

# The Kosovo Constitution – a Swiss cheese

The need for a transparent and comprehensive process during the constitutional reforms

## Executive Summary

June 15<sup>th</sup> 2011 marks the third year of the Kosovo Constitution coming into force. As the highest political and juristic act of the youngest country, the Constitution was prepared and approved through an accelerated and mostly closed process. It was compiled by a small group of local experts who were at all times being supervised by international experts, making sure that its provisions were in accordance with the Ahtisaari Plan. Public consulting with citizens and the civil society groups were organized within three weeks during the preparation of the constitution draft. Because these consultations were organized in inadequate spaces, without the appropriate awareness and notification of citizens and with many time constraints, it was clear that public consultations intended to fulfill only the formal aspect of the project-constitution preparation process. The members of the Kosovo Assembly were also deprived their right of discussing the project-constitution. Moreover, they were deprived of their voting right, thereby approving the constitution only formally with acclamation and without any special ceremony. However, it soon became clear that the new Kosovo Constitution had many gaps and juridical uncertainties that would obstruct consolidation of the new country and the efficient functioning of the state institutions. However, even with all identified gaps and uncertainties, amending and supplementing the constitution were not priorities until the moment when the major parties were faced with a political cramp about electing the President. As a result, only a few days after the negotiations between PDK, LDK and AKR to get out of the institutional crisis – supported by an Assembly resolution – the process of changing the constitution began. GAP Institute, through this analysis, recommends that the responsible Committee should organize a series of public hearings where independent experts from the academic world, specialized institutions (think tanks), civil society organizations and interested citizens could offer their remarks and recommendations. Furthermore, the leaders of the Assembly should make sure that the report with the proposed amendments from the Committee is debated within the Assembly and the proposed amendments are voted one by one according to the procedure defined in paragraph 2 of article 144 of the Constitution. An open process and a greater support for the new Constitution will make it a national document and not one considered as foreign or imposed upon us. In the future, major constitutional changes should not be left as a right

of only the parties in power or the governing coalitions, but rather should be decided by referendum.

## I. INTRODUCTION

June 15<sup>th</sup> 2011 will mark the third year since the Kosovo Constitution came into power. However, April 9<sup>th</sup>, the day when the Kosovo Assembly members formally approved it, continues to be considered as the Constitution Day. Prepared through an accelerated process, the Constitution was more a product of a long process of negotiations and all inclusive proposals to solve the status of Kosovo than an expression of sovereign will.

Even though it was proclaimed by the constitutional committee as a democratic project-constitution, concise, short and clear, the drafting process was not inclusive and transparent. Even with public discussions organized to provide an illusion of democratic dialogue, inclusion of remarks and suggestions by the civil society and independent experts were not taken into consideration during the drafting process of the Constitution. Furthermore, Kosovo citizens, as carriers of sovereignty, were not able to exercise their political will through their elected representatives, the Assembly members, who without any debate approved the Constitution with acclamation.

At the end, the Kosovo Constitution, as the highest juridical and political act of a country, became a voluminous document with 14 chapters and 162 articles. The content of the Kosovo Constitution is considered as the most advanced in the world in terms of respecting human rights, representing ethnic minorities and other social groups. However, a few months after entering into force, state institutions began to face a series of problems resulting from gaps and juridical uncertainties of the Constitutional provisions.

Some political parties, civil society organizations, and independent experts became convinced that the Constitution should be reviewed, changed and completed. However, even with all identified gaps and uncertainties, changing and completing the Constitution was not a priority until the moment when major parties were faced with a political cramp about the election of the President, which led to the risk of an institutional crisis and early elections. As a result, only a few days after the negotiations between PDK, LDK and AKR to get out of the institutional crisis and the resolution approved by the Assembly to support it, the process of changing the constitution began.

This analysis of GAP Institute for Advanced Studies intends to offer an explanation of the Constitution drafting and approval process and the problems that characterized it. Also, this analysis will examine some of the gaps and unclear provisions of the Constitution that caused problems in the

functioning of institutions and in some cases led to sub-decisions by the Constitutional Court. Even though the Constitution gaps are not directly linked to the way it was drafted, we believe that a more transparent and inclusive process of changing and completing it, would improve the Constitution document. We will conclude the analysis with concrete recommendations concerning the process that must be followed to change and complete the Constitution and the main issues that must be addressed.

## II. THE CONSTITUTION DRAFTING AND APPROVAL PROCESS

Only two days after declaration of independence, the Kosovo President in accordance with the all-inclusive proposal for the Kosovo status of the Special Emissary of the United Nations, Ahtisaari, mandated the Constitutional Committee to draft the new Kosovo Constitution. The Committee included representatives of political parties and local and international experts, who were divided in 10 working groups and drafted the project-constitution.

Even though as a process it had begun in 2007, the project-constitution was finalized by the constitution committee in less than two months after receiving the mandate by the President. This timeframe includes the process of drafting the project-constitution and the so called “public consulting” of the constitution committee with the academic world, independent experts, civil society, and citizens. Even though the project-constitution was a subject of public discussions only for three weeks, the constitution committee claims that during the meetings with citizens, organized tables, television debates, and communication by electronic mail it has accepted thousands of comments, suggestions and recommendations, 35% of which were fully or partially included in the Constitution content.

However, reality was completely different. The process of preparing the project-constitution by the constitution committee was a closed process, directed by a limited number of experts of the negotiating group and supervised by representatives of international institutions. The content of the project-constitution was widely impacted by the all inclusive proposal of the United Nations emissary for the solution of Kosovo’s status; hence many parts of it were prepared in New York and Brussels and were not even a subject of discussion in the constitution committee. Also, based on the competences set by the Ahtisaari Plan, the ICO representative, Pieter Faith certified the project-constitution before presenting it to the Assembly for approval.

Even though it was clear to the citizens, civil society, and to local independent experts that many parts of the Constitution were given ready-for-service and as such were indisputable, other important parts of the project-constitution could be improved. However, the way discussions with citizens, the civil society and independent experts were held gave the

impression that the constitution committee intended to fulfill only a formal aspect of the Constitution preparation process.

Organized in inadequate spaces, without the appropriate awareness and notification of citizens and with many time constraints, public consultations did not create a suitable environment where citizens could express their worries and offer suggestions that could help improve and advance the project-constitution. Therefore, the constitution committee's pretences that thousands of recommendations by citizens, the civil society and experts were analyzed and included in the project-constitution content do not seem very convincing, especially when we consider the time constraints that characterized the whole process of preparing and approving the Constitution.

Another bothering fact of the Constitution drafting and approving process is that more importance was given to the approval and formal signing of the project-constitution by the constitution committee than the approval of the Constitution by the Republic of Kosovo Assembly. Moreover, in the ceremony of signing the project-constitution and delivering it to the President, it was textually stated that the work was done and only the formal approval by the Assembly was expected.

It was more than clear that citizens, the civil society, independent experts and experts of constitutional affairs were not able to address to the appropriate extent their remarks and suggestions. However, it is surprising that in the extraordinary session of the Republic of Kosovo Assembly which was held for the approval of the project-constitution, the right to extend remarks and concerns was deprived to members of the parliament - the only public officials elected directly by citizens. The Assembly members were not only deprived their right to take the floor and discuss the project-constitution, but they were also unable to put in function the main mechanism of their jobs, voting. As it was planned and emphasized two days before, the Kosovo Constitution was approved by the Assembly on April 9<sup>th</sup> 2008, only formally and with acclamation.

### III. CONSTITUTION GAPS AND CHALLENGES IN INTERPRETING ITS PROVISIONS

Only a few months after entering into force, it was clear that Kosovo's new Constitution had many gaps, improvisations and legal obscurities that would create obstacles in the consolidation of the new country and the proper functioning of state institutions. The Constitution's provisions were characterized with contraventions, non consistency, double meanings, obscurities of concepts and notions, and technical errors that caused huge difficulties in practical interpretation. To exemplify the errors and gaps of the Constitution we will analyze the legal obscurities and contraventions in some of its provisions.

Obscurities and contraventions between provisions of the Constitution begin from its premise and its first two articles where the issues of nationality and sovereignty are addressed. According to article 2 of the Constitution, "Sovereignty of the Republic of Kosovo derives from the people, pertains to the people and is exercised, in accordance with the Constitution, through the elected representatives, with referendum, and in other forms, in accordance with provisions of this Constitution". However, the final and transitional provisions of the Constitution deny the exercising of sovereignty by the people, rather, power is conveyed to the international institutions in Kosovo.

According to article 143, paragraph 2, "The Provisions of the Comprehensive Proposal for the Solution of Kosovo's Status of March 26<sup>th</sup> 2007 are superior to all other legal provisions in Kosovo." Logically the Constitution as the highest juridical act is also included. On the other hand, article 147 specifies that "No authority of the Republic of Kosovo has jurisdiction to review, diminish or limit in any way the mandate, competences and obligations of the International Civil Representative which were determined in article 146. Moreover, the right of the sovereign to exercise its will by referendum, a right guaranteed with article 2, is nullified with provisions of article 81, where it is stated that "none of the laws of vital interest can be a subject to referendum".

Obscurities and contraventions are also evidenced in the provisions for the Assembly of the Republic of Kosovo, as the only institution elected directly by the citizens. Article 67, which regulates the issue of vice-presidents of the Assembly, specifies in paragraph 4 that one of the five vice-presidents must be elected by the non-Albanian and non-Serb community, but it does not explain the way of election and the rotation matter. Article 67 also does not offer the constitutional base for defining this procedure in other acts, such as the Assembly Regulation. According to paragraph 6 of the same act "the Presidency is responsible for the administrative functioning of the Assembly in the ways determined by the Assembly Work Regulation." However, since the term "administrative" was not defined in terms of its scope, the Assembly continues to face difficulties on properly interpreting this provision.

Two paragraphs of article 75 of the Constitution, which handle the issue of congressional immunity also have gaps that create double meanings and difficulties of interpretation. While paragraph 1 guarantees full immunity from prosecution for civil charges or discharge for acts and decisions within the scope and responsibilities of members of parliament, it creates uncertainties relating to the meaning of the term "scope and responsibilities of congressmen". Paragraph 2 does not properly define the matter of whether a member of parliament could be detained and arrested, and at the same time does not offer the juridical basis for defining this issue in the Law on Rights and Responsibilities of Deputies and the Assembly Regulation.



Even though this matter is regulated in detail in the Law on Rights and Responsibilities of Deputies and the Assembly Regulation, the way in which it is regulated has been disputed in several cases with the argument that paragraphs of article 75 of the Constitution have not been interpreted properly.

Article 86, where the procedures for electing the President are defined, contains many obscurities and contraventions within its paragraphs creating double meanings and leaving room for different interpretations. Obscurities and double meanings in paragraphs 4 and 6 of this article, which determine the voting procedure, led to disagreements after the election of the President by the Assembly in 2011 and seriously risked sending our country into early elections. The situation was resolved only after an interpretation by the Constitutional Court which declared the procedure by which the President was elected as non-constitutional.

Provisions concerning the matter of Government election and Prime Minister's competences also collide with each other in the proper application of democratic principles. While paragraphs 3 and 4 of article 95 of the Constitution foresee that the Government (The Prime minister and ministers) is considered elected if it receives majority of votes of all Assembly members, paragraph 4 of article 94, gives competences to the Prime Minister to replace at any time the ministers, without the consent of the Assembly. This minimizes the importance of the assembly's consent in approving the cabinet.

Moreover, paragraph 1 of article 95 leaves room for different interpretations when it states that "After the elections, the President of the Republic of Kosovo proposes to the Assembly the candidate for the post of Prime minister, in consultation with the political party or coalition that has won the majority of votes needed in the Assembly to form the Government. The words *"the majority of votes needed in the Assembly to form the Government"* allows an interpretation according to which the candidate for Prime minister can also be from the second or third party by the number of seats won in the Assembly if they convince the President that they have *"the majority of votes needed in the Assembly to form the Government"*. Furthermore, this statement collides with the last paragraph of this article, which handles the cases of Prime minister Resignations, stating that "the President of the Republic of Kosovo, in consent with *political parties or the coalition that has won the majority in the Assembly* mandates the new candidate to form the Government".

Juristic obscurities and similar gaps that we come across in provisions of the Constitution have lead to confusions even during the drafting and approval of laws by the Assembly. This is because the provisions that serve as constitutional bases create double meanings and have different interpretations. This is proved by a large number of case verdicts by regular courts addressing interpretations of laws and other juridical acts which

were subsequently challenged and referred for final interpretation by the Constitutional Court.

The problem of double meanings and the possibility for different interpretations in the Constitution's provisions is best evidenced by the procedure that elected Behxhet Pacolli as a state President. Even though the Constitutional Court declared the decision for electing Mr. Pacolli non-constitutional, the two international judges of the Constitutional Court did not agree with this verdict. These judges offered a different interpretation of provisions in article 86, which was not very distinct from the first interpretation given by the Assembly when the president was elected. Disagreements about ways to interpret the Constitution's provisions, even within the Court, are a clear indicator of gaps and juristic obscurities that characterize some articles of the Constitution.

Since its establishment in 2009, the Constitutional Court has been called in many cases to interpret provisions of the Constitution and to assess the constitutionality of decisions made by state and public institutions. Even though many of the requests were found to be unacceptable, in many other cases the Constitutional Court has found violations of provisions of the Constitution. Although the Constitutional Court has jurisdiction to interpret provisions of the Constitution only as they are, it remains surprising that the Constitutional Court did not explicitly state nor allude in any of its decisions to the juridical obscurities and weaknesses in provisions of the Constitution.

#### IV. WHAT SHOULD THE PROCESS OF CHANGING AND COMPLETING THE CONSTITUTION LOOK LIKE?

As in the foregoing processes, the drafting methodology and content, Kosovo's Constitution is manifested as a *sui generis* act, which does not reflect in appropriate levels the specifics that characterize the newly established country. Obscurities and contraventions that make it harder for the Constitution to be applied in practice, highlighted by independent experts and experts of constitutional matters since its approval, have already convinced the majority of the political spectrum that it is necessary to reopen the process of amending and supplementing the Constitution.

However, as with the procedures determined in provisions of the Constitution and understanding the complicated political situation in Kosovo, amending and supplementing the Constitution will not be an easy process. Firstly, amending and supplementing the Constitution requires the approval of two-thirds (2/3) of all Assembly members, including two-thirds (2/3) of all Assembly members that represent the non-majority community. Secondly, there is a diversity of beliefs from one parliamentary party to another as to which provisions should be changed and amplified.

Thirdly, final and temporary provisions of the Constitution, respectively articles 143 and 147 which do not give space for substantial changes, will not allow the fulfillment of expectations that the citizens and some political parties may have.

An agreement between the leaders of parties in power, PDK and AKR, and the party from the opposition, LDK, formalized through an Assembly-approved resolution the process of amending and supplementing the Constitution. They agreed it should be completed within 6-9 months from the date of the establishment of the Committee for changing the Constitution. Article 144 of the Constitution also states that the Government, the President or  $\frac{1}{4}$  of the Assembly's congressmen, according to the Assembly Regulation, can propose changes to the Constitution.

However, even though the Regulation does not specify how the proposed amendments should proceed in the Assembly, in the plenary session of April 22<sup>nd</sup>, the Assembly formed the Parliamentary Committee that will lead the process of amending and supplementing the Constitution. Although it would be important for the procedural process to be initiated by the President as the representative of "people's sovereignty", who would approach the Assembly with the request to form an *ad hoc* committee to amend and supplement the Constitution, the situation is completely different.

Credibility of the Constitution's amending and supplementing process was damaged since the beginning, when the request (motion) to form the committee in the Assembly was given. The request for forming the committee was brought by the leaders of parliamentary groups, based on points 2 and 3 of the resolution approved by the Assembly supporting the agreement between PDK, LDK and AKR. However, as a rule, the Assembly does not form committees for special cases based on resolutions. This can only be done based on paragraph 2 of article 77 of the Constitution and the provisions of article 71 of the Assembly's Regulation.

Until now, at least publicly, no consulting with parliamentary parties has been done concerning the scope of activities that this committee will be covering. Additionally, the mandate proposal was not attached to the official request to form the committee. When discussing the request in the Assembly, the scope of activities and limitations were not even mentioned, specifically the provisions that may be a subject of review by the committee during this process.

It seems that the view of the Assembly is that the committee's mandate is determined by point 2 of the agreement between PDK, LDK and AKR, stating that a Committee for Reforming the Presidential Election will be formed. This Committee will only draft the necessary constitutional amendments to ensure that the President is elected directly by the people. However, the last statements by the Prime minister and the representative



of ICO about the possibility of reviewing the constitutional provisions related to independence surveillance complicated the situation.

Forming a committee for amending and supplementing the Constitution without a clear mandate makes this process a difficult and unpredictable one. Also, the undefined mandate of this committee risks creating a precedent or negative practice, according to which, if the parties in power obtain the necessary numbers in the Assembly, the Constitution could easily be changed and amended. To avoid such situations, a practice must be established so that radical changes to the Constitution, specifically provisions of essential importance to the country, must be changed only in a referendum, called upon by article 2 of the Constitution.

On the other hand, the committee's structure, scope of activities, timeframes and level of involving the relevant actors will largely determine the success of the Constitution's amending and supplementing process. Now, after formation, it is of crucial importance that the committee prepares a detailed action plan where all the activities undertaken by the committee in the process of reviewing the Constitution's provisions and preparing the amendments will be defined. The Assembly should ensure that the committee has at its disposal all the technical and professional support necessary to successfully fulfill its mandate.

Although the committee consists of only members from the Assembly, in contrast to the process of drafting and approving the Constitution three years ago, involvement of all relevant actors in all phases of the process should be ensured. During the review of Constitution's provisions and before preparing the amendments, the committee should at first consult the appropriate state and public institutions (central and local) affected by specific provisions in review and should analyze the verdicts of the Constitutional Court which focus on the provisions being reviewed.

Then, the committee should organize a series of public hearings inside or outside the Assembly's residency, where independent experts from the academic world, specialized institutions (*think tanks*), civil society organizations and interested citizens can offer their remarks and recommendations for amending and supplementing provisions of the Constitution, about which the committee is mandated.

After the public consultative hearings have been finished, the committee should prepare a report with the proposed amendments. The final report with amendments should be reviewed and approved in the ad hoc committee. Opinions of the committee's minority who do not agree with the approved amendments should also be attached to the report. Then, the committee's final report will be submitted to the President of the Assembly.

Based on paragraph 3 of article 144 of the Constitution, the President of the Assembly sends the committee's report with the proposed amendments to the Constitutional Court for a preliminary evaluation, to ensure that the

proposed amendments do not violate any of the rights and freedoms guaranteed in Chapter II of the Constitution. After a response from the Constitutional Court has been received, the President of the Assembly through the Presidency of the Assembly refers the report with amendments and the opinion of the Constitutional Court for review in the plenary session.

In contrast to the procedure followed three years ago, this time, the Presidency of the Assembly must ensure that the report with its proposed amendments by the committee to amend and supplement the Constitution is debated and the proposed amendments are voted one by one according to the procedure defined in paragraph 2 of article 144 of the Constitution. Members of the committee who have disagreed with the proposed amendments, during the plenary session cannot propose alternative amendments for the same provisions except if they get  $\frac{1}{4}$  of the Assembly members (30 deputies) as determined in paragraph 1 of article 144. After the necessary number of votes in the Assembly is reached, the proposed amendments and amplifications for the Constitution of Kosovo will be considered approved.

## V. CONCLUSIONS AND RECOMMENDATIONS

### CONCLUSIONS

1. The process of preparing the project-constitution by the constitutional committee three years ago was closed, directed by a limited number of experts of the negotiating group and supervised by representatives of international organizations.
2. Public consulting with citizens, the civil society and independent experts during the drafting of the project-constitution was intended to fulfill only a formal aspect of the Constitution preparation process, and the constitutional committee did not show readiness to include the remarks and suggestions made by independent experts of the academic world, the civil society and ordinary people.
3. Three years after entering into force, evidence shows that the Constitution had many gaps, improvising and legal obscurities, contradictions, non-consistency, double meanings, unclear concepts and notions and terminological errors that make proper interpretation difficult in practice.
4. Kosovo's Constitution is featured as a *sui generis* act not only in the preliminary process, but also in the drafting methodology and content. It does not reflect in necessary levels the specifics that characterize the newly established country. Therefore, reopening the process of amending and supplementing the Constitution is necessary.

### RECOMMENDATIONS

1. The committee should prepare a detailed action plan, defining all the activities that the committee will undertake during the process of reviewing the Constitution's provisions and preparing the amendments.
2. The committee should ensure that during the review of the Constitution's provisions and before preparing the amendments, it must first consult respective state and public institutions (central and local) which are affected by those provisions and analyze the Constitutional Court's verdicts that focus on these provisions.
3. The committee should organize a series of public hearings inside or outside the Assembly's residence where independent experts from the academic world, specialized institutions (*think tanks*), organizations of the

civil society and ordinary citizens can offer their remarks and recommendations for the amendment and amplification of the Constitution's provisions.

4. The Presidency of the Assembly, in contrast to its actions three years ago, should ensure that the report with the committee's proposed amendments is discussed and the proposed amendments are voted one by one according to the procedure defined in paragraph 2 of article 144 of the Constitution.



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