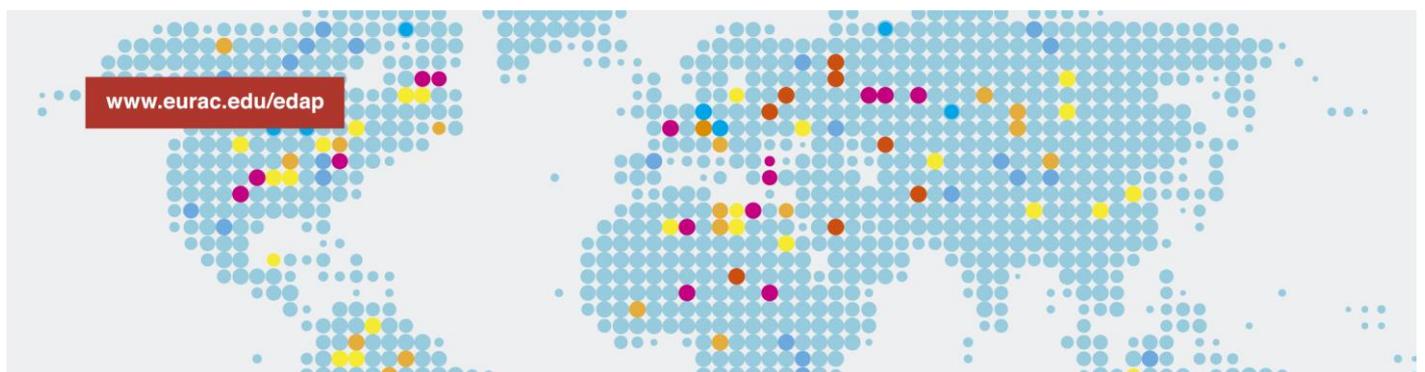


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# A Critique of Kosovo's Internationalized Constitutional Court

Andrea Lorenzo Capussela



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## Abstract

The quality and the sustainability of the democratic institutions established in post-independence Kosovo under the guidance of the international community depend to a large extent on the performance of its constitutional court. The considerable international investment in that court reflects this assessment. One of the reasons why Kosovo's international supervision has recently been terminated is that such court has been deemed to be functioning well. But its performance has not yet adequately been scrutinized. This essay reviews its most significant judgments, including decisions that deposed a president, annulled a presidential election, prevented a general election, and abolished the inviolability of parliament. The analysis of the reasons and effects of such rulings leads to the conclusion that the court gravely lacks independence and is subject to heavy political interference, which also the international judges do not seem immune from. The performance of the court is both a manifestation and a cause of Kosovo's acute governance problems, which its international supervision has failed to remedy. The international community's approach towards the court is also an illustration of the reasons why statebuilding in Kosovo led to unsatisfactory results, despite unprecedented investment.

## Author

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## Key words

Kosovo - Internationalized Courts - Constitutional Court - Statebuilding - Governance.

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# A Critique of Kosovo's Internationalized Constitutional Court

Andrea Lorenzo Capussela

## 1. Introduction: the Court and the Supervision of Kosovo

Statebuilding lies at the core of the contemporary approach to post-conflict reconstruction.<sup>1</sup> It is an element of the 'Responsibility to Protect' doctrine<sup>2</sup>. And it featured prominently in the legal, moral and political justification for the international response to the crisis of Kosovo, up to and beyond its independence.<sup>3</sup> Establishing the supremacy of the law is a necessary component of statebuilding, and erecting an independent and credible supreme or constitutional court is essential, particularly if the chosen model is a liberal democracy founded on a rigid constitution.<sup>4</sup>

After the 1999 NATO intervention Kosovo was administered by the UN, which established representative institutions shaped like those of a parliamentary republic. When it declared itself independent, in February 2008, Kosovo was placed under temporary international supervision. Under the watch of the International Civilian Office ("ICO"), Kosovo was expected to give itself the forms of a constitutional republic according to the principles set forth in the Comprehensive Proposal for the Kosovo Status Settlement (the so-called 'Ahtisaari plan'), which provided for the adoption of a rigid constitution and the establishment of a constitutional court.<sup>5</sup>

As the main choices reflected by Kosovo's constitution were directly imposed by the Ahtisaari plan, the long-term sustainability of the progressive principles the latter contains would to a large extent have depended on the

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<sup>1</sup> On statebuilding generally, see, e.g., Patrice McMahon and Jon Western (eds.), *The International Community and Statebuilding: Getting its Act Together?* (Routledge, Abingdon, 2012), and Mats Berdal and Dominik Zaum (eds.), *Political Economy of Statebuilding: Power After Peace* (Routledge, Abingdon, 2012).

<sup>2</sup> For three different analyses of this doctrine, see: Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution, Washington, D.C., 2009); Alex J. Bellamy, *Responsibility to Protect* (Polity Press, Cambridge, 2009); Philip Cunliffe, *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (Routledge, Abingdon, 2011).

<sup>3</sup> For three different perspectives on the crisis of Kosovo and the international response to it, see: Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (Oxford University Press, Oxon, 2009); James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (I.B. Tauris, London, 2009); David Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Nashville, 2009), 171-204.

<sup>4</sup> See, e.g., Dieter Fleck, "The Responsibility to rebuild and its potential for law-creation: good governance, accountability and judicial control", in *Journal of International Peacekeeping* 16 (2012), 84-98, which discusses the 'rebuild' component of the Responsibility to Protect doctrine.

<sup>5</sup> *Comprehensive Proposal for the Kosovo Status Settlement*, UN Doc. S/2007/168/Add.1, enclosed in UN Secretary-General, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, UN Doc. S/2007/168, 26 March 2007.

performance of the constitutional court, which also was the institution whose performance had more direct influence on the duration of international supervision because the emergence of an effective constitutional court would have rendered the ICO's corrective powers largely superfluous. For these reasons the court was closely supervised by the mission and received considerable financial and technical assistance from the international community.

The supervision of Kosovo ended on 10 September 2012, when the group of states that presided over it, the International Steering Group, judged that the new state had substantially implemented the Ahtisaari plan. One argument they relied upon is that Kosovo had a well-functioning constitutional court.<sup>6</sup> This essay discusses its empirical basis.

Five studies exist on the performance of that court, four of which are by authors who either worked with the court or sit on its bench. One, published in 2010, rests on an inaccurate and objectively misleading account of its rulings (see notes 24, 39 and 48, *infra*).<sup>7</sup> This account largely forms the basis of two articles published in 2013, which therefore suffer from the same flaws.<sup>8</sup> And the other two studies deal with very narrow questions, namely the court's treatment of "continuing situations", and the role of the president of the republic in Kosovo's constitutional order.<sup>9</sup>

As this literature does not offer an adequate basis for discussing the performance of the court, this essay shall firstly conduct a fresh analysis of its eight most important judgments. The first three, discussed also by the 2010 study, concern the independence of the public service broadcaster, equality and minority rights, and the impeachment of a president; the other five concern the incompatibilities of the office of the president, the validity of a

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<sup>6</sup> This emerges from the *communiqués* issued on 8 February (para. 1) and 12 July 2011 (para. 2), at <http://www.ico-kos.org>. See also ICO's lessons-learned report: International Civilian Office, *State Building and Exit: The International Civilian Office and Kosovo's Supervised Independence 2008-2012* (Pristina, 2012), 29-30, 46, 76 and 85.

<sup>7</sup> Steven Hill and Paul Linden-Retek, "Supervised Independence and Post-Conflict Sovereignty: The Dynamics of Hybridity in Kosovo's New Constitutional Court", in 36 *Yale JIL Online* (2010), 26-43. These authors worked in ICO's legal unit, which assisted the establishment of the court and supervised its work. One of them is a US diplomat who served as the deputy head of that unit between 2008 and 2010: my exchanges of views with him on the work of the court are not used in this essay, and the only non-public information on the actions and views of the ICO that is used here - in notes 91 and 93, *infra*, and the corresponding text - is drawn from my own direct knowledge of the facts.

<sup>8</sup> Qerim Qerimi and Vigan Quorroli, "A Constitutional Tradition in the Making: The Presidents' Cases and the Role of Kosovo's Constitutional Court in the Process of Democratic Consolidation", in 7 *Vienna J. on Int'l Const. L.* (2013), 49-67 (these authors teach at Kosovo's public university, and one also advises the justice minister); Nicolas Mansfield, "Creating a Constitutional Court: Lessons From Kosovo", *East-West Management Institute Occasional Paper Series* (Spring 2013), at <http://www.gjk-ks.org> (this institute was retained by Kosovo's donors to provide technical assistance for the establishment of the constitutional court, and this study is largely a summary of its work and results).

<sup>9</sup> David M. Palko, "The Risks of 'Continuing Situation' Litigation in Transitional Political Systems: Lessons from the ECtHR for the Constitutional Court of Kosovo", in 25 *Harvard Human Rights Journal* (2012), 183-217 (the author of this interesting study briefly served as a clerk for the constitutional court); Enver Hasani, "Constitutional Protection of the Head of State: The Case of Kosovo", in 7 *Vienna J. on Int'l Const. L.* (2013), 128-149 (this author is the president of the constitutional court, and his article in essence defends a judgment from the criticism of the parliamentary opposition).

presidential election, the dissolution of parliament, the immunities of the highest public offices, and the constitutionality of an international agreement. Some less important judgments are also briefly discussed, to corroborate the conclusions drawn from the analysis of the main ones. As these rulings have had significant effects on Kosovo's political life, the following pages shall devote some attention also to their context.

The jurisdiction of the court is rather broad. Beyond interpreting the constitution, judging the constitutionality of laws and arbitrating conflicts between the supreme institutions, it includes assessing whether proposed amendments to the constitution would curtail human rights or fundamental freedoms, and hearing individual complaints against public authorities, after the exhaustion of the available remedies.<sup>10</sup>

The court is composed of nine judges, appointed by the president of Kosovo upon a proposal by the parliament, which requires a two-thirds majority. A double-majority rule ensures that at least two judges belong to communities other than the dominant Albanian one: one of the current judges is from the Serb minority and one is from the Turkish one. While the international supervision lasted, three judges had to be foreign nationals, selected, paid and appointed by the ICO, which also provided three foreign jurists to the court, as experts. The three foreign judges who were appointed in 2009 - Snezhana Botusharova, of Bulgaria; Robert Carolan, of the USA; and Almiro Rodrigues, of Portugal - remained in the court after the end of international supervision under transitional arrangements whereby they are to serve for the duration of their original mandates.

## **2. The Ruling on the Financing of the Public Service Broadcaster**

### **2.1 The Decision, its Aftermath and its Effects**

Kosovo's public service broadcaster ("RTK") was financed by a monthly fee levied on all households. Its amount was 3.5 euros, equivalent to 1.5 per cent of the average monthly wage. Under a contract made with RTK, the fee was collected by the state-owned energy utility ("KEK") as part of the monthly electricity bills.

In September 2009 a pensioner who had filed with the constitutional court a complaint against the RTK fee applied for interim relief. He asked the court to suspend the fee, arguing that its level was unbearably high: about one tenth of his monthly income, he alleged. RTK opposed this request. KEK supported it, noting also that the contract for the collection of the fee had caused to it losses of about 400 million euros.<sup>11</sup>

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<sup>10</sup> The jurisdiction of the court is laid down in article 113 of Kosovo's constitution.

<sup>11</sup> KEK must advance the fee to RTK for every electricity bill it issued, but some 30 per cent of them were left unpaid: given Kosovo's socioeconomic conditions and the weakness of the judiciary, such claims are effectively worthless. Hence the losses, which are covered by the government budget.

On 16 October the court suspended the collection of the RTK fee throughout Kosovo, and not just for the applicant. This was its inaugural decision. The reasoning runs for less than one page, and the treatment of the merits is limited to this paragraph:

*[t]he court recognizes the importance of public broadcasting and its role in a democratic society. However, the court considers that the methodology used for financing public broadcasting in Kosovo should be alongside the best practices of Europe and its legal standards.*<sup>12</sup>

Neither these “practices” and “standards” nor the constitutional basis for the decision are illustrated. The rest of the reasoning deals with the question whether a public or a private interest was at stake: the discussion is rather confused and no explicit conclusion is reached. The admissibility of the main referral is not discussed: a subsequent ruling would prove that it was inadmissible, because the applicant had not exhausted the available remedies.<sup>13</sup> Nor does the court explain what irreparable damage - a condition for issuing such interim measures - would be suffered by the generality of the citizens, who had been paying the RTK fee for years. By any standard, this is an unmotivated decision.

Two judges appended dissenting opinions. Judge Rodrigues objected that the interim measures should not have been granted before deciding whether the main referral was admissible - which it was not, in his view, for the reason we just mentioned - and that the case did not concern the constitutionality of the law setting the RTK fee but its proper application, which does not fall within the jurisdiction of the court.<sup>14</sup> Judge Giyljeta Mushkolaj, of Kosovo, explains what the underlying issue was: having invoked the “constitutional guarantees of the freedom of expression and the freedom and pluralism of the media”, she observes that depriving the public service broadcaster of its fee would make it dependent on government financing and thereby harm its editorial independence; concurring with the arguments of judge Rodrigues, she notes that the majority “does not provide any justification” for its decision and curtly concludes that “nothing in the language or the spirit of the Constitution” supports it.<sup>15</sup>

In the operative part of the ruling the court had also recommended the parliament to revise the financing of RTK by 1 December 2009, after which

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<sup>12</sup> Constitutional Court of Kosovo, case KI 11/09, *Krasniqi v. RTK* (hereinafter, the “RTK” case), decision of 16 October 2009, p. 3 (neither this nor other rulings of the court cited here have been published: they are available at <http://www.gjk-ks.org>).

<sup>13</sup> The pensioner had initially sought relief from a municipal court, but had never been heard despite several requests. When he acted before the constitutional court, therefore, the case was still pending in the municipal court (if it had been opened at all); but rather than alleging a denial of justice, he had brought before the court the substance of his ignored complaint. The referral was therefore inadmissible because the available remedies had not been exhausted. This emerges from the decision by which the court subsequently closed this case, noting that it had become moot: see, *RTK*, decision of 30 May 2011, paras. 16-18.

<sup>14</sup> *RTK*, dissenting opinion of judge Almiro Rodrigues of 19 October 2009, paras. 16-26. Based on the applicant's allegation about his monthly income, which the court implicitly accepted, under the applicable law he should have been exempted from the RTK fee.

<sup>15</sup> *RTK*, dissenting opinion of judge Giyljeta Mushkolaj of 23 October 2009, 1 and 3.

the main referral would have been decided. The RTK law was not changed, despite the court's recommendation and ICO's pressure.<sup>16</sup> Of its own motion, on 14 June 2010 the court extended that deadline and the interim measures until 1 January 2011, quoting the parliament's efforts - described in a letter sent to the court by the speaker of parliament five months after the deadline had expired - to comply with that recommendation, and the "time constraints" it faced in revising that law.<sup>17</sup> In the meanwhile RTK was being financed by the government with *ad hoc* transfers from the treasury, and the contract between RTK and KEK had expired and had not been renewed. Of its own motion, on 30 May 2011 the court closed the case because it had become moot, as the fee was no longer collected.<sup>18</sup> The parliament adopted a new law on RTK only in April 2012, which allows budget financing to continue for three more years and, potentially, indefinitely.

The first decision issued by the court, therefore, was rendered upon an inadmissible application, without motivation, and beyond its jurisdiction. In fact, the ruling that closed the case seems an attempt to remedy the many mistakes of the first decision without directly contradicting it, because it fails to explain why the case had become moot - the reason of course is that the interim measures had *de facto* produced permanent effects - and it outlines the pensioner's allegations very differently than in the first decision: the complaint about the disproportionate level of the fee disappears, and it is replaced by a complaint about the constitutionality of the law governing it, which had never surfaced before. Closing the case was also a convenient way to terminate the unsuccessful dialogue with the parliament, which the court had opened with its recommendation to amend the law, and then sought to continue by spontaneously extending a deadline that had twice been ignored.

## 2.2 The Context: the Independence of the Public Service Broadcaster

In October 2009 Kosovo was about to have nation-wide municipal elections. Confidence in the government was low and declining, and the governing majority was riven by increasingly fierce infighting because the candidates of the two main coalition partners opposed each other in most municipalities.<sup>19</sup> In this context, the senior party of the coalition, led by the prime minister, had intensified its efforts to acquire influence over RTK.

Such efforts are described in an open letter addressed by the president of the European Broadcasting Union ("EBU") to the prime minister.<sup>20</sup> The letter,

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<sup>16</sup> ICO's concerns emerge from its press release of 21 May 2010, at <http://www.ico-kos.org>.

<sup>17</sup> RTK, order of 14 June 2010, p. 2. No application or request by either the applicant or RTK is mentioned by the order.

<sup>18</sup> RTK, decision of 31 May 2011. Again, no application or request by either the applicant or RTK is mentioned.

<sup>19</sup> See Alexander Anderson and Besa Luci, "State Of Constriction? Governance And Free Expression In Kosovo", Youth Initiative for Human Rights (Pristina, 2010), 13-16 and 26-28, at <http://ks.yihr.org>.

<sup>20</sup> Letter dated 26 October 2009, at <http://www.ebu.ch>.

sent ten days after the decision of the court and three weeks before the elections, states that EBU “is extremely concerned about the political and financial pressure being exerted by your government on RTK and its staff in the run-up to the [elections]”, and outlines in detail the “relentless process of political and economic interference” that began soon after Kosovo’s independence, as a result of which “RTK’s financial manager stated that ... RTK next month will not be in the position to pay salaries.” Referring also to the court’s decision, EBU concludes that “[t]his financial pressure appears to be nothing less than deliberate exhaustion and intimidation of RTK staff who are now intensively providing coverage of the electoral campaign.” To this day, according to several observers RTK remains under the effective control of the government, and, more precisely, of the prime minister’s party.<sup>21</sup>

The prime minister responded with an open letter that contains a rather generic rebuttal of such criticism. His letter, however, sheds further light on the background of the court’s decision: it notes the “deep resentment felt by many people” about the 3.5-euro fee, and it outlines the reasons why KEK no longer wanted to collect it.<sup>22</sup> The board of directors of KEK is selected by the government and is largely composed of political appointees, mostly close to the prime minister’s party: that it had asked the court to suspend that contract can be taken as a sure indication that, despite its protestations to the contrary, the government wanted the fee to be suspended.

So the remarkable errors of the court have objectively assisted the government in abolishing an unpopular levy and reducing the losses of the energy utility, and would fit rather well into a pattern of initiatives aimed at taking control of RTK. It is therefore legitimate to doubt whether they were innocent mistakes. In particular, the court knew, or could reasonably presume, that when KEK supported the suspension of the fee it had spoken on behalf of the government, which desired the fee to be suspended in general and not only for the applicant.

It is in this light that we should read judge Mushkolaj’s emphasis on the independence of the public broadcaster, as well as the second paragraph of judge Rodrigues’s dissenting opinion. Despite having said that the ruling was “unfounded in its entirety”, he qualifies the decision of the majority as their “good faith legal conclusions”; he writes that it is “unquestionable” that such conclusions had been reached “honestly, fairly and in full accordance with the ethical and professional obligations of the judges”; and he adds that he dissents “respectfully, with full faith in the indisputable integrity of the Majority’s decision”.<sup>23</sup> These unusual and perplexingly contradictory

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<sup>21</sup> See, e.g.: European Commission, *Kosovo under UNSCR 1244/99 - 2010 Progress Report*, Doc. SEC (2010) 1329, 9 November 2010, 16 and 47-48; and Bertelsmann Stiftung, “BTI 2012 - Kosovo Country Report” (Bertelsmann Stiftung, Gütersloh, 2012), 12, at <http://www.bti-project.de>.

<sup>22</sup> Letter dated 28 October 2009, at <http://www.kryeministri-ks.net>.

<sup>23</sup> *RTK*, dissenting opinion of judge Rodrigues, paras. 1-2. In his emphasis, the judge contradicts himself: if the decision was “unfounded in its entirety”, it can hardly be maintained that it had been taken in “full accordance” with the “professional” obligations of the judges; likewise, if the integrity of the court is “indisputable” one wonders why was such a forceful defence needed.

expressions are scarcely comprehensible outside of a context of plausible suspicions of political interference over the court.<sup>24</sup>

### 3. The Judgment on a Municipal Emblem and Minority Rights

#### 3.1 The Judgment, the League of Prizren and its Symbols

In 1878 the leaders of the Albanian subjects of the Ottoman sultan met in a house in the city of Prizren, in south Kosovo, and founded a league that issued the demand to join all their lands into an autonomous *vilayet*.<sup>25</sup> That house is one of the most eminent monuments of Prizren. It is known as the “House of the League of Prizren” and it hosts the “Albanian League of Prizren Museum”: in the first room hangs a large map of the Greater Albania that the league had prefigured, a political project that still surfaces in public comments in Kosovo and Albania. The symbolic identification between that late Ottoman house and the league is unmistakable to most citizens of Kosovo.

In October 2008 the municipal assembly of Prizren adopted the municipal statute. Article 7 reads as follows: “[t]he emblem of the Municipality is the ‘House of the League of Prizren’, and the text shall be ‘1878-Prizren’.”<sup>26</sup> The emblem appears on the first page of the statute: composed of two concentric circles, the image of the house is placed in the inner and wider one and the inscription appears below it. Turks and other ethnicities live in Prizren, alongside the Albanian majority, and the municipality has three official languages: Albanian, Serbian and Turkish.

In 2009 a member of the municipal assembly who is of Turkish origin complained before the constitutional court, arguing that “the symbol of the League of Prizren glorifies the identity of only one community” to the exclusion of the other ones.<sup>27</sup>

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<sup>24</sup> Hill and Linden-Retek, “Supervised Independence ...”, 36-37 describe the initial decision thus: “[t]he court ordered, under its authority to grant interim measures, that the Kosovo Assembly in effect develop an alternate means of financing RTK.” The suspension of the fee was the object of the applicant’s request and the main decision of the court, but it is omitted; nor are judge Mushkolaj’s arguments about RTK’s independence mentioned. Judge Rodrigues is merely said to have “disagreed with procedural and substantive aspects of the decision”, and his perplexing praise for the majority is commented thus: “[t]his was important not only because this was the court’s first published decision but also because it maintained collegiality and positive working relationships on the court.” Collegiality (and external legitimacy) was the main focus of the two authors, who also note that the “two other international judges” issued no opinions, implying that the majority of the international - and supposedly more reliable - judges either agreed with the decision or did not find it necessary to publicly distance themselves from it. On the contrary, only two international judges are listed by the published decision among those who sat in the panel: the third one was absent. Such inaccuracies, omissions and euphemisms render this summary objectively misleading, and generate the impression that the court issued a perhaps debatable decision on a matter of no great importance.

<sup>25</sup> See, e.g., Noel Malcolm, *Kosovo: A Short History* (Harper, New York, 2nd ed. 1999), 221-227.

<sup>26</sup> At <http://kk.rks-gov.net/prizren>. The translation of article 7 is by Google and the author.

<sup>27</sup> Constitutional Court of Kosovo, case KO 01/09, *Kurtiši v. Municipal Assembly of Prizren* (hereinafter, the “Prizren” case), judgment of 18 March 2010, para. 12.

The court agreed. Having noted that symbols matter, that a municipal emblem ought to be “a symbol for all the citizens” and not the “symbol of only one Community”, and that “Albanians identify with the ‘1878’ portrayed in the emblem [because] 1878 was the year of the founding of the League of Prizren”, the court observed that “no one in Prizren could doubt that the inclusion of ‘1878’ sought to favour the Albanian Community to the exclusion of the non-majority communities”, and concluded that the emblem “infringed [the] statutory and constitutional rights” of the minority communities.<sup>28</sup>

Oddly, at this point the reasoning starts afresh, because the court asks itself “to what extent” the emblem “complies” with the constitution. The court begins by noting that the Albanian community had given itself a privileged position thanks to the force of numbers, and then remarks, almost in passing, that the suggestion made by the applicant in the municipal assembly - namely, to remove ‘1878’ from the inscription of the emblem, and to add the word ‘municipality’ written in the three official languages - was “a reasonable proposal”.<sup>29</sup> Judge Rodrigues will attach a concurring opinion objecting to this very passage, chiefly because that proposal had been made by the applicant in a personal capacity.<sup>30</sup> The court does not develop this point any further, however, and quickly restates its previous conclusions.

On which basis, in the operative part of the judgment the court “decides” that the emblem is “incompatible” with the principle of equality and certain minority protection rules written in the constitution. But it also “orders” the municipality to amend both the statute and the emblem within three months; it “requires” reports on the municipality’s progress in implementing such order; and it “remains seized of the matter pending compliance with that Order.”<sup>31</sup> The legal basis for these three additional prescriptions is unclear, because under article 65.1 of its own rules of procedure “[i]f the Court establishes that certain provisions of the normative instrument are not in compliance with the Constitution, it shall declare the respective provisions to be invalid.” This should have sufficed, because the municipality could function also without an emblem and remained free to adopt a different one. Conversely, with its request for reports on the amendment of the emblem and its indirect suggestion about its features, the court opened itself to a possible dialogue with the municipality on the implementation of its judgment.

### 3.2 The Failed Efforts to Implement the Judgment

The international community praised the judgment, as a demonstration that Kosovo’s institutional system was capable of protecting minority rights. But the judgment met considerable opposition among the population: a mob even

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<sup>28</sup> *Ibid.*, para. 46.

<sup>29</sup> *Ibid.*, paras. 50-54.

<sup>30</sup> *Prizren*, concurring opinion of judge Almiro Rodrigues of 18 March 2010.

<sup>31</sup> *Prizren* judgment, para. 57.

“attempt[ed] to vandalize the Court’s premises”.<sup>32</sup> Such reaction led the court to publish a press release, by which it explained its judgment to the public. In particular, the court stated that the applicant “never objected to the image of the House of the League of Prizren being part of the emblem of the Municipality”, and that the court itself:

*never expressed a view that the image of the [house] was objectionable. The Court also expressed the view that the proposal ... in relation to having the words ‘Komuna’, ‘Opština’ [sic] and ‘Belediye’ within the circle of the emblem was a reasonable one.*<sup>33</sup>

The same words appear in a letter sent by the president of the court to the president of the municipal assembly.<sup>34</sup> Neither the press release nor the letter mention the removal of ‘1878’ from the emblem, which was part of the proposal endorsed by the court.

Contrary to what the court wrote, it can hardly be maintained that neither the applicant nor the judgment objected to the use of the image of what the municipal statute and the court itself call “the House of the League of Prizren”. The complaint, as we noted, focused on the “the symbol of the League” and the cultural-historical significance the latter: it is the emblem as a whole that was taken to symbolize the league, rather than either the year or the image of the house. And if it is true that in the crucial passages of its reasoning the court mentioned the year and not the house, it cannot plausibly be argued that the problem lay only in the former and not also in the latter: the issue was the reference to the league, not the graphic signs by which it was conveyed. If anything, the most objectionable part of the emblem is the image, because it is the largest and most visible one, and it is the clearest reference to the league (incidentally, 1878 is also the year of the Congress of Berlin, which ignored the league’s requests).

The court’s minimalist interpretation and its unusual step of explaining itself to both the public and one party of the case (no letter to the applicant is mentioned) indirectly illustrate the intensity of the opposition that its ruling had met. Which, in turn, offers a plausible explanation of the oddities of the judgment: foreseeing a negative reaction by the population, the court implicitly allowed the municipality to continue using the illicit emblem for three months, and it also sought to open enough space for a possible compromise, according to which the municipality could if necessary be allowed to keep the image of house in its emblem. By acting thus, however, the court markedly deviated from the valid/invalid criterion that ought to be its sole concern, and exposed itself to the risk of being involved in political negotiations. Discussions among the municipality, the ICO and the government on the implementation of the judgment in fact begun soon after

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<sup>32</sup> Mansfield, “Creating a Constitutional Court ...”, 10.

<sup>33</sup> Press release published on 8 June 2010, at <http://www.gjk-ks.org>; the correct spelling of the word ‘municipality’ in Serbian is *Opština*.

<sup>34</sup> Letter dated 7 June 2010, at: <http://www.gjk-ks.org>.

it had been issued.<sup>35</sup> That they were going badly is indicated by the press release and the letter of the court, in which the request to remove '1878' is conspicuous for its absence. This omission can hardly have been accidental, because the details of the emblem were the subject of heated public debate; and it strongly suggests that the court itself was involved in those negotiations, directly or indirectly, and that it had been persuaded to content itself with the insertion of the word 'municipality' written in the three official languages.

As it is, one day before the expiry of the deadline for changing the emblem the municipality requested an extension. Four days later the court (retroactively) granted it three more months, noting - in the same generous, exculpatory words it had used in the *RTK* case - that the municipality had shown "efforts ... to ensure compliance" and faced "time constraints".<sup>36</sup>

This was the last official or public step in this case. The municipality never amended article 7 of its statute and continued using its unconstitutional emblem, without visible objection by either the ICO, the rest of the international community, the government, or the court. What changed is that, at some point between late 2010 and 2013, the words '1878 - Prizren' vanished from the emblem that appears on the website of the municipality: it is thus possible that a deal had been reached, according to which the municipality agreed to use a partly sanitized version of the emblem in certain more visible places.<sup>37</sup>

Astonishingly, one of the existing studies on the performance of the court writes (in 2013) that "Prizren did not challenge the decision and moved promptly to implement it."<sup>38</sup> The judgment was effectively ignored, conversely, and it was treated more as a piece of advice than as a decision that, according to the emphatic formula of article 116.1 of the constitution, is "binding on the judiciary and all persons and institutions". Indeed, the most notable aspect of this case is less the decision itself than the failure to have it implemented.<sup>39</sup>

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<sup>35</sup> ICO, *Statebuilding and Exit ...*, 102 reports that the mission had to "trouble-shoot ... the case of the Prizren municipal logo".

<sup>36</sup> *Prizren*, order of 21 June 2010, 2.

<sup>37</sup> See <http://kk.rks-gov.net/prizren>. I ignore whether the unconstitutional emblem is used in the official documents and correspondence of the municipality, or on its buildings, flag and other insignia.

<sup>38</sup> Mansfield, "Creating a Constitutional Court ...", 10.

<sup>39</sup> Hill and Linden-Retek, "Supervised Independence ...", 37 explain that this case "involved the design [of the emblem], in particular the languages required to be incorporated", and that "the court ordered that the emblem be redesigned to address the language rights issues in an appropriate manner." These passages describe less the ruling of the court than its suggestion, which almost certainly was the topic of the negotiations in which the authors themselves were probably involved, as in the summer of 2010 they were both working in the legal office of the ICO. They acknowledge that, as of their writing, the judgment had not yet been "fully implemented", but they argue (at 42) that the fact that the municipality had asked for an extension of the deadline "indicates a degree of the institutional respect towards the court." On the contrary, as of 12 October 2010 - the *dies ad quem* of their essay, which comments a document published on that date - the extension had been granted, the new deadline had expired (on 18 September), no further extension had been requested, and no sign of implementation could be observed. They do note, however, that "there remains a real danger of failure to implement the decision: continued attention by the court as well

#### 4. The Judgment on the Impeachment of a President

Article 88.2 of the constitution prohibits the president from exercising any function in a political party. The person who held that office between 2007 and 2009 had nonetheless kept the leadership (presidency) of his party, arguing that he had 'frozen' his powers. In reality, he continued to exercise considerable influence over the party. This was quite evident after the municipal elections of November 2009, for instance, when a large faction of the party proposed to abandon the governing coalition: the president, who had negotiated that political alliance with the prime minister, actively opposed and (temporarily) defeated such proposal.

The president had been criticized for this behaviour, but the only way to sanction it was the impeachment procedure, which, under the constitution, requires a referral to the constitutional court by no less than 30 deputies (which corresponds to one quarter of the parliament). The necessary signatures were never collected because the governing coalition commanded a wide majority and much of the opposition was mindful of protecting the stability of the institutions as well as the external image of the new state, which was then campaigning for international recognitions.

The situation changed in the spring of 2010, when it emerged that the president was losing control of his party: it became likely that he would soon be unseated and that his party would move into opposition, under a new leader. The senior party of the governing majority, led by the prime minister, responded by openly making plans to form a fresh coalition with another junior partner, and prepared to break the existing alliance at a time of its own choosing.

It is in this context that on 25 June 32 deputies asked the court to impeach the president. But four days later three deputies withdrew their signatures. Thus, the first problem facing the court was whether the case could be heard at all.

The judgment introduces this discussion by quoting article 23 of the law that governs the constitutional court, which provides that it "shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party to the proceedings." But the court presently turns to a different argument, namely that "only all of the Deputies who initially signed the Referral can make a request to withdraw the referral once it has

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as by other domestic and international observers will be required" (at 42, note 76): this passage is interesting because it indirectly confirms that negotiations did take place, and probably involved also the court. Their general comment is that "[t]he result in this case was hailed by the international community as a positive development in ensuring minority rights in Kosovo and was seen as a victory for CSP implementation." (at 37; 'CSP' is an abbreviation for the Ahtisaari plan). This is true, but on 12 October 2010 the authors should have known that what initially might have seemed a victory had turned into its opposite: after that date the passage of time merely crystallized a defeat that had occurred when the extended deadline expired. Hence, this comment is no less misleading for being true, and it serves an aim that seems closer to propaganda than to scholarship.

been filed". This opinion is justified thus: the court conjectures that "other Deputies could seek to add [their signatures] in substitution" of those that had been withdrawn, and then asks itself: would this "cure the withdrawal", or would a fresh referral be necessary? The answer is circular: "[t]he unsatisfactory nature of such a situation is adequately dealt with by [article 23] which clearly gives continued life to a Referral, when properly made."<sup>40</sup> Whereas the question was precisely whether the referral had properly been made, namely whether or not the withdrawal of the crucial signatures was effective and had thus deprived the court of the jurisdiction to hear the case.

The question concerned the limits of the jurisdiction of the court, not the withdrawal of a party. Which was a necessarily collective one, for the constitution does not intend the court to judge the actions of the president unless at least 30 deputies take the - politically significant, as we saw - step of asking it to do so. And article 23 of the law on the constitutional court is of little assistance in solving this question because it assumes that jurisdiction exists, and it cannot derogate from the constitutional provisions that limit it. The court's opinion that all 30 deputies must agree on the withdrawal thus remains an apodictical assertion, and a very implausible one. Indeed, the court seems less interested to argue that point than to stigmatize such withdrawal, for it maintains - again without explaining why - that deputies "should not be allowed to withdraw their signatures without articulated, serious and substantial reasons."<sup>41</sup>

Moreover, with this decision the court marked a clear departure from the rigorous approach it took nine months before, when an opposition politician who had run in an important mayoral election complained for a breach of the election law: the complaint was judged inadmissible for a reason that, according to the liberal standard used in this judgment, could easily have been overcome.<sup>42</sup>

In their joint dissenting opinion two international judges argued that the referral was inadmissible, for the reasons we just summarized, and that the finding of a breach was "manifestly ill-founded" because the applicants had brought "no grounds" to conclude that the president had "exercised" political

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<sup>40</sup> Constitutional Court of Kosovo, case KI 47/10, *Rrustemi et al. v. Sejdiu* (hereinafter, the "Impeachment" case), judgment of 28 September 2010, para. 43. Both Qerimi and Quorroli, "A Constitutional Tradition ...", 58, and Mansfield, "Creating a Constitutional Court ...", 10 describe the court's reasoning in essentially the same terms, without comment.

<sup>41</sup> *Impeachment* judgment, para 44.

<sup>42</sup> Constitutional Court of Kosovo, case No. KI 73/09, *Kusari-Lila v. The Central Election Commission*, judgment of 23 March 2010. The complaint concerned the annulment of the results of 15 polling stations by the appellate panel of the election commission. The court unanimously judged it inadmissible because the applicant (the mayoral candidate) had not exhausted all available remedies: the court found that the proceedings before the election commission had not been commenced by the applicant-candidate, but by her political party: in this case, therefore, the available remedies had been exhausted in an objective sense - because the complaints brought by the party and by the applicant-candidate concerned the same issues - but not in a subjective sense.

functions within his party, which is the verb used by article 88.2 of the constitution.<sup>43</sup>

The judgment in fact does not explicitly adopt an extensive interpretation of that provision. This would not have been an easy argument to make, because - as the dissenting opinion remarks - the incompatibility rule written in the previous constitution of Kosovo used the verb 'to hold' instead, suggesting that the choice of a different verb was conscious and deliberate: merely *holding* an office in a political party would not infringe the constitution.<sup>44</sup> The court implicitly acknowledges this because it sets out to demonstrate the breach by reviewing the behaviour of the president, which would have been wholly unnecessary had the incompatibility rule banned the *holding* of party office, as the violation would have been *in re ipsa*. But rather than discussing the concrete actions of the president, of which the applicants had offered no evidence, the court's reasoning develops itself in the rarefied air of the logic of deduction: the court first notes that political parties compete for popular support also through their association with prominent personalities; it then observes that, by retaining the leadership of his party, the president had maintained an association with it, which was beneficial to both; and it concludes that the president and his party "thus 'make use of' each other [which] is one of the definitions for 'exercise'."<sup>45</sup> The argument is persuasive, but it is purely abstract: it describes one aspect of the rationale of the incompatibility rule, not the president's actual conduct. Thanks to this shift from the concrete to the abstract, the court could at once pay homage to the text of the constitution and obviate to the applicants' failure to bring *any* evidence of the breach. But to achieve this result the court also disregarded the rules on the burden of proof, the rights of defence, and probably also the *nullum crimen sine lege* principle, which all have particular relevance in an impeachment case.

And, as if to prove that its argument was a mere rhetorical device intended to transform a status into an action, the judgment states twice that the president had breached article 88.2 because he was "holding" the presidency of his party: a slip, presumably, but a revealing one, for the court did in fact sanction a status, not an action.<sup>46</sup>

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<sup>43</sup> *Impeachment*, dissenting opinion of judges Snezana Botusharova and Almiro Rodrigues of 28 September 2010, paras. 40 and 29, respectively.

<sup>44</sup> *Ibid.*, paras. 37-38. The 'constitution' of Kosovo during the UN protectorate was UNMIK regulation No. 2001/9 on a *Constitutional Framework for Provisional Self-government in Kosovo*, of 15 May 2001, whose paragraph 9.2.7 reads as follows: "[t]he President of Kosovo shall not hold any other office or employment." Whereas the two paragraphs of article 88 of the current constitution read as follows: "1. The President shall not exercise any other public function. 2. After election, the President cannot exercise any political party functions." It is in fact quite possible that the verb was changed precisely in order to allow the president to retain his party office, and thereby solve a problem that had *de facto* been ignored during the UN protectorate.

<sup>45</sup> *Impeachment* judgment, para. 68.

<sup>46</sup> *Ibid.*, para. 70 and para. II of the operative part. Qerimi and Quorroli, "A Constitutional Tradition ...", 61-62 support this decision, and make the same error: they argue that the president had breached his duties "by *holding* his political party position" (emphasis added), but do not deal with the question of the scope of this prohibition. Mansfield, "Creating a Constitutional Court ...", 10 describes the court's reasoning briefly and without comment.

Less than two years later, the court was asked to rule on the compatibility of some proposed constitutional amendments with certain principles of the constitution. Among them was an amendment that changed the incompatibility rule precisely by adding to it the verb 'to hold': the new text proposed for article 88.2 states that the president "shall not *hold or* exercise any function in a political entity". This change is clearly intended to strengthen the incompatibility rule. Nonetheless, in its assessment the court held its line and judged - apodictically, without any reasoning - that the proposed amendment "does not change the substance" of the incompatibility rule.<sup>47</sup> This ruling is very questionable too, because the double switch from a broad incompatibility rule (in the pre-independence constitution), to a narrow one (in the current constitution), back to a broad one (in the amendment) must surely imply that the constitutional legislator intended to intervene on the substance of that rule, and not just on its linguistic formulation. And while this ruling implicitly confirms the slip of the *Impeachment* judgment, it contradicts its ostensible motivation, which had interpreted the incompatibility rule narrowly (because the court had sought - no matter how inadequately - to prove that the president had 'exercised' his functions in the party).

Despite this string of logical weaknesses and inconsistencies, the fact that the president had breached the incompatibility rule was clear and visible to the population, and one could think that the court twisted the law in order to uphold the public interest. But unseating the president also favoured a partisan interest, for it helped the formation of a new governing coalition. After the judgment the party of the prime minister engineered a no confidence vote against its own government; elections were held; and, according to the plan we mentioned above, a fresh coalition was agreed with another junior partner, whose leader was elected president. Removing the former president thus avoided a highly undesirable *cohabitation*: for instance, the previous government had often exhibited a tendency to test the limits of the law, for private or partisan gain, and it would have been hard to continue doing so thus under the guardianship of a president belonging to the largest opposition party (which the deposed president remained loyal to).<sup>48</sup>

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<sup>47</sup> Constitutional Court of Kosovo, cases KO 29/12 and 48/12, *Proposed Amendments of the Constitution* (hereinafter, the "Amendments" case), judgment of 20 July 2012, para. 149.

<sup>48</sup> Hill and Linden-Retek, "Supervised Independence ...", at 41 write that that this judgment "has raised the court's profile significantly." Which is probably true. At 38, they greatly soften the force of the dissent of two international judges, which was quite radical on both admissibility and evidence: in particular, they are said to have argued that the referral was not "sufficiently" substantiated, whereas they wrote that *no* evidence existed. At 38, they also write that "[t]he other international judge, Judge Robert Carolan, evidently joined the majority": this is inside information, because the favourable vote of this judge - who was judge rapporteur - emerges neither from a published opinion (he issued none) nor from the arithmetic of the vote: nine judges sat in the panel, the required majority was five, and only two dissenting opinions were issued. His vote should presumably have remained confidential, to both the authors of this essay and their readers. This piece of information, however, was useful to the authors because it proves that there was no split between national and international judges, which is an important point in their assessment of the internal collegiality of the court, but probably also because - on account of the supposedly greater competence and impartiality of the international judges - it strengthens the impression that the majority took a defensible decision.

## 5. The Judgment on the Incompatibilities of the Acting President

The office of the president passed to the speaker of parliament, in an acting capacity. The speaker was the second in command (secretary-general) of the party of the prime minister, and he asked the court whether the incompatibility rule applied also to him. The court answered in the negative, with a unanimous decision: all three international judges sat in the panel, and appended no opinions.

This judgment should never have been issued, because the referral was inadmissible. The thirty subsections of article 84 of the constitution list the powers of the president, most of which are regulated in detail by other provisions of the constitution or by the law: the ninth one provides that the president “may refer Constitutional questions” to the court. The seven categories of questions that the president can bring before the court are enumerated by article 113, which governs the jurisdiction of the court: its text and purpose leave no doubt that the list is intended to be exhaustive. Hence, article 84(9) merely serves as a reference to article 113, which does not include questions on the incompatibilities of the president or, more generally, on the interpretation of the prerogatives and duties of that office. Yet, the court found the referral admissible on the basis of article 84(9), upon the argument that the question posed to it was a “constitutional” one: the coordination between this provision and article 113 is not even discussed.<sup>49</sup> This argument is plainly untenable, because interpreting article 84(9) as an open-ended entitlement to pose any ‘constitutional’ question to the court deprives article 113 and its careful limitations of any sense. But the result was intended, because the court continues thus: “[t]here will in due course, no doubt, be other Referrals on questions submitted by” presidents, who “should be encouraged to consult the one body capable of dealing with constitutional questions”.<sup>50</sup>

Thus the court, which had already approached the political arena in the *RTK* and *Prizren* cases, explicitly posed itself as the constitutional advisor of the institutions. This misunderstands the nature of the judicial function and is a major deviation from the constitution, which in article 113 intended to protect the court precisely from the risk of being dragged into political conflicts at the behest of a political authority. And it opened the gates of the court to cases in which there is no controversy or conflicting views: indeed, no public hearing was held in this case, and the court neither sought nor received submissions from other parties. The proceedings thus were a confidential dialogue between the judges and the acting president, who desired to retain his influence within his party.

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<sup>49</sup> Constitutional Court of Kosovo, case KO 97/10, *Krasniqi* (hereinafter, the “*Incompatibilities*” case), judgment of 22 December 2010, para. 14.

<sup>50</sup> *Ibid.*, para. 15.

Again, two years later the court had to return to this matter, to assess a proposed amendment of article 84(9). The proposed text reads that the president “raises constitutional issues in the Constitutional Court, *in accordance with the Constitution*”. Such amendment evidently intends to underline that the power to act before the court is regulated by *other* provisions of the constitution, namely article 113, and may therefore be exercised only in accordance with them. This, we have just argued, should have been clear to the court on the basis of a systematic reading of the constitution. Hence, the parliamentary committee that wrote this draft amendment either disagrees with the judges on this point, and desired to clarify its interpretation of it, or it agrees with them, but it intended as a matter of policy to abolish the president’s power to pose any ‘constitutional’ question to the court: *tertium non datur*. In its assessment of the amendment the court unanimously opted for the first interpretation, because it wrote - again without reasoning - that the proposed change “does not change the substance” of article 84(9).<sup>51</sup> Which necessarily implies that the court had erred in admitting the referral of the speaker of parliament.

To assess the merits of the judgment we must compare it to the *Impeachment* decision. There, the court had explained the rationale of the incompatibility rule by referring to both the role of the president - which is to represent “the unity of the people” and act as the “guarantor of the democratic functioning of the institutions” - and to the prerogatives of that office, several of which can be exercised at the discretion of the president: from this the court inferred that the incompatibility rule protects the citizens’ interest “to be assured of the impartiality, integrity and independence” of the president.<sup>52</sup> Interpreted thus, that rule should apply to an acting president too (especially because it bars the exercise, not the mere holding, of party functions: the sacrifice it requires of an acting president is limited and proportionate).

But this discussion is absent from the judgment, which takes a different route: having observed that the incompatibility rule provides that “after election” the president cannot exercise any function in a political party, the court concludes that it does not apply to the speaker of parliament because he took up the function of acting president by operation of law, and not pursuant to an election.<sup>53</sup>

The syllogism is impeccable, but it ignores both the rationale of that provision and the fact that the words ‘after election’ are superfluous, because there can be no incompatibility *before* one is elected president: thus, the remarkable agility that the court had displayed throughout the *Impeachment* case met an insurmountable obstacle in those two empty words, which allowed a very private interest to prevail over the public interest. Indeed, what distinguishes these two judgments is the political

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<sup>51</sup> *Amendments* judgment, para. 79.

<sup>52</sup> *Impeachment* judgment, para. 69.

<sup>53</sup> *Incompatibilities* judgment, para. 23.

context: the crucial difference is that the former president would have been a thorn in the side of the new governing coalition, whereas the speaker of parliament played a delicate role in it, because he was the leader of a critical faction of the prime minister's party.

## **6. The Judgments on a Presidential Election and the Dissolution of Parliament**

### **6.1 The Words that Invalidated the Election of a President**

As we said, soon after the *Impeachment* judgment early elections were held and the prime minister's party formed a fresh governing coalition, according to a deal under which the leader of the new junior partner had to be elected president (by the parliament) before the government could be established. This person is Kosovo's most prominent entrepreneur, has lived most of his life abroad and had had a controversial business career in Russia during the 1990s, which presumably made him vulnerable to corruption allegations or political attacks from Moscow (which opposes Kosovo's independence and could have an interest in discrediting its institutions). Much of the population felt that an unworthy, distant president was being forced upon them only to allow the prime minister to retain his office.

Although that candidate run unopposed, his election was not guaranteed because the government disposed of less than 70 votes and the constitution requires a two-thirds majority (80 deputies) in the first two ballots, which some interpreted also as a quorum: only in the third ballot is an absolute majority (61) sufficient. Under the constitution, moreover, the failure to elect that candidate would have provoked the dissolution of the parliament. Hence, a failed election would have provoked a genuine institutional crisis because the speaker of parliament cannot act as president for more than six months (the term would have expired soon), and only the president can call elections, appoint the prime minister, and grant the latter the mandate to form a government. Kosovo could have found itself without president, government and parliament at the same time, and with no way to appoint fresh ones.

Despite these risks, the deputies opposing the election of that candidate chose to leave the parliamentary session immediately before the vote began. The first two ballots were held, with 67 deputies present, and were proclaimed invalid. A short break followed. How high the stakes were is shown by the fact that the US ambassador, who was inside the hall of the parliament, was caught by journalists exchanging phone calls and SMS messages with an aide of the candidate on the count of the favourable votes and the ways - including "threats" - to persuade recalcitrant deputies within

the prime minister's party.<sup>54</sup> At the third ballot the candidate obtained 62 votes and was proclaimed president.

The election was immediately challenged before the court, for two main reasons: the quorum for holding the first two ballots had not been met, and more than one candidate was needed (there were also two cases of double-voting - 65 deputies voted but 67 ballots were found in the urn - but this complaint was not made). The court agreed. It dealt with the latter argument first: it noted that two passages of the article governing the election of the president refer to "candidates", in the plural tense; it observed that having more than one candidate is "more democratic"; and it directly concluded that the election was unconstitutional because there had been only one candidate.<sup>55</sup> On the other question the court went even beyond the (very questionable) argument of the applicants: having remarked that deputies have a duty to attend to parliament sessions, and that the constitution requires the vote of two thirds "of all deputies", it concluded that *all* deputies had to be present for the election to be valid (except, it conceded, those excused by the speaker).<sup>56</sup> Which is equivalent to requiring unanimity for electing a president, or at least ample generosity by the speaker in excusing absent deputies.

The dissenting opinion, by two international judges, persuasively demolishes this decision and warns the court of its consequences: under the constitution, according to these judges, the parliament had to be dissolved.<sup>57</sup>

## 6.2 The Clarification that Avoided an Election

On the next day the prime minister, the short-lived president and the speaker of parliament wrote to the court asking for clarifications on the judgment. The main issues they raised are four: whether parliament had to be dissolved

<sup>54</sup> Andrew Rettman, "MEP criticises US ambassador in Kosovo SMS affair", in *euobserver.com*, 3 April 2011, at <http://euobserver.com>, reports the SMS messages (*legenda*: 'Pacolli' is the presidential candidate; 'CD' or 'Dell' is the ambassador; 'Fatmir' is a prominent member of the prime minister's party, who opposed the election of that candidate; and 'Jakup' is the speaker of parliament and, an ally of Fatmir; 'Thaci' is the prime minister): "Mr Pacolli's SMS said: 'Ask CD what to do for 3 time' [and the aide's] reply said: 'Dell: Fatmir and Jakup were afraid of threat at the end. Thinks it will be close, but OK...'" the article also reports that the speaker of parliament "later confirmed to media that he had been 'threatened' by Mr Thaci." On the following day the press published the SMS messages, and the ambassador responded with an open letter and a complaint, which Reporters Without Borders, *Us Ambassador Launches Unacceptable Attack on Kosovo Journalists*, 1 March 2011, at <http://en.rsf.org>, qualified as "unacceptable harassment", advising the ambassador to criticize "the constant political interference [on the media] and notably on [the public broadcaster]" instead.

<sup>55</sup> Constitutional Court of Kosovo, case KO 29/11, *Hamiti et al.* (hereinafter, the "*Presidential election*" case), judgment of 30 March 2011, paras. 68 and 71. Qerimi and Quorroli, "A Constitutional Tradition ...", 63-64 agree with this reasoning, and Mansfield, "Creating a Constitutional Court ...", 11 describes it briefly and without comment.

<sup>56</sup> *Presidential election* judgment, paras. 83 and 85. Qerimi and Quorroli, "A Constitutional Tradition ...", 64 persuasively criticize this part of the judgment, whereas Mansfield, "Creating a Constitutional Court ...", 11 wrongly asserts that the court merely applied the two-thirds quorum.

<sup>57</sup> *Presidential election*, dissenting opinion of judges Robert Carolan and Almiro Rodrigues of 30 March 2011.

and elections held; whether the speaker could continue acting as president; whether the quorum for electing the president is a full parliament; and, to quote the speaker, “in practice, what does it mean that the judgment does not have retroactive effect?”.<sup>58</sup> Only the last two questions sought genuine clarifications, whereas the first two opened new issues: those from whose solution the institutional crisis depended. The court answered 24 hours later, on 1 April.<sup>59</sup>

Although entitled “Clarification”, the reply of the court is a judgment in both form and substance: seven judges deliberated upon it, they “decided” by a majority vote, and they explicitly addressed the “admissibility” of the two new questions.<sup>60</sup> This judgment must rank among the most extraordinary ones ever issued by a court of law.

The two clarifications were summarily given: on the quorum for the presidential election the court merely referred to the judgment; and on its non-retroactivity it said that the parliament’s decision electing the president “is no longer in force as of 31 March.”<sup>61</sup> The court did not elaborate further, but this implies that in the weeks that passed between the election and the judgment Kosovo had a president, albeit an illegally elected one. It must be on this basis that the court solved the first new question, about the acting president: if, in that period, there was a president, it follows that the speaker of parliament lost (and did in fact relinquish) his acting position upon the election, and resumed it afresh after its invalidation. But none of this emerges from the judgment, which merely states that “Kosovo has an Acting President as of 31 March 2011.”<sup>62</sup>

The entire answer to the second new question reads as follows: “[a]s to the second question whether the Judgment of this Court forces the dissolution of the Assembly and the holding of new elections, the answer is no.”<sup>63</sup> (“Period!”, the judges must have been tempted to add: it was, as we said, April Fools’ Day).

This succinct reply suggests that the matter was a mere technicality. Conversely, the deputies who chose not to take part in the vote were aware that a failure to elect the president would have entailed the dissolution of the parliament and a deep politico-institutional crisis: indeed, a wide segment of the political spectrum desired fresh elections, in the expectation that the prime minister’s party and its new partner would have lost support because they had tried to force the election of an unpopular president.

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<sup>58</sup> Constitutional Court of Kosovo, “Clarification” (hereinafter, the “*Clarification*” case), document dated 1 April 2011, para. 4.

<sup>59</sup> On that day the court did not only review, discuss and decide the complex questions posed to it on the previous day, but also had enough time to issue five other rulings, of an average length of four pages; the “Clarification” is one page longer. The two international judges who dissented on the *Presidential election* judgment did not sit in the panel that issued this “Clarification”, but sat in the panels that issued such five other rulings.

<sup>60</sup> *Clarification*, paras. 16-19.

<sup>61</sup> *Ibid.*, paras. 14 and 10, respectively.

<sup>62</sup> *Ibid.*, para. 12.

<sup>63</sup> *Ibid.*, para. 11.

Nor was the legal analysis self-evident. The reasoning we articulated on the term of the acting president cannot be extended to this question, because validity and effectiveness are distinct concepts. The non-retroactivity of the judgment invalidating the election addresses the fact that for one month the president had acted as such, and it is intended to safeguard the effects of the acts that he had performed or provoked, such as promulgating laws or causing the acting president to relinquish that office. But the election was nonetheless invalid, and was so ever since the vote: the parliament had failed to (properly) elect a president and no obstacle existed to drawing the conclusion that it had to be dissolved, because the non-retroactivity of the judgment safeguarded the effectiveness of its past actions too. The four-word brevity of the court's ruling is therefore arresting, for it prevented an election required by the constitution, and one which could have changed the political direction of Kosovo.<sup>64</sup>

This judgment, finally, should never have been issued. The court explicitly refused to consider it a new case, for which there was no valid referral, and relied on a clause of its rules of procedure that allows it to "rectify any clerical and calculation errors in the judgment" (rule 61(1)). Which conversely confirms that also in Kosovo courts cannot change their judgments *ex post*, nor add new rulings to them. More honestly, the court wrote that it also took into account "the exceptional importance of the case."<sup>65</sup> But by opening this unregulated space between rectifying errors and hearing a new case, the court could also ignore its rules of procedure and deliberate in the space of 24 hours, without holding a public hearing. Crucially, it neither sought nor received the views of the deputies who had requested the invalidation of the presidential election, and might have brought arguments for dissolving the parliament: just as in the *Incompatibilities* case, the proceedings were a secluded dialogue between the court and those seeking its help to solve a politically sensitive problem in the manner they desired.

The politics of this judgment are clear: the court had in effect been asked to avoid a crisis that could have seriously damaged Kosovo's superficial appearance of institutional solidity, and elections that would have been dangerous for both the prime minister's party and that of the short-lived president (who remains in the governing coalition to this writing, serving as deputy prime minister). The judgment invalidating the presidential election is

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<sup>64</sup> Although Qerimi and Quorrolu, "A Constitutional Tradition ..." do not comment this judgment, they discuss the question of the dissolution of parliament when they criticize (at 64) the dissenting opinion issued in the *Presidential election* case, which had argued that parliament should have been dissolved. As the quorum had not been met - these authors contend - "none of the rounds was constitutional, and could thus not be considered as constitutionally valid and completed. The dissolution of the assembly would have been demanded only if the three rounds had been concluded in accordance with the constitution." In other words, as there was no valid vote there can be no dissolution. This argument is not persuasive: because the two-thirds requirement is not a quorum but a special majority, as the language and architecture of the relevant provisions clarify; and because the constitution (article 86.6) states that parliament is to be dissolved "[i]f none of the candidates is elected [...] in the third ballot": what matters is whether or not a candidate is elected within the deadline set by the constitution (30 days before the end of the incumbent's mandate), irrespective of the reason.

<sup>65</sup> *Clarification*, para. 8.

harder to decipher. It probably stemmed from an instinctive, populist reaction against that president and the perceived unfairness of his election: a brief rebellion of the national judges, who were 48 hours later brought back to the function that the political élite expects them to perform.

Shortly after this judgment was issued a consensual candidate for the presidency was found. The election naturally complied with the court's ruling in the *Presidential election* case, in a way that offered an eloquent demonstration of its absurdity: a competing candidate had to be fielded, who received a dozen votes and whose name was not even reported by the press, and ahead of the vote the speaker solicitously excused all 20 absent deputies so as to respect the unanimity quorum imposed by the court.<sup>66</sup>

In parallel, the main political parties agreed to amend the constitution in order to obviate to the complications brought by ruling: the solution they chose is to switch to a direct popular election of the president.<sup>67</sup> This solution will alter the balance of power between the parliament and the executive authorities in favour of the latter, which seems distinctly inadvisable because in fragile democracies such as Kosovo presidentialism is generally associated with greater concentration of power, greater instability, greater rent extraction, and lower provision of public goods.<sup>68</sup> This solution of course responds to a political preference, for alternative ones were available, but it was indirectly suggested by the court's ruling, which had made a parliamentary election *de facto* impossible.

## 7. The Judgment on the Immunities of the Highest Offices

### 7.1 The Issue and its Background

In the summer of 2010 nine persons were arrested in connection with an investigation on war crimes allegedly committed during the 1999 conflict. Among the accused was one of the main military commanders of the Kosovo Liberation Army, a popular war hero whose *nom de guerre* was "Steel". He entered politics together with the current prime minister and in 2008 became a powerful minister. At the time of the arrests, however, he was out of the cabinet, was being investigated for corruption, and had become the leader of the growing faction of the prime minister's party that contested his leadership. He was not arrested together with his former comrades because he was a member of parliament.

Article 75.2 of the constitution provides that no deputy can "be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies." The

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<sup>66</sup> *Amendments* judgment, para. 25.

<sup>67</sup> *Ibid.*, paras. 21-24 mentions this political agreement, which was formally ratified by parliament 24 hours later; the necessary constitutional amendments have not yet been made, however, due to disagreements on a related reform of the electoral law.

<sup>68</sup> See, e.g., Juan Linz, "The perils of presidentialism", in *Journal of Democracy* 1 (1990), 51-69, and James Robinson and Ragnar Torvik, "Endogenous presidentialism", *NBER Working Paper* No. 14603 (December 2012), at <http://www.nber.org>.

subordinate clause “while performing her/his duties” can only be interpreted in three ways, namely that deputies cannot be arrested: (1) while they speak or vote in parliament, which are, in a narrow sense, their duties; (2) while they read draft laws, speak at rallies or do other political work, which is a broader definition of their duties; or else (3) either while they are inside the parliament (or their party's offices), or during parliamentary meetings (or political rallies), which is where and when such duties are performed. Each interpretation leads to absurdity, because the consent of the parliament becomes meaningless if deputies can freely be arrested after the parliamentary meeting has ended, or when they step out of parliament: prosecutors will never ask for such consent, and even if they did the parliament would never have enough time to review, discuss and vote on their request before the arrest becomes anyway possible. Such interpretations would transform article 75.2 into a rule about where or when deputies can be arrested, which plainly was not the intention of the constitutional legislator and runs counter the rationale of this immunity. That subordinate clause cannot therefore be given a prescriptive meaning, and must be read as merely clarifying that that deputies cannot be arrested while they *are* deputies, and not also after they lost their seat. Such clarification is of course unnecessary, but this interpretation is the only one that preserves the rest of the provision, whose intent is clear: without the parliament's consent, no deputy can be arrested.

The political élite and part of the international community wanted that deputy to be arrested because he had become a dangerous opponent of the prime minister and because he had been singled out as a corrupt politician, whose exclusion from the cabinet had been hailed as a sign that Kosovo was moving towards “clean government”.<sup>69</sup> But they did not want the parliament's consent to be asked because they believed that it would have been denied, which would have made the arrest impossible and would have harmed Kosovo's international reputation.

To solve this impasse they chose to ask the constitutional court to rule on the meaning of that subordinate clause, evidently hoping that its judges would have allowed that deputy to be arrested without the parliament's consent. The (internationalized) criminal court that was in charge of the war crimes case would have been entitled to make the referral, but this was out of the question for political reasons.<sup>70</sup> And as the prime minister was reluctant to make the referral himself, for reasons of opportunity, the political élite and several voices of the international community invited the speaker of parliament to request the opinion of the court. But the speaker had, by then, become an ally of the deputy whose arrest was being sought, and he declined the suggestion. The debate lasted several months. Even a

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<sup>69</sup> See Anderson and Luci, “State of constriction ...”, 32-34.

<sup>70</sup> The prosecutor and the judges in charge of this case belonged to the EU rule-of-law mission in Kosovo, named *EULEX*. As five member states have not recognized Kosovo, neither has the EU. And as the constitutional court was created after its independence and pursuant to its constitution, no EU judge could seek its opinion without at the same time implicitly recognizing Kosovo's statehood.

senior US diplomat, speaking from Washington, joined the chorus that insisted in pressing the speaker to make that referral.<sup>71</sup> The speaker steadfastly refused, making the scarcely refutable argument that Article 75.2 is quite clear: without the parliament's consent, no deputy can be arrested. In the end, the referral had to be made by the prime minister, one year after the arrest of the deputy's co-defendants.

## 7.2 The Judgment

As in the *Incompatibilities* case, the referral was inadmissible but was nonetheless heard. None of the questions posed to the court fell within the matters on which the government can seek the opinion of the court: hence, following the *Incompatibilities* precedent, the prime minister explicitly relied upon the generic provision that evokes the government's power to ask 'constitutional' questions to the court (article 93(10) of the constitution). The deputy whose arrest was being sought and the speaker objected, using the same argument we used above to demonstrate that the referral in the *Incompatibilities* case was inadmissible.<sup>72</sup> The judgment does not discuss this objection, presumably because the judges were aware of its strength but intended to continue acting as the constitutional advisors of the political power: a role they had explicitly designed for themselves, and which the political élite and part of international community had evidently found useful.

Also in this case the court had to later pronounce itself on a proposed amendment to the generic provision of the constitution, which specularly adds to its current text - "[t]he Government ... may refer constitutional questions to the Constitutional Court" - the words "pursuant to the Constitution": and, just as in the case of the provision applied in the *Incompatibilities* case, the court judged - again apodictically - that "the proposed amendment does not change the substance" of such provision.<sup>73</sup> Which again proves that the court had been wrong in relying on this provision to hear the prime minister's referral.

Predictably, the court ruled that deputies are covered by immunity only while the parliament is holding a meeting: at any other time, they can be arrested without its consent. The absurdities and contortions of its reasoning

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<sup>71</sup> The interview, given on 14 July 2011 to *Voice of America* by the deputy assistant secretary of state then in charge of the Balkans, is available at: <http://pristina.usembassy.gov>. This diplomat invokes the separation of powers to explain why it is the speaker who ought to make the referral - whose necessity is assumed but not explained - and says that the latter must choose between acting as "someone who stood up at a crucial moment of Kosovo's history" or as "a typical Balkan politician". Making the wrong choice, the diplomat warns, will "hurt Kosovo's reputation ... in Washington." This is generally viewed as a cardinal sin in Kosovo: this diplomat correctly describes the US as the "advisor or ... big brother" of Kosovo, which owes its independence to the USA and views Washington as the guarantor of its statehood. Interestingly, this diplomat approvingly remarks that Kosovo's political system had "used the Constitutional Court in an appropriate way to settle very complex *political and legal issues*" (emphasis added).

<sup>72</sup> Constitutional Court of Kosovo, case KO 98/11, *Government et al.* (hereinafter, the '*Immunities*' case), judgment of 20 September 2011, para. 35.

<sup>73</sup> *Amendments* judgment, para. 197.

are remarkable.<sup>74</sup> But they were inevitable: *ex falso quodlibet*, and likewise in order to demonstrate an absurd conclusion one must use at least one absurd argument. On whose basis that deputy was immediately arrested.

The court was asked several other questions, including whether the president and the members of the government also enjoy immunity from arrest. The constitution grants that immunity only to deputies. The court does not mention this choice - not even to say that it was a mistake - but merely notes that the president “has unique functions [and] cannot be hindered in their exercise by arrest or detention [but] must be permanently available”, and that “[t]he arrest and detention of such a person is repugnant to those ideals of the President representing the unity of the people and by [sic] embodying the statehood as head of State”.<sup>75</sup> The reasoning ends here. Presumably because it would have been hard to construct an argument that the constitutional legislator intended the president to be protected from arrest: president, government and parliament all benefit from immunity from prosecution for certain crimes, but only the members of parliament were granted immunity from arrest. Since such an argument was not available the court probably relied upon natural law or similar immanent principles, as its invocation of notions such as ‘ideals’ and ‘repugnant’ would suggest: the court might have read into natural law a precept whereby presidents cannot be arrested.

Thus, the same court that had annulled a presidential election because of a plural tense, and had allowed an acting president to remain deputy leader of a party - which evidently did not seem ‘repugnant’ to those ‘ideals’ - on the strength of two superfluous words, has now taken the immunity away

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<sup>74</sup> *Immunities* judgment, paras. 91-95. The court begins by noting that “[i]t is when deputies are at [parliament] meetings that they are performing their duties”, and that the immunity “protects that work”: consequently, outside of such meetings deputies “can not be said to be performing the work necessary to give effect to the Assembly” and can freely be arrested (evidently, the court believes that drafting laws, preparing amendments to them, reading reports on the execution of the budget, or meeting constituents are not part of their “duties”). If so, however, the parliament’s consent becomes meaningless because any deputy can be arrested at the end of any meeting, as we have noted above. Mindful of this problem, the court seeks to identify a residual role for such consent: “[t]he purpose of this requirement is to ensure that the work of the Assembly must not be hindered”, it wrote, and therefore such consent “is required to remove the deputy because his/her *physical presence is necessary* at the meeting” (para. 95, emphasis added). Necessary at that meeting, perhaps, but necessarily unnecessary at the next one, because between the two meetings the wanted deputy shall have been arrested. More precisely: as (1) the court’s argument takes into account neither the qualities of the deputy in question nor the agenda of the meeting, but is couched in purely abstract terms, such that it can be applied to deputy “X” and to meeting “M”, both randomly selected; and (2) the effect of the court’s argument is such that the presence of X is *a priori* necessary at meeting M but unnecessary at meeting M+1; it follows that (3) the court’s argument is contradictory, because deputy X cannot at the same time be necessary at M and unnecessary at M+1 if nothing distinguishes such meetings except the passage of time. Moreover, probably aiming for simplicity, the court made a slight change in the rule it was constructing: the operative part of the judgment reads that deputies can freely be arrested “when there are no ... meetings” (p. 24, para. A(IV)(2)). If so, what if there is a meeting but the wanted deputy is absent? The “physical presence” of such deputy is demonstrably unnecessary, because the meeting efficiently proceeds despite the deputy’s absence: is parliament’s consent still needed? Either answer to this question makes the reasoning of the court and the principle of law it stated mutually inconsistent.

<sup>75</sup> *Ibid.*, para. 125.

from the deputies and transferred it to the president, who did not have it: it effectively cut out one provision from one article of the constitution and placed it into another article. If hypocrisy is a homage that vice pays to virtue, with this judgment the court seems to have shed even this form of allegiance to its constitution.<sup>76</sup>

Granting the immunity also to the government would have been harder, because the arguments used for the president - whatever their precise configuration - cannot easily be extended to it. Hence, the court ducked the issue: the question is listed twice among the 15 ones that the government itself had posed, but it is the only one that is neither discussed nor answered.<sup>77</sup> The court presumably did not wish to rule that government members have no immunity, and left a doubt open that would justify a fresh referral in case of necessity.

This judgment offers conclusive evidence, if any was still needed, that this court is ready to go to remarkable lengths to bow to political pressure. And it must be noted that the decision was unanimous, that no concurring opinions were published, and that all the three international judges sat in the panel: one (Botusharova) was judge rapporteur and one (Carolan) presided the review panel in charge of evaluating admissibility.

## 8. Conclusions

### 8.1 The Performance of the Court and its Independence

Three constants can be observed in the set of cases we examined: (1) except in the *Prizren* and *Presidential election* cases, all referrals were demonstrably inadmissible (a slim doubt exists only in the *Impeachment* case); (2) except in the *Prizren* case, in all cases the decision on the merits was plainly mistaken; (3) except in the *Prizren* and *Presidential election* cases, all rulings conformed to the interests of either the political élite or its dominant faction, assembled around the prime minister. The most plausible inference is that this court has consistently used its powers to satisfy such interests, regardless of whether they were supported by the law (or the evidence, in the *Impeachment* case), and has chosen to extend its jurisdiction so as to encompass all the matters on which they impinged. Both exceptions are easily explained, and reflect specular concessions to national and international public opinion: the *Prizren* judgment did run counter the dominant interests, but it was issued, publicly praised by the international community, and never enforced; whereas the *Presidential election* decision was an irrepressible *cri de cœur*, a short-lived rebellion of the national judges.

This hypothesis is corroborated by the analysis of the jurisprudence of the court. I shall recall in particular its explicit decision to pose itself as the constitutional advisor of the institutions, beyond the limits of its jurisdiction

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<sup>76</sup> “L’hypocrisie est un hommage que le vice rend à la vertu” (La Rochefoucauld, *Maximes*).

<sup>77</sup> *Ibid.*, paras. 39(C) and 129(ii).

(*Incompatibilities, Immunities* and *Clarification*). Its choice to open a dialogue with the political authorities on the implementation of its judgments (*RTK* and *Prizren*). Its oblique, confused, circular, incoherent, absurd or absent reasoning, whenever the law posed obstacles to the dominant interests (all cases except *Prizren*). And its repeated, sudden *revirements* between opposite canons of legal interpretation, each of which led to decisions that favoured such interests: from an excessively liberal approach (*Impeachment*), to a blindly literalist one (*Incompatibilities* and *Presidential election*), back to the liberal one (*Clarification*), and ending with a judgment (*Immunities*) in which both canons coexist. *RTK* cannot be commented from this perspective, because it lacks a motivation, whereas *Prizren* is a convincing decision.

It is therefore possible to conclude that for this court the correspondence between the applicant's request, the law and the evidence is not a decisive criterion for adjudication when important interests are at stake. Hence, even if we assume that some, or even many other cases had been decided competently and fairly it would still be possible to conclude that this court gravely lacks independence and is subject to heavy political interference, because when such interests are at stake their direction becomes the decisive criterion for adjudication. Such a court can serve neither as a guarantor of the independence of the ordinary courts, themselves exposed to political interference, nor as an example for them: the constitutional court is both a manifestation and a cause of Kosovo's profound rule-of-law and governance problems.<sup>78</sup>

The ICO does acknowledge that "politics creeps into [the court's] deliberations", but it bears remembering that without the judgments we commented Kosovo would now have a different president, parliament, government and probably also prime minister.<sup>79</sup> Moreover, by abolishing the inviolability of the parliament - which existed in republican Rome, for the tribunes, and is affirmed in the 1789 declaration of the rights of man - the *Immunities* judgment left parliamentarians exposed to the risk of being arrested by a judicial system that is subservient to the élite, which is precisely the rationale of that ancient prerogative. The court's decision will weaken both the parliament and the dialectic between government and opposition. Its direct and indirect effects have already been observed: in October 2012, by order of the minister of interior the police has barred a group of parliamentarians from attending a demonstration, arrested one, and subsequently prevented them from entering the parliament by laying "siege" to it.<sup>80</sup> And on 27 June 2013 a parliamentary vote on a very controversial issue

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<sup>78</sup> On the weakness of the rule of law and the independence of the judiciary, see, e.g., European Commission, *Commission Staff Working Document*, Doc. SWD (2012) 339 final/2, 23 October 2012, 8-11.

<sup>79</sup> International Civilian Office, *Statebuilding and Exit ...*, 142.

<sup>80</sup> Freedom House, *Nations in Transit 2013: Authoritarian Aggression and the Pressures of Austerity* (Rowman & Littlefield, New York and Washington DC, 2013), 288.

“was made possible only after Kosovo Police escorted [some deputies who had staged a protest] out of parliament”.<sup>81</sup>

## 8.2 A Recent Test for our Conclusions

That vote concerned an agreement between Kosovo and Serbia on the governance of the northern corner of Kosovo, which had raised heated controversy in Kosovo. That territory is inhabited almost exclusively by Serbs, who rejected Kosovo's independence and have since lived in separation from the rest of the country: thanks to the forceful mediation of the European Union, in April 2013 Belgrade and Pristina agreed that such territory should come under the control of Kosovo's authorities, but should receive certain special self-determination prerogatives. Part of the opposition and a wide segment of the electorate criticized Kosovo's government for having made such concessions, which they regard as excessive, damaging, and contrary to Kosovo's constitution. Upon this argument some opposition parliamentarians challenged the law ratifying the agreement before the constitutional court.

The case was a delicate one. Had it upheld such criticism, which had a degree of plausibility, the court would have contradicted the government on a matter that is intimately linked to the emotional questions of Kosovo's statehood and its relationship with Serbia, and it would have severely damaged its standing before public opinion. But even aside from the outcome of the case, the court would have had to examine, dissect and interpret the agreement: this alone was problematic, for two reasons. Firstly, the agreement is (deliberately) couched in vague and generic terms, and it was meant to be better defined in subsequent accords: a ruling by the court on its interpretation would therefore have limited the government's negotiating freedom, possibly greatly so. Secondly, any plausible interpretation by the court would certainly have contradicted the government's public stance that the agreement does not grant to the Serb minority greater prerogatives than those set forth in the Ahtisaari plan: whether or not the agreement breaches the constitution, there is no doubt that it goes (a little) beyond the Ahtisaari plan because this is its very intent and *raison d'être*, for Serbia and the Serbs of north Kosovo had rejected the Ahtisaari plan.

This is the most politically sensitive case heard by the court since the decisions we reviewed above, and it is more delicate than several of them because it encroached upon important interests not only of Kosovo's élite but also of Serbia and of the international community, which had engineered, mediated and hailed the agreement.<sup>82</sup>

The question of the constitutional review of international agreements is a complex one, but it needn't be discussed here because the court solves it at

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<sup>81</sup> UNMIK, *Media Monitoring Headlines*, 28 June 2013, 1, at <http://media.unmikonline.org>.

<sup>82</sup> On the broader significance of this agreement, see, e.g., Stefan Lehne, “Serbia-Kosovo Deal Should Boost the EU's Western Balkans Policy”, in *Carnegie Europe*, 23 April 2013, at <http://carnegieeurope.eu>.

the outset of its reasoning. It states, probably correctly, that in Kosovo international agreements are subordinated to the constitution: they are “of inferior legal order to the Constitution [and are] subject to the Constitution.”<sup>83</sup> And it cites, as the basis for admitting the referral, an article of the constitution (113.5) whereby a certain number of parliamentarians can challenge before the court “any law or decision adopted by the Assembly as regards its substance and the procedure followed.” As the law ratifying the agreement only contains the ratification formula and a provision whereby the agreement is made an “integral part of this law”, reviewing the substance of the law must imply reviewing the substance of the agreement: indeed, the court itself writes that the purpose and effect of such law is to “incorporate [the agreement] into the Kosovo legal system.”<sup>84</sup> It ought to follow that the court was bound to review the substance of that agreement, under both the subordination principle it formulated and the constitutional provision upon which it had based its jurisdiction.

Yet the court refused to do so. It discussed and affirmed the procedural regularity of the law ratifying the agreement, but it judged that reviewing its substance fell outside of its jurisdiction. The reasoning runs for less than one page.<sup>85</sup> The court notes that the majority of the states of the Balkans do not allow their constitutional courts to review the constitutionality of international agreements after they have been ratified (which is what the court's survey concludes). It states that the agreement and the law ratifying it are separate acts. It recalls that it has already affirmed the procedural regularity of such law. It remarks that such law incorporates the agreement into the domestic legal system. And it observes that “no *Article* of the Constitution provides for a review by the Court of the constitutionality of the substance of international agreements” (in fact, the constitution does not *explicitly* authorize such review).<sup>86</sup>

But although each of these statements is true, they neither compose a recognizable argument nor can they support the court's conclusion that it “is not empowered to review whether the international agreement as such is in conformity with the Constitution.”<sup>87</sup> This conclusion is a *non sequitur*, by which the court directly contradicts both the general principle it had formulated - the subordination of international agreements to the constitution - and its own interpretation of the purpose and effect of the law ratifying the agreement.

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<sup>83</sup> Constitutional Court of Kosovo, case KO 95/13, *Ymeri et al.* (hereinafter, the ‘*Agreement*’ case), judgment of 9 September 2013, para. 52. The court's view seems persuasive, because article 16.1 of the constitution defines it as the “highest” source of law and provides that “[l]aws and other legal acts shall be in accordance with this Constitution”; although the constitution also provides that Kosovo “shall respect international law”, which includes the *pacta sunt servanda* rule, this provision is placed in the third paragraph of that same article, whose title is “Supremacy of the Constitution” and whose purpose is to lay down the hierarchy of the sources of law: the intention seems to be to place international law below the constitution in such hierarchy.

<sup>84</sup> Respectively: article 2 of Law No. 04/L-199; and *Agreement* judgment, para. 98.

<sup>85</sup> *Agreement* judgment, paras. 96-100.

<sup>86</sup> *Ibid.*, para. 99, emphasis added.

<sup>87</sup> *Ibid.*, para. 100.

This might perhaps have been the right decision, because it cannot be excluded that - contrary to what the court had stated - in Kosovo's legal system international agreements are *not* subordinated to the constitution. But what matters from our perspective is that even if the court took the right decision it was not aware of it: the court knowingly disregarded its own understanding of the hierarchy of laws, and consequently it also knowingly breached its own understanding of article 113.5 of the constitution.

This decision is very similar to those issued in the *RTK, Impeachment, Incompatibilities, Clarification* and *Immunities* cases, therefore: while in those instances the court had erroneously expanded its jurisdiction in order to solve sensitive questions in the manner desired by powerful interests, in this case it erroneously curtailed its jurisdiction so as not to issue a decision that would have harmed such interests by the mere fact of being issued, irrespective of the outcome. The agreement is probably compatible with the constitution, if anything because its language is sufficiently vague: but even if a serious doubt existed this court could easily have confected the necessary arguments to rule in favour of the agreement. This solution would not have overcome the political impasse, however, because it would have limited the government's future negotiating freedom and left its unpopular concessions exposed before Kosovo's electorate. As in the other cases we examined, the rationale of the court's decision must lie in these considerations, which also explain the contradictions and the weaknesses of its reasoning.

Judge Carolan dissented with that decision, upon arguments similar to ours.<sup>88</sup> His separate opinion also states that the agreement is compatible with the constitution, but it devotes only one line to this topic: a dozen words to opine on a complex issue that involves the principle of equality and the unitary character of the judicial system.<sup>89</sup> This judge probably felt that the public had to be reassured of the constitutionality of the agreement, but, like his colleagues, he evidently preferred not to examine or even describe it. Indeed, that this was might have been his intention is suggested also by the title of his opinion, which he qualifies as a "concurring" one despite the fact that he explicitly dissents with the crucial choice of the majority: it presumably is to justify that title that he writes that he agrees with the "effect" of the judgment but disagrees with its reasons.<sup>90</sup> The word is deftly chosen, but it cannot seriously be maintained that refusing to assess the constitutionality of an act is equivalent to affirming it. These two choices have the same effect only in a practical, political sense: which is what mattered to the court, as we saw, and probably also to this judge. Overall, the impression is that this "concurring" opinion - composed of less than thirty lines - was issued chiefly in order to defend the agreement from popular criticism without damaging the credibility of the judgment, and perhaps also

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<sup>88</sup> *Agreement*, concurring opinion of judge Robert Carolan of 9 September 2013.

<sup>89</sup> *Ibid.*, 3.

<sup>90</sup> *Ibid.*, 1.

to cast a lifeline to the subordination principle, which the court had chosen to first affirm and then disregard.

This judgment was issued in September 2013, and it attests that four years after its establishment the court has not yet begun its path towards maturing into a credible and independent guardian of the rule of law (in December 2013 it also emerged that the political authorities have again ignored a judgment, which had been issued three years before but poses risks to public finances).<sup>91</sup>

### 8.3 The International Community, the Court and the Political Economy of Kosovo

Neither ICO's supervision nor the presence of six foreign jurists - judges and experts - has protected the court's independence, therefore. The question, rather, is whether such international involvement has itself damaged the court, and in more direct ways than by harming internal collegiality or external legitimacy, which are the classic concerns about internationalized courts.

The question arises from an analysis of the known choices of the three ICO-appointed judges. Which are the following, listed in chronological order: one judge (Rodrigues) dissented with the *RTK* ruling (Carolan was absent and Botusharova's position is unknown); all three approved the *Prizren* judgment; one (Carolan) approved the *Impeachment* judgment, whereas the other two dissented; all three approved the *Incompatibilities* judgment; two (Carolan and Rodrigues) dissented with the *Presidential election* judgment, and did not sit in the panel that issued the *Clarification* judgment (Botusharova's position in respect of both decisions is unknown); all three approved the

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<sup>91</sup> See 'Thaçi nuk përfill vendimin e Kushtetueses për ish - punëtorët e Ballkanit' (Google translation: *Thaci flouts the decision of the Constitutional Court for the former 'Balkan' workers*), in *Koha Ditore*, 14 December 2013, at <http://www.koha.net/?page=1,3,169259>. The judgment in question is also a good example of the quality of the the court's decisions, for it was issued unanimously by the full panel of the court, and, unlike those discussed above, it concerned a case that did not involve sensitive political issues: Constitutional Court, case KI 08/09, *Independent Union of Workers of IMK Steel Factory*, judgment of 17 December 2010. The case concerned the failure to obtain the enforcement of a monetary claim (past salaries due to certain workers by a state-owned enterprise) that had been upheld by a final judgment of the ordinary courts. The constitutional court in effect ordered that payment to be made, with a judgment that: (1) assumes that the mere passage of time implied a denial of justice, ignoring - that is, it disregarding without explanation - the question as to whether the failure to enforce the judgment was due to the negligence of the judicial system, to that of the creditors, or to a combination of the two; (2) ignores the legislation governing insolvency and the principle of the equal treatment of creditors, because the state-owned enterprise was in liquidation, the claim in question far exceeded its net assets, and other creditors existed; and (3) equally ignores the existence of the corporate veil, because the judgment makes both the privatization agency - the sole shareholder of the state-owned enterprise - and the government liable for the payment of the claim, whereas that enterprise was a joint stock company and under Kosovo law shareholders (including sole shareholders) preserve the benefit of limited liability also within the context of an insolvency procedure. This last effect of the judgment provoked concern, as it opened public finances to a rather serious risk. The court was therefore asked for a clarification. But he clarification - issued, once more, beyond its jurisdiction, without public hearing, and giving access to the court to only one party of the case - failed to satisfy such concerns: this is the reason why the judgment has been ignored for three years (in ICO's silence: I followed this matter).

*Incompatibilities* judgment; whereas we are not aware of their votes in the *Agreement* case, apart from Carolan's perplexing opinion.

The *Impeachment* case clearly marks a watershed. Before that case one judge voted against an indefensible ruling (*RTK*), and all three approved a convincing one (*Prizren*). In the *Impeachment* case, two judges voted against the judgment, which was indefensible, and one in favour. And of the three equally indefensible decisions that have been rendered after that case, all three judges approved the two decisions that favoured the interests of the political élite (*Incompatibilities* and *Immunities*), and two dissented with the only one that ran counter such interests (*Presidential election*). Moreover, the deadline for implementing the *Prizren* judgment fell shortly before the issuance of decision that marked the watershed, after which the court made no efforts to obtain the enforcement of that judgment, or at least no visible or successful ones.

After the *Impeachment* judgment, therefore, the most notable constant in the choices of the international judges, or of the majority of them, is that they favoured the interests of the political élite, whether or not they were supported by a plausible reading of the law. Those judges were appointed and remunerated by the ICO, and could be dismissed at its discretion: consequently, if their formal independence from Kosovo's authorities was assured their actual independence from the ICO was not. Moreover, the ICO probably disposed of information on the deliberations of the court: as we observed (note 48, *supra*), the vote of judge Carolan in the *Impeachment* case - which marked the watershed - was known to the two former ICO officials who wrote the 2010 article on the court. All this casts a doubt on the actual independence of the international judges.

The ICO had instruments to influence their six Kosovar colleagues too, because it supervised the court and gave it "political support", as those two authors report.<sup>92</sup> They do not illustrate the forms of such support, but I am aware of a revealing example. In late 2009 the court made a grossly unreasonable budget request, which was largely rejected by the parliament: and yet, in spite of the warnings of the finance ministry, in 2010 the court consciously made expenditures that breached the budget ceilings, and therefore also the legislation governing public financial management; on both occasions, the ICO sided with the court and even encouraged it (in the name of its independence, but ignoring the accountability principle).<sup>93</sup> This episode

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<sup>92</sup> Hill and Linden-Retek, "Supervised Independence ...", 35.

<sup>93</sup> The court had requested an allocation of 3.3 million euros, but the parliament only granted it one million. Against my objections, the ICO gave qualified support to this request and argued that the parliament must not reduce it: conversely, article 14.2 of the law on the constitutional court bars only the government, and not the parliament, from revising the court's budget requests. Which included the following: (1) 810,000 euros to refurbish its building, despite the fact that the court had been allocated ample space in an EU-donated palace of justice that was about to be constructed; (2) 350,000 euros for cars (about 20), in conjunction with a request to increase the staff from 25 to 64, including drivers and messengers (in Kosovo, extremely few public officials have dedicated cars); and (3) salary levels twice as high, on average, as the maximum set by the civil service law (for instance, a messenger would have been paid more than the budget director in the ministry of finance). This last request was rejected, but in 2010 the court nevertheless paid such

certainly harmed the court's - or at least its president's - ability to stand *sine spe nec metu* before either the ICO or the government.

Hence, our question becomes whether the ICO has used its potential influence over the court, and, if so, what ends it pursued. The question can only receive a speculative answer, except in respect of two instances. A significant part of the international community had strong and well-publicized interests on the outcome of the *Immunities* case, which the court upheld by radically altering an explicit choice of the constitutional legislator. It is therefore presumable that such interests did weigh on the court, and they were so clear and well known that no explicit pressure needs being conjectured; but even assuming that the international community did not directly or indirectly influence this decision, its public support for it certainly legitimized *ex post* the misuse of the court's powers, and produced a very similar effect on the court's independence to *ex ante* influence. Similar interests and considerations were probably at play in the *Agreement* case, but we cannot formulate the same hypothesis because we have insufficient information on the choices of the international judges. In the *Prizren* case, finally, the ICO and the international community attached considerable political and symbolic importance to the implementation of the judgment. Faced with the steadfast resistance of the municipality, however, their desire to obtain at least a semblance of implementation turned against the institutional interests of the court: it is almost certain that it issued its unusual press release because it had been persuaded to trade away portions of the principles it had proclaimed in exchange for portions of the emblem.

But although these conclusions cannot be generalized into an answer to our question, there is no doubt that the ICO has consciously permitted the political élite to transform the court into an instrument to advance its own interests and entrench itself. Ever since its inaugural decision the inadequacy of the court's performance was too grave and too visible not to be remarked, and the ICO ought to have intervened: by choosing not to intervene, the mission deliberately allowed Kosovo's élite to capture the court. The vicissitudes of the court in fact offer a good illustration of the idiosyncratic form of state capture that has been observed in post-independence Kosovo, which stifles its economic, social and democratic development. And the approach taken by the ICO towards the court is equally representative of the policies followed in Kosovo by a significant segment of the international community, which led the most intensive and expensive statebuilding effort ever undertaken to produce very unsatisfactory results: fourteen years after the NATO intervention and one year after the end of its international supervision, Kosovo remains a "semi-consolidated authoritarian regime", the

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excessive salaries by drawing the necessary funds from other budget lines, in breach of the public financial management legislation. The first request was partly granted, even though it should have raised serious concerns, because in Kosovo corruption is endemic in public procurement and the court's request was not based on any recognizable need: its building had been refurbished in 2009, maintenance costs were amply covered by another budget line, and in Kosovo 810,000 euros can cover the construction cost of a sizeable office building, whereas the court merely desired to better refurbish a newly refurbished building.

only one in the Balkans; one third of its citizens live in poverty, on less than 1.55 dollars per day; and youth unemployment, among Europe's youngest population, approaches 70 per cent.<sup>94</sup>

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<sup>94</sup> Kosovo is qualified thus by Freedom House, *Nations in Transit 2012 ...*, 280. On poverty and unemployment, see, e.g. World Bank, *Kosovo: Unlocking Growth Potential. Strategies, Policies, Actions: A Country Economic Memorandum*, Report No. 53185-XK (Washington DC, 2010), at 1 and 56-69. For the most recent poverty and unemployment data, see, respectively: Gashi, Ardiana, "The Impact of the Crisis on Social Inclusion and Social Protection in Kosovo", in Will Bartlett and Milica Uvalić (eds.), *The Social Consequences of the Global Economic Crisis in South East Europe* (London School of Economics, London, 2013), 95-108, at 100; and European Commission, *Commission Staff Working Document ...*, 16.

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