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ARTICLE

"Two Courts" for *One Constitution*: Fragmentation of Constitutional Review in the Law of the Kosovo Specialist Chambers in The Hague

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Abstract
The Kosovo Specialist Chambers embody a remarkable project involving elements of the domestic law of the Republic of Kosovo, the EU's external relations law, and international criminal law. The Chambers' hybrid nature is not only unique, but also atypical in regards to its influence in Kosovo's constitutional order. The Specialist Constitutional Chamber is one of the instances of the Kosovo Specialist Chambers sitting in the Hague. The Specialist Constitutional Chamber resembles Kosovo's Constitutional Court on a specific, though exclusive, area of law—the law surrounding the court in general. The two courts not only exercise the same generic function—on the basis of exclusive material criteria—but also possibly parallel and compete with each other. The relationship between the "two courts" is at best explained with the term "fragmentation of constitutional jurisdiction." While the two courts are forced to endure under the same normative roof—the Constitution—they inherently exercise often conflicting functions and protect irreconcilable ideological perspectives. The article examines the interaction between the two courts primarily in a normative and jurisdictional perspective. It also presents recent tendencies of both courts to divert in divergent pathways. The article concludes that while the two courts present an unobserved case in comparative constitutional law, they also reveal an interesting and unconventional constitutional controversy appearing in the context of a sovereign country's relationship with international law obligations.

Keywords: Kosovo Specialist Chambers; EU; International criminal law; hybrid courts

A. Introduction

The Kosovo Specialist Chambers ("the Chambers") represent an effort of the European Union (EU) to establish a unique and utterly *sui generis* criminal tribunal that will investigate, prosecute, and adjudicate based on the findings of the Europe Parliamentary Assembly of the Council of Europe (PACE) Marty Report.[1] The Chambers are composed of international judges and prosecutors appointed by EU's ESDP Mission, the EULEX.[2] The EU also provides for all financial

[1]Fisnik Korenica, Argjend Zhubi & Dren Doli, *The EU-Engineered Hybrid and International Specialist Court in Kosovo: How 'Special' is it?* 12 EUR. CONST. L. REV. 474 (2016); *see also* Holvoet, Mathias, *The Continuing Relevance of the Hybrid or Internationalized Justice Model: The Example of the Kosovo Specialist Chambers*, 28 CRIM. L. F. 35 (2017).

[2]On contestations about lack of local ownership on EULEX Mission in Kosovo, see, e.g. Ewa Mahr, *Local Contestation Against the European Union Rule of Law Mission in Kosovo*, 39 CONTEMP. SEC. POL'Y 72 (2018).

resources, operational, and institutional support for the Chambers.[3] While the Chambers are tagged with "Kosovo" in their official designation, their connection to Kosovo is rather vague: The Chambers remain outside any sovereign control from Kosovo, except the fact that Kosovo provides for some aspects of the law governing the Chambers. Kosovo has neither effective nor ultimate control over the Chambers, meaning that none of its constitutional bodies, including the Constitutional Court, have any authority concerning control of the constitutionality and legality of its work. They belong to Kosovo in nothing but name. In that respect, Kosovo has passed a constitutional amendment and a specific law regulating the Chambers' business, thus authorizing the use of its nametag in the Chambers' official designation. Though the Chambers bear a resemblance to a hybrid tribunal, there are many who support the argument that the Chambers are more resonant of an entirely internationalized tribunal,[4] established by a unilateral constitutional act and endorsed by an international treaty conferring irrevocably sovereign powers to the EU to run it in practice.[5] Had it been a hybrid tribunal, Kosovo's constitutional bodies would have had some say in the control of the constitutionality and legality of its work as well as with its staffing, including judges and other personnel. Here we have in mind, for example, the cases of hybrid tribunals for Cambodia, East Timor, Lebanon, and Sierra Leone. Kosovo has no say as far as its material and procedural jurisdiction is concerned, staffing with judges, its personnel, and its financing. Thus, its naming as a fully internationalized criminal tribunal: The only "national" mark of the Chambers associated with Kosovo is its accused persons and some of their defense lawyers.

While the Chambers echo an interesting, and indeed a *sui generis* criminal tribunal project in many aspects—such as fragmented law on which it originates, international legal personality, relocation of headquarters, and standard of evidence admission—it also triggers the interest of legal audiences because of its Specialist Constitutional Chamber that parallels the jurisdiction of Republic of Kosovo's Constitutional Court. From an organizational perspective, the Chambers is comprised of three regular court instances of general jurisdiction: The Basic, the Appeals, the Supreme; as well as one of special jurisdiction—the Specialist Constitutional Chamber (SCC).[6] The SCC is vested with an exclusive jurisdiction to rule on constitutional issues arising out of and touching upon the Chambers. While this specific jurisdiction of the SCC is reminiscent of the self-contained regime of law in which the Chambers operate,[7] it also genuinely disturbs the nature and scope of the jurisdiction of the Kosovo Constitutional Court. Both in theory and practice, the Constitutional Court of Kosovo is entitled to rule on the constitutionality of any act within the constitution—a function operating on the substrate of the principle of constitutional supremacy envisaged in Article 16 of the constitution.[8] However, its character as the "guardian of

[3]The EU claims to be an active organization in regard to transitional justice domain. *See* EU External Action, *EU's Support to Transitional Justice*, European External Action Service, (Nov. 16, 2015); For a general overview on the actual state of SCC, see *KSC at a Glance*, Kosovo Specialist Chambers & Specialist Prosecutors Office, https://www.scp-ks.org/sites/default/files/public/content/ksc_at_a_glance-en.pdf.

[4]A discussion of this question is thoroughly considered in Emanuele Cimiotta, T*he 'Regionalization' of International Criminal Justice in Context*, 14 J. Intl. Crim. Just. 53 (2016).

[5]For the EU's official response to the Kosovo Assembly's decision to adopt the package of law establishing the SCC, at, see EU External Action, *Statement by High Representative/Vice President Federica Mogherini After Adoption by the Kosovo Assembly of the Law on Specialist Chambers and Specialist Prosecutor's Office*, European External Action Service, (Aug. 3, 2015); *Cf.* Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization?*, 14 J. Intl. Crim.l Just. 25, 26 (2016).

[6]L No. 05/L-053, On Specialist Chambers & Specialist Prosecutor's Office of Kosovo, art. 3, Rep. of Kosovo (2015) https://www.scp-ks.org/sites/default/files/public/05-l-053_a.pdf.

[7]SCC is not equal or comparable to domestic constitutional courts composed of mixed international-local panels. *Cf.* Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 Colum. J. Transnat'l L. 283 (2018).

[8]L No. 05/L-053, art. 16.

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the constitution" is affected by the mere fact that the SCC has been vested with a "slice" of this original and exclusive jurisdiction.

The "two courts" question[9] reverberates the theoretical and legal tension that is engendered by the potentially overlapping jurisdiction between the SCC and the Constitutional Court of Kosovo. This article elaborates this tension largely from a positivist perspective, looking at how certain aspects of the law can be inflicted by the nature of jurisdiction of the "two courts." First and foremost, the analysis considers the question of how the jurisdiction of the SCC is construed with an emphasis on the aspect of borders of exclusivity and matters that fall in the scope of the Chambers. Second, on that basis, the article then explores the all-too-powerful international element present in the operation of the SCC and how that affects Kosovo's sovereignty in the interpretation and guarding of its own constitution. Lastly, the article provides an analysis on the future of this interaction, giving hints as to whether the SCC can allegedly pull interpretation of Kosovo's constitution into the realm of international criminal law therefore adversely affecting the stature of an independent country.

B. An Analysis of the Clause Authorizing *Separation of Power* on Constitutional Review

The constitution assigns the Constitutional Court of Kosovo with a broad competence on constitutional control, by sanctioning that it "is the final authority for the interpretation of the Constitution."[10] We name the latter as the "final authority clause." Article 113 deducts that competence into a specific set of jurisdiction—both abstract and individual—by naming situations when and how the Constitutional Court of Kosovo can intervene. While the "final authority clause" designated by Article 112 presupposes no competition to the sole competence of the Constitutional Court of Kosovo, that is not the case in practice. Article 162, which was added as an amendment to the constitution in 2015, interferes to the instruction of the "final authority clause." Article 162 (3) reads:

> A Specialist Chamber of the Constitutional Court, composed of three (3) international judges appointed in addition to the judges referred to in Article 114 (1), shall exclusively decide any constitutional referrals under Article 113 of the Constitution relating to the Specialist Chambers and Specialist Prosecutor's Office in accordance with a specific law.[11]

It is clear that the provision indicates a separation of powers between the Constitutional Court of Kosovo and the Special Constitutional Chamber; it assigns the latter with a specific constitutional competence that is to be exercised under the auspices of jurisdiction sanctioned in Article 113. We name Article 162(3) as the "separation clause," because it separates a slice of the jurisdiction of Constitutional Court of Kosovo and confers that to the SCC.[12] It is the SCC who enjoy exclusive jurisdiction on issues relating to the Chambers. The so called "relationship clause"—by which Article 162(3) designates when an issue is ripe for the Special Constitutional Chamber's jurisdiction—is a rather vague concept that may have serious ramifications in the context of definition of one's scope of competence (*kompetenz-kompetenz*). We will examine the "relationship clause" in more details below. It is important to note that Article 3 of the Law on the Chambers

[9]This problem is often described by the term "competing jurisdictions." For an excellent article on "competing jurisdiction" between international courts and tribunals, see Nikolaos Lavranos Regulating *Competing Jurisdictions among International Courts and Tribunals*, 68 ZAOERV 575 (2008). On the topic of national vs. European courts' competition, see Frank Schimmelfennig, *Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalization of Human Rights in the European Union*, 13 J. EUR. PUB. POL'Y 1247 (2006).

[10]L No. 05/L-053, art. 112 (1),

[11]L No. 05/L-053, art. 162 (3).

[12]*Id.*

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asserts that the principle of independence will accompany the work of the Special Constitutional Chamber.[13]

However, the "separation clause" is not forthright. It is also colored with many other levels of prescription that make the Special Constitutional Chamber's nature of jurisdiction rather different from that of the Constitutional Court of Kosovo. The major aspect of this difference is the prescription of Article 3(2) Law on Chambers, which asserts that the Chambers—including the Specialist Constitutional Chamber, hereinafter, only the SCC[14]—shall:

> adjudicate and function in accordance with, a. the Constitution of the Republic of Kosovo, b. this Law as the lex specialis, c. other provisions of Kosovo law as expressly incorporated and applied by this Law, d. customary international law, as given superiority over domestic laws by Article 19 (2)of the Constitution, and, e. international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.

The list of sources of law for the SCC is exhaustive and cherry picked. This differs substantially from the sources of law on which the Constitutional Court of Kosovo relies. While the latter is only bound by the Constitution and the Law on the Constitutional Court of Kosovo, the SCC has a much different regime of law on which it should base its adjudicative activity. SCC shall adjudicate on the basis of the Law on the Chambers—which is a *lex specialis* that excludes other Kosovo laws from application in the circumstances relating to the Chambers—and the bulk of norms incorporated therein, having to do mostly with international humanitarian law and the jurisdiction of the SCC, material and temporal. Because of this, it is observed that the self-contained regime of law on which the Chambers originate, generate ample effect on the nature of jurisdiction which the SCC shall exercise. Isolation of the SCC in only some specific laws[15] —which it must abide by—drives it naturally into a direction that could put it in contradiction with the Constitutional Court of Kosovo. We name this as the "separation clause" because it will inevitably divert the SCC in a direction that makes its interpretations not originating in a uniform basis with that of the Constitutional Court of Kosovo.

The Law on the Chambers provides for other elements that make the SCC embedded in a logic that goes to the detriment of a "tuneful dialogue" with the Constitutional Court of Kosovo. While the standing criteria for a constitutional judge in the Constitutional Court of Kosovo are relatively generic and associated with the knowledge of constitutional justice, Article 27 of the Law on Chambers provides for a different approach. It requires that all Chamber judges, including those sitting in the SCC, "shall have established competence in criminal law and procedure or relevant parts of international law and constitutional law as appropriate, with extensive judicial, prosecutorial or defense experience in international or domestic criminal proceedings."[16] It appears that SCC judges are preconditioned to have more criminal law and international criminal law expertise than expertise in national constitutional justice.[17] Experience in constitutional law is only an

[13]L No. 05/L-053, art. 3.

[14]In fact, Article 3 (2) on Specialist Chambers and Specialist Prosecutor's Office of Kosovo, sets this rule for the entire tribunal and not only the SCC.

[15]This aspect is further strengthened in Article 33(8) on Specialist Chambers and Specialist Prosecutor's Office of Kosovo, which insulates the SCC even from all procedural laws having to do with regular as well as constitutional matters in Kosovo.

[16]L No. 05/L-053, art. 27.

[17]*Cf.* Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation Versus Legal Tradition*, 3 J. LEGAL ANALYSIS 411, 419-20 (2011) (argueing the traditional practice in European constitutional justice institutions is based on a "recognition" criterion which echoes the Kelsenian format of the function of a constitutional judge). There are several reasons for this in the Kosovo context: First and foremost, the Law on the Chambers effectively creates two judicial structures, one in Kosovo itself, which is based on the criteria of recognition, the other at the Hague, which is based on a mixture of carrier and

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addition to the major criteria foreseen therein, thus sidelining the core aspect of constitutional justice in each and every setting.

In other words, constitutional law experience of the judges of the Chambers is looked at from a dogmatic angle focused on criminal law, both international and domestic. Criterion on "experience in criminal proceedings" is very explicit, basically making it mandatory that such experience is part of the major component in the resume of a SCC judge as well. This dimension further preconditions a situation where SCC judges are even psychologically liberated from being associated with the ideology accompanying the existing precedent of Constitutional Court of Kosovo. For instance, while constitutional judges in Kosovo are preoccupied with a natural goal of reaching normative supremacy as the highest court in the country, those sitting at the Hague will mostly take care to push forward the ideology of international criminal law, focused on war crimes and crimes against humanity[18] It goes without saying that the previous and current jurisprudence of the Constitutional Court of Kosovo shall not be taken into account, or at least shall not be considered seriously by its peers in the Hague.

The only case in Europe, to which we are aware of, wherein a constitutional court has been deprived through a constitution from making use of its own previous jurisprudence is Hungary: The "2013 Orban-sponsored" constitutional amendments striped the Constitutional Court of Hungary from its wide jurisdiction it used to have. Besides, it was banned from using its previous jurisprudence—precedents—as a standard for adjudication in the future cases to be referred to it.[19] It was meant that such an approach will not only hinder independence and impartiality of the constitutional judge but also orient the court towards an interpretative model that will be opposed to the previous practice. The SCC's characteristic as a court, which is practically dissociated from the previous practice of constitutional interpretation, echoes the same standard; namely, the tendency to create a constitutional justice that may well oppose the jurisprudence of the Constitutional Court of Kosovo. This is at best detrimental to rule of law and the purpose entrenched in liberal democratic value that justice must be served independent of a pre-determined base.

Another major mechanical aspect also preconditions a different position of the SCC compared to the Constitutional Court of Kosovo. While the latter is composed of a permanent structure—with each judge enjoying a nine-year term of office—Article 33(3) of the Law on Chambers provides for a different organization of the SCC. It establishes that once a referral has been filed to the SCC,

> [t]he President of the [Chambers] shall assign the three Judges of the [SCC] as a Constitutional Court Panel. Should one of these judges not be available for assignment, the President of the Specialist Chambers shall assign the reserve constitutional judge. The assignment of the Constitutional Court Panel judges shall elapse the day after the Constitutional Court Panel renders its judgment/opinion, unless the Constitutional Court

recognition criteria, at least as far as constitutional law and its justice is concerned. The second reason is that career judges serving as constitutional justices tend to be dogmatic and leave aside or suppress altogether constitutional aspects of the criminal and civil cases pending before them. This last aspect is easy to comprehend as Kosovo, like most of the Kelsenian models of constitutional justice, career judges are not in charge of constitutional matters. In fact they are not allowed to judge on constitutional matters at all.

[18]On the relevance of "ideology" of the constitutional judge, see Tom Ginsburg & Nuno Garoupa, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INTL. & COMPAR. L. 539, 543 (2011).

[19]Uitz, Renáta, *Hungarian Ban Of Totalitarian Symbols: The Constitutional Court Speaks Up Again,* VERFASSUNSBLOG (Feb. 22, 2013), https://verfassungsblog.de/hungarian-ban-of-totalitarian-symbols-the-constitutional-court-speaks-up-again/. In fact, the weakening of the power of constitutional courts has started in Hungary right after the landslide victory of the center-right FIDESZ, Victor Orban's party, in the 2010 parliamentary elections. *Cf.* more in Halmai, Gábor: Illiberal Democracy and Beyond in Hungary, VERFASSUNSBLOG, (Aug. 28, 2014), https://verfassungsblog.de/illiberal-democracy-beyond-hungary-2/; Gábor Halmai, *Dismantling Constitutional Review in Hungary*, 1 RIVISTA DI DIRITTI COMPARATI 31 (2019).

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> Panel is concurrently involved in other proceedings, in which case the judges' assignments shall elapse when these proceedings are completed.[20]

One can observe that the power of the President of the Chambers to pick SCC judges from the Roster is unlimited. Even when they are picked, the judges will serve only as a case-based panel. Choice may well rely on personal preference. Their mandate will elapse once the case has been adjudicated—contrary to the permanency of judgeship in the Constitutional Court of Kosovo.

These mechanics have tremendous effects in the notion of constitutional precedent. It would be almost impossible for the SCC to develop and maintain a uniform sense of constitutional interpretation such as in the case of a centralized constitutional court with a permanent judgeship. Frequent changes of panels, combined with the endless power of the President of the Chambers to pick panel members, results in constitutional interpretations that are not driven by long-standing legacy and ideological factors, as is a standard in constitutional justice all around the world, where judges leave behind an interpretative memory much like traces of a snakeskin. That memory is based on uniform standards and clear methodology of decision-making throughout all cases, not such in the opposite scenario. Thus, it is argued that the SCC sitting in the form of one-off panels resembles more an instance of an international tribunal in which the case before it, and not the uniform interpretation of law, is the predominant existential aim of the court. This is already reflected in the form and content of reasoning put forward by the SCC, which is very much different from the one found at the case-law of the Constitutional Court of Kosovo. While the form does not result in precedential value, the content of the reasoning forms the essence of judicial precedent. In the Constitutional Court of Kosovo, the prevailing form of constitutional arguments is mostly "parallel conclusive arguments," with occasional "parallel, individually inconclusive, but together conclusive arguments," while in SCC appears to be dominating "one-line conclusive arguments."[21] The content of the SCC's reasoning and its deviation from the existing reasoning in Pristina's case law of the SCC will be discussed in Section E below in the context of the battle for uniformity in constitutional interpretation.

I. Delimitation of Jurisdictions: An Analysis of the "Relationship Clause"

As one could observe, Article 162 (3) establishes that the SCC shall be the final authority for interpretation of constitutional issues in relation to the Chambers. The "relationship clause" present in Article 162 (3) is rather vague, and its interpretation can range greatly. The latter provision establishes that the SCC shall be competent to judge anything falling in the scope of a relationship with the Chambers as defined by the Law on the Chambers—already named in the "relationship clause." In fact, last sentence of the "relationship clauses" states employs the phrase "in accordance with a specific law,"[22] leaving impression that it is the law, not the Constitution that serves as an ultimate foundation for decision-making. To compare, this is very different from the meaning of the last paragraph of Article 113[23] of the Constitution. Article 162(3) speaks of constitutional

[20]L No. 05/L-053, art. 33(3).

[21]The following are the argumentative structures in judicial opinions on constitutional matters: "one-line conclusive arguments," that is, a self-standing structure, in which every premise is presented as a necessary component of the argument; "parallel conclusive arguments," that is, a cumulative parallel structure, in which distinct, autonomous considerations lead to the same conclusion; and finally, "parallel, individually inconclusive, but together conclusive arguments," that is, various considerations brought up by the opinion are neither presented as necessary nor as sufficient to entail the conclusion, but as elements bearing, at least, some relevance for the issue at hand. *Cf.* András Jakab, Arthur Dyevre & Giulio Itzcovich, Comparative Constitutional Reasoning 802 (András Jakab, Arthur Dyevre & Giulio Itzcovic eds., 2017).This book is a collection of essays dealing with comparative constitutional reasoning in all key legal systems of the world, using one of the three structures of argumentation. In the case law of the Constitutional. Court of Kosovo, the "one-line conclusive arguments" are usually used with resolution on inadmissibility—or decisions not on merits.

[22]L No. 05/L-053, art. 162(3)

[23]*Id.*

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ratione materiae beyond and above any point of jurisdiction from Article 113 of the Constitution, provided that it has to do with matters falling within the material jurisdiction of the SCC.

In the case of the last paragraph of Article 113, one observes that the additional jurisdiction may be provided for by law which is not the case with Article 162(2). In the stipulation of Article 113(10) of the Constitution, one understands that that is jurisdiction assigned by sectorial laws of a specific nature raising constitutional matters. But this is not meant to serve as a foundation for constitutional review, as in the case of Article 162 (3). One such law falling within the ambit of Article 113(10) would be, for example, law on self-government which foresees the dismissal of a mayor of the municipality acting contrary to the Constitution. However, the original dismissal decision is not a product of the Constitutional Court of Kosovo but of the government ministry dealing with local self-government. The role of the Constitutional Court of Kosovo is either to consent to or deny the dismissal decision of the ministry discharging the mayor to have allegedly acted in violation of the Constitution.[24] This is very different from the case under discussion from Article 162(3), wherein we face the situation of a reverberation of parameters for constitutional review to be used by the SCC: It is the Law on SCC, not the provisions of the Constitution, that serve as a foundation for review. While this may sound unproblematic, in practice it is because while the Constitution and not the Law on Constitutional Court which draws the jurisdictional body of the Constitutional Court Kosovo, an entirely new pattern of jurisdictional construction follows the SCC. The approach to locate the jurisdiction of the SCC into a law echoes a tendency that will naturally make its operation incentivized to escape from the uniform practice of interpretation of jurisdiction pursued by Constitutional Court Kosovo in the last ten plus years.

Be that as it may, it is clear that the intention of the drafters of Article 162 had been to provide that the SCC jurisdiction is intended to cap the Chambers from a constitutional review standpoint. Article 49 of the Law on Chambers makes it abundantly clear as it concretizes this aspect by establishing that:

> [The SCC] shall be the final authority for the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the Specialist Chambers and the Specialist Prosecutor's Office. 2. [The SCC] shall have jurisdiction over any referral to the Constitutional Court made by persons authorised to make referrals under Article 113 of the Constitution which relates to or directly impacts the work, decisions, orders or judgments of the [Chambers].[25]

The above article undoubtedly further specifies the "relationship clause" by adding another level of explanation, namely the words "relate to or directly impact the work, decisions, orders or judgments" of the Chambers. This level basically construes the concepts of "relate or directly impact" and "work or any sort of decision"[26] as the variables which ought to embrace the "relationship clause" on the basis of which the SCC will assert its jurisdiction. While this is not so problematic for *ratione personae* aspects, this may be very intricate for *ratione materiae* aspects of the SCC's jurisdiction.

We propose a test that should, in principle, manifest whether a case is admissible before the SCC on the basis of this construction of the "relationship clause." We name "relate or directly impact" as the dependent variable, because it manifests the origin, or cause of a result, that will be observed at the level of "work or any decision" of the SCC, which we name as the independent variable. For the SCC to assert its jurisdiction, the dependent variable—"relate[s] or directly impact[s]"—must be shown to have occurred due to an independent variable—"the work or

[24]*Cf.* Law N. 03/L-040 on Local-Self government , art. 64 ["Mayor: Removal from the Office"] (june, 4 2008).

[25]Law on Specialized Chambers of the Republic of Kosovo, adopted by Kosovo's Assembly in August 2015.

[26]Here the term "work of any decision" will be used as a short hand for the quote ". . . the work, decisions, orders or judgments of the [Chambers]" L No. 05/L-053, art. 49.

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any decision"—in order for the SCC to assert its jurisdiction. This is different from the situation within the meaning of paragraph ten of Article 113 of the Constitution, where parameters for constitutional review are located in a law outside the Constitution. While in the case of "relationship clause" we are faced within the parameters of the constitution itself for constitutional review since the SCC—when faced with "relationship clause"—has to determine the "relate and impact" on "work or any decision" of its own. This is deciding about causal relationship between two variables, while in the former case one has to do with ascertainment of the exact parameters for constitutional review of given acts of public authorities.

While this may be less problematic for the definition of jurisdiction over Article 162 and the Law on Chambers—which together form the *lex specialis* law for the Chambers—it can become seriously destructive if the scope of law which is pulled under the jurisdiction of the SCC indicates matters under the exclusive jurisdiction of the Constitutional Court of Kosovo. This may well be the case on issues which *ratione materiae* pass the test of the two variables, but at the same time raise issues which are located in the general law of the Republic of Kosovo—beyond the *lex specialis* on the Chambers. To make it simpler, if one reads the original "relationship clause" it resembles something that provides to the SCC a jurisdiction over Article 162 of the Constitution and the Law on Chambers, because only these two legal bases specifically regulate the Chambers' status, function, and operation. While this can be so in many scenarios, the test based on the two variables offers broader room to pull into the SCC's *ratione materiae* any piece of legislation or issue arising out of the implementation of the constitution that just "may perhaps" impact the work of the Chambers. This scenario engenders the clash of the "two courts" on the same *materiae*.

Digging further on this issue, one has to analyze the extent to which the potential exists that the two variables test is passed on laws over which the Constitutional Court Kosovo has exclusive jurisdiction. One can notice that Article 49 of the Law on Chambers has narrowed the SCC's material jurisdiction by introducing the independent variable; in the original "relationship clause" it was only the dependent variable that was present, whereas the test encompassed only the "relate" wording.[27] That being said, one would, at this moment, need a more detailed scrutiny of the dependent and independent variables: Namely, the terms "relate or directly impact" and the "work or any decision" of the Chambers. The "relate or directly impact" seems to have been written as an alternative norm, considering the "or" in between, namely only one of the alternatives would suffice. Considering that "directly impact" is much narrower that "relate," because the latter could be anything that has a meaning for the Chambers whereas the former should be something that is evidenced as impacting the status or functions of the Chambers, we argue that the term "relate" encapsulates "directly impact." Therefore, "relate" would suffice for this test, making "directly impact" irrelevant.

The term "relate" is extremely vague in an exercise necessitating an assertion of jurisdiction. In principle, "relate" would pull into the scope of reviewable *materiae* anything that possibly may interfere, affirm, or parallel the Chambers. Acts that can enjoy that status range from those laws that regulate judicial, prosecutorial, or criminal procedural law to constitutional material aspects such as human rights law, independence of judiciary, access to court, principle of separation of powers, or rule of law. This covers a very wide range of laws or constitutional provisions, far beyond what is the tangible *lex specialis* on the Chambers; such as a law on Kosovo's Specialized Prosecution Office—an instance equipped with competence to fight serious crimes—may well fall in the scope of "relate," because competences assigned to the Specialized Prosecution Office could well "relate" to exclusive fields of competence assigned to the Chambers as well. Another example is the constitutional article sanctioning the status of international agreements in Kosovo's law, which, again, may well fall within the scope of "relate" because its meaning would also be relevant for the international agreement in which the Chambers originate. To prove "relate," one would simply rely on assumptions rather than evidence, because

[27]Law on Specialized Chamber of the Republic of Kosovo.

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the term seeks to affirm a standing and/or positioning, as opposed to a conflict. Hence, the test on the dependent variable is a relatively easy, primarily intellectual, exercise not involving any hard evidence or factual background as a prerequisite.

The independent variable is much more concrete. It also, in principle, requires some sort of evidence to prove that something will relate to the "work, decision, orders or judgements" of the Chambers. The independent variable has been designed to appear as a result of the cause present in the dependent variable. Quantity-wise, it can encompass anything that is the "work" of the decisions of the Chambers, ranging from the form in which they were adopted to the manner in which they are to be executed. That would involve whatever that affects the daily business, functions, immunities, witness protection programs, adoption of judicial decisions and their execution, and aspects of administration of justice in general. It can also be ascertained that the independent variable has the form of a "result," thus some sort of evidence at least in the form of probability proof must be ascertained.

Once both tests have been passed, the SCC would conclude that it has *ratione materiae* jurisdiction to pronounce on it. This would perhaps provoke a potential clash with the original and exclusive jurisdiction of the Constitutional Court of Kosovo. The clash between the two court being a realistic risk, we will now consider the relations between the two courts from the perspective of "kompetenz-kompetenz," the principle of constitutional supremacy and uniform interpretation of law function.

A. The Question of *Kompetenz-Kompetenz* and the "Two courts"

The major question in this research project is who among the two courts is entitled with the "kompetenz-kompetenz" designation? In principle, there is no norm governing the hierarchy between the two. The only norm applicable in their relationship is a horizontal one, the "relationship clause." The risk that both courts maintain that they are entitled to rule on the same problem is possible both theoretically and practically. The "relationship clause" can only resolve contestations that are clear on *materiae*; should contested *materiae* appear as overlapping, intersecting, or touching upon one another, it will likely put both courts on the same wing. Hence, the "relationship clause" is not sufficiently exhaustive when it comes to controversies that can be isolated in the scope of the SCC or that of the Constitutional Court of Kosovo. This is a moment that problematizes the question of "kompetenz-kompetenz" and begs the question of what is a sovereign jurisdiction, what is it composed of and which parts of it are transferred to the -SCC- by the Republic of Kosovo?

Ever since it was mentioned in a dissenting opinion, and much later endorsed by scholars such as Fitzmaurice, jurisdiction is a distinct category from competence.[28] It is, first and foremost, an issue of sovereignty as it denotes inherent rights that belong to functions of modern states. Without it, a state is not considered a sovereign as it cannot freely exercise its jurisdiction over its territory and population. In order for it to be exercised, sovereign jurisdiction does not have to be formally written in a constitution or other legalislative act. It is always presumed that jurisdiction exists in favor of a sovereign state: In this sense, "kompetenz-kompetenz," a doctrine created by German scholars in nineteenth century,[29] was meant to answer question as to who decides in

[28] *See,* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 39, 1–33,(Apr. 9) (separate opinion by Daxner, J.). The relevant part of Dr. Daxner's Dissenting Opinion reads as follows:

> In my opinion , the word 'jurisdiction' has two fundamental, meanings in international law. This word is used: (1) to recognize the Court as an organ instituted for the purpose *jus dicere* and in order to ability to appear before it; (2) to determine the competence of the Court, i.e., to invest the Court with the right to solve concrete cases". For comments and the position of later professor Fitzmaurice, see more in Veijo Heiskanen, "Jurisdicition v. Competence : Revisiting a Frequently Neglected Distinction.

See also Manley O. Hudson, *The Corfu Channel Case: Significance of First Ruling by Present Court*, 34 A.B.A. J. 467 (1948).

[29] *See*, Francis Hamon, Michel Troper, Droit Constitutionnel, 334 (37th ed. 2016).

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cases where there are no clear formal rules on jurisdictional engagement. This means "kompetenz-kompetenz" is not always settled in line with the formal rules of engagement, such as those existing in arbitral tribunals, both domestic and international. Because it is an aspect of state sovereignty, "kompetenz-kompetenz" represents an inherent jurisdiction of the state to decide about itself and its jurisdiction in all cases, no matter whether it exists in a written form as an authorization or not.[30] A sovereign state may face the situation in which it has made use of "kompetenz-kompetenz" standard, not only in war and during crisis times, as foreseen by Carl Schmitt,[31] but also during peaceful times. This occurs when the whole membership in a state organ has to recuse themselves form deciding a case as a result of the conflict of interest. In the latter situation, "kompetenz-kompetenz" rule is expressed in an old adage of the United States Supreme Court, which says that "when all are recused, none is recused."[32]

Within this context, the issue of sovereign jurisdiction in the form of "kompetenz-kompetenz," there are at least three competing hypotheses that one may arise in regards to -SCC-: First, the hypothesis that the -SCC- originates in a "notwithstanding norm; second, the hypothesis that the -SCC- originates in a system of law where "predefined hierarchy" on the date of adoption of the constitution cannot be altered; and, third, the hypothesis that the -SCC- and the Constitutional Court of Kosovo are meant to organize a constructive dialogue so that both humbly defer to the "relationship clause" as a substantive standard of resolving their jurisdictional terrain.

Hypothesis One implies that the SCC originates in a "notwithstanding norm" that it substantiates a self-contained regime of law where the interpretations of the Constitutional Court Kosovo cannot inflict the jurisdictional autonomy of the SCC. That hypothesis would support the view that the SCC's jurisdictional autonomy entails the principle of non-interference from the Constitutional Court of Kosovo. This would further suggest that the -SCC- has priority in defining its own boundaries of jurisdiction vis-à-vis Constitutional Court Kosovo on the basis of the principle that the later amendment—Article 162 of the Constitution enacted in 2015—altered the original "kompetenz-kompetenz" attribution of the Constitutional Court Kosovo.

Hypothesis two theorizes that the SCC originates in a system of law on which there is a "predefined hierarchy" on the date of adoption of the constitution that cannot be altered. That implies that the original role foreseen for the Constitutional Court on the date of adoption of the Constitution is unalienable, as it also comprises a sort of "fundamental structure" whose change would alter the "entrenchment norm" of the Constitution. This would further suggest that the Constitutional Court of Kosovo cannot be disposed of its exclusive jurisdiction to rule on the Constitution as a whole and its systemic character, including the relationship between Article 162 and other articles in it. This suggests that Constitutional Court of Kosovo retains primacy in defining its own boundaries of jurisdiction vis-à-vis the SCC; its "kompetenz-kompetenz" attribution has not been altered even if it was intended so by Article 162.

[30]Category "kompetenz-kompetenz" is part and parcel of internal sovereignty and rests upon a fundamental idea that law is the product of will, which means that only positive law is legally binding. This has two consequences. The first is the idea of the hierarchy of norms, and, the second, is the absence of any substantive limits to the power of the state. The "kompetenz-kompetenz" is the second consequence of the sovereignty, whatever its forms of manifestations—within certain legal frame or outside any legal frame. Michel Troper, *Sovereignty in* The Oxford Handbook of Comparative Constitutional Law 350, 354-359 (Michael Rosenfield & Andras Sajo ed., 2012).

[31]*Cf.* Carl Schmitt, Constitutional Theory 150 (Jeffrey Seitzer trans. ed., 2008); *Id.* at 174, 402–403.

[32]Aaron S. Bayer, *The Rule of Necessity*, Nat'l L. J. 1 (2007). *See also* Evans v. Gore, 253 U.S. 245 (1920) This is the first case in which the American "kompetenz-kompetenz" was tested in American jurisprudence, albeit with different name, that is, the rule of necessity. *See also* I. S. B., *The Case for Reversal of* Evans v. Gore, 25 Va. L. Rev. 975 (1939) (discussing the possibilities of review of the precedent in *Evans v Gore* in light of a decision from 1939, in which the US Supreme Court revoked the immunity from taxation of salaries of federal judges; this reversal of the precedent, did not take place so that *Evan v Gore* remains in place ever since); Thomas McKevitt, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 Hofstra L. Rev. 818 (1996) (discussing the history of "kompetenz-kompetenz" as a result of recusal of all judges in a historical context , since fifteenth century, so called *Dr. Bonham Case;* despite the recusal of all judges, the US Supreme Court has ruled based on the rule of necessity that it is eligible and authorized to decide over its own matters).

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Hypothesis three states that the SCC and the Constitutional Court of Kosovo are meant to organize a constructive dialogue on the "relationship clause" implies a pluralistic policy in respect of the duty to ensure uniform interpretation of the constitution. This further suggests that the two courts perceive their jurisdictional roles as naturally interdependent and they attach significance to the fact that the constitution-maker implied an equivalent position between them. This would suggest that "kompetenz-kompetenz" attribution is a constantly developing notion, not clear and based on the case-by-case dialogue between the two courts. The Bosphorus format of the two European courts can well describe this hypothesis in practical terms.

The question remains, then, which hypotheses best explains the "kompetenz-kompetenz" problem between the "two courts"? First and foremost, one observes that neither the SCC nor the Constitutional Court of Kosovo are vested with an *ex officio* jurisdiction.[33] They cannot respond to this question on their own motion. Someone has to raise this issue in order for one of them to have the chance to reply. Analyzing the recent practice of the SCC, one observes the *Constitutional Amendment Case* (*CAC*) of the SCC where this issue was generally problematized.[34] The Constitutional Court Kosovo had also circumstantially dealt with this issue in its *Amendment on Specialized Chambers Case* (*ASC*).[35] *CAC* exemplifies the tendency of the SCC to assert its role as the court tasked with "kompetenz-kompetenz." It did so primarily because the case was filed by the President of the Assembly, Ms. Vjosa Osmani. Had the President of the Assembly filed the case before the Constitutional Court of Kosovo, the motion could have taken another direction. In that situation, the Constitutional Court of Kosovo would have been faced with an issue of sovereign jurisdiction and the legal nature of the constituent power, as expressed originally in February 17, 2008 when Kosovo declared its independence from Serbia, followed by adoption of its current Constitution on April 15, 2009. The latter unequivocally foresees its own supremacy over any other legal act or provision and is in line with the Declaration of Independence of Kosovo of February 17, 2008.

Original expression of the will of the constituent power of Kosovo has an entrenched nature and was never meant to be handed over to any other sovereign, including the supremacy clause of the Constitution, as a legal expression of the exercise of original constituent power of Kosovo. In this case, had the referral been filed with the Constitutional Court of Kosovo by the President of Kosovo, the latter would have had a legitimate ground to opt for hypothesis two above, defending its own sovereign jurisdiction beyond the "relationship clause", that is, focusing its attention exclusively on the resolution of "kompetenz-kompetenz," leaving aside other aspects of the *ratione materiae* competence of the SCC. In this case, the state of Kosovo would have risen up in defense of its own sovereignty rights *vis-à-vis* other public authorities acting in the name of Kosovo—such as the SCC over which Kosovo has neither effective nor ultimate authority. In that situation, the Constitutional Court of Kosovo would have acted as a state agent defending one of the core socio-

[33]Rule (a) of the Rule of Procedure and Evidence (RPE) of the SCC authorizes the President to file a referral with the SCC, on behalf of the Judges sitting in plenary, for the purpose of reviewing the RPE or amendments thereto, pursuant to Article 19(5) of the Law. In re Revised Rules of the Rules of Proc. and Evidence Pursuant to Article 19(5) of the L. [Rules of Procedure], SCC, No. KSC-C-C-PR-2017-03, June 28, 2017. This is an *ex officio* right of the President of the SCC to trigger the proceeding before the SCC. This is a procedural right only and does not entail the head of the SCC to decide over "kompetenz-kompetenz." Besides, as noted, "kompetenz-kompetenz" relates to the subject as a whole that is entitled to decide the matter having a legal personality, which is the SCC as a whole, not any of its chambers. Chambers of the SCC have no separate legal standing and the jurisdiction assigned to them is integral, as a whole, divided into competences for each chamber. This is a result of the fact that a decision on "kompetenz-kompetenz" in constitutional matters can well be the end of the whole story, not a decision on certain competence or entitlement of a legal subject. In our case, to be clearer, we have to deal with the basic question of "kompetenz-kompetenz" over the overlapping of the two jurisdictions over the same constitutional matter, such as over the supremacy of the Constitution as an integral document governing the constitutional relationships within Kosovo.

[34]In re Proposed Amends. to the Const. of Kosovo [CAC], Specialist Chamber of the Constitutional Court [SCC], No. KSC-C-C-2020-11, Nov. 26, 2020

[35]Constitutional Court of the Republic of Kosovo, 'Constitutional Amendment on Specialized Chambers case', Judgment, KO26/15, dt. 15/04/2015

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political functions of the Republic of Kosovo—the function of defending state sovereignty as an essential part of the overt socio-political functions of each and every state.[36] As the practice pursued by SCC in *CAC* demonstrates, hypothesis one—though unilaterally imposed by the SCC—has been implied as the explanatory model showing the relations between the two courts. It remains to be seen whether this starting basis will survive the future dynamics between the two courts. Constitutional Court of Kosovo had relied in *ASC* that hypothesis three applies in relations *inter se*. Reconciling these two approaches will be difficult and possibly symbolize a pluralistic order illustrating the relationship between the two.

A. The Principle of Constitutional Supremacy and the "Two Courts"

One major principle of European constitutions is their supremacy principle. It is a consequence of the exercise of an original constituent power—first constitution—or the derivative one—power of constitutional revision.[37] Even when certain legal acts have primacy over a national constitution, such as the case with EU law, this is so because a national constitution itself sanctions it.[38] Likewise, Kosovo's Constitution establishes the principle of constitutional supremacy as one of the major constitutional values enumerated in Article 16(1). It is the Constitutional Court of Kosovo that is vested with the competence to ensure the systematic application of this principle in the context of constitutional interpretations, review of compatibility of legislation, and other legislative acts consistency with the Constitution, including the review of compatibility of Constitution with international agreements and binding norms of international law. With the establishment of the Chambers, the SCC has not been tasked with the same competence, that is to say, with the preservation of constitutional supremacy principle in the adjudication of cases relating to the Chambers and filed before it. It is not tasked with preserving the supremacy of the Constitution, as this is an inalienable sovereign right of the people of Kosovo to be exercised via a constituted organ, Constitutional Court of Kosovo, but with deciding cases along the lines of the "relationship clause" as described above. While that enterprise might seem uncomplicated, it is in fact a major, complex issue in the context of the competing jurisdictions of the two courts.

Complexity arises in two directions: First, while the SCC has been named as a Constitutional Chamber for the scope of the Chambers' *materiae*, its jurisdiction very much resembles a tribunal grounded in applicable international law, including customary international law. It would be somewhat hard, and partly irreconcilable, to intend to preserve the constitutional supremacy principle while serving as an organ of international law. Exercising that function would require local ownership and a domestic outlook on interpretation of sovereign features of the country's law. Secondly, while it is not the SCC that is in charge of ensuring the constitutional supremacy principle in proceedings before it, but only acts and decides based on the Constitution of Kosovo, it cannot rely on its own interpretation of this principle. It must ensure consistent deference to the Constitutional Court of Kosovo, whose practice has enlightened that principle in the course of more than thirteen years of precedent. While Article 162 assigns to the SCC an almost fully independent standing *vis-à-vis* the Constitutional Court of Kosovo, one can argue that it is not tasked

[36]*Cf.* Jacques Caillosse, *Les* fonctions *socio-politiques de l'*Etat, *in* INTERNATIONAL DE DROIT CONSTITUTIONNEL: SUPREMATIE DE LA CONSTITUTION: TOME 321–356, 325–326, 329, 341–352(Michel Troper & Dominiques Chagnollaud eds., 2012).

[37]For more on matters of constituent power as a manifestation of the exercise of a sovereign authority by its actors—the people when it comes to the original constituent power and the constituted authority when it comes to the derivative constituent power, see Claude Klein, *Le pouvoir constituent*, *in* TRAITE INTERNATIONAL DE DROIT CONSTITUTIONNEL: SUPREMATIE DE LA CONSTITUTION: TOME 3, 5–31 (Michael Troper & Diminique Chagnollaud eds., 2012), Arnaud Le Pillouer, *Le pouvoir de revision*, *in id.* at 33–65.

[38]Troper, *supra* note 30, at 359. The same was the case with Kosovo during the supervised independence, February 2008–September 2010, during which period the Ahitisari Plan enjoyed full supremacy over the Constitution, based exactly on the final and transitional provisions of the 2008 Constitution of Kosovo.

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with the interpretation of the constitutional supremacy principle because, that principle cannot ever become embedded in a discourse developed by the international judges of the SCC, most of whom have no specific Kosovo constitutional background and are free to loosely interpret constitutional sovereignty of the host country due to the Chambers' lack of local ownership of the law they interpret.

Maintenance of constitutional supremacy requires a number of prerequisites that must be possessed by those holding it, such as feeling the patriotic essence of a country's constitutional features and fighting for its survival in the face of foreign and international competing elements. The very reason for this lies in the fact that, as noted, the supremacy clause represents a legal manifestation of jurisdiction that is a sovereign right of any state resulting from the exercising the original constituent power of its people. It is unnatural to pretend that these features can be maintained by the SCC's judgeship for reasons are both psychological and structural.

With these two characteristics, one understands that complexity is not only normative, the first direction above, but also psychological and professional, the second direction above. We will now observe how these things appear in the practice of the two courts and where this impetus leads. A primary example is the *CAC* case.[39] The President of the Republic of Kosovo, Mr. Hashim Thaçi, sponsored a constitutional amendment to "extend" the mandate of the SCC beyond August 2020.[40] While the constitutional provision in Article 162, parargaph 13, likely designated the end of August 2020 as the end for the Chambers' mandate, the sponsored amendment demonstrated a move that intended to table in the Assembly a new amendment voting procedure. Reaching a two-thirds majority in the Assembly to pass the amendment would have been very hard politically in the context of 2020's legislature. The SCC had to respond in *CAC* whether the proposed constitutional amendment violated the "entrenchment nor" of the Constitution.

The Constitutional Chamber reasoned through a structure of arguments that echoed more the international context of the SCC than the normative grounds embedded in the Constitution and the practice of the Constitutional Court of Kosovo.[41] It emphasized the constitutive nature of the EU in the establishment of the SCC and recalled that Kosovo had transferred irrevocable sovereign powers to the EU.[42] It also insisted that such amendment cannot be tabled for voting without holding consultations with the EU, because, in the SCC's view, it would amount to an adverse effect to the status of the Chambers.[43] It is clear in *CAC* that the SCC views the principle of constitutional supremacy as a formalistic aspect as opposed to a substantive point of reference. Its arguments echo more an internationalist contextual interpretation of the developments, which may harm the Chambers' status in Kosovo's legal system, than normative arguments underpinned by constitutional principles. Insistence on providing an unconditional constitutive role to the EU with regard to the status of the Chambers amounts to an interference of the basic premise of constitutional supremacy, Kosovo's sovereignty in international law. *CAC* vigorously demonstrates the incompatibility of the constitutional responsibility vested in the SCC with the role originally contemplated in the Constitution. It echoes a silent attack on the principle of constitutional supremacy by undermining Kosovo's sovereign features and proposing the assumption that certain irrevocable sovereign powers have already been conferred to the EU by an international treaty.

[39]In re Proposed Amends. to the Const. of Kosovo [CAC], Specialist Chamber of the Constitutional Court [SCC], No. KSC-C-C-2020-11, Nov. 26, 2020.

[40]*See* Avni Puka & Fisnik Korenica, *The "Struggle" to Dissolve the Kosovo Specialist Chambers in The Hague: Stuck between Constitutional Text and Mission to Pursue Justice*, 20(3) L. & Prac. Int'l Cts. & Tribunals 548 (2021).

[41]*CAC*, KSC-CC-2020-11, ¶ 53.

[42]*Id.* ¶ 63.

[43]*Id.* ¶ 69.

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B. The Battle on "Uniform Interpretation" of the Constitution and Horizontal Conflicts on Substantive Law

Ensuring uniform interpretation of the Constitution is a natural purposive element of constitutional justice. There cannot be two substantive standards—namely, two interpretations by the same level of token—for the same standard of substantive law. Maintaining uniform interpretation of the Constitution by the two courts is an essential element of fair and reasoned discharge of judicial duties by the "two courts." Their divergent interpretations on substantive standards would call into question the right to equality of subjects appearing before them,[44] and, at the same time, violate the obligation inherent in their competence to adjudicate questions arising of "one" Constitution.[45] Relying on European Court of Human Rights (ECtHR) case law, the Constitutional Court of Kosovo has itself criticized divergent case law as, among other things, running counter to the principle of legal certainty and the prohibition of arbitrariness.[46] The practice shows another reality. We have identified a number of divergences between the two courts in interpretation of the constitutional bill of rights, as grouped below.

I. Divergences in Regard to European Convention on Human Rights (ECHR) Article 8

In 2018, the SCC ruled on the compatibility of the Rules of Procedure of the Court with the Constitution ("*Rules of Procedure*" case).[47] One of the aspects raised as problematic by the SCC is the scale of prohibition regarding restrictions on interception of communications viewed against the standards of ECHR Article 8.[48] The Rules of Procedure had originally "imposed a near general prohibition on the application of investigative measures to information deriving from a lawyer-client relationship [which includes] all 'professional or other confidential' relationships . . . ."[49] The SCC rejected this standard as overly protective. Confidently, although relying on its jurisdiction protecting human rights, the SCC demonstrated its willingness to authorize broader exceptions to the right to private family life as viewed from the perspective of interception of communications. The SCC, acting as an instance of constitutional review of Rules of Procedure adopted by the Plenary, argued:

> The Court is cognisant of the onerous responsibility imposed upon the Specialist Prosecutor to investigate crimes within the jurisdiction of the Specialist Chambers and of the importance of ensuring that the Office is not fettered in the discharge of its functions. Prohibiting the possibility of seeking to apply investigative measures to a wide range of confidential relationships beyond that of a lawyer-client may restrict, unduly, the Specialist Prosecutor in the discharge of his or her functions under the Law. Lawyer-client communications are always privileged and, thus, should not, in principle, be subjected to covert interception. However, information deriving from other professional or other confidential relationships, whilst

[44]Lekë Batalli, *Parallel Justice: A First Test for Kosovo's Specialist Chambers and Specialist Prosecutor's Office*, VerfBlog (Apr. 3, 2019), https://verfassungsblog.de/parallel-justice-a-first-test-for-kosovos-specialist-chambers-and-specialist-prosecutors-office/ (arguing in favor of "parallel justice" as well).

[45]One of the recent controversial aspects is whether the SCC may rely on customary international law as a source of law for the accused. Kadri Veseli's Defence Team argued in favor of the fact that the Constitution does not authorize use of CLI because it violates the principle of legality in criminal procedure, a principle which is clearly a basic human right norm in Chapter II of the Constitution. While the SCC took note of this point, the first instance has rejected this claim, thus proving that it uses the theory of sources as a discretionary tool in spite of the fact that the Constitution's text is clear on the principle of legality. *See* Lachezar Yanev, *To Custom or Not to Custom: A Battle for the Applicable Sources of Law at the Kosovo Specialist Chambers*, EJIL: Talk! (Aug. 10, 2021), https://www.ejiltalk.org/to-custom-or-not-to-custom-a-battle-for-the-applicable-sources-of-law-at-the-kosovo-specialist-chambers/.

[46]Bayerische Versicherungsverbrand, Constitutional Court of Kosovo, ¶ 64, No. KI35/18, Jan. 27, 2020.

[47]*Rules of Procedure*, No. KSC-CC-PR-2017-03. *See* Enver Hasani & Getoar Mjeku, *International(ized) Constitutional Court: Kosovo's Transfer of Judicial Sovereignty*, 13(4) Vienna J. Int'l Const. L., 373, 391 (2019).

[48]*Rules of Procedure*, No. KSC-CC-PR-2017-03, ¶ 62.

[49]*Id.* ¶ 22.

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> subject to a high degree of protection may – depending on all the circumstances of a given case – be of considerable importance in the investigation of serious crimes. . . . Provided that adequate safeguards exist, it is for an independent tribunal to assess whether the private and public interests in respecting the confidentiality attaching to a particular relationship should prevail over the public interest in the investigation and prosecution of serious crimes.[50]

The SCC clearly insists that confidential relationships should not be generally prohibited by means of application of ECHR Article on the interception of communications. Moreover, while Article 8 ECHR does not mention "public interest" as one of the bases on which restriction of the right to private family life may be authorized,[51] the SCC goes on to install "public interest" as a domain on which limitation of this right would be valid. This clearly opens the possibility for a wide range of scenarios that would authorize restriction of the right to private family life by means of interception of communications.[52]

The Constitutional Court of Kosovo had pronounced on a similar legal basis in its *Badivuku* case.[53] It had construed the right to private family life in view of the interception of communications in a much deeper argument originating in ECtHR case law. First and foremost, the Constitutional Court of Kosovo requires that the restriction of ECHR Article 8 be "prescribed by law,"[54] which was definitely not the case in the *Rules of Procedure* case. It further demands that the law itself be clear and accessible to the public.[55] Moreover, it rules out any restriction that is not based on a justifiable legitimate intention, such as "public security," "national security," and some other bases that amount to a significant risk.[56] Clearly, the Constitutional Court of Kosovo ruled out "public interest" as a possible basis whereby authorization of interception of communications would be justified. In addition, it implied that in order for the restriction to have a legitimate aim it must have been prescribed by law in a manner that foresaw confirmation of the prosecutorial decision for interception by an authorized court of law.[57]

This said, the SCC and Constitutional Court Kosovo present divergent practices of interpretation of ECHR Article 8 in cases of the interception of communications. The SCC seems much more defensive over the prosecutorial functions, whereas the Constitutional Court of Kosovo pursues a victim-based perspective on restrictions to the right to private family life. The latter is not only more generous in protecting the rights of the accused but also much more substantiated in the case law of the ECtHR—which definitely demonstrates two examples of deference to the latter.

II. Divergences in Regards to ECHR Article 6 and the Prosecution's Order Compelling the Accused to Present Documents Against Himself

The SCC has pronounced on the right to fair trial in *Hasani* case.[58] The applicant had argued that the Specialist Prosecution's compelling him to present documents harmed his interests in the context of the right to remain silent and the prohibition of self-incrimination. The SCC had, in principle, argued that the Order of the Prosecution "had obliged the Applicant, a confirmed suspect, to produce the documents and information and had warned that contempt would be found with

[50] *Id.* ¶¶ 23–25.

[51] It mentions "public security" but not the wide-ranging "public interest."

[52] This position of the SCC runs counter its own constitutional jurisprudence, generated in another case. In one of its cases dealing with the right to personal integrity and the right to privacy, it found that the retention of bodily materials failed to strike a fair balance between competing public and private interests, as would be required by Article 55.4 of the Kosovo Constitution. Rules of Procedure, No. KSC-CC-PR-2017-01, at paras. 96–106.

[53] Badivuku, Constitutional Court of Kosovo, Nos. KI63/19, KI66/19, Apr. 26, 2021, para. 225 (inadmissibility resolution).

[54] *Id.* ¶ 220.

[55] *Id.* ¶ 222.

[56] *Id.* ¶. 223.

[57] *Id.* ¶ 222.

[58] In re Concerning Prosecution Order of Dec. 20, 2018 [Hasani], SCC, No. KSC-CC-2019-05, Feb. 20, 2019.

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possible enforcement measures taken if the Applicant had failed to produce the documents specified [therein]."[59] However, the SCC was satisfied with the mere withdrawal of the Specialist Prosecution from its order, therefore concluding implicitly that an alleged violation has been redressed.[60] With the SCC declining to pronounce on the violation, one can argue that it implied an intention to minimize the nature of this interference with the right to remain silent and the prohibition of self-incrimination. Contrary to this practice, the Constitutional Court of Kosovo applied a much wider and explicit account of the right to remain silent and prohibition of self-incrimination. In *Berisha*, the Court argued that the right to non-self-incrimination means that the prosecution ought not to produce evidence against an accused gathered by forcing him/her against his/her will.[61] It further confirmed that the right to remain silent is applied throughout the whole cycle of criminal procedure, including while the accused is questioned at an early stage of investigation.[62] The Constitutional Court of Kosovo's reliance on *Saunders vs. UK*, [63] an ECtHR case, is a clear indication on the unconditional application of this right.[64]

This said, one can observe a relatively different trajectory of drawing the borders of the right to remain silent and the prohibition of self-incrimination by the SCC and Constitutional Court of Kosovo. The two trajectories suggest different compatibility regimes as well as different margins of protection of the same constitutional *materiae* and of Kosovo's constitutional bill of rights. This divergence, seen from the perspective of individual parties' rights in the human rights complaint procedure, echoes violation of the ECtHR's standards on this topic, including the principle of legal certainty, and may also amount to systemic arbitrariness.[65]

C. Conclusion

The article examined the intersection between the "two courts" in utilizing their constitutional interpretation jurisdiction. It demonstrated how each court views its own jurisdiction and the potential for conflicts that may arise in their normative and functional interactions. While the "two courts" question is rather illogical—considering that it amounts to an interference to the basic principle of the Constitutional Court as the final guardian of constitutionalism—it still appears in practice as an undefined reality that oscillates between tension and unilateralism. The article therefore generally concludes that the "two courts" question, in view of Kosovo's constitutional scheme, presents an interesting study case, reminiscent of a normative order that has internalized political contestations almost in an illogical legal framework that is purported to "mutually" co-exist.

The article examined the "relationship clause" and argued in favor of its limited relevance in resolving the controversy between the "two courts." While the letter of the "relationship clause" seems to direct the interpretation in a non-conflictual context, the practice of exclusive interactions between the "two courts" will naturally make the case for a tense relationship. This is especially the case in regards to "kompetenz-kompetenz" debate, which, combined with the principle

[59]*Id.*¶ 49.

[60]*Id.* ¶ 53.

[61]Berisha, Constitutional Court of Kosovo, No. KI34/18, June 11, 2018.

[62]*Id.* ¶ 60.

[63]Saunders v. UK, App. No. 43/1994/490/572 (Dec. 17, 1996) http://hudoc.echr.coe.int/webservices/content/pdf/001-58009?TID=thkbhnilzk.

[64]Last, but not least, the SCC, as far as the right to fair trial is concerned, seems to conform to standards for substantive review as applied in several cases by the Constitutional Court of Kosovo, although not on the issue of composition of the hearing panels in criminal matters: In reviewing Rule 19 (3) of the Rules of Procedure, originally permitting a hearing to continue before two members of a panel whenever third member was absent, it found that rule to be inconsistent with the Article 31.2 guarantee of "a hearing before a tribunal established by law." *See* No. KSC-CC-PR-2017-01, ¶¶ 12–18, 36–40 (citing Pandjikidzé v. Georgia, App. No. 30323/02, ¶ 104 (Oct. 27, 2009); Posokhov v. Russia, App. No. 63486/00, ¶ 39 (2003); Buscarini v. Saint-Marin, App. No. 31657/96 (May 4, 2000).

[65]*E.g.*, Neydet Sahin v. Turkey, App. No. 13279/05, ¶ 56 (Oct. 20, 2011).

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of constitutional supremacy, lead to a disagreement between the two in fundamental constitutional sovereignty issues. Another more hands-on aspect of the controversy—as the article demonstrated—is observed in the divergent case law practices of the two courts in interpreting the same substantive catalogue of human rights law. This said, it is concluded that, while the "relationship clause" does not resolve the controversy between the two courts in practical settings, the existing norm imposes an active and enduring battle that remains to be treated in the future on the bases of individual cases and contexts.

It is thus concluded that the "two courts" question presents an interesting and unconventional constitutional controversy appearing in the context of a sovereign country's relationship with international law obligations. The nature of the hybridity of the SCC is definitely unconventional, too. The bottlenecks of the "two courts'" relationship will generate further debate and incentivize uncommon practices of two different adjudication mechanisms and practices under the same sovereign Constitution. The effective control of the EU over the Chambers—and Kosovo's and EU's lack of accession to the ECHR—will complicate this question even further. This characteristic of the "two courts" question will therefore further demonstrate the multifaceted nature of the EU's engagement in external law projects that are neither international nor local, whereas Kosovo's constitutional law will demonstrate that characteristic in a progressive, though often unpredictable, form.

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