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Making Sense of the Political Question Doctrine: The Case of Kosovo

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Abstract

Ever since it was announced in *Madison v. Marbury*, and articulated in *Baker v. Carr*, the political question doctrine that tends to exclude 'mega politics' from judicial check has been a controversial tool of judicial abstention. Not only that it is not universally applied, but it seems also to be losing significance even in countries of its usual influence due to extensive judicialization of 'mega politics,' which implies that there is no claim which the courts will not hear. Based on the judicialization of the Kosovo conflict, this paper shows why the doctrine deserves to be revived and even transplanted in jurisdictions outside its usual reach, particularly in disputes regarding real-life unilateral secession.

Keywords

political question doctrine – judicialization of mega politics – right to secession – unilateral secession – constitutional courts – Serbia – Kosovo

1 Introduction

The usual meaning of the political question doctrine implies judicial non-intervention in cases in which a constitution assigns to the political branches of government the final authority to resolve an issue, or in cases in which suitable criteria for judicial determination are missing.[1] The doctrine, born in American

1 *Baker v. Carr*, 369 U.S. 186, 210 (1962).

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constitutional jurisprudence under the separation of powers principle,[2] is not globally extended or accepted: for example, a leading principle in the German constitutional law presupposes that "[...]all questions arising under the Basic Law - even highly politicized matters of foreign affairs - are amenable to judicial resolution[...]".[3] Moreover, even in jurisdictions whose courts have developed the political question doctrine, the doctrine has always been under fire for its alleged inconsistency with the rule of law and a canonical view on the role of the courts within the constitutional system.[4] Finally, it has been suggested that the global expansion of judicial power, in particular, the process which Ran Hirschl has termed "judicialization of mega-politics,"[5]reflects the doctrine's demise.[6]Put differently, we live in a time when it is perceived that all questions, even those of a pure political flavor, such as a state building, can be handled by judges.

Consequently, it was only a matter of time until the long-lasting Serbia/Kosovo dispute would be, to paraphrase Tocqueville, resolved into a judicial question.[7] Thus, following Kosovo's unilateral declaration of independence, Serbia's counter-secessionist strategy included involvement of the International Court of Justice (ICJ), which was asked by the UN General Assembly to deliver an advisory opinion as to the legality of Kosovo's unilateral secession from

2 For the doctrine's history, see, e.g., Tara Leigh Grove, "The Lost History of the Political Question Doctrine," 90 (6) *New York University Law Review* (2015), 1908–1974.

3 Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, Durham, London, 2012), 196.

4 See, e.g., Louis Henkin, "Is There a 'Political Question' Doctrine?," 85 (5) *Yale Law Review* (1976), 597–625; Wayne McCormack, "The Justiciability Myth and the Concept of Law," 14 (3) *Hastings Constitutional Law Quarterly* (1987), 595–634; Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis," 75 (5) *Yale Law Journal* (1966), 517–596; Martin H. Redish, "Judicial Review and the 'Political Question'," 79 (5&6) *Northwestern University Law Review* (1984–1985), 1031–1061; Rebecca L. Brown, "When Political Questions Affect Individual Rights: The Other Nixon v. United States," 1993 *The Supreme Court Review* (1993),125–155.

5 Ran Hirschl, "The Judicialization of Politics", in Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds.), *The Oxford Handbook of Law and Politics* (OUP, Oxford, 2008), 119–141.

6 For a discussion, see Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" 11 *Annual Review of Political Science* (2008), 93–118; Mark Tushnet, "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine," 80 (4) *North Carolina Law Review* (2002), 1203–1235.

7 "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Alexis de Tocqueville, *Democracy in America*, (Kopf, New York, 1945, edited by Phillips Bradley), 2.

Serbia.[8] Although it could have declined to do so, the ICJ accepted jurisdiction, finding that the question asked was legal since "[a] question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question."[9] Soon afterwards, the Serbian Constitutional Court and the Constitutional Court in Kosovo faced requests to decide on the constitutionality of the Brussels Agreement, reached in the political dialogue between Belgrade and Pristina to normalize mutual relations.[10] The constitutional mandate of both constitutional courts to decide issues arising from the political negotiations aimed at overcoming the secessionist dispute was clearly susceptible from the separation of powers perspective, but the courts' jurisdiction was not challenged on this ground.

Before taking a closer look at these cases, it is worth mentioning that ever since it has become an international issue, the Kosovo conflict has regularly been discussed as a case of self-determination, the right to secession or humanitarian intervention.[11] At the same time, although courts, both international and national, have adjudicated different issues arising from the conflict, few studies have considered resolution of the conflict through the lenses of judicial decisions, and even if they did, they have focused exclusively on the international judicialization of the case.[12] Studies analyzing the propriety of

8 ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (22 July 2010), *I.C.J. Reports 2010*, 403. (Hereafter: the Kosovo Advisory Opinion).

9 *Ibid.*, para. 25.

10 The Constitutional Court of the Republic of Serbia, Conclusion no. IUo-247/2013, 10 December 2015, *Official Gazette RS*, 13/15; Constitutional Court in Kosovo, Case No. KO 95/13, Judgment of 9 September 2013 and Case No. Ko 130/15, Judgment of 23 December 2015.

11 See, e.g., Rob Dickinson, "The Global Reach and Limitations of Self-Determination," 20 (2) *Cardozo Journal of International and Comparative Law* (2012), 367–398; Peter Hilpold, "The Kosovo Case and International Law: Looking for Applicable Theories," 8(1) *Chinese Journal of International Law* (2009), 47–61; Daniel Fierstein, "Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications," 26 (2) *Boston University International Law Journal* (2008), 417–442; Nico Krisch, "Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo,"13(1) *European Journal of International Law* (2002), 323–335; A.P.V. Rogers, "Humanitarian Intervention and International Law," 27(3) *Harvard Journal of Law and Public Policy* (2004), 725–736.

12 See, e.g., Marko Milanović and Michael Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion*, (OUP, Oxford, 2015); Richard Falk, "The Kosovo Advisory Opinion: Conflict Resolution and Precedent,"105(1) *American Journal of International Law* (2011), 50–60; Timothy William Waters, "Misplaced Boldness: The Avoidance of Substance in the International Court of Justice's Kosovo Opinion," 23(2) *Duke Journal of Comparative and International Law* (2013), 267–333; Ralph Wilde, "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo",105(2) *American Journal of International Law* (2011), 301–307; Maurizio Arcari and Louis Balmond (eds.), *Questions*

conflict judicialization in the first place, which would approach the dispute from the political question doctrine, are notably missing, even though the effects of judicial decisions are rather modest: judicial interventions have neither contributed to resolving the conflict, nor influenced political leaders to change their initial positions. On the contrary, resolution of the conflict seems to be much farther away than ever before.

The article draws on the Kosovo example to show that the courts' increased involvement in resolving 'mega-political' controversies in general, and those arising from a real-world secessionist dispute in particular, frustrate rather than facilitate conflict resolution and make the separation of powers principle vulnerable. I will demonstrate that in disputes in which unilateral secession has already happened, judicial intervention does not bring the conflict closer to an end because the courts are prone either to take a case and avoid the substance, or to deliver decisions contrary to the solutions already achieved through international conflict resolution, but in line with established national meta-narratives. Based on the Kosovo example, I will explain why a general presumption that (constitutional) courts exist to decide and not to evade constitutional issues[13] might work against rather than in favor of the separation of powers principle. I intend to show that the executive branch involved in resolving a secessionist dispute will allow the courts to intrude into its areas of competence whenever it is politically expedient to do so, notwithstanding the properly limited judicial role in state formation. Finally, I will claim that although neither of the courts involved in the Kosovo conflict have applied the political question doctrine as a tool to decline deciding on cases, nothing prevented them from doing so for the first time, because the doctrine would have helped them to reach the best result within their mandate based on the separation of powers.

After the Introduction, this article proceeds in six parts. Part 2 sets the inquiry in context by reviewing the rise of judicialization of 'mega-politics' and the connotations of the political question doctrine. Part 3 offers a brief history of the Kosovo conflict. Parts 4 and 5 explain the courts' decisions as well as their ramifications. Part 6 juxtaposes judicialization of the Kosovo dispute with similar comparative judicial interventions. Part 7 concludes by underscoring why judicial non-interference in cases with a 'mega political' flavor in general, and in those arising from real-life secessionist claims in particular, is in line with the principles of constitutional democracy.

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de droit international autour de l'avis consultatif de la Cour internationale de Justice sur le Kosovo, (Giuffré, Milano, 2011).

13 Herman Schwartz, "The New East European Constitutional Court,"13(4) *Michigan Journal of International Law* (1992), 741–785, at 752.

2 'Mega-Politics' in Courtrooms: Whether and How Judges Decide

The American best-selling constitutional product is judicial (constitutional) review. Before World War I, apart from the USA, it was only Norway that had the court empowered to exercise judicial review.[14]Today, democracy is customarily shaped by what courts decide to say – 83% of valid constitutions envisage judicial review in one way or another.[15]Moreover, the courts are empowered to interpret what is deemed to be fundamental law, not only in countries traditionally associated with judicial review, such as federal, post-conflict and post-authoritarian countries, but also in stable parliamentary democracies, traditionally coupled with legislative supremacy.[16]It might seem, therefore, right to conclude that a democracy short of judicial review is defective.[17]

What fascinates here is not only the prevalence of judicial power. Equally appealing is the broad dimension of its scope: worldwide, from abortion to equality, from same-sex marriage to trade commerce, from education to immigration, from criminal justice to environmental protection, from the right to die to the right to be forgotten, hardly any issue is left unchecked by the courts. The most common reason to justify the rise of judicial review is protection of individual rights. However, the global expansion of judicial review is not only discernible from the rights issue. The judicial check now encompasses 'judicialization of mega-politics': issues like the right to secede, electoral outcomes, regime change, war-making, restorative justice, collective identity, core executive prerogatives in foreign affairs, national security and fiscal policy, are generally no longer untouchable by the courts.[18]

Judicialization of 'mega-politics,' central to this discussion, provokes many lurking questions. First, there is the issue of whether all questions arising under the constitution are amenable to judicial resolution. Second, although there is hardly any political issue which is not, as Tocqueville claimed, sooner or later resolved into a judicial question, it is questionable whether Tocqueville's thesis

14 Carlo Guarneri and Patrizia Pederzoli, *From Democracy to Juristocracy? The Power of Judges: A Comparative Study of Courts and Democracy*, (OUP, Oxford, 2002, C. A. Thomas, English editor), 135.

15 Tom Ginsburg and Mila Versteeg, "Why do Countries Adopt Constitutional Review?," 30 (3) *Journal of Law, Economics and Organization* (2014), 587–622, at 587.

16 See Stephen Gardbaum, "Separation of Powers and the Growth of Judicial Review in Established Democracies (Or Why has the Model of Legislative Supremacy Mostly been Withdrawn from Sale?)," 62(3) *American Journal of Comparative Law* (2014), 613–639.

17 Doreen Lustig and Joseph H. H. Weiler,"Judicial Review in the Contemporary World: Retrospective and Prospective," 16 (2) *International Constitutional Law Review* (2018),315–372, at 316.

18 Hirschl, *op.cit.* note 6, 94.

is confirmed whenever a political issue comes on the judicial agenda, or only when a judicial decision solves a political question in a way that influences political controversy. Third, even if a dispute is normatively justiciable, the issue is whether it is institutionally justiciable: in other words, in cases with a 'mega political' flavor, do courts really have the best or final answers or, from a democracy perspective, would their best decision be to leave it to political institutions to decide the case? A final related issue is whether democracy is still operable, or the judicialization of 'mega-politics' symbolizes a transition from democracy to 'juristocracy.'

The purpose of this article is not to answer all these questions. Instead, I offer here three particular claims that will prove useful later on.

The first and the simplest is that two different approaches to the separation of powers explain (non) acceptability of judicial interference in resolving 'mega political' issues. In one view, the separation of powers justifies judicial review on all occasions, even when the act of a government is political "since it ensures that every branch of the government acts lawfully within its sphere, thus guaranteeing the separation of powers."[19] Under this view, endorsed by Aharon Barak, even going to war or making peace are justiciable issues because "where is a legal norm, there is legal criteria that operate the norm."[20] Moreover, not only that every issue is normatively justiciable, but every issue is also institutionally justiciable: although political institutions should decide cases of a political nature, respect for the law requires their consideration to be checked by the courts, because nothing in a democracy can justify their decisions contrary to the constitutional or statutory law.[21]

On the practical level, even if their dominant position confirms this view, the courts do achieve different results. For example, the Supreme Court of Canada[22] and the German Federal Constitutional Court, in principle, do not avoid deciding cases involving 'mega politics.'[23] As already mentioned, "all issues arising under the Basic Law are amenable to a judicial resolution

19 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, Princeton, Oxford, 2008), 185.

20 *Ibid.*, 182.

21 *Ibid.*, 186.

22 See, e.g., Peter W. Hogg, *Constitutional Law of Canada* (4th ed.; Carswell, Scarborough, Ontario, 1997), 810; Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Thomson Reuters Canada Limited, Toronto, 2012).

23 See, e.g., Kommers and Miller, *op.cit.* note 3, 189–215; see, also, Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*(Princeton University Press, Princeton, 1992),117–125.

if properly initiated under one of the various procedures [...]"[24] Yet, what is discernible from judicial practice is the German Court's language of great restraint in foreign and military affairs cases. Besides, when checking whether under the constitution political institutions had the power to decide what they had decided, the German Federal Constitutional Court declared that flexibility and discretion rested on the political institutions regarding decision-making in areas of foreign affairs.[25] Although it supports judicial monopoly in interpreting the Basic Law, the Court will not intervene when it finds the issue normatively non-justiciable, that is, when it lacks legally manageable criteria for deciding the issue, as it held in the *Cruise Missile Case*.[26] As a result, judicial deference to the political branches of government in cases involving pure politics typically leaves a case to non-judicial resolution, which is precisely what the political question doctrine advocates. To this doctrine, I now turn.

In contrast to the thesis that there is no issue that can bar judicial review is the thinking that the courts should silence themselves in cases of complex political controversies. Born in *Marbury v. Madison*,[27] but articulated much later in *Baker v. Carr*, the political question doctrine, accepted mostly by the US federal courts, exemplifies this view and advocates judicial non-interference in purely political matters. While the very existence of the political question doctrine is –even in the US – theoretically disputed, in practice the doctrine continues to live on: the US Supreme Court has narrowed its application,[28] but recent lower court practice contravenes the Supreme Court position.[29] The political question doctrine is followed in Israel with some transformations, as well as in the UK, albeit without specific doctrinalization.[30] The doctrine also made its way into some other parts of the common law world.[31] Finally, some

24 Kommers and Miller, *op.cit.* note 3,196.

25 See, e.g., *East -West Basic Treaty Case*, BVerfGE 36, 1 2 BvF 1/73 (1973); *Rudolf Hess Case*, 55 BVerfGE 349 (1980). However, the Court did intervene in military affairs cases but only to reaffirm the separation of powers principle and confirm that the Parliament alone has a constitutional right to decide on military deployments. See *AWACS II Case*, 121 BVerfGE 135 (2008).

26 *The Cruise Missile Case*, 66 BVerfGE 39 (1983).

27 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

28 *Zivotofsky ex Rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, (2012).

29 *Smith v. Obama*, 17 F. Supp. 3d 283 (D.D.C. 2016).

30 For more see Margit Cohn, "Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems," 59(3) *The American Journal of Comparative Law* (2011), 675–713.

31 See in Mtendeweka Owen Mhango, *Justiciability of Political Questions in South Africa: A Comparative Analysis* (Eleven International Publishing, The Hague, 2019).

aspects of the political question doctrine can be tracked down in European Court of Human Rights jurisprudence, albeit without specific reference.[32]

In the ever-ongoing debate about the doctrine, many try to elaborate its inevitability from the perspective of expedience. Alexander Bickel's justification of the doctrine, as one of his devices for judicial non-intervention, suggests that courts can choose to do nothing whenever they sense a lack of capacity, when they are not adequate vehicles for articulating principled resolution and when there is anxiety that their judgment will not be ignored.[33] The foundation of the political question doctrine in a mature democracy, Bickel claims, is "the self-doubt of an institution which is electorally irresponsible and has no earth to drown strength from."[34] In addition, there is a forgotten argument by Peter Mulhern that the doctrine springs from a democratic system of the government in which all three branches of government share responsibility for interpreting the constitution.[35] That argument rebuffs the view that the political question doctrine undermines the rule of law as the doctrine enables this shared responsibility according to constitutional arrangements.[36]

This is not the place for a full discussion of the political question doctrine. However, one should keep in mind that, by declining to intervene, courts do not lose their monopoly on interpreting the constitution. On the contrary, the courts retain the power to determine who decides on constitutional issues – in most cases they will claim their supremacy to rule on constitutional issues, while in a minority of cases, whenever separation of powers requires it, they will find either that the issue is allocated to political institutions for a decision or that they lack the capacity to decide.[37] Accordingly, by applying the political question doctrine the courts respect both the separation of powers principle and the rule of law.

My second claim concerns Tocqueville's position that any political issue is sooner or later resolved into a judicial question. In my opinion, this thesis

32 See ECtHR, *Markovic and Others v. Italy*, ECtHR Judgment (14 December 2006) Appl. No.1398/03; for a detailed discussion, see Julie Hunter and András Sajó, "Applications of the Political Question Doctrine at the European Court of Human Rights," 8 (3) *Journal of Parliamentary and Political Law* (2014), 627–637.

33 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nded. Yale University Press, New Haven, London, 1986), 184.

34 *Ibid.*

35 Peter Mulhern, "In Defense of the Political Question Doctrine," 137 (1) *University of Pennsylvania Law Review*, (1988), 97–176, at 175–176.

36 *Ibid.*

37 Tara Leigh Grove argues that the doctrine serves as a source of judicial power, not as a mechanism of judicial restraint. See Leigh Grove, *op.cit.* note 2, 1960–1970.

can be understood to imply two different things: (a) that a political question is resolved into a judicial question whenever a court is asked to resolve a political dispute or (b) that a political question is resolved into a judicial question only when a delivered judicial decision has actually influenced political controversy.

If the former is true, then allegedly the issue whether international law prohibits the use of nuclear weapons was resolved into a judicial question, since it was the subject of an Advisory Opinion delivered by the ICJ in 1996.[38] Yet, twenty-three years afterwards, there is still no clear and explicit rule under international law against either use or possession of such weapons. Adherence to the UN Treaty on the Prohibition of Nuclear Weapons, adopted in 2017, is going rather slowly, with 37 out of 50 necessary state ratifications, and with none of the nuclear-armed countries prepared to join.[39] Similarly, if the focus is on the judicial agenda and not on the effects of judicial interventions, then one may say that Israeli/Palestine West Bank Wall or Barrier Conflict was resolved into a judicial question because the ICJ deliberated the issue in 2004.[40] However, 15 years after the ICJ found Israel in violation of international law and ordered Israel to stop building the Barrier and to dismantle the section already completed, Israel has not only continued to build the Wall, but has built two new walls over the past 15 years.[41] Moreover, it seems that in the meantime, building a border wall has become a favorite model in preventing forced migration, although such a measure seriously contravenes international human rights law.

Finally, the crucial point in assessing the rising power of the courts in resolving 'mega political' issues is that influential political stakeholders have promoted judicialization of 'mega-politics.'[42] There are different reasons why politicians choose to transfer hot political issues to the courts, and usually, they are context-specific. Nonetheless, in politically controversial cases politicians most often decide to delegate decision-making authority to the courts either to secure public legitimacy for their decisions, to share responsibility in hard cases, to obstruct and harass the ruling majority, or simply to attract

38 ICJ, The Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in an Armed Conflict, Advisory Opinion (8 July 1966), *I.C.J Reports 1996*, 66.

39 See at https://www.un.org/disarmament/wmd/nuclear/tpnw/.

40 ICJ, Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion (9 July 2004), *I.C.J. Reports 2004*, 136.

41 Netta Ahituv,"15 Years of Separation: The Palestine's Cut Off from Jerusalem by the Wall," *Haaretz*, (10 May 2018), available at https://www.haaretz.com/israel news/.premium.MAGAZINE-15-years-of-separation-palestinians-cut-off-from-jerusalem-by-a-wall-1.5888001.

42 Hirschl, *op.cit.* note 6, 113.

public attention regardless of the outcome of the judicial intervention.[43] Paradoxically, instead of being a separation of powers control mechanism, the courts have become more and more an enforcement mechanism for the political branches of government.

It is against that background that this article attempts to make sense of the political question doctrine in judicialization of the Kosovo conflict.

3 A Brief History of the Kosovo Conflict

To explain why the courts should have silenced themselves about the Kosovo dispute, I have first to shed light on the very conflict itself. In a nutshell, the political dispute between Serbia and Kosovo revolves around the issue of who has an exclusive right to exercise sovereignty over Kosovo.

Serbia has put the matter in the preamble of its 2006 Constitution by reaffirming that Kosovo is an integral part of its territory. To seal the issue, the preamble also creates enforceable law by issuing constitutional obligations for all state bodies to uphold and protect state interests in Kosovo in all internal and foreign political affairs. In an equally straightforward manner, Article 1 of Kosovo's Constitution defines Kosovo as an independent, sovereign, democratic, unique, and indivisible state.[44] Having in mind that the territory has been placed under UN administration, albeit today with a significantly limited mandate,[45] Resolution 1244 of the UN Security Council, passed shortly after the NATO intervention in 1999, also speaks about sovereignty rights over Kosovo. Under the 1244 Resolution, which is still in force, Kosovo is a part of what was then the Federal Republic of Yugoslavia (the FRY), whose sovereignty and territorial integrity the 1244 Resolution reaffirms, together with previous calls for substantial autonomy and meaningful self-administration for Kosovo. However, Serbia and Kosovo read the Resolution differently. Kosovo, employing a plain meaning rule, asserts that the Resolution does not mention either Serbia or Kosovo within Serbia.[46] By contrast, Serbia considers that the 1244 Resolution must be read in conjunction with an internationally recognized

43 *Ibid.*,106–108.

44 For more details on the Constitution of Kosovo see Joseph Marko, "The New Kosovo Constitution in a Regional Comparative Perspective," 33 (4) *Review of Central and East European Law* (2008), 437–450.

45 For more details, see UN Mission in Kosovo, at https://unmik.unmissions.org/mandate.

46 Enver Hasani, the former president of the Constitutional Court in Kosovo, in the interview for Slobodna Evropa (25 October 2008), available at https://www.slobodnaevropa.org/a/1332722.html.

fact, that after the dissolution of the FRY, it was Serbia who was a successor state, meaning that all international instruments pertaining to the FRY, including the 1244 Resolution, concerned and applied in their entirety to Serbia as the successor.[47]

The conflicting sovereignty claims stream from the context in which Kosovo's knot is leashed, including its toponymic, historical, political, and demographic aspects.

First comes the issue of the name. The territory, called in English Kosovo, the Serbs officially name "Kosovo and Metohija" and unofficially "Kosmet," which is the abbreviation of the former.[48] The territory under dispute also has its Albanian name - the Republic of Kosova.

The "who was here first" argument is the second problem that tied the knot. The Serbs claim that Kosovo became a part of the first Serbian state as early as its foundation in the 12th century, and its political, religious and cultural center in the 14th century.[49] The Albanians argue that they had inhabited Kosovo much earlier - even long before the Romans, meaning that they were already there when the Serbs, as part of the Slavic tribes, arrived in the middle of the sixth century.[50]

The issue of Kosovo's political identity, however, lies in the heart of Kosovo's knot. Before it unilaterally declared independence from Serbia in 2008, Kosovo never had a separate political identity. It was part of the medieval Serbian state, the Ottoman Empire, the Kingdom of Serbia, and finally, as a Serbian region or province, a part of three ex-Yugoslav states.

What makes Kosovo Serbian is history in the first place. The fact that it was part of Serbia during the golden age of the medieval Serbian state molded the contemporary Serbian nation.[51] Additionally, many religious and cultural sites from that time symbolize the center of the Serbian spiritual and cultural heritage even today.

When the Ottoman Empire occupied Serbia in 1445, Kosovo came under Turkish rule for almost five centuries, until 1913.Throughout Turkish rule, the

47 Art. 60 (4) of the Constitutional Charter of the former State Union of Serbia and Montenegro reads: "Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor."

48 The members of the extremist parties in Serbia frequently use this abbreviation.

49 Stevan, K. Pavlowitch: *Serbia: The History Behind the Name* (Hurst & Company, London, 2002), 2–7.

50 Tim Judah, *Kosovo: What Everyone Needs to Know* (OUP, Oxford, 2008), 18.

51 For more see, e.g., Ivan Čolović, *Smrt na Kosovu Polju: istorija kosovskog mita* (XX vek, Beograd, 2016).

ethnic composition of Kosovo radically changed. At the very beginning of Turkish occupation, the majority of the population was Serbian, but later, in several waves, the Serbian population moved to the north, to the area of today's Serbia, Hungary, Bosnia and Herzegovina, and Croatia.[52] Throughout the same period, Albanians first resisted the Ottoman conquest, but then later most of them converted to Islam.[53] After the migrations of the Serbs, the Albanians, with great support from the Turkish state, moved into depopulated Kosovo and made this area populated overwhelmingly by Albanians,[54] which is a fact that has not changed up to nowadays.

The Kingdom of Serbia, recognized as an independent country at the Berlin Congress in 1878, acquired Kosovo again in 1913.[55] After the First World War, Kosovo first became a part of the Kingdom of Serbs, Croats, and Slovenians, and soon afterwards a part of the first Yugoslav royal state, in which it was unofficially called 'an old Serbian territory.' Serbia again lost Kosovo during the Second World War, when it was a part of Italian-controlled Greater Albania, but recovered it in 1945, when Kosovo was integrated into the second Yugoslav state, first as a region within Serbia, and then from 1963 onwards, as its autonomous province, within borders it now possesses.[56]

The decentralization of the former Yugoslavia, initiated in 1974 with adoption of a new federal Constitution, largely explains present developments. Under the 1974 Yugoslav Constitution, Kosovo preserved the status of an autonomous province within Serbia, but acquired significant powers within the federal structure: in the Federal Assembly, its representatives were placed on an equal footing with representatives of the Republic, and were authorized to participate in the national legislative process even if the legislation was not to be implemented on its territory.[57] Kosovo also had its independent institutions in which the Albanian language became the principal language of governance. The provincial institutions could adopt provincial legislation and implement its internal policy without the consent of Serbia.[58] Moreover, in principle, Kosovo could wield a veto power over federal constitutional amendments[59] as well as

52 László Gulyás, "A Brief History of the Kosovo Conflict with Special Emphasis on the Period 1988–2008," 27 *Historia Actual Online* (2012), 141–150, at 141.

53 Ivo Banac, *The National Question in Yugoslavia: Origins, History, Politics* (Cornell University Press, Ithaca, London, 1988), 46.

54 *Ibid.*

55 Gulyás, *op.cit.* note 52,142.

56 *Ibid.*

57 Art. 298–305 of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia.

58 Art. 301 of the 1974 Constitution of the Socialist Autonomous Province of Kosovo.

59 Art. 398–400 of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia.

veto power in the Serbian Assembly.[60] Its status differed from the status of the former ex-Yugoslav republics only in one crucial aspect – unlike the republics, Kosovo had no constitutionally granted right to secede from Yugoslavia.[61] Such an atypical constitutional arrangement, which made the province of Kosovo autonomous beyond the level traditionally reserved for regional or provincial entities, significantly tightened the already tight Kosovo knot.

Although many in Serbia claimed that the 1974 Constitution gave too much to the Albanians, not even broad political autonomy satisfied the Albanians, who, right after Tito's death, started to claim the status of a republic. Massive street demonstrations, arrests, tanks on the streets, special police force interventions, as well as a state of emergency marked the 1980s.[62] It was against this background that former Serbian president Slobodan Milošević emerged and, in 1990, with the adoption of the new Serbian Constitution, effectively stripped Kosovo of its autonomous status. Formally, the autonomous province was not abolished, but the mainstay of the 1990 Serbian Constitution was designed to secure transformation to a unitary state. During the 1990s Kosovo had neither legislative initiative nor administrative control over matters of its own concern. As a result, the Albanians started to build their own parallel institutions. From 1991 to 1998, Kosovo was governed officially through the Serbian state system, and unofficially, through a local Albanian system run by local Albanian politicians. The Albanians also left the Serbian state institutions and did not want to participate in national and local elections organized by the Serbian state, not even in 1992 when there was a window of opportunity to depose Milošević from a position of power.[63] It seems, therefore, right to conclude that it was not autonomy but its termination that drifted the Albanians towards independence.[64]

Radicalization of Albanian resistance, exemplified in the formation of the Kosovo Liberation Army (the KLA), added fuel to the fire: in 1998, military action was employed in the entire area of Kosovo.[65] The clash between the Serbian

60 Art. 427–428 of the 1974 Constitution of the Socialist Republic of Serbia.

61 General Principles, I, of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia.

62 Judah, *op.cit.* note 50, 57–58.

63 The Albanians refused to participate in the federal presidential elections in 1992 during the short-lived democratic government of Prime Minister Panić, who called on them to vote. For more, see the interview with Tibor Várady, former federal Minister of Justice in Márk Losoncz and Krisztina Rácz (eds.), *A vajdasági magyarok politikai eszmetörténete és önszerveződése 1989–1999* (L'Harmattan Könyvkiadó Kft., Budapest, 2018), 266.

64 Tibor Várady, "Minority Rights in the Successor States of the Former Yugoslavia", in Ferenc Glatz (ed.), *European Union, the Balkan Region and Hungary* (Europa Institut Budapest, Budapest, 2009), 113.

65 Judah, *op.cit.* note 50, 75–83.

forces and the KLA resulted in many atrocities committed against the Kosovo population. Thus, the Serbian forces used excessive force against the Albanian population, causing civilian deaths, forced disappearances, and damage to civilian property.[66] The Serbs and non-Albanians left the area or were ethnically cleansed.[67] International efforts to bring the clash to an end, including an internationally verified mission to Kosovo, failed.[68] What followed in 1999 was the NATO military intervention: without UN Security Council authorization, for 78 days NATO planes bombed selected targets in Serbia, including Kosovo.

The rest of the story is well-known: in the aftermath of NATO intervention, Kosovo was placed under UN administration, only to declare its independence unilaterally in 2008. Nonetheless, Kosovo is not yet totally free from international supervision: the UNMIK continues to implement its mandate in limited terms, the EU runs its mission aimed to build and monitor rule-of-law institutions, while as of 2016, the Specialist Chambers and the Specialist Prosecutor's Office, staffed by international judges and prosecutors and placed in the Hague, function officially as a part of the Kosovo justice system.

Finally, the solidity of Kosovo's knot can be explained in demographic terms as well. During the Yugoslav period, demography in Kosovo dramatically changed. In 1948, Serbs and Montenegrins formed 27.5% of the population, while Albanians 68.5%.[69] By 1991, the Albanian population had grown to 82.2%, while the Serbian and Montenegrin figure had dropped to 10.9 %.[70] According to the last census from 2011, out of the 1.7 million population of Kosovo, 92.2% are Albanians and 1.5 % Serbs.[71] The Serbs and the Albanians see the demographic changes through different lenses. The fact that between 1966 and 1980 the growth of the Albanian population was followed by their political, educational and economic privileges, Serbia explains with the existence of a *de facto* Albanian state within the Serbian borders. On the other hand, for Kosovo, demography made a new reality. Its unilateral declaration of independence well illustrates this point.

It was in this context that political actors in Serbia and Kosovo advanced the idea that in a highly judicialized word, the courts should have been the one that would decide on the Kosovo knot.

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66 For more see, e.g., "ICTY: The Kosovo Case, 1998–1999, How the Crimes in Kosovo were Investigated, Reconstructed and Prosecuted", *Interactive Narrative*, available at http://kosovo.sense-agency.com/.

67 Judah, *op.cit.* note 50, 82.

68 *Ibid.*, 83–87.

69 *Ibid.*, 59.

70 *Ibid.*

71 See at http://ask.rks-gov.net/media/4404/kosovo-in-figures-2017.pdf.

The ICJ was first asked to intervene and deliver an advisory opinion as to the legality of the unilateral declaration of independence. The Serbian Constitutional Court and the Constitutional Court in Kosovo faced requests to decide on the constitutionality of the Brussels Agreements, reached in the internationally supervised political dialogue between Belgrade and Pristina with the aim of normalizing relations between the two parties. While the ICJ accepted jurisdiction but decided to avoid the substance of the challenge, the Serbian Constitutional Court rejected jurisdiction with an explanation that favored the Serbian government's position. The Constitutional Court in Kosovo rejected the first challenge, but then accepted the second with open arms, and decided that it was not the time, to paraphrase Jefferson, for the dead hand of the past to loosen its grip on the living present. Consider the following.

4 Who Remembers the International Judicialization of the Kosovo Conflict?

After Kosovo unilaterally declared independence the underlying issue in the conflict became a million-dollar question of whether international law recognizes the right of a people to self-determination outside the colonial context and consequently allows secession. While some think that international law makes clear that no right to self-determination exists, in the sense of external independence, and therefore no general right to secession,[72] others claim that secession is not expressly regulated by international law[73] or that "secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."[74] In other words, there is a perception that in some cases international law explicitly prohibits secession, whereas in others, it creates the right to secession, while at best, international law neither prohibits nor creates the right to secession.[75]

When Serbia turned to the General Assembly to put the question to the ICJ, it hoped to obtain an opinion which would support its fight against the secession of Kosovo. Kosovo, on the other hand, expected to get explicit confirmation that it was entitled to exercise the right to self-determination and

72 Tom Ginsburg and Mila Versteeg, "From Catalonia to California: Secession in Constitutional Law," 70 (4) *Alabama Law Review* (2019), 923–985, at 934.

73 Waters, *op.cit.* note 12, 287.

74 James R. Crawford, *The Creation of States in International Law* (2nd ed. OUP, Oxford, 2006), 390; Marko Milanović, "Arguing the Kosovo Case," in Milanović and Wood (eds.), *op.cit.* note 12, 33.

75 Milanović, *op.cit.* note 74, 33.

therefore to secede from Serbia. However, after it received the question, the Court delivered a minimalist decision, and although it did not declare Kosovo's unilateral declaration of independence illegal in itself, it said nothing about the right to self-determination outside the colonial context, the relationship between the right to secession and territorial integrity, nor about recognition of a new unity by third states, all of which were underlying questions in the dispute.[76] Besides, the Court showed no interest in considering the allegations that international law recognizes a 'remedial right to secession' for oppressed peoples outside the colonial context.[77] Instead, in what Timothy Waters termed 'misplaced boldness,' the Court ruled that there was no general prohibition related to unilateral secession in international law and that the document by which Kosovo declared independence did not violate either international law, or Kosovo's Constitutional Framework, for its authors acted in private rather than in an official capacity.[78]

Substantial to this discussion is the issue whether the ICJ could have refrained from rendering an advisory opinion in the case of Kosovo by applying the political question doctrine. To recall, the first issue the ICJ has to determine regarding any request for an advisory opinion is the competence of the General Assembly or the Security Council to submit the request. Then comes the issue of judicial propriety even if conditions for ICJ jurisdiction are met.[79] Thus, according to Article 65 of its Statute, the ICJ 'may give an advisory opinion on any legal question,' which implies first, that the Court can refuse to give an opinion; and second, that the Court can follow the 'political question' route.

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76 The Kosovo Advisory Opinion, *op.cit.* note 8, paras. 79–83.

77 For more on the right to 'remedial secession' see, e.g., Evan M. Brewer, "To Break Free From Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion," 45(1) *Vanderbilt Journal of Transnational Law* (2012), 245–292; Milena Sterio, "Self-Determination and Secession under International Law: the New Framework," 21 (2) ILSA *Journal of International and Comparative Law* (2015), 293–306.

78 The Kosovo Advisory Opinion, *op.cit.* note 8, para. 109. While this part of the ICJ holding is extremely problematic and requires a thorough discussion beyond the purpose of this article, Sujit Choudhry argues that the ICJ, in fact, recognized that "In asserting constituent power, these representatives of the people of Kosovo were engaging in the act of constitution-making through secession, giving rise to a new constitutional order." See Sujit Choudhry, "Secession and Post-Sovereign Constitution-Making after 1989: Catalonia, Kosovo, and Quebec,"17 (2) *International Journal of Constitutional Law* (2019), 461–469, at 466.

79 Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford and Portland Oregon, 2004), 43.

One may argue that, unlike in the context of constitutional democracies, the United Nations does not function under a genuine separation of powers principle central to the concerns of the political question doctrine. However, the fact is that executive and legislative powers are unevenly divided between the General Assembly and the Security Council.[80] While the ICJ has no right *per se* to decide on the legality of acts adopted by the political UN organs, with its powers to render advisory opinions at the request of UN bodies and to resolve disputes between states based on their consent, it nevertheless functions as the principal judicial body in the UN system.[81] Despite some opposing views,[82] and albeit some imperfections, the relationship among the main UN bodies can be framed in terms of separation of powers.[83]As Erika de Wet explains "the absence of a strict separation of powers [in the UN System] would not mean that there is no separation at all."[84]

In any case, the wording of Article 65 of the ICJ Statute allows the ICJ to decline to render a requested opinion if it finds that the case involves an issue which is not a legal one. The ICJ took a firm position that only for compelling reasons may it decline to give a requested opinion.[85] This has so far never happened, not even in cases which concerned binding resolutions of the Security Council.[86] The ICJ 's understanding, namely that any question posed in terms of law and raising problems of international law appears to be a legal one, explains this state of affairs.[87] Although there is much to be said on behalf

80 Nigel D. White, *The Law of International Organizations* (2nd ed. Manchester University Press, Manchester, 2005), 21.

81 *Ibid.*

82 In the *Tadic* case, the International Criminal Tribunal for the former Yugoslavia, concluded that the United Nations was not based on the separation of powers principle. See *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal and Jurisdiction, Case No. IT–94–1–T, October 1995, Appeals Chamber, para. 43.

83 See e.g. White, *op.cit.* note 80, 21–23; De Wet, *op.cit.* note 79, 109–116; While admitting that there is no clear separation of powers principle in the international legal order, Jed Odermatt nevertheless theorizes the avoidance of the ICJ to render advisory opinions in terms of political question doctrine. See Jed Odermatt, "Patterns of Avoidance: Political Questions before International Courts,"14(2) *International Journal of Law in Context* (2018), 227–229.

84 De Wet, *op.cit.* note 79, 116.

85 See, e.g., ICJ, Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion (23 October 1956) *I.C.J. Reports 1956*, 13; The Construction Wall Advisory Opinion, *op.cit.* note 40; The Kosovo Advisory Opinion, *op.cit.* note 8, para.30.

86 For a discussion see De Wet, *op.cit.* note 79, 47–48, 54.

87 The Kosovo Advisory Opinion, *op.cit.* note 8, para. 25.

of this view, here it suffices to say that the ICJ has been heavily criticized for taking this approach, both in scholarly literature and in dissenting opinions of its own judges.[88] For example, in the *Kosovo Advisory Opinion Case*, four judges found the case to be a recipe for the ICJ to refuse to answer the question on the grounds of the separation of powers principle that functions in the UN system and for political question considerations.

Thus, for Justices Tomka and Skotnikov, by answering the question, the ICJ would have to decide the issue as in exclusive competence of the Security Council. Because the Security Council was actively seized of the matter, Justice Tomka argued that "the majority's answer given to the question put by the General Assembly prejudices the determination, still to be made by the Security Council, on the conformity *vel non* of the declaration with resolution 1244[...]".[89] Justice Skotnikov concluded that:

> "[...]even if a determination made by the Court were correct in the purely legal sense [...]it may still not be the right determination[...]When the Court makes determination as to the compatibility of the UDI with resolution 1244 – a determination central to the régime established for Kosovo by the Security Council – without a request from the Council, it substitutes itself for the Security Council."[90]

In his separate opinion, Justice Keith emphasized that the General Assembly lacked an interest in asking the question for it was the Security Council that had an almost exclusive role in dealing with the Kosovo conflict. Therefore,

> "[...]the Court should address that issue of the appropriateness of an organ requesting an opinion if the request is essentially concerned with the actual exercise of special powers by another organ under the Charter, in relation to the matter which is the subject of the request."[91]

Considering the propriety of the ICJ to give an opinion, Justice Bennouna took the political question doctrine route and pointed out that the ICJ was asked to consider an essentially political question, incompatible with its status as a

88 For a scholarly debate see, e.g., Anthony Aust, "Advisory Opinions," 1 (1) *Journal of International Dispute Settlement* (2010), 123–151; DW Greig, "The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States", 15 (2&3) *International & Comparative Law Quarterly* (1966),325–368; De Wet, *op.cit.* note 79, 48–54.

89 The Kosovo Advisory Opinion, *op.cit.* note 8, Separate Opinion of Justice Tomka, para. 8.

90 *Ibid.*, Separate Opinion of Justice Skotnikov, para. 9.

91 *Ibid.*, Separate Opinion of Justice Keith, para. 6.

judicial organ and not capable of being resolved via legal standards.[92] For him, as the ICJ got in a position to assess and interfere in the situation in Kosovo:

> "[...]the Court cannot pronounce on the legality of the declaration of independence without interfering in the political process of maintaining peace established by the Security Council some ten years ago, which that organ has been unable to bring to a conclusion."[93]

However, the majority of judges seized the opportunity of being asked to guide the General Assembly in the matter of the Kosovo dispute, to reinforce the ICJ 's institutional position within the UN framework. Thus, building upon its previous case law, the ICJ recalled that its discretion whether or not to respond to a request for an advisory opinion existed to protect its role as the principal judicial organ of the United Nations and the integrity of judicial function.[94] Accordingly, it is not hard to conclude that the ICJ decided to provide a judicial perspective on the Kosovo dispute to reaffirm the Court's participation in the activities of the United Nations.

Now, the ICJ 's findings demonstrate that the Kosovo Advisory Opinion was not drafted to serve either law or politics. First, it added nothing to the law of secession. Second, the Court's option to take the case and say nothing made the judicial branch irrelevant in resolving the dispute between Belgrade and Pristina. This, in fact, was announced by the parties involved in the Kosovo dispute in particular before the ICJ, when they declared that whatever the opinion was, it would not change their position concerning the declaration of independence.[95] Today's perspective confirms that in the aftermath of the ICJ Opinion, not only have the Serbian and Kosovar narratives remained the same, but the tensions caused by the unilateral declaration of independence were not reduced. The ICJ 's conclusion in previous cases, namely, that the potential non-effect of its opinion to dispute resolution cannot be regarded as a compelling reason not to give an opinion,[96] is acceptable only if its opinion at least clarifies international law itself and, thus, provides the UN body with advice on the legal principles applicable to the matter under dispute. However, the Kosovo Advisory Opinion neither has precedential value in the sense of clarifying international law on secession, nor has it contributed to a solution of the Kosovo conflict. Third, I

92 *Ibid.*, Separate Opinion of Justice Bennouna, paras.13–14.

93 *Ibid.*, para.16.

94 The Kosovo Advisory Opinion, *op.cit.* note 8, para. 29.

95 *Ibid.*, para. 21.

96 See, e.g., The Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in an Armed Conflict, *op.cit.* note 38, para.17.

would subscribe to the opinion of the dissenters, namely that it was not the job of the ICJ to assess the accordance of Kosovo's declaration of independence with international law, but, rather, the job of the Security Council alone, which in fact and in any case did not ask the ICJ to give its opinion on the question. In sum, the Court could have refused the request for an opinion in the Kosovo case following the political question route both on principled and pragmatic grounds.

Putting the non-effects of the Kosovo Advisory Opinion to one side, true, the Opinion had adverse practical implications. Thus, in the conflict between Russia and Ukraine, which soon followed, the Advisory Opinion weakened the anti-secessionist position of the states opposing Russia's annexation of Crimea on the grounds that Kosovo was a *sui generis* case.[97] Pitted against such an argument, Russian president Putin's claim that Kosovo and Crimea belonged to the same category was, in fact, defensible.[98] If secession stands for the 'formal withdrawal from a central authority by a member unit',[99] then surely the appeal to the *sui generis* nature of the Kosovo case hardly makes any sense.[100] Although in every case of secession, from Texas to Quebec, from Catalonia to Crimea, from Kosovo to Scotland, circumstances and motivations are different, the phenomenon of separation is the same. Therefore, when Putin used the Kosovo Advisory Opinion to justify the annexation of Crimea, despite his misinterpretation and despite Russia's refusal to recognize Kosovo and its military suppression of Chechnya's right to self-determination, the appeal of his claim, as already observed, was undeniable.[101]

Finally, the ramifications of the Kosovo Advisory Opinion confirm Anthony Aust's claim that the Court should consider refraining from giving an advisory opinion in cases of long-standing political controversy capable of being

97 Paul Linden Retek and Evan Brewer, "Why Crimea is not Kosovo, and Why it Matters," *Open Democracy* (18 March 2014) available at https://www.opendemocracy.net/en/odr/crimea-justified-kosovo-ruling-icj-2008-russia-putin/.

98 For more see Marko Milanović and Michael Wood, "Introduction," in Milanović and Wood (eds.), *op.cit.* note 12, 4.

99 John R. Wood, "Secession: A Comparative Analytical Framework," 14 (1) *Canadian Journal of Political Science* (1981), 107–134, at 110.

100 For a discussion on the *sui generis* nature of the Kosovo case, see, e.g., Miodrag A. Jovanović, *Kosovo i Metohija: Četiri pravno/politička eseja*, (Pravni fakultet Univerziteta u Beogradu, Beograd, 2013), 49–80; see, also, Anne Peters, "Has the Advisory Opinion's finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?", in Milanović and Wood (eds.), *op.cit.* note 12, 291–313.

101 Even though the ICJ never said that Kosovo's separation from Serbia was legitimate, Putin used the rhetoric of secession to merge Kosovo and Crimea and claim that as generally established in the Kosovo Advisory Opinion, no permission from a country's central authority was needed in the case of Crimea. See in Milanović and Wood, *op.cit.* note 98, 4.

resolved only through political negotiations, no matter how helpful an advisory opinion might be.[102] However, one may argue that it is questionable whether leaving resolution of the Kosovo dispute to the political organs of the UN, and especially the Security Council, might yield effective results due to the veto power of the influential states which might side either with Serbia (e.g., Russia and China) or Kosovo (e.g., the United States and Great Britain). Even so, one should have in mind that the long-lasting Kosovo dispute is even less suitable for being resolved by judicial power, and in particular not by an advisory opinion, because an advisory opinion, no matter how influential might be, is not legally binding and, therefore, is unlikely to prove effective.[103]

5 Normalization of Relations between Belgrade and Pristina in the Age of Judicial Power

In 2013, after often exhausting talks driven and supervised by the EU, Belgrade and Pristina signed the "First Agreement on Principles Governing the Normalization of Relations" in Brussels.[104] The key provisions of the Agreement concern the governance of the northern part of Kosovo, which is inhabited almost exclusively by Serbs, who rejected Kosovo's independence and have since lived in separation from the rest of Kosovo. Under the First Brussels Agreement, Belgrade and Pristina agreed that the northern part of Kosovo should come under the control of Kosovo's authorities as well, but should receive certain special self-determination prerogatives. Therefore, the Agreement envisaged the formation of the Association of Serb Municipalities in Kosovo. In August 2015, the second agreement known as the Association Agreement, based upon the First Brussels Agreement, was also signed. This Agreement contains the principles intended to guide the establishment of the Association of Serb Municipalities.[105]

The agreements raised high hopes of a long-term solution to the difficult position of the Serb minority. To an equally important extent, the First Agreement also gave a strong impetus to the European integration process for both Serbia and Kosovo.[106] Kosovo opened negotiations aimed at signing

102 Aust, *op.cit.* note 88,147.

103 *Ibid.*,150.

104 The Agreement in English is available at http://www.kim.gov.rs/eng/p03.php (herineafter: the First Brussels Agreement).

105 See Art. 1–11 of the Agreement.

106 For more see Spyros Economides and James Ker-Lindsay, "'Pre-Accession Europeanization': The Case of Serbia and Kosovo," 53 (5) *Journal of Common Market Studies* (2015), 1027–1044.

a Stabilization and Association Agreement with the EU, and Serbia officially opened negotiations for EU membership.

When seen from the political perspective, the constitutional survival of the Brussels Agreements was of vital political importance for both the Serbian government and the Pristina political authorities. Yet, the ink was barely dry on the First Brussels Agreement when it was attacked in Belgrade as evidence that Serbia recognized Kosovo, while in Pristina it was seen as excessive and contrary to the Constitution. The First Brussels Agreement was challenged before the Constitutional Court in Serbia and the Constitutional Court in Kosovo. The Court in Kosovo ruled on the Association Agreement, as well.

5.1 *Ignoring Judicial Interpretive Responsibility: Judicialization of the First Brussels Agreement before the Serbian Constitutional Court*

5.1.1 The Background

Borrowing from Hirschl's writings on the judicialization of 'mega-politics', judicialization of the First Brussels Agreement in Serbia was a transfer of a contested political 'hot potato' by opposition politicians who were unable to settle the dispute between Belgrade and Pristina and saw judicialization of the conflict as a way to embarrass and obstruct the ruling majority. Thus, the First Brussels Agreement was challenged before the Serbian Constitutional Court by 25 MPs of the Serbian Parliament belonging to the opposition party which fanatically opposed both any kind of negotiations with Pristina and the candidacy of Serbia for EU membership.[107] Most of these MPs were members of the formerly ruling party, which, before Kosovo declared independence, were involved in the status talks and rejected a plan for internationally supervised independence of the province. They challenged the First Brussels Agreement on different grounds, the main one of these being that it constituted *de iure* recognition of Kosovo and was, as such, unconstitutional.[108] To approach the Constitutional Court's decision, it is useful to provide some insights into the jurisdiction and the politics of the Court,[109] as well as the constitutional framework decisive for the challenge.

Serbia belongs to a set of countries with the centralized European model of constitutional adjudication conferred upon the Constitutional Court. It inherited this model from the former Yugoslavia, where the Constitutional Court

107 Conclusion no. IUo-247/2013, op.cit. note 10.

108 *Ibid.*, 1.

109 The discussion about the Court's jurisdiction and its politics relies on my article, Violeta Beširević, "Governing without Judges: The Politics of the Constitutional Court in Serbia", 12 (4) *International Journal of Constitutional Law* (2014), 962–965.

was first established in 1963. The present Constitution, adopted in 2006, defines the Constitutional Court as an autonomous and independent state institution. Like many constitutional courts in transitional countries, it enjoys broad jurisdictional authority. For a significant period, the abstract review was by far the most important function of the Court. Apart from 'subsequent review,' the 2006 Constitution introduces the possibility of a 'preliminary review,' thereby empowering the Constitutional Court directly to influence adoption of legislation. In addition to legislative acts, abstract review was extended by the 2006 Constitution to international treaties as well. The Court also has jurisdiction over disputes relating to conflicts of jurisdiction; over electoral disputes in the absence of other judicial proceedings; and over requests to ban a political party, trade union organization, or civic association. It also has a role in proceedings concerning impeachment of the president of the Republic and termination of the tenure of various members of the judiciary. Yet a genuine breakthrough in the constitutional review system in Serbia came with the practice of the individual constitutional appeal introduced in 2006.[110]

The judicial appointment mechanism is constructed to minimize the chance that any political institution should dominate the Court: the president of the Republic appoints five judges from among ten nominated by the Parliament; another five are elected by the Parliament, from among ten proposed by the President of the Republic; finally, the last five judges are appointed at a general session of the Supreme Court of Cassation from among ten candidates proposed by the High Judicial Council and the State Prosecutor Council, which are (arguably) independent bodies with powers of judicial appointment.[111]

Even though broad jurisdictional authority has brought the Court into the very center of political controversies, the Serbian Constitutional Court has never amounted to 'counter-majoritarian difficulty.' Formal judicial autonomy and broad jurisdictional authority have not transformed the Court from being a passive, rubber-stamp institution into a more active institution willing to hold political power to account. In my previous work on the Serbian Constitutional Court, scrutiny of the most controversial political cases, including those concerning constitution-making, a state of emergency, judicial reform and political decentralization, demonstrated the Court's proclivity to rule only when either its decisions have become politically irrelevant or when the preference of the ruling majority became manifestly clear.[112] Besides, the Court failed to build transformative 'jurisprudence' due to subjective legal-cultural perceptions

110 *Ibid.*, 964–965.
111 *Ibid.*, 965.
112 *Ibid.*, 966.

of judge-made law. Production of highly technical and inconsistent rulings, the judges' subscription to a narrowly conceived positive jurisprudence, the absence of precedential authority and poor legal reasoning – all combined to substantiate the claim that constitutional review in Serbia has not amounted to an effective mechanism of governance.[113]

Now, any Constitutional Court decision about the First Brussels Agreement presupposes a constitutional framework that carries significance for constitutional review. The way in which the Constitution portrays Kosovo leaves little room for judicial enforcement. The Constitution refers to Kosovo in the Preamble, in the text of the presidential oath and in a provision which delegates regulation of its status to a future law, which up to this day has not yet been adopted. If one accepts that a constitution is a "precommitment strategy of the people in which they commit themselves in advance to a certain course of action,"[114] then one can discern very little from the constitutional text about Serbia's approach to Kosovo. Apart from proclaiming that Kosovo is part of Serbia, the Constitution says nothing about the structure of Kosovo's autonomy, its prerogatives, and its relation with the central state.

Last but not least, the Serbian Constitution allocates powers of political affairs to both the Government and the National Assembly. The Government is to decide and implement the politics, but it is accountable to the National Assembly for the politics of the Republic of Serbia, execution of laws and other general acts, as well as for the work of public administration.[115]

In sum, when the Serbian Constitutional Court was asked to rule on the First Brussels Agreement, it was clear that neither the Court's general approach to constitutional review in politically sensitive cases nor the relevant constitutional framework facilitated judicialization of the Agreement.

5.1.2 The First Brussels Agreement Case

And indeed, in the case of the First Brussels Agreement, the Constitutional Court of Serbia played its safe strategy, declined to rule in a timely manner, and after a two-year delay it dismissed the challenge on jurisdictional grounds. In a highly technical ruling the Court found that the Brussels Agreement was neither an international agreement nor another kind of general act reviewable by the Court.[116]

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113 *Ibid.*, 974–978. For similar findings see Tatjana Papić and Vladimir Đerić, "On the Margins of Consolidation: The Constitutional Court of Serbia," 10(1) *Hague Journal on the Rule of Law* (2018), 59–82.

114 Cass Sunstein, *Designing Democracy: What Constitutions Do* (OUP, Oxford, 2001), 97.

115 Art. 99 and 123 of the Serbian Constitution.

116 Conclusion no. IUo-247/2013, *op.cit.* note 10, 1.

The judicial focus was exclusively on the issue whether the nature of the Agreement permitted the Court's intervention, but not whether the issues arising from the Agreement were amenable to judicial resolution. Moreover, a striking feature of the Court's ruling is that a significant part of the majority opinion was based on the *amicus curie* opinions delivered by the Legal Adviser to the Serbian Ministry of Foreign Affairs and the Serbian representative at the Venice Commission, appointed by the government.[117] Thus, the Court had not distanced itself from judicial submissiveness in politically sensitive cases even when it was clear that judicial restraint should be exercised.

What alternative route could the Court have followed? There are not many situations that breach the logic of Kelsen's resistance to pure politics in the constitutional order than the situation which emerged in the aftermath of Kosovo's unilateral declaration of independence. In my view, the Agreement was not reached to allow the re-functioning of state power on the territory of Kosovo but to protect the Serbian minority living in Kosovo and general state interests to the extent possible in the given political situation.[118] The Constitutional Court was not equipped – nor it was in a position – to decide whether the establishment of the Association of Serb Municipalities, the organization of judicial power and police units, could have protected Serbs and general state interests in Kosovo, because this was a political question which was non-justiciable and could not be resolved by legal standards. The Court could have decided that it was not a function of the Court to substitute its opinion for the opinion of political institutions in Serbia and could have declined to rule on the basis of the separation of powers principle, as this was a basic organizing principle in the Serbian Constitution, as in other constitutional democracies. If the Court wanted to serve constitutional law in a more substantive way, it could have employed either the language of the German Federal Constitutional Court in the *Cruise Missiles Case*, when the Court ruled that the complaints were inadmissible because it lacked legally manageable criteria for deciding the case.[119]

Alternatively, the Court could also have borrowed the language of restraint of the same Court in the *East-West Basic Treaty Case* and the *Saar Case*, when the Court, in a quite deferential judicial review, supported broad discretionary

117 *Ibid.*, 31, 51–52.

118 I have developed this thesis in Violeta Beširević, "If Schmitt were alive...Adjusting Constitutional Review to Populist Rule in Serbia", in Violeta Beširević (ed.), *New Politics of Decisionism*, (Eleven International Publishing, The Hague, 2019), 201; see, also, Violeta Beširević, "A jedan razlog menja sve: kontrola ustavnosti Briselskog sporazuma u svetlu doktrine političkog pitanja", 14 (1&2) *Hereticus* (2016), 127–151, at 147.

119 *The Cruise Missile Case*, 66 BVerfGE 39 (1983).

powers of the political institutions in pursuing foreign affairs.[120] Thus, the Serbian Constitutional Court should not have lost sight of the political position from which the Agreement had arisen, of the political realities it sought to shape or to alter, and when it had to measure the First Brussels Agreement against the Serbian Constitution it should have assigned a broad discretion to the Serbian political institutions in negotiating the position of the Serbian minority in Kosovo with the institutions from Pristina, although this is not an approach I advocate in this paper.

The Court did not follow this alternative route, either. Instead, it delivered a highly technical ruling and thus confirmed its subscription to a narrowly conceived formalistic jurisprudence and readiness to avoid making sense of constitutional values whenever constitutional review may lead to confrontation with political institutions.[121]

5.2 *How the Constitutional Court in Kosovo Put a Stop to Normalization of Belgrade/Pristina Relations*

5.2.1 The Background

Three points differentiate the judicialization of the two Brussels agreements before the Constitutional Court in Kosovo from the judicialization of the First Brussels Agreement in Serbia. The first relates to the readiness of the two constitutional courts to step into the center of political battles, the second to the different status of the Brussels agreements in the two legal orders, while the third refers to the reasons for judicialization.

First, unlike the Serbian Constitutional Court, the Constitutional Court in Kosovo has shown no hesitance in ruling on politically sensitive cases.[122] True, this has been considerably generated by its rather broad jurisdictional authority, the position it occupies in the constitutional framework, and its initial hybrid composition that was supposed to secure the political and ethnic neutrality of the Court. Thus, in the constitutional framework, the Court figures as a final and independent authority empowered to interpret the

120 *The Saar Statute Case*, Bverfg No. 7 E 4, 157 1 BvF 1/55 (1955).

121 The last example of the judicial submissiveness in high profile political cases is the Court's refusal to assess the constitutionality and legality of the Decision on Declaring a State of Emergency in response to the COVID-19 pandemic. See Ruling no. IUo-42/2020 of 21 May 2020.

122 See, e.g., Dren Doli, Fisnik Korenica and Albana Rexha, "Promising Early Years: The Transformative Role of the Constitutional Court of Kosovo", *WORKING PAPER* 4/2016, available at http://www.legalpoliticalstudies.org/wp-content/uploads/2016/09/Final-September-2016-Constitutional-Court-Kosovo-WP.pdf.

Constitution and decide on the compliance of laws with the Constitution.[123] Its jurisdiction includes both abstract and concrete judicial review, resolving conflict of jurisdictions among supreme institutions and deciding on individual submissions regarding alleged human rights violations by the public authorities. The Court also decides disputes over the compatibility of referendum with the Constitution; over compatibility with the Constitution of the declaration of a state of emergency and actions undertaken during a state of emergency; over compatibility of a proposed constitutional amendment with binding international agreements ratified under the Constitution; and over constitutional violations during election of the Assembly. The Court is empowered to assess whether proposed constitutional amendments would diminish constitutionally entrenched human rights and freedoms. Finally, apart from these specific jurisdictional powers, additional jurisdiction of the Court may be determined by law.[124]

In terms of its composition, the Court is composed of nine judges appointed in an interaction between the Assembly and the President: a proposal which must come from a two-thirds parliamentary majority is followed by appointment of the President.[125] However, the two-thirds majority requirement concerns the appointment of seven judges, while the other two judges are appointed after being proposed by a simple majority present and consent of the MPs representing ethnic minorities in the Assembly.[126] To secure the Court's political and ethnic neutrality, it was a hybrid court in its initial phase, composed of six national and three international judges.[127] At present this is not the case – all constitutional judges are nationals.

The framework in which it operates has brought the Court to the epicenter of political developments in Kosovo. From the very beginning of its establishment, the Court was faced with most vexing questions including impeachment of the President,[128] the dissolution of parliament and the validity of presidential elections[129] and immunities of public officials.[130] Yet assessment of its performance in terms of its ability to influence the consolidation of democracy in Kosovo somewhat varies. Some perceive the Court as one of the most active

123 Art. 112 (1) of the Constitution of Kosovo.
124 *Ibid.*, Art. 113.
125 *Ibid.*, Art. 114 and 118.
126 *Ibid.*, Art. 114 (3).
127 For a detailed discussion, see Doli, Korenica and Rexha, *op.cit.* note 122, 17–21.
128 Case No. KI 47/10, Judgment of 28 September 2010.
129 Case No. KO 29/11, Decision of 30 March 2011.
130 Case No. KO 98/11, Decision of 20 September 2011.

and influential constitutional courts in the region of the former Yugoslavia,[131] while others find that its role in Kosovo's "semi-consolidated authoritarian regime" is reduced to serving the interests of the political elites or dominant factions, so that neither international supervision nor international judges have managed to protect the Court's independence.[132]

The second point that distinguishes the judicialization of EU-driven agreements before the Constitutional Court in Kosovo from the same process in Serbia is that, unlike Serbia, Kosovo ratified the First Brussels Agreement as it had an interest in exercising the prerogatives of a sovereign state.[133] Accordingly, the Court's task was to rule on the conformity of a ratified international treaty with the constitutional framework, which meant that it had to interpret not only the Constitution but the Agreement as well. Additionally, although the legal nature of the Association Agreement was questionable from Kosovo's perspective because its Assembly did not ratify it, the fact is that it did not prevent Kosovo's Court from going into interventionist mode. In contrast, the legal nature of the First Brussels Agreement proved to be a shelter for the Serbian Constitutional Court from considering the case, because the Agreement arguably could not be associated with either of the constitutionally reviewable acts.

Finally, the reasons for the judicialization of the Brussels agreements before Kosovo's Constitutional Court were different from the Serbian case. In Serbia, the constitutional review procedure was initiated by opposition members who in their previous governmental mandate were unable to close a deal with Pristina. Delegation of authority to the Constitutional Court in Kosovo, however, was a result of a heated political game not only between the then-ruling majority and opposition but also between the then-ruling political players themselves – the Prime Minister and the President.[134]

5.2.2 Judicialization of the Brussels Agreements

In its ruling on the First Brussels Agreement, Kosovo's Constitutional Court took an approach similar to that of the Serbian Constitutional Court. The

131 Doli, Korenica and Rexha, *op.cit.* note 122, 28.

132 Andrea Lorenzo Capussela, "A Critique of Kosovo's Internationalized Constitutional Court," 2 *European Diversity and Autonomy Papers* (2014), 1–40, at 36.

133 Law No. 04/L-199 on the Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia, cited in Doli, Korenica and Rexha, *op.cit.* note 122, 46, f. 164.

134 For more see Bodo Weber, "Awkward Juggling: Constitutional Insecurity, Political Instability and the Rule of Law at Risk in the Kosovo-Serbia Dialogue," *BIG DEAL* (policy note) available at https://prishtinainsight.com/wp-content/uploads/2016/04/BIRN-Report-2016-ENG.pdf.

proceedings before the Court was instituted by twelve MPs belonging to the opposition party only five days after the Assembly adopted the Act on Ratification of the First Brussels Agreement and before it entered into force.[135] The MPs claimed that the Ratification Act was unconstitutional since it embodied provisions violating foundational constitutional principles as well as constitutional provisions on local self-government and the principle of multi-ethnicity.[136]

As generally 'active,' the Court accepted jurisdiction but, like the Serbian Constitutional Court, it dismissed the challenge on jurisdictional grounds, holding that it was not empowered to review the constitutionality of international agreements.[137] In a concise manner, the Court reasoned that the Ratification Act and the First Brussels Agreement were two separate legal acts adopted in different procedures, with different purposes and legal effects. In the Court's view, the Ratification Act was adopted in the constitutionally required procedure, and therefore was in conformity with the Constitution. Besides, the Court stressed that its purpose was to incorporate the First Brussels Agreement into the Kosovo legal system.[138] However, the Court was not responsive to the idea that it should also decide on the substance of the First Brussels Agreement because "no Article of the Constitution provides for a review by the Court of the constitutionality of the substance of international agreements."[139]

To recall, the ruling in the *First Brussels Agreement Case* was delivered in an atmosphere of highly-charged emotions: on the one hand, the Agreement aimed to provide a stable solution for the Serbian minority, which was significantly impacted by the secession, while on the other, the authorities in Pristina, which signed the Agreement, were heavily criticized by the opposition and the majority of citizens, who found the Agreement excessive and damaging for the constitutional framework.[140] Accordingly, the proper question for the Court was to ask itself whether 'the province of the court' was to inquire how the executive performs duties revolving around watershed questions of who were members of a community and where were the borders of the new unit. However, the Court did not follow this route. Again, as in the Serbian case, the Court's declining to intervene was not based on the separation of powers principle, but the formal issue triggering the nature of the challenged

135 Case No. KO 95/13, *op.cit.* note 10, para. 5.
136 *Ibid.*
137 *Ibid.*, paras. 99–100.
138 *Ibid.*, para.98.
139 *Ibid.*, para.99.
140 Capussela, *op.cit.* note 132, 31.

act. Regrettably, the Court, in this case, did not use the perfect opportunity to explain the meaning of the constitutional provision which defined the Court as 'the final authority to interpret the Constitution' which implies the assumption that that duty is divided between the Court and the political institutions, as offered by Mulhern.

Nor in the *Association Agreement Case* had the Court set a test to distinguish cases amenable to constitutional review from those involving political questions and therefore immune to judicialization. As in the case of the First Brussels Agreement, the Association Agreement was a product of negotiations between the central state and territory which had unitarily declared secession and aimed to accommodate a trapped minority in the new unit. Therefore, the task of the Court was neither to resolve the principles of inclusion of the Serbian minority under Kosovo's control differently from what was achieved in the political negotiations nor to diminish the purpose of the Agreement, which the Court had actually done.

At the time when the power to decide was delegated to the Court, public sentiment turned into riots against the Association Agreement. The opposition parties blocked the work of the Assembly, and widespread protests displayed strong anti-Agreement emotions. All of these created feats of negative emotions about the EU-driven deal that should have facilitated the position of the Serbs living among the ethnic Albanian majority.[141]

A decision of the then-President to turn the case over to the Court can be read either as her inclination to the opposition and a chance to implement her own political agenda, as an attempt to unblock political life paralyzed by mass anti-agreement emotions or as a convenient opportunity to increase her visibility in the political game, regardless of the outcome of the constitutional proceedings. Whatever her motivations might have been, the Court's response provokes worries here. In sharp contradiction with its previous ruling, the Court not only accepted jurisdiction but also accepted the task of reviewing the Agreement, despite its own previous finding that international agreements were not constitutionally reviewable acts.[142] Moreover, the fact that the Association Agreement was not incorporated into the domestic legal order (it was signed but not ratified) was immaterial for the Court: starting from the premise that the Association Agreement derived from the ratified First Brussels Agreement, the Court emphasized that its "legal consequences related to the

141 Doli, Korenica and Rexha, *op.cit.* note 122, 49–50.

142 Case No. KO 130/15, *op.cit.* note 10.

implementation of [...] the First Agreement" could generate consequences for the constitutional order, and therefore concluded that the challenge involved a justiciable issue.[143]

The results of the Court's review stand as contrary to the letter and spirit of the Association Agreement: despite confirming that the Association of Serb Municipalities should be established as envisaged in the First Brussels Agreement, the Court invalidated the principles that defined the institutional structure of the Association and the relationship between the Association and other institutions in Kosovo, finding that they were not entirely consistent with the Constitution, in particular with its key provisions on equality before the law, fundamental rights and freedoms, and the rights of communities and their members.[144] In short, the Court concluded that the Association of Serb Municipalities could not be established under the principles defined in the Association Agreement by Belgrade and Pristina's political authorities, but should be redefined according to the findings in its ruling.[145]

Several aspects of this ruling deserve a closer look. First, the Association Agreement establishes that Association of Serb Municipalities would be a legal entity defined by its Statute, which will comprise 'at least the elements' set out in the Agreement and would be adopted by "a constituent assembly composed of the elected members of the assemblies of the participating municipalities."[146] The Association Agreement further specifies that the Kosovo Government, based on the First Brussels Agreement, will adopt a legal act on the establishment of the Association, which must be reviewed by the Constitutional Court.[147] Basically, the Association Agreement entrusted the Constitutional Court with the same task the negotiating parties entrusted to the South African Constitutional Court when they found themselves in deadlock – to review whether the text of a future South African constitution conformed to the specific principles agreed upon in advance by the negotiating parties.[148] Thus, as the Constitutional Court in Kosovo rightly acknowledged, its task was to review a legal act of Kosovo's Government which might

143 *Ibid.*, paras.107–108.

144 *Ibid.*, para.189 (3) (4).

145 *Ibid.*, para.189 (5).

146 Art. 2 and 3 of the Association Agreement, available in English at http://www.kim.gov.rs/eng/p17.php.

147 Art. 2 of the Association Agreement.

148 The Constitutional Court of South Africa, Decision of 6 September 1996 on Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

incorporate the Statute of the Association of Serb Municipalities, but not the Association Agreement itself.[149]

Moreover, the Court also acknowledged that its duty was neither to legislate nor to draft legal norms since it was "for the Government [...] while preparing the legal act for the implementation of the First Agreement related to the Association [...] to make it in compliance with the letter and spirit of the Constitution[...]"[150] However, unlike the South African Constitutional Court, which answered what it was asked, the Constitutional Court in Kosovo rewrote its task and examined whether the Association Agreement itself was in conformity with the existing constitutional framework,[151] thus leaving no room either for the constituent assembly or the political authorities in Kosovo to comply with the Association Agreement in the first place.

Second, in the *Association Agreement Case*, the Court not only overruled its previous finding not to review international agreements, and expanded its scope of jurisdiction basically to any governmental act capable of affecting the constitutional order, but stood contrary to the ruling majority holding at that time more than two-thirds of the 120 seats in the Assembly, who supported the Association Agreement.[152] To recall, the Kosovo Constitution determines that the Constitutional Court is the final authority for interpreting the Constitution, meaning that the political branches of government are also responsible for interpreting the Constitution. Consequently, the Court should have avoided ruling in the case in order to avoid causing a kind of embarrassment that would result from different pronouncements by various departments on one question. As the German Federal Constitutional Court emphasized in *the Hess Case*, "It is of the great importance to the German Federal Republic that it speaks in international forums with a single voice."[153] This is what Kosovo's Constitutional Court recognized in the *First Brussels Agreement Case*, but not in *the Association Agreement Case*. Third, the Association Agreement was supposed to help Kosovo to gain control over the whole territory over which it allegedly had sovereignty. The question whether the agreement would advance or retard such prospects was a question of political judgment beyond the Constitutional Court's competence and should have been declared non-justiciable.

149 Case No. KO 130/15, *op.cit.* note 10, para. 117.
150 *Ibid.*
151 *Ibid.*, para.116.
152 Doli, Korenica and Rexha, *op.cit.* note 122, 50, 55.
153 *The Hess Case*, *op.cit.* note 25.

Finally, the very same Court just recently explicitly ruled that the only constitutional institutions competent in the sphere of foreign affairs were the Government/Prime Minister and the President, and that their powers could not be transferred to any other body, not even to the special state delegation established to negotiate with Serbia by law of *lex specialis* character.[154] This approach, unlike in the *Association Agreement Case*, ensures respect for separation of state powers proclaimed in Articles 4 and 7 of the Kosovo Constitution.

To this day, the Association of Serb Municipalities has not been established. It would be a gross overstatement to claim that the Constitutional Court alone has prevented formation of the Association of Serb Municipalities. However, the fact is that by invalidating the key provisions of the Association Agreement that secured the integration of the Serb minority into Kosovar society, the Court ruined the efforts of Kosovo's political representatives to solve the problem of the trapped minority after secession by giving them a high degree of political and cultural autonomy. It also contributed to the prolongation of instability and conflict between the majority of the population and a minority who fear becoming second-class citizens. Moreover, another long-term political aim – Kosovo's accession to the EU – has also been damaged, since normalization of the relationship with Serbia has been set as a condition for further accession process.

6 Judicialization of the Kosovo Conflict in Comparative Perspective

The last issue I want to discuss in this paper is whether judicialization of the Kosovo conflict made sense from the comparative law of secession perspective.

The ICJ 's endless effort to refrain from delivering answers in the Kosovo Advisory Opinion, and the non-effects of national constitutional courts towards normalization of relations between Serbia and Kosovo, signal that the courts should have chosen to stay silent in the first place, not only because the law of self-determination and secession was unsettled, but also because the question of secession and the related right of peoples to self-determination are issues hardly answerable via the judicial process.

However, this argument goes by too quickly. One may argue that the US Supreme Court decision in *Texas v. White*[155] testifies to the opposite – when the Court ruled that states could not unilaterally leave the union, it, in fact,

154 Case No. KO 43/19, Decision of 27 June 2019, para.87–88.

155 *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

resolved political questions associated with secession. Yet, there is a wrinkle here. Mark Graber persuasively argues that the *White* decision was reached rather late to resolve the secession issue and that it is better conceptualized as resolving only questions associated with Reconstruction.[156] Indeed, the case was argued before the US Supreme Court in 1869, eight years after Texas declared secession from the US and joined the Confederacy, and in the aftermath of the American Civil War, as a response to the reconstruction policy of the state government appointed by the president of the USA, after federal forces regained control in Texas. Accordingly, the *White* case confirms that, in judicial responses to secession, timing matters and that de Tocqueville's thesis suggests that a political question becomes a judicial question only when a decision resolves the political controversy.

Even when the courts were called upon to resolve the secessionist claim in a real-life secessionist dispute, they did not manage to bring to an end the dispute between the central authority and the unit, which wanted to secede. Take, for example, the Chechen case. In 1997, between the two Chechen wars, the Russian Constitutional Court faced the challenge of the legality of the invasion undertaken by President Yeltsin as a response to Chechnya's declaration of independence in 1991.[157] The legal issues revolved around the illegality of the invasion in the absence of legislative approval, the illegality of presidential decrees, and human rights violations during the first Chechen war. Still, the Court used the opportunity not only to determine Chechnya's aspiration to self-determination and independence as unconstitutional, but also to rule out the possibility of a unilateral declaration of independence under the constitutional framework.[158] The Court specified that in the absence of a constitutionally recognized right to self-determination, the status of a republic of the Russian Federation could only be changed through an agreement between the Republic and the Federation.[159] Thus, although the Court addressed the issue of secession, its ruling only clarified that the Constitution did not countenance secession, had no impact on a more than century-long dispute between Russia and the Chechens, nor did it prevent the two parties from engaging in yet another war over Chechen territory only two years after the ruling was delivered.

156 Mark Graber, "Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited," 21(2) *Constitutional Commentary* (2004), 484–545, at 508.

157 For more see William E. Pomeranz, "Judicial Review and the Russian Constitutional Court: the Chechen Case," 23 (1) *Review of Central and East European Law* (1997), 9–48, at 9.

158 *Ibid.*, 25–26.

159 *Ibid.*, 26.

It is not hard to come up with other examples. Based on the Catalan example, Tom Ginsburg and Mila Versteeg argue that the constitutional court's bold attempts to shut down secessionist aspirations seem to encourage, rather than discourage, radicalization of secessionist movements.[160] Beyond a shadow of a doubt, the Spanish Constitutional Court's decisions that somewhat curtailed Catalan autonomy[161] (in 2010) and declared a would-be referendum on Catalonia's independence unconstitutional[162] (in 2014), were not able to thwart the secessionist fever from reaching fever pitch in 2017. What followed then fits well with my claim that resolving real-life secessionist disputes should not be the task of the courts. First, the Constitutional Court's suspension of the Catalan Referendum Law on Self-Determination on the grounds of its unconstitutionality[163] did not stop the secessionists from holding the 2017 referendum on independence, even under the incendiary circumstances. Second, the Constitutional Court's decision which finally declared that law void, did not turn a different page in the political controversy over the status of Catalonia. In fact, in the recent (2019) general elections, the separatist parties increased their influence in the Spanish parliament by getting 22 MPs, five more than they had before.[164]

On the other hand, the *Secession Reference* delivered by the Canadian Supreme Court in the Quebec case might have weakened arguments against judicialization of secessionist claims on twofold grounds.[165] First, the Court's finding that 'secession is a legal act as much as a political one' appears to stand against the claim that secession is a political – hence non-legal – issue.[166] In the presence of deeply divided views on secession within Quebec itself, the Court sustained would-be secession only if compatible with constitutional values, including democracy itself.[167] Second, by hinting that there might

160 Ginsburg and Versteeg, *op.cit.* note 72, 27. For difficulties in perceiving territorial autonomy in the Spanish constitutional law, see, e.g., Carlos Flores Juberías, "Postepena transformacija španskog ustavnog prava," 1 *Pravni zapisi* (2018), 58–60.

161 Judgment No. 31/2010, available in English at: http://www.tribunalconstitucional.es/fr/jurisprudencia/ResolucionTraducida/312010,%200f%20June%2028.pdf.

162 Judgment No. 42/2available in English at: http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/STC42-2014.aspx.

163 The Spanish Constitutional Court, *Prime Minister v. Parliament of Catalonia*, STC No. 114/2017, available at https://boe.es/boe/dias/2010/07/16/pdfs/BOE-A-2010–11409.pdf For comments see Asier Garrido-Munoz, "Prime Minister v. Parliament of Catalonia,"112 (1) *American Journal of International Law* (2018), 80–88.

164 https://www.thelocal.es/20190430/moderate-catalan-separatists-boosted-in-spain-election.

165 See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

166 *Ibid.*, paras.27–28.

167 *Ibid.*, paras.32, 49.

be a constitutionally recognized right to a negotiated secession,[168] it can be asserted that the Court had resolved the political questions associated with the secession and managed to silence the separatist claims.

However, there is a part in the *Secession Reference* which supports the claim that the task of deciding competing claims in a secessionist dispute is not a job for judges.[169] Namely, the Supreme Court of Canada explicitly ruled that apart from specifying constitutional rules on secession, it had no other role in a secessionist dispute: "The Court has no supervisory role over the political aspects of constitutional negotiations[...]"[170] Having said that, the Court actually endorsed the political question doctrine on the grounds suggested by Mulhern and divided the job of constitutional interpretation of the constitutional rules on secession between the political institutions and itself. Thus, according to the Court, the job of the judicial branch is to specify a constitutional framework within which negotiation should occur, but "the reconciliation of the various legitimate constitutional interests[...] is necessarily committed to the political rather than the judicial realm."[171] Moreover, the Court acknowledged that the judgments reached within the negotiation process are political and thus institutionally non-justiciable: "The Court would not have access to all of the information available to the political actors and the methods appropriate for the search for truth in a court of law are ill-suited[...]".[172]

Yet, the fact is that the Court's intervention was a turning point in the secessionist dispute, which diminished the prospects of Quebec seceding from Canada.[173] The same is valid for Bavaria, whose potential secession from Germany was recently ruined by the German Federal Constitutional Court when it found that the Basic Law provided no grounds for Bavaria to secede from Germany.[174] Recall here that in the presence of a clear democratic setting,

168 *Ibid.*, para. 97.

169 Sujit Choudhry and Robert Howse have also drawn attention to this aspect of the *Secession Reference*. See Sujit Choudhry and Robert Howse, "Constitutional Theory and the Quebec Secession Reference," 13 (2) *Canadian Journal of Law and Jurisprudence* (2000), 143–169, at 157–162.

170 *Reference re Secession of Quebec, op.cit.* note 165, para. 100.

171 *Ibid.*, para.101.

172 *Ibid.*

173 For the influence of this decision on the comparative law on secession see Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference* (Palgrave Macmillan, Basingstoke, 2019).

174 See Judgment of 16 December 2016, BVerfG, Beschluss der 2, Kammer des Zweiten Senats vom 16, Dezember 2016 - 2 BvR 349/16, at http:// www.bverfg.de/e/rk20161216_2bvr034916.html (Ger.) cited in Garrido-Munoz, *op.cit.* note 163, n.33.

it is the job of the constitutional courts to resolve political controversy with legal standards, and thus, allow democracy to function. In the case of Germany, which is not underpinned by a substantial secessionist clam, by clarifying the silence of a constitutional text on secession, a judicial decision facilitates, rather than frustrates democracy. Similarly, the Supreme Court's opinion in the *Secession Reference* removed room for potential political instability that would frustrate democratic processes in Canada, by specifying that the Canadian Constitution would allow secession only if negotiated in a process mindful of majority rule, the rule of law, federalism, and respect for (trapped) minorities.[175] To paraphrase Cass Sunstein, by preventing society's polarization over an issue which did not dominate in that society, the courts in both countries protected democratic self-government and secured that democratic deliberation did not divert to matters that were not central to the system of self-government.

But then again, the Canadian and German cases differ from the Kosovo case in several aspects. First and foremost, both the Supreme Court of Canada and the German Federal Constitutional Court were asked to opine on would-be secession, unlike in the Kosovo case, where the courts were asked to intervene in a dispute revolving around a real, materialized secession. It is one thing to ask courts in functional liberal democracies, like Germany and Canada, whether a political act of secession would be constitutionally allowed or not.[176] It is quite another to ask courts to rule on competing claims or to interfere in negotiation once secession is accomplished, albeit unconstitutionally. The Supreme Court of Canada did recognize a limitation of this sort:

> "We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations."[177]

What also differentiates Kosovo from Quebec and Bavaria is the fact that, unlike in the Kosovo case, the disputes in Canada and Germany were neither

175 For comments see Susanna Mancini, "Secession and Self-Determination", in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP, Oxford, 2012), 482.

176 For the argument that secession is compatible with liberal-democratic constitutionalism, see, e.g., Miodrag Jovanović, "Can Constitutions be of Use in the Resolution of Secessionist Conflicts?," 5(2) *Journal of International Law and International Relations*, (2009), 59–89.

177 *Reference re Secession of Quebec, op.cit.* note 165, para.100.

accompanied by an armed conflict, civilian casualties, and gross human rights violations, nor rooted in what Hungarian philosopher István Bibó termed 'pathological absence of continuity in territorial status',[178] which all makes defining the state via a judicial process significantly challenging.

Finally, the Canadian Supreme Court – which did rule in favor of the constitutional right to secede – did not legitimize an unconditional, unilateral right to secession but said that secession had to be negotiated according to the substantive values guaranteed by the constitution, including protection of the rights of so-called trapped minorities living in the given territory and who opposed secession. As I have shown in the previous section, Kosovo's secession was not negotiated, nor was the status of the trapped Serbian minority resolved between the two parties before secession, which makes the reference to the Quebec case largely inapplicable to the Kosovo case. Moreover, not only was the position of the Serbian minority not a concern of Kosovo's authorities when they declared unilateral secession from Serbia, but also when it finally became the subject of negotiations between Belgrade and Pristina, Kosovo's Constitutional Court invalidated almost everything agreed between the two parties, doing precisely what the Supreme Court of Canada in the *Secession Reference* said the court should not do. Thus, while in the case of Quebec judicial interference in a secessionist dispute was therapeutic,[179] in the case of Kosovo it was not.

Accordingly, constitutional adjudication may 'channel conflict-provoking secessionist dispute to rules of democratic logic,'[180] only if a decision to secede has not been made. Put differently, once the secessionist decision has materialized beyond the constitutional framework, it stops being legal and becomes a political, non-justiciable issue.

7 Conclusions

At first sight, the judicialization of 'mega-politics' appears to mark the demise of the political question doctrine, which tends to exclude pure politics from a

178 Ištvan Bibo, *Beda malih istočnoevropskih država* (Izdavačka knjižarica Zorana Stojanovića, Sremski Karlovci, 1996, translation from Hungarian Arpad Vicko), 51. I am grateful to Miodrag Jovanović for reminding me of this argument.

179 See Nathalie Des Rosiers, "From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts," 37 (1) *Court Review* (2000), 54–62.

180 Mancini, *op.cit.* note 175, 500.

judicial check. Judicialization of the Kosovo conflict shows that the doctrine not only deserves to be revived but also needs to be transplanted in jurisdictions outside its usual reach, particularly in disputes regarding materialized unilateral secession and territorial sovereignty, because the borrowing would allow the courts to reach the best solution within constitutional designs or international law.[181]

The Kosovo case confirms that the shift of the policy-making authority from the political branches to the unaccountable judiciary can produce not necessarily benevolent results. The Kosovo Advisory Opinion added nothing to the law on the secession, had no effects on Belgrade-Pristina relations, but paradoxically had precedential value in the Declaration of Crimean independence.[182] By giving the impression that the last words on the legal aspects of the inclusion of the Serbian minority under Kosovo's rule have been said, the Constitutional Court in Kosovo additionally frustrated hard talks between Belgrade and Pristina, which for quite some time have been in deadlock. Finally, instead of specifying who decides constitutional issues arising from secession and returning a 'hot potato' to the political branches of government, the Serbian Constitutional Court in the *First Brussels Agreement Case* limited itself to technical reasons for declining jurisdiction. It thus confirmed its image of a court not willing to confront political institutions and abandon the passive role it plays in the Serbian constitutional system almost since its establishment.

Application of the political question doctrine in cases of unilateral secession, like Kosovo, would not deprive the courts of their monopoly in interpreting the constitution because the courts will retain the power to decide who decides constitutional issues. In disputes arising from watershed political questions touching state sovereignty, the organization of territory and nation-building concerns, evoking the doctrine would encourage the shared

181 Justice Julia Laffranque argues that "Judicial borrowing should not be considered as a goal in itself, but rather as a tool in order to achieve the best solution." See in Julia Laffranque, "Judicial Borrowing: International & Comparative Law as Nonbinding Tools of Domestic Legal Adjudication with Particular Reference to Estonia," 42 (4) The International Lawyer (2008),1287–1302, at 1290.

182 The Declaration of Independence, proclaimed by the Supreme Council of Crimea on 11 March 2014, refers directly to the Kosovo Advisory Opinion: "We, the members of the parliament of the Autonomous Republic of Crimea and the Sevastopol City Council [...] taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on July 22, 2010, which says that a unilateral declaration of independence by a part of the country does not violate any international norms, make this decision." Cited in Peters, *op.cit.* note 100, 291.

responsibility of all three branches of the government in protecting a constitution. Constitutional principles and representative democracy would, thus, be better served. This was a driving reason for the Supreme Court of Canada to note in the *Secession Reference*: "Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences[...]"[183]

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183 *Reference re Secession of Quebec, op.cit.* note 165, para.101.