks.org/repository/docs/gjkk_ko_103_14_ang.pdf [hereinafter KO103/14].

40. Case No. KO 29/11. Sabri Hamiti and other Deputies, were issued a "Clarification of Judgment" on the following legal basis: (1) Article 113.5 of the Constitution; (2) Article 42 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo; and (3) Rules 56 (1) and 61 of the Rules of Procedure of the Constitutional Court. *Id.* However, the Court's jurisdiction is set forth in Article 113 of the Constitution. See CONST. OF THE REPUBLIC OF KOS art. 113. Moreover, in Article 113.10, it is foreseen that "additional jurisdiction may be determined by law;" therefore, additional jurisdiction to the Court cannot be determined by the Court's rules of procedures. See *id.* Neither Article 113 of the Constitution nor Law No. 03/L-121 on the Constitutional Court provides the Court with jurisdiction to issue *clarifications* to its judgments. See *id.* Moreover, the parties that addressed the questions for clarification did not have the legal basis to refer such questions to the Court, since the nature of the referrals by the authorized parties is enumerated in Article 113, and questions for clarification of a judgment of the Constitutional Court is not listed in Article 113 of the Constitution or in Law No. 03/L-121. See *id.*; Case No. KO 29/11.

41. See, e.g., KO103/14. This judgment by the Court is more of an advisory opinion than an actual adjudication. See *id.* There was no action from any of the actors or organs of state power prior to the judgment. *Id.* Afterwards, the President preceded in accordance with the Court's Decision—something that should have been done in the first place since the Court found that both articles of the Constitution are compatible. See *id.*

42. The judgment in Case No. KO 29/11 helped the political parties in the Assembly overcome a political stalemate that resulted in inclusive political agreements between the political parties at the Assembly. This eventually led to the election of a new president and avoided a potential political vacuum and resulting political instability in the country. Case No. KO 29/11.

state; in fact, its core function is to review the constitutionality of the state's acts.⁴³

In the next two sections, by revisiting the Constitutional Court of Kosovo's jurisdiction, powers, and jurisprudence, we shall reveal how the Court has incorporated new de facto constitutional standards into Kosovo's constitutional system through judicial activism.⁴⁴

III. JURISDICTION OF THE CONSTITUTIONAL COURT OF KOSOVO: THE COURT'S POWERS

The principle of separation of powers is a fundamental principle embodied in the Constitution of Kosovo.⁴⁵ Accordingly:

[T]he rule of law requires at least that the government justify its powers by reference to statute or the royal prerogative and may also require the government to conform to basic procedural standards of justice and equality. On the other hand, parliamentary supremacy prevents the courts from overriding a statute. Both the separation of powers and the European Convention on Human Rights requires the courts to check misuse of power by the executive but also to avoid trespassing into the political territory of the government.⁴⁶

The first President of the Constitutional Court of Kosovo, Mr. Hasani, described the Constitutional Court of Kosovo's jurisdiction as "wider in scope than any other in the region of the Balkans: modeled upon the German Constitutional Court[,] it has [] jurisdiction almost over every aspect of the actions of public authority."⁴⁷

The Court, being "the final authority for the interpretation of the Constitution," has explicit legal authority for both judicial review of the laws and the acts of the executive branch and other state institutions that exercise public authority.⁴⁸ This is not the case with the United States Constitution, which does not explicitly determine which institution is responsible for the Constitution's final interpretation.⁴⁹ This is not to say

43. See CONST. OF THE REPUBLIC OF KOS art. 112.

44. See *infra* Parts III, IV.

45. See CONST. OF THE REPUBLIC OF KOS art. 4.

46. See JOHN ALDER, GENERAL PRINCIPLES OF CONSTITUTIONAL AND ADMINISTRATIVE LAW 363 (4th ed. 2002).

47. See Enver Hasani, *Constitutionalism in Kosovo and the Relationship Between Constitutional Justice and the Supreme Court*, in CONSTITUTIONAL JUSTICE IN SOUTHEAST EUROPE 59 (Enver Hasani et al. eds., 2012) [hereinafter Hasani].

48. See CONST. OF THE REPUBLIC OF KOS art. 112-13.

49. See generally U.S. CONST.; see also John N. Hostetler & Thomas W. Washburne, *The Constitution's Final Interpreter: We the People*, 8 REGENT U. L. REV. 13-14 (2013) (challenging the premise that the U.S. Supreme Court should be the final arbiter of the U.S. Constitution).

that American legal doctrine does not recognize the concept of judicial review; as Farber and Sherry argue, judicial review is an American invention.⁵⁰

The Court is a centralized and permanent special judicial institution, institutionalized directly by the Constitution in order to guarantee respect of the state's constitutional order—a doctrine also known as constitutionality.⁵¹ The Court decides issues of constitutionality based on constitutional and legal criteria.⁵² Constitutional jurisdiction can only be exercised within the framework of procedural rules.⁵³ This requirement stems not only from notions of security and legal order, but also from the guarantee of equal protection of laws, a fundamental principle of justice that is inherent in a democratic constitution oriented towards the rule of law.⁵⁴

It should be noted that as a special judicial constitutional body, the Constitutional Court is not empowered to review the legality of norms because this is not a competence foreseen in Article 112, Paragraph 1 of the Constitution.⁵⁵ However, in many other countries, unlike Kosovo, the constitutional court represents the main institutional mechanism which protects constitutionality *and* legality of norms.⁵⁶ The Court's authority to exercise abstract control over the constitutionality of legal norms is derived from the above-mentioned constitutional norm.⁵⁷ Being the final authority implies that the Court's judgments have final legal effect and cannot be reviewed by any state institution or mechanism.⁵⁸

Kosovo's Constitution provides the Court with the constitutional authority to repeal all unconstitutional and illegal acts and identify constitutional violations by state authorities.⁵⁹ The Constitutional Court's decisions are binding on the judiciary and all persons and institutions of the Republic.⁶⁰ This means that court decisions are not of mere declarative

50. DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* 3 (2009) ("This is a book defending judicial review: the power of courts to strike down laws that violate the Constitution. Judicial review was an American invention, but it has spread to most democracies around the world.").

51. *See* CONST. OF THE REPUBLIC OF KOS art. 112-13.

52. *See id.*

53. *See* CONST. OF THE REPUBLIC OF KOS art. 113.

54. *See* Cvetan Cvetkovski, *The Constitutional-Judicial Control of the Legislative and Executive Powers in Central and Eastern Europe Countries*, OPEN SOC'Y INST. (1999), available at <http://rss.archives.ceu.hu/archive/00001008/01/8.pdf>.

55. *See Kosovo MPs Proclaim Independence*, *supra* note 1.

56. *See, e.g.*, CONST. OF THE REPUBLIC OF CROAT. art. 126, 129 ("The Constitutional Court of the Republic of Croatia: . . . shall decide upon the compliance of laws with the Constitution, . . . shall decide upon the compliance of other regulations with the Constitution and laws . . .").

57. *See* CONST. OF THE REPUBLIC OF KOS art. 116.

58. *See id.*

59. *Id.*

60. *Id.*

character, but that they constitute direct legal effect and obligation.⁶¹ In this regard, Article 116 of the Constitution reads, “[d]ecisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.”⁶² Furthermore, this constitutional provision clarifies that the Court’s decisions are not only binding for the parties involved in the procedure, but also *erga omnes*.⁶³

The proceedings before the Court differ from the judiciary’s classical rules; given the nature of the dispute submitted before the court—the character of the constitutional dispute—the court proceedings are separate and express features of the dispute’s constitutional nature.⁶⁴ Thus, the Court decides only on cases brought forward in a legal manner by authorized parties.⁶⁵

While Article 112 of the Constitution lays out the general principles of the Constitutional Court’s functions and mandates, Article 113 determines the Court’s jurisdiction while limiting its judiciary review.⁶⁶ One aspect of Article 113 is that it provides that additional jurisdiction for the Court may be determined by law.⁶⁷ However, the Law on the Constitutional Court does not create additional jurisdiction for the Court; it was adopted with the purpose to further regulate the organization and functioning of the Constitutional Court.⁶⁸ The Law regulates the organization and functioning of the Court, the procedures for submitting and reviewing referrals to the Constitutional Court, the terms and procedures for appointing and dismissing Constitutional Court judges, the basic procedural principles and rules of the Court, and other organizational issues.⁶⁹

It goes without saying that the extent of judicial review provided to the Constitutional Court by the Constitution is very wide in scope.⁷⁰ The Constitutional Court has been given legal authority to judge the legal acts and decisions of the main organs of state power: the president, the Parliament, the Government, regular court decisions, and local government bodies.⁷¹ Moreover, the Court has jurisdiction to make an assessment of the constitutionality of the election process, the election and dismissal of the

61. *See id.*

62. *See* CONST. OF THE REPUBLIC OF KOS art. 116.

63. *Id.*

64. *See generally* R. P. CONST. CT. KOS.

65. *See* CONST. OF THE REPUBLIC OF KOS art. 113 (“The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.”).

66. *See* CONST. OF THE REPUBLIC OF KOS art. 112-13.

67. *See* CONST. OF THE REPUBLIC OF KOS art. 113.

68. The Law on the Constitutional Court (Law No. 03/L-121) was approved by the Assembly of Kosovo on December 16, 2008. *See* Hasani, *supra* note 47, at 59.

69. *Id.*

70. *See* CONST. OF THE REPUBLIC OF KOS art. 112-13.

71. *See id.*

president by parliament, the constitutionality of referendums, and other important processes.⁷²

A very special jurisdiction given to the Constitutional Court concerns the obligation that the Speaker of the Assembly has to refer proposed constitutional amendments to the Court before they are approved by the Assembly in order to ascertain whether the proposed amendments diminish the rights and freedoms guaranteed in Chapter II of the Constitution.⁷³ Before a constitutional amendment is approved in the parliament, it should be referred to the Constitutional Court.⁷⁴ This is somewhat problematic and provides the grounds for an activist Court. In a hypothetical case, if the Assembly of Kosovo decides to amend and change the Constitution with respect to the Constitutional Court's powers and/or role—for example, by limiting the Court's jurisdiction abolishing the Court and empowering a regular court to interpret the Constitution—must these amendments be subject to the Constitutional Court's approval? Would this constitute a conflict of interest for the judges? Would they be able to act impartially as final interpreters of the Constitution? Though rhetorical questions, they provide solid ground for future academic research. In any case, the Court can actually deny the Assembly's right to adopt such amendments to the Constitution, unless such amendments would diminish the fundamental rights set forth in Chapter II of the Constitution.⁷⁵

While exercising judicial review based on the above constitutional norms, the Constitutional Court may act in different roles depending on the issue that is presented before the judges.⁷⁶ When deciding cases regarding the compliance of laws, decrees of the president or prime minister, government regulations, or compatibility with the Constitution regarding municipal statutes, the Court stands both as a controller of accountability for the government and other institutions of public authority and as a source of protection for individuals by requiring the government and other institutions to conform to basic legal acts and procedural standards of justice and equality.⁷⁷

When the Court adjudicates a conflict among the constitutional competencies of the Assembly of Kosovo, the president of the Republic of Kosovo and the Government of Kosovo, the Court can be viewed as

72. *See id.*

73. *See* CONST. OF THE REPUBLIC OF KOS art. 113.

74. Thus far, the Speaker of the Parliament has referred three sets of constitutional amendments to the Constitutional Court. *See, e.g.,* Liz Fuller, *Consensus Reached Over Georgian Constitutional Court Changes*, RADIO FREE EUR./RADIO LIBERTY (June 8, 2016), <http://www.rferl.org/content/georgia-constitutional-court-changes-kvirikashvili-margvelashvili-usupashvili/27786224.html>.

75. *See* CONST. OF THE REPUBLIC OF KOS art. 113.

76. *See id.*

77. *See id.*

arbitrator among the parties.⁷⁸ The Court has the legal prerogative to assert compatibility of a proposed referendum with the Constitution; in such a case the Court might be regarded as a protector of minorities—especially members of ethnic communities.⁷⁹ A referendum might be declared unconstitutional if the subject of the referendum is a law of vital interest to ethnic communities and their members.⁸⁰ When ten or more deputies of the Assembly contest the constitutionality of any law or decision adopted by the Assembly on substantive or procedural grounds, the Court protects minority groups from potentially negative outcomes.⁸¹ However, in cases of this nature, the Court should be very careful not to be used as a political instrument by a minority of the legislature's members in order to obstruct the legislature's work or to overload the Court with cases of a purely political (rather than legal or constitutional) nature.⁸²

When an individual's constitutional rights are violated by public authorities, they can only refer these violations to the Court after they exhaust all legal remedies provided by law.⁸³ In these cases, the Court protects individuals from the abuse of power by public authorities. Furthermore, it acts as the guardian of constitutional human rights and individual freedoms. Indeed, this is the only area throughout the Constitution where individuals are authorized by the Constitution to initiate a procedure for constitutional control before the Constitutional Court.⁸⁴ In exercising this jurisdiction, the Court exercises complete control of the state's individual acts regarding the protection of fundamental human rights as foreseen in Chapters II and III of the Constitution.⁸⁵ Wolfe argues that this jurisdiction constitutes the only legitimacy for which there should be judicial control.⁸⁶ I am also of the opinion that this jurisdiction constitutes the only legitimate ground for justifying the Court's judicial activism.

The risk that the Constitution creates by providing the Court with a wide scope of jurisdiction for judicial review and constitutional interpretation is that it provides for a potentially activist Court with activist judges who, instead of interpreting the letter of the Constitution, impose their own beliefs and convictions.⁸⁷ For the Court to maintain a degree of

78. *See id.*

79. *See id.*

80. *See, e.g.,* CONST. OF THE REPUBLIC OF KOS art. 81 (prohibiting certain laws from being the subject of a referendum).

81. *See* CONST. OF THE REPUBLIC OF KOS art. 113.

82. *See* Kmiec, *supra* note 18, at 1463-64.

83. *See* CONST. OF THE REPUBLIC OF KOS art. 113.

84. *See generally* CONST. OF THE REPUBLIC OF KOS.

85. *See* CONST. OF THE REPUBLIC OF KOS Ch. I-II.

86. *See* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 337 (1986).

87. *See* Kmiec, *supra* note 18, at 1463-64.

restraint in interpreting constitutional norms, it is of utmost importance that the judges be fully independent of any political or ideological bias.⁸⁸ Indeed, the law governing the Constitutional Court of Kosovo provides that judges should be "independent and impartial during his/her mandate."⁸⁹ Nonetheless, it should be noted that one Constitutional Court judge has been publicly reprimanded: Judge Kadri Kryeziu is excluded from serving as a Constitutional Court judge on any case: (1) having a political context; or (2) where the president of the Republic of Kosovo, the Assembly of Kosovo, the Government of Kosovo, the Ombudsperson, or municipalities may appear before the Court as parties.⁹⁰ This case shows just how peculiar the Court's position is, especially considering the fact that the Court has a wide range of constitutional authority for judicial review.⁹¹ The resolution in Case No. KK124/14 showed that the Court is ready to undertake whatever measures are necessary to uphold the Court's impartiality and integrity.⁹²

As detailed in the next section, the Kosovo Constitutional Court has used its jurisdiction and the country's general political conditions to set new standards and even change the Constitution's norms.⁹³ If judged only by its jurisdiction and the cases it has decided, one might view the Constitutional Court of Kosovo as one of the most activist courts in the world.⁹⁴ Moreover, one might argue that the Court has acted as a replacement for the legislature in certain cases by changing the letter of the Constitution and thus introducing new constitutional standards into Kosovo's constitutional system.⁹⁵ All this is done by managing highly complex political cases, and by developing a thick construct of constitutional rights that the Court uses to check executive power.⁹⁶

88. *See id.*

89. *See* LAW NO. 03/L-121 art. 5 (Kos.), available at http://www.confueconstco.org/en/congress/congress-XVI/Law_of_the_Constitutional_Court_of_Republic_of_Kosovo_-_E.pdf.

90. Judge Kadri Kryeziu has been spotted as a participant in an electoral meeting of one of the main political parties in Kosovo; this "error of judgment" (as admitted by Judge Kryeziu himself) resulted in public questioning of his impartiality. Case No. KK124/14, [2014] (Kos.), available at http://www.gjk-ks.org/repository/docs/gjkk_kk_124_14_ang.pdf [hereinafter Case No. KK124/14]. Therefore, on August 19, 2014, the Committee of Judges, which was established by a decision of the President of the Constitutional Court, submitted its final report to the Court with findings concerning the allegations made against Judge Kryeziu. *Id.* This report resulted in a Decision of Court to publicly reprimand Judge Kryeziu for this violation and exclude him from participating as a judge on the Constitutional Court in any case having a political context, which includes cases where the following parties may appear: the President of the Republic of Kosovo, the Assembly of Kosovo, the Government of Kosovo, the Ombudsperson, and municipalities. *Id.*

91. *See id.*

92. *See id.*

93. *See infra* Part IV.

94. *See, e.g.,* Capussela, *supra* note 11.

95. *See id.*

96. *See infra* Part IV.

IV. TRACING JUDICIAL ACTIVISM OF THE COURT: JURISPRUDENCE OF THE COURT

Since its establishment in 2009, the constitutional control exercised by the Constitutional Court has proved to be the best mechanism to ensure that the state institutions function within the bounds of the constitution, thus eliminating arbitrary, politically motivated decision-making that could have negative consequences for the rights of individuals in the country. Yet, the Court's decisions have also caused the first two democratically-elected presidents of the Republic to resign.⁹⁷ Since its establishment, the Court has addressed a number of complex and politically charged cases: it has examined the constitutionality of three sets of constitutional amendments, has annulled the nomination of the candidate for Chief State Prosecutor, and has ordered the Kosovo Prosecutorial Council (KPC)⁹⁸ to repeat the election procedure for the position of Chief State Prosecutors.⁹⁹ The Court has also declared provisions of a law to be incompatible with the Constitution, and has ruled in hundreds of other diverse cases. Naturally, the Constitutional Court's wide and diverse activities provide ample material to assess the role that it has played in building the rule of law and democracy in Kosovo.

Right after its establishment, the Court found itself dealing with several high profile case referrals, which tested the Court's credibility and professionalism.¹⁰⁰ Thrust immediately into the limelight, the Court felt obliged to address and answer complex and politically charged cases, though with serious risks, without any delay or indecisiveness.¹⁰¹ The Court proved to be up to the task and issued a series of timely, important, and well-reasoned decisions, especially with regard to the protection of the rights of the ethnic communities and universal human rights, thus setting the standard in the newly established state.¹⁰² I have chosen two prominent

97. See Case No. KO 29/11.

98. The KPC is an independent institution, consisting of members from the prosecution offices (experts) and from other parts of Kosovar society, such as civil society, law faculty, lawyers, and the Minister of Justice (in person), which allows for different input to the discussions and development of the overall strategy for the State Prosecution in Kosovo. See CONST. OF THE REPUBLIC OF KOS art. 110. The Chief State Prosecutor chairs the Council; he or she is appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council. *Id.*

99. See, e.g., Cases No. KI99/14 and KII00/14, [2014] (Kos.), available at http://www.gjk-ks.org/repository/docs/KI99-14_ANG.pdf [hereinafter Cases No. KI99/14 and KII00/14]. The Court ruled to annul the challenged decisions in KPC No. 146/2014 and KPC No. 151/2014 on the nomination of the candidate for Chief State Prosecutor and ordered the KPC (Kosovo Prosecutorial Council) to repeat the election procedure for the position of Chief State Prosecutor in conformity with its judgment and without prejudice as to the outcome of that repeated procedure. *Id.*

100. See *infra* Part IV.a-b.

101. See *infra* Part IV.a-b.

102. See *infra* Part IV.a-b.

cases dealt with by the Court to illustrate how, via judicial activism, the Court has set standards and changed the very norm of the Constitution.¹⁰³

a. Setting the Standard: The "Prizren Logo Case"

The case of *Cemailj Kurtisi v. Municipal Assembly of Prizren*¹⁰⁴, commonly referred to as the "Prizren logo case," is one of the standard-setting cases decided by the Court which has had a positive impact on both the Court's reputation and the protection of ethnic communities' rights. The case was brought before the Court by a member of the Prizren Municipal Assembly—a body of elected officials that represents those who live in the Municipality of Prizren.¹⁰⁵ The case involved a constitutional challenge to a recently-adopted municipal statute that established the official emblem of the Municipality of Prizren.¹⁰⁶ The statute provided that the Municipality of Prizren's emblem would bear "The House of the League of Prizren" along with the notation "1878—Prizren."¹⁰⁷ The year 1878 is known as the year when the "League of Prizren" was founded.¹⁰⁸ The League of Prizren was an assembly of Albanian leaders from all over the Balkans that worked to establish an autonomous Albanian state.¹⁰⁹ The Municipality of Prizren, which is located in the western part of Kosovo and is close to the Albanian border, is well known for its multi-ethnic population that lives in peace with each other.¹¹⁰ The applicant claimed that the new emblem did not reflect the multi-ethnic nature of Prizren's population, thus violating constitutional norms that protect and promote the rights of ethnic communities and minorities.¹¹¹ The Court held that the emblem violated: (1) Article 3's guarantee of equality of all individuals before the law; and (2) Kosovo's existence as "a multi-ethnic society consisting of Albanian and other Communities."¹¹² The Court also found that the emblem violated: (1) the rights of minority communities to use and display community symbols found in Article 58; and (2) the state's obligation to ensure adequate conditions for the preservation of the identities of such communities.¹¹³

103. See *infra* Part IV.a-b.

104. Case No. KO 01/09, [2010] (Kos.), available at http://www.gjk-ks.org/repository/docs/ko_01_09_Ven_ang.pdf [hereinafter Case No. KO 01/09].

105. Case No. KO 01/09.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Case No. KO 01/09.

111. *Id.*

112. *Id.*

113. *Id.*

The Court unanimously ruled in favor of the applicant and struck down the municipal statute.¹¹⁴ The Court reached some very important conclusions.¹¹⁵ The Court acknowledged the symbolic importance of emblems, the multi-ethnic composition of Prizren, and the need for an emblem that respects all of Prizren's citizens.¹¹⁶ Additionally, the Court called upon international human rights instruments, such as the Council of Europe Framework Convention for the Protection of National Minorities, which is directly incorporated in the Constitution of Kosovo.¹¹⁷

The fact that the decision was unanimous (even though the judges are of different ethnic backgrounds) and that the Municipality of Prizren complied with the decision immediately demonstrated that the Court has integrity in setting standards for dealing with human rights and the rights of ethnic communities. The Court set a new standard because it emphasized that the state of Kosovo has a duty to enable ethnic communities to enjoy their constitutional rights in the spirit of a "multi-ethnic society" as provided by the Constitution.¹¹⁸ The Constitution of Kosovo defines the Republic of Kosovo in Article 1 (Definition of State), which states that "[t]he Republic of Kosovo is an independent, sovereign, democratic, unique[,] and indivisible state . . . [t]he Republic of Kosovo is a *state of its citizens*"¹¹⁹ Article 3 of the Constitution (Equality Before the Law) acknowledges that "[t]he Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically"¹²⁰

In my opinion, these are two different definitions of the Republic—namely a "citizen's state," opposed to the well-known notion of a "nation state"—and the "multi-ethnic society consisting of Albanian and other Communities." Terms such as "state" and "society" are both comprised of people; they are interrelated and depend on each other, yet they are not the same. There are fundamental differences between the two. I am of the opinion that Article 1 defines the state of Kosovo, while Article 3 of the Constitution might be regarded as defining the society in Kosovo. Therefore, the Prizren logo case is "standard setting," in my opinion, since it implies that a state (as a political organization) should reflect society's multi-ethnic composure—in this case, the inhabitants of Prizren.

The Court proved to be up to the task when it comes to protecting individual constitutional human rights by emphasizing not only the state's

114. *Id.*

115. Case No. KO 01/09.

116. *Id.*

117. *Id.*

118. CONST. OF THE REPUBLIC OF KOS art. 3.

119. CONST. OF THE REPUBLIC OF KOS art. 1 (emphasis added).

120. CONST. OF THE REPUBLIC OF KOS art. 3.

obligation to protect individual human rights, but also the state's responsibility when it fails to defend the rights of its citizens.¹²¹ This case, along with the Diana Kastrati case, is seen as proof that an active Court can play a decisive, positive role in setting the standards for human rights protection in a new democracy such as Kosovo.¹²²

b. Changing The Constitutional Norm: Case No. KO 57/12—the Referral of the President of the Republic of Kosovo, Her Excellency, Atifete Jahjaga, Contesting the Voting for the Approval of the Law No. 0411-084

This case marked the first time the President referred a question to the Constitutional Court using its Constitutional prerogative.¹²³ The President referred the issue to the Court after the Assembly of Kosovo, with a *simple majority vote*, overturned the President's "veto" on Law No. 04/L-084, entitled "On Pensions of Kosovo Security Forces Members."¹²⁴ In the President's view, this vote in the Assembly was in violation of Article 80, Paragraph 4 of the Constitution.¹²⁵

Article 80, Paragraph 4 of the Constitution reads as follows: "The Assembly decides to adopt a law returned by the President of the Republic of Kosovo by majority vote of all its deputies . . ." ¹²⁶

The question posed by the President, through its representatives to the Court, was:

Whether Article 80, paragraph (4) of the Constitution of [the] Republic of Kosovo was violated during voting/adopting procedure of Law No. 04L-084 "On Pension of the members of Kosovo Security Forces[.]" which was overturned for reconsideration to the Assembly of Kosovo with the decision of the President[,] and consequently whether the competence of the President provided in Article 84.[.] Para. 6 of the Constitution of [the] Republic of Kosovo, to return the Law for reconsideration is violated?¹²⁷

First, the Court split the original question of the President's representatives into two questions:

121. See Case No. KO 01/09.

122. See *id.*; see also the Diana Kastrati case.

123. Case No. KO 57/12.

124. *Id.*

125. *Id.*

126. CONST. OF THE REPUBLIC OF KOS art. 80 (emphasis added).

127. Case No. KO 57/12.

1) *Whether the competence of the President provided in Article 84 (6) of the Constitution of [the] Republic of Kosovo, to return the law for reconsideration has been violated?*

2) *Whether Article 80 (4) of the Constitution of [the] Republic of Kosovo was violated during voting/adopting procedure of Law on Pensions of KSF members?*¹²⁸

The process of adopting and enforcing laws begins when laws are approved by the Assembly,¹²⁹ signed by the Speaker of the Assembly, and are finally promulgated by the president.¹³⁰

The president may return a law to the Assembly for reconsideration when he or she considers them to be harmful to the legitimate interests of either the Republic of Kosovo or one or more communities.¹³¹ This prerogative of the head of state can be used only once per law,¹³² and it can be turned down by the Assembly; this therefore constitutes a “suspensive veto.”¹³³ When the president decides to exercise his or her right to return a law to the Assembly for reconsideration, per Article 80, Paragraph 4 of the Constitution, the Assembly decides to adopt a law returned by the president by a majority vote of the Assembly’s deputies.¹³⁴ A majority vote of the Assembly’s deputies (an absolute majority) is required either to approve the original law and reject the president’s “veto” or to approve the president’s remarks in his or her “veto” of the law.¹³⁵

A veto by the president should be regarded as both a political act and a legal act of the head of state toward an action of the legislative body. A reading of the above-mentioned Constitutional norm implies that when the president exercises his or her right to veto, the Assembly has the obligation to proceed via a special voting system—in this case, a majority vote of all its deputies.¹³⁶ However, the Court said that this obligation does not exist in a case where the president proposes amendments to the returned law for reconsideration.¹³⁷ The Court reached this conclusion by referring to

128. *Id.*

129. *See* CONST. OF THE REPUBLIC OF KOS art. 80.

130. *See id.*

131. *See* CONST. OF THE REPUBLIC OF KOS art. 84.

132. *Id.*

133. *Id.*

134. *See* CONST. OF THE REPUBLIC OF KOS art. 80.

135. *Id.*

136. The Assembly of Kosovo has 120 MPs (Members of Parliament), and sixty-one votes are needed to constitute a majority vote of all its deputies. *See* CONST. OF THE REPUBLIC OF KOS art. 64, 69.

137. The Court reached the following conclusion: “[The] obligation of the Assembly of Kosovo . . . [i.e.] ‘to adopt a law returned by the President of the Republic of Kosovo by majority vote of all its deputies. . .’ . . . does not exist in case that the President of the Republic proposes amendments to the returned law for reconsideration.” Case No. KO 57/12.

constitutional provisions that grant the president the right to initiate legislative initiatives from his or her scope of authority.¹³⁸

Nevertheless, the president's right to "veto" legislation passed by the Assembly is separate and different from the right to initiate legislation.¹³⁹ The president's right to veto derives from the principle of checks and balances that is enshrined in the Constitution.¹⁴⁰ In my opinion, because these are two different presidential rights, the Constitution has foreseen two different types of voting in the Assembly; when deciding on a legislative initiative proposed by the president, a simple majority vote is required, but when deciding on a law returned for consideration (vetoed) by the president, an absolute majority of all the MP's votes is required.

The Court reached a conclusion in this decision that created a new, de facto constitutional competence for the president—the right to propose an amendment to a law that has already been passed by the Assembly.¹⁴¹ Nonetheless, it should be noted that nowhere in the Constitution's text is there a prescription of such a prerogative for the president at this stage of adopting the laws.¹⁴² I am of the opinion that on reaching these conclusions, the judges of the Court imposed their beliefs—not the letter of the Constitution.

In addressing an increasing number of cases of a political nature, the Constitutional Court of Kosovo effectively rewrote or redefined the actual constitutional norms.¹⁴³ The effects of these decisions were mainly positive since they helped resolve a political crisis.¹⁴⁴ On the other hand, there is a general understanding, and I position myself in support of this view, for the Court to: (1) be activist in striking down statutes and laws that violate the Constitution; and (2) set standards in protecting and promoting universal human rights.¹⁴⁵ However, the Court should refrain from intervening by interpreting the Constitution in politically charged cases or interpreting the constitutional competences of different institutions, thus rewriting the actual norms of the Constitution.¹⁴⁶ This should remain a duty for the other branches of the Republic (either via a referendum or via the legislature, and for the political actors within a polity), and the Court should not become or be viewed as "king maker" in this field.¹⁴⁷

138. *Id.* (citing CONST. OF THE REPUBLIC OF KOS art. 79).

139. *See* CONST. OF THE REPUBLIC OF KOS art. 84.

140. *See* CONST. OF THE REPUBLIC OF KOS art. 4.

141. *See* Case No. KO 57/12.

142. *See generally* CONST. OF THE REPUBLIC OF KOS.

143. *See supra* Part IV.

144. *See supra* Part IV.

145. *See supra* Part IV; *see also* CONST. OF THE REPUBLIC OF KOS art. 56.

146. *See* Kmiec, *supra* note 18, at 1463-64.

147. *See id.*

V. CONCLUSION

The question of when judicial review ends and judicial activism begins has been the theme of an ongoing debate since the concept of judicial review was first introduced in the famous *Marbury v. Madison*¹⁴⁸ case before the Supreme Court of the United States. The line between judicial review and judicial activism in the Constitutional Court of Kosovo is blurred, and it is hard to identify where judicial review ends and where judicial activism begins. This is due to the historical context and positioning of the Constitutional Court in Kosovo, the nature of judicial review in the European context, and the jurisdiction that is given to the Court.¹⁴⁹

Professor Tushnet poses:

it is entirely unhelpful to talk about an ‘activist’ Court or one that is ‘judicially restrained.’ Those terms are almost entirely parasitic on one’s views about what the Constitution properly interpreted really means: The Court should be activist in striking down statutes that violate the Constitution properly understood, and restrained—actually, completely quiescent—otherwise.¹⁵⁰

It is judicial review that gives the Constitution its practical bite and makes it more than mere rhetoric.¹⁵¹ Without it, government officials would be free to evaluate the constitutionality of their own conduct.¹⁵² Judicial review is of utmost importance to a society that aspires to have the rule of law, as it “contributes to the accountability of government and the protection of individuals.”¹⁵³ Most modern theories of judicial review dispense with the traditional principle of legislative deference.¹⁵⁴ Modern judicial review is precisely the process of giving meaning to the allegedly “open-ended” generalities of the Constitution. Resolving the ambiguity of

148. 5 U.S. 137 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”).

149. See *supra* Part II.

150. See Jonathan H. Adler et al., *Supreme Court Term, Online Debate*, FEDERALIST SOC’Y (June 27, 2008), <http://www.fed-soc.org/publications/detail/supreme-court-term>.

151. See, e.g., David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L. REV. 723, 786 (2009) (“It is common to conceive of judicial independence as serving a countermajoritarian function: judicial independence is necessary, the conventional story goes, if courts are to protect individuals and minorities from government persecution and tyrannous majorities alike.”).

152. See Law, *supra* note 151, at 786 (“Courts perform monitoring and coordinating functions that safeguard popular sovereignty by enabling the people to exercise effective control over their government. They cannot perform these functions, however, unless they enjoy independence from the government that they are supposed to monitor.”).

153. See ALEXANDER H. TURK, *JUDICIAL REVIEW IN EU LAW* 1 (2009).

154. See Law, *supra* note 151, at 729.

2016] "*JUDICIAL ACTIVISM" OR CONST. INTERPRETATION?* 819

unspecified constitutional content is the *raison d'être* of the Constitutional Court as final interpreter of the Constitution. The Constitutional Court in this regard has played a decisive role in exercising judicial review of the acts of public authorities.