

CALLING KOSOVO'S CONSTITUTION: A LEGAL REVIEW¹

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ABSTRACT

One of the world's youngest constitutions, the Constitution of Kosovo not only summarises the international community's prescribed obligations towards Kosovo's polity and establishes the polity *per se*, but also determines Kosovo's governing system and prescribes the rights and liberties of Kosovo's citizens. The constitution also determines the extra rights of ethnic minorities and assigns guarantees for their participation in public life. The constitution, moreover, specifies its relationship with the Ahtisaari Plan and lays out the international civilian representative's position in Kosovo. To better understand these attributes, this paper shall conduct both a legal review of the Kosovan Constitution and draw some conclusions about the governing system and model of democracy established by the constitution.

KEYWORDS. Kosovo's Constitution, Ahtisaari Plan, Sovereignty, Assembly, government, president, Judiciary, Constitutional Court, International Civilian Representative, Ethnic minorities

INTRODUCTION

In the days following the North Atlantic Treaty Organization's (NATO) successful deployment of peacekeeping forces in Kosovo, the United Nations (UN) Security Council adopted Resolution 1244. Fourteen members of the

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Security Council voted for the resolution, none opposed it, and China abstained.⁴ Issued under the authorisation of the United Nations Charter,⁵ this resolution established the United Nations Interim Administration Mission in Kosovo (UNMIK) and authorized UN peacekeeping forces.⁶ The resolution directed UNMIK to establish a civilian administration in Kosovo, with the goal of building provisional and self-governing Kosovan institutions.⁷ As the first steps toward developing democratic institutions, UNMIK adopted the Constitutional Framework for Kosovo,⁸ which not only established Kosovan transitional institutions, but also provided domestic legitimacy for the UNMIK's powers in Kosovo, in addition to the constraints implied vis-à-vis the Kosovan provisional institutions. The constitutional framework did not imply any sovereign powers for the provisional institutions, however, it did establish most of the basic institutional structures of a polity. During the transitional phase, the framework generally has been considered a de-facto constitution of Kosovo,⁹ and as such acknowledges the attributes of a state that it created throughout Kosovan public life.

In October 2005, following international developments surrounding the Kosovo issue, the Security Council authorized the initiation of the international settlement process on Kosovo's status. In addition, the Security Council embraced the secretary general's attempts to begin the negotiation process between Kosovan representatives and Serbia, as foreseen in Resolution 1244.¹⁰ As a consequence, the secretary general appointed Marti Ahtisaari to be the special envoy for the future status of Kosovo.¹¹ Ahtisaari's responsibilities included organizing the negotiation process between the Kosovan people's representatives¹² and Serbian institutions. If it appeared that

⁴ UN DOC. S/RES/1244 (1999) of June 10 1999.

⁵ See Chapter 7 of the UN Charter.

⁶ See paragraph 10 of Resolution 1244 (UN DOC. S/RES/1244 (1999) of June 10 1999), which authorizes the secretary general to deploy a civilian mission in Kosovo.

⁷ Matheson M J "United Nations governance of post-conflict societies" (2001) *The American Journal of International Law* Vol 95 no 1 76–85.

⁸ UNMIK Regulation on Constitutional framework for provisional self-government in Kosovo No 2001/9.

⁹ Weller M *Contested statehood: Kosovo's struggle for independence* (New York: Oxford University Press, 2009).

¹⁰ UN Doc S/PRST/2005/51.

¹¹ UN Doc S/2005/708 and S/2005/709.

¹²The Serbian government did not accept the idea that representatives of the Kosovan people are, simultaneously represent both Kosovans and the local Serbian community in Kosovo. However, legally, the Kosovan negotiating party included members of ethnic minorities – as provided by the international community's prescription; thereby the representatives of the Kosovan people also represent the Serbian minority in

the negotiating parties could not reach agreement, the UN tasked Ahtisaari with drafting a proposal for the determination of Kosovo's status in accord with the Contact Group's policy on Kosovo's status.¹³

The negotiations between the Kosovan people's representatives and Serbian institutions failed¹⁴ because of disagreement over Kosovo's international status. Serbia insisted that Kosovo could not become a state, whereas the Kosovan people's representatives claimed that the only acceptable solution was an independent Kosovo.¹⁵ Nevertheless, as Ker-Lindsay argues, "the status process was not about discussing status options, such as autonomy—instead, it was about creating the structures for a Kosovo state."¹⁶ Following the failure of negotiations, Marti Ahtisaari drafted a plan for Kosovo's status, called the Ahtisaari Plan,¹⁷ and sent it to the Security Council for adoption.¹⁸ Despite the secretary general's endorsement of the Ahtisaari Plan, the council did not approve it because of fundamental disagreements among council members.¹⁹ ²⁰ Thus, Resolution 1244 remained in force.²¹

Following these developments, the United States and its European allies began to search for a solution that would employ the Ahtisaari Plan while still

Kosovo (see the statements of the Negotiating Group of Kosovo, delivered through the Kosovan President).

¹³ UN Doc S/2005/709. The Contact Group's policy upon Kosovo's status prescribed three prohibitions: no union with another country, no return to the pre-1999 position and no partition of Kosovo.

¹⁴ Erler G "Kosovo - 120 days after the Constitution's adoption" (2008) *Sudosteuroopa Mitteilungen*. Vol 05-06 16–21.

¹⁵ Kostovva D "Legitimacy and International Administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective" (2008) *International Peacekeeping*. Vol 15 no 5 631–647.

¹⁶ Ker-Lindsay J "From autonomy to independence: The Evolution of International Thinking on Kosovo, 1998–2005" (2009) *Journal of Balkan and Near Eastern Studies* Vol 11 no 2 141–156 (quoted from page 153).

¹⁷ 'Ahtisaari Plan' is a short name for the international Comprehensive Proposal for the Kosovo Status Settlement of 2007, proposed by the United Nations Office of Special Envoy for Kosovo (Ahtisaari Plan, in the official form, is UN Doc. S/2007/168/Ad 1, March 26 2007).

¹⁸ UN Doc S/2007/168 of March 26 2007.

¹⁹ For the importance of a Security Council-approved settlement for Kosovo's status, see the Contact Group Minister's Statement on Kosovo, S263/2007, September 27 2007.

²⁰ UN Doc S/2007/168 of March 26 2007.

²¹ Serbia holds that Resolution 1244 prohibits the Kosovan Declaration of Independence. See a comprehensive report on this at: Security Council Report, Kosovo, Update Report No 1, March 10 2008. Available at: <<http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3945613/>>.

following Resolution 1244's prescriptions. In the meantime, under close supervision by the international community, the Kosovan people's representatives declared Kosovo's independence, requesting recognition from individual states.²² The Kosovan Declaration of Independence stated that Kosovo shows its appreciation for an international mission through the European Union and acknowledges the Ahtisaarian obligations over Kosovo's polity.²³ Still, because of the deadlock in the Security Council over a joint accord about Kosovo, the United States and the main European powers decided to recognise unilaterally Kosovo's independence.²⁴

In the meantime, although the European Union (EU) had shown its unwillingness to deploy a mission without clear authorization from Resolution 1244, either through the Security Council or the secretary general,²⁵ it replaced UNMIK with the European security and defence policy (ESDP) mission in Kosovo in the post-status phase. Hence, in a joint interaction between the UN Secretary General, the United States and the European Union, these actors agreed to make a place for the ESDP mission in Kosovo and transfer most of the existing powers of UNMIK to the ESDP mission.²⁶ Therefore, the European Union mission in Kosovo²⁷—the European Union Rule of Law Mission in Kosovo, known as EULEX—took over the responsibility of supervising the Kosovan institutions' independence along with European Union Special Representative (EUSR).²⁸ The European Union also assigned the EUSR the duties of the International Civilian Representative (ICR), as requested by the Ahtisaari Plan. The EUSR nominee, Peter Faith, was, therefore, confirmed both as the EUSR and the ICR.²⁹ It is important to

²² Kosovo's Declaration of Independence, February 17 2008.

²³ This declaration accepted the international constraints upon Kosovo, and recognized the significance and position of the Ahtisaari Plan, Kostovicova, D "Legitimacy and International Administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective" (2008) *International Peacekeeping* Vol 15 no 5 631–647).

²⁴ Advancing freedom and democracy reports: Kosovo: United States Department of State, Bureau of Democracy, Human Rights and Labour. May 2008.

²⁵ Council of the European Union, 6496/08 (Presse 41) Press Release 2851st Council's Meeting, General Affairs and External Relations, Brussels, February 18 2008.

²⁶ UN Doc S/2008/354, UN Doc S/2008/458, and UN Doc S/2008/692.

²⁷ Council Joint Action 2008/124/CFSP of February 4 2008 on the European Union Rule of Law Mission in Kosovo, EULEX-Kosovo, Official Journal of the European Union L42/92.

²⁸ Council Joint Action 2008/123/CFSP, February 04 2008 Appointing a European Union Special Representative in Kosovo. *Official Journal of the European Union*, L42/88.

²⁹ Press Statement, First Meeting of the International Steering Group (ISG) for Kosovo, February 28 2008, paragraph 3, Vienna.

note that the ICR “was modeled after the Office of the High Representative in Bosnia and Herzegovina, whose powers to override the local legislative decisions and rule by decree have, since 1995, illustrated the pitfalls of building democracy by undemocratic means”.³⁰

Given this, one may consider Kosovo’s statehood-building³¹ as an internationally driven process that culminated in the Ahtisaari Plan.³² The plan provided broad guarantees for the protection of the Serbian minority in a sovereign Kosovo, including a deep decentralization process that favoured the Serbian minority.³³ Although the plan was not formally adopted in the Security Council, it did determine substantial and formal matters in relation to the establishment of Kosovo’s statehood, which, *inter alia*, implied that Kosovo should have a constitution. As a result, as specified by the Ahtisaari Plan,³⁴ the Kosovan president appointed a multi-ethnic Constitutional Commission, responsible for composing and proposing a draft of the Kosovan Constitution.³⁵ Closely supervised by many international representatives, the work of the commission, reflected the international community’s concern – and perhaps even their desired outcomes – for the constitution.³⁶ However, as Marko argues, this process resulted in a lack of legitimacy, which, in turn, has forced the Albanian political elites in Kosovo to face a sharp drop in popular legitimacy.³⁷

³⁰ Kostovicova D “Legitimacy and international administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective” (2008) *International Peacekeeping* Vol 15 no 5: 631-647 (at 636).

³¹ For more about the Kosovan state-building process, see Kosovo’s fragile transition, International Crisis Group. Europe Report, No 196 September 25 2008.

³² Kostovicova argues that Ahtisaari Plan has two main attributes: first, the plan delivers a communitarian and territorial approach; and second, the plan prescribes the supervision upon Kosovo’s polity (Kostovicova D “Legitimacy and international administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective” (2008) *International Peacekeeping* Vol 15 no 5: 631–647).

³³ Tansey O Kosovo “Independence and Tutelage” (2009) *Journal of Democracy* Vol 20 no 2 153–166.

³⁴ See the Comprehensive Proposal for the Kosovo Status Settlement, February 26 2007, Article 10.

³⁵ Decree of the Kosovan President on the appointment of the Kosovan Constitutional Commission, February 19 2008. Accessed at (March 30 2010): <http://www.kosovoconstitution.info/repository/docs/VENDIMI%20I%20PRESIDENTIT%20per%20KKK.pdf>.

³⁶ For more about the ethnic minorities’ representatives and international involvement in the Kosovan constitution-making process, see: Tunheim, J “Rule of law and the Kosovo Constitution” (2009) *Min J Int’l L* 18 371.

³⁷ Marko J “The new Kosovo Constitution in a Regional Comparative Perspective” (2008) *Review of Central and East European Law* Vol 33 437–450.

Following the proposal of the Kosovan Constitutional Commission and the decree by Kosovo's president, the representatives of the Kosovan people adopted the Kosovan Constitution on April 9, 2008. This acknowledged the international community's constraints, made manifest in the constitution, upon Kosovo's polity. The Kosovan Constitution entered into force on June 15, 2008, when most of the powers of the UNMIK already had been transferred to the Kosovan polity and the ESDP mission in Kosovo. Kosovo's Constitution complemented the establishment of Kosovo's statehood by providing it with a domestic legal origin. Moreover, the constitution not only established and/or recognized the international community's constraints upon Kosovo's polity, it also recognized the international community's civilian presence in Kosovo. As such, the International Civilian Representative (ICR) – who was also simultaneously the EUSR – certified Kosovo's constitution as being in accordance with the Comprehensive Status Proposal for Kosovo (Ahtisaari Plan).³⁸ Hence, the global community, via this representation, acknowledged that the Kosovan Constitution followed both the spirit and the details of the Ahtisaari Settlement. In addition, the Kosovan constitution-making process involved consulting with the citizens of Kosovo, including ethnic minorities; as a consequence, many of the citizens' suggestions were included in the constitution.³⁹

In strict domestic terms, the Constitution of Kosovo provides a contested basis for a classic sovereign polity, given accepted limitations. Still, the Constitution delivers most of the statehood authorizations for the Kosovan polity and promotes a legal order with a somewhat unique configuration. In that context, Kosovo's Constitution, in one way or another, subsumes the Kosovan legal system and declares superiority over the governing system of Kosovo. Therefore, the Constitution of Kosovo embeds a legal rationality into Kosovo's statehood, providing a legal basis for its functioning.

Kosovo's constitution has many distinguishing features which might not be apparent in other 'classic' constitutions; however, these features are a product of the constrained sovereignty in Kosovo demanded by the international community. Given this context, one may then ask whether the Constitution of Kosovo is a 'people's constitution'. Of course, a number of criticisms have been put forth which contest the legitimacy of the

³⁸ Press release of the Constitutional Commission of Kosovo, in regard to Peter Faith's decision On the certification of the Kosovan Constitution, April 2 2008. Accessed at (March 25 2010): <http://www.kushtetutakosoves.info/?cid=1,203,1316>. See also the press statement, Second meeting of the International Steering Group (ISG) for Kosovo, April 17 2008, paragraph 4, Vienna.

³⁹ Press release of the Constitutional Commission of Kosovo, regarding the "inclusion of citizens' recommendations in Kosovo's Constitution", March 4 2008. Accessed at (March 25 2010): <http://www.kushtetutakosoves.info/?cid=1,203,1296>.

Constitution; nonetheless, it should be noted that the Constitution has been adopted by the Kosovan people's representatives, despite the huge impositions made by the international community on both the Constitution and the constitutional development process.

The Constitution consists of fourteen chapters and 154 articles, regulating both the formal and substantial matters of the state. Most importantly, it proclaims the style of Kosovo's polity – its model of democracy and the basis upon which it functions. Moreover, it establishes and determines the circles of competences of the Assembly, the president, the government, and the judiciary. It also establishes a range of rights and liberties for Kosovo's citizens – in addition to the extra guarantees that it delivers for the ethnic minorities. The constitution positions the state in the direction as that of the Ahtisaari Plan, accepting the ICR's position in Kosovo.⁴⁰ Ultimately, the Constitution determines the procedure for constitutional amendment and outlines the mode of transition from the previous legal order to the new one.

Therefore, this paper, in addition to providing a general analysis of most of the matters mentioned above, reviews Kosovo's Constitution in general. As such, it examines the proclamations delivered in the general provisions and then explores the governing system description within the Constitution. Following that, this paper focuses upon the rights and liberties section of the Constitution with special attention to the constitutional guarantees for ethnic minorities. Next, the study discusses the amendment procedure and the procedure's legal and political consequences. Finally, this paper reviews the position of the Ahtisaari Plan in relation to the Constitution of Kosovo and discusses the legal implications.

This paper concludes with the argument that Kosovo's Constitution contains a significant number of constitutional innovations that, in a classical sense, may not have been seen previously. This review contends that Kosovo's Constitution provides a limited basis for a classic polity.

GENERAL PRINCIPLES OF KOSOVO'S CONSTITUTION

This section reviews the basic provisions of Kosovo's Constitution (hereafter "Constitution"), focusing on Kosovo's state principles. This part of the Constitution, to achieve certain objectives, delivers both formal proclamations and substantial obligations for Kosovo's polity. This analysis begins with a survey of the Constitution's preamble.

In its preamble, the Constitution describes its aspirations and refers to the 'enactor' of the Constitution. It opens with the famous phrase, "We, the people", thereby acknowledging the people as the authors of the Constitution.

⁴⁰ The International Civilian Representative's powers are prescribed by the Ahtisaari Plan.

This statement illustrates the people's determination to form a democratic and peace-loving state and proclaims Kosovo as a state for all of its citizens.⁴¹ The preamble also represents a commitment to guarantee the rights and liberties of all citizens and to promote social prosperity. Furthermore, the preamble proclaims the state of Kosovo's determination to promote stability in the region and to be one of the world's peace-loving countries. Finally, the preamble reveals Kosovo's intention to become a member of the Euro-Atlantic organizations. As such, the preamble of Kosovo's Constitution dedicates most of its proclamations to the 'peaceful' character of the state entity being legally and formally established by this Constitution. The preamble does not refer to any historical event, unlike the constitutions of most other countries, and makes no indication of any 'nationalistic pride'. Hence, one may consider the preamble a step toward making the state of Kosovo a nationalist-free country. There is no sign that the Constitution is authored by a single ethnicity, as opposed to an ethnically pluralistic Constitution; rather, the preamble refers to all of Kosovo's citizens as its authors, whatever their ethnic background.

Having surveyed the preamble, the basic provisions section of the Constitution will be examined next. In the first provision, Kosovo's Constitution proclaims that: "The Republic of Kosovo is an independent, sovereign, democratic, unique and indivisible state".⁴² Thus, the Constitution proclaims Kosovo's independence and sovereignty. As a matter of such determinations, one may consider the Constitution to be the domestic legal foundation of sovereignty. Also within this provision, the Constitution designates democracy as the governmental format for Kosovo and describes Kosovo's territory as unique and indivisible. The territorial "uniqueness and indivisibility" function as complementing principles of sovereignty and statehood. As will be discussed in this paper, apart from these particular proclamations and determinations, Kosovo's statehood and sovereignty are neglected and/or constitutionally constrained.

The Constitution specifies, "The Republic of Kosovo is a state of its citizens. The Republic of Kosovo exercises its authority based on the respect for human rights and freedoms of its citizens and all other individuals within its borders".⁴³ This sentence constitutionally proclaims Kosovo to be a citizens' state – disregarding potential nation-state statehood, and sets forth the human rights dimension of the polity as a Constitutional principle.

⁴¹ The European Commission considers the Kosovan Constitution to be "a Constitution of a high European standard." See Commission Staff Working Document: Kosovo under UNSCR1244/99 2008 Progress Report. Commission of the European Communities, SEC (2008) 2697, Brussels.

⁴² Kosovo Constitution 2008, Article 1, para 1.

⁴³ Kosovo Constitution 2008, Article 1, para 2.

In light of this, one may argue that the Constitution of Kosovo establishes Kosovo as a state of its citizens but not as a state of a single ethnic group. As such, as John Rawls argues, “it is of a fundamental ideal of liberal democracy that all citizens should enjoy fully equal citizenship”.⁴⁴ Since the Constitution shows no sign of privileging or recognizing any ethnic group, it both liberally governs and equally recognizes the citizens’ constitutional position; therefore the Constitution provides a statehood that is legally bound to the Kosovan citizens but not to any specific ethnic community. Furthermore, following Bernd Rechel’s findings,⁴⁵ as far as the human rights dimension of the polity is concerned, human rights in Kosovo are important for a number of reasons. First, the importance of the proclamation of human rights in the Constitution of Kosovo stems from domestic factors: the historical legacies and domestic political crises in Kosovo have made the protection of minority rights crucial for the existence of a multi-ethnic polity. In addition, the international community’s conditionality regarding Kosovo’s statehood and the international community’s support for Kosovo have been directly linked with Kosovo’s respect for minority and human rights. Hence, the latter facts have affected directly the Constitution of Kosovo’s design. However, as Warbrick and McGoldrick argue, the Constitution attaches to itself the *erga omnes* duty to respect human rights and protect minorities. Thus, as Warbrick and McGoldrick assert, the human rights dimension of the Constitution of Kosovo touches the exact concern of the countries that must recognize and accept Kosovo’s statehood.⁴⁶ Hence, the human rights dimension of the Constitution of Kosovo reflects the both the domestic and international aspirations of Kosovo.

In this review, it is also important to discuss these provisions in the context of the Montevideo Convention. The Constitution of Kosovo refers to Kosovo’s territory as an element of the state and defines the relationship of the people who live in that territory to Kosovo’s statehood. In addition, the Constitution highlights the polity’s aspiration to participate in international diplomatic relations. From that perspective, the Constitution of Kosovo indeed proclaims the concepts of Kosovo’s state territory, population, sovereign government, and relations with other states and international organizations, as determined by Article 1 of the Montevideo Convention on

⁴⁴ Rawls in Conover P et al “The elusive ideal of equal citizenship: Political theory and political psychology in the United States and Great Britain” (2004) *The Journal of Politics* Vol 66 no 4 10–61.

⁴⁵ Rechel B Introduction in Rechel B ed *Minority rights in Central and Eastern Europe*. (New York: Routledge, 2009).

⁴⁶ Warbrick C and McGoldrick, D Kosovo “The Declaration of Independence” (2008) *International and Comparative Law Quarterly* Vol 57 675–690.

the Rights and Duties of States.⁴⁷ Hence, one may argue that the Constitution of Kosovo prescribes, to the extent possible, the principles of the Montevideo Convention as a means of proclaiming statehood in a legal context.

The subsequent constitutional provision declares that: “The Republic of Kosovo shall have no territorial claims against, and shall seek no union with, any State or part of any State”.⁴⁸ Thus, Kosovo is constitutionally restrained from making a “territorial incursion” toward any nation that it could seize, and it should abstain from joining or seeking a union with any state. This is directly aimed at constitutionally prohibiting a potential ‘union’ of Kosovo with Albania – a real concern of the international community.

Using a ‘Lincolnian’ approach, Kosovo’s Constitution proclaims that: “The sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum and other forms in compliance with the provisions of this Constitution”.⁴⁹ Thus, the Constitution establishes the peoples’ sovereignty as the method of governance, thereby acknowledging three principles: first, that sovereignty stems from the people; second, that sovereignty is exercised on behalf of the people; and third, that sovereignty is exercised via the peoples’ representatives and/or referenda. To that extent, the Constitution promotes ‘Lincolnian Democracy’.

Following that section, the Constitution specifies that: “The sovereignty and territorial integrity of the Republic of Kosovo is intact, inalienable, indivisible and protected by all means provided in this Constitution and the law”.⁵⁰ Here the Constitution provides both a foundation and obligation for Kosovo’s polity to protect its territorial integrity and sovereignty, meaning that external aggressions or internal secessions will be constitutionally fought. This is implicitly based on Article 2(4) of the UN Charter, which asks states to refrain from actions that interfere with a state’s territorial integrity and political independence. In addition, the above provision complements Article 2(7) of the UN Charter, which requires the United Nations to refrain from intervening in domestic affairs, excluding the application of Chapter VII of the UN Charter.⁵¹ In light of Chapter VII, the ESDP’s mission in Kosovo could not be considered a breach to Kosovo’s territorial integrity as prescribed in Articles 2(4) and 2(7), given that the ESDP’s mission in Kosovo is derived

⁴⁷ Montevideo Convention on the Rights and Duties of States 1933, Article 1.

⁴⁸ Kosovo Constitution 2008, Article 1, para 3.

⁴⁹ Kosovo Constitution 2008, Article 2, para 1.

⁵⁰ Kosovo Constitution 2008, Article 2, para 2.

⁵¹ United Nations Charter, Article 2, paras 4 & 7.

from Chapter VII of the U.N. Charter.⁵² Furthermore, the Constitution details Kosovo's capacity to become part of international security alliances.⁵³ This could be interpreted as being motivated by Kosovo's intention to become a part of either NATO or ESDP, if integrated into the European Union.

On the other hand, although the Constitution of Kosovo legally establishes Kosovo's sovereignty, one may argue that, in the post-Cold War world, no state can be sovereign without being recognized internationally. This might lead us to examine the number of states that have recognized Kosovo;⁵⁴ however, we will approach this question by further digging into the Montevideo Convention, which specifies the following:

“...the political existence of the state is independent of recognition by the other states. Even before recognition, the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interest, administer its services and to define the jurisdiction and competence of its courts”.⁵⁵

After reviewing the proclamations in Kosovo's Constitution and reading the excerpt from the Montevideo Convention, one may argue that the proclamations for a fully fledged sovereignty have logical complementarity with the spirit of the Montevideo Convention. As such, the proclamations alone, as the Montevideo Convention proscribes, play a role in the existence of Kosovo's statehood.

Even though the Constitution of Kosovo proclaims the territorial indivisibility of Kosovo, there are some territorial areas within Kosovo that are not effectively governed by Kosovo's institutions. The Northern Mitrovica region of Kosovo is one such case; it remains (as of this writing) outside of the Constitution of Kosovo's authority.⁵⁶ This has led to the conclusion that, although the Constitution of Kosovo provides a basis for indivisible territorial sovereignty, its relevance in practice remains unrealistic in some places. So far, this has been one of the most egregious violations of the Constitution of

⁵² See a basic argument for this in: De Wet E “The governance of Kosovo: Security Council Resolution 1244 and the establishment and functioning of EULEX” (2009) *American Journal of International Law* Vol 103 no 1 83—96.

⁵³ Kosovo Constitution 2008, Article 2, paragraph 3.

⁵⁴ Sixty-five nations have recognized Kosovo's independence to date, although the independence has not been recognized by the United Nations as a collective unit (see Kosovo's Ministry of Foreign Affairs, States that have recognized Kosovo. Available at: <http://www.mfa-ks.net/?page=1,33>).

⁵⁵ Montevideo Convention, Article 3.

⁵⁶ Freedom in the World Country Report 2009, Freedom House. Available at: <http://www.freedomhouse.org/template.cfm?page=22&country=7757&year=2009>).

Kosovo. The lack of constitutional supremacy in those sections has been associated with not only criminal resistance but also total institutional failure and negligence.⁵⁷ Therefore, constitutional proclamations of territorial unity face enormous challenges in practice.⁵⁸

One of the most important proclamations and/or determinations that Kosovo's Constitution delivers relates to the principle of multi-ethnicity. As such, the Constitution states that: "The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions".⁵⁹ As a way of recognizing the equality of ethnic minorities' positions with that of the Albanian majority,⁶⁰ the Constitution establishes Kosovo as a multi-ethnic state. In that context, the Constitution does legally impose the multi-ethnicity principle as a basis for Kosovo's polity. It then follows that the Constitution is, in that context, a multi-ethnic constitution, since the state that it legally produces is a multi-ethnic state, having dismissed the governing principle of rule by the majority. To that end, Kosovo's Constitution offers relatively rich protections for ethnic minorities, guaranteeing an equal state for all of its citizens⁶¹ by disregarding the majority's ethnic background as a constitutional principle. Yet, although it is regarded as a principle, the Constitution employs this principle in almost every aspect of Kosovan institutional life, as will be discussed later. Hence, as Pond argues, this proclamation most substantially employs and consequently provides an over-proportional representation of minorities in institutional life,

⁵⁷ Commission Staff Working Document: Kosovo under UNSCR1244/99 2009 Progress Report. Commission of the European Communities, SEC (2009) 1340, Brussels.

⁵⁸ For this reason, Kosovo's government and the ICO have adopted a *Strategy for the Northern Mitrovica*, which attempts to establish constitutional supremacy over the latter (Radio Free Europe, *Kush eshte pjese e strategjise se Veriut? Radio Free Europe*. Available at: <http://www.evropaelire.org/content/Article/1931637.html>).

⁵⁹ Kosovo Constitution 2008, Article 3, para 1.

⁶⁰ According to the Kosovan Statistical Institute, Kosovo's population is composed of: Albanians – 92 percent, Serbs – 5.3 Serbs, Turkish – 0.4%, Roma – 1.1 %, and Others – 1.2% (Kosovan Statistical Office, Report for 'Ndryshimet Demografike te popullsisë se Kosoves ne periudhen 1948–2006'. Series no 4: Statistics of Population. Available at (April 15 2010): http://www.ks-gov.net/ESK/index.php?opinion=com_docman&task=cut_view&gid=8&Itemid=8).

⁶¹ The citizenship regime produced by the Kosovan Constitution is argued to have an inclusive approach, meaning that multi-ethnicity is reflected in the design of Kosovan citizenship. See: Krasniqi G "The Challenge of Building an Independent Citizenship Regime in a Partially Recognized State: The case of Kosovo" (2010) *CITSEE Working Papers Series 2010 paper no 04* available at: <http://www.law.ed.ac.uk/citsee/workingpapers>.

creating a positive discrimination in favor of minorities which can be practically observed in the institutional context.⁶²

In addition, the Constitution determines that: “Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution”.⁶³ Hence, the Constitution enacts the principle of the separation of powers: it establishes that the Assembly shall exercise the law-making powers,⁶⁴ the president shall represent the unity of the people,⁶⁵ and the government shall execute the laws and policies.⁶⁶ In this vein, the Constitution establishes the judiciary as the law-controlling and interpreting body⁶⁷ and the Constitutional Court as the final interpreter of the Constitution.⁶⁸ One may therefore argue that the separation of powers principle materializes through an institutional triangle consisting of the Assembly, the government and president, and the judiciary, whereas the Constitutional Court should ultimately guard the overall constitutional order. This system of the separation of powers also enacts the principle of checks and balances; however, the proclamation of the principle of checks and balances could have no meaning if it does not materialize in the state itself. Therefore, observation over time will indicate whether this principle has materialized substantially.

The Constitution’s section on basic provisions addresses another important issue – the official language. The Constitution determines that: “The official languages in the Republic of Kosovo are Albanian and Serbian”,⁶⁹ moreover, “Turkish, Bosnian and Roma languages have the status of official languages at the municipal level or will be in official use at all levels as provided by law”.⁷⁰ As a result, the Constitution recognizes two official languages and authorizes other languages to be used officially at the municipal level. It is worth noting, however, that the Kosovan population, as evidenced by Kupchan, is made up of roughly 90 percent Albanians—most of the rest is either Serbian or another ethnic minority.⁷¹ As such, the

⁶² Pond, E. “The EU’s test in Kosovo” (2008) *The Washington Quarterly* Vol 31 no 4 97–112.

⁶³ Kosovo Constitution 2008, Article 4, para 1.

⁶⁴ Kosovo Constitution 2008, Article 4, para 2.

⁶⁵ Kosovo Constitution 2008, Article 4, para 3.

⁶⁶ Kosovo Constitution 2008, Article 4, para 4.

⁶⁷ Kosovo Constitution 2008, Article 4, para 5.

⁶⁸ Kosovo Constitution 2008, Article 4, para 6.

⁶⁹ Kosovo Constitution 2008, Article 5, para. 1.

⁷⁰ Kosovo Constitution 2008, Article 5, para. 2.

⁷¹ Kupchan A C “Independence for Kosovo: Yielding Balkan reality” (2005) *Foreign Affairs* Vol 82 no 6 14–20.

Constitution offers a well-grounded multi-ethnic logic of official languages,⁷² which contributes to the multi-ethnic nature of the state, given the importance of the use of language in the citizen-state relationship.⁷³ In addition to the language, the Constitution determines that Kosovo's state symbols should represent the multi-ethnic character of the state, thus disregarding single-ethnic symbols for the polity.⁷⁴ To this end, *inter alia*, the Kosovan Constitutional Court has dismissed the emblem of the Municipality of Prizren, considering that, as determined by the Constitution, it does not sufficiently represent all ethnic groups that live in the city.⁷⁵ This has led to many public contestations;⁷⁶ however, the international community has welcomed this decision, acknowledging that the Kosovan Constitutional Court is adequately preserving the constitutional principle of multi-ethnicity.⁷⁷

Other important determinations that the Constitution provides in the section on basic provisions include the proclamations for a market economy, the preservation of cultural heritage, freedom, peace, and others.

One of the most important determinations that the Constitution delivers concerns the Constitution's legal position. The Constitution specifies that: "The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution",⁷⁸ [and that the] "the power to govern stems from the Constitution".⁷⁹ To this extent, one may argue that the Constitution is the highest [human] legal act of the polity, and no other legal norm can compete or override the Constitution. As argued near the end of this paper, this proclamation conflicts with another provision of the Constitution itself. Still, one might argue that the principle of constitutional superiority is here at least proclaimed and determined. Moreover, in this section the Constitution establishes that the power to govern

⁷² For more, see Lantschner E "Protection of Minority Communities in Kosovo: Legally ahead for European Standards – Practically still a long way to go" (2008) *Review of Central and East European Law Review* Vol 33 451–490.

⁷³ This links directly to the standards of the European Charter for Regional or Minority Languages 1992, European Treaty Series no 148. Council of Europe.

⁷⁴ Kosovo Constitution 2008, Article 6 para 1.

⁷⁵ Case no KO01/09 *Qemajl Kurtisi vs Municipal Assembly of Prizren* Ref no AGj07/10, Constitutional Court of Kosovo, March 18 2010.

⁷⁶ "Kundershtohet Vendimi i Gjykes Kushtetuese per Emblemen e Prizrenit", *Kosova Info* (Prishtine). Available at (April 12 2010): <http://www.kosova.info/2010/03/kundershtohet-vendimi-i-gjykes-kushtetuese-per-emblemen-e-prizrenit/> (published on March 24 2010).

⁷⁷ News Release "Ruling of Constitutional Court supports Community Rights—ICR". No 04/2010 of March 24 2010 available at (April 15 2010): http://www.kos.org/2/100319_CC_PRIZREN_emblem_eng.pdf.

⁷⁸ Kosovo Constitution 2008, Article 16, para. 1.

⁷⁹ Kosovo Constitution 2008, Article 16, para. 2.

stems from the Constitution only, establishing the Constitution as both the source of and limit upon Kosovo's governance. Having proclaimed and determined itself as the highest legal act, the Constitution has, in fact, determined itself – as Hans Kelsen's *grundnorm*, that is “the basic norm that constitutes the unity in the multitude of norms by representing the reason for the validity of all norms that belong to this order”.⁸⁰ To this extent, the abovementioned provision of the Constitution of Kosovo imitates or creates the Constitution as the *grundnorm* – or the peak – of Kosovo's legal system. Still, this is only a proclamation, so the issue of whether the Constitution can stand as a *grundnorm* needs to be more deeply analyzed. It is important to remember that the Ahtisaari Plan, a document in competition with the Constitution, has also proclaimed itself as a basis for the Constitution of Kosovo, and, in doing so, the plan declares itself superior to the Constitution. As a result, the position of the Constitution of Kosovo vis-à-vis the Ahtisaari Plan remains a contested matter, especially given the status settlement's obligations undertaken by Kosovo. However, although this issue is contested, the search for a *grundnorm* in the Kosovan legal order continues to be indefinitely linked with the abovementioned proclamation of the Constitution.

The remaining elements of the Constitution's basic provisions section cover international agreements, the applicability of international law, and the delegation of sovereignty. To provide external sovereignty, the Constitution authorizes the polity to enter into international legal instruments and to become part of international organizations.⁸¹ However, as of this writing, Kosovo has been part of only two international organizations – the International Monetary Fund and the World Bank.⁸² This potentially weakens Kosovo's international position. In contrast to the international organizations, the Constitution provides that “ratified” parts of international law will – upon ratification by the parliament – become automatically part of the internal law of Kosovo. This establishes a monist system of relations between domestic and international law,⁸³ whereas, in practice, the Constitution and the practical challenges to the latter have created dualist elements. Still, some constitutional provisions remain relatively illogical in terms of the position that ratified parts of international law deliver vis-à-vis the Kosovan legal

⁸⁰ Kelsen Hans (1970) “The pure theory of Law” Translated by Knight, Max from *Reine Rechtslehre* (Berkeley: University of California Press, 2nd edition, 1960) p 195.

⁸¹ Kosovo Constitution 2008, Articles 17 & 18.

⁸² Press Release No 2009/658 “Kosovo joins the IMF and WB” United States Department of State, Bureau of Public Affairs. June 29 2009.

⁸³ For more about the monist system, see: Shaw M QC *International Law* (Cambridge: Cambridge University Press, Sixth edn, 2009); and Hillier T *Sourcebook on public international law*. (London: Cavendish Publishing Limited, 1998)

system, and they complicate the position of constitutional norms amid the norms of the latter.

Ultimately, in the basic provisions section, the Constitution authorizes state institutions to delegate state sovereignty to international organizations and establishes the procedure for doing so. That is, of course, an authorization for the polity *vis-à-vis* the European Union integration process, given that direct constitutional powers are recognized to the polity so as to be able to delegate sovereign powers to the European Union.

Having surveyed the basic provisions section of the Constitution, the analysis moves on to an examination of its provisions for the governing system.

KOSOVO'S TOP GOVERNING INSTITUTIONS

The second part of the paper reviews the Constitution's provisions which establish and regulate the top governing institutions, or—in particular—the Assembly, the government, the president, and the judiciary, including the Constitutional Court. Although one may appreciate the Constitution of Kosovo for its standard of democracy, rule of law, separation of powers, and identification of human rights,⁸⁴ a deeper review may indicate whether any of these principles have not been well-provided.

As Marko asserts, the relationship between the three branches of the polity suggests that the Constitution of Kosovo delivers a parliamentary system of governance.⁸⁵ However, the Pufendorfian notion of sovereignty would not fit well with the powers articulated by the Constitution. “To summarize Pufendorf’s understanding, to legislate, to judge, to determine war and peace, to raise armies, to levy taxes, and to enforce the will decreed in the legislation is what it means to be sovereign”.⁸⁶ Hence, either the authorizations provided by the Constitution are lacking or it does not actually authorize the polity to engage in wars, to raise armies, and to provide unrestrained legislation, which can be seen as a limit on what defines a Pufendorfian-sovereign constitution. The examination begins with the constitutional provisions provided for the Kosovan Assembly.

⁸⁴ Kosovo (Under UNSCR 1244) Administrative Legal Framework, Assessment of May 2009, Sigma Programme’s Report for Kosovo (financed by the OECD & EU).

⁸⁵ Marko J “The new Kosovo Constitution in a regional Comparative Perspective” (2008) *Review of Central and East European Law* Vol 33 437–450.

⁸⁶ Pufendorf cited at: DeHart Paul R *Uncovering Constitution’s Moral Design*. (Columbia: University of Missouri Press, 2007) p 74.

ASSEMBLY

The Constitution establishes that: “The Assembly is the legislative institution of the Republic of Kosovo directly elected by the people”.⁸⁷ This provision relates two specific things: first, that the Assembly is the law-making body of the polity; and second, that the people directly elect the members of the Assembly. In addition to the Assembly’s power to make laws, the Constitution assigns others, including the power to appoint and dismiss the government,⁸⁸ the power to appoint and dismiss the president of Republic,⁸⁹ the power to ratify international agreements,⁹⁰ the power to approve the budget of the state,⁹¹ the power to propose Constitutional Court judges,⁹² and others. Thus, the Constitution establishes the Assembly not only as a law-making body, but also as a peoples’ representative body, capable of appointing and dismissing high-level officials for the governing institutions of the state. In this context – given that the Assembly is the only people-elected body in the polity – its power to articulate the peoples’ sovereignty makes it the most legitimate body in the polity, as determined by the Constitution.

The Constitution⁹³ specifies that the Assembly shall have 120 members, elected through a proportional system.⁹⁴ Out of these 120 members, the Constitution reserves twenty places for the representatives of minorities.⁹⁵ This constitutional guarantee which reserves places for representatives of ethnic minorities ensures that no ethnic minority goes unrepresented in the Assembly⁹⁶ no matter the outcome of the popular vote. The guaranteed parliamentary seats for ethnic minorities ensure a multi-ethnic Assembly, thereby excluding the possibility for majority overrule. According to the Constitution, every ethnic minority which exists in Kosovo’s territory shall

⁸⁷ Kosovo Constitution 2008, Article 63.

⁸⁸ Kosovo Constitution 2008, Article 65, para 8.

⁸⁹ Kosovo Constitution 2008, Article 65, para 7.

⁹⁰ Kosovo Constitution 2008, Article 65, para 4.

⁹¹ Kosovo Constitution 2008, Article 65, para 5.

⁹² Kosovo Constitution 2008, Article 65, para 11.

⁹³ Kosovo Constitution 2008, Article 64, para 1.

⁹⁴ United States has appreciated the standard of the first elections held under the authority of the Kosovan Constitution. See: Press Release on “Kosovo’s first elections since independence”. United States Department of State. November 16, 2009. Available at (April 11 2010): <http://www.state.gov/r/pa/prs/ps/2009/nov/131994.htm>.

⁹⁵ Kosovo Constitution 2008, Article 64, para 1 subpara 1 & 2.

⁹⁶ Currently, there are three parliamentary groups that belong to ethnic minorities in the Kosovan Assembly, with more than twenty members from the ethnic minorities’ communities. Available from the Assembly’s website: <http://www.assembly-kosova.org/?cid=2,192>.

have guaranteed seats in the Assembly, with the Serbian minority having the highest number of guaranteed seats (10).⁹⁷

The Constitution specifies that the Assembly shall be chaired by a president,⁹⁸ with at least two of the Assembly's deputy presidents coming from the ethnic minorities' members. According to the Constitution, the president and deputy-presidents of Assembly shall be appointed on the basis of a relative majority, whereas their dismissal can take place only if a majority of two-thirds vote in the Assembly.⁹⁹

The members' mandate, according to the Constitution, is free, given that members "are representatives of the [whole] people [as opposed to a portion of constituency] and are not bound by any obligatory mandate".¹⁰⁰ That means that members have no constitutional obligation *vis-à-vis* their strict electorate – the members' mandate is free and not linked with the electorate's will. The Constitution recognizes that the members have a representative mandate unconstrained by their electorate's desires; hence, they represent the whole people of Kosovo, despite from whence their votes derived. In addition, the Constitution determines that once a Kosovan is at least 18 years old, he/she is eligible to become a member. Moreover, the composition of the Assembly "shall respect internationally recognized principles of gender equality".¹⁰¹ Therefore, the Constitution recognizes and establishes the gender balance principle in the Assembly's composition, meaning that, despite the popular vote, women shall take member positions at a certain percentage (i.e., one-third of the Assembly should be composed of women, according to the Electoral Law of Kosovo).

As per the Constitution, "A member of the Assembly of Kosovo shall neither keep any executive post in the public administration or in any publicly owned enterprise nor exercise any other executive function as provided by law".¹⁰² This provides a clear division between the members of the Assembly and the members of the government or other state institutions. Also, members of the government cannot simultaneously hold the position of member of the Assembly, so that those in the Assembly voting to appoint the government will have clear relationships.

⁹⁷ Most of these, according to Hughes, have been imposed by the international community through the Ahtisaari Settlement. See: Hughes J "EU conflict management policy: Comparing the security-development model in the '*sui generis*' cases of Northern Ireland and Kosovo". Paper presented at the European Consortium for Political Research, September 10–12 2009, Potsdam, Germany. Available at: <http://eprints.lse.ac.uk/26061/>.

⁹⁸ Kosovo Constitution 2008, Article 67, para. 2.

⁹⁹ Kosovo Constitution 2008, Article 67.

¹⁰⁰ Kosovo Constitution 2008, Article 70, para. 1.

¹⁰¹ Kosovo Constitution 2008, Article 71, paras 1&2.

¹⁰² Kosovo Constitution 2008, Article 72.

The members of the Assembly are granted immunity “from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. [However] the immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly”.¹⁰³ Therefore, although members have a limited immunity, the judiciary branch members cannot prosecute members of the Assembly. This style of immunity is similar to that granted to representatives and senators in the United States Congress.

The Constitution provides the Assembly with the capacity to regulate its own procedural function through the adoption of an internal regulation. This requires the assent of at least two-thirds of the members.^{104, 105} Furthermore, the Constitution assigns to the Assembly the power to establish permanent or ad hoc committees; investigative committees may be established at the request of at least one-third of members.¹⁰⁶ The investigative committee requirements allow any opposition political party to request that an investigative committee be established, thus creating the possibility to wield formidable opposition parliamentary power. In a similar vein, the Constitution determines that there shall be a permanent Committee on the Rights and Interests of [ethnic] Communities, which shall control the representation of ethnic communities’ interests in the law-making process.¹⁰⁷

One of the most important matters determined by the Constitution is the legislative initiative. The Constitution establishes that the initiative for adopting a law may “be taken by the President of the Republic of Kosovo from his/her scope of authority, the government, deputies of the Assembly or at least ten thousand citizens as provided by law”.¹⁰⁸ Thus, a number of different actors may initiate the adoption of a law in the Assembly. Moreover, a legislative initiative could be initiated by any of Kosovo’s ten-thousand citizens, which makes the Assembly ‘open’ in terms of law initiatives.

The Constitution sets forth that laws are adopted at the Assembly if the majority of members present vote in favor of the law. The law adopted by the Assembly should be promulgated by the President of Republic within eight days of its adoption. The president may use a suspensive veto against a law,

¹⁰³ Kosovo Constitution 2008, Article 75, para 1.

¹⁰⁴ Kosovo Constitution 2008, Article 76.

¹⁰⁵ The current regulation has been adopted under the authority of the former constitutional framework, issued by UNMIK. See: Assembly of Kosovo “Rules of procedure of the Assembly of Kosovo” approved on May 20 2005 and amended on June 1 2006.

¹⁰⁶ Kosovo Constitution 2008, Article 77.

¹⁰⁷ Kosovo Constitution 2008, Article 78.

¹⁰⁸ Kosovo Constitution 2008, Article 79.

which sends it back to the Assembly. The Assembly can then override the president's veto by using the same majority that it used for its adoption. If the law is adopted by the Assembly a second time, then it is automatically promulgated, without the need for the President of Republic's signature. The entry into force of an adopted and promulgated law should take place fifteen days after the given law has been publicized in the *Official Gazette of Kosovo*.¹⁰⁹

The Constitution makes a distinction between usual laws and vital interest laws. In that context, the Constitution determines that a law of vital interest requires a double majority in the Assembly for adoption. Laws of vital interest can be adopted, amended, or abrogated only if the majority of the Assembly, and majority of those holding guaranteed seats (i.e., reserved seats) in the Assembly, vote in favour of it.¹¹⁰ This double-majority for laws of vital interest, as opposed to a common majority, makes the participation of ethnic minorities crucial in the adoption process of vital laws.¹¹¹ If the vital interest law fails to garner a double-majority, this essentially constitutes an ethnic-minority veto of any law that might constrain their interests. Yet, as Marko argues, this is not a one-ethnic-minority absolute veto and may not be used by one ethnic group only for blocking all of the others.¹¹²

Ultimately, the Constitution regulates the manner through which the Assembly might be dissolved. It specifies that the Assembly can be dissolved under three circumstances: first, when the government with a decreed prime minister cannot take the votes for appointment in the Assembly; second, when the Assembly fails to appoint the President of Republic for a certain period of time; and third, when the members themselves require the dissolution.¹¹³

PRESIDENT AND GOVERNMENT

PRESIDENT OF THE REPUBLIC

The Constitution of Kosovo provides a bi-cephalic executive branch, meaning that there shall be a president and a government headed by a prime minister. The Constitution establishes that: "The president is the head of state

¹⁰⁹ Kosovo Constitution 2008, Article 80.

¹¹⁰ For more about the double majority procedure in the Kosovan vital laws' case, see: Tansey O Kosovo "Independence and Tutelage (2009) *Journal of Democracy*. Vol 20 no 2 153-166.

¹¹¹ Kosovo Constitution 2008, Article 81, para 1.

¹¹² Marko J "The new Kosovo Constitution in a Regional Comparative Perspective" (2008) *Review of Central and East European Law* Vol 33 437-450.

¹¹³ Kosovo Constitution 2008, Article 82.

and represents the unity of the people of the Republic of Kosovo”.¹¹⁴ This fundamental power held by the President of the Republic (hereafter, “president”) is formal, meaning that nothing substantial can be acquired by the president if he/she represents the unity of the people. The manner of appointment of the president required by the Constitution leaves questions as to whether the president can be a true representative of the people’s unity remains to be.

In addition, the Constitution specifies that the president shall represent the state internally and externally,¹¹⁵ shall guarantee the Constitution’s performance,¹¹⁶ shall promulgate laws adopted by the Assembly,¹¹⁷ shall return laws to the Assembly for reconsideration,¹¹⁸ shall sign international agreements,¹¹⁹ can propose amendments to the Constitution,¹²⁰ shall lead the foreign policy of the country,¹²¹ shall be the chief of Kosovo’s Security Force (Army),¹²² shall decree the candidate for Prime Minister from the party that has won the majority of seats in the Assembly,¹²³ shall appoint and dismiss judges and prosecutors upon the proposal of Kosovo’s Judicial Council and Kosovo’s Prosecutorial Council,¹²⁴ shall appoint the commander of Kosovo’s Security Force upon proposal of the government,¹²⁵ shall appoint the governor of the central bank,¹²⁶ shall appoint the chair of the Electoral Commission,¹²⁷ shall appoint the ambassadors and the head of the Intelligence Service upon the proposal of the government, shall declare states of emergency,¹²⁸ and so forth.

Prior to analyzing the president’s powers, one must understand how the Constitution determines the election of the president. The Constitution specifies that the president shall be appointed by the Assembly via a two-thirds vote of the whole Assembly. “If a two thirds (2/3) majority is not reached by any candidate in the first two ballots, a third ballot takes place between the two candidates who received the highest number of votes in the

¹¹⁴ Kosovo Constitution 2008, Article 83.

¹¹⁵ Kosovo Constitution 2008, Article 84, para 1.

¹¹⁶ Kosovo Constitution 2008, Article 84, para 2.

¹¹⁷ Kosovo Constitution 2008, Article 84, para 5.

¹¹⁸ Kosovo Constitution 2008, Article 84, para 6.

¹¹⁹ Kosovo Constitution 2008, Article 84, para 7.

¹²⁰ Kosovo Constitution 2008, Article 84, para 8.

¹²¹ Kosovo Constitution 2008, Article 84, para 10.

¹²² Kosovo Constitution 2008, Article 84, para 12.

¹²³ Kosovo Constitution 2008, Article 84, para 14.

¹²⁴ Kosovo Constitution 2008, Article 84, paras 15-19.

¹²⁵ Kosovo Constitution 2008, Article 84, para 20.

¹²⁶ Kosovo Constitution 2008, Article 84, para 27.

¹²⁷ Kosovo Constitution 2008, Article 84, para 26.

¹²⁸ Kosovo Constitution 2008, Article 84, paras 21-30.

second ballot, and the candidate who receives the majority of all deputies of the Assembly shall be elected as President of the Republic of Kosovo".¹²⁹ As a result, the president is likely to be elected from a coalition of parties or from the party that holds the government (i.e., the one that has 50 percent plus one (1) members in the Assembly).¹³⁰ The president's election will usually end in the third round of voting, given that the coalition of parties or the party holding the majority in the Assembly will most likely require the seat of the president. As a result, president will likely be a political tool of the majority party (or coalition of parties) in the Assembly; therefore, no political independency can be assumed to be delivered by the president *per se*.¹³¹ The underlying reasoning for powers of the president, especially those in the judiciary sphere, conflict with the manner of the presidential election specified in the Constitution. It follows that one should not assume that the president's position within the political context represents the unity of the people, given that the manner in which the president is elected preconditions a partisan president, rather than a non-partisan (i.e., comprehensive) one. Still, the powers of the president granted by the constitution do make him or her a constitutionally powerful president.

The Constitution grants a mandate of five years for the president and allows reelection only once.¹³² Moreover, it sets forth that the president, while in office, can exercise no partisan functions, meaning that the Constitution prohibits the president from holding a partisan affiliation and/or position.¹³³ Despite this limitation, the current Kosovan president holds both the position of president of the LDK party and the position of President of Republic, having legally 'frozen' his position within the LDK.¹³⁴ This is considered, however, a gap within the Constitution itself; this contest has generated many clashes within the Kosovan party politics.¹³⁵ The Constitution does not specify whether 'freezing' one's position in one's party, while continuing to hold it formally, is sufficient to make one eligible to hold the position of the

¹²⁹ Kosovo Constitution 2008, Article 86, para 5.

¹³⁰ The current president comes from LDK, which is a part of the coalition of political parties that hold the government. See: Platforma e Sejdiut per LDK *Gazeta Express* available at (April 20 2010):

<http://www.gazetaexpress.com/web/index.php/artikujt/lexo/28976/C4/C13>.

¹³¹ See, for instance: Rikonfirmohet koalicioni LDK-PDK *BBC in Albanian* available at (April 21 2010):

http://www.bbc.co.uk/albanian/news/2009/11/091120_kos_partner.shtml.

¹³² Kosovo Constitution 2008, Article 87.

¹³³ Kosovo Constitution 2008, Article 88.

¹³⁴ Kryetari "i ngrirë" cakton ministrat, *Koha Net*, available at (April 21 2010): <http://www.kohaditore.com/index.php?cid=1,22,17097>.

¹³⁵ Ditelindja e Kushtetutes *Gazeta Express* available at (April 21 2010): <http://www.gazetaexpress.com/web/index.php/artikujt/lexo/28316/C4/C13>.

President of Republic. Nonetheless, many argue that the Constitution prohibits a President of Republic with double positions.¹³⁶ This issue has not yet been ruled on by the Constitutional Court.

The Constitution has established a relatively complex procedure for dismissing the president:

“If the President of the Republic of Kosovo has been convicted of a serious crime or if the Assembly in compliance with this article determines that the President is unable to exercise her/his responsibilities due to serious illness, or if the Constitutional Court has determined that he/she has seriously violated the Constitution, the Assembly may dismiss the President by two-thirds (2/3) vote of all its deputies”.¹³⁷

The Constitution strongly protects the president’s mandate, and as such, it widely restricts the possibility for dismissal and allows the undertaking of the dismissal process only with two-thirds of the vote, as opposed to the majority of votes necessary for his or her election.

GOVERNMENT

The Constitution establishes that the government “consists of the Prime Minister, deputy Prime Minister (s) and ministers”,¹³⁸ and its function is to “exercise the executive power”¹³⁹ of the state, which consists of implementing the “laws and other acts adopted by the Assembly of Kosovo”.¹⁴⁰ Therefore, the government is the most powerful part of the executive branch. In particular, the Constitution specifies that the government can propose and implement the internal and foreign policy of the polity,¹⁴¹ promote economic development,¹⁴² propose laws and issue sub-laws,¹⁴³ propose the budget of the state,¹⁴⁴ direct the public administration of the country,¹⁴⁵ propose the appointment of ambassadors and other chiefs of independent institutions in

¹³⁶ Radio Free Europe, ‘Kushtetuta nuk lejon poste te dyfishta’. Available at (April 01 2010): <http://www.evropaelire.org/content/Article/1336999.html>.

¹³⁷ Kosovo Constitution 2008, Article 89, para 3.

¹³⁸ Kosovo Constitution 2008, Article 92, para 1.

¹³⁹ Kosovo Constitution 2008, Article 92, para 2.

¹⁴⁰ Kosovo Constitution 2008, Article 92, para 3.

¹⁴¹ Kosovo Constitution 2008, Article 93, para 1.

¹⁴² Kosovo Constitution 2008, Article 93, para 2.

¹⁴³ Kosovo Constitution 2008, Article 93, paras 3 & 4.

¹⁴⁴ Kosovo Constitution 2008, Article 93, para 5.

¹⁴⁵ Kosovo Constitution 2008, Article 93, paras 6 & 7.

Kosovo, and other similar duties. The Constitution determines that the government shall be headed by a prime minister, whose office shall have individual competences, as opposed to those of the government as a whole.¹⁴⁶ Moreover, the prime minister has the capacity to remove a minister of his/her government without the assent of the Assembly.¹⁴⁷ The prime minister's position is relatively powerful as a matter of the constitutional arrangement, i.e., stronger than that of a *primus-inter-partes* prime minister. Because of these stipulations, the prime minister shall head the government and be able to direct and demand accountability from his/her ministers. Here, the Constitution provides for a powerful prime minister, whose powers make him or her a proper chief of the government (or at least provide him or her with the option to become one).

The Constitution requires that the government be appointed by the Assembly with a majority of votes. As a preliminary step, the President of the Republic shall decree the prime minister from the party or coalition that has won the majority of seats in the Assembly, whereas the prime minister shall compose the government and send it up for a vote in the Assembly.¹⁴⁸ Yet:

“...if the proposed composition of the government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement”.¹⁴⁹

As relates to the ministries, the Constitution determines that the number of ministries and their functioning shall be regulated with an internal act of the government.¹⁵⁰ It also determines that there must be a minimum of two ministers in any government representing ethnic communities,¹⁵¹ one of whom should come from the Serbian minority.¹⁵² As such, the Constitution offers a rich, ethnically plural government, given the obligation to include

¹⁴⁶ Kosovo Constitution 2008, Article 94.

¹⁴⁷ Kosovo Constitution 2008, Article 94, para 4.

¹⁴⁸ Kosovo Constitution 2008, Article 95, paras 1, 2 & 3.

¹⁴⁹ Kosovo Constitution 2008, Article 95, para 4.

¹⁵⁰ Kosovo Constitution 2008, Article 96, para 2.

¹⁵¹ Three ministries are currently led by ethnic minorities' representatives (two of them belong to the Serbian community). See: New mandate, New Opportunities, National Democratic Institute October 2008, Prishtina.

¹⁵² Kosovo Constitution 2008, Article 96, para 3.

ministers from the ethnic communities, exclusive from the votes in the Assembly.

In terms of responsibility, the Constitution determines that the government shall be responsible to the Assembly for its work. The responsibility can be required individually or collectively.¹⁵³ Thus, in order to forge an inflexible link between the people's legitimacy and the executive branch, the Constitution establishes a proper parliamentary-controlled government. It follows that one may consider this governing system to be purely parliamentary.

The Constitution has bestowed the government and its members with immunity.¹⁵⁴ In addition, it establishes that the dismissal of the government may be undertaken if a motion of non-confidence against the government passes successfully with a majority of votes of all members of Assembly.¹⁵⁵

Overall, the Constitution provides no special protection for the government from the Assembly; however, the style of the governing system provides that the majority of the Assembly functions as a tool of the prime minister or the government as a whole. Thus, the Assembly does not possess true control of the government, given the strict partisan linkage between the majority of members in the Assembly and the holders of government positions.

JUDICIARY

The Constitution determines that the judicial branch of power shall be exercised by courts¹⁵⁶ and provides that "judicial power is unique,¹⁵⁷ independent, fair, apolitical and impartial and ensures equal access to the courts".¹⁵⁸ This constitutes a range of formal guarantees that the Constitution delivers vis-à-vis the judiciary. To that end, the Constitution establishes the judiciary an accurate interpreter and controller of the law. It guarantees the right to appeal first-level judicial decisions to a higher judicial level,¹⁵⁹ thus

¹⁵³ Kosovo Constitution 2008, Article 97.

¹⁵⁴ Kosovo Constitution 2008, Article 98.

¹⁵⁵ Kosovo Constitution 2008, Article 100.

¹⁵⁶ Kosovo Constitution 2008, Article 102, para. 1.

¹⁵⁷ Currently, the justice system in the North of Kosovo is dysfunctional, hence, in practice, it cannot be described as an indivisible justice system, as proclaimed by the Constitution. See: *Probleme me funksionimin e gjykatave ne veri BBC in Albanian* available at (April 19 2010):

http://www.bbc.co.uk/albanian/news/2010/03/100310_prishtina.shtml.

¹⁵⁸ Kosovo Constitution 2008, Article 102, para 2.

¹⁵⁹ Kosovo Constitution 2008, Article 102, para 5.

acknowledging that the judicial system is based on the double-tier interpretation of law (ie, the principle of appellation).

The Constitution states that there shall be a Supreme Court, as the highest judicial institution, which shall ultimately judge whatever cases are raised. The Supreme Court shall have at least three judges who come from the ethnic communities. In addition, the terms of the Supreme Court judges shall last seven years and be elected by the president of Kosovo upon the proposal of Kosovo's Judicial Council.¹⁶⁰

The Constitution requires that other courts in Kosovo be established and regulated by law. The appointment of judges in all other courts in Kosovo is decreed by the president upon the proposal of Kosovo's Judicial Council. Furthermore, the Constitution specifies that the "composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality".¹⁶¹ Similarly, the Constitution establishes that the "initial mandate for judges shall be three years... The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law".¹⁶² In addition, the Constitution prohibits the establishment of extraordinary courts.¹⁶³

The Constitution establishes Kosovo's Judicial Council as an institution which guarantees the independent functioning of the judiciary. To that end, Kosovo's Judicial Council is composed of members who are appointed by the judiciary itself, by the Assembly of Kosovo, and in particular, by the members of Assembly who hold reserved seats.¹⁶⁴ In that context, Kosovo's Judicial Council is constitutionally independent *vis-à-vis* the executive and legislative branch. Thus, the control over the judiciary's performance has been preconditioned to be accurate. Similarly, Kosovo's Judicial Council shall be able to make mandatory nominations of judges at all levels, propose mandatory dismissals of judges, and perform disciplinary measures upon judges if malpractice occurs.¹⁶⁵ Kosovo's Constitution authorizes the Judicial Council to develop rules for the functioning and organization of the judiciary, subordinate to the relevant laws.

The Constitution establishes the position of State Prosecutor, which is "an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law".¹⁶⁶ In addition, it establishes the Prosecutorial Council, an institution that

¹⁶⁰ Kosovo Constitution 2008, Article 103, paras 1–3.

¹⁶¹ Kosovo Constitution 2008, Article 104, para 2.

¹⁶² Kosovo Constitution 2008, Article 105, para 1.

¹⁶³ Kosovo Constitution 2008, Article 103, para 4.

¹⁶⁴ Kosovo Constitution 2008, Article 108.

¹⁶⁵ Kosovo Constitution 2008, Article 108.

¹⁶⁶ Kosovo Constitution 2008, Article 109, para 1.

is mandated to deliver nominations for prosecutors as well as proposals for dismissing prosecutors, and generally ensures that the functioning of the prosecutorial system is lawful and constitutional.¹⁶⁷

Overall, the Constitution provides a relatively stable basis for the judiciary's independence, largely ensured by the powers of Kosovo's Judicial Council. To that end, the constitutional protection of the judiciary's independence is well equilibrated with the two other branches of governing system. However, the judiciary faces serious performance challenges,¹⁶⁸ leading to potentially serious breaches in the Constitution of Kosovo's prescription for a functional and independent judiciary.¹⁶⁹

CONSTITUTIONAL COURT

The Constitution empowers the Constitutional Court to adjudicate the constitutionality of laws and decisions. As such, the Constitution establishes that: "The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution".¹⁷⁰ The Constitutional Court, therefore, essentially controls the application of the Constitution and, as such, takes the necessary steps to enable its accurate application. In particular, the Constitution authorizes the Constitutional Court to interpret the constitutionality of laws, governmental regulations, and decrees issued by the prime minister and the president.¹⁷¹ In addition, it has the jurisdiction to resolve conflicts of competences between the President of the Republic, the Assembly and the government, decide on the constitutionality of a proposed referendum, review the constitutionality of a declaration of a state of emergency and those actions undertaken during such a state, control the constitutionality of a proposed constitutional amendment with the binding international agreements, and control the constitutionality of elections for the Assembly.¹⁷² Moreover, the Constitution assigns to the Constitutional Court the rights to control the constitutionality of municipal statutes and to judge any potential constitutional infringement caused by the President of Republic.¹⁷³ In all of these jurisdictions, only institutional actors

¹⁶⁷ Kosovo Constitution 2008, Article 110.

¹⁶⁸ Kosovo (Under UNSCR 1244) Administrative Legal Framework, Assessment of May 2009, Sigma Programme's Report for Kosovo (financed by OECD & EU).

¹⁶⁹ State Department's Human Rights Report for Kosovo 2009, available at: <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136039.htm>.

¹⁷⁰ Kosovo Constitution 2008, Article 112, para 1.

¹⁷¹ Kosovo Constitution 2008, Article 113, para 1.

¹⁷² Kosovo Constitution 2008, Article 113, para 3.

¹⁷³ Kosovo Constitution 2008, Article 113, para 5.

can initiate the procedure before the Constitutional Court; citizens are not authorized by the Constitution to do so.

One might ask whether the Constitution allows individuals to raise questions and file appeals at the Constitutional Court. The Constitution does allow individuals to raise questions of constitutional rights and abuses of freedoms in Constitutional Court, provided that all other judicial remedies have been exhausted.¹⁷⁴ This is the only time when individuals can raise a question in the Constitutional Court; therefore, the Constitution provides citizens a limited opportunity in which to question constitutionality at the Constitutional Court level. As such, this bias against the citizens may be considered a democratic deficiency, since an unconstitutional law, for example, cannot be challenged by individuals at the Constitutional Court. Hence, the Constitution, in this context, denies the public an opportunity to directly participate in challenging the unconstitutionality of an act.

This raises the question of whether the Constitutional Court can *ex officio* exercise its jurisdiction, without the need for an appeal from an institutional actor or individual. The Constitution provides no *ex-officio* powers for the Constitutional Court; therefore, the court's authority, more or less, depends on institutional or individual requests.

The Constitution requires that the Constitutional Court have nine judges, appointed by the President of the Republic upon the proposal of the Assembly. Seven of the judges are to be proposed by two-thirds of the Assembly, with two judges to be elected by the majority of Assembly after gaining the consent of the members holding reserved seats (minority members).¹⁷⁵ The judges of the Constitutional Court shall have immunity,¹⁷⁶ and their dismissal can take place only if two-thirds of its judges recommend the removal and the President of Republic issues a decree concurring with their recommendation.¹⁷⁷ In contrast to the appointment process of the court overall, the transitory provisions of the Constitution require that, in the transitory period, three of the judges of the Constitutional Court not be Kosovan citizens – instead, they are to be appointed by the International Civilian Representative upon consultation with the President of the European Court of Human Rights.¹⁷⁸

Given the analysis above, the governing system installed by the Constitution may be considered to be a purely parliamentary system. As a consequence, the Assembly remains the only route through which the people's legitimacy may be employed; therefore, the Assembly exercises both

¹⁷⁴ Kosovo Constitution 2008, Article 113, para 7.

¹⁷⁵ Kosovo Constitution 2008, Article 144.

¹⁷⁶ Kosovo Constitution 2008, Article 117.

¹⁷⁷ Kosovo Constitution 2008, Article 118.

¹⁷⁸ Kosovo Constitution 2008, Article 152.

the representation function and the law-making function. As such, the Assembly has control over both the government and the president. The judiciary is free from this political control, so its independence remains relatively well-protected.

In contrast, the president holds a wide range of powers—not commonly found in purely parliamentary systems of governance; however, in practice, the president should be appointed by a parliamentary majority which simultaneously holds the government. Given this, the Constitution’s authorizations for the president, and especially the powers that the president holds over the judiciary, make no sense in legal-rational terms, since a president who comes from the same parliamentary majority that holds the government can offer the judiciary no protection. In that context, most of the powers of the president have no logic *vis-à-vis* the mode of appointing the president. Therefore, the Constitution makes it highly likely that the president and the Assembly will be controlled by the coalition or the party in control of the government.¹⁷⁹ In addition, given the president’s manner of appointment, no semi-presidential elements are apparent in the Constitution. Similarly, the only powerful obstacle which could be set forth against the government is parliamentary opposition—which can block some of the laws and form investigative commissions (from a constitutional point of view). Taken as a whole, the Constitution produces a purely parliamentary governing system where the separation-of-powers principle is widely applied.

THE RIGHTS AND LIBERTIES OF CITIZENS

The Constitution creates an environment rich with human rights and liberties.¹⁸⁰ Given the conflicts that appeared and persisted between Albanians and Serbs after the dissolution of the Socialist Federal Republic of Yugoslavia, it guarantees special protection instruments for ethnic minority citizens.¹⁸¹ However, in general, the Constitution forms the basis for almost every right and liberty a citizen possesses.¹⁸² The Constitution’s framers

¹⁷⁹ For more on the importance of the political supervision of the Assembly upon the government, see: National Democratic Institute for International Affairs (2006) *Towards Development of International Standards for Democratic Legislature* Washington.

¹⁸⁰ For a detailed human rights’ analysis at the municipal level, see: Krasniqi, G “Local Policies in Multiethnic Communities” (2009) *KIPRED’s Civil Dialogue Working Paper Series*. Prishtina.

¹⁸¹ For more about the history of conflicts between Albanians and Serbs, see: Malcolm N *Kosovo – A Short History* (London: Macmillan, 1998).

¹⁸² It is worth looking at: State Department’s Human Rights Report for Kosovo 2009 available at: <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136039.htm>.

considered the human rights provisions to be a core responsibility of the new document. In addition, the Ahtisaari Plan had set forth its own human rights' guarantees that later became accepted as constitutional elements. The Constitution also delivers direct-applicability powers to a wide range of international legal instruments. Thus, the Constitution accepts and provides at least three sources of human rights guarantees: first, the constitutional guarantees of rights and liberties; second, the Ahtisaari Plan's guarantees of rights and liberties; and third, the international legal instruments to which the Constitution *per se* refers. These are reviewed in this section.

Kosovo's Constitution establishes that: "Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo".¹⁸³ It then states that: "The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution".¹⁸⁴

In more substantial terms, the Constitution guarantees the right to be equal before the law;¹⁸⁵ the right to life;¹⁸⁶ the right to personal integrity;¹⁸⁷ the right to be protected from torture, cruel, inhuman, or degrading treatment;¹⁸⁸ the prohibition of slavery and forced labor;¹⁸⁹ the right to liberty and security;¹⁹⁰ the rights of the accused;¹⁹¹ the right to fair and impartial trial;¹⁹² the right to legal remedies;¹⁹³ the principle of legality and proportionality in criminal procedures;¹⁹⁴ the right not to be tried twice for the same criminal act;¹⁹⁵ the freedom of movement;¹⁹⁶ the right to privacy;¹⁹⁷ the right to marriage and family;¹⁹⁸ the freedom of expression;¹⁹⁹ and many other rights and liberties. Although the Constitution seems to enact a high standard when it comes to those rights and liberties which are guaranteed, the Freedom House Report

¹⁸³ Kosovo Constitution 2008, Article 21, para 1.

¹⁸⁴ Kosovo Constitution 2008, Article 21, para 2.

¹⁸⁵ Kosovo Constitution 2008, Article 24.

¹⁸⁶ Kosovo Constitution 2008, Article 25.

¹⁸⁷ Kosovo Constitution 2008, Article 26.

¹⁸⁸ Kosovo Constitution 2008, Article 27.

¹⁸⁹ Kosovo Constitution 2008, Article 28.

¹⁹⁰ Kosovo Constitution 2008, Article 29.

¹⁹¹ Kosovo Constitution 2008, Article 30.

¹⁹² Kosovo Constitution 2008, Article 31.

¹⁹³ Kosovo Constitution 2008, Article 32.

¹⁹⁴ Kosovo Constitution 2008, Article 33.

¹⁹⁵ Kosovo Constitution 2008, Article 34.

¹⁹⁶ Kosovo Constitution 2008, Article 35.

¹⁹⁷ Kosovo Constitution 2008, Article 36.

¹⁹⁸ Kosovo Constitution 2008, Article 37.

¹⁹⁹ Kosovo Constitution 2008, Article 40.

argues that the Constitution²⁰⁰ limits the freedom of expression if the freedom concerned is used for fueling ethnic conflicts.²⁰¹ This, however, may be negatively interpreted from a liberal human rights perspective and might contradict some of the international legal instruments on human rights.

The second element of the constitutional protections of human rights consists of the international legal instruments of which the Constitution recognizes their direct applicability in Kosovo. As a result, Kosovo accepts and employs the doctrine of incorporation, given that the instruments concerned automatically take effect in the domestic law.²⁰² In light of that, the Constitution states that:

“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

- (1) Universal Declaration of Human Rights;
- (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- (3) International Covenant on Civil and Political Rights and its Protocols;
- (4) Council of Europe Framework Convention for the Protection of National Minorities;
- (5) Convention on the Elimination of All Forms of Racial Discrimination;
- (6) Convention on the Elimination of All Forms of Discrimination Against Women;
- (7) Convention on the Rights of Children;
- (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment”.²⁰³

Furthermore, the Constitution declares, “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.²⁰⁴ Along these

²⁰⁰ Article 40, para. 2.

²⁰¹ Freedom in the World Country Report 2009, Freedom House. Available at: <http://www.freedomhouse.org/template.cfm?page=22&country=7757&year=2009>.

²⁰² For more about the doctrine of incorporation, see: Aust *A Handbook of International Law* New York: Cambridge University Press, 2005)

²⁰³ Kosovo Constitution 2008, Article 22.

²⁰⁴ Kosovo Constitution 2008, Article 53.

same lines, the direct applicability of international legal instruments in Kosovo provides a wide and rich environment for the guarantee and protection of rights and liberties. Similarly, as seen in this list of applicable conventions and agreements, the European Court of Human Rights' case law is binding upon the Kosovan courts' jurisdiction – this leads to a judicial system that should be compulsorily referred to the comprehensive system of European human rights.

Overall, the Constitution provides a wide range of rights and liberties and recognizes the direct applicability of many international legal instruments in Kosovo's legal system. In addition, the case law of the European Court of Human Rights 'Europeanizes' Kosovo's legal order, as a result of the Constitution's prescription. Still, one totally illogical provision provided by the Constitution specifies that: "fundamental rights and freedoms guaranteed by this Constitution may only be limited by law".²⁰⁵ With no rational basis for this, the authors consider it an unreasonable portion of the Constitution.

RIGHTS AND PRIVILEGES OF ETHNIC COMMUNITIES

The Constitution provides special guarantees for the members of ethnic minorities. As such, it offers a special constitutional position, as opposed to a rule of majority governance, to those minorities, thereby making their participation in public life and constitutional protection privileged.²⁰⁶ The Constitution declares that:

"Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in chapter II of this Constitution²⁰⁷ . . . [and] Every member of a community shall have the right to freely choose to be treated or not to be treated as such, and no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice".²⁰⁸

²⁰⁵ Kosovo Constitution 2008, Article 55, para 1.

²⁰⁶ For more about the minorities' special protection system, see: Lantschner E "Protection of Minority Communities in Kosovo: Legally ahead for European Standards – Practically still a long way to go" (2008) *Review of Central and East European Law Review* Vol 33 451–490.

²⁰⁷ Kosovo Constitution 2008, Article 57, para 1.

²⁰⁸ Kosovo Constitution 2008, Article 57, para 2.

Kosovo's Constitution determines the responsibility of the state *vis-à-vis* ethnic communities and guarantees cultural autonomy for the communities concerned.²⁰⁹ In addition, it creates a Consultative Council of Communities, responsible for creating the institutional link between the ethnic minorities (represented in the Council) and the institutional structures.²¹⁰ In a similar way, the Constitution guarantees that the “communities and their members shall be entitled to equitable representation in employment in public bodies and publicly owned enterprises at all levels”,²¹¹ meaning that a true representation of ethnic minorities in public institutions and services is constitutionally assured. However, given the Serbs' boycott of participating in the institutions and the existence of parallel Serbian-government-funded institutions, these provisions are being challenged in practice; therefore, the guarantees concerned are, in many cases, rejected by the Serbian minority in Kosovo. This is most likely leading to a practical and/or political dismissal of the constitutional principle of multi-ethnicity by the Serbs themselves.²¹²

Taken as a whole, one may consider the Constitution to be a consociational constitution, given that the ethnic minorities' constitutional position, both in the context of institutional representation and in that of rights and duties, is based on the consociational model of democracy²¹³—as opposed to a majoritarian model of democracy. Consociational democracy, according to its founder Arend Lijphart, is a model of governance that “makes plural societies more thoroughly plural. Its approach is not to abolish or weaken segmental cleavages but to recognize them explicitly and to turn the segments into constructive elements of stable democracy”.²¹⁴ Therefore, overall, the Constitution of Kosovo creates a position for the minorities' that is well protected, liberally recognized, and politically empowered. This supports the argument that the Constitution is a consociational one, though Hughes contests this claim by arguing that there is no longer a vibrant communitarian minority in Kosovo that can take part in a fully functional consociational system of governance.²¹⁵

²⁰⁹ Kosovo Constitution 2008, Article 59.

²¹⁰ Kosovo Constitution 2008, Article 60.

²¹¹ Kosovo Constitution 2008, Article 61.

²¹² Tansey O “Kosovo: Independence and Tutelage” (2009) *Journal of Democracy* Vol 20 no 2 153–166.

²¹³ This term is used to describe the Arend Lijphart theory of consociationalism.

²¹⁴ Lijphart A *Democracy in Plural Societies. A Comparative Exploration* (New Haven and London: Yale University Press, 1977) p 42.

²¹⁵ Hughes J “EU Conflict Management Policy: comparing the security-development model in the *sui generis* cases of Northern Ireland and Kosovo” (2009) *Paper presented at the European Consortium for Political Research, 10-12 September 2009, Potsdam, Germany*. Available at: <http://eprints.lse.ac.uk/26061/>.

KOSOVAN CONSTITUTION'S RELATIONSHIP TO THE AHTISAARI PLAN

The position of the Constitution appears to be relatively subordinate to that of the Ahtisaari Plan.²¹⁶ In regard to this issue, the Constitution states:

“The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for Kosovo’s Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail”.²¹⁷

Although the Ahtisaari Plan is thought to have legal authority over the Constitution, however, one might still argue that the Ahtisaari Plan is legally empowered by the Constitution itself, given that the United Nations did not approve it. From that perspective, the Constitution’s section recognizing its subordination to the Ahtisaari Plan could be amended, therefore leading to a Constitution with no acknowledgment of the plan’s authority. Yet, as Hughes asserts, “the universal Albanian view is that the ‘multi-ethnic’ framework will be removed by the Kosovan government or will be superseded by a new constitution or legal framework within ‘a few years’, as the current system lacks ‘local ownership’, it seems inevitable that it will be superseded in due course”.²¹⁸

CONSTITUTIONAL AMENDMENT PROCESS

The Constitution of Kosovo sets forth that the Constitution’s amendment “shall require for its adoption the approval of two-thirds (2/3) of all deputies of the Assembly, including two-thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo.”²¹⁹ Therefore, the ethnic communities’ position in the constitutional amendment process is equal with

²¹⁶ For the political consequences of this, see an extensive analysis in: Kosovo’s fragile transition, International Crisis Group Europe Report N°196 September 25 2008.

²¹⁷ Kosovo Constitution 2008, Article 143, para 3.

²¹⁸ Hughes J “EU Conflict Management Policy: Comparing the security-development model in the *sui generis* cases of Northern Ireland and Kosovo” (2009) *Paper presented at the European Consortium for Political Research, 10–12 September 2009, Potsdam, Germany*. Available at: <http://eprints.lse.ac.uk/26061/>.

²¹⁹ Kosovo Constitution 2008, Article 144, para 2.

that of the majority. Given this equality, the ethnic minorities' members in the Assembly can veto a constitutional amendment, thereby totally blocking it. This provision of the Constitution has ensured that the constitutional guarantees for ethnic minorities cannot be altered unless the ethnic minorities themselves agree to it. As such, the Constitution provides a rigid amendment process, leading to a rigid constitutional model.

CONCLUSION

The paper has reviewed the most vital parts of Kosovo's Constitution and, while reviewing each of its segments, has summarized the essential arguments. This paper reviewed the basic provisions of the Constitution and examined the constitutional components provided for the top institutions of the polity, its citizens' human rights and liberties, the ethnic communities' special rights and liberties, and, finally, the constitutional amendment process as well as the relationship between the Constitution and the Ahtisaari Plan.

The most central segments of the Constitution aim to ensure the participation of ethnic communities in public life, in part, by guaranteeing their rights and liberties. In addition, the ethnic communities' involvement in public life is both institutionally and substantially guaranteed by the Constitution.

The Constitution outlines a pure parliamentary system of governance, wherein the Assembly is the only body of the state elected by the people. This makes the Assembly the only source of popular legitimacy in the whole governing system of Kosovo. As a result, both the government and the president are appointed by the Assembly and controlled—in one way or another—by it. Nevertheless, as presented herein, the Constitution shows no signs of making the Assembly independent from the government; instead, it preconditions an Assembly that is politically bound to the government, given that the coalition or party holding the government holds the absolute majority of seats in the Assembly. Admittedly, the judiciary's independence is constitutionally well established, but no rationality for the president's powers in that field could be found.

One may conclude that the Constitution provides three bases of protecting human rights and liberties: that of the Constitution *per se*, that of the Ahtisaari Plan, and that of international legal instruments which have direct applicability in Kosovo, as a matter of the Constitution's sanctioning.

In conclusion, Kosovo's Constitution exists as a consociational constitution, one that builds a system of governance dedicated to the protection of minorities *vis-à-vis* the majority's rule. Ultimately, the Constitution is subordinate to the Ahtisaari Plan; this calls into question 'constitutional supremacy' and leads to an innovative form of sovereignty.