

CONSTITUTIONALIZATION OF INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS: LESSONS FROM KOSOVA

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Abstract

This work scrutinizes modalities of the constitutionalization of international human rights instruments in the Republic of Kosova. Most of the newly established democracies or post-communist countries, as Kosova is, have adopted the highest western standards in guaranteeing human rights protection. However, the approach that this country has followed to make these standards part of its constitutional system is rather unique. Indeed, Kosova represents an unprecedented case for the place it has given to international instruments on its constitution. This peculiarity, subject of this study, will be examined through the elucidation of three main issues: First, the constitutional regulation of human rights which is heavily based on international human rights law; Second, the unparalleled approach of directly incorporating international instruments into constitution; and Third, the unique determination of the Article 53 of the Kosova's constitution which requires the interpretation of human rights matters of all state authorities to be made according to the jurisprudence of the European Court of Human Rights.

Keywords: Constitutionalism, Human rights, Constitution, International instruments, ECHR, ECtHR.

JEL Classification: K30, K33, K38

1. A brief history of Kosova's Constitution

In an extraordinary parliamentary sitting on February 17, 2008, members of Kosova's Assembly unilaterally declared Kosova an independent and sovereign state. Projected to straightforwardly accommodate a number of political solicitudes of international community, on its sixth paragraph, the Declaration of Independence determines that "*Kosova is a special case arising from Yugoslavia's nonconsensual breakup and is not a precedent for any other situation.*"⁴ From the Kosovan constitutional law perspective, the Declaration of Independence represents the first constitutional norm of the country or, as it is known in the Pure Theory of Law, its *grundnorm*.

Following the Declaration of Independence, on April 9, 2008, the Assembly adopted Kosova's Constitution, thus exercising what in the theory of constitutional law is known as the original constitutive power or *pouvoir constituant originaire*.⁵ On its preamble the Constitution reflects Kosova's people determination to "*build a future of Kosova as a free, democratic and peace-loving country that will be a homeland to all of its citizens*" and their commitment to the "*creation of a state of free citizens that will guarantee the rights of every citizen, civil freedoms and equality of all citizens before the law.*"⁶

The drafting course of Kosova's Constitution has undergone a very difficult process of political negotiations that started from the establishment of UNMIK administration under Resolution 1244 of UN Security Council of 1999⁷ and went on until the declaration of independence in 2008. By

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⁴ The Declaration of Independence is an act of the Parliament of the Republic of Kosova unanimously approved by all of the 109 Members of the Parliament present. The full text of the Constitution in: https://www.assembly-Kosova.org/common/docs/Dek_Pav_e.pdf. For more on the Declaration of Independence of the Republic of Kosova cf: Warbrick, C. (2008, August 11). *Kosova: The Declaration of Independence*: International & Comparative Law Quarterly. Retrieved July 29, 2019, from <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/div-classtitlei-Kosova-the-declaration-of-independencediv/4C2A96887BE047E53B0D745D793E343B>.

⁵ On the nature of the constitutiinal power in the former-communist countries, including Kosova, cf: Dorsen, N., Rosenfeld, M., Sajó, A., Baer, S., & Mancini, S., *Comparative constitutionalism: Cases and materials*. (St. Paul: West Academic Publishing, 2016).

⁶ Constitution of Republic of Kosova (June 15, 2008), Preamble.

⁷ Security Council Resolution 1244 (1999) on the situation relating Kosova, from <https://peacemaker.un.org/Kosova-resolution1244> (Retrieved Jul 2019).

its very nature, this process has left its mark on the Constitution. Indeed, the entire constitutional text is written within the lines determined by the Comprehensive Proposal for the Kosova Status Settlement known also as the Ahtisari's Plan of March 26, 2007.⁸ Moreover, certain provisions included in the Constitution are a verbatim copy of the Ahtisari Plan. Furthermore, the latter foresaw the composition and functioning of the commission that would draft the constitution. In addition to the local specialists, Ahtisari required that this commission must consist of international experts.⁹ Such stipulation not only aimed to acquire the international expertise during the drafting process of the constitution, but to also to guarantee that the project would remain within the contours of the Ahtisari Plan.¹⁰ Some authors even hold the opinion that the whole constitutional text is a product of international experts, hence excluding any minor role of the locals on its drafting.¹¹

Indeed, the influence of the international organizations and other international agents on the constitutional-making process is not a Kosovar phenomenon. Bosnia and Hercegovina, Iraq, and Afghanistan,¹² even Germany and Japan after the World War II, are some of the typical precedents where international community has left the mark of their constitutional-making process.¹³ Undoubtedly the extent of this influence varies from one country to another, and it is conditioned by the respective socio-political dynamics and contexts.¹⁴

Kosova's Constitution is a thoroughly rigid document. Its amendment requires two thirds of the votes of all Members of the Parliament, including the two thirds of the members holding guaranteed seats representing the non-majority communities living in Kosova.¹⁵ Furthermore, the Constitution requires that amendments can be enacted by the Parliament only after the Speaker of the Parliament have referred the proposed amendments to the Constitutional Court for an antecedent opinion on whether the proposed modifications do or do not reduce the human rights and freedoms as defined in Chapters 1 and 2 of the Constitution, and whether the proposed modifications are in harmony with the spirit of the Constitution.¹⁶

2. Human rights in the Kosovan constitutional system

Legal doctrine embraces the general opinion that human rights are natural rights to which

⁸ Comprehensive proposal for the Kosova status settlement, (Mar 26, 2007) - <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>.

⁹ Comprehensive proposal for the Kosova status settlement, Article 10, Mar 26, 2007. http://www.unosek.org/docref/Comprehensive_proposal_-_Propozimi_gjith%EBp%EBrfshir%EBs_-_albanian_final.pdf. See also Tunheim, J. "Rule of Law and the Kosova Constitution". Minnesota Journal of International Law, (2009), 18(2). Retrieved July 29, 2019; Aucoin, L. "Views from the Field on Constitution Writing: The Case of Kosova (Interview)". The Fletcher Journal of Human Security, (2008), XXIII. Retrieved Jun 20, 2019.

¹⁰ Marko, J. "The New Kosova Constitution in a Regional Comparative Perspective". Review of Central and East European Law, 33(4), (2008), 437-450. doi:10.1163/157303508x339698a; Weller, M. *Shtetësia e kontestuar. Administrimi ndërkombëtar i luftës së Kosovës për pavarësi*. (Prishtinë. KOHA Publishing, 2009).

¹¹ Hasani, E. "Veçoritë themelore të sistemit kushtetues në Kosovë". Revista, "E drejta" nr. 2. A publication of University of Prishtina "Hasan Prishtina" (2014); Peters, A. and Preuss, U. K. *International relations and international law*. In Tushnet, M. V., Fleiner-Gerster, T., & Saunders, C. (Eds.). Routledge handbook of constitutional law. (Abingdon, Oxon: Routledge, 2015), P. 33-34; Hay, E. "International(ized) Constitutions and Peacebuilding". Leiden Journal of International Law, 27(1), (2014), 141-168.

¹² Miller, L., & Aucoin, L. *Framing the state in times of transition: Case studies in constitution making*. (Washington, DC: United States Institute of Peace Press, 2010).

¹³ Markesinis, B. S., Fedtke, J. J., Ackermann, L., Barak, A., Bryde, B., Canivet, G., . . . Schiemann, K. *Judicial recourse to foreign law: A new source of inspiration?* (London: Routledge Taylor & Francis Group, 2007).

¹⁴ Harding, A., Leyland, P., & Groppi, T. "Constitutional Court: Forms, Functions and Practice in Comparative Perspective". Journal of Comparative Law, III(2), (2008), 1-22.

¹⁵ Constitution of Republic of Kosova, (15 June 2008), Article 144, par. 2.

¹⁶ Constitution of Republic of Kosova, (15 June, 2008), Article 144, par. 3. The Constitutional Court of Kosova in cases K.O. 29/12 and K.O. 48/12 decreed that in those case in which it adjudicates the constitutionality of the proposed amendments, will not only consider the human rights and freedoms embedded in Chapter II but also all of the human rights and freedoms guaranteed by the Constitution and stipulated in harmony with the spirit of the constitutional order of Kosova, as well as the principles and values protected by article 7 of the Constitution. In other countries, this control occurs a posteriori, even though there exist exceptions. In Europe, such exceptions occur in the case of Kosova, Ukraine, Moldova, Turkey etc. A number of other countries in the world in which the a logic of the priori control of the constitutional amendments is installed are: South Africa, Azerbaijan, Kyrgyzstan etc. Cf. The European Commission for Democracy through Law (Venice Commission) *Report on Constitutional Amendment. Adopted by the Venice Commission at Its Plenary Session* (Venice, 11-12 December 2009). CDL-AD (2010) 001. Study No. 469/2008 (Strasbourg, 19 January 2010). Also found in: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e).

people have a claim simply in virtue of their being human beings, and as a consequence their enjoyment in practice does not depend on whether they are or are not embedded in the constitution. As such, they exist as an objective order of values which survive the constitution.¹⁷ The majority of civil and political rights, known as classical rights, enjoy such a status. The remaining rights which do not have such a status are known as positive rights, and are enjoyed by individuals in virtue of their being embedded in the constitutional text. This approach with regard to the nature of rights is followed in the Constitution of Kosova.¹⁸

All of the former communist countries, including Kosova, but also countries with a long democratic tradition, have assigned human rights and freedoms a prominent place in their national constitutions.¹⁹ In its approach to human rights and freedoms, Kosova is an exception amongst former communist countries: human rights and freedoms are protected by two Chapters of the constitution, Chapters 2 and 3. Article 21, which determines the General Principles, defines the fundamental human rights and freedoms as "inseparable, inalienable and inviolable on the basis of the legal order of the Republic of Kosova." Furthermore, Article 22 determines the international human rights instruments which are directly applicable in Kosova, while Article 53 determines the standards of interpretation of fundamental human rights and freedoms in harmony with the decisions of the European Court of Human Rights. The above constitutional determinations create what may be called the Kosovar Charter of human rights, and which in fact grounds the constitutional identity of Kosova.²⁰

The history of Kosova is characterised by gross violations of human rights. In the first constitution instituted in 1974, Kosova was granted full autonomy and declared a subject with equal rights in the Yugoslavian Federation. However, Serbian violence and terror, that is the gross violations of human rights, became a quotidian phenomenon, culminating with the illegal revocation of the autonomy in 1989 through the violent measures undertaken by the Serbian regime.

At the end of the previous century, during the war in Kosova, about 10 thousand people were killed and 3500 went missing.²¹ This explosion of killings, imprisonments, tortures and disappearances in the later part of the 90's attracted the attention of the entire international community.²² After repeated failures to find a peaceful resolution which would have halted the violations of human rights by the Serbian regime in Kosova, on March 23 1999, NATO initiated a campaign of air strikes against the Serbian objectives on the ground. In his statement made on the occasion of the initiation of the bombing campaign, Javier Solana, at the time the NATO General Secretary, justifies the air strikes by need to stop an authoritarian regime from oppressing a nation at the end of 20th century Europe. "We have a moral duty to take this action. We have this responsibility and we must fulfil it."²³ Although NATO bombings continued uninterrupted, it was only on July 12, 1999 that an agreement was reached according to which Serbian military forces would leave Kosova, whilst KFOR would be located on the ground.²⁴

This history was recognised by the International Court of Justice in its Advisory Opinion regarding the Declaration of Independence of Kosova given on July 22, 2010, in which it is stated "Serbian authorities responded with an intensification of repression against the Albanians. Thousands were murdered, imprisoned and tortured... Furthermore, on January 15, 1999 Serbian forces were responsible for the perpetration of the Recak massacre, in which 45 Albanians were barbarically

¹⁷ Hasani, E. "Veçoritë themelore të sistemit kushtetues në Kosovë". E Drejta – A journal of University of Prishtina "Hasan Prishtina", (2014), 2.

¹⁸ Ibid

¹⁹ Cf. Gavison, R. "What Belongs in a Constitution?" *Constitutional Political Economy*, 13(1), (2002), 89-105; Gennady M. Danilenko, G. M. "The New Russian Constitution and International Law". *The American Journal of International Law*, 88(3), (1994), 451-470.

²⁰ Hasani, E. "Veçoritë themelore të sistemit kushtetues në Kosovë".

²¹ Humanitarian Law Center *31,600 documents undoubtedly confirm death or disappearance of 13,535 individuals during war in Kosova*, (2015) Retrieved from <http://www.hlc-rdc.org/?p=28185&lang=de>.

²² Human Rights Watch: *Kosova War Crimes Chronology*, Retrieved from <http://www.hrw.org/legacy/campaigns/Kosova98/timeline.shtml>.

²³ Press Statement by Dr. Javier Solana, Secretary General of NATO, 23 March 1999, <http://www.nato.int/docu/pr/1999/p99-040e.htm> (May 2019).

²⁴ Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999. Retrieved from <http://www.nato.int/Kosova/docu/a990609a.htm> (June 2019).

murdered, mainly women and children. About 5 thousand inhabitants of this village were forced to leave their homes immediately. Four days later, the Security Council would strongly condemn this act, while urging for the identification of the perpetrators of this crime and bringing them before the International Penal Court for former Yugoslavia. (...) the Serbian side intensified its bombing, repression and ethnic cleansing of the Kosova Albanians(...).²⁵

3. The relation between the Kosova Constitution and international law

In contrast to the developed democracies, the developing democracies tend to assume responsibilities which arise from the international human rights protection instruments. Thoroughly analysed by legal scholars, this observation fully reflects the responsibilities that Kosova has assumed in the field of the protection of human rights. The Constitution of Kosova is amongst the newest constitutions in the world and it enjoys a very friendly relation with international law. Most of the legal scholars concur that post-communist European countries - including Kosova - have followed a logic which is accepting of the monist model.²⁶

For a fuller understanding of the journey that built the relations between the Constitution of Kosova and international law, it is very important that we give a very brief review of the very recent history. In June 1999, UN Security Council passed resolution 1244 which placed Kosova under the international administration of the UN mission in Kosova, UNMIK. This raised the question of adherence to the international standards for protection of the human rights by the UN mission. This issue was regulated by the UNMIK Regulation No. 1999/24 of December 12, 1999, which determines, amongst other things, that "in the exercise of their function, all persons bearing public duties or occupying public positions must adhere to the internationally accepted standards of human rights as determined by: (A) The Universal Declaration of Human Rights of December 10, 1948; (B) The European Convention on Human Rights and Fundamental Freedoms of November 4, 1950 and its Protocols; (C) The International Convention on Civil and Political Rights of December 16, 1966 and its Protocols; (D) International Convention on Economic, Social and Cultural Rights of December 16, 1966; (E) The Convention on Elimination of all forms of Racial Discrimination of December 21, 1965; (F) Convention on Elimination of all Forms of Discrimination Against Women of December 1965; (G) Convention Against Inhumane, Cruel and Degrading Punishment of December 17, 1948; and (H) International Convention on the Rights of Child of December 20 1989."²⁷

The same documents are suggested by the Constitution of Kosova instituted in 2008.²⁸ Thus, the human rights guaranteed by the Constitution of Kosova have a strong grounding in the international law on human rights. "This grounding in international law on human rights connects with Kosova's history, and especially in connection with the values and principles which the third chapter of the Constitution purports to sanction. The relation between international law and Kosovan

²⁵ Advisory Opinion of the International Court of Justice on Kosova's Declaration of Independence, Jul 22, 2010. Retrieved from <http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>. Cf. doctrinal treatises on this case: Symposium: Kosova in the ICJ, German Law Journal Vol. 11, no. 8, (2010), Agora: The ICJ's Kosova Advisory Opinion, American Journal of International Law Vol. 105, no. 1, (January 2011), <https://web.archive.org/web/20120331012442/http://www.asil.org/pdfs/ajil/Jan2011TOC.pdf>.

²⁶ Stein, E. "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?" The American Journal of International Law, 88(3), (1994), 427-450. Cf. Paulus, A. L. (n.d.). From dualism to pluralism: The relationship between international law, European law and domestic law. *Making Transnational Law Work in the Global Economy*, 132-153.

²⁷ UNMIK-ut Regulation nr. 1999/24 on applicable law in Kosova, (1999). Retrieved from http://www.unmikonline.org/regulations/unmikgazette/03albanian/A1999regs/RA1999_24.htm. The question of the application of the European Convention on Human Rights in Kosova during the international administration has generated debate. At the time, the Serbia-Montenegro Union had ratified the Convention in 2004 without any reservations regarding its territorial application and this for many had the implication that its ratification by Serbia and Montenegro extended its application also in Kosova. However, UNMIK opposed this implication on the grounds that the contracts and treaties in which Serbia was a party were not obligatory for UNMIK in view of the sui generis as defined in resolution 1244 of the Security Council. To put an end to this debate and clarify the situation, UNMIK passed the above mentioned regulations which determined the international standards on human rights applied in Kosova. Cf. Knoll, B. Loja e Hedhjeve: Dështimi i Gjyqit Evropian në Mbylljen e Zbrazësisë së të Drejtave të Njeriut në Kosovë, (Human Rights and Policies Journal of University of Prishtina, 2008).

²⁸ Cons. of Republic of Kosova, (June 15, 2008), Article 22.

constitutional rights has been qualified as an honest one."²⁹

There are a number of provisions in the Constitution of Kosovo which are dedicated to the regulation and explication of the position of international treaties. Thus, in Article 18 the Constitution divides treaties according to their importance into two groups. In the case of treaties of special importance, it requires that the ratification process take place in the parliament. More precisely, this case is regulated by the constitution as follows: "The Parliament of the Republic of Kosovo can ratify an international treaty with the two thirds (2/3) of the votes of all of its members in the following cases:

- (1) territory, peace, alliances, and political and military issues
- (2) fundamental rights and freedoms
- (3) the membership of the Republic of Kosovo in international organisations
- (4) the taking on of financial responsibilities by the Republic of Kosovo."³⁰

On the other hand, treaties that fall outside the domains specified above are ratified after having been signed by the President of the Republic of Kosovo or the Prime Minister.³¹

On December 16, 2011 the Parliament of the Republic of Kosovo enacted Law No. 04/L-052 on the ratification of international treaties, which expands and more clearly specifies the circle of subjects with the right of ratifying international treaties on behalf of the state of Kosovo. Article 6 of this law stipulates that "the President, the Prime Minister and the Minister of Foreign Affairs have the right of completing all the actions in connection with the ratification of international treaties entered into by the Republic of Kosovo, in agreement with the Constitution of Kosovo and the Vienna Convention on the Law of Treaties."³²

It is clearly determined that the international treaties ratified by the Republic of Kosovo become part of the Kosovan domestic legal system.³³ The constitutional determination that the international treaties ratified by the Republic of Kosovo become an internal part of the domestic legal system imply the conclusion that the Constitution of Kosovo embraces the doctrine of incorporation.³⁴ Furthermore, it is determined that these treaties are directly applicable except in the cases in which they are not self-applicable and their application requires the enactment of a new law. That is in the cases when a treaty is not applicable it should be materialised by the enactment of a new domestic law.³⁵

Article 17 of the Constitution in a sense determines the capacity of the state of Kosovo to act as party in an international treaty "The Republic of Kosovo enters into international contracts and joins international organisations."³⁶ Furthermore, this article clearly expresses the determination of the Republic of Kosovo to be "a part of international cooperations for the promotion and protection of peace, security and human rights."³⁷

In the treatment of the positions occupied by the international treaties in the Kosovan domestic legal system, it is important to observe Article 16.1. which explicitly stipulates that "The Constitution is the highest legal authority of the Republic of Kosovo. Laws and other legal acts must be in accordance with this Constitution."³⁸

Thus, in each case an international treaty must be in harmony with the Constitution, otherwise its application is prohibited. This situation points to another concept - that of the constitutionality control of the treaties, which is of special importance in view of the supremacy of the constitution

²⁹ Morina, V., Korenica, F., & Doli, D. "The relationship between international law and national law in the case of Kosovo: A constitutional perspective". *International Journal of Constitutional Law*, 9(1), (2011), 274-296.

³⁰ Cons. of Republic of Kosovo, (June 15, 2008), Article 18, par. 1.

³¹ Cons. of Republic of Kosovo, (June 15, 2008), Article 18, par. 2.

³² Law No. 04/L-052 on ratification of international agreements, Article 6, par. 1.

³³ Cons. of Republic of Kosovo, (June 15, 2008), Article 19.

³⁴ Cf.: Stein, E. "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?".

³⁵ Cf. Economides, C. *The Relationship Between International and Domestic Law*, (1993). Report of the European Commission for Democracy Through Law (Venice Commission), Science and Technique of Democracy, No. 6, CDL-STD(1993)006., Strasbourg.

³⁶ Cons. of Republic of Kosovo, (June 15, 2008), Article 17, par. 1.

³⁷ Cons. of Republic of Kosovo, (June 15, 2008), Article 17, par. 2.

³⁸ Cons. of Republic of Kosovo, (June 15, 2008), Article 16, par. 1.

over the international treaties.³⁹

4. Direct application of international acts in the field of human rights

Article 22 provides for the human rights and freedoms guaranteed by international treaties to be directly applicable in the Republic of Kosova, and for their supremacy -in cases of conflict-over laws and other legal acts enacted by public institutions. In the latter case, supremacy is established for:

- The Universal Declaration of Human Rights
- The European Convention on Human Rights and Fundamental Freedoms and its Protocols
- The International Convention on Civil and Political Rights Protocols
- The Council of Europe Framework Convention for the Protection of National Minorities
- The Convention on Elimination of all forms of Racial Discrimination
- Convention on Elimination of all Forms of Discrimination Against Women
- Convention Against Inhumane, Cruel and Degrading Punishment
- International Convention on the Rights of the Child

The striking fact about Article 22- which regulates the issue of the application of international instruments in Kosova- is the absence from it of the International Convention on the Economic, Social and Cultural Rights and of the European Social Charter. The absence of these international instruments has been pointed out on several occasions by the Ombudsperson.⁴⁰ It can be argued that the framers of the Constitution of Kosova made this decision in view of financial considerations stemming from the economic situation of Kosova. Nevertheless, the Constitution of Kosova provides for certain economic and social rights, such equality and nondiscrimination.

This form of application and incorporation of international legal acts within the constitution of Kosova is unique. It is common practice for a country to become a member of an international treaty after having joined the corresponding international organization which serves as the sponsor of that particular treaty. This practice has been established not because a non-member state of an international organisation lacks the right to unilaterally approve and apply the treaties sponsored by that particular organisation, but because membership in the organisation provides the legal and diplomatic mechanisms which oversee the implementation of the treaty. Thus, the implementation of a treaty becomes compulsory for a member state as a consequence of the application of international law, whose application is supervised by the international organisation.⁴¹ Specifically, Kosova currently is neither a member of the United Nations nor of the Council of Europe but it has made the decision to voluntarily apply the above international human rights acts.

In general, the constitutionalisation of the international human rights acts is a strong indicator of the good will of Kosova's institutions to provide a high level protection of human rights and fundamental freedoms. However, their application presents a serious challenge for the Kosova institutions, particularly for the common courts and even for the Constitutional Court. The absence

³⁹ The jurisdiction of the Constitutional Court of Kosova is defined by article 113 of the Constitution. However, it is not given the right to adjudicate on the agreement of the international treaties with the constitution. This became clearer in case N0. KO95/13 which was brought before the Constitutional Court to evaluate the constitutionality of Law No. 04/L-199, on the ratification of the first international treaty on the principles which regulate the normalization of the relations between the Republic of Kosova and the Republic of Serbia and its implementation plan. The court ruled that "In regard to the content of the first international treaty, the Court rules that no article of the constitution provides for the evaluation of the constitutionality of the content of the international treaties by the Constitutional Court". The clarifications of the court in its decision on the case KO95/13 imply that, according to the constitution, the Court has jurisdiction for evaluating the Law on Ratification, but it is not authorized to adjudicate on whether the international treaty is in accordance with the constitution. Thus, the Court ruled that it is not in its *ratione materiae* to evaluate the constitutionality of international treaties. In consequence, the Court rejected the request for evaluating this international treaty. (Cf. Constitutional Court of Kosova, Case no. KO95/13). However, in 2015 changed its previous position and accepted for adjudication, both on content and process, the international treaty titled "Association/Community of Serb majority municipalities in Kosova - general principles/main elements", signed by the Republic of Kosova (See the Judgement http://www.gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf).

⁴⁰ Ombudsperson Institution, Annual Report (2011) p. 16. Retrieved from <https://oik-rks.org/en/2012/09/20/eleventh-annual-report-2011/>.

⁴¹ Istrefi, K. "Përvetësimi Kushtetues i të Drejtave Ndërkombëtare të Njeriut në Rendin Juridik të Kosovës". I. Law Journal of University of Prishtina, (2013).

of a tradition in the application of the international law as well as the fragility and lack of professionalism on the part of the institutions of justice are only the basic challenges that characterise this field.

5. The status and importance of KEDNJ in Kosova's constitutional system

The European Convention on Human Rights (ECHR)- whose authority and jurisdiction qualify it as being a unique mechanism of its kind - and the decisions of the European Court of Human Rights (ECtHR), which guarantee its implementation - occupy a crucial place in Kosova's system for the protection of human rights. The European Convention on Human Rights is perhaps the most modern document for the protection of human rights and freedoms. While analysing this dimension of ECHR, Michale Boyle writes "It seems that today there is unanimous agreement that ECHR represents one of the most important developments in the history of European Law and one of the great achievements of the Council of Europe. The emergence of the authority of the European Court of Human Rights has been described as one of the most remarkable phenomena in the history of international law, and perhaps in all of the history of law."⁴²

Furthermore, ECHR has been thought of as a harmonising device of human rights between national legal systems.⁴³ In fact, through the decisions of ECtHR, the effects of ECHR have been transmitted beyond the borders of Europe: the influence of its legal practices is felt on issues which the United Nations faces daily as well as on other human rights organisations, such as Inter-American Commission and Supreme Courts all over the world which "will see Strasbourg's jurisprudence as a guide and interwoven in human rights issues."⁴⁴ Meanwhile, European countries have defined the form of incorporating ECHR within their domestic judicial systems. The form of incorporation is specific to the country.

The Republic of Kosova is not part of the Council of Europe nor has it ratified ECHR. Nevertheless, ECHR is applicable within its internal legal system. This has been made possible through specific clauses in Article 22 of the Constitution. According to this article, ECHR is directly applicable and has primacy, in cases of conflict, over the provisions of laws and other legal acts enacted by other public institutions.⁴⁵ In fact, the application of ECHR within the domestic legal order is defined by the Declaration of Independence.⁴⁶ Specifically, article 53 of the Constitution prescribes that "The Human Rights and fundamental freedoms guaranteed by this constitution ought to be interpreted in harmony with the judicial decisions of the European Court of Human Rights."⁴⁷ This implies that each of the rights determined by the Constitution, including those in article 22, ought to be interpreted in line with the standards set by Strasbourg. That is, in the cases when the standards set by the international instruments for the protection of human rights embedded within Kosova's internal legal system differ, article 53 of the constitution requires that the interpretation given by ECtHR ought to prevail. Further, this implies that the principles, values, norms and premises embedded in Chapters II and III of the Constitution mirror the fundamental features of modern Western constitutionalism.⁴⁸ The provisions of article 53 of the Constitution of Kosova are unique: they do not exist in the constitution of any European Country.

Not only do the determinations of Article 53 affirm Kosova's aspirations for membership in

⁴² Boyle, M. "On Reforming the Operation of the European Court of Human Rights". European Human Rights Law Review, Issue 1, (2008).

⁴³ Nean, T. C. "Considerations regarding the authority of the European Convention on Human Rights and fundamental freedoms and of the European Court on Human Rights jurisprudence on the national law systems in some of the member states". Law Review, 1/4, (2011).

⁴⁴ Boyle, M., *op. cit.* (2008).

⁴⁵ Cons. of Republic of Kosova, (June 15, 2008), Article 22.

⁴⁶ Declaration of independence is an act of Kosova's Assembly, (17 February 2008) The full text is available at: http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf. Cf: Botusharova, S. "The Constitutional Court of Kosova and the European Court of Human Rights" in Hasani, E., Paczolay, P., and Riegner, M. (eds). *Constitutional Justice in Southeast Europe, Constitutional Courts in Kosova, Serbia, Albania, and Hungary between Ordinary Judiciaries and the European Court of Human Rights.* (2012), p. 73.

⁴⁷ *Ibid.*

⁴⁸ Hasani, E. "Veçoritë themelore të sistemit kushtetues në Kosovë". Law Review Journal of University of Prishtina. No. 2, (2014).

the Council of Europe and European Community- through its alignment of the internal legislation and mechanisms with the requirements of membership; it also serves to protect the trust in the national institutions. The lack of internal political stability causes the weakening of trust in the decisions made by the public institutions. By requiring that the interpretation of human rights be in compliance with the judicial decisions of ECtHR, the Constitution of Kosova eliminates these doubts and proves to the international community its will to adhere and protect the human rights and fundamental freedoms.

Article 53 justifies the reasons why the framers of the Constitution thought that the enumeration of human rights and other international instruments which are directly applicable in Kosova is insufficient. In the absence of Article 53, human rights would be subject to unpredictable interpretations, for a number of reasons. A simple inclusion of ECHR in the list would not suffice because the interpretations of ECHR that ECtHR gives become new laws on their own, thus making the latter a living mechanism in the field of human rights. The Convention alone consists of a set of abstract set of human rights which must be interpreted in the spirit of the times and thus, because of the large dynamical changes in society, would have eluded any predictions that the framers of the Convention would have made.⁴⁹

With the passing of time the Constitutional Court of Kosova has developed a sophisticated jurisprudence. In this regard, its consistent referrals to the the interpretations and decisions of Strasbourg have had an important positive impact in the development of human rights standards. Furthermore, the practice of Strasbourg, namely its materialization, has enabled the Constitutional Court to strengthen public's trust in its own work and professionalism. While emphasising the role and importance of ECHR, the Constitutional Court of the Republic of Kosova in its decision on the case of KO 01/09, writes "This Court must give supplementary interpretations of the Constitution and Convention, while all the time remembering the necessity of the protection of the human rights and fundamental freedoms as determined in both of them. Many European countries which have recently emerged from totalitarian regimes have approved European standards for the protection of human rights. Kosova has followed the same practice. Ours is a system of the constitutional law, grounded on the principle of equality, adherence and respect for human rights and application of the rule of law."⁵⁰

" (...) at the same time a closer look at the jurisprudence produced by the Constitutional Court shows a certain methodological issues which can be improved in the Court's future work. First, ECHR and the jurisprudence produced in Strasbourg must be taken into account not only in reaching the conclusions of the Constitutional Court of Kosova, which must be within the domain of the applicability of the human rights as guaranteed by the Constitution of Kosova, but also in order to study the principles and doctrines developed by ECtHR. The Constitutional Court must develop a uniform system of citation and referral in its judicial practice and the rights determined in the systems of other international treaties."⁵¹

ECHR is obligatory not only for the Constitutional Court but also for the basic courts, including the application of the judicial practices of ECtHR. However, seldom do basic court judges refer to ECHR or to ECtHR practices. An example of a case where ECHR is referred to is the penal case No. 425/11, Arben Krasniqi, in which a mixed panel of EULEX⁵² judges ruled that "Article 22 of the Constitution makes ECHR directly applicable in Kosova's legal system. Furthermore, article 53 of the Constitution requires that "the interpretation of human rights and fundamental freedoms guaranteed by the constitution must be consistent with the judicial acts of the European Court of Human Rights"... therefore the pannel of judges must interpret Article 156 (2) of the KPPK in "the

⁴⁹ Laffranque, J. Can't Get Just Satisfaction. *Judgments of the European Court of Human Rights - Effects and Implementation*, (2014), 75-114.

⁵⁰ Cons. Court of Republic of Kosova, Judgement in case No. KO. 01/09, Qemailj Kurtishi vs. Municipality of Prizren.

⁵¹ Istrefi, K. "Përvetësimi Kushtetues i të Drejtave Ndërkombëtare të Njeriut në Rendin Juridik të Kosovës". *Law Review Journal of University of Prishtina*. No.1, (2013).

⁵² EULEX is the European Community Rule of Law mission installed in Kosova immediately after Kosova's declaration of independence. Its mission is to assist Kosova in the field of the rule of law. Further, cf.: <http://www.eulex-Kosova.eu/?page=2,44>.

right to challenge" in harmony with the findings of ECtHR."⁵³

Furthermore, according to the practice of the Constitutional Court, ECHR is obligatory also for other non-judicial institutions of the state. In this regard, in case Nr. KO. 01/09 the Court clarifies "The decisions made by the courts which adjudicate according to the principles and norms of these conventions, especially the European Court of Human Rights based in Strasbourg, not only helps all of the courts of Kosovo, but also other state institutions, in connection with the interpretation and application of human rights and fundamental freedoms."⁵⁴

6. Conclusions

In an effort to guarantee the fundamental rights and freedoms and to affirm Kosovo's preparedness to abide by international law, the framers of the Constitution have designed a reliable method of incorporating the international instruments directly into the Constitution and have placed these instruments at the highest level in the hierarchy of laws within Kosovo's legal system.

The constitutional clauses which incorporate the international human rights instruments within Kosovo's domestic legal system are unique. This is because Kosovo is not a signing party of these conventions, and they have been embedded in the domestic legal system through certain constitutional provisions which make them directly applicable and even give them supremacy over any domestic law.

Nevertheless, the inclusion of these international instruments in the Constitution does not reduce the challenges of practical implementation faced by Kosovar institutions, particularly by the judiciary system and the Constitutional Court.

The lack of a tradition in the implementation of international law and the fragility and non-professionalism of judicial institutions are just some of the initial challenges of practical implementation of Article 22. Therefore, Article 53 of the Constitution represents a further step in Kosovo's commitment to align with international and European standards for human rights, especially those developed by the European Court of Human Rights. Article 53 substantiates the entrenched uncertainty of the drafters of Kosovo's Constitution to leave entirely the interpretation of human rights in the hands of the Kosovo's institutions.

By virtue of Article 53, the Constitutional Court of Kosovo in recent years has developed an advanced jurisprudence in regard of human rights and freedoms. In this regard, the consistent reference it has made to Strasbourg practice, has served to a great extent in the development of standards for the protection of human rights in Kosovo.

The consolidation of Kosovo's statehood has undergone a vast international influence that has foreshadowed this constitutional approach towards human rights. International intervention in 1999, as well as international presence and assistance until the declaration of independence, made the statements of the articles 22 and 53 of the Constitution almost indispensable. The frequency of constitutional interpretations based on these articles in almost all the cases that involve human rights is an indisputable proof that this form of constitutionalization of international instruments was seen as the best guarantee for human rights protection. As such, the incorporation of international instruments in Article 22 of the Constitution, especially the determination in Article 53, can be seen among the most significant mechanisms through which our Constitution protects citizen's fundamental freedoms and rights.

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⁵³ Case P. No. 425/11, case against Arben Krasniqi et al., Ruling on admissibility of Agim Zogaj's statements and diaries (also known as witness X), District Court of Pristina, March 21, 2012.

⁵⁴ Cons. Court of Republic of Kosovo, Judgement in Case No. KO. 01/09, Qemailj Kurtisi vs. Municipality of Prizren.

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