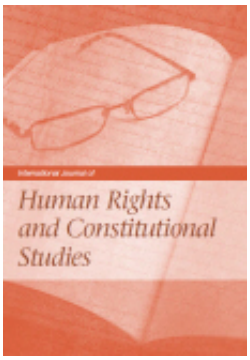

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The constitution comes second: how the Constitutional Court of Kosovo disregards the supremacy of the constitution

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The constitution comes second: how the Constitutional Court of Kosovo disregards the supremacy of the constitution

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Abstract: This article examines the Kosovo Constitutional Court's controversial practice of overlooking the Kosovo Constitution's normative supremacy in its jurisprudence. While all constitutional organs can participate in ensuring constitutional supremacy, the role of a Constitutional Court in this regard is unsurpassed as the final interpreter of a constitution's meaning. That said, rather than carefully following the Kosovo Constitution, the Kosovo Constitutional Court frequently relies on other legal sources to reach a decision, although they might directly contradict the Constitution. These sources include ordinary legislation, foreign legal experience, Venice Commission materials, and ECtHR's case-law (not on Kosovo). Often, this practice results in diminished human rights protection, as evidenced best in the Etem Arifi case.

Keywords: Kosovo Constitutional Court; constitutional supremacy; normative hierarchy; constitutional interpretation; comparative constitutional law; human rights; judicial review; Kosovo.

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1 Introduction

Historically, large-scale acceptance of constitutional supremacy is a relatively late occurrence. Before the Second World War, its contrary doctrine, legislative supremacy, served as the dominant model of constitutionalism worldwide. As exemplified not only by the Westminster-style parliamentary sovereignty but also by the French view that laws are the highest manifestation of the *volonté générale*, most countries before 1945 regarded the legislature as the highest authority of the legal system.[1]

It took the totalitarian takeovers, which the previous system failed to prevent, as well as the sheer scale of atrocities committed before and during World War II, for many countries worldwide to abandon legislative supremacy and settle for an alternative model of constitutionalism: a bill of rights entrenched in a supreme written document, and the

power of a set of judges to decisively invalidate legislation that would conflict with this higher law.[2] In a second wave after 1989, also for post-communist central and eastern European states and many African countries, the constitutional supremacy model became an obvious choice. This widespread deliberate switch was not a legal novelty, but it was based on the achievements of the American experience, where constitutional supremacy had long been a significant cornerstone of the political order.[3] Currently, most countries worldwide,[4] in some form or another,[5] assert the principle of the supremacy of the constitution.

Constitutional supremacy generally means that the constitution is the highest authority in a legal system, the supreme law of the land. By definition, this entails having a normative hierarchy within the legal order where the constitution is placed at the top and has priority in case of conflict with any other legal source.[6] These features of constitutional supremacy also imply another fundamental principle: if ordinary laws have a lower rank than the constitution, then the legislator is in a subordinate position – compared to the sovereign constituent power.[7] Not only the legislature but all constituencies and political institutions must abide by the constitution, the law of the laws.[8]

Constitutional supremacy was also an obvious choice for newly independent Kosovo (2008).[9] It even has a special provision in the Constitution,[10] which reads as follows:

> Article 16: Supremacy of the Constitution
>
> 1 The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.
>
> 2 The power to govern stems from the Constitution.
>
> 3 The Republic of Kosovo shall respect international law.
>
> 4 Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution.

Although constitutional supremacy can exist in principle independently of judicial review,[11] the power of courts to invalidate legislation and other acts incompatible with the constitution certainly gives practical meaningfulness to the constitution's supremacy.[12] While all constitutional organs can engage in safeguarding constitutional supremacy,[13] a Constitutional Court's role in this regard is unparalleled as the final arbiter of the meaning of a constitution.

That said, as I will seek to demonstrate in this paper by examining the jurisprudence of the Kosovo Constitutional Court (hereafter: KCC or the Court), the power to exercise judicial review does not automatically result in a court upholding the supremacy of the constitution.[14] Several times in its jurisprudence, despite its crucial duty to guard the constitution, Kosovo's apex court has given priority to other sources, to the detriment of the constitution's authority in the legal order. More often than not, this approach resulted in an underprotection of human rights guaranteed in the Kosovo Constitution.

The general problem with the Court's approach is that the Constitution does not seem to be the starting point in its constitutional analysis. The Court often disregards that the Constitution is the supreme law and instead puts greater emphasis on other sources and authorities, such as ordinary law, Venice Commission's opinions and Forum's inputs (out of context), and ECtHR's case-law (inappropriate use). This improper reliance on other sources often happens despite the plain wording of constitutional norms, rendering the Constitution secondary in deciding a case. This approach is particularly problematic,

given that in these instances, the human rights protection suggested by the other sources was weaker than that provided by the Constitution. Based on these observations, I argue in this paper that the KCC is undermining the inherent characteristic of the Constitution as the highest authority in the Kosovo legal system, to the detriment of constitutionalism. (on the other hand, this paper will not propose for the Court to avoid engaging with foreign sources or that it should pursue a strictly formalist approach to constitutional interpretation. Instead, it simply urges the Court to make a well-informed and reasonable reliance on other sources while being mindful of the Constitution it is expected to guard, together with the full scope of human rights enshrined therein).

2 Disregarding the highest legal act

To display the KCC's problematic approach of disregarding the Constitution's supremacy in its jurisprudence, we will begin by elaborating the most illustrative case on this issue: the Etem Arifi case (2021). Following that, we will discuss some other recent examples from the Court's case-law to show that the problem is not isolated but stands at the core of the Court's current constitutional reasoning.

2.1 A Distorted normative hierarchy: the Etem Arifi case

The *Etem Arifi* case[15] is undoubtedly one of the most puzzling cases in the Court's jurisprudence, which best illustrates the problem. In this case, the Court, initially by resorting to an inaccurate comparative survey of foreign legal experience, Venice Commission opinions and recommendations (not on Kosovo), and ECtHR's case-law, disregards the plain wording of the Constitution to decide the case. Further in its interpretation, resorting to the ordinary electoral law, the Court then disregards the Venice Commission opinions and ECtHR's case-law it took into account earlier as well. Particularly problematic was disregarding based on ordinary legislation the ECtHR's case-law it used initially, considering that under the Constitution, "[h]uman rights and fundamental freedoms guaranteed by [the] Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."[16] Hence, ultimately, by a rather strange constitutional reasoning, an ordinary law in this case became *lex superior*.

Leaving aside other shortcomings of the case, I will focus only on those related to the Court disregarding constitutional supremacy, underlining the problems with the Court's reasoning. Before looking into the Court's reasoning, first, we will go over the facts of the case.

2.1.1 Facts of the case

In the *Etem Arifi* case, several deputies of the Assembly challenged the constitutionality of the Assembly's decision to elect the Government of Prime Minister Avdullah Hoti on June 3, 2020.[17] The applicants alleged that the Hoti Government's election was unconstitutional since a deputy who voted in favour, Etem Arifi, was convicted and thus did not have a valid mandate as deputy at the time of voting. (Arifi began serving his sentence around four months after voting for the election of the Government.) The applicants contended that since Arifi's (invalid) vote in favour was the 61st (out of

120 deputies), i.e., the bare minimum of votes required to elect a government in Kosovo, the Hoti Government never received the necessary votes to be elected. Thus, according to the applicants, the Court should declare the Government's election unconstitutional.

What made this case more difficult for the Court was that Etem Arifi was convicted before joining the legislature. Thus, the plain constitutional provisions on ending a deputy's mandate did not apply.[18] So, for the Court, the main question became whether a sitting deputy convicted before joining the legislature could have won their seat in the first place. Therefore, ultimately, the issue focused on the constitutional and legal norms on the ineligibility of candidates for deputies and consequently on the scope of the right to be elected. In other words, if Etem Arifi did not meet the criteria to become a candidate in general elections in the first place, he never gained a valid mandate in the Assembly afterward, despite being voted by the electorate. And if he did not gain a valid mandate, it means that his vote was also invalid. As a result, the election of the Hoti Government should be held unconstitutional (simply because Etem Arifi's vote was decisive).

Meanwhile, the constitutional and legal rules on the ineligibility of candidates for deputies turned out to be conflicting. Despite its plain language, the Central Election Commission (CEC) did not apply the Law on General Elections earlier when certifying Etem Arifi's candidacy. The CEC approved his candidacy despite Article 29 of this Law clearly stating that anyone "found guilty of a criminal offence by a final court decision in the past three (3) years [is ineligible]." Thus, under this provision of the Law, a person found guilty for any criminal offence within the last three years, regardless of whether the court decision expressly limited their electoral rights or whether the individual was sentenced or not, is ineligible to run for deputy. Despite this provision of the Law, the CEC based its decision to certify Mr. Arifi on an earlier *Supreme Court* judgment,[19] which interpreted this provision as infringing on the constitutional right to be elected enshrined in Article 45 of the Constitution, which states:

> Article 45: Freedom of Election and Participation:
>
> Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

Thus, for the Supreme Court, given the plain language of this constitutional provision, a judge must be involved on a case-by-case basis and consider whether limiting a convicted person's electoral rights is necessary. Only if a court has expressly limited a person's electoral rights can the CEC prohibit that person from candidacy. Following this reasoning, the CEC certified Arifi's candidacy for the upcoming general elections, although he had been found guilty in the last three years (since his electoral rights were not limited by a court decision). The KCC, on the other hand, had a different interpretation of what should have been done.

2.1.2 Above all, ordinary law

First, the Court begins its analysis in the *Etem Arifi* case by elaborating on Venice Commission's 'Report on exclusion of offenders from Parliament', which contains comparative data on restricting passive electoral rights from Council of Europe member states and ECtHR's case-law.[20] The Court then conducts a comparative survey of the existing situation in several countries (members of the Venice Commission's Forum who

responded to the Court's questions). After these elaborations, the Court concludes: the prevailing European standard is that electoral rights can also be limited by law, and an express court decision is not always necessary. Therefore, the Court would find it perfectly acceptable if Kosovo adhered to the same standards as many other (democratic) countries. But what about the plain text of Article 45 of the Constitution, which clearly states that only a court decision can prevent a person from being elected? That does not seem to matter for the Court, as the current ECtHR case-law suggests a different solution, in line with the situation in other countries and Venice Commission opinions (Paras 196, 292).

Kosovo drafted its Constitution in 2008. Presumably, the drafters of the Constitution intended that only an 'express decision of a court of law' could limit electoral rights,[21] as this was the general understanding in pre-*Scoppola* Europe.[22] The overall aim was to ensure the proportionality of the restricting measure, in line with ECtHR standards at the time. The Court did not seem to have been aware of these developments and did not mind allowing a limitation of electoral rights without an express court decision, despite the plain wording of Article 45.

On the other hand, while the Constitution (Article 53) states that constitutional rights must be interpreted consistently with ECtHR's case-law, this does not mean that the latter automatically prevails over the Constitution in case of conflict. The Court's approach is particularly problematic given that the constitutional provision afforded better human rights protection. Undoubtedly, ECtHR's case-law should bind the Court only as setting minimum standards for human rights protection; the Constitution can go beyond that threshold. The Court should not apply ECtHR's case-law if it contradicts constitutional norms and provides weaker human rights protection. That should be the understanding of 'consistent with' in Article 53 of the Constitution, not that ECtHR's case-law has absolute priority.[23]

Thus, the Court's first step was to prioritise foreign legal experience and ECtHR's case-law over clear constitutional provisions. The second step was even more controversial. The Court then decides the case using the Law on General Elections, ignoring the comparative survey and ECtHR's case-law it elaborated earlier.

Although the current European understanding is that a restriction on passive electoral rights must not be general, automatic, or indiscriminate, the Court ignored these standards (although they were stated clearly in the Venice Commission documents the Court cited).[24] The reasoning was that the Law on General Elections, 'in conjunction' with a provision outside the Constitution's bill of rights, indicated otherwise (Para 291). The Law just states that someone is ineligible if "found guilty of a criminal offence by a final court decision in the past three (3) years." And since the Constitution's 'special'[25] Article 71(1) states that "[e]very citizen of the Republic of Kosovo who is eighteen (18) years or older and *meets the legal criteria* is eligible to become a candidate for the Assembly [*emphasis added*]," it is acceptable for the legislature to impose any additional eligibility requirements.[26] In other words, ordinary legislation can limit anyone's political rights without needing an express limitation by a court decision, as required by Article 45 of the Constitution (paras 182–184).

Thus, it seems that the Court first ascertained the prevailing European standard (i.e., limiting electoral rights does not automatically require an express court decision) and then tailored its interpretation in that direction, despite the plain wording of the Constitution suggesting otherwise. But it is surprising that afterward, the Court did not assess whether the *legal criteria* for ineligibility complied with ECtHR standards in this

case. That is, whether they are general (applying to a large group of people), automatic (applying irrespective of the nature of the offense or the length of the sentence), or indiscriminate (effects depending on the timing of the elections).[27] Once again, the Court disregarded the Constitution, which requires in addition that limitations on fundamental rights and freedoms are necessary "in an open and democratic society."[28] The Court simply concluded: "Article 71 of the Constitution – which deals exclusively with the 'qualifications' to run for a deputy of the Assembly – stipulates that every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the deputy. These 'legal criteria,' referred to in Article 71 of the Constitution, are defined by the Law on General Elections, which in Article 29.1 (q) clearly and explicitly states that no person can be a candidate for deputy for elections to the Assembly, if he/she has been convicted for a criminal offense by a final court decision in the past three years. This constitutional and legal definition is in line with the practice followed by many democratic countries, as noted by the relevant documents of the Venice Commission, as well as the responses of the member states of the Venice Commission Forum" (Para 292).

In the end, Article 45 of the Constitution, which provides that only a court decision can limit the right to vote, becomes meaningless. For the Court, despite this provision, Etem Arifi, who was found guilty in the past three years but whose electoral rights were not limited by a court decision, did not gain a valid mandate in the Assembly. Meanwhile, ineligibility criteria remain general, automatic, and indiscriminate, inconsistent with ECtHR's case-law (and, by extension, the Constitution). Thus, the crime-based model of limiting political rights set by the Law on General Elections prevails over the more targeted approaches stated in the Constitution and ECtHR's case-law.[29] We would have had a different result if the Constitution was – as it should be – the starting point in the Court's constitutional analysis. (It is worth noting that a mere legislative amendment to the Law on General Elections, removing Article 29(1)(q), would render the *Etem Arifi* case moot).

2.1.3 Going down the rabbit hole: non-constitutional loss of mandate

After becoming entangled in its odd reasoning, the Court (unnecessarily) disregards *another* constitutional provision in *Etem Arifi*. Once more, by resorting to ordinary legislation. Previously, the Court held that Etem Arifi could not have won a deputy seat in the Assembly since he was ineligible to run. Next, the Court, surprisingly, turns its attention to the constitutional and legal rules on the loss of mandate. This step was unnecessary because the Court had previously found that Mr. Arifi had never won a valid mandate after all (meaning there was no mandate to lose). But the Court took this route anyway, mirroring the Venice Commission's 'Report on exclusion of offenders from Parliament.'

The Constitution exhaustively lists the grounds on which a deputy of the Assembly may lose their mandate. These grounds are: the deputy does not take the oath; the deputy resigns; the deputy becomes a member of the Government of Kosovo; the mandate of the Assembly comes to an end; the deputy is absent from the Assembly for more than six consecutive months (in some cases, the Assembly of Kosovo can decide otherwise); the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime; and the deputy dies.[30]

The Law on General Elections, on the other hand, provides additional grounds for when a deputy might lose their mandate. Particularly problematic is the following: a deputy will lose their mandate if the conditions under Article 29 of this Law (on the ineligibility of candidates) arise.[31] In other words, if a condition that would make a person ineligible to run for deputy arises later, that deputy will lose their seat. The Constitution does not recognise this ground.

Interestingly, the Court concludes:

> "Article 112.1.c of the Law on General Elections refers to the loss of the mandate of the deputy if any of the conditions/circumstances provided in Article 29 of this Law are met. Such an approach, embodied in the Law on General Elections, is also in line with the practice of many member states of the Venice Commission, as elaborated in the Report of the Venice Commission on the Exclusion of Offenders from Parliament … Article 29 of the Law in question stipulates, among other things, the impossibility to run in the parliamentary elections for persons who have been found guilty of a criminal offense in the last three years before the elections (Article 29.1.q). Consequently, the interconnected interpretation of Article 112.1.c and 29.1.q of the Law on General Elections, practically leads to the conclusion that the mandate of the deputy is lost if any of the requirements which would prevent him from running in the parliamentary elections for deputies of the Assembly is met." (§§210–211)

Again, the ordinary Law on General Elections took precedence over the Constitution. A key rationale for the Court's reasoning seems to be that this approach is "in line with the practice of many member states of the Venice Commission." But there is no constitutional basis to reach that conclusion. The Constitution explicitly states that a deputy will lose their seat if they are "convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime." By allowing a loss of mandate for any conviction (regardless of sentence), the Court rendered this provision useless.

The Court ultimately held that "Etem Arifi has not won the mandate of the deputy in accordance with Article 71.1 of the Constitution and Article 29.1(q) of the Law on General Elections, nor he may exercise it, in accordance with Article 70.3.6 of the Constitution, in conjunction with Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Article 112.1 (a) and (c) of the Law on General Elections" (§267). Consequently, Etem Arifi's decisive vote in the election of the Hoti Government was invalid as well, making the Government unconstitutional (and forcing new elections).

2.1.4 Another problematic dimension: disregarding the nature of fundamental rights

Human rights and fundamental freedoms under Chapter II are no ordinary constitutional norms within the Kosovo Constitution. According to the Constitution, "[h]uman rights and fundamental freedoms are the basis of the legal order of the Republic of Kosovo."[32] Any proposed constitutional amendment must be reviewed *in abstracto* by the Constitutional Court to see whether it diminishes any of the rights guaranteed in Chapter II. Hence, while not supra-constitutional,[33] the rights guaranteed in Chapter II stand above amendment power and must be treated with extra caution.[34]

Thus, it is especially problematic that one of the Constitution's unamendable provisions – Article 45, which provides that electoral rights can only be limited by a court decision – was diminished by an ordinary law that imposed a general, automatic, and indiscriminate ban on electoral rights, and the Court upheld it. Besides, the Court regarded Article 45 as *lex generalis* (paras 191–192) and gave priority to Article 71(1).[35]

Rather than Venice Commission's opinions and reports for other countries, comparative surveys, or ECtHR's case-law, the Court's starting point in its analysis should always be the Constitution, especially the 36 articles in Chapter II that form the basis of the legal order. Of course, the Court can (and should) engage with other sources, but not to the detriment of the Constitution's normative supremacy.

3 Not an isolated problem

The Court's approach of considering the Constitution secondary in its decisions was foreshadowed earlier and is evident following *Etem Arifi*.

For example, previously in the *Nisma* case, the Court incidentally noted: "in all instances when the Constitutional Court or the regular courts of the Republic of Kosovo interpret the human rights and freedoms guaranteed by the Constitution, the human rights standards set out in the case law of the ECtHR, should apply to these rights and freedoms when applicable. In the event of a conflict between the two, the standards set by the ECtHR in interpreting the ECHR will prevail."[36] This way, the Court acknowledged that the Constitution is not the supreme law of the land when it conflicts with ECtHR's case-law. As it turned out, this could also include instances where the human rights protection provided by ECtHR case-law is weaker than that provided by the Constitution, an approach seen most clearly in the *Etem Arifi* case.

The Court does not seem to view the ECHR as an instrument that only sets a minimum level of human rights protection for state parties (while in Kosovo, it has a constitutional rank).[37] State parties can provide protection above and beyond that afforded by the ECHR. As a result, it is highly contentious that the KCC maintains that in any possible conflict between the Kosovo Constitution and ECtHR's case-law, the latter must prevail. Undoubtedly, this position undermines the higher law quality of the Constitution.

The Court has followed this problematic approach also in other cases. For instance, in a series of cases in which individuals challenged the constitutionality of individual acts of public authorities – under Article 113(7) of the Constitution, which enables a full constitutional complaint – the Court dismissed the complaints as *ratione materiae* incompatible with the Constitution.[38] Although the complaints were against individual acts of public authorities (ordinary courts that denied requests for reopening of proceedings), the Court dismissed the complaints as inadmissible since the right to a fair trial under ECHR (which the Court determined the matter fell under) does not apply in cases of reopening of proceedings. Thus, the Court again provided weaker protection to individuals based on ECtHR's case-law, although under the Constitution, it should have declared the complaints admissible and judged them on their merits (given the full constitutional complaint in place). This way, the Court barred individuals from fully realising their rights under the Constitution.[39]

Despite Article 53 of the Constitution only stating that human rights and fundamental freedoms shall be interpreted consistent with ECtHR's case-law, the Court, in a limiting

approach, also applies ECtHR's (procedural) standards and principles where no interpretation of constitutional rights is warranted. For instance, the Court chose to strike out an important case it was handling, based on ECtHR's case-law on Article 37, although it was in the public interest for the Court to continue and decide on the merits. The case involved a review of the constitutionality of a President's decree suspending local elections due to the COVID-19 pandemic.[40] Since the Kosovo President eventually chose to hold elections (after an eight-month delay) and then resigned from the presidency, the Constitutional Court decided to strike out the case. First, there is no constitutional basis for the Court to construct its constitutional interpretation based on ECtHR's case-law on procedural provisions. Second, the KCC reduced the scope of this case to a human rights issue before turning to ECtHR's case-law. But the constitutional case went beyond human rights (the right to free elections). It was a fundamental issue of whether the President may suspend elections without an authorising constitutional provision (presumably to protect public health) and whether doing so infringed basic principles of local self-governance guaranteed in the Constitution. The Court needed to recognise the public interest in deciding this case anyway. But, by uncritically following ECtHR's case-law, the Court again came short in guarding the highest legal act in Kosovo. (There was recently a discussion in Kosovo about whether, in light of yet another wave of COVID-19 cases, the President may postpone the local elections scheduled for mid-October 2021. In the end, due to a lack of political will, the President did not take any decision. If the Court had not dropped this case, we would not have had this discussion.)

The Court appears to follow a distorted normative hierarchy in other cases as well. In the *Salaries II* judgment,[41] the Court assesses the aims and principles of the Law on Salaries in Public Sector as self-standing concepts. For example, the Court considers the Law's primary flaw its failure to achieve the main stated aim, namely the 'harmonisation' of salaries in the public sector.[42] It is inapt to assess a law's aims and principles in this form unless failure to achieve them is tied to an alleged violation of constitutional provisions, especially fundamental rights. The question to be asked is, what constitutional provision is violated by the law's failure to achieve its stated aims and principles? The Court found no violation in this aspect but reviewed the Law in a vacuum. The Court does not effectively use the Law's failure to achieve 'harmonisation' when finding a violation of the Constitution. Aside from the aim of 'harmonisation,' the Court conducts a self-standing assessment of the law's general principles of 'transparency' and 'predictability'. As a result, rather than just undertaking a review of constitutionality, the Court also reviewed whether a statute is compatible with its general provisions.

In another case, the Court got entangled in perplexing constitutional analysis when assessing whether a restrictive measure was prescribed by law. The Court somewhat elevates an ordinary statute to a constitutional level, directing public authorities on how to act in the future with that statute in mind, while failing to address what the constitutional standards in the matter are (on the competent authorities and conditions for prescribing sanctions for minor offenses related to the pandemic).[43]

The Court's distorted normative hierarchy and disregard for the Constitution are also present in other decisions.[44] As can be seen, there is a systemic problem in the Court's constitutional reasoning, which overlooks the supreme law quality of the Constitution.

4 Reinstating the Constitution's supremacy

To adequately protect the constitutional order and uphold the Constitution's supremacy, the Court must revise its approach regarding the normative hierarchy it implements in deciding a case. The Constitution should always be the starting point in the Court's analysis, rather than Venice Commission's opinions on other countries, foreign legal experience, or ECtHR's case-law (on other countries). Within the Constitution, special attention should be paid to its bill of rights, which forms the basis of Kosovo's legal order (Article 21). The Court should turn to ECtHR's case-law, in line with Article 53, only after an extensive analysis of the Constitution. Contrary to the *Nisma* standard, in case of an open conflict between the Constitution and ECtHR's case-law, the Constitution should undoubtedly prevail if it provides stronger human rights protection. That should be the understanding of 'consistent with' in Article 53, and the Court must abandon its minimalist approach to constitutional rights. Additionally, the Court should refrain from using ECtHR's case-law in cases that do not require an interpretation of human rights and fundamental freedoms guaranteed by the Constitution.

On the other hand, where applicable, the Court's use of ECtHR case-law should be more appropriate. The Court frequently cites ECtHR cases without elaborating how their facts and legal aspects are analogous or relevant to the case before the Court. Sometimes, the cited cases are not analogous at all, or the Court misinterprets them. In addition, the Court should always keep in mind that the margin of appreciation principle is at the core of the ECtHR's proportionality assessment. The KCC, as a national court, should weigh in this fact when deciding on a case, being careful not to provide less protection for human rights than the Constitution suggests (especially keeping in mind the proportionality criteria set in Article 55 of the Constitution). Also, not every ECtHR case should be considered equally important. The Court should be mindful that the ECtHR's jurisprudence is subject to change and that some decisions are more authoritative than others. As a general rule, the Court should start its examination of ECtHR case-law with more recent Grand Chamber decisions. Again, always being mindful of the letter and spirit of the Kosovo Constitution.

The Court is under no obligation to rely on foreign law or Venice Commission's documents on other countries. Having persuasive authority at most, they should be used to gain insight into a problem, not as binding sources. When engaging with these sources, the Court should keep it short and simple (rather than lengthy and repetitious), demonstrating clearly how these sources inform its decisions. In addition, the Court should properly engage with foreign law. Instead of selecting proper comparators and analogous case-law, the Court largely relies on the overall legal experience of other countries, as informed by the court liaisons of member states in the Venice Commission Forum. For example, in a relatively recent and important case, the Court submitted inquires to the Forum only three days after receiving submissions from all parties.[45] As can be seen from the submitted questions below, not much can be inferred from any response without a thorough analysis of our Constitution on the subject and a proper understanding of the constitutional settings of the responding countries:[46]

1 After the motion of no confidence in the Government, is there a constitutional/legal possibility that allows the formation of the new Government within the same legislature?

2 Is there a constitutional/legal obligation to dissolve the Assembly after the no-confidence motion against the Government?

3 Do you have case law on this issue?

Comparative perspectives should only be informative for the Court and not a starting point in its constitutional analysis. The Court should also make sure that its comparative constitutional inquiry is executed properly, in line with the methodological principles and considerations of constitutional comparison as a distinct field of scholarship and practice.

5 Conclusions

The Kosovo Constitutional Court often places the Constitution second when deciding a case. Rather than carefully following the Constitution, the Court regularly relies on other sources to reach a decision, undermining the Constitution's normative supremacy within the legal order. The sources the Court uses to reach a decision include Venice Commission materials (on other countries), foreign legal experience, and ECtHR's case-law (not on Kosovo) – although they may contradict the Constitution. The Court's distorted normative hierarchy is also visible in the fact that, although infrequently, the Court assesses the legality (instead of the constitutionality) of an act, prioritises ordinary laws over higher sources, and reviews a legal act as self-standing without reference to any constitutional provision. The *Etem Arifi* case best illustrates the problems with the Court's constitutional reasoning.

Under Article 53 of the Kosovo Constitution, the case-law of the ECtHR is a binding source when interpreting constitutional rights. However, the Court views the Strasbourg mechanism as imposing maximum standards rather than thresholds in human rights protection. The Court applies the same case-law over the Constitution also in cases where the Constitution provides better human rights protection.

Based on these observations, the paper ends with some brief suggestions for reinstating the supreme law quality of the Constitution in Kosovo's legal order and, as a result, enhancing human rights protection.

Notes

1 Gardbaum, S. (2001) 'The new commonwealth model of constitutionalism', *American Journal of Comparative Law*, Vol. 49, p.713.

2 ibid, pp.714–715.

3 Limbach, J. (2001) 'The concept of the supremacy of the constitution', *MLR*, Vol. 64, No. 1, pp.2–3.

4 Hirschl claims that there are over 160 countries worldwide that proclaim some form of constitutional supremacy. Hirschl, R. (2014) 'The origins of the new constitutionalism: lessons from the 'old' constitutionalism', in Gill, S. and Cutler, A.C. (Eds.): *New Constitutionalism and World Order (CUP)*, p.95.

5 On intermediate models, ie, models that share characteristics of both legislative and constitutional supremacy systems, see Gardbaum, S. (2010) 'Reassessing the new commonwealth model of constitutionalism', *International Journal of Constitutional Law*, Vol. 8, No. 2, pp.167–206. On constitutional supremacy being conceptualized differently depending on legal tradition, see Romeo, G. (2020) 'The conceptualization of constitutional

supremacy: global discourse and legal tradition', *German Law Journal*, Vol. 21, No. 5, pp.904–923.

6 Hirschl, R. (2012) 'The political economy of constitutionalism in a non-secularist world', in Ginsburg, T. (Ed.): *Comparative Constitutional Design (CUP)*, p.174.

7 Limbach (No. 3) 1; Mendez-Pinedo, M.E. (2016) 'Supremacy/primacy', in *Max Planck Encyclopedia of Comparative Constitutional Law*, Para 3.

8 Grimm, D. (2012) 'Types of constitutions', in Rosenfeld, M. and Sajó, A. (Eds.): *The Oxford Handbook of Comparative Constitutional Law*, pp.109–110, OUP.

9 See, e.g., Art. 4 of the Kosovo Declaration of Independence. As one of the US lawyers who was involved in the drafting of the Kosovo Constitution notes, constitutional supremacy was selected right away as one of the most fundamental principles "that must be included in any constitution". Tunheim, J. (2009) 'Rule of law and the Kosovo Constitution', *Minnesota Journal of International Law*, Vol. 18, No. 2, pp.371, 377, fn 12.

10 Generally, supremacy clauses in non-federal systems are in a sense redundant since written constitutions do not need to declare their own supremacy, as that is self-evident. Only around 30 constitutions worldwide contain supremacy clauses. Mendez-Pinedo (No. 7) Paras 29, 34, 38–39.

11 Troper, M. (2003) 'The logic of justification of judicial review', *International Journal of Constitutional Law*, Vol. 1, No. 1, pp.105–108; Nino, C.S. (1996) *The Constitution of Deliberative Democracy (YUP)*, pp.189–196.

12 Limbach (No. 3) 4; Möllers, C. (2013) *The Three Branches: A Comparative Model of Separation of Powers*, pp.126–127, OUP. On the role constitutional supremacy had on the origins of judicial review in early American milieu, see Ginsburg, T. (2008) 'The global spread of constitutional review', in Whittington, K.E., Kelemen, R.D. and Caldeira, GA (Eds.): *The Oxford Handbook of Law and Politics*, pp.82–83, OUP; Troper (No. 11), pp.103–105.

13 Limbach (No. 3), p.4.

14 See also Troper (No. 11), p.106, p.108.

15 Constitutional Court of Kosovo (2021), KO95/20.

16 Kosovo Constitution Art. 53.

17 The Court erroneously calls this case one of abstract review of constitutionality that cannot concern individual rights (Para 138). The review was not abstract, since it concerned a specific decision of the Assembly which produced concrete effects in a case. Also, an act of the Assembly can still infringe individual rights, regardless of what type of review the court performs.

18 Art. 70 of the Constitution (Mandate of the Deputies): "… The mandate of a deputy of the Assembly comes to an end or becomes invalid when: … the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime".

19 Supreme Court of Kosovo (2017) AA.-Uzh.nr.16/2017. Only the Constitutional Court can engage in judicial review in Kosovo. The Supreme Court, as a second instance in electoral disputes, simply decided to directly apply Article 45 of the Constitution and ignore the conflicting electoral law.

20 European Commission for Democracy Through Law (Venice Commission), 'Report on Exclusion of Offenders from Parliament' CDL-AD(2015)036, Opinion no. 807/2015.

21 European Commission for Democracy Through Law (Venice Commission), 'Code of Good Practice in Electoral Matters' CDL-AD(2002)23 para I.1.1.d.

22 Scoppola v. Italy no. 3 app no 126/05 (ECtHR, May 22, 2012). European Commission for Democracy Through Law (Venice Commission), 'Amicus Curiae Brief for the ECtHR in the case of Berlusconi v. Italy: On the minimum procedural guarantees which a state must provide in the framework of a procedure of disqualification from holding an elective office' CDL-AD(2017)025 Para 4.

23 See also De Hert, P. and Korenica, F. (2016) 'The new Kosovo constitution and its relationship with the European convention on human rights: constitutionalization 'without' ratification in post-conflict societies', *ZaöRV*, Vol. 76, pp.143,163.

24 E.g., Venice Commission, 'Report on Exclusion of Offenders from Parliament' Paras 19, 21.

25 The Court considers that this Article 71(1) of the Constitution, which concerns candidacy eligibility for the legislature, is special (lex specialis) compared to Article 45 of the Constitution which grants the right to be elected in a general manner. Hence, Article 71(1) is more applicable in this case. This approach of differentiating constitutional norms via meta rules is rather unusual in constitutional interpretation. Preuss, U.K. (2011) 'The implications of 'eternity clauses': the German experience', *Israel Law Review*, Vol. 44, No. 3, pp.431–432.

26 The Court did not even consider that besides age, meeting 'legal criteria' to be eligible as a candidate for the legislature might simply mean to fulfil basic (minimum) requirements to stand for election (e.g., having mental capacity). Instead, the Court took it to mean that the legislature can add any legal criteria for deputy candidates and it would pass constitutional muster, despite the clear wording of Article 45 of the Constitution.

27 Marshall, P. (2017) 'Suspension of political rights of prisoners', in *Max Planck Encyclopedia of Comparative Constitutional Law*, Para 22.

28 Article 55(2) of the Constitution.

29 For more on models of limiting political rights, see Marshall (No. 27) Para 11.

30 Article 70(3) of the Constitution.

31 Article 112 of the Law on General Elections.

32 Article 21 of the Constitution.

33 As Roznai notes, unamendable principles are not in fact supra-constitutional, since they do not stand above the original constituent power. Instead, they only limit the amendment power (the derived constituent power). Roznai, Y. (2013) 'The theory and practice of 'supra-constitutional' limits on constitutional amendments', *International & Comparative Law Quarterly*, Vol. 62, No. 3, pp.559–560.

34 Presumably, the drafters of the Constitution crafted the provisions of Chapter II carefully, given that they meant these provisions to be unamendable (so long as amendments reduce the protection afforded). As is usually the case with unamendable provisions, their symbolic value is that it conveys the message as to what a constitutional system's core principles are. Especially the KCC should be mindful of this message, which is even expressly mentioned in article 21 of the Constitution. On the expressive functions of constitutions (including of unamendable provisions), see Albert, R. (2013) 'The expressive function of constitutional amendment rules', *McGill Law Journal*, Vol. 59, No. 2, pp.225–281. On the different motives for the creation of unamendable provisions and their characteristics, see Roznai, Y. (2017) 'Unconstitutional constitutional amendments: the limits of amendment powers', pp.16–18, 26–38, OUP.

35 See also No. 25.

36 Constitutional Court of Kosovo (2021] KI207/19, Para 109.

37 Article 22 of the Constitution. On the other hand, Kosovo has not acceded to the ECHR, as it is not a Council of Europe member state.

38 E.g., Constitutional Court of Kosovo (2016) KI159/15; (2016) KI80/15, KI81/15 and KI82/15 (joined); (2017) KI07/17.

39 See Enver Hasani and Muhamet Brahimi, Gjyqësia Kushtetuese (UP 2021), pp.845-881.

40 Constitutional Court of Kosovo (2020) KO98/20.

41 Constitutional Court of Kosovo (2020) KO219/19.

42 Since the Law excluded expressly from its scope the Kosovo Intelligence Agency and the Kosovo Security Force, and it left some internal issues to be regulated via sub-legal acts of the Assembly's Presidency) (paras 263, 311).

43 Constitutional Court of Kosovo (2020) KO61/20 (Paras 160–168).

44 For instance, sometimes the Court seems to assess also the legality of a certain measure (instead of only its constitutionality). In a recent case, the Court held that "it can also be concluded that there was no violation of Article 2 of the (Criminal Code) or Article 385 paragraph 1 item 1 of the (Criminal Procedure Code), as stated in the Referral" (KI77/21, Para 54). The Court also uses ECtHR standards and principles in other cases which do not warrant an interpretation of constitutional rights. For instance, on issues of admissibility of individual complaints, the Court draws its standards mostly from ECtHR's jurisprudence on article 32 (especially regarding what should be considered a manifestly ill-founded complaint) (e.g., KI183/20). Again, there is no constitutional basis for this approach. In addition, the Court uses a rather weak proportionality assessment in its decisions. Instead of using the full-fledged proportionality criteria in Article 55 of the Constitution, the Court simply mirrors the proportionality assessment made by the ECtHR, which, as a non-national court, incorporates the margin of appreciation principle in its proportionality assessment. The Court not only puts the ECtHR case-law first most of the times, but also quite often makes an erroneous interpretation of the same case-law. See, for instance, the recent cases KI45/20 and KI46/20 (joined), where the Court extensively analyses ECtHR's case-law on Article 14 (prohibition of discrimination) and how this article is only of an ancillary nature, completely leaving aside in its analysis Article 1 of Protocol 12, which provides for a general prohibition of discrimination. In these same cases, instead of assessing the constitutionality of the challenged acts of public authorities properly, the Court assessed whether these acts were in conformity with Court's views on the ordinary electoral law (and what that law's ratio legis is when it comes to establishing a gender quota for parliament). Instead of assessing whether the law itself violates the constitution (derivative violation), the Court simply assesses whether the legal interpretations by public authorities were in compliance with the law itself, whose wording is pretty straightforward and no other course of action was obvious to public authorities [see Article 112(2) of the Law on General Elections]. The Court seems to think that it is not able to review a law's constitutionality unless that law is challenged in an abstract review procedure (Para 112). On this point, see Steinberger, H. (1993) 'Models of constitutional jurisdiction' (CoE), pp.28–29.

45 Constitutional Court of Kosovo (2020) KO72/20, Paras §§7–19.

46 These responding countries were England, Brazil, Liechtenstein, Austria, Slovakia, Sweden, Czech Republic, Croatia, Germany, Bulgaria, North Macedonia, Moldavia and South Africa. Some of these countries' constitutional systems are completely different from that of Kosovo.