BUILDING CONSTITUTIONALISM IN KOSOVO/A

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ABSTRACT

As the nation-state legal regimes are currently supplemented by numerous transnational and global orders as global common interest" and/or "rule of law" and/or "human security", it will be an attempt to illustrate modern approaches to democratization which are seeking to encourage inter-ethnic cooperation and participation through constitutional accommodation. The most illustrative cases in this regard are Constitution of South Africa, Bosnia-Herzegovina and the newest Constitution, that of Kosovo. The fragile peace among ethnic groups created certain security, through the line envisaged in the Constitution while each of Constitutional Court addresses the issues of central post conflict dilemma: how to maintain group rights while preserving the individual rights that form a core of liberal democracy. By reviewing the decisions of the Constitutional Court it came as a conclusion that all three Courts wisely chose a middle road between group based constitutional democracy and the protection of individual rights against majoritarian will. However, besides security issue on the post conflict societies, the socio-economic rights are at stake therefore the author concludes that lack of envisaged socio-economic rights as the constitutional rights, especially in the Constitution of Kosovo will pose a real challenge to clarify the participatory development of citizens toward accelerating sustainable development within a state.

Keywords: Constitution, multi-ethnicity, constitutional court, minority rights, constitutional interpretation, constitutional rights, socio-economic rights.

ÖZET

Ulus devletin meşru yönetim şekli günümüzde "ortak küresel çıkarlar", "hukukun üstünlüğü", "kişi güvenliği" ve çok sayıda sınır ötesi küresel kurallarla bütünleşmiştir. Bu durum demokratikleşme için, anayasal uyum aracılığıyla etnik işbirliği ve katılıma teşvik isteyen modern yaklaşımı açıklayacak bir girişim olacaktır. Bu konuda en açıklayıcı durum da Güney Afrika Anayasası, Bosna Hersek ve Kosova'nın yeni Anayasasıdır. Anayasa Mahkemesinin her biri çatışma sonrası ikilem sorunlarını da bildirirken: Liberal demokrasinin temel şekli bireysel hakları korurken grup hakları nasıl müdafaa edilir? Etnik gruplar arasındaki dirençsiz barış, Anayasada öngörülen yükümlülükler üzerinden belirli bir güvenliği de sağlamıştır. Anayasa Mahkemesi'nin kararlarını gözden geçirerek, her üç Mahkemenin, gruba dayalı anayasal demokrasi ve çoğunlukçu ira-

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deye karşı bireysel hakların korunması arasında orta bir yolu akıllıca seçtikleri sonucuna varılmıştır. Oysa, çatışma sonrası toplumlardaki güvenlik sorununa karşın sosyo-ekonomik haklar da tehlikededir. Bu nedenle yazar, tasarlanmış olan sosyo-ekonomik hakların eksikliğini anayasal haklar olarak neticelendirmiştir. Devlet içindeki sürdürülebilir kalkınmayı hızlandırma yönünde vatandaşların kalkınmasına katılımı aydınlatmak için özellikle Kosova Anayasasında gerçek anlamda bir mücadele durumunda olunacaktır.

Anahtar kelimeler: Anayasa, çoklu etnik köken, anayasa mahkemesi, azınlık hakları, anayasal yorumlama, anayasal haklar, sosyo-ekonomik haklar.

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Towards Modern Constitutionalism in the Newest State in the World

The status question of Kosovo has been a rather lengthy, difficult and painful process.[2] The debate over it reached the crucial point with the Declaration of Independence of 17 February 2008, which was supported by the USA and some European countries, because the Declaration turned Kosovo toward a new phase of development that seeks to build the statehood through a constitutional system.

Although it was lengthy process, developments on a future status came as a result of ensuring regional peace and stability by lifting Kosovo out of an eight-year limbo brought (about by) an obsolete, temporary UN administration and an undeveloped, low-growth economy. The resolution came based on the Plan of UN Special Envoy, the Former President of Finland, Martti Ahtisaari.

Ahtisaari presented his plan in mid-March 2007 in the form of a "Comprehensive Proposal"[3] - to the Secretary General and was backed by the Security Council with the full support by 26 March, which gave a seal to the building of the constitutional system. The process followed a four-

[2] *For more on UN Administrationsee: Ralph Wilde, International Territorial Administration and, in Nigel D.White/Dirk Klaasen (Eds), Carsten Stahn,'constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government",14(3)Leiden Journal of International Law (2001), 531-561id.,"The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis", 5 Max Planck Yearbook of United Nations Law; Alexandros Yannis, "The UN as Government in Kosovo", 10 Global Governance (2004) 67-81 The UN, Human Rights and Post Conflict Situations 2005, (Iliriana Islami, The Insufficiency of International Legal Personality of Kosovo as Attained Through the European Court of Human Rights: A Call for Statehood, in Symposium:Final Status for Kosovo: Untying the Gordion Knot, published Chicago-Kent Law Review 1/2005.*

[3] *The "Comprehensive Proposal for Kosovo Status Settlement", S/2007/168/Add.I, 27 March 2007, available at www.unosek.org/unosek/en/statusproposal.html*

teen month negotiations mandated by the Council, which had become known as "the status process".[4]

Through this plan, Ahtissari delivered to Belgrade and Prishtina a draft status settlement proposal that covered a wide range of issues related to Kosovo's future, in particular measures to protect Kosovo's non-Albanian communities, as well as a clear recommendation that Kosovo should become independent subject to a period of international supervision, by mandating a new international presence and allowing supervised independence.[5]

Ahtisaari argued that supervised independence came as the only option, considering that reintegration into Serbia was not viable and continued international had administration lost its sustainability. The proposal chose a compromise that granted to Albanians their demand for independence and to Serbia protection of its interests through a series of constitutional provisions within Kosovo, such as decentralization that gives Serb–majority municipality's extensive autonomy and protection of Serbian religious sites and cultural monuments in Kosovo. As such, the Albanian majority had to demonstrate the willingness and commitment to protect Serb special status and their cultural rights within Kosovo in exchange for Kosovars having special status and cultural rights in Serbia.[6] It is worth noting that, the Ahtisaari package envisaged that the instrument would guarantee equality and stability in the region, particularly through minority protection, which is increasingly regarded as a responsibility shared among national and international actors. Thus, the constitution is increasingly influenced by international norms and standards for minority protection – a process that can be characterized as the "internationalization of constitutional law".

Constitutional Options, Accommodating Ethnic Differences

Through its normative part, a constitution precisely emphasizes that the state is an organized form of life. Yet, at the same time, the cornerstone of a constitution is that, it deals with non-formally regulated, normalized

4 International Crisis Group, Kosovo: The Challenge of Transition, Europe Report No. 170, 17 February2006,www.crisisgroup.org/library/documents/europe/balkans/170_kosovo_the challenge_of_transition.pdf>.

5 Contact Group's Guiding Principles for a Settlement of Kosovo's Status, November 2005 (html).

6 Susan L. Woodward, Does Kosovo's status Matter? On the International Management of Statehood, Sudost Europa, 55 (2007), 1,S.p.1-25, p.2.

behavior, which constitutes the "social substratum "of the constitution[7] That's how the normative constitutional part will always interact with an empirical reality, which precedes it and will have to assert itself by developing the "constitutional order".[8] Therefore, developing the constitutional order in the post-conflict societies becomes the most crucial point to make an effective viable state.

The scope of the functions of a constitution can be regarded as defining limits to political power, organizing a political entity, offering political and other guidelines, justifying governance, constituting a political system as a legal community and contributing to the integration. On the other hand, the constitution emerges as a central defining power in these societies precisely because of the limitations it imposes, by restricting the capacity of majority to exercise the political will.

Reflecting restrictions on the majority, who would otherwise impose their political will, constitutionalist's approach the debate with a new view, which insists that, as the international community is a legal community, the order should be supported with the emergence of new bases of legitimacy for the international legal system. This view implies that state sovereignty should gradually be complemented by other guiding principles, notably the "global common interest" and/or "rule of law" and/or "human security".[9]

This important modification necessarily conceives that international law cares about development of the domestic constitutional standards. Biaggini has put it succinctly: "constitutional law is becoming more international, international law more constitutional".[10] Based on the new international legal approaches, the Constitutions of states, particulary of new emerging states, come to the forefront in demonstrating these new internationalization tendencies.

Therefore, the Constitutional framers of Kosovo had to encompass the prevention (or resolution) of ethnic conflict crucial for maintaining stability and peace. Minority rights are regarded as possible instrument for

7 H. Heller, Staatslehre, Eds by G.Niemeyer.

8 The concept is borrowed from the terminology used by the Third Legal Studies Association

9 *Anne Peters "Global Constitutionalism Revisited" in International Legal Theory, vol 11, pg 39-68, p.49*

10 G.Biaggini,"Die Idee der Verfassung-Neuausrichtung im Zeitalter der Globalisierung?", Zeitschrift für Schweizerisches Recht 119 (2000), 445 et seq.(455) (translated by German students upon the request of author)

avoiding or resolving ethnic conflict.[11] And were anticipated in the Ahtisari proposal. Furthermore, as minority rights are considered as the core basis for viable state, the drafters were strict in embracing international standards and providing minority rights for Kosovo Serbs far beyond European standards.[12] Compare to other more national-oriented constitutions, such as, the most prominent example, the Constitution of France, which is blind to ethnic diversity. France did not join the Framework Convention on the Protection of National Minorities. Furthermore, the Constitutional Council of France has declared that the implementation of the Council of Europe's Charter for Regional or Minority Languages in France would violate Art.2 of the Constitution, according to which the language of France shall be French.[13]

The Constitutional drafters succeeded in their task of envisaging Kosovo as multi-ethnic society, tantamount to the latest developments in international law, especially of those multi-nationals, plural-ethnic states noted for internal violence and conflict and terrorist outrages towards a positive influence of new, pan-European sentiments.

Developments through accommodating ethnic diversities through constitutional options could be traced in Spain, whereby Basque armed separatists groups ETA reached in 2006 a permanent ceasefire in their armed action against the state authority, giving to an end their armed action against the state authority and ending their decades-long campaign of civic violence within Spain. In a major breakthrough, the Spanish Parliament pursued negotiations with Catalonia as an economic-industrial power within Spain, which resulted in approving a new Constitutional Charter for Catalonia. This Charter recognized Catalonia, in terms, as a "Nation", fully compatibly with the existing Spanish Constitution of 1978; interpreting Spain in that context as a "Nation of Nations", a plur-

11 See Jost Delbruck (ed) 'New Trends in International Lawmaking - International' Legislation' in the Public Interest (1997).

12 *see for more, Emma Lantschner, Protection of Minority Communities in Kosovo: Legally Ahead of European Standards-Practically Still a Long Way to Go, Review of Central and East European Law 33 (2008) p.451-490.*

13 Conseil Constitutionnel, Decision 99-412 DC, 15 June 1999, available at <www.conseil-constitutionnel.fr/decision/1999/99412/99412dc.htm>. see for more *Antti Korkeakivi " In Defense of Speaking Out: The European Human Rights Regime and the protection of Minority Languages in intercultural Hum.Rts.L.Rev.137 2008* (further explanation; One has to take into account that these earlier constitutions emerged in a different historical context with differing underlying social and economic circumstances and problems(for instance, the cleavage between nobility and under-classes.

al-National state"".[14] The Charter for Catalonia for more stepped down into the concrete and practical level establishing the guarantee of new financial benefits for Catalonia, stated to be up to 50 per cent of Income Tax and Value Added Tax revenues collected in the region. These actions were key legal undertakings in the devolution, thus resulting in the Spanish central government's decision making powers.

Accommodation into the Constitutional options began also in Canada with Quebec's "Quiet Revolution" that began at the opening of the 1960s as a movement for revival and renewal in a contemporary context of the French language and culture, which brought proposals for change and modernization of the Canadian federal system and the Canadian constitution as written in 1876 as a whole bringing into play particular Quebec's role. Constitutional change proposal advanced by French-Canadian political leaders were always formulated at a very high level of abstraction of a "special" constitutional status for Quebec within the Canadian federal system. Later on, only the concept of "particular" constitutional status was used. However, the Separation proposal did not achieve support of the voters. Therefore it seemed that general public was not engaged anymore in the constitutional debate and the constitutional dossier was closed without any new attempts to reopen it.[15]

As the practice shows the art of problem solving it is to make changes when they are still timely and before a political situation becomes out-of-hand. The case of Former Yugoslavia is the most tragic one. However, after the dissolution, the EU was adamant on it's the preference for the establishment of the "multi-ethnic, democratic states on the territory of the former Yugoslavia in order to make viable region ensuring regional peace, security and development. Since 1991, when European states defined criteria according to which they would recognize new states in the region, they have emphasized that they must guarantee "the right of ethnic and national groups and minorities".[16]

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14 *Cit Edward Mc Whinney, Self-Determination of Peoples and Plural-Ethnic States in Contemporary International law; Failed states, Nation-building and the Alternative, Federal Option, 2007 p. 80.*

15 ibid p. 82

16 *Guidelines on the Recognition of new States in Eastern Europe and in the Soviet Union", 16 December 1991. See also, Mathew Craven, The European Community Arbitrarion Commission on Yugoslavia, BYBL66(1995),333,Iliriana Islami The Quest for Statehood in the internationalized Territory of Kosovo and the Challenges Ahead in Hubert Isak edt A European Perspective for the Western Balkans, Graz 2007, pp.191-205;Enver A Steve Terret, The Dissolution of Yugoslavia and the Badinter Arbitration Commission:A Contextual Study Peace-Making Efforts in the Post-Cold War,2000;*

Therefore, the Constitution of Bosnia-Herzegovina is also another product of the new basket regarding the emergence of international law principles.[17] It comes as result of emerging new succession state of Bosnia-Herzegovina, after the breakaway from SFRY, although with the heavy human price. Vance-Owen plan did preempt with the vision of a highly decentralize federal state for a new Bosnia-Herzegovina entity, while the Dayton Peace Agreement ended the tragic war.[18] The proposal anticipated the new entity to rest on three constituent peoples based on three different, largely autonomous provinces, each of which would be identified with one of the three different ethno-cultural groups: Bosnian-Muslim, Croat-Catholic and Serb-Orthodox. The capital, Sarajevo, would function as an ethno-cultural mixed unit. As such, the overall effect was to ensure constitutional "cantonisation" as the three designated provinces was divided into three sub-units or cantons to assure cultural self-determination of the groups.

Based on the accommodation of ethnic diversity, the Constitution of Kosovo, adopted by the Assembly of Kosovo on 9 April 2008, which came into effect on 15 June 2008, can be seen as being perfectly in line with this development. Furthermore, the novelty of the Constitution is that it does not speak about the "majority" or "minority" but instead for the minority, use the term "communities", which is more advanced compared to other countries in Europe, as emphasized at the beginning of this document under Chapter I (Basic Provisions), Art.3 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".

In this respect, it becomes clear that constitutions forge the relationship between international and national law creating a network of norms with the aim of establishing judicial globalization, where the process of judging, lawyering, and judicial outcomes themselves are affected by the mounting influence of international bodies towards tackling fundamental problems that face all people in all countries.[19]

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17 *Enver Hasani, Uti Possidetis Juris:From Rome to Kosovo, 27 Fletcher F. World Affairs 85, 88-89/2003*

18 *General Framework Agreement for Peace in Bosnia and Herzegovina, Dec.14, 1995 35 I.L.M. 75.*

19 Michael Donelan, A Community of Mankind, in The Community of States 140, 142 (James Mayall ed.,1982)

The crux of the Interpretation through the Constitutional Courts

As the relationship between constitutional law and constitutional reality is a complicated issue that reflects on natural tension depending on the degree of correspondence between "reality" and "normativity," constitutional reality can undermine or lend substance to the constitution.[20] As such, a constitution that does not take into accounts the initial historical–political situation (i.e. empirical social preconditions), will sooner or later prove to be questionable.

The most illustrative findings could be found back on post-colonial African constitutional order as the "phantom states" and "phantom legislation" is evidence of a barely tolerable tension between "normativity" and "reality" in the constitutional order of "weak African developing countries", whose continued existence has little to do with internal consolidation but is to a considerable degree guaranteed by international system.[21] As there is an already practice of building constitutionalism and international system guaranteeing for it, the repeated form is manifestly presented in the newest constitution: that of Bosnia-Herzegovina and that of Kosovo. Therefore, the task for ensuring compliance of the interpretation of the Constitution with international system principles is entrusted in it's entirely to the Constitutional Courts and the interpretation of it.

Constitutional Court interpretation based on the spirit of the constitutional drafters makes the guarantee for advancement of constitutional order. The parallel of the interpretation of the Constitution by a Constitutional Court in the same fashion could be taken, in South Africa, Bosnia-Herzegovina and Kosovo, as fragile societies with the potential of erupting into the ethnic conflict.

In the South Africa, the political negotiations were arranged to overcome remnants of apartheid. Hence, the principles of Constitution were constituted a shield for the protection of the white minority and its privilege from the possible redistributive inclinations of a black-led government. Otherwise, rejection of the principles would likely have delayed the transition or compounded the crisis of governance then destabilizing it. Tak-

[20] *Benedek, W. Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene. In:Zeitschrift für auslädisches öffentliches recht und Völkerrecht,1994 Vol.54.*

[21] *Jackson, R.H/C.G. Rosberg (1982): Why Africa's Weak States Persist. The Empirical and the Judicial in Statehood. In: World Politics, 35. & Ginther K. (1983): Conclusions. In: Ginther,K/W.Benedek (eds): New Perspectives and Conceptions of International Law. An African-European Dialogue. Vienna.*

ing this into account, the Constitutional Court of South Africa strictly enforced Principle XXII ensuring that the national government would not encroach on the powers of the Provinces.[22]

Thus, the Court found unconstitutional those provisions that failed to provide the required "framework for local government structures," as well as the failure to ensure the fiscal integrity of political subdivision.[23] For the Court, the South African Constitution should provide only those powers to the national government "where national uniformity is required" and only economic matters and issue of foreign policy met this restrictive definition.[24]

The same result has happened in the Bosnia-Herzegovina. The Dayton Peace Accords created the three entities of Bosnia-Herzegovina, which are nearly ethnically homogenous mini-states within Bosnia-Herzegovina divided into their respective constituent peoples. The Federation of Bosnia and Herzegovina is an Entity of "Bosnia[k]and Croats as constituent peoples".[25]

While the Republica Srprska is the "State of Serb people and all of its citizens"[26]. The Constitutional arrangements, de facto vests in the Entities almost complete autonomous status and decision-making authority.[27] On the other hand, the Constitution requires that each Entity "amend their respective constitutions to ensure their conformity with [the national] constitution."[28]. With this constitutional arrangement, the Constitution of Bosnia and Herzegovina provides one of the world's unique confederated systems, based entirely on ethnicity[29]. The Constitution thus creates a

22 S.African Constitution of 1993 sched. 4, Principle XXII.

23 *In re* Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 861, 911 (CC) (S. Afr.

24 See id. at 845 (explaining that the Constitution mandates that legislative powers should be allocated predominantly, if not wholly, to the national government where national uniformity is required.

25 *Federation of Bosn.&Herz.Const.art.I (1), available at www.ohr.int/print/?content_id=5907last updated Sept.26,2001*

26 *Republica Srpska Const. art. I(1) (amended 2003), available at www.ohr.int/print/?content_id=5907*

27 *Bosnia & Herz.Const.art. III (1) (a)-(j). It further provides that "[all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of Entities". Id.art.III (3)(a).*

28 Id.art.XII(2)

29 *Ronald C.Slye, Comment, The Dayton Peace Agreement: Constitutionalism and Ethnicity, 21 Yale J. Int'l L.1990, at 460*. For more see Paul C.Szasz, Comparative Peace: A Look at Recent Peace Agreements, Bosnia and Herzegovina&Kosovo, 94 Am. Soc'y Int'L.Proc.298,298 (2000); Paul C. Szasz, The Dayton Accord: The Balkan Peace Agreement, 30 Cornell Int'L.J. 759,765 1997; Eliz-

legal paradox: an attempt to integrate all people into a unified Bosnia and Herzegovina, while basing such integration precisely on that which divides Bosnia and Herzegovina: ethnicity.[30]

The Constitutional Court had the role to interpret the Constitution when the case came before it on February 12, 1998, through a claim filed by then Chairperson and Bosniak member of the State presidency, Alija Izetbegović. President Izetbegović claimed that sixteen provisions of the Republica Srpska Constitution and six provisions of the Federation Constitution violated the Constitution of Bosnia and Herzegovina. Among the challenged provisions, the most controversial were those that referred to the "constituent peoples" in either entity. In adjudicating this very contentious issue due to extreme sensitivity, the Constitutional Court took nearly two years to examine the merits and decide the matter. Regarding the Constitution of the Republika Srpska, the Court found provisions containing language referring to the "Serb people" to be unconstitutional;[31] likewise, regarding the constitution of the Federation, the Court found provisions containing the language "Bosnia[k]s, Croats as constituent peoples" to be unconstitutional.[32] The essence of the Court's decision was its pronouncement that the Preamble of the Constitution of Bosnia and Herzegovina "designates" all citizens of Bosnia and Herzegovina – Bosniaks, Croats, Serbs and "others" as constituent peoples , i.e., as peoples."[33]

The decision as such conferred the rights and privileges for citizens regardless of their ethnicity or place of residence. In other words, Serbs cannot have preferential status, merely because of their ethnicity, in the Republika Srpska; nor can Bosniaks and Croats, due to their ethnicity, have preferential status in the Federation. Although, with its decision, the Court applied the strategy as such to recognize the collective rights to each of the ethnic groups insofar as those rights ensured equality and the procedural protection to participate effectively in the government, it fina-

abeth M. Cousens, Making Peace in Bosnia Work, 30 Cornell Int'L.J.789,789 1997; Fionnuala Ni Aolain, The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis, 19 Mich.J.Int'l L. 957,958 1998.

30 *Ibid , p.460.*

31 *case U 5/98, Partial Decision (Jan.30, 2000), Partial Decision (Feb.19, 2000), Partial Decision (Aug.19, 2000), available at http://ccbh.ba/decisions.case.asp?ul=5&u2=98*

32 Id para B

33 Id. Para.52

lized the decision by impeding any dream on independence or secession.[34]

The decision, adjudicated and reasoned by the Constitutional Court of Bosnia-Herzegovina embodied citizen-based democracy in which individual rights are taking the primacy and not consumed by majoritarian passions.

As the international law is developing towards the protection of fundamental rights by safeguarding peace, the transfer of policies traditionally regulated by domestic law are no longer the exclusive responsibility of national constitutions, the international or supranational governance structure becomes general policy. Therefore, where international law does promulgate certain groups rights, they are intended to protect persons belonging specifically to a minority.[35] "Although, most international instruments do not provide for positive rights to a minority group as a whole; rather, they ensure only that such rights are not denied by discriminatory action by the State".[36]

Through this line, as the Constitution of Kosovo designated Kosovo as multi-ethnic society it took care to provide series of rights for communities, including the right to use their language before the courts and public bodies, the right to education in their mother tongue,[37] the right to enjoy access to information in their own language, the right to establish associations to promote the interest of their community, to enjoy equal opportunities and fair representation with respect to employment in public bodies at all levels and guaranteed representation of all minority communities in the Kosovo Assembly.[38]

Above all, the Constitution also laid down that: "Human rights and fundamental freedoms guaranteed by the….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: under (4); Council

34 Partial Decision, supra note 72, para.59.)

35 *Anna Morawiec Mansfield, Ethnic But Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina, 103 Colum.L.Rev.2052 2003, at 2080.*

36 Ibid.

37 See Art.5.

38 *Chapter III Rights to Communities and Their Members.*

of Europe Framework Convention for the Protection of National Minorities".[39]

As the Constitutional Court was established in January 2009, on 22 April 2009, Ćemaijl Kurtiśi, Vice Chairperson of the Municipality of Prizren filed a referral claiming that Art.7 of the Statute of the Municipality of Prizren was in violation of Articles 3.1, 6.1, 58.1 and 59.1 of the Constitution, considering that the emblem of the Municipality in which is signed "The House of the League of Prizren" by the following wording "1878-Prizren,"[40] yet the Municipality is multiethnic. He continues by stating that the League of Prizren recognizes the cultural-historical significance of the Albanian community only, however, the emblem carries no elements that signify the other communities and community members and the presence of multi-ethnicity. According to him, the emblem does not transmit a message of multi-ethnicity in a very multi-ethnic area such as the Municipality of Prizren.[41]

The Constitutional Court had jurisdiction over the case, and it found the violation of the Constitution by recalling that 'The Republic of Kosovo is multi-ethnic society consisting of Albanian and other Communities' (Art 3.) and equally guarantees the right of communities to use and display Community symbols, (Art.58) in accordance with the law and international standards. It was also emphasized the responsibility of the State to promote a spirit of tolerance and dialogue, and to support reconciliation among communities".[42] The Court furthermore recognized that the Albanian Community has been put in a privileged position, because it has the dominant position in the Municipality (parag.51). Therefore, the Court ordered the Municipality of Prizren to change the emblem in accordance with Art.3 of the Constitution.

One has to admit that establishing a "constitutional system" should foremost be the compliance of functions and values associated with constitutionalism. Therefore, Constitutionalism has to address the relationship between the state and the other emerging, and to varying degrees "consti-

39 Art. 22
40 Art7 of the Statute of the Municipality.
41 See Judgement case no. KO 01/09.
42 Judgement parag. 49

tutionalized, levels of governance in order to establish legitimacy and coherence".[43]

Composition of the Courts as the Step towards Establishing the Constitutional System

In order to protect the values enshrined in the Constitution and to comply with the principles of international law, even the judges that compose the Court that is the final interpreters of the Constitution should be elected in a manner as to reflect the spirit of the drafters of the Constitution. Therefore, as it was envisaged in the parallel analysis of South African Court, the judges were elected based on the proportionality of reserved seats on the parliament, so as to secure ethnic balance.

In Bosnia and Herzegovina, of the nine members on the Court, four members are selected by the Federation House of Representatives, which, in practice, results in two Bosniak and two Croat jurists; two additional Serb members are to be selected by the Republika Srpska National Assembly.[44] The remaining three members of the Constitutional Court shall be selected by the President of the European Court of Human Rights after consultation with the Presidency. These judges shall not be citizens of Bosnia and Herzegovina nor of any neighboring state. The same composition of national and international judges was envisaged for the Constitutional Court of Kosovo by the Ahtisaari Plan. Out of nine judges, two judges belong to minority communities, which, in practice, results in one Serb and one Turk judge, as well as three international judges selected by the international community.

In the two latter Courts, the hybrid nature of the Court composed of citizens of the state and citizens of nations beyond the border reflects concerns that, while decisions in the political bodies may be deadlocked by ethnic obstruction, the judiciary cannot be allowed to succumb to similar ethnic intransigence.[45] The presence of non-Bosnian jurists on the Constitutional Court of Bosnia and Herzegovina and that of non-Albanian on the Constitutional Court of Kosovo appears to provide a safety net for fair and efficient adjudication of disputes, while maintaining an equitable balance of representation of judges from each of the ethnic groups. Thus,

43 *Cit.Thomas Cottier/Maya Hertig, "The Prospects of 21st Century Constitutionalism" Max Plank Yearbook of United Nations Law, vol.7, 2003, 261-328, at 298.*

44 Art.VI (I) (a) of the Constitution.

45 *Fionnuala Ni Aolain, The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis, 19 Mich.J.Int'l L. 1998, at 982-83.*

it is imperative that the Courts, to the extent possible, insulate from ethnic bias while preserving independence and integrity.

Interpretation of the Constitution through the Lenses of International Law

Above, this article examined the system of the three Constitutional Courts, although each of the courts have their own history and characteristics, there is similarity concerning the application of the international law. Article 39 of the final Constitution of South Africa provides that, in construing the Bill of Rights, a court "must consider international law".[46] Most observers will note that the provision only envisions consideration of international human rights norms. In construing the obligations of the Constitution, the Court found an obligation to protect those rights recognized in open and democratic societies as being "inalienable entitlements of human beings". Because the Court could not find a common language as to what entitlements and rights are indisputable, the Court required the Constitution, to guarantee, at a minimum, those rights that have achieved a wide measure of international acceptance. As a result, in aggregating the fundamental rights, South Africa's proposed constitution established a set of rights "as extensive as any to be found in any national constitution"[47] One might say that of outstanding and much noted examples of comparative constitutional jurisprudence, the certification judgments of South Africa's Constitutional Court fall into this category. South Africa's transitional constitutional law gave the court a unique role. This arbiter was entrusted to the Constitutional Court; having in mind that judiciary had been too much part of the apartheid system to make judicial politics the obvious choice for the safe-guarding of constitutional transition from a racist system to a multi-racial democracy.[48]

Concerning the other two Constitutions, that of Bosnia-Herzegovina and that of Kosovo, there is a similarity. In the Constitution of Bosnia and Herzegovina, Annex 4 has its own annex that enumerates 15 international human rights instruments and declares them applicable in BiH. The question, however, was what kind of rank supersedes. This was clarified by the Constitutional Court in case U-5/1998, which attributed "constitu-

46 S. AFR. CONST. ch 2,&39(1)(b).

47 Samuel Issachorff "Constitutionalizing Democracy in Fractured Societies" 82 Tex.L.Rev.1861 2003-2004, at 1880.

48 Brun-Otto-Bryde"the Constitutional Judge and the International Constitutionalist Dialogue, 80 Tul.L.Rev.203 2005-2006.

tional rank" not only to Annex 4, but also to other Annexes and the international instruments in the annex to Annex 4. Interestingly, Article II.2 of the Dayton Constitution also declares the European Convention and its Protocols (hereineafter: ECHR) directly applicable and that the Convention "shall have priority over all other law". The meaning of the last sentence of this provision created, however, much confusion since it was literally translated into the domestic languages as "priority over all other laws" or "statutes" thereby giving the ECHR a rank between the constitution and the statutes of parliament.[49] In the Constitution of Kosovo, there is much clearer interpretation. Art.53 of the Constitution clearly states: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights". This Article makes the Constitution more comprehensive than the provisions of the other discussed constitutions, because the Constitution of Kosovo ranks itself and gives itself superiority, even though the interpretation of its norms will be in accordance with ECHR jurisprudence.

Therefore, international law is even more clearly used as a legal argument where the text of the national constitution itself refers to an international standard.

Finally, we find an important field of a normative use of foreign law in constitutional system where"simple" constitutional law is limited by higher constitutional principles.

Socio-Economic Rights and Interpretation of the Constitution

It is sometimes tempting for constitutional framers to reach only a formal reconciliation of conflicting interests simply by reaching political compromise. For them, simply reaching a political compromise is the ultimate result of their concern. Resembling in this is what John Rawls characterized as a mere "modus vivendi", political compromises in the constitutional sense are founded on self or group interests or on the outcome of political bargaining.[50]

Political compromise also depends strongly on the compromise concerning social rights, because of the relationship between social rights and fundamental constitutional values. To take a closer look at how socio-

[49] Joseph Marko "Constitutional Reform in Bosnia and Herzegovina; The Dayton Constitutional Framework, in (Hubert Isak edc.) A European Perspective for the Western Balkans, Graz 2007.

[50] John Rawls, Political Liberalism 146-47, Columbia Univ.Press 1993.

economic rights are compromised by constitutional framers through abstract wording this article will consider how the Constitutions of South Africa and Bosnia-Herzegovina compare to the Constitution of Kosovo.

Sections 26(1) and 27(1) of the South Africa Constitution guarantee everyone's rights to access to "adequate housing", "health care services, including reproductive health care", "sufficient food and water" and "social security" rights that the state "must respect, protect, promote and fulfill". Under Section 26(2) and 27(2), the State must take "reasonable legislative and other measures" within its "available resources" in order to achieve the "progressive realization" of these rights. Furthermore, the Constitution explicitly prohibited arbitrary evictions.[51] This part tells us that the government is a required to provide social services progressively. The language used is in harmony with the language used in international law, for ex. The Covenant on Economic, Social and Cultural Rights. Although socio-economic rights are conferred in generalized terms, this Constitution at least creates government obligations. However, the terms used lag behind the concreteness of other Constitution, such as the India Constitution, which states that the state social duties are established in the form of "Directive Principles of State Policy".[52]

By looking closely at the Bosnia and Herzegovina Constitution, one can see that under Section 3 (Enumeration of Rights) there is no core basis for most classical social rights, such as the rights to health care, social security and housing. While on the other hand, under Annex 1, among the International Covenants listed is the Covenant on Economic, Social and Cultural Rights.

While, oddly enough, socio-economic rights are listed in the Constitution of Kosovo, the newest Constitution in the world, housing is not listed as the core right, under Chapter II –Art.51 stating that under 1. "Healthcare and social insurance is regulated by law", & 2. "Basic social insurance related to unemployment, disease, disability and old age shall be regulated by law". And most importantly, the Covenant on Economic, Social and Cultural Rights is not listed among the other International Agreements directly applicable foreseen in Art. 22

51 S. Afr. Const. 1996 Sect. 26(3). In addition according to this provision," no one may be evicted from their home demolished, without an order of court made after considering all relevant circumstances".

52 www.oefre.unibe.ch/law/icl/in00000_.html

One might argue that South Africa entered the constitutional period with a developed industrial base, a well-functioning market economy and strong institutions of civil society both inside and outside the market arena.[53] However, as modern constitutions encompass fundamental values, the constitutional framers should have in mind, especially in the Constitution of Kosovo, that the main focus of development policy is now on establishing a national and international constitutional order that does justice to development, and which, apart from human rights and the rule of law, socio-economic rights plays a role.

It seems that Constitutional Courts will have to play a role in the determination and legitimization of socio-economic rights through the adjudication process, which would be determined by enforceable positive claims of the individual against the state.

CONCLUSION

To sum up, Constitutional Law is no longer a parochial subject, but has become an international one. The main reason for this change is the development of international human rights law. The ensuing international constitutionalist discourse has benefited all participants and will continue to do so. We should be inspired by foreign law to transcend the narrow-mindedness that has governed the development of constitutional law for too long, and we should look to foreign experiences to apply constitutionalist principles to the difficult problems that confront all societies in the twenty-first century. As such, it is worth mentioning that socio-economic rights are important issues for the continued growth of developing states. The Constitution of Kosovo, albeit the newest one in the world, did not envision a socio-economic state. However, this should not prevent this issue from being addressed through Constitutional amendments in order to clarify the participatory development of citizens in exercising their socio-economic rights, as well as to illuminate the path toward accelerating sustainable development and transforming Kosovo towards EU membership.

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