

Pace University

DigitalCommons@Pace

---

Pace International Law Review Online  
Companion

School of Law

---

1-2011

## Constitutional Rigidity in Kosovo: Significance, Outcomes, and Rationale

Fisnik Korenica  
*University of Prishtina*

Dren Doli  
*Group for Legal and Political Studies*

Follow this and additional works at: <https://digitalcommons.pace.edu/pilronline>



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Fisnik Korenica and Dren Doli , Constitutional Rigidity in Kosovo: Significance, Outcomes, and Rationale, Pace Int'l L. Rev. Online Companion, Jan. 2011, at 1.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review Online Companion by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

PACE UNIVERSITY  
SCHOOL OF LAW

INTERNATIONAL LAW REVIEW  
ONLINE COMPANION

---

Volume 2, Number 6

January 2011

---

**CONSTITUTIONAL RIGIDITY IN KOSOVO:  
SIGNIFICANCE, OUTCOMES, AND RATIONALE**

**Fisnik Korenica<sup>1</sup> and Dren Doli<sup>2</sup>**

ABSTRACT

This article discusses the issue of constitutional rigidity from the perspective of the Constitution of Kosovo. At the outset, the article analyzes the amendment procedure within the Constitution and its nature in terms of the actors and procedures involved. Next, the article questions the nature of constitutional rigidity in Kosovo and seeks to address the position of veto players. Arguing that the Constitution of Kosovo is rather rigid, the article then questions the significance of consti-

---

<sup>1</sup> Fisnik Korenica is a lecturer on the “Theory of State and Law” at the University of Prishtina and a Senior Research Fellow at the Group for Legal and Political Studies. The paper is written as part of the Group for Legal and Political Studies’ research project “Assessing Democracy in the Western Balkans.” The authors thank the Group for Legal and Political Studies’ Research Committee for providing in-depth comments and recommendations on the first draft.

<sup>2</sup> Dren Doli is a Senior Research Fellow at the Group for Legal and Political Studies and a Senior Lecturer on “Law Principles” at Universum University College. Prior to this, he served as a Senior Legal Executive for Integration to the Kosovo Prime Minister.

tutional rigidity in light of the model of separation of powers, human rights, and the Constitutional Court's constitutional "updating" role. The article concludes that constitutional rigidity in Kosovo offers a rather authoritative role to the Constitutional Court, allowing it to address the issue of the scope and substance of the Constitution through its own case law.

#### KEYWORDS

Kosovo – Constitution – Constitutional Rigidity – Separation of Powers – Human Rights Instruments – Constitutional Court.

#### INTRODUCTION

The stability of constitutional regimes and the overall performance of constitutional systems are often regarded as consequences of constitutional rigidity. Though many argue that constitutional systems that are regarded as rigid face problems because of the dynamism of societal and political affairs, the view that constitutional rigidity is nevertheless hugely significant in certain processes is true and widely accepted. Therefore, constitutional rigidity is a rather important factor within a constitutional system and certain constitutional regimes in the world regard their rigid nature as important to their feasibility and performance.

Constitutional rigidity is a phenomenon that illustrates how "tough" it is to amend a constitution. Therefore, rigid constitutions are those that have tough amending procedures, as opposed to flexible constitutions, which could be amended easily and through "flexible" procedures. A rigid constitution, however, produces many results, most importantly, the "stiffness" to use the political tools for overcoming constitutional provisions. As such, constitutional rigidity is often regarded as a counter-balance for political actions that tend to make constitutional provisions comply with the political needs of a country or partisan interests. However, on the other hand, certain scholars would nevertheless argue that constitutional rigidity diminishes the chances of making constitutional provisions comply with reality and satisfy societal needs. To begin, this article

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

approaches the notion of constitutional rigidity by conceptualizing it as a double-faced phenomenon, namely the rigidity of amending the constitution and the great influence of constitutional courts' rulings, which remain practically unaffected by a "revenge" constitutional amendment or legislative battle.<sup>3</sup>

This article discusses a number of issues related to rigidity in the Constitution of Kosovo, making the topic quite appealing and novel. Most particularly, the article explores four issues: first, the rigidity of the Constitution of Kosovo, second, the relationship between the Constitution's rigidity and the model of separation of powers set by it, third, the importance of constitutional rigidity in face of constitutional human rights, and fourth, constitutional rigidity in the face of the Constitution's dynamic interpretation.

Most would agree that the international state-building process in Kosovo has ended up with an internationally supervised constitutional drafting process.<sup>4</sup> Though the domestic political elites, from almost every ethnicity,<sup>5</sup> have been represented and have "written" the Constitution of Kosovo, one can argue that the latter is a product of the Ahtisaari Settlement and the overall international state-building efforts over Kosovo.<sup>6</sup> Therefore, the Constitution of Kosovo's rationale is

---

<sup>3</sup> See AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 219, 223 (1999), available at [http://yalepress.yale.edu/yupbooks/excerpts/lijphart\\_patterns.pdf](http://yalepress.yale.edu/yupbooks/excerpts/lijphart_patterns.pdf).

<sup>4</sup> See John Tunheim, *Rule of Law and the Kosovo Constitution*, 18 MINN. J. INT'L. L. 371, 376-78 (2009).

<sup>5</sup> See President's Proclamation Appointing the Constitution Commission of the Republic of Kosovo (Feb. 19, 2008), available at [http://www.kushtetutakosoves.info/repository/docs/VENDIMI\\_I\\_PRESIDENTIT\\_per\\_KKK\\_ENG.pdf](http://www.kushtetutakosoves.info/repository/docs/VENDIMI_I_PRESIDENTIT_per_KKK_ENG.pdf).

<sup>6</sup> For more information on the certification of the Kosovo Constitution, see generally Press Release, Secretariat of Constitutional Commission, Government of Kosovo, Draft Constitution of Republic of Kosovo is Certified (Apr. 2, 2008), available at <http://www.kushtetutakosoves.info/?cid=2,203,1316&-tpl=news.php> (demonstrating Peter Faith's decision on the certification of the Kosovan Constitution). Press Release, International Civilian Office, Second Meeting of the International Steering Group (ISG) for Kosovo (Apr. 17, 2008), ¶ 4, available at <http://www.ico-kos.org/pdf/17%20April%202008%20-Vienna.pdf> (discussing the certification of the Constitution). For more information on the Ahtisaarian Settlement process, see generally HENRY H. PERRITT, THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN (2009) (explaining how Kosovo became an independent state

based on an international design for Kosovo, which was aimed at building a multiethnic state of Kosovo.<sup>7</sup> Given this, most of the choices forced by internationals within the constitutional drafting process in Kosovo have been aimed at building protection mechanisms for the ethnic minorities in Kosovo, and sustaining the overall multiethnic character of the polity.<sup>8</sup> In view of the latter, the character of Kosovo's Constitution, in terms of the amending model, follows the same rationale.<sup>9</sup> This article will begin with a discussion of the Kosovo Constitution's amendment process.

### CONSTITUTIONAL RIGIDITY AND THE KOSOVO CONSTITUTION

The British constitutional system illustrates the most flexible "constitution" in the world. In fact, the doctrine of "parliamentary sovereignty," the principle governing the constitutional system of United Kingdom, allows the UK Parliament to pass an amendment to the constitution by adopting a law with a simple majority of votes. Moreover, there is no British court that could question the constitutionality of laws passed by the UK Parliament, which is logically fashioned by the British constitutional model. As such, the British example is in opposition to "constitutional rigidity."

With the British system in mind, the constitutional systems of other countries can be compared in order to understand

---

and providing a broader view on the Ahtisaarian settlement process). For more information on the state-building process in Kosovo, see generally INT'L CRISIS GRP., KOSOVO'S FRAGILE TRANSITION, EUROPE REPORT NO. 196 (Sep. 25, 2008), available at [http://www.crisisgroup.org/~media/Files/europe/196\\_kosovos\\_fragile\\_transition.ashx](http://www.crisisgroup.org/~media/Files/europe/196_kosovos_fragile_transition.ashx) (discussing the state-building process in Kosovo).

<sup>7</sup> See, e.g. Colin Warbrick, *Kosovo: The Declaration of Independence*, 57 COMP. L.Q. 675 (2008).

<sup>8</sup> See generally Joseph Marko, *The New Kosovo Constitution in a Regional Comparative Perspective*, 33 REV. CENT. & E. EUR. L. 437 (2008); MARC WELLER, *CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE* (2009).

<sup>9</sup> The European Commission argues that the Constitution of Kosovo is a constitution of a high European standard, see generally *Commission Staff Working Document, Kosovo (under UNSCR 1244/99) 2008 Progress Report*, SEC (2008) 2697 working doc. (May 11, 2008).

5

*CONSTITUTIONAL RIGIDITY IN KOSOVO:  
SIGNIFICANCE, OUTCOMES, AND RATIONALE*

their constitutional amendment processes. One can argue that the constitutional amendment process depends on the model of the state governed by the constitution in question. This means that federal states have largely different approaches for amending a constitution when compared to unitary states. In fact, one could argue that federal constitutions are *per se* more difficult to amend than unitary states' constitutions.

In principle, there are three models of constitutional amendment: 1) constitutional amendment solely through a simple majority in parliament, 2) constitutional amendment through interaction between parliament and the people through a referendum, and 3) constitutional amendment by combining double majorities and/or supermajorities in the parliament, delays, thresholds, etc.

The first model of constitutional review belongs to the "flexible" models of constitutional amending and this article will thus not discuss this category further. Surely, the British example fits within this model. The second model reflects a model of constitutional rigidity since the constitutional amendment could be undertaken only if a majority in parliament has provided the endorsement, and the people through a referendum have agreed.<sup>10</sup> In this case, the rigid nature of the constitutional amendment would have both political legitimacy deriving from parliament, and popular legitimacy deriving from the people's say in the referendum. There are a number of models under the third method, however, which combine mainly institutional and threshold elements in the constitutional amendment process. Such examples could include the double majority in a two-chamber parliament, the qualified majority of two-thirds or four-fifths in a single-chamber parliament, the qualified majority (of any kind) in parliament (one or more chambers) plus the endorsement of the people or the president, etc.<sup>11</sup>

---

<sup>10</sup> For examples from the American states' constitutions and how the popular say hampers the constitutional amendment process or the proposed amendment itself, see generally Charles V. Laughlin, *A Study in Constitutional Rigidity I*, 10 U. CHI. L. REV. 142 (1943).

<sup>11</sup> For further information on the various models of constitutional amendment and the steps that can make a constitution rigid, see JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND*

Prior to embarking on an analysis of the Kosovo perspective, this article will provide some examples of constitutional amendment models.<sup>12</sup> The US Constitution, a federal state constitution, provides several methods of amendment. With regard to the amendment process, the United States Constitution states:

the Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>13</sup>

Based on Article V of the US Constitution, one can say that this instrument could be changed in many ways. Most importantly, the initiative for commencing the amendment procedure belongs to both to Congress and the States' legislatures. Congress nor the States have a monopoly over the initiation of the amendment process. Approval of amendments rests with the individual States. On the other hand, a close examination of the above-mentioned article, shows that it prohibits the amendment of some articles and sections of the Constitution. For instance, Article V prohibits a constitutional amendment touching issues such as the prohibition of equal suffrage by the States in the Senate. Therefore, this leads to the idea that through Article V, the US Constitution establishes a hierarchy

---

CONSTRAINTS 101 (2000); LIJPHART, *supra* note 3, at 219; JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 114 (1996).

<sup>12</sup> Many provide evidence that almost all constitutions in the world possess articles that allow partial or total change of the constitution, *see generally* HENC VAN MAARSEVEEN & GER VAN DER TANG, WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY (1978).

<sup>13</sup> U.S. CONST. art. V.

7

*CONSTITUTIONAL RIGIDITY IN KOSOVO:  
SIGNIFICANCE, OUTCOMES, AND RATIONALE*

between the constitutional norms themselves and prohibits constitutional amendments that would affect issues concerning equal suffrage of the States in the Senate. Article V demonstrates that the people are neither directly allowed to participate, for example through a referendum, in the initiation of the constitutional amendment nor adoption processes. Still, the amendment process is quite difficult and complex. As such, the three issues posed by Article V of the US Constitution will be analyzed within the context of the Constitution of Kosovo amending procedure also.

If France is taken as an example, two approaches could be followed in order to amend that country's constitution. The first method is to obtain a majority of votes in both chambers of the French Parliament and a majority of the people's votes in a referendum. The second method is to attain a two-thirds of vote in a joint plenary session of both chambers of Parliament with no need for a referendum required.<sup>14</sup> France's Constitution also sets forth that the decision of whether to place a constitutional amendment in a referendum rests with the President even though it might have been endorsed through the second method discussed above. Regarding the hierarchy of norms within the Constitution, the French Constitution states that the "republican form" of government cannot be amended in any way.<sup>15</sup> Therefore, it is implied that an amendment of the French Constitution is not directly up to the people and that it might be amended within the parliamentary framework only. Additionally, it is clear that the prohibition to changing the republican form of government reflects the superiority the constitutional norm regulating that issue has in the French Constitution.

In Switzerland, one would be able to speak for special majorities. Amendments to the Swiss Constitution require the approval of not only a majority of the Swiss people by referendum, but also of the majority of the cantons. More specifically, "[t]he half-cantons are given half weight in the canton-by-canton calculation; this means that, for instance, a constitu-

---

<sup>14</sup> See LIJPHART, *supra* note 3, at 222.

<sup>15</sup> Carl J. Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 HARV. L. REV. 801, 835 (1959).

tional amendment can be adopted by 13.5 cantons in favor and 12.5 against.”<sup>16</sup>

Having discussed some of the prevailing approaches to amending a constitution, let us embark on analyzing the process as laid down in the Constitution of Kosovo.

In the main body of the Kosovo Constitution the following about sovereignty and its sources, is proclaimed “the sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum and other forms in compliance with the provisions of this Constitution.”<sup>17</sup>

As far as Article 2.1 of the Constitution of Kosovo is concerned, one can say that since the source of sovereignty rests with the people, then they are the only ones that can amend the Constitution. However, Article 2.1 makes it clear that, even though the Constitution recognizes the people as the source of sovereignty, it paves the way for allowing indirect methods of constitutional amendment by the people. In fact, since the Constitution of Kosovo proclaims that sovereignty can be exercised both through referendum and elected representatives, one could argue that the constitutional amendment process is brought “outside” the direct control of the people. Logically, the counter-popular elements in the amendment procedure of the Constitution of Kosovo are consequently complimentary with Article 2.1. On the other hand, Article 2.1 does not restrict or prohibit the people’s direct participation in the exercise of sovereignty, for example, through the constitutional amendment process, but it does nevertheless pave the way for another method, that of exercising sovereignty through representatives.

The first question relating to the amendment process is, who and how many actors can initiate the procedure concerned. Article 144.1 of the Kosovo Constitution authorizes three actors to initiate the constitutional amendment process, namely, the Government, the President of Republic, and one fourth of

---

<sup>16</sup> LIJPHART, *supra* note 3 at 40.

<sup>17</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 2, §1, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

*CONSTITUTIONAL RIGIDITY IN KOSOVO:  
SIGNIFICANCE, OUTCOMES, AND RATIONALE*

Members of Parliament (MPs). With Article 144.1 in mind, one can make at least two arguments. First, institutional actors have a monopoly over the initiation of an amendment to the Kosovo Constitution. Since there is no room for popular initiatives for amending the Constitution, one could argue that the initiative on the constitutional amendment process in Kosovo is closed off to direct participation by the people and biased against them. Moreover, since only three institutional actors are authorized to raise the issue or initiate the constitutional amendment process, we argue that the control over the initiation of the constitutional amendment process is rather monopolistic in institutional terms also. Second, the initiative on constitutional amendment is rather biased and no pluralistic ground can be found in it. As will be argued below, the model of separation of powers established by the Kosovo Constitution allows the government and the President of Republic to belong to one governmental coalition as practice so illustrates.<sup>18</sup> Though one-fourth of MPs is a small number of votes to allow a parliamentary vibrant ground to initiating constitutional amendments for even small political parties in the Parliament, one can argue that the MPs are usually party members and follow partisan interests. Hence, the right to initiate the amendment of the Kosovo Constitution rests with partisan members and interests overall and no independent and/or non-partisan institution, for example, the ombudsperson, can be part of the initiative concerned. We argue that the initiative to amend the Constitution is a monopoly of institutional actors on the one hand, and partisan members on the other, though one can speak for a partisan-plural ground when it comes to the small number of MPs allowed to initiate the amendment process. With this in mind, one can argue that the right on initiating a constitutional amendment requires a rigid procedure, when considering that popular initiatives and independent institutions are not authorized to initiate it. The opposite is true when the issue is seen from a political perspective since the initiative can come so flexibly from political institutions. Hence, when taken as a whole, the counter-popular character of the

---

<sup>18</sup> See Fisnik Korenica & Dren Doli, *Calling the Kosovo's Constitution: A Legal Review*, 22 DENNING L.J. 51, 63 (2010) (Eng.).

right in initiating a constitutional amendment follows the constitutional rationale for “restraining” popular initiatives and the rule of majority, that is common to consociational constitutional regimes. This will be further supported with the arguments and analysis depicting the adoption of constitutional amendment proposals shown below.

To dig deeper into the question of the amendment process and in order to argue whether the Kosovo Constitution is flexible or rigid, we quote Article 144.2, the constitutional article describing the amendment process:

[a]ny amendment shall require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo.<sup>19</sup>

Article 144.2 is the only part in the Kosovo Constitution that explicitly regulates the issue of the adoption of constitutional amendments. Article 144.2 establishes a number of principles regarding the model the amendment process of the Kosovo Constitution follows in terms of the debate between rigidity and flexibility. In view of Article 144.2, one can come up with at least four arguments.<sup>20</sup>

First, Article 144.2 introduces an amendment process that is more than a requirement for a simple majority. In contrast to the flexible British Constitution, the Kosovo Constitution can be amended through a parliamentary route only. Two-thirds of MPs, in fact, is quite a high bar to clear in Parliament, and it would represent a rather wide compromise. Hence, through a simple calculation, two-thirds of the overall membership of Parliament is equal to 80 MPs or 66.6 percent.

Second, in view of Article 144.2, the adoption of a constitu-

---

<sup>19</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 144, §2, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

<sup>20</sup> Many constitutions in Europe follow the same constitutional amendment process, namely amendment of the constitution through parliament, see, e.g., 1994 CONST. art. 195 (Belg.); C.E, B.O.E. n. 167/8, Dec. 29, 1978 (Spain); BUNDES-VERFASSUNGSGESETZ [BV-G][CONSTITUTION] BGBl No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 2/2008 art. 44 (Austria).

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

1

tional amendment to the Kosovo Constitution requires a double supermajority. Hence, the double majority, which consists of both a two-third majority of Parliament and a two-third majority of the ethnic minority MPs in Parliament, is a rather high bar for the adoption of a constitutional amendment.

By digging deeper into the issue of double majorities, one can bring an interesting argument.<sup>21</sup> First, concerning the entire parliamentary two-third majority (the first supermajority required), a two-third majority is somewhat beyond the number of MPs required to build a coalition government.<sup>22</sup> In this context, an absolute majority in Parliament (50 percent + one) could appoint both the Government and the President of Republic in the final process. Hence, logically and politically, a governmental coalition would never be close or equal to two-thirds of MPs. With this in mind, the first majority required to adopt a constitutional amendment, seeks to set forth a parliamentary bar or threshold that exceeds the coalition of parties that usually hold the Government. Therefore, as far as a majority of two-thirds of the votes in Parliament is required for the adoption of a constitutional amendment, a coalition government would not be able to satisfy this condition alone, at least logically and practically, even though the idea of having a coalition government consisting of two-thirds of MPs is not impossible. To this extent, the supermajority of two-thirds of Parliament, required to pass a constitutional amendment could not be a monopoly of the ruling coalition government. Instead, a broader consensus, with parties that stand outside the coalition government is needed. Second, concerning the two-thirds of minority MPs required to pass a constitutional amendment

---

<sup>21</sup> To increase the rigidity of this amendment procedure, the constitution drafters could have used the “delay” device in the amendment procedure. However, with the current regulation, the amendment procedure cannot be delayed, which suggests that the amendment can be adopted within minutes, if the votes taken satisfy the requirement set forth in the provision concerned. For more information on the “delay” device in the amendment process, see ELSTER, *supra* note 11, at 143. Some constitutions require that in order for an amendment to be adopted, it must take the supermajority in two legislatures, namely, take the vote in the parliament existing under the current mandate, and the parliament that will be made with the coming election.

<sup>22</sup> See Korenica & Doli, *supra* note 18, at 84-85.

(the second supermajority required), it represents a supermajority that is both broad and rather inclusive in terms of ethnic minorities represented in the Kosovo Parliament.<sup>23</sup> A two-thirds majority of ethnic minority MPs, in fact, exceeds the number of seats that Serbs alone have in the current composition of Parliament. It means that, a two-thirds majority at the level of ethnic minority MPs is not a monopoly of Serbian MPs alone, with Serbs being the largest ethnic minority in Kosovo. This, therefore, suggests that the two-thirds minority MPs' vote in Parliament is neither a prerogative of one ethnic community's MPs, say Serbian MPs, nor an easily reachable bar from the perspective of other ethnic communities' MPs.<sup>24</sup> However, can the Kosovo Parliament remain without any ethnic minority MP and dismiss the supermajority required? No, the Kosovo Constitution offers twenty reserved seats for ethnic minority MPs, regardless of the popular vote results.<sup>25</sup> The model of constitutional amendment provided by the provision concerned follows a power-sharing rationale, as does the entire Kosovo Constitution.<sup>26</sup>

Third, Article 144.2 allows no room for popular say in the adoption of an amendment proposal. The adoption of a constitutional amendment cannot be put to a referendum or in any

---

<sup>23</sup> There are twenty reserved seats for ethnic minority representatives. The international community has these seats be reserved, one could say, *see* JAMES HUGHES, CONFERENCE PAPER, COMPARING THE SECURITY-DEVELOPMENT MODEL IN THE 'SUI GENERIS' CASES OF NORTHERN IRELAND AND KOSOVO at 13 (Sep. 10-12, 2009), *available at* <http://eprints.lse.ac.uk/26061/>. There are three ethnic minority parliamentary groups in Kosovo's Assembly currently with more than 20 MPs, *see* Republic of Kosovo Assembly, Numerical Representation of the Kosovo Assembly, <http://www.assembly-kosova.org/?-cid=2,107> (last visited Jan. 23, 2011).

<sup>24</sup> *See generally* Oisin Tansey, *Kosovo Independence and Tutelage*, 20 *J. DEMOCRACY* 153 (2009); GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002).

<sup>25</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 64, *available at* <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

<sup>26</sup> *See generally* Korenica & Doli, *supra* note 18; *see also* AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1968); AREND LIJPHART, *THINKING ABOUT DEMOCRACY: POWER-SHARING AND MAJORITY RULE IN THEORY AND PRACTICE* (2008).

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

other type of direct popular decision making.<sup>27</sup> Hence, closing off the amendment adoption process to popular participation gives Parliament a monopoly over the constitutional amendment process and makes it a prerogative of political parties' representatives in Parliament. At the same time, however, besides promoting a monopoly belonging to Parliament, Article 144.2 weakens the likelihood of upholding the principle of rule of majority. Since this model of amendment with a double supermajority reflects a possibility for veto from the ethnic minority's MPs in Parliament, adding that people are prohibited to give a say in the adoption process, this results in the adoption of a constitutional amendment being in opposition to the principle of rule of majority. With this in mind, the constitutional rigidity provided by Article 144.2 is a counter-majoritarian mechanism,<sup>28</sup> which nevertheless provides an ethnically plural authority when it comes to the constitutional amendment process. In addition, since this model of constitutional rigidity produced by the Kosovo Constitution is a counter-majoritarian mechanism, one could say that it lacks domestic legitimacy.<sup>29</sup> Nevertheless, popular participation would be allowed in a legislative procedure, which offers the people somewhat of a role in the legislative process. However, the Kosovo Constitution dismisses the possibility for referendums in cases of vital laws,<sup>30</sup> which, therefore, shows that the Constitution and the Constitutional Court's rulings interpreting the Constitution cannot be depopularized or deimmunized in the legislative process either. The idea of prohibiting direct popular participation in constitutional amendment processes stands in harmony with the principles of consociation or power shar-

---

<sup>27</sup> This is a normal condition for states that establish constitutions that provide power-sharing governance (especially in ethnically divided societies), *see generally* Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96 (2004).

<sup>28</sup> This argument stands in conformity with the general claim made by LIJPHART, *supra* note 3, at 230.

<sup>29</sup> The problem of domestic legitimacy is a long argued phenomenon that has followed the Constitution of Kosovo since its adoption, *see* Marko, *supra* note 8, at 449; WELLER, *supra* note 8, at 258.

<sup>30</sup> *See* CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 81, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

ing,<sup>31</sup> with Kosovo being an internationally promoted state that must follow power sharing mechanisms.<sup>32</sup>

Fourth, one can question whether there is any part of the Constitution that cannot be subject to the amendment process. Doctrinally, many argue that, in general, constitutions should be amendable, however, some parts should be harder to amend than others.<sup>33</sup> The Kosovo Constitution through Article 144.3, sets forth that the adoption of a proposed constitutional amendment can be considered undertaken “only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution.”<sup>34</sup> Though Article 144.3 is not explicitly made to form part of the amendment process, it, both logically and legally, touches on and influences the amendment process as well. Therefore, in light of Article 144.3, one would argue that Chapter II of the Kosovo Constitution could not be subject to a constitutional amendment that lessens rights, therefore leading to the argument that Chapter II of the Constitution is not amendable.<sup>35</sup> In

---

<sup>31</sup> For more on power-sharing systems of governance, *see generally* AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1968); Arend Lijphart, *Consociational Democracy: The Views of Arend Lijphart and Collected Criticisms*, POL. SCI. REVIEWER [143] available at [http://www.mmsi.org/pr/15\\_01/schendelen.pdf](http://www.mmsi.org/pr/15_01/schendelen.pdf); AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977); Arend Lijphart, *Consociation and Federation: Conceptual and Empirical Links*, 12 CANADIAN J. POL. SCI. 499 (1981); AREND LIJPHART, *CONFLICT AND COEXISTENCE IN BELGIUM: THE DYNAMICS OF A CULTURALLY DIVIDED SOCIETY* (1981); AREND LIJPHART, *THINKING ABOUT DEMOCRACY: POWER-SHARING AND MAJORITY RULE IN THEORY AND PRACTICE* (2008).

<sup>32</sup> *See* HENRY H. PERRITT, *THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN 1* (2010); WELLER, *supra* note 8, at 39; Tunheim, *supra* note 4, at 376-77.

<sup>33</sup> *See* Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 255 (1996).

<sup>34</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 144, §3, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

<sup>35</sup> The German Basic Law, for instance, does not allow the amendment principles within articles 1 and 20, *see* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23,

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

view of Article 144.3, therefore, there is a hierarchy of norms within the Constitution itself, with Chapter II being unamendable,<sup>36</sup> if the amendment concerned lessens rights. Since the Constitution gives Chapter II a special role and having argued that this is the only unamendable part of the Constitution, it has a higher hierarchy in the system of norms within the Constitution. This, therefore, builds upon the idea that Chapter II of the Constitution remains untouchable by any amendment, whereas the constitutional rigidity has no meaning in terms of the Chapter concerned.<sup>37</sup>

### CONSTITUTIONAL RIGIDITY AND SEPARATION OF POWERS FROM THE KOSOVO CONSTITUTION'S PERSPECTIVE

Having argued that the Constitution of Kosovo is rather rigid, and having analysed the morphology of the rigidity concerned, we now embark on the impact and/or outcomes that the constitutional rigidity in Kosovo will deliver. Therefore, in this section we question the significance and outcomes of constitutional rigidity in face of the model of separation of powers established by the Kosovo Constitution. Prior to embarking on the debate of constitutional rigidity versus separation of powers in Kosovo's case, it is worth noting that Ferreres-Comella has built a rather interesting and grounded argument on the

---

1949, BGBl. LXXIX (Ger.).

<sup>36</sup> The same can be seen in the Bosnia and Herzegovina Constitution, “[n]o amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.” BOSNIA AND HERZEGOVINA CONSTITUTION Dec. 1, 1995, art. 10 ¶ 2, available at [http://www.servat.unibe.ch/icl/bk00000\\_.html](http://www.servat.unibe.ch/icl/bk00000_.html).

<sup>37</sup> The Constitution of Kosovo recognizes the prevalence of Ahtisaari Settlement over itself. However, many would say that only the Constitution of Kosovo could be seen as a *groundnorm* of Kosovo's legal order. The Ahtisaari Settlement, on the other hand, though established by the Constitution as having supremacy over the Constitution, could be nevertheless dismissed through a constitutional amendment. If the latter would be the case, then the provision of the Constitution regulating the status of Ahtisaari Settlement and its prevalence could not be seen as unamendable. Dren Doli & Fisnik Korenica, *What About the Kosovo Constitution: Is There Anything Special? Discussing the Groundnorm, the Sovereignty and the Consociational Model of Employed Democracy*, 4 VIENNA INT'L CONST. L.J. (forthcoming 2010).

debate concerned. Ferreres-Comella argues that, in parliamentary systems of governance, like most of the European countries, a rigid constitution would deliver a supplementary role for the constitutional court: that of counterbalancing the two other branches of government. In fact, argues Ferreres-Comella, since in a parliamentary system of governance the party or coalition holding the majority of seats in the parliament has no real control over the government, there is no real control that could come from the parliament over the government. Therefore, the control from the legislative branch vis-à-vis the government would not nevertheless “harm” its performance or counterbalance its work, or it does not exist at all. The only way to somehow oppose the government in parliamentary governance is through the opposition parties in parliament. Hence, in parliamentary systems of governance, argues Ferreres-Comella, the constitutional courts, and generally the judiciary, must take the role of balancing the executive-legislative realm. In this context, a rigid constitution, would strengthen the role of the constitutional court in interpreting the constitution in a way that counterbalances the politicized work of the executive-legislative realm, while allowing the latter to have no likelihood of changing the constitution as a way for surpassing the constitutional court’s rulings.<sup>38</sup> With this in mind, one wonders if the constitutional rigidity in Kosovo could play the same role in face of the executive-legislative realm. To develop an analysis over this, we must first analyze the model of separation of powers established by the Kosovo Constitution.

The Kosovo Constitution has established a rather pure parliamentary system of governance,<sup>39</sup> with the establishment of the separation of powers principle. The country is headed by a President, who is appointed by Parliament once an absolute majority of votes in Parliament is reached in the third round. The executive branch is held by a government, which is appointed by Parliament once an absolute majority of votes (50%

---

<sup>38</sup> See generally Victor Ferreres-Comella, *A Defense of Constitutional Rigidity*, *Analisi e Diritto* 2000, 45, available at [http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi\\_2000/ferreres.pdf](http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2000/ferreres.pdf) (describing rigidity of the Federal Constitution).

<sup>39</sup> See Marko, *supra* note 8, at 444.

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

+ one vote) is obtained. The legislative branch is held by the unicameral Parliament, which consists of 120 MPs. The judiciary is held by the regular courts, and the constitutional court. As far as the relationship between the legislative and executive branches, the Kosovo Constitution provides for a relationship that is based on the coalition of parties holding the government. In this context, the President of the Republic and the Government are a product of an agreement between the coalition partners or the party holding the majority of seats in Parliament.<sup>40</sup> In view of this, the control of Parliament towards the government and the President of the Republic is nevertheless practically impossible since any decision in the Parliament would need to be made with votes from the MPs coming from the party or coalition of parties holding the Government and the President. Hence, legislative control, other than that by the opposition in Parliament is impossible in the practical context, though Parliament is constitutionally authorized to control the Government.<sup>41</sup> To this extent, the model of separation of powers provided by the Kosovo Constitution practically and politically allows a “marriage” between the Government, the President of the Republic, and the absolute majority of MPs,<sup>42</sup> who are bestowed with the right to take almost any decision exercising defined legislative powers. In this regard, therefore, one questions whether the rigid nature of the Kosovo Constitution has any role in the relationship between the executive-legislative realm and the Constitutional Court.

Generally, constitutional rigidity in Kosovo provides for a strong Constitutional Court, whose rulings cannot be easily counterbalanced or altered by a constitutional amendment. In this context, since a constitutional amendment would be very difficult to pass given the double supermajorities required, the rulings of Kosovo’s Constitutional Court remain the only route for interpreting the Constitution. In view of this, constitutional rigidity in Kosovo puts the Constitutional Court in a very po-

---

<sup>40</sup> Doli & Korenica, *supra* note 18, at 74-80.

<sup>41</sup> See CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 65, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

<sup>42</sup> See Doli & Korenica, *supra* note 18, at 63.

werful position and, most importantly, makes it fundamentally difficult to overrule a decision of the Court through a constitutional amendment or through a legislative or popular vote. With this in mind, the Kosovo's Constitutional Court practically enjoys the power to decide what the constitution means and allows no room for political revenge. This would mean that the Constitutional Court would have the power to make "factual" amendments to the Constitution, as opposed to formal ones. In this regard, the Constitutional Court's rulings constitute factual amendments to the Constitution, and as such, would be more open to non-parliamentary interests, since the judicial activity of the Court will be based, among others, on the claims of the parties standing before it.

Following this argument, therefore, one should ask if constitutional rigidity has as a result a role in the model of separation of powers established by the Constitution. In this regard, as argued above, since the Kosovo Constitution provides for a rather pure parliamentary model of governance, the "marriage" between the executive and legislative branches is somehow impossible to be controlled by the parliamentary opposition. Hence, constitutional rigidity offers Kosovo's Constitutional Court the power to counterbalance and control the constitutionality of actions by the Government, Parliament and President, which are nevertheless instruments of the party or coalition of parties holding the majority of seats in Parliament. In such circumstances, we argue that Kosovo's Constitutional Court enjoys the power to control the Government, Parliament, or President of the Republic, while no other political or non-political actors would have the power to do so vigorously.<sup>43</sup> Therefore, we argue that constitutional rigidity in Kosovo has given the Constitutional Court the opportunity and power to control the executive and legislative branches, which have a natural im-

---

<sup>43</sup> For a broader view on the constitutional provisions regulating the position of the Constitutional Court of Kosovo, see Fisnik Korenica, *Pointing the Rule-of-Law in a Transnational Polity: The Case of Kosovo's Law on the Constitutional Court*, [Vol 10] issue 3 CONTEMP. ISSUES IN L. 183, 187 (2010); Dren Doli & Fisnik Korenica, *Kosovar Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses*, 11 German L.J. 803, 809 (2010), available at [http://www.germanlawjournal.com/pdfs/Vol11-No8/PDF\\_Vol\\_11\\_No\\_08\\_803-836\\_Kosovo%20Context\\_Doli%20&%20Korencia%20FINAL.pdf](http://www.germanlawjournal.com/pdfs/Vol11-No8/PDF_Vol_11_No_08_803-836_Kosovo%20Context_Doli%20&%20Korencia%20FINAL.pdf).

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

minence. With this role, therefore, the Constitutional Court becomes the most powerful controlling and counterbalancing mechanism in the face of the partisan and political actors holding the executive and legislative branches. Nevertheless the Constitutional Court's power, is only possible thanks to the inability of the legislature to amend the Constitution or "fight" the Constitutional Court's rulings, which are naturally a product of constitutional rigidity.<sup>44</sup>

The authority of the Constitutional Court is further empowered through the constitutional provision, which gives it the right to control the constitutionality of procedures followed for adopting a constitutional amendment. This certainly authorizes the Court to ban an amendment if, in the view of Court, it was issued in a manner that is unconstitutional.<sup>45</sup> Besides this, one can say that comparative evidence shows that the broader the power of constitutional review the more freedom in the polity,<sup>46</sup> which strengthens the arguments made above.

To support the above-mentioned arguments and claims, we explain two essential Constitutional Court rulings, which test the accuracy of our claims. First, in *Rrustemi et al v. President of Republic*, the Kosovo Constitutional Court, in a decision that conforms to the nature of a rigid constitution, ruled that the President of the Republic is violating the Constitution by simultaneously holding the post of President of the Republic and President of a political party.<sup>47</sup> The President of the Republic, Mr. Fatmir Sejdiu, claimed that an earlier agreement with politicians allows the holding of the two posts simultaneously and thus is not a constitutional violation.<sup>48</sup> However, with the rul-

---

<sup>44</sup> See John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 LAW & SOC. INQUIRY 501, 510 (1997).

<sup>45</sup> See CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 113, § 3, cl. 4, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

<sup>46</sup> See Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. OF POL. ECON. 445, 448 (2004), available at [http://works.bepress.com/cgi-viewcontent.cgi?article=1002&context=florencio\\_lopez\\_de\\_silanes](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=florencio_lopez_de_silanes).

<sup>47</sup> For some more insight on the problem, see generally Doli & Korenica, *supra* note 18.

<sup>48</sup> See, for instance: Financial Times, 28 September 2010 Retrieved from: <http://www.ft.com/cms/s/e383958c-ca48-11df-a860-00144feab49a>. See also: 'Thik pas shpine'. *Koha Ditore Newspaper*, 28 September 2010, citing Finan-

ing, the Constitutional Court brought a new legal state of affairs into the political scene, illustrating that partisan agreements and parliamentary inability to seek the implementation of the Constitution are absolutely dismissed, therefore, leading into a rigidly controlled parliament and party scene from the Constitutional Court.<sup>49</sup> With the new ruling, therefore, party politics has changed directions, and overall there is no possibility for a constitutional amendment to counter the ruling. Hence, with the ruling in *Rrustemi et al. v. President of Republic*, the Constitutional Court has shown that it can review and control the work and the overall performance of the executive and legislative branches, including partisan agreements, thus allowing no place for the violation of the Constitution. This, in turn, has limited the exploitation of the main institutions of the country by political parties and has changed the way in which coalition agreements will be viewed in the future. All this, is based on the attitudes of constitutional rigidity, where revenge through a constitutional amendment over the Constitutional Court's rulings would be impossible.

Second, in Case No. KO 80/10, the Constitutional Court was asked to decide whether, according to the Constitution, the resignation of a directly elected mayor from a public post effected with the release of a statement to the media would be sufficient. In fact, the Ministry for Local Governance has found itself in a dilemma concerning whether to recognize the resignation of a local mayor from the incumbent-government party. The mayor claimed that with his return to office, he had annulled the resignation.<sup>50</sup> The Constitutional Court, as a result, used a highly abstract notion in the Constitution to rule that the resignation of a public official, elected directly by the people, does not require confirmation from any institution, and such an action ends the mayor's mandate.<sup>51</sup> With this ruling,

---

cial Times.

<sup>49</sup> GYJKATA KUSHTETUESE [CONSTITUTIONAL COURT OF KOSOVO] Sept. 28, 2010, LËNDA NR. KI 47/10, *available at* [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_shq\\_2.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_shq_2.pdf) (Kos.).

<sup>50</sup> *See Presidenti kerkon sqarime ne rastin Qeskaj*, (Aug. 18, 2010, 4:26 PM CET), <http://www.zeri.info/artikulli/1/1/9840/presidenti-kerkon-sqarime-ne-rastin-qeskaj/>.

<sup>51</sup> *See* GYJKATA KUSHTETUESE [CONSTITUTIONAL COURT OF KOSOVO] RASTI

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

2

therefore, the Constitutional Court confirmed that it effectively controls the Government and Parliament, respectively since the executive branch and Parliament, who were on the mayor's side, were unable to opine on this issue. Therefore, both cases show how a rigid constitution has strengthened the Constitutional Court's role in controlling and reviewing the constitutionality of the executive and legislative branches' performance and acts, while ensuring that an act by Parliament to overcome a ruling would be almost impossible.

### CONSTITUTIONAL RIGIDITY AND HUMAN RIGHTS GUARANTEES FROM THE KOSOVO CONSTITUTION'S PERSPECTIVE

In this section, the article embarks on examining the significance of the relationship between constitutional rigidity and human rights in Kosovo. We approach the issue from a legal constitutional point of view while pointing out the central issues that are relevant in this regard. Therefore, most practically, we question if the rigid nature of the Kosovo Constitution affects constitutional human rights. To reach an answer, we approach the problem from two different perspectives and analyze the issue from the perspectives concerned.

First, the human rights protections afforded by the Kosovo Constitution are rather numerous.<sup>52</sup> It contains a number of rights ranging from political, social, economic, and dignity. Besides the list of human rights listed in the Constitution, the Constitution has constitutionalized a number of international human rights instruments.<sup>53</sup> Through the constitutionalization of the international instruments concerned, the Constitution has recognized to them a constitutional legal power.

Second, the Constitution, especially in Chapter III, offers a

---

NR. KO 80/10, *available at* [http://www.gjk-ks.org/repository/docs/aktgj-ykim\\_rasti\\_%20ko\\_%2080\\_10.pdf](http://www.gjk-ks.org/repository/docs/aktgj-ykim_rasti_%20ko_%2080_10.pdf) (Kos.).

<sup>52</sup> For more information about the international human rights standards in the Constitution of Kosovo and their relevance in the state building process, *see generally* Tunheim, *supra* note 4.

<sup>53</sup> *See* CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 22, *available at* <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

number of special rights for ethnic communities in Kosovo, both at a personal and collective level.<sup>54</sup> The Constitution has established a rather privileged position for ethnic communities that have a minority status in Kosovo.<sup>55</sup> Hence, with these two issues, one would question if constitutional rigidity in Kosovo has any effect on constitutional human rights in general or on ethnic minority constitutional rights' guarantees.

First, one questions whether constitutional rigidity has any effect on the issue of constitutional human rights in Kosovo. The rulings of the Constitutional Court in the context of the interpretation of constitutional human rights will be deemed as final and to counterbalance those interpretations through legislative and/or executive action would be almost impossible. On the other hand, the Constitutional Court would determine the scope and substance of the rights concerned and legislative actions challenging those rulings would be almost unachievable. Since there is a list of ten international human rights instruments incorporated into the Constitution, the Constitutional Court is able to make rulings that both respect and employ the substance of the international instruments concerned. This, therefore, leads to a type of constitutional justice that addresses the issue of human rights through the Court's own case law on international human rights instruments, while allowing no room for the legislative branch to limit or ban the rights that have been guaranteed by the instruments concerned and the constitutional courts' rulings. Overall, therefore, in the field of human rights, constitutional rigidity allows the Constitutional Court to produce powerful rulings, which cannot be overturned by the legislature and the Court's reference to international human rights instruments will increase and internationalize the scope of human rights available in Kosovo. Constitutional rigidity, as such, will, first, allow the Constitutional Court to determine through its own case law the substance and scope of rights and freedoms guaranteed by the Constitution while, second, also hindering the idea of the legis-

---

<sup>54</sup> For a broader view of this, *see generally* Marko, *supra* note 8.

<sup>55</sup> For more information on ethnic minorities' privileges in Kosovo, *see generally id.*; WELLER, *supra* note 8; MINORITY RIGHTS IN CENTRAL AND EASTERN EUROPE (Bernd Rechel, ed., 2009).

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

2

lature dealing with the definition of rights and constitutional principles of human rights. Additionally, thanks to the Constitution's rigid nature, the Constitutional Court's "expanded" role with regard to human rights leads to more political freedom.<sup>56</sup>

Second, one would question if constitutional rigidity has a role with regard to ethnic minority constitutional rights in Kosovo. Besides being quite appealing, the rigid mechanism built within the Kosovo Constitution was primarily aimed at assuring that ethnic minority rights and privileges remain unaffected from majority rule.<sup>57</sup> Hence, constitutional rigidity in Kosovo would assure that no right or privilege at the personal or collective level guaranteed by the Constitution to ethnic minorities in Kosovo would be hindered or interfered with unless the ethnic minority MPs themselves provide their assent. This means that Parliament would only amend a constitutional right or freedom if the ethnic minority MPs themselves provide their assent for such an amendment. Hence, constitutional rigidity in Kosovo assures that ethnic minority rights and freedoms guaranteed by the Constitution remain intact. This assures against any action by the majority MPs in Parliament and thus reduces concerns of the majority reducing ethnic minority rights and privileges. In addition, this model of constitutional rigidity makes the ethnic minority MPs themselves responsible for and capable of controlling and having the capacity to protect their electorate's constitutional rights and freedoms. Moreover, the Constitutional Court is also responsible for making sure that the chapter dedicated to human rights and privileges remains unchanged by any constitutional amendment.<sup>58</sup>

---

<sup>56</sup> See La Porta, *supra* note 46, at 447.

<sup>57</sup> For more information on the ethnic minorities' rights and freedoms in Kosovo see generally Emma Lantschner, *Protection of Minority Communities in Kosovo: Legally Ahead for European Standards—Practically Still a Long Way to Go*, 33 REV. CENT. & E. EUR. L. 451 (2008).

<sup>58</sup> For a counter-majoritarian ruling of the Constitutional Court of Kosovo, which certainly follows a constitutional rigidity rationale, see generally GYJKATA KUSHTETUESE [CONSTITUTIONAL COURT OF KOSOVO] Qemajl Kurtisi v. Municipal Assembly of Prizren, Mar. 18, 2010, CASE NO. KO 01/09, available at [http://www.gjk-ks.org/repository/docs/ko\\_01\\_09\\_Ven\\_ang.pdf](http://www.gjk-ks.org/repository/docs/ko_01_09_Ven_ang.pdf); For a discussion of how public opinion disapproves of this, see generally Kundershtohet Vendimi i Gjykes Kushtetuese per Emblemen e Prizrenit, *Kosova Info*

Overall, one could argue that the Kosovo Constitution's bill of rights and the Constitutional Court's case law have a counter-majoritarian nature, which could boost popular opposition to it.

#### CONSTITUTIONAL RIGIDITY, "EUROPEANIZATION," AND UPDATING THE KOSOVO CONSTITUTION

Rigid constitutions face problems with respect to the dynamism of societal and political affairs. The problems concerned relate to the fact that rigid constitutions are hard to amend, changes in societal and political affairs would require updated constitutional regulations. Thus, constitutional rigidity makes it difficult for these constitutions to adapt to dynamic societal affairs, which would be best addressed from a constitutional perspective. In view of this problem, one should question whether there is any way of updating the Constitution of Kosovo. Certainly, in constitutional regimes having a rigid nature this role rests with the Constitutional Court,<sup>59</sup> which must interpret and update constitutional rules.<sup>60</sup>

Therefore, in this section, we question whether the role of the Kosovan Constitutional Court in interpreting and upholding the "updated" character of the Constitution has any meaning in terms of the overall constitutional openness.

To start with, it is worth noting "... abstraction is neces-

---

(Pristine), available at <http://www.kosova.info/2010/03/kundershtohet-vendimi-i-gjykates-kushtetuese-per-emblemen-e-prizrenit/>.

<sup>59</sup> For example, the US Supreme Court decision of *Marbury v. Madison*, which establishes the doctrine of judicial review, shows that even without an amendment, the Court can create a "factual" amendment, see Walter Murphy, McCormick Professor of Jurisprudence, Emeritus at Princeton University, Lecture at 2000 Harry Eckstein Lecture at Univ. of California at Irvine, *Constitutional Interpretation as Constitutional Creation*, available at <http://www.democ.uci.edu/research/lecture%20series/murphy.php>

<sup>60</sup> For a review of how the US Supreme Court has substantially altered the founding principles of the American Constitution by adapting them to societal changes, see generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006). There is evidence that a third way of amending a constitution occurs in practice, namely the change of constitutional principles through customs and political evolution, such as the practice of transferring the government from a monarchy to an elected government in Europe, see generally Roger D. Congleton, *On the Durability of King and Council: The Continuum Between Dictatorship and Democracy*, 12 CONST. POL. ECON. 193 (2001), available at <http://rdc1.net/forthcoming/kingcon.pdf>.

## CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE

sary for a rigid Constitution to preserve its democratic legitimacy through time.”<sup>61</sup> In view of this argument, one would question whether the nature of the Kosovo Constitution allows for vital rulings by the Constitutional Court. It is quite hard to say whether the Kosovo Constitution is abstract enough to allow change over time. However, in order to question the issue of dynamism with respect to the Constitutional Court’s role in updating the Constitution, we approach the issue by analyzing Article 53 of the Constitution.

Article 53 of the Kosovo Constitution states “[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”<sup>62</sup> In light of Article 53, one can argue that the Constitutional Court’s rulings, with regard to the interpretation of the substantive rights and freedoms granted by the Constitution, must be kept in line with the European Court of Human Rights’ (ECtHR) case law. Therefore, the ECtHR’s case law is a mandatory reference for all interpretations by the Kosovan Constitutional Court as far as human rights are concerned.<sup>63</sup>

Based on Article 53 and the rigid character of the Kosovo Constitution, there are a number of consequences resulting from the Kosovan Constitutional Court’s role. First, the Constitutional Court is obliged to interpret the Constitution, not only on the basis of constitutional norms, but also on ECtHR case law. Hence, the Kosovo Constitution is not a closed constitution, rather it is fully open, and the Constitutional Court’s rulings must comply with the substance of ECtHR case law.<sup>64</sup>

---

<sup>61</sup> Ferreres-Comella, *supra* note 38, at 50.

<sup>62</sup> CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, art. 53, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

<sup>63</sup> For more information on how the European Court of Human Rights’ rulings are implemented at the national level, see generally Eur. Comm. for Democracy through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, 53d Sess., Doc. No. CDL-AD (2002) 34 (2002), available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)034-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)034-e.asp).

<sup>64</sup> See GYJKATA KUSHTETUESE [CONSTITUTIONAL COURT OF KOSOVO] Imer Ibrahim and 48 other former employees of the Kosovo Energy Corporation v. 49 Judgments of the Supreme Court of the Republic of Kosovo, June 23, 2010,

Second, given the rigid character of the Constitution, the Constitutional Court is given the task of adapting the Constitution to recent circumstances and societal affairs. In view of this problem, therefore, the Constitutional Court will uphold the “updated” character of the Constitution because it is based on the dynamism of ECtHR case law,<sup>65</sup> as required by Article 53 of the Kosovo Constitution. With this in mind, the Constitutional Court, given the rigid nature of the Constitution and its crucial role in upholding the up-to-the-minute character of the hard-to-change Constitution, will interpret it on basis of ECtHR case law, which is rather up-to-date.

Third, since the Constitutional Court’s rulings will stand in harmony with ECtHR case law, then, the rulings concerned will “europeanize” the Kosovo Constitution.<sup>66</sup> The ‘Strasbourgization’ of the Constitutional Court’s rulings, which stand as final and have constitutionally legal power, will produce a constitutional regime that is updated on the basis of ECtHR case law, whereas the legislature would find itself incapable of overturning the Constitutional Court’s rulings with an amendment, thus making it impossible for the legislature to challenge the Constitutional Court’s rulings. In effect, this results in the Kosovo Constitution being ‘factually’ amended in accordance with the ECtHR’s perspective.

## CONCLUSION

This article has discussed constitutional rigidity from the perspective of Kosovan constitutional law. In general, the article has argued that the Kosovo Constitution is a rigid one and that the amendment process is such that amendments are allowed only if an ethnically-consented double supermajority is achieved.

---

CASE NO. KI 40/09, *available at* [http://www.gjk-ks.org/repository/docs/ki\\_40\\_09\\_ang\\_vendimi\\_meritor.pdf](http://www.gjk-ks.org/repository/docs/ki_40_09_ang_vendimi_meritor.pdf).

<sup>65</sup> For more information on ECtHR case law and its recent trend of dynamism, *see generally* FRANCIS G. JACOBS ET AL., *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (5th ed., 2010).

<sup>66</sup> Some argue that ECtHR case law is a constitutional model for Europe, *see* STEVEN C. GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 171 (2006).

## *CONSTITUTIONAL RIGIDITY IN KOSOVO: SIGNIFICANCE, OUTCOMES, AND RATIONALE*

2

Initially, the article questioned the issue of constitutional rigidity from the perspective of scholarship. Then, the article embarked on the particulars of the Kosovo Constitution. The article described the manner in which a constitutional amendment can be initiated, arguing that this right is monopolized by institutional actors. In this context, the Kosovo Constitution's amendment process is open to political initiatives, but closed to the people.

The article then depicted the constitutional amendment adoption process. The article argued that the adoption of a constitutional amendment is closed to popular initiatives, and that direct popular participation in no way exists. Additionally, the amendment process requires a double supermajority in Parliament, namely, a supermajority of the entire Parliament and a supermajority of the MPs representing ethnic communities. Overall, the amendment process set by the Constitution is in some way counter-majoritarian, however, ethnically plural. The article shows that the Kosovo Constitution is a rather rigid one.

Subsequently, the article discussed the issue of constitutional rigidity in face of the model of separation of powers set by the Constitution, arguing that with the pure parliamentary model of governance that Kosovo has, constitutional rigidity will precondition the Constitutional Court to have power over the executive and legislative branches, whereas the rigidity as such would practically immobilize Parliament from putting a constitutional amendment in place easily.

Next, the article discussed the issue of constitutional rigidity in terms of human rights in Kosovo, arguing that constitutional rigidity will give the Constitutional Court authority to determine through its own case-law the substance of constitutional human rights, while allowing no legislative counterbalance in this regard.

Finally, the article questioned the issue of dynamism of the Kosovo Constitution in the context of the rigidity, arguing that the authority to update the Constitution rests with the Constitutional Court, whereas on basis of Article 53, the Court is preconditioned to 'Strasbourgize' its case law.

In conclusion, the Kosovo Constitution is rather rigid, and

this authoritatively strengthens the role and authority of the Constitutional Court. On basis of this, the Court will, through its own case law, adapt the Constitution so that it conforms with current societal needs and the balancing aims vis-à-vis the executive and legislative branches. In addition, despite the fact that constitutional rigidity in Kosovo has a counter-majoritarian nature, it might produce many counterbalancing results in terms of political or partisan interests.