

REPORTS OF THE RAPPORTEURS

Disclaimer

The views expressed herein represent the opinions of the speakers and do not necessarily represent the views of their organization or the OSCE Mission in Kosovo.

Session I: “General introduction to constitutions”

Moderator: Per Oeyvind Semb, OMIK

Introductory remarks:

Ambassador Werner Wnendt, Head of OSCE Mission in Kosovo

Keynote Speaker:

Paul Williams, American University, Washington College of Law & School of International Service

Panel discussions:

Vernon Bogdanor, Oxford University, Brasenose College, Rick Lorenz, Jackson School of International Studies, University of Washington

Emilia Drumeva, Constitutional Court of Bulgaria

Respondent:

Hydajet Hyseni, Chairperson of the Assembly Committee on Legal, Judicial and Constitutional Framework Matters

**Objective**

This session was intended to present the main functions of a constitution in a democratic governmental structure as well as its main characteristics. The role and the specificity of the constitutional process was also discussed.

Introductory remarks

Ambassador Wnendt underlined the rationale behind the organization of the roundtable, namely to enlarge and deepen the ongoing debate on constitutional issues by bringing together local actors and international experts. He stressed the complexity of the task and urged participants to refrain from politicising the debate in order to allow for interaction and a fruitful exchange of ideas.

First Speaker

The keynote speaker stressed the importance of the constitutional process, per se, in particular in a post-conflict context with a divided society such as Kosovo. He drew the parallel with the status process, indicating that, even though some parts of a constitution are likely to be provided by the status settlement, the constitutional process was more far-reaching. It would require local ownership and inclusiveness to ensure legitimacy of the outcome.

The process was likely to be a long one and, in his view, might continue after status settlement because of the extensive consultations needed to build political consensus over a shared vision.



The speaker expanded on the different phases of the process. (1) A preparatory phase of initial consultations aiming at an agreement on a clear set of rules and timeframe. (2) A drafting phase to balance broad political guidance and technical work. This was described as the most difficult phase that had to be carefully managed. (3) A period of public consultation to educate the public on the constitution and ensure broad ownership. A mechanism to channel public input should therefore be developed. (4) A final review should allow comments and suggestions arising from the public consultations to be processed. During this phase, the document could also be reviewed by relevant institutions to ensure consistency with, for instance, international laws and norms. (5) After adoption, a phase of implementation, to foster confidence and ensure its legitimacy, should be foreseen.

According to the speaker, throughout this entire exercise, some rules should be respected:

- limit the appearance of incumbent control which could create distrust and lead to a lack of legitimacy;
- provide multiple opportunities for participation, which could also generate useful ideas and be a model for future democratic behaviour;
- create adequate structures to enable and secure compromises;
- be forward looking; and
- carefully manage the international community's participation, especially in Kosovo where the international community is, at the same time, strongly involved in the status talks.



First panel speaker

The first panel speaker stressed that although the constitution is indeed essential, it is, however, neither the beginning nor the end of the democratic process, because institutions created under the constitutional framework would function only if there was a general agreement. Therefore, emphasis should be on building political agreement. This is especially the case in divided societies such as Kosovo where tensions between granting equal status to different groups and institutional efficiency should be carefully balanced. In other words, the more communities have confidence in the system, the less that guarantees are needed and the more institutions could be efficient. He further suggested that a way to increase confidence when adopting a constitution in such an environment could be the use of multiple referendums, one in each of the constitutive groups.

Second panel speaker

The second panel speaker compared the situation in Kosovo and Georgia. He stressed that while the context was fundamentally different, there were similarities with other post-conflict regions in the world. In that respect, it was also important to compare and draw on experiences from abroad.

Third panel speaker

Based on her participation in the drafting of the Bulgarian constitution and subsequently as a practitioner, and currently in her capacity as a constitutional judge, the speaker stressed the key role of experts in the process. Together with the politicians, experts have to be able to show flexibility and originality in offering solutions that could be acceptable while building political consensus.

Commenting on the minimum content a constitution should encompass, she first referred to basic rights and fundamental freedoms and second to its function as a framework law setting standards and principles. A constitution need not cover everything but it should be able to give answers to any question through the interpretative process.

Referring to the drafting and the adoption of the constitution, she explained that although people are the constituent power in a democracy, for practical reasons a constituent body such as a qualified assembly should be established and the modality for adoption clearly defined. She concluded her intervention on specific provisions to enable the implementation of the constitution without creating a vacuum after entry into force. It could include a package of laws for the first step of the constitution.



Respondent

Responding to the keynote speaker, he stressed that there was a general agreement on the need for international support in the constitutional process as well as a need to learn from the experiences of other regions in the world. At the same time, he underlined the specificity of the situation in Kosovo when finding suitable solutions. He also specified that Kosovo had constitutional experiences in the past and possesses local expertise, which should play a crucial role. The aim would be, in fine, to have a positive impact on regional stability.

Further developing on the general principles, he stated that there was consensus on having a functional, modern and operative European constitution, including human rights principles. It would also include more advanced solutions for the rights of minorities that would reasonably favour minority communities and would be in harmony with the wishes of the majority. In his view, there was also a general agreement on developing a parliamentary system that should aim at more functionality than the current one under the Constitutional Framework.

Finally, he considered that the Assembly, for instance through the establishment of a so-called constitutional conference, should actively participate in the constitutional process.

Discussion

Constitutional process – Role of the Assembly

The discussion focused mainly on the process itself rather than on the content of a constitution. It was acknowledged that the process requested ownership through broad consultations based on democratic principles of transparency and inclusiveness in order to ensure legitimacy. Based on the same rationale, most speakers stressed the leading role the Assembly should take. The discussants also recognised the role the Working Group on Constitution of the Negotiating Team could play at this stage. Participants also stressed that proper implementation of the constitution was certainly even more important than adopting a good text.

Short versus long constitutional process

Numerous comments were made on links between the constitutional process and the status process. On one hand, some believed that a constitution should be ready for status day, one reason being that it would avoid having the international community imposing a document. On the other hand, it was stressed that the mistake would be to rush the process since it would certainly prevent reaching a consensus, in particular with minority communities. Since a constitutional framework in Kosovo exists, there was, in this perspective, no risk of a legal vacuum and therefore no urgency, especially if the goal of the process is to find long-term solutions that would lessen the pervasiveness of ethnic divisions. At the same time, it would enable to avoid overlapping or influencing the status process.



Minority communities concerns

It was also emphasised that the drafting process should allow the participation of experts from all communities to work on shared approaches and that comments raised by minority communities should also be taken into consideration in the drafting, and not solely listened to. In other words, the majority should not try to benefit from the constitutional process but work for all.

Interventions that referred to the content of a constitution mainly stressed the need to balance individual rights and minority (or community) rights as well as between institutional efficiency and the protection of specific groups. Another perceptible tension between the different comments was how visionary the constitution should be and, therefore, whether the emphasis should be on future integration rather than on actual protection.

Rapporteur: Patrice Quesada, OMiK

Session II: “Institutions”

Moderator: Franklin De Vrieze, OMiK

Keynote Speakers:

Vernon Bogdanor, Oxford University, Brasenose College
Amjad Atallah, Strategic Assessments Initiative
Arsim Bajrami, Working Group on Constitution, Kosovo Negotiation Team

Respondent: Gjynaze Sylja, Head of the AAK Parliamentary Group

Objective

This session intended to focus on institutional arrangements needed to ensure a functioning government in Kosovo, including the separation of powers and checks and balances.

First Speaker

The first keynote discussed different models of structuring the executive branch. By asking to whom the government would be responsible, the parliament or another institution, he pointed out that if the government was responsible to the parliament, it would, therefore, be responsible to the “majority.” An alternative could be a “cross-community” government where minority parties are in the government as a matter of right.



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The speaker highlighted a number of roles the head of State can play to reconcile different communities or serve in a symbolic function. In any case, a president should, especially in the case of Kosovo, represent all the people.

The speaker then outlined a broad range of legislative practices for protecting minorities, such as minority vetoes or weighted majority voting. He noted that the fundamental problem was how to protect minorities without introducing inflexibility into the legislative system. One suggestion was to establish a committee system in the parliament to scrutinize the work of the government. Legislation could be scrutinized at a number of stages: the pre-legislative stage, when draft legislation was first presented to the parliament; the legislative stage, when witnesses could be called to inform the parliament; and the post-legislative stage, to determine how effectively legislation was being implemented.

The speaker also stressed potential abuses that can occur when a government can dissolve parliament without limit. On the other hand, he pinpointed that a fixed-term for the parliament might lead to inflexibility and deadlock. Here again a balance must be ensured.

Using a range of models in practice throughout Europe, he noted that checks and balances are integral for any government but no ideal method existed. Institutions themselves were not the key; the key to successful governance is the spirit and willingness to make institutions work. If the willingness to do so was not there, even a perfect constitution will not work. This theme was repeated throughout the roundtable.

Second Speaker

Constitution and status process

The second speaker noted that negotiating independence and the constitution at the same time posed difficulties. Referring to Palestine, he pointed out that in some cases, developing states get neither independence nor a constitution, and cautioned participants that the process of drafting a constitution can be long, sometimes taking years. He pointed out that the perfect arrangement was one where the final status process complements the constitution and vice versa.

How the constitution shapes the state

Noting that the constitution determined the form of government, he stressed its lasting effect on the state and on how it would be perceived. Recent state practice showed that the constitution determined how the international community would see the new state, as a moral leader for the region or simply repeating the mistakes of its neighbours. By extension, it would determine the level of support. Constitutional drafters should therefore set a standard, think inspirationally, and not in a technocratic way.

Key issues the constitution should resolve

First, the structure of the state. This can range from confederal to federal to unitary. Regardless of the model chosen, it would have to ensure the preservation of human rights and the establishment of a functioning economy. Drafters should not feel confined to established models; as new states develop, there would likely be new forms of state structure.



Second, the structure of the executive. A presidential system may serve as a unifying force and ensure separation of powers. There is a degree of accountability to voters but this system could lead to authoritarianism. A parliamentary model includes all groups, and is flexible since coalitions often need to be formed between political parties. Parliamentary systems are more accountable to public control and are more transparent. He pointed out that parliamentary systems are often the most sustainable for new democracies; in fact, all continuously democratic states formed after WWII have a parliamentary system. Finally, he stressed that a mixed system can be inherently unstable.

Third, the structure of the legislature. A constitution must define whether the legislature will be unicameral or bicameral and how under which conditions the parliament can be dissolved..

The speaker concluded by emphasizing the important role of minorities in the constitutional drafting process, including women. He stressed tha□



Third Speaker

The third speaker emphasized that a constitution is a contract between the citizens and the state and that for Kosovo, the new constitution would aim to support the new state and provide maximum rights to all communities at the local and central level. The main goals are, therefore, national cohesion, unity of the people and the functioning of Kosovo's institutions.

The speaker affirmed that although several issues were being negotiated in the framework of the status talks, such as the reform of local government and minority rights, the constitution must be developed under the Assembly, as the highest representative institution in Kosovo. He underlined that some time would be required to include all the people of Kosovo in the drafting process.

Referring to the separation of powers, he pointed out that every constitution limits the government's power in some manner, such as legislative oversight to the powers of the president over specific issues. Focusing on the role of the president, he recommended five instruments of authority: (1) to promulgate laws; (2) to propose laws; (3) the veto power; (4) to appoint the prime minister; and (5) to dissolve the parliament.

Respondent

The respondent pointed out that the constitution in a post status context would have to be sustainable; therefore, the drafters must ensure its consistency with the future status. Support for a parliamentary system was also expressed because of what she qualified as its flexibility, its high level of responsibility and its sustainability. Describing the current system as inefficient, she stressed the need for the new constitution to define Kosovo's sovereign institutions, including new ministries such as a Ministry of External Affairs, Defence and European Integration. The pr□

Discussion

The open discussion concentrated on the protection of minorities through the legislative process as well as on how to make the drafting process more inclusive. The session ended with a discussion on the political realities of drafting a constitution.

On Protecting Minorities

Participants agreed that the protection of minority rights was an important issue to be determined in the constitution. Some stressed the shortcomings of the current system, in particular that the Assembly Committee on the Rights and Interests of Minorities was not functioning effectively and that little information was available about its work. Many did not regard the committee as important, eventually protecting the interests of the governing coalitions rather than of the communities. Therefore a discussant felt that communities themselves must protect their interests and decide on proper legislative mechanisms. He advocated for the creation of a separate chamber for minorities with a variety of legislative protections at both central and local level.

Other participants felt that all communities in Kosovo had to work together to protect minority rights and, while acknowledging the need for protective mechanisms, cautioned to avoid "the mistakes of Bosnia."

Linking the protection of minority rights to the balance of powers, some participants believed that to function, those mechanisms would require the development of a culture of consensus rather than a culture of veto. Good will should predominate the constitutional process, as a way to avoid future deadlocks.

On inclusiveness and representation

Suggestions were made to include state councils, liaison organizations, representatives from professional





organization and of economic and local interests of all communities. All participants shared the belief that the constitutional process had to be inclusive in order for all people in Kosovo to feel invested in the process and the product.

On political realities

Participants referred to the sensitivity of the current political context. They recognised that some provisions or principles would come out of the status process, particularly in the areas of minority rights, reform of local government and cultural heritage. Therefore, some discussants called for the communities in Kosovo to find solutions together to facilitate the conclusion of status talks.

Role of the experts and the politicians

Discussants noted that although experts draft the constitution, it is the politicians who have to create the proper environment. Together, experts and politicians will have to find original solutions that make the future state of Kosovo operational.

Implementation of the constitution

A discussant pointed out that respect for the rule of law was crucial for a constitution to be implemented and, as one discussant noted, whether Kosovo would be a successful state or not depended on how the majority dealt with the minority. A willingness and a sense of responsibilities would be required from both the state and the citizens. But because of the past seven years, a great institutional mistrust still existed. A good constitutional process could help convincing people to develop political will.

Rapporteur: Jennifer Ober, Public International Law & Policy Group

Session III: “The Judiciary”

Moderator: Wolff-Michael Mors, OMIK

Keynote Speakers:

Godwin Muscat Azzopardi, UN International Judge, Supreme Court of Kosovo

Rick Lorenz, Jackson School of International Studies, University of Washington

Nekibe Kelmendi, Working Group on the Constitution, Kosovo Negotiation Team

Respondent: Dragiša Krstović, SLKM Parliamentary Group



Objective

This session intended to focus on the constitutional arrangements necessary to ensure the independence of the judiciary and to look at arrangements for constitutional review.

First Speaker

The first keynote speaker stressed that an independent judiciary was one of the basic constitutional principles. The constitution should provide the structure of government and the limits of governmental action. Quoting from United Nations General Assembly Resolutions on the subject, the speaker outlined elements needed for the establishment of an independent judiciary.

He stressed that it was essential to have a strong judiciary willing and able to protect an individual against the majority; in case of conflict, judges should be enabled to take decisions as they see fit on the basis of the law and the merits of the facts. To that end, judges also need to maintain a high standard of conduct to maintain the integrity and dignity of the judiciary. It would not be enough to provide for an independent judiciary on paper, but it must also be seen as independent.

Recognising that the new constitution should bring a qualitative change to the existing situation in Kosovo, he noted the importance

and relevance of an independent judiciary in the light of a future European Union perspective, where judges would need to be enabled to set aside national laws in favour of European Union law.

Referring to concrete examples from recent Eastern European constitutions, he stressed the protection of the interests of the judiciary towards the rest of the state. He also mentioned the importance of limiting incompatible activities with the post of judge and the necessity to have effective financial disclosure mechanisms to assist in combating corruption. Furthermore, he emphasized the importance of self-management of court administration resources.

Second Speaker

Using a large number of examples from recently adopted constitutions, he illustrated the types of language which may be used to establish an independent judiciary. The speaker highlighted two issues of concern:

1. How to ensure an objective role for courts and/or a constitutional court, in order to avoid the loss of public support. Maintaining public respect for the institution of the judiciary without the judiciary serving public opinion is crucial to maintaining an independent judiciary.
2. How to guarantee a diversity of judicial personnel, and whether or not a specific number of reserved posts per minority group is an appropriate solution.



Third Speaker

She highlighted that the courts were an illustration of the nature of the state, and stressed that an independent judiciary, respected by the executive and the legislative powers of government, was essential to the maintenance of the principles of legality and the rule of law since the judiciary decides on the most essential human values. The speaker recommended to make the basic principles of an independent judiciary accessible to the public so that the public could ultimately seek to maintain those principles.

Commenting on the current functioning and organization of the judiciary in Kosovo, she expressed the view that since 1999, judicial independence has not been respected. The speaker referred to the existence of three court jurisdictions operating virtually or factually in parallel, namely the local Kosovo courts, the international judges and the Serbian courts. She concluded that only with a resolution on the status of Kosovo would it be possible to establish an independent judiciary.

Respondent

The respondent, starting with an overview of the current state of the judiciary in Kosovo, highlighted a series of deficiencies, including: the unclear legal framework of the judiciary; lack of human and material resources; concerns with the appointment authority of the SRSG; lack of public trust in the judiciary; insufficient monetary compensation for judges; and excessive length of judicial procedures. Based on this analysis, he stressed that Kosovo was a specific case and that further provisional solutions would not be beneficial, although he conceded that they may be necessary.

He considered that a constitution for Kosovo should set out, at a minimum, the following elements: responsibilities of the courts; the structure of the judiciary; organization of the courts (including specialised courts); that the judiciary shall be independent and unbiased; functions incompatible with that of judge; and that the judiciary should reflect the diversity of Kosovo. He concluded by noting that respect for the rule of law and human rights in Kosovo would depend on good constitutional solutions to ensure the independence of the judiciary.





Discussion

The discussion concentrated on the value of having a Constitutional Court, the role of such a court, the positive and negative aspects of allowing individual constitutional complaints, the appointment procedures for judges, the position of the prosecutorial office, the execution of judicial decisions, and the risk of political interference in judicial decision-making given the constitutional culture of Kosovo.

On Constitutional Courts¹

Several participants considered that, in the current context of Kosovo and the challenges of its complex applicable law framework, a Constitutional Court could assist in ensuring clarity and legal certainty in the applicable law and the constitutionality of existing and future laws.

Allowing individual claims

A different question presented was the value of allowing individual claims to be brought to a Constitutional Court for judicial review of the constitutionality of public action in individual cases. The predominant opinion of participants was that, whereas such a system has value, the danger of the court becoming overloaded by large numbers of individual claims argued strongly against allowing this. In addition, claimants could seek to abuse the constitutional review as a fourth level of appeal on the merits of their case. One solution to the potential for abuse would be to ensure that while cases were on appeal for judicial review by the constitutional court, the previous decision was not suspended and the operation of the law continues. Experiences in Bulgaria suggested that allowing individual claims should not be considered in the early phase of operations of a Constitutional Court.

On appointment and budget procedures

Several participants expressed concern with the appointment of judges by the legislature and the control of financial resources by the executive. Coupled with the lack of a tradition of an independent judiciary in Kosovo, and negative practices in the past, it was considered essential to protect the judiciary from political influence as much as possible. To this end, some participants preferred appointment and financial control through an independent High Council of Justice or similar body. Nevertheless, it was also considered important to prevent too strong a judicial power from hindering the functioning of the other powers of the state.



On the other hand, several participants expressed the need for a strong relationship between the judiciary, society in general and other public institutions. An independent judiciary should not lose contact with society and should reflect Kosovo society in its composition. Although appointment by Parliament could increase the risk of political interference, this could be prevented by strong checks and balances in the overall system of public institutions. A separation of the budget of the judiciary from the general state budget could also contribute to protecting the independence of judiciary.

Representation

In general, participants favoured that the judiciary should reflect the diversity of the population of Kosovo. Most participants were not in favour of quotas, or reserved posts, for specific sectors of the population. A definition in the Kosovo Constitution of the nature and diversity of the population of Kosovo, coupled with the statement that the judiciary should reflect that diversity, could be sufficient to guarantee diversity in judicial appointments. As long as the appointment procedure is not

¹ Historically, review of the constitutionality of laws can be performed either *a priori*, before the law is adopted or *a posteriori*, once the law is in operation. For the latter, two main models prevail: The Austrian model, establishing a specialized Constitutional Court solely dealing with constitutional matters or the United States' model, where the competence of constitutional review is conferred to the Supreme Court. Both Systems do exist in Europe. Many Central and Eastern European states have recently adopted specialized Constitutional Courts for the purpose of reviewing the constitutionality of laws and public acts because they are believed to be strong and efficient in a time of transition.

politicized, appointment based on merit should automatically lead to a diversity of judicial personnel.

On public faith in the judiciary

A variety of inter-linked issues arose in relation to ensuring public faith in the judiciary particularly for some sectors of the population. The risk of political influence in criminal justice through executive control of the police and the prosecutor's office was a particular concern. The importance of fair, speedy and low-cost judicial procedures to the establishment of public faith was highlighted. Several participants noted that the appointment of higher numbers of judges and providing them with higher salaries would be necessary to improving public confidence. In addition, problems with the enforcement and execution of court judgements need to be resolved. Nevertheless, public faith could not become the determining factor in designing independent judiciary arrangements, because in judicial decision-making one party usually will not be satisfied with the outcome.



Rapporteur: Ronald Hooghiemstra, OMiK

Session IV: "Human Rights"

Moderator: Wolff-Michael Mors, OMiK

Keynote Speakers:

Emilia Drumeva, Constitutional Court of Bulgaria

Ron Hooghiemstra, OMiK

Respondent: Džezair Murati, Head of the 6+ Parliamentary Group

Objective:

This session intended to provide a general overview on to which extent to include human rights in the constitution and on possible protection mechanisms.

First keynote speaker

The keynote speaker explained the rationale behind the need to include human rights in the constitution itself. She referred to its historical definition as being, together with the separation of powers, the second constitutive element of a democratic society.² Furthermore, she explained that in a constitution, 'human rights' become 'fundamental rights' because they are the binding expression of the values linking the society together with the individual.

Since those rights are objective values, they are 'directly applicable laws' justifying an obligation to protect. Protection becomes the essence of those rights whether they are negative rights (to guarantee freedom from infringement such as security, liberty, political rights, judicial rights or remedies, equality rights or non-discrimination) or positive rights (redistribution of the fruits of the individual contribution to the society such as social and economical rights). Therefore, protection mechanisms deriving from positive and negative rights are also different.



² Article 16 of the Declaration on the rights of men and citizens, 1789.



The question opened through this theoretical presentation was which human rights have their place in a constitution. She stressed that the inclusion of rights and the enforcement mechanisms should be defined after research, comparisons, how certain mechanisms are received by the population, as well as study of international law.

On minority rights

When considering those specific human rights referred to as 'minority rights', she stressed that they are also a category of fundamental rights and belong to the constitution. By definition, minority rights embody collective rights of that group as well as individual rights of any member of a group; at the same time she stressed that those rights should fulfil an integrating function. She emphasised, however, that there was no universal model either at the constitutional and institutional level or in the degree of precision in the constitution. Too much detail may narrow its scope and future situations could be overlooked.

Protection mechanisms

Protection mechanisms could include internal mechanisms (i.e. through regulations to produce guarantees that the rights would be followed and violations sanctioned). In case of restrictions (and therefore, except for rights which cannot be restricted), the principle of proportionality should apply and be included in the constitution. Regarding outside mechanisms, she referred to access to remedies including direct or indirect access to a constitutional court or the creation of an ombudsperson institution. Another category are supranational mechanisms, in particular the integration process that is taking place throughout Europe.



Second keynote speaker

The second speaker took another approach to the human rights problematic and its links with the constitution. He stressed that since human rights were primarily contained in international law, the crucial point was the relationship between international and national law and, more precisely how to integrate them into national legislative architecture. Referring to the constitutional framework in Kosovo, he explained that although the standards contained in international treaties on human rights are directly applicable, it did not provide explanations for their relationship to the local legislative framework. This created problems with the practical application of these standards.

Presenting two models, one at each extremity of the range of possibilities, the speaker extracted a list of elements that must be addressed when drafting the constitution to allow coherency as well as an efficient protection of human rights. Important elements include: the status of treaties; their entry into force; the relationship with national law; the remedies for violations; and a feedback mechanism to avoid future violations.

Discussion

The view shared by most of the discussants was that although the constitutional framework in Kosovo ensured, to a certain extent, the protection of human and minority rights, it did not particularly succeed when it came to positive rights such as the right to work. The balance between individual and minority rights as well as between human rights in general and the general interest was again discussed as a fundamental question that the constitution should answer through the entire constitutional process.

However, some representatives expressed concern that protection mechanisms should take into account the reality in Kosovo, particularly with regard to the specific situation and interests of each community. a

more pragmatic approach referring to the level and understanding of integration for each of these communities should be adopted.

It was also admitted that the level of preparedness and education of the population to stand for their rights was a determining factor in ensuring effective protection. Therefore, even a perfect constitution, with its deriving mechanisms, would not be enough to guarantee adequate protection.

Rapporteur: Patrice Quesada, OMiK

Session V: “Elections”

Moderator: Petra Blaess, Stability Pact

Keynote Speaker: Vernon Bogdanor, Oxford University, Brasenose College

Keynote Speaker: William Spencer, Public International Law & Policy Group

Respondent: Nazim Jashari, ORA Parliamentary Group

Objective

This session intended to focus on elections in a constitutional context, including types of electoral systems and provisions for an electoral monitoring body.

First Speaker

The first keynote speaker began by discussing selected methods to ensure fairness in electoral procedures, and in particular through the establishment of an electoral commission. He stressed five important functions: to administer elections; to ensure that constituency boundaries are drawn fairly; to ensure that the media report fairly and that each party has equal media time; to ensure that parties keep proper accounts of contributions and spending; and to provide civic education and voter information.

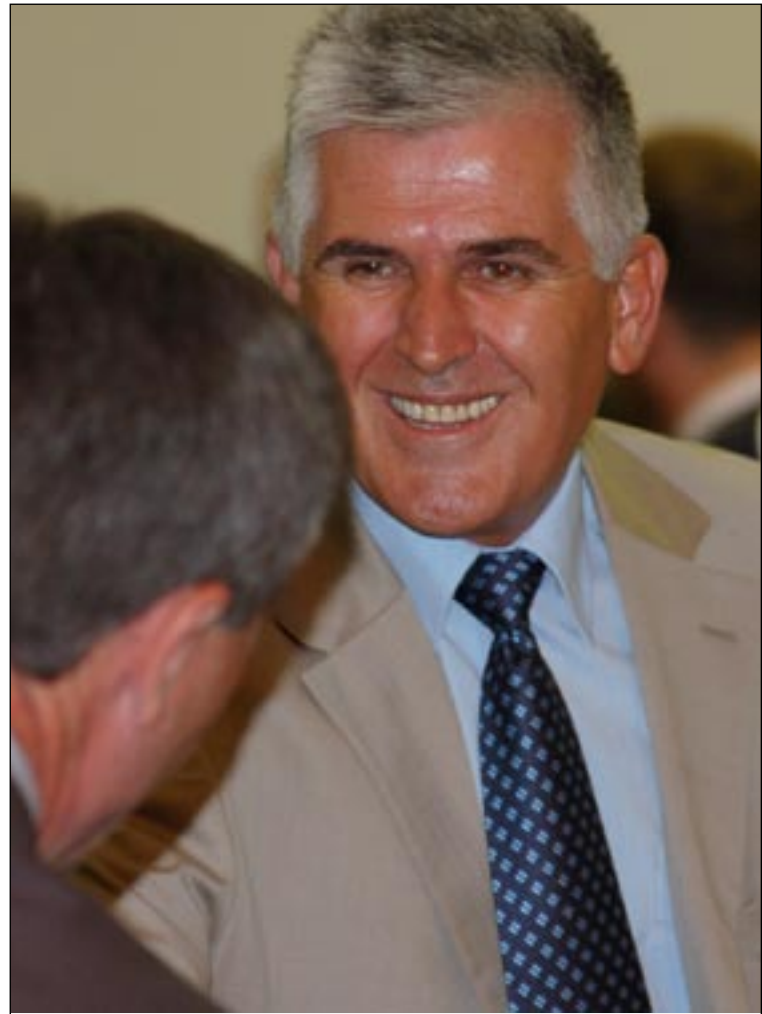
He expanded on different models for an electoral commission: one composed of impartial, non-party members such as judges and the other with a membership balanced among parties, headed by a non-party member and/or include international members. In either case, the electoral commission must win the confidence of the government by being independent and transparent.

Fair representation

Discussing how to develop an electoral system that gives fair representation, he referred to a variety of electoral system in use in modern European states: the “first past the post” model³, or proportional representation. The system was more practical when many political parties competed and, more importantly, provided a more fair representation to minorities and to individuals with an emphasis on equality among genders. Proportional representation can be with a constituency system or a national system as in Israel. All countries using proportional representation mandate a threshold that a party must achieve in order to gain representation.

He stressed that when choosing an electoral system, it was necessary to decide between allowing to vote for a candidate (open list) or for a party (closed list). The speaker recommended a balanced ticket for multi-member constituencies, where women or minorities could be represented on the ballot without the need for any special procedural rules.

In conclusion, the speaker stressed that no ideal electoral system existed and that states must choose one that suits its own particular needs.



³ Where the par[]



Second Speaker

The second speaker stressed that many constitutions included only a few key electoral provisions and have an electoral law separate from the constitution. This provided a way to entrench norms to protect against ruling party manipulation since constitutions are difficult to amend. The most commonly included provisions are, inter alia: independence of the electoral commission; composition of the commission; terms of office; suffrage rights; voter registration; political party rights; constituency boundaries; rules governing presidential elections; national election system; candidacy rights; qualifications for candidates; election schedules; deadlines; and electoral dispute resolutions.

The speaker raised concerns about including too many electoral provisions in the constitution, but also stressed that it served as valuable safeguard to the democratic process. Several “universal” principles exist which include the right of everyone to vote and stand for election, such as mandating that electoral registers must be up to date as well as establishing clear criteria to submit a candidacy. There are also a set of principles establishing “equality” such as: equal voting rights; balanced distribution of seats; equality of the opposition; and national minority and gender equality. To ensure “fairness” the state must allow voters the freedom to form an opinion. The state must be neutral in finding elections and should impose sanctions on campaign violations. “Secrecy” is maintained by allowing votes to be individual and private. And finally, “direct suffrage” is maintained by allowing at least one chamber of the legislature to be directly elected, some national legislative bodies and some councils.⁴

Respondent

The respondent stressed that Kosovo has an excellent electoral law and a successful record of free and fair elections, with fair representation of parties and candidates and fair media coverage. He also stated that financial obligations have been fulfilled through the electoral code and formal requirements for parties, candidates and procedure have been met.

Discussion

The participants concentrated on the protection of minorities through the election process. They agreed that minority representation was important but disagreed on how to achieve “fair” representation. Several discussants felt that the constitution had to provide for “guarantee” or “reserve seats” and possibly some reserve ministries, as exists now. Others asked if a state could truly be called a democracy if reserved seats had to be mandated, stressing that Kosovo’s current system of reserve seats was unfair to majority parties.

Rapporteur: Jennifer Ober, Public International Law & Policy Group



Session III: “Other Constitutional Issues”

Moderator Peter Vanhoutte, OMiK

Keynote Speakers:

Paul Williams, American University,
Washington College of Law & School of
International Service

Wolff-Michael Mors, OMiK

Respondent: Naim Jerliu, LDKparliamentary
group

Objective

This session intended to discuss any constitutional elements that did not fall under the main categories previously discussed. It included, inter alia, procedures for changing and/or amending the constitution, application of international treaties, as well as procedures of transferring sovereignty to supranational organizations.

⁴ The □

First Speaker

In his presentation, the keynote speaker highlighted a list of elements and sought to relate it to the specific situation of Kosovo. He first stressed that the most widely used procedure for amending a constitution is a special majority vote in parliament, followed or not by a referendum. He emphasised that the legal supremacy of the constitution was a basic principle. Citizenship could be defined either by stating rights and duties or by stating the requirements for citizenship. Other issues of importance, in his view, are the official languages or protected languages, the conditions and duration of the state of emergency. However, he stressed that issues such as symbols, flag, anthem, and capital did not need to figure in the constitution and could be left for subsequent legislative action.

Second speaker

The speaker used comparative analysis of different types of constitutions (mainly the German, Danish and Slovenian constitutions) to highlight the existing range of options. He also stressed the need to refer to those kind of comparative studies to figure out what would suit best to the situation in Kosovo. Referring to the nature of the constitution itself, he explained that it could be either normative or symbolic; that it could have relevant wording or being more of ritual nature; that the constitution could be either demanding or rather be descriptive, it could also be a flexible text (interpretation) or a more rigid one; in the same line, amendments could be done either by changing the language in the constitution or by modifying its interpretation. Basically, what was important to understand is that there is no ideal text but that solutions will have to be in accordance with the context. Therefore, it was important to understand that the constitution is not just a text, but has to be understood in its social and political environment.



Respondent

The respondent referred to the status process to stress that the supremacy of the constitution would be problematic for Kosovo if it was the result of negotiations and not of a popular vote. Therefore he advocated for a constitutional process that would be the result of a legitimate process, and according to him, the Assembly should take the leading role. The Assembly should also ensure the participation of all communities to make the process inclusive and create ownership.

He also referred to the issue of defence forces, stressing that this element should also be a part of the debate, because the constitution will have to provide an answer to that question. He also recognised that this was also part of the status talks.

Discussion

Most of the issues covered during this session were already been mentioned in previous sessions as the focus was mainly on the interaction between the status process and the constitutional process. Participants came to recognise the fact that although both processes were linked, it was better to focus on non-status related issues to avoid having to parallel processes running counter to one another. The remaining question was how far the status settlement would go. Some discussants expressed the view that it was unlikely that the new constitution would give less than the current constitutional framework, especially to the minorities. It was, therefore, important to wait for the outcome of the talks.



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