

The New Kosovo Constitution in a Regional Comparative Perspective

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Abstract

Kosovo's declaration of independence is not the end of the long story of a difficult relationship between the various Serb state formations and Kosovo Albanians, but only the beginning of a new chapter. The present article discusses the constitutional choices that had to be made in the drafting of the new Kosovo Constitution with regard to institution-building and conflict management in light of the experiences in Bosnia and Herzegovina and Macedonia. After studying the political background and the legislative history of the drafting of the Constitution and analyzing how the Constitution regulates the governmental structures and human rights, the author comes to the following conclusions: First, there are serious doubts about the effective interplay between Kosovo institutions and the ICR and the capacity to create an "effective" system of checks and balances based on legal security. Second, he identifies the lack of feeling of "ownership" of the constitutional drafting process among the Kosovo Albanian political elites as a serious handicap for the legitimacy of the Constitution. Third, legal gaps and confusion persist regarding legal remedies against administrative decisions. Fourth, he identifies a promising balance between "civic" and "ethnic" elements that is achieved by granting ethnic overrepresentation while at the same time ruling out an absolute veto power for any ethnic group. Finally, he comes to the conclusion that all institutional arrangements cannot guarantee integrative effects as long as good neighborly relations are not developed with Serbia, but this should be fostered by European integration.

Keywords

conflict management, Constitution, European integration,
institution building, human and minority rights

Introduction

After Kosovo representatives unilaterally declared independence on 17 February 2008, Kosovo's new Constitution entered into force on 15 June 2008. Seen from the perspective of constitutional theory, the Constitution of a country is, of course, supposed to provide a legitimate legal framework for the exercise of state powers. In drafting a constitution,

several “constitutional choices” have, thus, to be made with regard to the establishment of institutions of the legislative, executive and judicial powers and how they relate to one another as well as the relationship of individuals or groups *vis-à-vis* state authorities and among themselves, the so-called “horizontal effect” of human and minority rights arrangements. A closer look into preambular provisions or chapters with general principles will also reveal that every constitutional text must be seen in light of its historical and political context, since such provisions frequently have the character of a “response” to political and legal problems of the past. Thus, it is not accidental that the German Basic Law of 1948, by signaling the absolute importance of “human dignity” as the basic value for state and society in its Article 1, is a response to all of the atrocities that had been committed by the Nazi regime. So, it is no surprise that the preamble of the Kosovo Constitution begins with the phrase “We, the people of Kosovo [...]” following the example of the US Constitution after the American Declaration of Independence. Moreover—with due regard for the regional and comparative context—the new Kosovo Constitution must also be seen in light of internationally mediated conflict settlements such as the Dayton Constitution, which is laid down as Annex 4 to the General Framework Agreement on Peace 1995,¹ and the Macedonian Constitution, which has been substantially revised on the basis of the Ohrid Agreement of 2001.² Any comparison, therefore, must focus not only on institutions, but structures and functions that have to be carried out by constitutions. *First*, each constitution has to provide for the stability of the political system by establishing and regulating a system of separation of powers thereby also conferring legitimacy upon it. In so doing, a constitution also has an important function to protect individuals and groups against the domination of persons, other groups or even the “majority” of “the people”.³ *Second*, a constitution must provide for the integration of groups and society and should not contribute to the disintegration of state and society.

Seen from this perspective, the need for reconstruction and reconciliation after violent conflicts creates different “constitutional choices” with which we are familiar from past processes of transition from authoritarian

¹ The General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 14 December 1995, 35 I.L.M. 75, reproduced at <http://www.ohr.int/dpa/default.asp?content_id=380>.

² Ohrid Framework Agreement, 13 August 2001, reproduced at <http://www.coe.int/t/e/legal_affairs/legal_co-operation/police_and_internal_security/OHRID%20Agreement%2013august2001.asp>.

On the implementation of the Ohrid Agreement, see Joseph Marko, “The Referendum on Decentralization in Macedonia 2004: A Litmus Test for Macedonia’s Interethnic Relations”, 4 *European Yearbook of Minority Issues* (2004/05) (Brill, Leiden, 2006), 695–721.

³ See Lani Guinier, *The Tyranny of the Majority* (Free Press, New York, 1994).

rule to democracy.⁴ There are no longer general problems of the “architecture of democracy”;⁵ choosing between parliamentarism or presidentialism, unitary structures or federal arrangements or between a majoritarian or proportional representation electoral system, which have priority over all other strategic decisions regarding institution-building. Following the conflict cycle from peace making to peace-building, particularly local, but also international actors are involved in both phases, rather different problems emerge: *first* of all, how to provide and guarantee (physical) security not only in the short run immediately after a war, but also in a mid-term perspective as a necessary requirement for the re-establishment of mutual trust; *second*, how is it possible to not only construct democratic political authority as such, but at the same time to provide the ground for legitimacy of state authorities based on representation, accountability, efficiency and effectiveness; and, *finally*, what is the prospect for an ethnically deeply divided society living together in the same state? Will people be forced by an international military presence and civil administration to co-exist on the same territory with ongoing territorial and institutional division? Or is the goal of “sustainable” peace-building more than co-existence, namely reconciliation through the establishment of mechanisms fostering inter-ethnic cooperation so that the vicious cycle of “intergenerational vengeance”—which too easily can transform a post-conflict situation into a new pre-conflict stage—can be broken? Questions such as these obviously demonstrate that a claim of state sovereignty and a declaration of independence cannot resolve any of these problems. Kosovo’s declaration of independence is, thus, not the end of the long story of a protracted history of a difficult relationship between the various Serb state formations and Kosovo Albanians, but only the beginning of a new chapter.⁶

2. Political Background and Legislative History

By 1991, Kosovo’s Albanian political elites had already drafted and adopted the so-called Kacanik Constitution after a declaration of independence in the process of the dissolution of rump-Yugoslavia dominated by Milošević. Due to the efforts of the international community to stop the ongoing war in Croatia and to prevent the outbreak of war in Bosnia and Herzegovina,

⁴ See the seminal study by Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Johns Hopkins University Press, Baltimore, 1996).

⁵ Andrew Reynolds (ed.), *The Architecture of Democracy* (Oxford University Press, Oxford, 2002).

⁶ For a concise history of the conflict with analyses from the perspectives of public international law, constitutional law, and politics see Joseph Marko (ed.), *Gordischer Knoten Kosovo/a: Durchschlagen oder entwirren* (Nomos, Baden-Baden, 1999) (with a summary in English); and *id.*, “Independence without Standards? Kosovo’s Interethnic Relations Since 1999”, 5 *European Yearbook of Minority Issues* (2005/06) (Brill, Leiden, 2007), 219–241.

these legal acts were simply ignored despite the fact that they had been adopted in a democratic and peaceful way in reaction to the abolition of territorial autonomy and the establishment of an unconstitutional regime of discrimination and violent suppression of Albanian speaking citizens by Serb state authorities—so that these authorities could no longer be qualified as “representative government” in the legal terms of the Friendly Relations Declaration of the UN. Already before and during the Rambouillet Conference of February 1999—in order to stop a fully-fledged war on the ground between Serb military and para-military forces and the KLA—local political parties had draft constitutions in their desk drawers in the event of conflict settlement and finally gaining political independence.⁷ It goes without saying that the establishment of the UN Interim Administration Mission in Kosovo (UNMIK) based on—in all Kosovo Albanian eyes—the “unambiguous” compromise of UN Security Council Resolution 1244⁸ between preserving the territorial integrity of the FRY and granting Kosovo “substantial autonomy” until a final status settlement, not excluding a newly independent, sovereign state of Kosovo, nourished expectations that a constitution for such a situation could already be elaborated within the mandate of UNMIK. A secret meeting in Prizren in 2000, headed by the Special Representative of the UN Secretary-General (SRSG), Bernard Kouchner, tried to find out whether or not the Rambouillet document could be used for constitution drafting. However, the Rambouillet Agreement was—obviously following the Dayton model—drafted in such a way as to give the Serb community in Kosovo and the government of Serbia enough power not only to establish and uphold territorial and institutional “parallel structures” of governance in Kosovo but, also, to block the decision-making processes in the central governmental institutions of Kosovo. Five years after Dayton, however, the effects of territorial separation and an institutional power sharing arrangement allowing any of the so-called “constituent peoples”—*i.e.*, Serbs, Croats or Bosniacs—to block the entire decision-making process on the central level so that all necessary political and economic reforms were prevented, had already become clearly visible. In addition, the Serbian government, backed by Russia, did everything to stop a political process whereby the impression of Kosovo “state” institutions could have been created. Although UNMIK was authorized by Resolution 1244 to create “institutions of self-governance” and to “transfer” powers to them, a compromise was finally found with the creation of a “Constitutional

⁷ The following description of the drafting process follows Marc Weller, “The Kosovo Constitution and Provisions for the Minorities in Kosovo”, 6 *European Yearbook of Minority Issues* (2006/07) (Brill, Leiden, forthcoming).

⁸ United Nations Security Council resolution 1244 (1999) of 10 June 1999 reproduced at <<http://www.unmikonline.org/regulations/unmikgazette/02english/Res1244ENG.pdf>>.

Framework” as a necessary legal basis⁹ for local institution-building, since Resolution 1244 was silent on this issue. This “Constitutional Framework” responded to the time-winning international formula of “standards before status” and was drafted by the UNMIK legal office and advisors from international organizations. It is, thus, no wonder that it did not create a sense of “local ownership” by Kosovo Albanian leaders, nor by the Serb community leaders who were under strong influence of the Belgrade government. Nevertheless, the structure of the document and the institutions it created did provide, on the one hand, for a fully-fledged local institutional system of legislative, executive and judicial powers of “provisional” Kosovo institutions following the rule of law doctrine of separation of powers—even if the parliament was not called “parliament”, but only an “Assembly” and also the establishment of an organizationally separate Constitutional Court had been prevented by Serbia and Russia. These institutions were, on the other hand, not only under the strict supervision of UNMIK and, in particular, the SRSG with important powers and responsibilities reserved for him in the fields of security and financial affairs, but could be exercised—like in monarchic absolutism—without checks and balances, thereby violating the most basic principle of rule of law itself. With regard to the structural problem and constitutional choice of legitimacy *versus* effectiveness, it became clear after the March riots of 2004 and the Eide Report of 2005¹⁰ that the “standards before status” approach had failed. Based on this report, the UN Secretary General appointed former Finnish President Martti Ahtisaari as Special Envoy for the Future Status Process for Kosovo. Again, the Kosovo Albanian leaders assumed that this process, like Rambouillet, would lead to the drafting of a constitutional settlement and, thereby, define Kosovo’s “final status”. And again, their expectations were not met. In hindsight it is clear that, due to the refusal of all Belgrade governments backed by Russia to accept any other solution than the reintegration of Kosovo into Serbia and all Kosovo Albanian leaders’ position of refusing to accept anything other than political independence from Serbia as the “final status”, the strategy of Ahtisaari to find a compromise over “technical” issues such as the protection of culture and monuments or “decentralization”¹¹ was doomed to fail. In the end, before Ahtisaari ended negotiations in summer 2007, the “Compre-

⁹ Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, adopted 15 May 2001, reproduced at <<http://www.unmikonline.org/regulations/unmikgazette/index.htm>>.

¹⁰ Kai Eide, “A Comprehensive Review of the Situation in Kosovo”, UN Doc. S/2005/635, 7 October 2005, reproduced at <www.unosek.org/docref/KaiEidereport.pdf>.

¹¹ For a careful analysis of all the decentralization plans, see Gresa Caka, *Decentralization in Kosovo: A Key to Status Settlement*, Master thesis in the frame of the MES “European Integration and Regionalism” (University of Graz, Graz, 2006).

hensive Proposal for the Kosovo Status Settlement” was structured *à la* Dayton with a set of general principles and twelve annexes.¹² Unlike Dayton, however, it did not include a fully elaborated constitution. The first four annexes established constitutional principles such as secularism and multiethnicity, referred to international human rights instruments to be incorporated into the future constitutional framework, and followed the system of protection and political representation of ethnic communities already established by the constitutional framework. The chapter on the judiciary also included provisions for an internationalized Constitutional Court. Finally, detailed provisions were made for a continued international civil and military presence.

After the failure to reach an agreement on the Ahtisaari plan in the region as well as in the UN Security Council, these elements of the proposal served as a blueprint for the constitutional drafting process. The Albanian parties were in disagreement as to how the process should be organized; either by experts from political parties including representatives of ethnic communities or under the leadership of the Kosovo Assembly or even in the format of a constitutional convention. In the end, following the Ahtisaari proposal—which had foreseen a group of twenty-one experts combining professional expertise with political representativeness—a group of twenty-one constitutional drafters, including the main political parties representatives, was established as the “Constitutional Working Group”. After the declaration of independence, it has been transformed into the “Constitutional Commission of Kosovo”. From the very beginning, the US Administration, represented by USAID, exercised strong influence on the constitutional process, providing the group of twenty-one with its experts and excluding other external, international experts.¹³ The work on the constitutional draft was divided into ten different working groups on the preamble, founding principles, Kosovo institutions, fundamental rights and freedoms, security and order, community rights, judicial power, economic relations, local self-government, and independent agencies and ombudsperson. In the end, due to Professors Bajrami’s and Kuci’s leadership, an overall draft could be published and put to a public consultation process which lasted from 19 February to 4 March 2008 and which resulted in useful changes (such as bringing the retrenchment of

¹² United Nations, “Comprehensive Proposal for the Kosovo Status Settlement”, S/2007/168/Add.1, 26 March 2007, reproduced at <http://www.unosek.org/docref/Comprehensive_proposal-english.pdf>.

¹³ For an interesting comparison with the parallel constitutional reform process in Bosnia and Herzegovina, where also the US ambassador tried to exert the decisive political influence, see Tomislav Maršić and Joseph Marko, “The Constitutional Reform Process in Bosnia and Herzegovina”, Trans European Policy Studies Association (TEPSA), Briefing Paper for the European Parliament’s Committee on Foreign Affairs, December 2007, reproduced at <<http://www.europarl.europa.eu/activities/committees/studies/download.do?file=18713>>.

human rights in cases of emergency in line with the European Convention on Human Rights). By 2 April 2008, the final version of the draft Constitution was certified by the International Civil Representative as foreseen under the Ahtisaari proposal and finally adopted by the Kosovo Assembly on 9 April 2008.

3. Governmental Structures

The structure of the new Kosovo Constitution follows modern democratic constitutions providing, after the preamble, for a set of different “basic provisions” in chapter I followed by a catalogue of human rights in chapter II, and rights of (ethnic) communities and their members in chapter III. Chapters IV through VIII outline the institutional structures of the legislature, executive and judiciary. The following chapters have no comprehensive logic by regulating “economic relations” more in the form of policy guidelines for state authorities in chapter IX, followed by two short and general provisions on “local government and territorial organization” which form chapter X. Chapter XI regulates the institutions of the “security sector” including law enforcement institutions and chapter XII “independent institutions” such as the Ombudsperson, Auditor-General, the Central Election Commission, the Central Bank and an Independent Media Commission. Chapters XIII and XIV include “final” and “transitional provisions” regulating, *inter alia*, the complex relationship of the Ahtisaari Proposal and the new Constitution as well as Kosovo’s statehood and international supervision, which has been labeled in political discourse as “conditional independence”.

A closer look into the preambular provisions and the basic provisions reveals that the language used to characterize the Republic of Kosovo is almost completely free of any remnants of ethno-national ideology. Both the preamble and Article 1, para. 2 refer to citizens as the basic unit of the state combined with the respect for human rights and individual equality before the law. Only in Article 3—when strangely defining the “Republic of Kosovo”, *i.e.* the state, as a “multi-ethnic society”—the text refers to “Albanian and other communities”, a phrase which was inserted only in the final stage of the drafting process.¹⁴ Differentiating again between the Albanian and “other” communities which are not enumerated conveys, however, on the symbolic level the “identity fiction” of the majority population and “the” state, which is a characteristic element of the ethno-national ideology.¹⁵

¹⁴ The author of this article had been asked by the ICO to give a comment on the “updated harmonized version” of the second draft as of 22 December 2007 which did not include this reference.

¹⁵ See Joseph Marko, “The Law and Politics of Diversity Management: A Neo-institutional Approach”, 6 *European Yearbook of Minority Issues* (2006/07) (Brill, Leiden, forthcoming).

The provision of Article 1, para. 3 finally entrenches one of the political fiats of the international community also laid down in the Ahtisaari Proposal, namely that Kosovo “shall seek no union with any State or part of any State”, thereby prohibiting an *Anschluss* to Albania.

With regard to the institutional structures of the legislative, executive and judicial powers created by the new Constitution, the following observations can be made:

First, the new Constitution establishes a parliamentary system of government. According to Articles 65, para., 7, and 86 the “Assembly”—being the legislative institution—elects the President of the Republic and “may” dismiss him with a two-thirds majority for constitutionally specified purposes outlined under Article 91. Articles 65, para. 8, 95 and 100 prescribe that the government be elected by the Assembly through a procedure similar to a vote of confidence after the President of the Republic has designated the leader of the strongest party or party coalition as Prime Minister in order to form the cabinet. Article 100 regulates the motion of no confidence as an instrument of political control by the parliament which is constitutive for a parliamentary system. Strangely enough, the designation and number of ministers is not regulated by law, but “by an internal act of the Government” according to Article 96, para. 2. Taken over from a presidential form of government are the competences of the President for a suspensive veto of legislation according to Article 80 and to start a procedure for “abstract” judicial review of laws or normative regulations by the administration through the Constitutional Court according to Article 113, paras. 2 and 3. In addition, the President “may” dissolve the Assembly after a successful vote of no confidence against the Government. Finally, the President appoints all judges and prosecutors, however, only after nomination by the respective Judicial or Prosecutorial Councils or—in the case of judges of the Constitutional Court—after nomination by the Assembly.

Second, since Kosovo has been created as a unitary state, there are only two territorial levels of executive power, *i.e.*, the central level and the local level. Chapter X, however, referring to local government and territorial organization, was drafted in a rather inconsistent way. According to Article 124, para. 1 “the basic unit of local government [...] is the municipality”. The next sentence of this provision establishes that municipalities “enjoy a high degree of local self-government”, which creates confusion between the possibility and functional necessity of decentralization of the state administration on the one hand, and the constitutionally guaranteed right of municipalities to self-government on the other insofar as they have—according to Article 113, para. 4—the right to contest the constitutionality of laws or acts of Government that interfere with their

competences before the Constitutional Court. Moreover, chapter X lacks a determination of the bodies of local administration or self-government. Strangely enough, references to the institutions of a municipal assembly, executive bodies and even the existence of mayors but, also, to “local offices of central authorities” can only be found in the chapter on the rights of (ethnic) Communities.

Third, the provisions on the judiciary contain serious flaws. Article 103 refers to the organization of courts: paragraph 1 refers to the existence of a Supreme Court and “other courts” to be regulated by law, whereas paragraph 7 allows the creation of “specialized courts”. Seen from the perspective of the existing court system, paragraph 1 obviously refers to the civil and criminal courts at municipal and district level with the Supreme Court as the court of last instance. In addition, Article 102 guarantees the right to appeal a “judicial decision”. Nowhere does the new Constitution, however, refer to any legal remedies against administrative decisions. The only implied reference can be found under Article 54 in the chapter on human rights, which guarantees “Judicial Protection of Rights”. This provision not only guarantees judicial protection against any violation of the constitutionally guaranteed human rights listed in this chapter but, also, “if any right guaranteed [...] by law has been violated [...]”. A systematic interpretation of the constitutional provisions quoted above must lead to the conclusion that any administrative decision either on the local or central level can immediately be contested before a court without the necessity of exhausting all possible remedies in the administrative procedure. Moreover, the question of which court must be addressed remains unresolved: can or must the decision of a ministry be contested before a municipal court or—the other way around—can the decision of a local administrative body only be contested before the Supreme Court after the exhaustion of remedies in administrative procedure since a judicial procedure starting again at local level would be a never ending story probably violating the principle of fair trial due to the length of procedures? Moreover, the provisions of Article 113, paras. 7 and 8—which provide for an individual complaint mechanism before the Constitutional Court only in cases of violation of human rights, but not other rights, and the possibility for courts to refer cases to the Constitutional Court if the law is deemed unconstitutional in the judicial proceeding, but not if they have to decide on the possible unconstitutionality of an underlying administrative decision—are not harmonized with Article 54. This will lead to a hybrid system of judicial review confusing the American system of diffuse judicial review and the Central European system of monopolized judicial review of the legality or constitutionality of both administrative

and judicial decisions by specialized courts, *i.e.*, constitutional courts and administrative courts. The reference to “specialized courts” according to Article 103—and the need for judicial protection not only of constitutionally guaranteed rights but of all “subjective” rights granted also by ordinary laws according to Article 54—might be seen as a hint that administrative adjudication by specialized courts was finally taken into account at the last minute but could not be fully elaborated.¹⁶

Finally, the relationship between the governmental institutions of Kosovo and the supervision by the International Civilian Representative must be taken into account. It is “essential” for a constitution and the alleged “sovereignty” of a state that the Constitution—following the phrase of the US Constitution—enjoy the rank of “supreme law of the land” in a legal hierarchy. As a matter of fact, Articles 2 and 16 follow this constitutional doctrine. Article 112, para. 1, also declares the Constitutional Court the “final authority for the interpretation of the Constitution”. On the other hand, Article 143 obliges all Kosovo institutions to “abide by all of the Republic of Kosovo’s obligations under the Comprehensive Proposal for the Kosovo Status Settlement” and, according to paragraph 2 of Article 143, “the provisions of the Comprehensive Proposal for the Kosovo Status Settlement [...] shall take precedence over all other legal provisions in Kosovo” so that according to paragraph 3, “the Constitution, laws and other legal acts [...] shall be interpreted in compliance with the Comprehensive Proposal [...]”. Since, finally, the International Civilian Representative is declared “the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal” and that “no Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations” of the ICR, the “supremacy” of the Constitution to be upheld by the Constitutional Court is preempted on behalf of the Comprehensive Proposal which is—again following the phrase of the American Supreme Court in *Marbury v. Madison*—the “paramount law”. It is obvious from the Comprehensive Proposal and these “transitional provisions” that the constitutional drafters followed the example of the High Representative in Bosnia and Herzegovina which was given “Bonn Powers” not only to supervise, but also to intervene in the political process by replacing the Parliament as the law-making authority and to dismiss all public officials obstructing the implementation of Dayton. In a ground-breaking decision, the Constitutional Court of Bosnia and Herzegovina, however, also tried to establish a system of checks and balances between local powers and the international administration by declaring itself competent to review all laws which the High Representative had adopted, thereby “substituting”

¹⁶ I was hinting at this general problem in my assessment of the Draft 2 (version of 22 December 2007) for the ICO (on file with the author).

the parliament of Bosnia and Herzegovina.¹⁷ It seems obvious that the prohibition for Kosovo authorities, including the Constitutional Court, to “review” any decisions of the ICR has again a “responsive” character to the Bosnian situation despite the fact that the ICR cannot fully “substitute” the Kosovo Assembly, but only veto legislation.

4. Human Rights

A closer look into the catalogue of fundamental rights and freedoms in chapter II of the new Constitution reveals the aspiration of the drafters to establish a “modern” text, *i.e.*, the standards elaborated elsewhere for the protection of human rights.

Article 22 incorporates a number of international human rights agreements and instruments, namely the Universal Declaration of Human Rights, the European Convention on Human Rights and Freedoms and its Protocols, the International Covenant on Civil and Political Rights and its Protocols, the Council of Europe Framework Convention for the Protection of National Minorities, and the UN Conventions on the Elimination of All Forms of Racial Discrimination, the Elimination of All Forms of Discrimination against Women, the Rights of the Child and against Torture. The catalogue of human rights in chapter II includes not only liberal and political rights but, also, socio-economic rights, namely the “right to work and freely to choose his/her profession and occupation” (Article 49) and to “healthcare and social insurance” (Article 51); also, under Chapter IX under the title “Economic Relations”, we find a provision guaranteeing “consumer protection” (Article 119, para 7.) Thus it is surprising that the list of international instruments under Article 22 does not include the UN Covenant on Economic, Social and Cultural Rights nor the European Social Charter.

This article does not provide the space for discussion of each provision, but a critical assessment of the human rights catalogue must single out three structural problems.

First, it is obvious that the drafters of the constitution tried to follow the most modern European “standards” in human rights protection by referring to both the European Convention on Human Rights and even taking the case law of the Strasbourg Court and the Charter of Fundamental Rights of the European Union into account. However, two interrelated problems are created thereby. On the one hand, the method of copy and paste from different sources leads to a “hybrid text” which only partly follows the text of the ECHR and/or the Nice Treaty as can be seen, for instance, from the text of Article 27. Since the Constitutional Court is

¹⁷ See Joseph Marko, “Moving from Excessive Complexity to Moderate Asymmetry: The Case of Bosnia and Herzegovina”, in Marc Weller (ed.), *Asymmetrical Autonomy Designs* (Cambridge University Press, Cambridge, forthcoming).

the “final authority” to interpret the Constitution, this would not create a problem *per se*. But, according to Article 53, human rights have to be interpreted “consistent with the court decisions of the European Court of Human Rights”, *i.e.*, also by the Constitutional Court. This will definitely lead to the question—which has also arisen in Bosnia and Herzegovina in the jurisprudence of the Bosnian Constitutional Court—of what rank the ECHR as such enjoys and to what degree the decisions of the European Court of Human Rights (ECtHR) have binding effect. Against the Ahtisaari Comprehensive Proposal, Article 22 of the Constitution gives the ECHR no supremacy over the constitution, but only over (ordinary) laws and other acts of public institutions, which is called the “mezzanine theory”, with regard to the incorporation of international law into the domestic legal order. On the other hand, if the Constitutional Court has to follow the case law of the Strasbourg Court, this legal hierarchy will be reversed and can create, at least theoretically, a conflict between the constitutional and international legal obligations of Kosovo through the problem of the degree to which the provisions of the Kosovo Constitution violate the ECHR as can be seen, for instance, from Article 44, para. 2.

Second, a similar problem is created by the legislative technique used for the determination of the limitations of the enjoyment of human rights. Articles 46 and 55 are informative in this respect. Article 46 regulates the protection of property. Paragraph 3 states that “no one shall be arbitrarily deprived of property”. The same provision goes on with the determination that expropriation might be justified “if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation [...]” This provision simply confounds the standards of judicial review elaborated by the European Court of Human Rights and Constitutional Courts in Central European countries. It goes without saying that the much older standard of “arbitrariness” would give much more legislative discretion than the “proportionality test” elaborated by the ECtHR or the German Constitutional Court. The same holds true for Article 55, which regulates the “general limitations” of human rights. Paragraphs 2 and 4 of this provision again repeat the single elements of the proportionality test elaborated in the case law of European courts in rather clumsy language creating more confusion than clarity. Moreover, paragraph 2 also provides that courts “shall pay special attention to the essence of the right limited” which is taken over from the much older doctrine of the German Constitutional Court following from Article 19 of the Basic Law and giving much more legislative discretion than the proportionality test.

Finally, a politically rather strange provision can be found in Article 44. This provision guarantees freedom of association, which includes, accord-

ing to the case law under Article 11 of the ECHR, the freedom to found political parties. The prohibition of political parties is, of course, a rather sensitive issue so the German Basic Law monopolized the competence to prohibit political parties and/or their activities with the Constitutional Court. This “model” was copied in many Eastern European countries that adopted new constitutions after the transformation to democratic governance. Paragraph 3 of Article 44, however, allows the prohibition of political parties “by a decision of the competent court”. It goes without saying that the possibility for any regular court to ban political parties will not foster political stability so that the Kosovo Assembly could make use of the provision of Article 113, para. 10 which allows the creation of additional jurisdiction of the Constitutional Court by law.

5. A Functional Analysis

Taking up the “constitutional choices” discussed in the beginning in light of conflict management and institution-building in a comparative perspective with the experiences made in Bosnia-Herzegovina and Macedonia, the following conclusions can be made:

First, a constitution “constitutes” legitimate state authority by creating the necessary institutions and regulating the exercise of their powers. Seen from this perspective, the problem of the “supremacy” of the constitution elaborated above raises serious doubts about the effective interplay between Kosovo institutions and the ICR and the capacity to create an “effective” system of checks and balances based on legal security which is, in itself, a precondition for political stability and economic development. All the problems created by the mantra of “standards before status” under the UNMIK Administration could be repeated under the ICO despite the fact that the governmental structures of the parliamentary system foreseen in the Constitution provide a sound institutional basis for an effective political process.

Second, throughout UNMIK Administration as well as in the drafting process, Kosovo Albanian political elites were never given the feeling of “ownership”. This is a serious handicap for the legitimacy of the constitution and—again—the relationship to the ICR. The efficacy of the functions of political stability and democratic participation as well as the possibility of creating an “exit strategy” for the international supervision will again depend on the willingness of the Kosovo political leaders to cooperate and—even more so—of the international civilian administration to take their Kosovo counterparts “seriously”. The never ending discussions in Bosnia and Herzegovina for more than a decade about when and under which conditions to “close” the Office of the High Representative must be seen as the writing on the wall in this respect.

Third, the function of protection of individuals and their rights against state authority might be undermined because of the flaws of the text of the Constitution with regard to limitations of human rights and the confusion about legal remedies against administrative decisions. These legal gaps and confusions will have to be filled and clarified by an effective Constitutional Court system on the one hand and the creation of “specialized courts”, in particular an administrative court system by the legislator on the other.

Finally, the balance of human rights and (ethnic) community rights which are extensively dealt with in an article by Emma Lantschner in this special issue as well as the balance between individual and group rights privileging the ethnic communities in particular through ethnic representation and participation in the legislature and executive show the learning curve of both mediators of the international community and political elites in Kosovo. The failures of the strict “corporate” power sharing system of the Dayton Constitution, which led to a blockade of the political system with regard to necessary political reforms for the creation of effective institutions and economic reforms, were not repeated, but lessons were drawn from the “success” of the Ohrid Agreement. The balance between the “civic” and “ethnic” elements is achieved by granting ethnic overrepresentation and thereby attempt to create a feeling for “effective participation” in the exercise of state authority. On the other hand, absolute veto power for any ethnic group—as was the case in the Dayton Constitution—is omitted and replaced after the “Badinter” formula of the Ohrid Agreement through a complex system of double majority requirements. Thereby, also integration and effectiveness of political decision-making should be balanced.

In the end, however, no institutional arrangements can guarantee integrative effects as long as good neighborly relations are not developed with Serbia. The rights of the Serb community in Kosovo allow for integration as the “co-nation” in Kosovo, but the integrative effects following from the constitutional provisions must be made use of and cannot be effective as long as the Serb community in Kosovo—under instruction from Belgrade—boycotts participation in Kosovo institutions. Thus, it will be the spillover effect from European integration in the ongoing Stabilisation and Association Process and the implementation of future SAAs that will defuse the tensions between Belgrade and Prishtina and provide the ground for the good neighborly relations addressed in the Preamble of the Constitution before full membership of both countries in the EU.