

Politics of Enforcing A “Multi-Ethnic” Society in Kosovo-A Brief History of Constitutional Development and State Building in Kosovo

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Abstract: Constitutional law and state building in Kosovo was conducted with the goal of creating a multi-ethnic society; this impacted on the nature of the international administration from 1999-2008 and also the nature of Kosovo’s political/judicial structures after independence. The determination to forge a multi-ethnic society impacted on the design of various institutions and has had the perverse effect of cementing ethnic divisions and enabling certain parties/groups opposed to the existence of Kosovo to infiltrate Kosovo’s institutions. As a result, the creation of an inclusive “Kosovo” identity has been somewhat paralyzed. This paper aims to revisit constitutional history development of Kosovo to try and make sense of the current state of affairs in the Constitution of Kosovo.

Keywords: history; constitutional law; state building; multi-ethnicity; Kosovo

1. Politics of Enforcing A “Multi-Ethnic” Society in Kosovo-A Brief History of Constitutional Development and State Building in Kosovo

1.1. What was the Nature of the State Building in Kosovo 1999-2008? The International Community’s Policy of Imposing “Multi Ethnicity”

The birth of the Kosovo state must be understood in the context of the exceptional conditions of ex-communist Yugoslavia’s disintegration. Kosovo’s state-building process began long before its Declaration of Independence in February 2008 and after the North Atlantic Treaty Organization’s (NATO) intervention in 1999. Several external and actors, including the United Nations, European Union, and the United States, contributed much over a long period of time to establish the requisite institutional framework for a functioning governmental structure.

The nature of state building in Kosovo in this period is characterized with a heavy involvement of international community in the post war Kosovo after 1999, and their seemingly obsession to create an ideal multi ethnic society in Kosovo. The concept of multi ethnicity was introduced and reinforced in the state building process despite the fact that demographics did not support such a concept, and in fact history shows that precisely the ethnicity was the cause for conflict in Kosovo and several accounts

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point in this direction.¹ So the question is where “international community” in charge to administer Kosovo not aware of the historical facts or perhaps the policy proposals that they sent to their supervisors, in paper sounded great and nobody cared actually to question them? We will never know. What is a fact is that international community instead of focusing in creation of institutional mechanisms for interethnic cooperation with the aim to create an inclusive political community they kept producing policy documents that were out of touch with the reality and indeed produced contrary effects which resulted in cemented ethnic divisions in Kosovo. The fact that United Nations Resolution 1244 was vague about the future political status of Kosovo did not help at all. Rob Atkins argues that the institutional designs intended to promote representative government and manage ethnic conflict have institutionalized ethnicity as a key resource in political competition. International interventions have thus continued and extended processes of ethnicization that take place in ethnic mobilization and conflicts.²

The presiding lines of this section is an account of these ineffective policy efforts of “international community” to forge a “multi ethnic” society in Kosovo through institutional design in the period between 1999 until the independence of Kosovo and how this impacted the ensuing process of state building after the independence.

This period is marked with what in my view was a blind persistence of “international community” to forge a multi ethnic concept in Kosovo after the establishment of international administration under UNMIK. The basis of this policy perhaps can be traced back to the Rambouillet Accords – eventually signed by the Kosovo Albanian delegation but rejected by the Yugoslavs – which served as the basic template for many of UNMIK’s later policy initiatives. The Agreement included the statement, which read “...the preservation and promotion of the national, cultural, and linguistic identity of each national community in Kosovo are necessary for the harmonious development of a peaceful society”³. The Agreement set a goal that of interethnic harmony in the Kosovo society. Hehir argues that it was not at all clear, however, that the preservation of Serbian and Albanian identities was required for there to be peace in Kosovo; in fact, evidence suggested that so long as these identities were preserved, let alone promoted, they would actively undermine peace and stability in the province⁴.

The evidence from the theory and the practice showed that policy of division of power in ethnic lines actually cemented the ethnic divisions within the societies and brought about failed states. As Marko argues in the case of Bosnia and Herzegovina

¹ See generally Hehir, A., *The Efficacy of the International Administration’s Policy of Coerced Co-operation in Kosovo*. EISA Conference paper. Sweden. <http://www.eisa-net.org/sitecore/content/bebruga/eisa/publications/feeds/stockholm.aspx>. 2010.

² See (Aitken, 2007, pp. 247-267).

³ See Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords), Chapter 1.

⁴ See Hehir, A., *supra* note 1, p. 3.

(BiH) the combination of entrenched and reinforced ethno-politics and the counter-productive institutions-building strategies of the international community were doomed to fail¹. Further Professor Marko argues that; all forms of racism and ethno-nationalism are based on the same structural code, which is characterized by the unilinear equation of identity=equality=inclusion, or, the other way round, difference=inequality=exclusion².

Very little was done in the post war Kosovo regarding the most problematic and pressing issues; war crimes, ethnically motivated attacks and corruption of public institution. Though there were extended reports on war crimes and ethnically motivated attacks in Kosovo³ the numbers of court cases that addressed or adjudicated this phenomenon were insignificant. What would happen within the society of Kosovo if perpetrators of these crimes would be judged and sentenced? Would this help heal the wounds of a society that emerged from the war? Would it-judging those who committed ethnically motivated crimes - helped in creation of a sense of community and unification of society against those individual criminals and help build trust amongst ethnic groups? Again we will never know, we can only assume what if? Ineffectiveness to bring justice by local justice in local courts-which by the way was administered by the international community-to war crimes and ethnically motivated crimes helped in further division amongst ethnic lines in the Kosovo society. Yet ironically as evidence in this section shows there were concentrated efforts to reinforce the concept of multi-ethnicity in the public institutions as a mean of political stability and to increase the legitimacy of the institutions.

Another factor that diminishes the legitimacy of public institutions is the corruption of public officials. Corruption poses risks to political legitimacy and stability in the society. Reports and leaked documents show that those policies to tackle allegations on corruption hardly ever made it to the court, instead some administrative bodies within UNMIK dealt and gave sometimes even strange recommendations on how to deal with an allegation on corruption⁴. Anti-corruption initiatives and court cases

¹ For more on constitutional design and role of external factors on it, politics and ethnic divisions in failed state see generally Marko, J., *Defective democracy in a failed state? Bridging constitutional design, politics and ethnic divisions in Bosnia-Herzegovina*. In Ghai, Yash, and Sophia Woodman. *Practising Self-Government*, pp. 281-315, 284.

² See (Marko, 2016).

³ See Human Rights Watch (2004). *Failure to Protect: Anti-Minority Violence in Kosovo, March 2004*, Vol. 16, No. 6(D), July.

⁴ See for example UNMIK Investigation Task Force documents of 13 December 2004 Case 285/04 Pristina Airport – Possible administrative irregularity regarding tender procedures. The allegation was that two companies with the same owner took part at least three times in the same Airport tenders. The Recommendation 1 in this case was: The Airport staff responsible for procurement activity should receive adequate training in the handling of procurement matters and to adhere to all applicable Procurement Regulations. (see the official report on the link <https://file.wikileaks.org/file/un-kosovo-pristina/OIOS-20041213-01.pdf> last accessed on 15.06.2016).

that would harshly punish such practices would strengthen legitimacy of the public institutions and trust on them, a necessary component for social cohesion. Yet they were largely missing during the UNMIK era in Kosovo. This reluctance to fight corruption and to strengthen the judiciary in this fight is another factor that leads to a general mistrust of the general public in public institutions in Kosovo.

Yet, the biggest and the most determinant deficiency of the international administration in Kosovo under United Nations Mission in Kosovo (UNMIK) in my view was lack of clarity on what the final status of Kosovo would be. UNMIK was established by United Nations Security Council Resolution 1244. The resolution determined the role of UNMIK's as overseeing the establishment of interim political institutions of self government "pending a final settlement "but never specifying what this settlement would entail. This vague approach towards the final status of Kosovo undermined all its credibility with the Albanians as majority in Kosovo and within the Kosovo Serb community as well, for "the key contestation in Kosovo, and the source of the previous conflict, was the competing claims over Kosovo's sovereignty"¹. The powers vested in UNMIK constituted a significant accentuation of anything the UN had ever previously undertaken². On May 15, 2001, the Special Representative of the Secretary-General of UN in Kosovo signed UNMIK regulation 2001/9 to approve the Constitutional Framework for Provisional Self-Government of Kosovo. The entry into force of this constitutional framework marks a new stage of self-government of Kosovo. This is the most important document approved by UNMIK, because it sets up the comprehensive legal framework for self-government institutions of Kosovo. The Constitutional Framework on Interim Self-Government in Kosovo describes and establishes institutions of self-government in Kosovo, the President of Kosovo, the Assembly, the government of Kosovo, local government, and the electoral system. This historic document was the basis for the people of Kosovo to establish democratic structures. The document was of a constitutive nature since it established the main organs of self government. It was an interim constitutional framework since it was meant to assist the process of determining Kosovo's final status. At the time, however, it was argued that a "constructive ambiguity" surrounding Kosovo's final status would facilitate the diminution of antagonistic claims on Kosovo and provide space for compromise³. In the other hand, unprecedented power was vested in UNMIK and in particular the Special Representative of the Secretary General (SRSG)⁴. While these extensive powers

¹ See Lang, A., *Conflicting Rules: Global Constitutionalism and the Kosovo Intervention*, in Aidan Hehir (ed.) *Kosovo, Intervention and Statebuilding: The International Community and the Transition to Independence*. London: Routledge.

² See Michael M., *United Nations Governance of Postconflict Societies*. In *American Journal of International Law*, 95/76, pp. 76-85 p. 76.

³ See Independent International Commission on Kosovo. *The Kosovo Report: Conflict, International Response, Lessons Learned*. Oxford University Press on Demand, 2000, p. 261.

⁴ See Julie M., *The Impact of Intervention on Local Human Rights Culture*, in Anthony Lang (ed.) *Just Intervention*. Washington: Georgetown University Press, p. 162.

were legitimized at the time as a temporary arrangement, by 2003 UNMIK's powers had in fact grown and were arguably greater than was required of an administration ostensibly mandated to promote self-government¹.

The ambiguity on the final status and the status quos in Kosovo was untenable by the end of 2003. This led to introduction by UNMIK of policies that were ill constructed – "Standards before Status"² and decentralization policies were later introduced, with the aim to move towards the final status of Kosovo. The "Standards before Status" policy was first introduced in 2003 and idea was that Kosovo's final status would be addressed only after eight standards were achieved by the self government institutions of Kosovo. The standards describe a multiethnic society where there is democracy, tolerance, freedom of movement and equal access to justice for all people in Kosovo, regardless of their ethnic background.³ The eight standards assembled specific and ambitious targets and contained with provisions to ensure that the entire political system, the judiciary and the police reflect Kosovo's ethnic diversity. The aim was to create „a democratic, tolerant, multi-ethnic Kosovo that will be at peace with itself and the rest of the region“⁴. Yet even back then there were warnings that ‘support of the Kosovo Albanian-dominated Provisional Institutions for the concept and practice of multi-ethnicity remained inconsistent’⁵ and ‘a lack of commitment among large segments of the Kosovo Albanian population to creating a truly multi-ethnic society in Kosovo’.⁶ Yet this was ignored and the policy moved forward, which made the policy and artificial constructs which had little practical utility, until it was openly questioned by the head of UN himself⁷.

Literature review and empirical evidence suggests that interethnic accommodation is likely to be facilitated in two situations; first, where there are a large number of ethnic groups neither one of which is dominant, and the second, where there are a small number of large ethnic groups evidencing a high degree of geographical

¹ See (Sobjerg, 2006, p. 67).

² For the complete text of the "Kosovo Standards Implementation Plan" visit [http://www.unmikonline.org/standards/The "Standards"](http://www.unmikonline.org/standards/The%20Standards) were endorsed by the UN Security Council (4880th Meeting (PM), Press Release SC/795, 12 December 2003) and the Contact Group. The Contact Group was formed in April 1994 and is composed of USA, UK, Italy, Russia, France and Germany. James Gow (1997). *Triumph of the lack of will – International diplomacy and the Yugoslav War*. London: Hurst & Company, p. 263.

³ See (Gardner, 2011, p. 64).

⁴ See UNMIK Press Release (2004). Harri Holkeri's Address to the UN Security Council, 6 February (UNMIK/PR/1119), <http://www.unmikonline.org/press/2004/pressr/pr1119.pdf>.

⁵ See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2004/348, dated 30 April 2004, <http://www.unmikonline.org/SGReports/S-2004-348.pdf> last accessed December 2016, p. 7.

⁶ Id at p 14.

⁷ See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2005/88, date 14 February 2005, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2005/88 (last accessed December 2016).

dispersion and intermixing.¹ In Kosovo neither situation existed in 1999 which constituted, Andrew Taylor to note that “a multi-ethnic society in which one ethnic group predominated, and which was spatially organized in ethnically homogenous electoral districts”² based on the demographic evidence in Kosovo, and history of conflict in 1990’s, Taylor warned that “no amount of constitutional engineering or type of electoral system could, at this stage in Kosovo’s history, mitigate the bitterness and divisions in society”.³ The empirically based consideration of the situation was evidently overlooked by international community which continued to persist in a policy based on “aspirations and the international administration’s inflated sense of its own capacity”.⁴ From the beginning ethnicity was central to UNMIK’s organization of the local administration with the new arrangements for Kosovo’s political system and judiciary designed to ensure ethnic plurality through the use of ethnic quotas.⁵

Analyzing constitutional design, politics and ethnic divisions in BiH Professor Marko argues that “the combination of entrenched and reinforced ethno-politics and the counter-productive institutions-building strategies of the international community were doomed to fail”.⁶ Moreover Professor Marko argues that; all forms of racism and ethno-nationalism are based on the same structural code...⁷ He argues that only if the ideologically constructed and in no way “natural antagonism of equality and difference is transformed into a triadic structure of identity, equality and diversity without the alleged predetermination for conflict or cooperation, institutional diversity management becomes possible in order to reconcile political unity, legal equality and cultural diversity within one social and political system.”⁸

2. What Happened in Kosovo? A Brief History of Constitutional Development of Kosovo since the WWII

Kosovo has tried to develop a constitutional identity of its own that is reflective of its particular history and the circumstances of its birth and development as a state, from a former part of an ex communist country to an independent state. This constitutional identity hence represents a mix of aspirations and commitments expressive of Kosovo’s history. The constitutional identity is a dynamic concept; it

¹ See Taylor, A., *supra* note 2, pp. 65-66.

² See Taylor, A., *supra* note 2, pp. 65-66.

³ See Taylor, A., *supra* note 2, p. 111.

⁴ See Hehir, A., *supra* note 1, p 12.

⁵ See Hehir, A., *supra* note 1, p 12.

⁶ For more on constitutional design and role of external factors on it, politics and ethnic divisions in failed state see generally MARKO, J. *supra* note 6, p. 284.

⁷ See Marko, J. *supra* note 7.

⁸ See Marko, J. *supra* note 7.

“evolves in ongoing political and interpretative activities occurring in courts, legislatures and other public and private domains¹.

The two topics –constitutional law and state building–are interrelated in many different ways. The constitutional history of Kosovo has played a role and has impacted the current institutional choices in the constitution of Kosovo of 2008. One of the aims of this study is to show transformation of Kosovo society from a monist and communist system into a plural democratic society, which has been rather different from other former communist societies. Most importantly this is an analysis of the international community’s efforts to reinforce the multiethnic concept in the Kosovan society through the creation of institutions of self government in Kosovo from 1999 until the declaration of independence in 2008. Last but not least the constitutional history of Kosovo is important as it informs us about the constitutional heritage of Kosovo which without any doubt impacted the current constitutional system in Kosovo.

The history of constitutional developments of Kosovo has its origins after World War II.² There is no doubt that the knowledge of the history of the Albanian and Serbian relations and differences over Kosovo do help in understanding Kosovo’s constitutional history and current state of affairs in Kosovo. Political history cannot really be separated from the constitutional history of Kosovo; nonetheless I will try to explain in brief only the constitutional and legal developments of Kosovo after World War II.

From 31 January 1946 until today, Kosovo has gone through these main stages in its constitutional development:

- a) Kosovo’s constitutional development in the era of former Socialist Federal Republic of Yugoslavia³ from 1946 to 1989;
- b) Kosovo’s constitutional development from 1989 to 1999;
- c) Kosovo's constitutional development from June 1999 to February 2008–placement of Kosovo under the legal regime of United Nations Security Council Resolution (UNSEC) 1244; Kosovo under United Nations Mission in Kosovo (UNMIK) administration;

¹ See Jacobsohn, Gary J. (2011). *The formation of constitutional identities*. In Tom Ginsburg & Rosalind Dixon, eds. *Comparative constitutional law*. Edward Elgar Publishing, p. 129.

² Serbia took control of Kosovo in 1912. Most of the population of Kosovo was Albanian. In all official census, the Serbian population in Kosovo never reached above 24% of the general population in 1919. Due to the Serb settlement policy, the number of Albanians initially diminished, but the settlement policy proved to be ineffective and the Albanian population in Kosovo increased over time. For more information on the History of Kosovo see (Malcolm, 1998, pp. 252-285).

³ The Socialist Federal Republic of Yugoslavia was the Yugoslav state that existed from its foundation in the aftermath of World War II until its dissolution in 1992 amid the Yugoslav Wars.

d) Declaration of Independence on 17th February 2008 and the adoption of the Constitution of Kosovo;

In this period SFRY absorbs Kosovo¹ and places it formally within the structure of a Republic-Serbia, which in itself is an uncommon even strange legal and political solution of organizing a federal state. The main and highest organs of state power in Kosovo during this period were the People's Council, the Provincial Executive Council and provincial administration bodies. While in this period, Kosovo did not enjoy autonomy in the judicial sphere²³.

Kosovo under the constitutional regime of 1946 was characterized by three legal-political acts that are most important: the Constitution of SFRY of January 31, 1946, the Constitution of Serbia of January 1947 and the Statute of the Autonomous Province of Kosovo-Metohija of 23 May 1948. In this period of constitutional development, Kosovo had vague political subjectivity within the Yugoslav Federation, expressed amongst others in its direct representation in the National Assembly of the SFRY⁴⁵.

During this period discrimination against Albanians⁶ was visible especially in public life, as Serbs and Montenegrins, who represented 27.5% of Kosovo's population, occupied 68%⁷ of positions in public service⁸. This led to massive demonstrations of Albanians in Kosovo who demanded change in 1968, openly calling for the creation

¹ When the Axis powers occupied Yugoslavia in 1941, Kosovo became part of Albania, which was itself controlled by Italy. With the defeat of the Axis powers, Yugoslavia, then ruled by Communists led by Josip Broz Tito, regained control over Kosovo. For details on the legal status of Albania during the Second World War. See (Sereni, 1941, pp. 311–317).

² In the territory of Kosovo were formed four district courts and county courts as the second instance court, and there was no Supreme Court as the highest judicial instance at this period of time.

³ See Article 2 of the 1946 Constitution. In Marc Weller, *The crisis in Kosovo: 1989-1999* (1999). Vol. 1, *Documents and Analysis*, p. 52.

⁴ See Constitution of Social Federative Republic of Yugoslavia, Article 54.

⁵ The Constitutional Law which was approved on January 13, 1953, followed subsequently with a similar constitutional law approved in Serbia resulted in deterioration of the legal and political status of Kosovo. This is mainly due to the significant weakening of the position and the treatment of Kosovo's rights and duties within the federation; not as the rights that derived from the Yugoslav federation, but as authorizations, which were to be transferred by the Republic (of Serbia) to Kosovo authorities. This change occurred via Article 113 and 114 of the Constitutional Law on the Basis of Social and Political Organization of the Federative People's Republic of Yugoslavia and Federal Bodies of Power which was approved on January 13, 1953.

⁶ See Kosovo under Autonomy, 1974 – 1990, published at <https://www.cla.purdue.edu/si/Team1Reporte.pdf>.

⁷ The Kosovo census data after WWII reveal the following demographic situation: in 1948, Albanians 68.5%, Serbs 23.6%, Montenegrins 3.9%; in 1953, Albanians 64.9%, Serbs 23.6%, Montenegrins 3.9%; in 1961, Albanians 67.2%, Serbs 23.6%, Montenegrins 3.9%; in 1971, Albanians 73.7%, Serbs 18.4%, Montenegrins 2.5%; in 1981, Albanians 77.4%, Serbs 13.2%, Montenegrins 1.7%; and in 1991, Albanians 82.2%, Serbs 9.9%, Montenegrins 1%. See Noel Malcolm, *Kosovo: a short history*, p. 316. Other categories in the censuses include Muslims, Turks, Roma, and Croats.

⁸ See Malcolm, N., *supra* note 30, p. 323.

of the Republic of Kosovo, equal to the other constituent republics within the framework of socialist Yugoslavia.

The new Constitution of FSRY of 1974 marks a turning point in improving the position of the Albanians in general and political and constitutional status of Kosovo within the FSRY. They mark the first departure of Kosovo's constitutional position in the frames of multi-nationality of the former Yugoslav federation. In effect, the federal constitution of 1974 gave Kosovo de facto republican status, but not de jure status¹².

The new Constitution of SFRY of 1974 was an expression of internal self-determination whereby federal units were given wide powers for the exercise of effective control over their respective territories³. In terms of legal developments, Kosovo had its own Constitution, the Constitutional Court and Supreme Court, its own Parliament and Executive Committee; it had its own representatives in both the SFRY Chamber of Republics and Provinces and the Federal Chamber and was also represented in the Federal Presidency⁴.

The constitutional choices made in the Constitution the SFRY of 1974 and subsequently SAP Kosovo Constitution of the same year, de facto regarded Kosovo as the subject and constitutive element of federalism in Yugoslavia, with similar rights (but not completely equal) with the other federal Republics⁵. Kosovo had its representatives in all government and federal institutions; participation in the implementation of legislative functions and other executive functions at the level of the Federation⁶; equal participation with other federal units in the processes of extraction and change from the Constitution of the SFRY of 1974; and finally in its

¹ See Kosovo under Autonomy, 1974 – 1990, published at <https://www.cla.purdue.edu/si/Team1Reporte.pdf>.

² See (Krieger, 2001, p. 2). Article 1 of Constitution of the Socialist Federal Republic of Yugoslavia, reads: "The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntary united nations and their Socialist Republics and of the Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Republic of Serbia, based on the power of self-management by the working class and all working people; it is at the same time a socialist self-management democratic community of working people and citizens and of nations and nationalities having equal rights.

³ See Vidmar, J., *International legal responses to Kosovo's Declaration of Independence*. In *Vand. J.* (2009). *Transnat'l L*, 42, p. 779.

⁴ See Article 4 of the 1974 of the Constitution. In Heike Krieger, *The Kosovo conflict and international law: an analytical documentation 1974-1999*, supra note 106, p. 3.

⁵ Article 301 provides, inter alia: As the principal subject of the rights and duties of the Province, the Assembly shall directly and exclusively: 1. decide on amendments to the Constitution of S.A.P. Kosovo and approve the amendments to the Constitution of the S.F.R.Y. and the Constitution of the SR Serbia; 18. consent to the alteration of the territory of the S.A.P. Kosovo; 19. elect and relieve of office the delegation of the Assembly of the S.A.P. Kosovo to the Chamber of Republics and Provinces of the Assembly of the S.F.R.Y.; 20. elect and relieve of office the member of the Presidency of the S.F.R.Y. from the S.A.P. Kosovo.

⁶ See Article 291 in Krieger, H., supra note 69.

responsibility for its own development and the development of the federation as a whole¹. The International Criminal Tribunal for the Former Yugoslavia (ICTY) noted that: “this Constitution gave the provinces a significant degree of autonomy, which included the power to draft their own constitutions, to have their own constitutional courts, to have a representative in the SFRY Presidency in Belgrade, and the right to initiate proceedings before the Constitutional Courts of Yugoslavia and Serbia. In addition, they were represented, along with the republics, in the SFRY Chamber of Republics and Provinces and the Federal Chamber, which was the legislative body with the power to amend the SFRY Constitution”².

The Constitution of 1974 established what could be called a hybrid³ constitutional position for Kosovo in the framework of the Federation of the former Yugoslavia, a constituent part of it and at the same time structured within Serbia. According to Article 245 of the 1974 Constitution the nations and nationalities of the SFRY had equal rights⁴ and brought full equalization of the institutions of the Republics and Socialist Autonomous Provinces (SAPs).

However, the new political landscape created with the Constitution of 1974 in fact did not meet Albanians aspirations for a Republic of Kosovo within the Yugoslav Federation. On the other hand Serbian constitutional lawyers claimed that asymmetric federalism was discriminating against the Socialist Republic of Serbia. In the infamous SANU Memorandum⁵ complained that Serbs were discriminated against by Yugoslavia's constitutional structure of 1974 and argued for a fundamental reorganization of the state. In 1988 and 1989, the Serbian assembly prepared amendments to Serbia's constitution that would profoundly impact the legal status of Kosovo's autonomy. To do so, however, required the assembly of Kosovo to vote and accept these amendments⁶. Because Kosovo's autonomy was established within the federal constitutional order, Serbia could not independently interfere with this status⁷. However, due to police intimidation on the eve of the vote

¹ See Article 348, (regulating the federal government); and article 381 (regulating the constitutional court) in Krieger, H., *The Kosovo conflict and international law: an analytical documentation 1974-1999*, supra note 69.

² See ICTY, Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebrojša Pavković, Vladimir Lazarević, Sreten Lukić (hereinafter Prosecutor v. Milutinović et al.), Case No. IT-05-87-T, Judgment of 26 February 2009, Vol. I, pp. 83-84, par. 213, available on the ICTY website: <http://www.icty.org/case/milutinovic/4#tjug> (last accessed on November 2, 2015).

³ I use the term hybrid to describe the constitutional situation were Kosovo at the same time was constituent part of Yugoslav Federation and being formally placed within the Constitution of Serbia.

⁴ See Krieger, H., supra note 69, p. 3.

⁵ The Memorandum of the Serbian Academy of Sciences and Arts is a document produced by a committee of the Serbian Academy of Sciences and Arts from 1985 to 1986. Excerpts of the draft were published by *Večernje novosti* in September 1986.

⁶ See Constitution of the Socialist Federal Republic of Yugoslavia (1974), Article 301.

⁷ See Vidmar, J., supra note 70, p. 787.

¹ Kosovo's deputies voted to accept the amendments. In a vote on March 1989, the Serbian Assembly accepted and formally confirmed the amendments as adopted by Kosovo's Assembly². The constitutional amendments were followed by laws and other measures such as: the law on the action of Republic bodies in special circumstances in Kosovo³ (approved on 3 June 1990 by Serbia Parliament); the law on invalidation of the activity of the Assembly of Kosovo and its government⁴ (approved on 5 July 1990 by Serbia parliament); the law on labour relations in special circumstances (approved on 26 July 1990 by Serbia parliament)⁵. On the basis of that law, 135,000 Albanian workers were expelled from their jobs. All together, these laws accompanied by other decisions meant that public activities in the Albanian language were banned, starting with education, culture, science, and media, while Kosovan Albanian employees working in institutions such as schools, university, health institutions, media, police and other relevant sectors were fired en masse. Elementary School Law and Secondary School Law adopted in 1992 made Serbian the language of instruction in Kosovo for both elementary and secondary schools⁶. The vote of the above mentioned laws and subsequent measures at the Serbian Assembly effectively terminated and abrogated the autonomy of Kosovo in an illegal way.

Albanians in Kosovo opposed these actions by the Serbian parliament. On 2 July 1990, 114 out of 118 members of the Kosovo Assembly who were elected as representatives of the people of Kosovo, met in front of the Assembly building, which they were not allowed to enter, and adopted a resolution-referred also as a Constitutional Declaration- declaring Kosovo "an equal and independent entity within the framework of the Yugoslav federation"⁷. Reacting to the resolution of 2 July 1990, the Serbian Assembly dissolved Kosovo's organs of self-government- the

¹ See Ramet, S.P. (2006). *The three Yugoslavias: state-building and legitimation, 1918-2005*. Indiana University Press, p. 353.

² See Malcolm, N., supra note 30, p 344; (describing the autonomous status of Kosovo under the 1974 Constitution).

³ See Law on the Actions of Republic Agencies under Special Circumstances, 26 June 1990, Official Gazette of Socialist Republic of Serbia, 33/90. In Weller, Marc, ed. *The crisis in Kosovo 1989-1999*. Vol. 1, *Documents and Analysis*, pp. 60-61.

⁴ See Law Terminating Work of the SAP of Kosovo Assembly and the Executive Council, 5 July 1990, Weller, Marc, Ed. *The crisis in Kosovo 1989-1999*. Vol. 1. *Documents and Analysis*, pp. 61-62. See also Serb Assembly Regulation on Implementing Law Terminating Work of SAP Kosovo Assembly and Executive Council, 13 July 1990.

⁵ Law on Labour Relations under Special Circumstances, Official Gazette of the Republic of Serbia, No. 22/91. In Weller, Marc (1999). *The Crisis in Kosovo 1989-1999. Documents and Analysis*, Publishing Ltd, September, pp. 62-63.

⁶ See Elementary School Law, Official Gazette of the Republic of Serbia, No. 50/92 and Secondary School Law, Official Gazette of the Republic of Serbia, No. 50/92, in Weller, M., Ed. *The crisis in Kosovo 1989-1999*. Vol. 1. *Documents and Analysis*, p. 63.

⁷ See Malcolm, N. supra note 30 at p. 346.

Assembly and the government¹. Through a series of other laws and unconstitutional acts it began the process of the political deinstitutionalization of Kosovo.

The adoption of the Constitutional Declaration, by the Assembly of Kosovo was a legitimate and legal act of a legally elected representative body/authority of Kosovo under the Constitution of 1974. Seen from the historical perspective, the Constitutional Declaration reaffirmed the political will amongst the Albanian people of Kosovo for self-determination. The Declaration of Independence of 2 July 1990 is essentially a political act that contains the legal position and decision by the Assembly of Kosovo, to annul its previous decision to consent to constitutional amendments in the Constitution of the Republic of Serbia (March 23, 1989), which seen from a procedural aspect did not even exist. The so called Constitution of the Republic of Kosovo-known also as Constitution of Kacaniku (Kushtetuta e Kacanikut)-with all accompanying documents; passed the Law on elections, as well as several other decisions necessary for the work of the Assembly of Kosovo. Adoption of this Constitution marked the culmination of the legitimate demands, which in political scene of Yugoslavia began to be articulated in the mass demonstrations of Albanians between 1968 and 1981 in which the primary and dominant political demand was the constitution of Kosovo as a republic with equal rights with the other republics of former Yugoslavia.

The decision of the Assembly of Serbia to abolish the autonomy of Kosovo and to dissolve all state organs of self government were imposed via police and military force. Therefore discrimination along ethnic grounds against Albanians by the Serbian regime was daily policy in Kosovo; a de facto state of apartheid² was installed via laws that aimed to change the demographic structure of the population of Kosovo³.

Meanwhile, elsewhere in the federal Yugoslavia, the disintegration of the Yugoslav state had begun. Four federal units, via the referendums declared their intent to become independent countries and later passed their respective declarations of independence⁴.

With the dissolution of Yugoslavia the political demands of Albanians changed⁵. Noticing the democratic movements elsewhere in the Yugoslav federation, on 2 July

¹ See Malcolm, N. *supra* note 30 at p. 347.

² We know the term apartheid from South Africa-hence the definition of the term by the Oxford Dictionary is "a policy or system of segregation or discrimination on grounds of race". I use the term to describe a similar state policy, official state policy of Serbia in Kosovo towards a specific ethnic group-Albanians, expressed in laws that were adopted by the Serb Parliament during this period.

³ See Zakon o Posebnim Uslovima Prometa Nepokretnosti. Law on the Restriction of Real Property Transactions, Official Gazette of the SR Serbia No. 30/89, translated in Kosovo: law and politics, Kosovo in normative acts before and after 1974.

⁴ In June 1991 Slovenia Declares Independence. In the same year Croatia and Macedonia declare their independence. In 1992, Bosna and Hercegovina Declares Independence. Author note.

⁵ See Vidmar, J., *supra* note 70, p. 789.

1990 the Assembly of Kosovo adopted the Resolution proclaiming the Republic of Kosovo as an independent and sovereign state and decided to held referendum¹. The referendum was held in Kosovo on 26 to 30 September 1991 and the absolute majority (almost 99% of voters from the 87% of the electorate that voted in the referendum) opted for a sovereign and independent state of Kosovo². This declaration of independence of Kosovo was recognized only by Albania³.

On April 27, 1992, Serbia and Montenegro created the Federal Republic of Yugoslavia (FRY). Notably, when the FRY was established, a federal status of Kosovo equal to that of Serbia and Montenegro was neither offered to nor demanded by Albanians⁴.

In these circumstances Albanian elite organized themselves into political parties and set up quasi governmental organizational structures always with the aim to implement the independence of Kosovo. In this environment, Kosovo Albanians organized not only parallel political institutions but also parallel systems of education and healthcare⁵.

Historian and author Noel Malcolm describes the situation in Kosovo in the '90's⁶:

“To produce an adequate survey of the human rights abuses suffered by the Albanians of Kosovo since 1990 would require several long chapters in itself. Every aspect of life in Kosovo has been affected. Using a combination of emergency measures, administrative fiats and laws authorizing the dismissal of anyone who had taken part in one-day protest strike, the Serb authorities have sacked the overwhelming majority of those Albanians who had any form of state employment in 1990. Most Albanian doctors and health workers were also dismissed from the hospitals; deaths from diseases such as measles and polio have increased, with the decline in the number of Albanians receiving vaccinations. Approximately 6,000 school-teachers were sacked in 1990 for having taken part in protests, and the rest were dismissed when they refused to comply with a new Serbian curriculum which largely eliminated teaching of Albanian literature and history”

In 1995, the situation in Kosovo changed when the Bosnian issue was settled with the adoption of the Dayton accords that followed the limited use of force by NATO in relation to Bosnian Serb forces⁷. The failure of the Dayton accords to address the Kosovo issue made it clear to Kosovo Albanians that the Kosovo issue would not be addressed through similarly decisive measures. In reaction to the increased human rights violation and the hesitation to address the issue of Kosovo, the Kosovo

¹ See Weller, M., ed. p Supra note 86, pp. 17; 64-65.

² See (Vickers, & John, 1998, p. 251).

³ See (Crawford, 2006, p. 408).

⁴ See Vidmar, J., supra note, 70, p. 789.

⁵ See Malcolm, N., supra note 30, p. 349.

⁶ See Malcolm, N., supra note 30, p. 349.

⁷ See (Weller & Wolff, 2005, p. 245).

Liberation Army (KLA) emerged. This was a guerrilla like armed group. The situation quickly evolved into a full war between the KLA and Serbian and Yugoslavian military and police¹.

Weller posts that international engagement with Kosovo was half-hearted and sporadic, despite the fact that the importance of Kosovo to stability in the wider Balkans was widely acknowledged². The war in Kosovo resembled the scenes already seen in Bosnian war. In February 1999, an internationally-sponsored³ conference was convened in Rambouillet, France and gathered representatives of Kosovo Albanians and representatives of the Yugoslav government. The aim of the conference was to provide a political solution to the conflict, or as the document itself suggests an interim agreement for peace and self-government in Kosovo⁴. The Rambouillet agreement was organized with the aim of ending the violence in Kosovo and facilitating the return of refugees and displaced persons. The Kosovo delegation eventually accepted this arrangement, since it did not prejudice its claim to self-determination and provided there would be a process allowing for the ultimate option of independence after the expiry of the three years term agreed-upon as interim period⁵. The agreement was rejected by the Serbian delegation. This rejection by the Serbian delegation and the escalation of the war in Kosovo prompted the Humanitarian Intervention by NATO⁶ against the Serbian military targets on 24th March 1999. On 10 June 1999 the United Nations Security Council approved Resolution 1244/1999, placing Kosovo under the international administration of the United Nations Mission Interim in Kosovo, (UNMIK). One of the tasks of UNMIK was “to help the people in Kosovo to rebuild their lives and heal the wounds of conflict”⁷

On February 17th 2008, Kosovo was proclaimed a sovereign and independent state at an extraordinary meeting of the Assembly of Kosovo. The Declaration of Independence was an Act of the Assembly as an institution of the Provisional Self-

¹ See Weller, M. & Wolff, S., supra note 99, p. 246.

² See Weller, M. (1989, p 33).

³ The six-nation “Contact Group,” comprised of delegations from the United States, Britain, France, Germany, Italy, and Russia, meets in London to discuss a resolution to the Kosovo conflict. At the conclusion of the conference, they issue an ultimatum to the Yugoslavian government and Kosovar Albanians, requiring them to attend peace talks in Rambouillet, France beginning on February 6 (see February 6-23, 1999). London: Press Association, 1/29/1999; BBC, 1/30/1999.

⁴ The full text of the Rambouillet Agreement is available online at: http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html (last accessed on November 15 2015).

⁵ See Weller, M. & Wolff, S., supra note 99, p. 245.

⁶ For more on the humanitarian Intervention see Christopher, G. (2002). *Humanitarian intervention: the case of Kosovo*, pp. 141-175.

⁷ For more on the nature of UNMIK and its role see Reka, B., *UNMIK as an international governance within post-conflict society*, in *New Balkan Politics* 7/8 (2003).

Government, adopted unanimously by all members of the assembly present, 109 members.

On April 8, 2008, the Constitution of the Republic of Kosovo was signed by the President of the Republic of Kosovo the next day on April 9, 2008, draft Constitution of the Republic of Kosovo was ratified by the Assembly of the Republic of Kosovo. April 15, 2008 - The Constitution of the Republic of Kosovo was fully enacted as the highest legal act of the Republic of Kosovo. The Constitution of Kosovo of 2008 originally with 154 articles in fourteen chapters. has been amended twice so far with AMENDMENTS I - XXII¹ and AMENDMENT XXIII² and now it has total of 162 articles. Its provisions are of both the formal legal nature and regulate substantial matters of the state. It contains a dedicated Chapter on fundamental rights and freedoms³. One of the characteristics of the Constitution, which represents advancement in the field of minority rights protection by a Constitution in the region and beyond⁴, is that it contains a special chapter dedicated to the rights of non majority communities and their members⁵. The constitutional history of Kosovo should have impelled the constitutional designers of the new constitutional order to produce a text that would ensure both the highest standards of human rights, and ensure the adherence of the citizens of Kosovo to the new constitutional order as well as to guarantee that all the citizens of Kosovo would be involved in the political decision making process regardless of ethnicity, religion or race. The Constitution of 2008 determines the procedure for constitutional amendments and it outlines in detail the modus of transition from the old legal order into the new one.

Conclusion

Ethno nationalism/ethnocentrism has continued to grow in Kosovo, and ethnocentrism - is a source of constant tension in the process of state-building in Kosovo which threatens to impact structural functionality of the institutions and threatens to destabilize the entire constitutional system. Over the course of negotiating the final status of Kosovo, it became clear to the political elites in Kosovo, who represented the majority of population i.e ethnic Albanians, that the independence of Kosovo would be possible only if they were ready to offer the highest legal and institutional mechanisms for enabling political participation for all ethnic communities that are not in majority in Kosovo, so as to provide the highest standards for the protection of human rights of communities/minorities. The

¹ See Official Gazette of Republic of Kosovo no.25, date 7 September 2012.

² See Official Gazette of Republic of Kosovo no.7, date 26 march 2013.

³ See Constitution of Kosovo (2008) Chapter II. Fundamental Rights and Freedoms.

⁴ For example none of the Constitutions of the countries that emerged independent from SFRY contains such chapter.

⁵ See Constitution of Kosovo (2008) Chapter III [Rights of Communities and their members] Article 57

international community involved in mediation of the final status of Kosovo did not want to help create a new state that would turn against its citizens and abuse their rights. Therefore participation in decision making process by the non-majority ethnic communities was important to the political elite in Kosovo to ensure the institutional design of the new state enjoyed full legitimacy. Externally this was important to show to the international community the readiness of the political elite to embrace the highest standards of democracy and protection of minority rights so the new state of Kosovo would get international recognition and acceptance by the international community of the states. On the other hand during the negotiating process, Serbia vowed to ensure an ethnic entity for Serbs of Kosovo, while refusing to recognize and accept the independence of Kosovo. In their political platform they argued for a political entity of Serbs within Kosovo akin to the Republic of Srpska in Bosnia and Herzegovina. Such an entity would undoubtedly have made the entire institutional design dysfunctional and ultimately would likely have rendered Kosovo a failed state. This in return would have had repercussions for democracy and human rights on the ground. That proposal was ultimately rejected by both the international community and the Kosovan delegation, but did they ultimately fall into the similar trap by creating ethnically based municipalities? The evidence suggests so. And this is one of the main obstacles towards creation of the common inclusive identity of Kosovans. For, in my view, the Constitution is of outmost importance to secure both democracy and stability in a society, especially those that are divided along ethnic lines; to ensure the political participation of all ethnic groups on the one hand by providing fundamental human rights protection by the highest legal act of a polity and to ensure functional institutional mechanism to achieve it.