

ARTICLE

“Advise and Rule” or “Rule by Advising”: The Changing Nature of the Advisory Jurisdiction of the Constitutional Court of Kosovo

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Abstract

Constitutional courts play an essential role in authoritatively interpreting constitutions. Oftentimes they go beyond the constitutional text by inventing so-called judge-made law. Their authority to interpret the text covers not only substantive parts but also the clause authorizing their jurisdiction. Such power, namely the power to interpret the limits of their jurisdiction, is often used to intervene in the interpretation of the constitution more vigorously than explicitly authorized. One example is the invention, designation, and development of the advisory jurisdiction by the Constitutional Court of the Republic of Kosovo. On that basis, the Court has, for almost ten years of its existence, pronounced on numerous fundamental issues relating to the governing system, power maps, and entitlements on political authority. The Court developed its advisory jurisdiction in a rather unpredictable and impulsive fashion; however, it steadily revealed its willingness to engage with interpretations that sought to resolve high-stakes issues. Such bravery also had a credibility cost for the Court. The year 2018 marked a major shift in the Court’s interpretation of its own jurisdiction to “advise.” In the *Central Election Commission* case, it abandoned its previous precedent and commenced a passive, restrained attitude in engaging with the constitutional interpretation on the basis of case or controversy. This Article analyzes the Court’s path and change of course in this cycle.

Keywords: Kosovo; Constitutional Court of the Republic of Kosovo; advisory jurisdiction; Constitutional Court jurisdiction

A. Introduction

Constitutional courts are common interpretative players among most European democracies.¹ They represent an essential device to safeguard fundamental rights and resolve constitutional disputes. They often play a key role in ensuring fair interpretation of democratic rules as established in constitutional frameworks. It would be wrong to say, however, that constitutional courts are the sole transcribers of constitutions; that they enjoy a limitless say on what the constitution is and what it is not; that they can engage with constitutional interpretation at any point in time; that they have unconstrained competence over the nature of constitutional claim; and so on. The truth is quite to the contrary. Both theory and practice of modern constitutional justice acknowledge

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¹On the Constitutional Court of Kosovo, its origins and institutional set up, see Dren Doli & Fisnik Korenica, *Kosovar Constitutional Court’s Jurisdiction: Searching for Strengths and Weaknesses*, 11 GERMAN L.J. 803–36 (2010); Visar Morina, *The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns*, 35 REV. CENT. & E. EUR. L. 129–58 (2010); Qerim Qerimi & Vigan Qorrolli, *A Constitutional Tradition in the Making: The Presidents’ Cases and the Role of Kosovo’s Constitutional Court in the Process of Democratic Consolidation*, 7 VIENNA J. INT’L CONST. L. 49–67 (2017).

that constitutional courts have rather limited *modus operandi*, which we refer to as the jurisdiction.² They are entitled to intervene only in austere instances, and only as specifically defined in the constitutional clauses authorizing their jurisdiction. Courts are not sovereign in their power to interpret. Rather, they are restricted on aspects such as persons, subject-matter, time, or territory. The main rationale behind such restrictions is that the very idea of jurisdiction is to ensure that constitutional courts operate in a system where power is fragmented, balanced, coordinated, and safeguarded against abuse. That said, one of the key questions surrounding the jurisdiction of constitutional courts is the nature and scope of such jurisdiction. The rationale and permissibility of a constitutional court's advisory jurisdiction is thus one of those outstanding questions.

Advisory jurisdiction of constitutional courts, or courts tasked with constitutional adjudication regardless of their type, is not uncommon. It is more present among common law jurisdictions. Canada has a decentralized constitutional review system, and it is one of the illustrious cases presenting advisory jurisdiction.³ Art. 53 (1, 2) of the Canadian Supreme Court Act provides that:

The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact *concerning . . . the interpretation of the Constitution Acts*; [in connection with the latter] [t]he Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations [provided explicitly above], with reference to which the Governor in Council sees fit to submit any such question.⁴

In its famous *Quebec* case, the Canadian Supreme Court relied on the above-mentioned jurisdictional clause to pronounce on the issue. It noted that “[t]here is no constitutional bar to this Court’s receipt of jurisdiction to undertake an advisory role.”⁵ It admitted, however, that an advisory question cannot be purely abstract, but must relate to the determination of rights and duties referring to a certain issue.⁶ Trying to legitimize the character of its advisory jurisdiction, the Court went further:

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise. Finally, the

²E.g., Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 ICON 44, 46 (2007); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362 (1953); Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 4 ICON 633, 656–58 (2004).

³On this, see James L. Huffman & Mardilyn Saathof, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction*, 74 MINN. L. REV. 1251–1336 (1990).

⁴Canadian Supreme Court Act, R.S.C. 1985, c S-26, § 53; In addition,

Where a reference is made to the Court under subsection (1) or (2) [including reference questions jurisdiction], it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court. . . . *Id.*

⁵Reference re Secession of Quebec, [1998] S.C.R. 217 (Can.).

⁶*Id.*

Court may deal on a reference with issues that might otherwise be considered not yet “ripe” for decision.⁷

The standard developed in *Quebec* seems to legitimize advisory jurisdiction with the argument that questions submitted are justiciable, in the sense that there is no other institution that has been tasked with an explicit competence to do so—which I refer to as competence silence. Justiciability, in this regard, means that a question relates to a legal or factual situation, and therefore it is not totally illusory. The fact that the question presents no controversy does not undermine its justiciable character. That said, advisory jurisdiction seems to have been interpreted quite flexibly, with the standards of justiciability and competence silence wordlessly inferred. Similar to Canada, the Indian Supreme Court has been tasked with an almost identical advisory jurisdiction.⁸ For the sake of comparison, the International Court of Justice, although not a court of constitutional adjudication, has also been tasked with advisory jurisdiction.⁹

Contrary to the Canadian and Indian practice, the United States Supreme Court has rejected the possibility of engaging in advisory jurisdiction.¹⁰ It argued in *Muskrat v. United States*, one of the leading jurisdiction-related cases, that its jurisdiction can only “be exercised *when a proper case* between opposing parties is submitted for determination [and that the Court] cannot be required to decide cases over which it has not jurisdiction . . . [as] to do so would require it to give opinions in the nature of advice concerning legislative action.”¹¹ *Muskrat* indicates the Court’s stark disagreement with an opinion-giving or advising jurisdiction. The UK’s Royal Supreme Court, as of now, also seems to lack any advising jurisdiction.¹²

In the same way, Western Balkan countries lack a coherent definition of constitutional courts’ jurisdiction. It is quite clear, however, that none of the Western Balkan states’ constitutions provide for advising jurisdiction to their constitutional courts. Articles 149 and 150 of the Montenegrin Constitution suggest that the Constitutional Court has not been vested with any advising jurisdiction: In all matters, the case must be made and presented by an applicant against another party.¹³ Articles 108–13 of the Constitution of Northern Macedonia stand in the same pool; they do not provide for any advisory jurisdiction. This is confirmed by Article 16 of the Rules of Procedure of the Constitutional Court, which determines that “[i]f the initiative requires opinion, [the] court will inform the submitter [that it] is not competent to decide for such

⁷*Id.*

⁸See INDIA CONST. art. 143

If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

See also Akshada Dhagamwar & Supriya Dash, *The Advisory Jurisdiction of the Supreme Court of India: A Study*, 5 INT’L J. L. & LEGAL JURIS. STUD. 158–74 (2010).

⁹Statute of the International Court of Justice, Chapter IV. Likewise, the Inter-American Court of Human Rights has been assigned with an advisory jurisdiction, as determined in Art. 2 of its Statute. See Statute of the Inter-American Court of Human Rights, Resolution No. 448 (Adopted Oct. 1979) https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

¹⁰E.g., *Constitutional Courts*, ENCYCLOPEDIA BRITANNICA; Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 768 (1998).

¹¹*Muskrat v. United States*, 219 U.S. 346, 357 (1911) (emphasis added). Some state constitutions in the United States, such as Florida, have established the possibility for advisory jurisdiction in their supreme courts. In this regard, see OVERVIEW OF THE FLORIDA SUPREME COURT, <https://www.floridasupremecourt.org/Justices/Overview-of-the-Court> (last visited Oct. 17, 2020).

¹²SUPREME COURT OF THE UNITED KINGDOM PRACTICE DIRECTION 1, <https://www.supremecourt.uk/procedures/practice-direction-01.html> (last visited Oct. 17, 2020). Australia’s High Court has similarly rejected the possibility for an advisory jurisdiction. See, e.g., Helen Irving, *Advisory Opinions, the Rule of Law, and the Separation of Powers*, 4 MACQUARIE L.J. 105 (2004).

¹³Though Art. 150 provides the Montenegrin Constitutional Court with an *ex officio* triggering of its jurisdiction, it is a sort of proceeding in which no case is presented by a party that the court would have to rely to resolve the contestation.

issues.”¹⁴ Article 16 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina equally reject any possibility for an advisory jurisdiction.¹⁵ Albania’s Constitutional Court stands in the same frames, as Article 49 of the Law on Constitutional Court clearly bans any possibility for parties to submit open questions; it insists on a case that involves at least a contestation.¹⁶ Similarly, Article 167 of the Serbian Constitution also does not provide for an advisory jurisdiction to the Constitutional Court. Overall, all Western Balkan countries, with Kosovo being an exception, have followed an explicit path of not providing any sort of advisory jurisdiction to their constitutional courts; their acts positively regulate all cases when the procedure before their courts can be triggered, and advisory jurisdiction seems to have been intentionally left outside those prescriptive norms. That said, one may argue that the Western Balkan region in general follows an almost common trend in keeping constitutional courts primarily within expressively restrained jurisdictional clauses. Provision of advisory jurisdiction would have provided the possibility for their courts to become active players. Kosovo’s case remains quite different in this theme, as the Constitutional Court of Kosovo has, for a long time, developed, and as a result operated, a form of advisory jurisdiction.¹⁷ We will analyze it more in depth in the sections below.

B. Advisory Jurisdiction of the Constitutional Court of Kosovo

The question of advisory jurisdiction of the Constitutional Court of Kosovo—also known as the CCK—presents a mute polemic for two critical reasons. First, the constitution does not explicitly designate or allude to an advisory jurisdiction; it was designed and developed in an inventive interpretation of some indescribable provisions in the constitution by the CCK over almost a 10-year timespan. Second, it has had a shapeless, emerging nature construed on rather far-reaching criteria. For the sake of definition, advisory jurisdiction in this sense is understood as an opposite to the adjudicative function, where opposing parties and disputes are raised before the court. Relying on its advisory jurisdiction, CCK has pronounced on some of the most important constitutional questions relating to the principles of government, thereby inferring landmark constitutional interpretations. Now, I will offer an overview of the specific constitutional provisions providing CCK’s jurisdiction.

Article 113 of the Constitution defines the jurisdiction of the CCK. This is the primary—probably, the only—constitutional basis setting the jurisdiction of the CCK. However, the CCK is mentioned in some other provisions in the Constitution, namely, Article 84(9), which amongst others enumerating the competences of the President of the Republic, states that the President “can refer constitutional questions to the [CCK].” The same appears in the clause providing for the government competences in Article 93(10), wherein the government is authorized to refer constitutional questions to the CCK. Contrary to both provisions, Article 135(4) confers to the Ombudsman the competence to refer issues to the CCK—however, as specifically indicated—in line with provisions of this constitution. The latter seems clearly an indication of the fact that Article 135(4) is not a jurisdiction-conferring provision; rather, it is a cross-reference to a competence that has already been specified in a separate legal basis in the Constitution. Both Article 84(9) and Article 93(10) lack that indicating clause. The main question present in this inquiry is whether or not Article 113 is the sole provision prescribing the jurisdiction of the CCK, or whether Article 84(9) provides for additional jurisdiction. One could extend this question by inquiring whether Article 84(9) is written to be read as a

¹⁴Art. 16, Rules of Procedure of the Constitutional Court of the Republic of Macedonia. The Macedonian Court may, however, *ex officio* initiate a constitutional review proceeding. Art. 14, Rules of Procedure of the Constitutional Court of the Republic of Macedonia.

¹⁵Rules of Procedure, Constitutional Court of Bosnia and Herzegovina.

¹⁶Art. 49, Law on the Organization and Functioning of the Constitutional Court of Albania.

¹⁷On this topic, see Durim Berisha, “Constitutional Questions”—How Kosovo’s Constitutional Court Expands its Jurisdiction, VERFASSUNGSBLOG, (Sept. 25, 2018), <https://verfassungsblog.de/unconstitutional-constitutional-questions-how-kosovos-constitutional-court-expands-its-jurisdiction/>.

jurisdiction-conferring legal basis or merely as a provision echoing generally something that has been specifically defined in Article 113.¹⁸

To answer this question, one needs to compel an existential interpretation, an interpretation that relies on the theory of sources. The question is therefore whether Article 84(9) exists as a jurisdiction-conferring provision or not, and not whether its meaning is an add-on to Article 113. The difference in practice is that, should Article 84(9) be read as a jurisdiction-conferring provision, it would open the possibility that the President of the Republic appear as a party before the CCK on “any constitutional issue.” That would give standing to the President of the Republic to seek advice on anything of constitutional nature. On the contrary, if Article 113 remains the only source of law to delineate the jurisdiction of the CCK, the President of the Republic could appear as a party to the CCK only on the basis of, at minimum, a constitutional controversy packaged in a case. The limitless nature of Article 84(9) could nevertheless, if interpreted as an independent jurisdiction-conferring clause, alter considerably the theory on which the CCK operates, its subsidiary character, and the overall conceptualization of constitutional justice in the Republic of Kosovo. That being the case, this Article problematizes one of the most prevailing doctrinal reflections relating to the mode of intervention of the CCK in Kosovo.

As a matter of principle, in a systematic perspective—one that looks at the system as a whole and pretermits script—the horizontal conflicting relationship between Article 113 and Article 84(9) is one that could possibly be resolved through three tools of interpretation: First, the *ejusdem generis* principle, second, the *lex specialis derogat legi generali*, and third, the *noscitur a sociis* principle. I will test each of them against this backdrop. First, I will see whether the *ejusdem generis* principle could resolve the relationship between Article 113 and Article 84(9). Although *ejusdem generis* seems comparable to the *lex specialis* principle, in fact, it is not. The US Supreme Court pronounced on *ejusdem generis* in *Circuit City Stores Inc. v. Adams*, noting that it is a standard of interpretation which infers that if “general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”¹⁹ It is a rule of construction primarily used to deconstruct the legislative intent; therefore it cannot be applied unconditionally.²⁰ It is nevertheless the case that this principle could be used as a rule of construction to aid and assist the identification of the intent of Article 84(9), which although not enumerating things, it is placed in a clause, Article 84, that has an enumerating form—the “preceding provision.” Therefore, when the subsequent Article 113 refers to the “president of republic” and the standing criteria before the CCK—as the object generally mentioned in Article 84(9)—one could argue that the general wording construed in Article 113 is written to embrace only the objects identified in Article 84(9). One may contravene this argument by denoting the fact that *ejusdem generis* cannot be applied on thematic issues but rather on objects.²¹ I disagree, maintaining that the President of the Republic falls well within the category of “persons”—as it is a person vested with competence—whereas constitutional controversies which the President of the Republic is authorized to file before the CCK fall well in the scope of “things,”²² because they encompass what the President of the Republic could deliver as an output of a public office. Though that seems right, the remainder of the problem cannot be solved. Article 84(9), the preceding provision, does not seem narrower than wording present in Article 113, the subsequent provision. That said—only the contrary may be true—that Article 113 seems to embrace wording present in Article 84(9). Article 84(9) has been intended to be read as embracing the limitations of Article 113, not the contrary;

¹⁸Because Art. 84(9), Art. 93(10) and Art. 135(4) refer to the same situation in our analysis—one of the dependent variables—we merely make the comparison between Art. 113 and Art. 84(9).

¹⁹*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

²⁰Walter M. Clark, *The Doctrine of Eiusdem Generis in Missouri*, 1952 WASH U. L. REV. 250, 251, 260 (1952).

²¹*Id.* at 250.

²²On the possibility for a more liberal use of this standard, see *id.* at 252.

anything beyond the scope of what has been positively permitted in Article 113 is negatively prohibited, and Article 84(9) cannot override that ceiling. *Ejusdem generis* must therefore be rejected as a possible tool for resolving this problem.

Second, does the *lex specialis derogat legi generali* better resolve the controversial relationship between Article 84(9) and Article 113? I tend to think not, because, in terms of content, the wording of Article 84(9) seems more an exception rather than a general rule over Article 113. Should the contrary have been the case, *lex specialis derogat legi generali* would have addressed this issue more properly than *ejusdem generis*. The second option should also be rejected for not being plausible enough.

Third, the *noscitur a sociis* principle implies that “[t]he meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it.”²³ In this regard, *noscitur a sociis* would imply that Article 84(9) is the “doubtful word” whereas Article 113 is the “associated wording.” Two arguments would support this point. First, Article 84(9) is a very general prescription, which leaves the impression that it could not have been constructed to serve as the only norm regulating that topic in the constitution. Its construction, moreover, indicates a processual competence; the authorization for the President to refer cases to the CCK. It does not indicate limits to exercise that competence. Second, knowing the fact that in a democratic constitutional setup most competences are built on the premise of checks and balances, it does not imply the limitlessness of the President’s power to refer questions to the CCK. Therefore, it would be rightly ascertained that the meaning of Article 84(9) should be associated with the meaning of Article 113. Were it otherwise, there would be no reason for the intended benefit of Article 113, whose limitations tackle again the same object—the president’s authority to file cases before the CCK. I conclude that, in principle, *noscitur a sociis* resolves the question of relationship between the two provisions.

CCK was provoked with a number of questions which utilized Article 84(9), and others, as independent legal bases to trigger its jurisdiction. CCK showed a positive attitude toward the inclusion of Article 84(9) as an independent source of law regulating its jurisdiction for many years, however it lately changed its attitude. I will now review these developments and witness the undulation of CCK’s advisory jurisdiction.

C. The Rise and Fall of Advisory Jurisdiction in an Original Interpretation of the CCK: From QESKA to CEC

The CCK pronounced on the advisory jurisdiction of Article 84(9) for the first time in *Qeska*.²⁴ The case was referred to the CCK by the President of the Republic, who asked the Court, “[w]hich institution in the Republic of Kosovo is responsible for assessing the effectiveness and validity of the resignation and for confirming the eventual expiry of a mayor’s term of office . . .”²⁵ The question was absolutely abstract and not based on a proper controversy. It asked about an abstract situation of law, that of handling the consequences of an act of resignation by a municipal mayor, primarily from a general point of view. The President of the Republic, however, requested an authoritative interpretation. The CCK replied in a rather premature form, arguably because this was the first case of this kind submitted to it. It advanced its argument in support of an advisory jurisdiction stemming from Article 84(9) on two simple bases: First, the fact that the question

²³Silvia Zorzetto, *The Lex Specialis Principle and its Uses in Legal Argumentation. An Analytical Inquire*, 3 EUNOMIA. REVISTA EN CULTURA DE LA LEGALIDAD, 61, 80 (2012).

²⁴Berisha names this as the “precedent” for this sort of jurisdiction. See Berisha, *supra* note 17.

²⁵The Constitutional Court of Kosovo, *The Referral of the President of the Republic of Kosovo, His Excellency, Dr. Fatmir Sejdiu, for Explanations Regarding Jurisdiction over the Case of Rahovec Mayor, Mr. Qazim Qeska*, Case No. KO 80/10, 10 (2010).

raised before it was of a constitutional nature; and, Second, that the referral had been based on Article 84(9)—regardless and independent from Article 113.²⁶ In *Qeska*, the CCK not only elevated Article 84(9) to the level of a jurisdiction-conferring clause, but also omitted from inserting any standards besides the infinite “constitutional materiae” criterion. It ruled in abstract, replying to the posed question that: “Any resignation of any mayor is final and definitive and it puts an end of a Mayor’s mandate . . . consequences of that act are the calling for elections by the President . . .”²⁷ This said, *Qeska* illustrates the fact that Article 84(9) was deemed to be an additional element, thus opening new pathways to the law setting CCK’s jurisdiction, with the effect that the President of the Republic became a party that could refer any advisory question before the court. CCK, however, did not argue with the rationale behind the presence of restrictive criteria in Article 113 regarding the *locus standi* of the President of the Republic—if it has already been assigned with the limitless standing ascertained in Article 84(9). As time passed, CCK expanded its advisory jurisdiction further and pronounced on several other issues. We remain in the remit of those that enlighten procedural relevance of advisory jurisdiction, such as *PM Nominee (PMN)*, *Agreement on Principles relating to Serbian Municipalities Association (APSMA)*, and, finally, the rebutting *CEC*.

Another landmark case involving the advisory jurisdiction of CCK is *PMN*. Due to the fact that after the June elections in 2014 the party with the higher number of votes on election day could not form a majority coalition in the parliament, the President of the Republic referred the abstract question of the meaning of constitutional terms—such as “won” elections and attributes of the winning party—as well as the definitions of statements like “necessary to create the Government.” The President of the Republic also requested clarification of statements such as “according to the same procedure,” “majority in the Assembly,” and many more open textured constitutional phrases and wordings.²⁸ CCK started its admissibility review by asserting that “[i]t is not the task of the Court to evaluate the facts of the particular case, but the above mentioned facts appear to have raised constitutional questions . . .”²⁹ The idea of proclaiming that it does not refer to facts of the particular case was to prove that the Court stands within the remit of advice on legal issues. It demonstrates, however, that, per this standard, the Court does not consider it permissible to advise on factual issues of constitutionality. Digging deeper into admissibility review, CCK again referred to Article 84 (9) as a jurisdiction-conferring provision,³⁰ therefore confirming that the referral for advice is admissible. The only criterion it applied in this regard was again that of the “constitutional materiae.” It argued that for the question to be of “constitutional nature,”³¹ in this case, it must “aim at ensuring the consistent application of the President of the Republic’s mandated constitutional competences in accordance with . . . constitution.”³² It is difficult to perceive whether such an objective is reachable within the permit of “legal,” and without consideration of contextual facts problematizing the issue which the CCK refused to consider in the preceding passage. However, one must argue that, in *PMN*, the scope of the “constitutional question” had been rephrased through a functionalist interpretation. CCK seemed to propose that, for a question to be of constitutional nature, it must also be directly associated with the functional application of law by the referring party—in the case at hand, the President of the Republic. The “association link,” seemingly a form of *ratione personae* limitation—which now appears as either a new, additional criterion or a dynamic sub-criterion of the “constitutional nature”—leads to several consequences on the nature of advising jurisdiction. It imposes a deductive model of

²⁶*Id.* at 25–26.

²⁷*Id.* at 1–2.

²⁸The Constitutional Court of Kosovo, Concerning the Assessment of the Compatibility of Article 84(14) [Competencies of the President] with Article 93 [Election of the Government] of the Constitution of the Republic of Kosovo, Case No. KO103/14, 3 (2014) [hereinafter *PM Nominee Case*].

²⁹*Id.* at 26.

³⁰*Id.* at 19.

³¹The terms “constitutional materiae” and “constitutional nature” have been used interchangeably.

³²*PM Nominee Case* at 27.

procedural standing on the basis of Article 84(9). The referring party must argue that the question posed for interpretation falls within practical aspects of his or her official business, and that must be associated to a duty or authorization deriving from the constitutional norm. In addition, it must be proved that the “link” should be connected to the principle of consistency as a quality of the “law application” function. *PMN* therefore restricts quite extensively the scope of the question posed by the applicant according to Article 84(9) by introducing the standard of “association link.” The President of the Republic proved to meet this criterion in *PMN* on the basis of her competence to nominate the prime minister as established in Article 95(1). Needless to mention, *PMN*’s interpretation of Article 84(9) excludes any possibility that Article 113 be considered as a possible source of jurisdiction when interpreting the *locus standi* of the President of the Republic. CCK replied to the question posed in a rather abstract interpretation of the constitutional statements referred, giving broad hints on notions such as that of:

The use of the terms “political party or coalition” when they are mentioned . . . means a political party or coalition that is registered under the Law . . . , participates as an electoral subject, is included in the electoral ballot, passes the threshold and, thus, acquires seats in the Assembly.³³

The advice clearly demonstrated the abstract nature of this exercise, not clearly making the point about a case.³⁴

In *AP SMA*, the CCK was again faced with another question filed by the President of the Republic, that of the constitutionality of an international agreement on the Principles of the Association of Serbian Municipalities.³⁵ The applicant asked whether the Principles of the Association were compatible with the Constitution.³⁶ Although the President of the Republic initially requested that the case be considered under Article 113, the CCK ruled that, because the principles are not of legal nature, they cannot be contested on that legal basis.³⁷ Instead, CCK immediately recalled Article 84(9) as the source of jurisdiction to rule on the posed question. *AP SMA* seemed to develop further the notion of advisory jurisdiction from a legal-legitimacy point of view. CCK made several attempts to rewrite a supporting reasoning for having read Article 84(9) as a jurisdiction-conferring clause. It started by referring to the previous *Acting President Krasniqi Question on His Mandate*, where it held that one of the reasons for interpreting Article 84(9) so was, “. . . because there is no other body from whom the [President of the Republic] may seek an answer to the constitutional questions.”³⁸ It seemed to refer to a “competence silence” as noted above, similar to the *Quebec* case of the CSC. Here again, the CCK appeared to rephrase the question of jurisdiction, relying on Article 84(9). Whether or not there is another body tasked to give opinions on constitutional questions is a matter of constitutional law, not of pragmatic clarification. The mere fact that the constitution is silent on constitutional questions ranging from illusory to general may itself be its intention. As long as it has not been

³³*Id.* at 2(b).

³⁴*PMN* triggered severe credibility consequences, primarily because political actors saw the massively activist tone of the court as beyond the scope of independent and professional interpretation.

³⁵Principles of Association of Serbian Municipalities is a semi-formal agreement between Kosovo and Serbian governments facilitated by the EEAS. See Principles of Association of Serbian Municipalities, Kos.-Serb., Aug. 25, 2015, http://eeas.europa.eu/archives/docs/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf.

³⁶The Constitutional Court of Kosovo, Concerning the Assessment of the compatibility of the principles contained in the document entitled “Association/Community of Serb Majority Municipalities in Kosovo—General Principles/Main Elements” with the Spirit of the Constitution, Article 3 [Equality Before the Law], 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo, Case No. KO130/15, 85 (2015).

³⁷*Id.* at 95-96.

³⁸*Id.* at 103 (emphasis added).

permitted positively, Article 113, which prescribes the jurisdiction of the CCK, has a positive permissibility nature of text, meaning that it tells when the CCK is allowed to exercise its jurisdiction as opposed to when it is not. It demonstrates that it has purposely been designated to have that meaning. Were it otherwise, the argument would have no limits on its far reachability. One would have argued that anything that has been positively permitted—to note, the rule that governs the jurisdiction is a permissibility rule—could be read as meaning everything else, as long as it has not been prohibited.

CCK tried to reply to this polemic in *APSMA* by referring to Article 112(1), which reads: “[CCK] is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.”³⁹ It continued to build upon this basis by maintaining that it “considers that the questions raised in the present Referral are of utmost importance and relevant to the constitutional order of Kosovo.”⁴⁰ Therefore, CCK inferred that “Article 112.1 provides the appropriate constitutional basis for the assessment of the Principles for compatibility with relevant constitutional provisions.”⁴¹ It seemingly mistook the question of the *locus standi* of the President of the Republic—which, amongst other things, raises *ratione personae* limitations on jurisdiction—with that of whether the CCK is vested with the competence to stand as the final authority for interpreting the constitution. Altogether, *APSMA* provided for a conjunctive reading of Article 84(9) with Article 112(1)—an attempt to broaden the legal basis with the purpose of better legitimizing the far-reaching nature of the advising jurisdiction materialized under Article 84(9).

To prove the “constitutional nature” of the question in *APSMA*, CCK went further by arguing that:

. . . [T]he Court considers that the legal effects on the institutions, envisaged by the First Agreement, relate to the form of governance of the state, inter alia, in its division into central and local self-government. Moreover, the legal consequences related to the implementation of this part of the First Agreement have an impact on the constitutional order of the Republic of Kosovo. As such, the manner in which the First Agreement is implemented has implications for the democratic functioning of the state.⁴²

CCK therefore concluded that *APSMA* fulfils that criterion, declaring it admissible.⁴³

Seen from a macro perspective, *APSMA* made a completely fluctuated designation of the jurisdiction stemming from Article 84(9). Although it still insisted on the “constitutional materiae” criterion, it rebuilt it fundamentally compared to *PMN*. It also omitted from even mentioning the “association link” as sub-criterion, and did not test the applicant against it. However, it changed elementarily the nature of the “constitutional materiae” by introducing the “impact test” as a *ratione materiae* problem—as opposed to the abandoned *PMN*’s *ratione personae* “association link.” The “impact test” seemed more an indication of the need to functionally legitimize its intervention under the clause authorizing the CCK to be the final interpreter of the constitution. It now requires that for the question to be of “constitutional materiae” it must raise an issue that could—in the abstract—affect the constitutional order. The “impact test” seems to have been written to mean “adversely affect” the constitutional order. The issue posed in the question must thereby adversely affect or jeopardize the constitutional order in order for it to fall in the “constitutional materiae.” How much the order should be adversely affected by that issue for it to fall in that category remains unanswered. That said, *APSMA* proved again the unstable nature of argument upheld by CCK, abandoned the previous *PNA*’s “association link,” and devised the new “impact

³⁹*Id.* at 99.

⁴⁰*Id.* at 104

⁴¹*Id.*

⁴²*Id.* at 107 (emphasis added).

⁴³*Id.* at 108.

test,” which seems to go in a very different direction; that of framing the advisory jurisdiction in line with a negative impact test. On that basis, CCK answered in *APSM*A in a negative legislating fashion, by prohibiting several aspects of the Agreement on Principles as unconstitutional, and therefore ruling that “[the] Association/Community of Serb majority municipalities in Kosovo—general principles/main elements are not entirely in compliance with [the Constitution].”⁴⁴

Three general observations follow the three landmark cases analyzed above. First, there is a high level of indeterminacy, both in the contents of the questions and—though much less indeterminate—the answers of the CCK. Indeterminacy refers here to the lack of association of the questions with a concrete situation of controversy in application of law, thereby entangling the object primarily from a norm-expository, as opposed to a dispute-resolving, take. Second, formal definition of the jurisdictional clause in these three landmark cases has serious problems with consistency, legal certainty, and rationale. While it is absolutely perfect for constitutional courts to exercise advisory jurisdiction, that kind of intervention needs to be reasonable by observing the limits which the constitution has explicitly imposed. CCK seems to have failed to develop a sound relationship between Article 113 and Article 84(9), as there is little evidence manifesting an argument of the complete meaning that the latter provision has on the Court’s jurisdiction. Third, “constitutional advice” as an output often does not satisfy the applicants’ requests, therefore using it as a basis CCK has often outshone the limits of a restrained attitude on its business. One can point to the fact that such jurisdiction seems not to be advisable, especially in consolidating democracies, where political stakes are too high for a court to resolve them without a credibility cost.

CCK rebutted entirely its advisory jurisdiction with the *CEC* case in 2018.⁴⁵ The Court was asked to offer a general interpretation of Article 139 of the Constitution in regards to party or coalition entitlements to be represented in the Central Electoral Commission, the body in charge of election management.⁴⁶ The case was initiated by the President of the Republic in a tricky move trying to legitimize his will to appoint three PAN Coalition⁴⁷ members in the CEC. CCK dismissed the question posed by the President of Republic as inadmissible, and later called it admissible after the case was exhausted as a controversy between the two parties. The rebuttal of the advisory jurisdiction with the *CEC* will have practical consequences on the scope of jurisdiction of the CCK. *CEC* is thus an exemplary act of the CCK’s turn to a restrained judicial attitude, as opposed to its activism exercised on the basis of Article 84(9).

In *CEC*, the President of the Republic requested the CCK to pronounce on the question “[f]rom which parliamentary groups [Central Electoral Commission] members should be appointed . . . [?]”⁴⁸ In reviewing its admissibility, the Court first raised the fact that there is a new cohort of judges recently appointed—with five out of nine new judges.⁴⁹ CCK outwardly intended to manifest the fact that a change of precedent is possible with a new majority in the court—ironically, it being a sociological, rather than a legal, argument. The Court then started its analysis of admissibility with first reference to Article 113(1), which states that CCK “decides only on matters referred to the court in a legal manner by authorized parties.”⁵⁰ It tailored its letters imitating *Osborne v. Bank of the United States* of the US Supreme Court, where the judiciary is defined as a branch “capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.”⁵¹ It went further to analyze the privileged

⁴⁴*Id.* at 3.

⁴⁵The Constitutional Court of Kosovo, Request for Interpretation of Article 139, 4, of the Constitution of the Republic of Kosovo, Case No. K079/18 (2018) [hereinafter *CEC case*].

⁴⁶*Id.* at 3.

⁴⁷A coalition between three parties: Kosovo Democratic Party, Alliance for the Future of Kosovo, and Initiative Party.

⁴⁸*CEC case* at 3.

⁴⁹*Id.* at 7.

⁵⁰*Id.* at 52.

⁵¹*Osborn v. Bank of U.S.*, 22 U.S. 738 (1824) (emphasis added).

applicants entitled *ratione personae* to trigger the jurisdiction of the court.⁵² Noting that the President of the Republic is one of the privileged applicants according to Article 113, it then noted the specific instances when he may appear before the CCK, such as when the constitutionality of a law or another legal act is contested.⁵³ The earlier reading of Article 84(9) as a jurisdiction-conferring provision was absolutely abandoned in *CEC*, which clarified that the only basis for constitutional referrals for privileged applications is Article 113. As noted earlier, Article 113 requires that there be a controversy between two claims for the issue to be justiciable before the CCK. In trying to legitimize its change of attitude in exposing the reading of Article 84(9) and the previous practice of advisory jurisdiction triggered by questions referred to the CCK, it further argued:

The Court's earlier case law regarding the consideration of referrals submitted under a broad meaning of the notion "constitutional question" should be understood in the spirit of the *process of establishing the foundations* of the constitutional judiciary and of the *social need* for the Court in its beginnings to be included in interpretations of specific articles of the Constitution, in particular when the questions raised were related to the exercise of the competences of the President, as established by the Constitution; when the issues raised affected the separation of powers; in preserving the constitutional order; as well as when the issues raised had fundamental implications for the functioning of the constitutional system of the country.⁵⁴

CEC tries to inhibit the rationale for the previous practice with a pragmatic argument, that of the need for a more activist constitutionality control in the early years of Kosovo's state-building. Though this point was not mentioned in any of the previous landmark cases referred to above, the gravity of the argument seemed too shallow. Attributing CCK a role which it is not supposed to play, neither in a transitory period nor in an emerging democracy, seems wrong. Moreover, an activist attitude in the operation of the CCK, or any court, is, neither on the basis of literature nor practice, a guarantee for robust constitutionality. On the contrary, boundless and not well balanced authority maps between high institutions—which may well be the case in scenarios where activist roles are played by constitutional courts or regular courts in general—lead to practices that run counter to principles of liberal constitutional democracies. CCK therefore should have developed a normative, as opposed to a behavioral, argument to cogitate the honesty of its earlier standard on advisory jurisdiction.

Building on that premise, CCK concluded in *CEC* that:

Based on the fact that the Constitution has explicitly defined the jurisdiction of the [CCK], including the authorized parties to activate its jurisdiction, the possibility for the [CCK] *to take a consultative or advisory role is limited, as such role would run counter to its fundamental role to decide on the cases brought before it.* The practice of other countries recognizes cases when constitutional courts have exercised advisory jurisdiction, but later such practice of consultative nature has been removed because of its incompatibility with the decision-making nature of constitutional courts. Specifically, in the case of the Constitutional Court of Germany, the Law on the Federal Constitutional Court . . . provided for the possibility of giving advisory opinions from this court . . . However, only a few years later, due to the mandatory nature of the "advisory opinions," the provision of the abovementioned law, which allowed such a jurisdiction, was repealed . . .⁵⁵

⁵²*CEC case* at 53.

⁵³*Id.* at 54–55.

⁵⁴*Id.* at 71 (emphasis added).

⁵⁵*Id.* at 76 (emphasis added).

As one could observe, CCK legitimized its departure from the previous practice by emphasizing the absence of advisory mechanisms in other constitutional justice systems, Germany being a key reference for it. CCK makes no argument whatsoever on the rationale of including comparative law as a persuasion to abandon advisory jurisdiction. It further tried to argue that an advisory jurisdiction would undermine the fundamental nature of the court, suggesting that the CCK must act within the remit of a restrained—negative legislating—jurisdictional perspective. Its denotation on the “fundamental role” is an insistence to embark on a new perspective of jurisdictional strategy, that of case or controversy as procedurally prescribed in Article 113. Though case or controversy in CCK’s context do not have an identical meaning with that of decentralized American judicial review,⁵⁶ they still share the same logic. That said, *CEC* will be remembered as the landmark dictum designating case or controversy standard on the CCK’s interpretation of its jurisdiction. It would thus generate ample literature review and case practices that would alter the role and influence of the Court in Kosovo’s justice system and beyond.

D. The *CEC*’s “Case or Controversy” in the Light of Comparative *Polémique*

Needless to say, CCK falls in the continental systems of centralized constitutional justice. It enjoys rather broad abstract jurisdiction on the basis of Article 113.⁵⁷ It also substantially differs from the admissibility of constitutional—judicial review—cases in the American, diffused system. That said, I must reiterate that reference to the “case or controversy” does not intend to replicate the American classic, *Marbury v. Madison*. Instead, it simply uses the frames of the doctrine to expose the notional meaning of the *CEC*’s standard. We make this analysis only in the view of Article 113, to be more precise, the parts relating to privileged applicants, as opposed to the individual complaint mechanism as designated in Article 113.7. A perspective of American jurisprudence on case or controversy will thus be compared and embedded into the logic driving *CEC*’s motive and applicability in practice. Needless to say, we make this discussion only in the framework of the discussion of CCK jurisdiction on privileged applicants, that is, applicants who need not to prove that they have a direct interest on the case as a *locus standi* criterion and who, due to their institutional position, enjoy limitless access to the CCK on the basis of non-private criteria. The case in American jurisprudence, is described in the following way in the famous, *Osborne*:

[Judicial branch] is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.⁵⁸

As one can observe, the case in American jurisprudence refers predominantly to a referral brought to the court by a private party to avow one’s rights against an act of public authority. According to Chief Justice Marshall in *Cohens v. Virginia*, there are two classes of controversies in the US jurisprudence:

In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends “all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

⁵⁶On case or controversy, see, for example, Rosenfeld *supra* note 2, at 634.

⁵⁷The same could be explicitly observed in Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo.

⁵⁸*Osborn*, 22 U.S. at 738 (emphasis added).

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended “controversies between two or more States, between a State and citizens of another State,” “and between a State and foreign States, citizens or subjects.” If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union.⁵⁹

A case may also exist within the remit of a public authority versus another public authority, such as the President of the Republic in the case of Kosovo—before the CCK in our scenario—for the mere fact that the head of state cannot invoke his or her privileged position as an applicant before the CCK on issues of non-public interest. It means that when the President of the Republic triggers the jurisdiction of the CCK, he or she does so on the presumption of protecting public good or interest and the authority prescribed to him or her by the constitution, not his or her personal rights as a private litigant. That would place the President of the Republic in the second class of controversy in the words of the *Cohens* dictum, namely, one which depends on the character of the litigant. This seems to be one of the ways *CEC* tries to classify its reference to Article 113. The US Supreme Court digs deeper into the concept of case or controversy later on. *Muskrat* is also a landmark decision relevant to this discussion, where the Court further determined that:

A case or controversy . . . implies the *existence of present or possible adverse parties whose contentions* are submitted to the court for adjudication. . . . [The US Supreme Court] has no veto power on legislation enacted by Congress, and its right to declare an act of Congress unconstitutional can only be exercised when a *proper case between opposing parties* is submitted for determination.⁶⁰

Muskrat illustrates an attempt by the US Supreme Court to insist on a “controversy,” be it proved or alleged, which obviously makes two or more parties present opposing interests, thereby defending conflicting claims. It is logical that there cannot be opposite claims on material law without there being opposite parties whose interests are based on opposing positions. *Muskrat*’s insistence to read the controversy as a conflict of interests between parties is absolutely logical in practice. That said, according to *Muskrat*, a case cannot include a conflict of interest without it presenting a situation with adverse parties and claims. Once that condition is exhausted, the case becomes amenable to judicial consideration.

Although *Muskrat* and *CEC* cannot be comparable on a plain basis, they still present similar functional logic. While *CEC* repeats *Muskrat* in its insistence to withdraw the CCK from the domain of advisory jurisdiction, their construction is not identical. *CEC*’s insistence on the doctrine of case or controversy, by explicitly maintaining that Article 113 is the sole legal basis for locating the jurisdiction of the CCK, implies the same result. CCK has no competence to assert jurisdiction in any case without there being a controversy as determined by the situations enumerated in Article 113. More concretely, Article 113 provides for three types of jurisdiction for privileged applicants.⁶¹ First, jurisdiction to control the constitutionality of laws and other acts issued by the government, President of the Republic or the Assembly, with the definition of legal act comprehended broadly.⁶² Second, jurisdiction to control the constitutionality of certain

⁵⁹*Cohens v. Virginia*, 19 U.S. 264 (1821). See also Cornell Law School, *The Two Classes of Cases and Controversies*, LEGAL INFORMATION INSTITUTE <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/the-two-classes-of-cases-and-controversies#fn366art3>.

⁶⁰*Muskrat*, 219 U.S. at 346 (referring to *Chisholm* and *Marbury*).

⁶¹The constitution also provides CCK with the jurisdiction to hear cases of individual human rights violations by acts of public authorities, as defined in Art. 113.7. The individual complaint mechanism—a non-privileged applicant system—is not within the scope of this Article.

⁶²The Constitutional Court of Kosovo, Constitutional Review of Specific Articles of Law No. 06/L-114 on Public Officials, Case No. KO203/19 (2020).

functional aspects of the application of the Constitution, such as situations arising from claims on conflict of competences, declarations of state of emergency, adoption of referenda, serious violations of the Constitution by the head of state, et cetera. Third, jurisdiction to preemptively review constitutional amendments initiated in the Assembly. Fourth, jurisdiction on preliminary reference questions on the constitutionality of a law, referred by courts on the basis of a case being adjudicated before it. In the view of *CEC*, the doctrine of case or controversy applies only in the first, second and fourth categories of jurisdiction, the third needing no opposite claims for the CCK to assert its jurisdiction, as it is a preemptive constitutionality control.

In the light of *CEC*, where the Court makes it clear that it has no advisory jurisdiction, Article 113 needs to be located in the framework of an adapted case or controversy doctrine. Two aspects of the doctrine need to be adapted to the CCK's context. First, the fact that there is no requisite to prove the direct interest of the applicant on the case, namely that the applicant is a privileged one and has no private interest on the result of the case. The case is also not limited only to a concrete situation but may arise from an abstract constitutional compatibility problem. Second, the controversy is merely between two public authority bodies, with no possibility for a private litigant's rights being involved in the process. *Muskrať's* logic, however, may be well applied in the remainder of the elaboration.

Article 113's first category of jurisdiction on the basis of privileged applicants is one that purports to control the compatibility of legislation and other acts with the constitution. Control of compatibility, in this respect, is one which must appear in a controversy between at least two parties. For example, Article 113(2) authorizes the President of the Republic to request CCK to control the compatibility of laws with the constitution. In this regard, the President and the Assembly would be the two opposing parties. While the President must make the case for the "unconstitutionality" of the law, the Assembly would have to present arguments defending the constitutionality of that law. The "controversy" would be on whether the law is constitutional. In this respect, the President of the Republic cannot merely refer a law for compatibility control without presenting a view that questions its constitutionality—one that argues that the law in question is deemed by him as unconstitutional. Should the referral make no reference to an actual controversy, the case would, as per *CEC*, routinely be deemed as inadmissible. In this regard, the controversy which must be claimed by the referring party is one which contests the constitutionality of the attacked act, the contrary would result in the case being inadmissible. The second category of jurisdiction, in the same vein, is one that purports to control the compatibility of certain situations, arising out of the application of the law, with the constitution. In the view of *CEC*, the referring party must make the case for a constitutional controversy at the level of behavior, namely, a controversy in the factual application of the constitutional norm. Similarly, a controversy needs to also be presented in the preliminary reference procedure, which we identified in the fourth category above. The third category of jurisdiction is the only one which stands in the premise of non-controversy due to its preemptive nature, though even in that case the submission of the draft-amendment to the CCK should be made in respect to controlling whether or not it is compatible with Chapter II of the Constitution. The fourth category of issues is also one which requires a controversy, because the incidental control of a law could be triggered only after the judge or regular court is in doubt about the constitutionality of a law on which the case before it is based. That definitely requires that the judge or regular court put, at the center of the call to control, the constitutionality of the facts of the case before it, which make the law disputable from a constitutionality perspective.

E. The Influence of *CEC* in the Future Jurisprudence of CCK

CEC will likely affect the nature of CCK's intervention in the interpretation of the constitution. Of immediate consequence was the *EULEX* case, initially referred as an advisory reference question

and later repacked as a conflict of competence case. In *EULEX*, CCK confidently affirmed the CEC standard: It called the case inadmissible because the President of the Republic did not prove the existence of a controversy.⁶³ Lack of controversy was evidenced by the fact that there was no specific claim which would purport to call unconstitutional a certain situation which happened as a conflict of competence between the President of the Republic, the claimant, and the Assembly, the alleged respondent. A few other cases referred by privileged applicants were called inadmissible on the same basis.

That said, CEC will likely portray the CCK as primarily a passive interpreter of the Constitution, considering its self-restraint nature when reading its jurisdiction under Article 113. It marks a new period of development of constitutional jurisprudence where the Court does not play an activist role; rather, it chooses to implement an exhaustion policy on its interpretation. Cases need first to be drained by other institutional players to the level that they represent a controversy. Once that threshold is met, it will be only a limited number of players who could refer cases of constitutional review before the CCK. This passive reading of its jurisdiction will likely make the Court less worried about its public image because it will not need to intervene in the first place. Rather, its position in the sequence of intervention will remain last. It would not be called to interpret the Constitution without political players, primarily, but not only, having invested serious efforts to find a consensus on the proper meaning of an issue and having spent relatively high efforts to make the case for a controversy. The exhaustion policy will likely make the pool of arguments richer and the discourse around constitutional interpretation more pluralistic. The Court will only intervene once there are adverse parties who have, in essence, developed diverging concepts and interests on the same constitutional norm subject to interpretation. Constitutional rhetoric will thus be richer and more profound among privileged applicants, whereas the Court will have plenty of room to choose among alternative arguments rather than to invent their own. This will present the Court with fewer incoming cases in terms of numbers, but also with much wealthier and more factually clear acts and situations supported by opposite arguments. CEC will also influence the concept of the Court as an interpreter of the constitution. The Court will gradually transform its role from a sole interpreter to the final instance of interpretation—basically, the very textual attribution which it has been prescribed with in Article 112. It will mark an end to the preventive constitutional justice and restart the original mode on the premise of repressive jurisdiction.

This will undeniably mirror a more humble reading of the separation of powers principle.⁶⁴ Though the Court does not belong to any of the branches of government, its activist tone hindered the possibility for the regular judicial system to solve some of the issues at the level of lawfulness, or lawfulness in respect of an obligation deriving from the constitution. More room for the regular judiciary to resolve questions of lawfulness as a result of constitutional obligations will strengthen the perspective of regular judges on the application and interpretation of the constitution; the interpretation of the constitution will be given a chance of decentralization. It would also help the Court to better respect the functional significance of the three branches of government and make its intervention respectful of the government branches' ability to interdepend dynamically, rather than seek assistance from the Court at first chance.

F. Conclusion

This Article offers a systemic review of constitutional norms governing CCK's jurisdiction and specific landmark cases which invented, designated, and further developed its advisory

⁶³The Constitutional Court of Kosovo, Request for Assessment of the Conflict Among the Constitutional Competences of the President of the Republic of Kosovo and the Assembly of the Republic of Kosovo, as Defined in Article 113.3 (1) of the Constitution, Case No. KO131/18 (2019).

⁶⁴Berisha goes on to argue that this policy would also bring more respect to the principle of rule of law. See Berisha, *supra* note 17.

jurisdiction in cases when questions were posed by the President of the Republic or the Government, pursuant to Article 84(9) and Article 93(10). This Article concludes that, while both Article 84(9) and Article 93(10) have been construed as jurisdiction-conferring provisions by the CCK, there is little sense to recognize that status alongside the text of Article 113. Because the latter remains the only legal basis in the constitutional text providing for a full-fledged definition of terms and *locus standi* of applicants, it is concluded that it was not the intent of the Constitution to tolerate an advisory jurisdiction in the form developed by the CCK in *Qeska*, *PMN*, and *AP SMA*.

Regarding the nature of the advisory jurisdiction, this Article concludes that the three landmark cases examined above follow an indeterminate, often inaccurate and inconsistent definition of when the CCK can be involved in an advisory function. While almost each of them comes up with a new shape of limits/jurisdiction for the CCK, all of them intend to legitimize the fact that advisory questions are tolerated because involvement of the CCK would be more helpful than harmful. CCK portrays its involvement from a pragmatic perspective, probably not opportunistic, intending to teach a lesson to other state authorities on how to better comply with the Constitution. While this intention may have been good and necessary from a sociological perspective, it definitely involved the Court in high-stake political debates and placed it in the position of “Mr. Fix It.” That role was definitely not envisaged for the Court, and such intensive and limitless involvement by the Court in constitutional troubles comes at a cost for its credibility. This is so because the Court would need to pay for the lack of willingness of political actors to at least try resolve questions and exhaust controversies before they are filed to the Court. I conclude that this sort of practice has left the Court with severe credibility consequences in the public discourse.

The CCK eventually abandoned its previous practice of advisory jurisdiction with the *CEC* case, and in doing so turned almost everything upside-down. High institutions in Kosovo will now lack a hand to assist them in resolving questions that, although artificially induced most of the time, bear high relevance for the functioning of the governing system. While *CEC* lacks a substantive argument on why the CCK alters one of its core interpretations on its sources of jurisdiction, it still takes a straightforward approach in confirming something that resembles at least the textual value of constitutional provisions, as presented in a systemic reading of Article 113. *CEC* manifests a major development that will likely predetermine a much more restrained attitude by the CCK. It would, in the same way, pull the Court from being simply an assistant to the President of the Republic and the government and give it more authoritative potential to intervene in cases where controversies have been drained and well elevated to a level that justifies the Court’s involvement.