

The partial transfer of Kosovo's state sovereignty to the EU and international organisations – constitutional aspects

Abstract

This article examines the issue of the partial transfer of Kosovo's sovereignty to international organisations, addressing the issue's constitutional considerations in respect of the Kosovo Constitution. We also consider here the issue of Kosovo's territorial integrity throughout the period of international administration from the UN until the declaration of independence and presently. What are the current possibilities that such a future transfer of state sovereignty might take place? And will constitutional changes and amendments take place to enable the partial transfer of Kosovo's sovereignty to the EU after the European integration process begins? Finally, we review practice in some countries that have gone through the European integration process, considering how they have adapted their constitutions regarding the process of the partial transfer of sovereignty to the EU. The article concludes that Kosovo has been set up as a state to be engaged in Euro-Atlantic integration processes and that, consequently, there are few constitutional barriers to the concessions of sovereignty required to allow it to play its part in such processes.

Keywords: EU, state sovereignty, constitutional changes, integration process

Introduction

After 1999, with the liberation of Kosovo from Serbia, the next part of the process of establishing a new constitutional settlement for Kosovo occurred under its status as a country under UN international administration (Resolution 1244, 1999). Until the final determination of Kosovo's status, the establishment of the Constitutional Framework for Provisional Self-Government in Kosovo, as a basis for establishing a constitutional and legal order, began after the international administration and this set up the Provisional Institutions of Self-Government in Kosovo (UNMIK, 2001). This laid the foundation for the establishment of the central institutions of government and the proclamation of laws by the Assembly of Kosovo, which constitutes the constitutional and legal order of Kosovo until such times as its final status of has been determined.

Following liberation and the deployment of the UN international administration, Kosovo has had a relationship with the EU which can be divided into two periods: the first from 1999 to 2008, up until the declaration of independence; and the second, after the declaration up to the present day. Compared to other countries in the region and specifically the western Balkans, Kosovo's relationship with the EU has a specif-

ic focus and the integration process is developing in a clear direction, in spite of Kosovo's sovereignty not being recognised by five EU member states (Zahiti, 2013). In this regard, as well as the recommendations of the European Commission Progress Reports published annually for Kosovo, the result is that there are developing requirements to meet in terms of political, economic, human and other criteria. All these are a means of improving the situation further and continuing the process of European integration up until its full realisation (Progress Reports for Kosovo, 2009-2016).

The first steps towards establishing a constitutional order in line with the EU *acquis* have been taken since the first drafting of laws by the Assembly of Kosovo (2002), in which the Rules of Procedure of the Government and Assembly of Kosovo, as the Provisional Institutions of Self Government (2001-2008), provided that 'The laws should be harmonised with the EU *acquis*' (Assembly and Government Rules of Procedure, 2001). From this point began the creation of the constitutional order in Kosovo located firmly within a context of a European integration process. This did not present any formal obligation for Kosovo because Kosovo had no agreement with the EU from which would stem the obligation to harmonise its legislation with the *acquis*, but it did so voluntarily and unilaterally both to express and to present its readiness for European integration.

Territorial integrity of the Republic of Kosovo

The violent dissolution of Yugoslavia led to a situation in which, regarding territorial borders:

On one side in these wars, the Serbs deny the legitimacy of the internal borders of Yugoslavia, while the rest of the Yugoslav republics accept the validity and their legitimacy. Or, to put it another way, some Yugoslav self-determination actors were opposed to the existing territorial status quo at the time of the fall of Yugoslavia and others were opposed to this change in the territorial status quo. (Hasani, 2003)

The context of Kosovo's territorial integrity is inter-related with historical and political developments at different times. After the 1999 liberation, Kosovo was placed under UN International Administration, with Kosovo's territorial integrity being guaranteed by UN Security Council Resolution 1244/99, and then with the Constitutional Framework for Provisional Self-Government in Kosovo. Furthermore, the Assembly of Kosovo, established on the basis of the Constitutional Framework for Provisional Self-Government in Kosovo, issued a Resolution on 5 May 2002 regarding territorial integrity, i.e. its resolution on the Protection of the Territorial Integrity of Kosovo.

As far as Resolution 1244/99 is concerned, this does not provide any clarity regarding the territorial integrity of Kosovo although, when it does refer to territory, it expressly defines the territorial integrity of FRY.¹ In this respect, the reference to the territorial integrity of FRY also includes Kosovo as an entity within the territorial

1 FRY – Federal Republic of Yugoslavia.

boundaries (Resolution 1244, 1999). In terms of finding a political solution to this problem, as a means towards solving the Kosovo crisis but by making reference to the territorial integrity of FRY, UN Security Council Resolution 1244/99, in Annex II, item 8, expressly makes provision for:

A political process towards the establishment of a temporary political agreement that would enable substantial self-government for Kosovo, taking full account of the Rambouillet Agreement and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia; and other countries in the region, as well as demilitarization of the Kosovo Liberation Army. Negotiations between the parties on a solution should not delay or impede the establishment of democratic self-governing institutions. (Resolution 1244, 1999)

In terms of Kosovo's territorial integrity, Resolution 1244's lack of a definition of the territorial integrity of Kosovo is, at least in part, related to the international presence and its assumption of the responsibilities of international security since it does expressly stipulate that:

The presence that will be established and will operate in Kosovo, will include: carrying out border surveillance tasks as required. (Resolution 1244, 1999)

From one perspective, the purpose of Resolution 1244/99 is not to prejudice the question of final status but to recognise an understanding that, until final status is determined, the boundaries of Kosovo and the territory within those borders should be recognised after two years, this being reflected more precisely in the Constitutional Framework for Provisional Self-Government in Kosovo.

This, in practice, means that:

In this case, the application of the principle of *Uti Possidetis* turns out that administrative boundaries will be transformed into international borders in the full sense of the word. (Shaw, 2008)

The Badinter Commission did not deal with the issue of Kosovo, but it can be indirectly understood, based on the precedent it set upon the break-up of Yugoslavia, that the internal frontiers of the federal state are the international borders of the states that emerged from Yugoslavia and declared independence (Badinter, 1992). The same situation ought to apply to the proclamation of the Declaration of Independence of Kosovo, implying that the administrative boundaries, at the time of the former Yugoslav federal state, were transformed into internationally-recognisable state borders at the moment of Kosovo's declaration of independence.

As opposed to UN Security Council Resolution 1244/99, the Constitutional Framework for Provisional Self-Government in Kosovo (2001) has a precise terminology when defining the territorial integrity of Kosovo, even though the Constitutional Framework is based on 1244/99, since the general provisions expressly stipulate that:

Kosovo is an inseparable territory throughout which exercises their responsibilities the Provisional Institutions of Self-Government established under this Constitutional Framework for Provisional Self-Government. (UNMIK, 2001)

The Constitutional Framework for Provisional Self-Government in Kosovo also addresses the issue of territory by referring to municipalities as territorial units, defining that:

Kosovo is composed of municipalities, which are the basic territorial units of local self-government with responsibilities as set forth in UNMIK legislation in force on local self-government and municipalities in Kosovo. (UNMIK, 2001)

Apart from these two acts, Resolution 1244/99 and the Constitutional Charter for Provisional Self-Government of Kosovo, in reference to the question of territorial integrity, and specifically the territorial integrity of Kosovo, is also the Resolution on the Protection of Territorial Integrity of Kosovo adopted by the Assembly of Kosovo. The Kosovo Assembly, through this resolution, opposed the demarcation agreement reached between the former Federal Republic of Yugoslavia and Macedonia on 23 February 2001, in which Kosovo resolved to lose some 2 400 hectares of land, the private property of Kosovo's citizens. The international presence established in Kosovo on the basis of Resolution 1244/99 did not take any action on this, even though it was obliged under Resolution 1244/99 to do so. Among other things, the Assembly's Resolution requested that:

UNMIK, SRSG,² KFOR³ forces, Government and Kosovo President, take immediate measures to protect the borders of Kosovo, the free movement of citizens of Kosovo, throughout its territory, as well as the avoidance and rejection of the consequences of the so-called Agreement on the demarcation line between the FYR Macedonia⁴ and the Serbian Government without the participation of international and local authorities. (Assembly Resolution 2002).

The Comprehensive Proposal for the Kosovo Status Settlement, as far as territory is concerned, was determined that Kosovo would control its borders, including within the security sector, where it is stated that:

Except where specified in this solution, Kosovo will have authority over law enforcement, security, justice, public security, intelligence, civilian emergency and border control in its territory. (Comprehensive Proposal, 2007)

- 2 SRSG – Special Representative of the UN Secretary General in Kosovo.
- 3 KFOR – The Kosovo Force (KFOR) is a force led by the North Atlantic Treaty Organization, the international peacekeeping force responsible for creating a safe environment in Kosovo.
- 4 FYR Macedonia – The Former Yugoslav Republic of Macedonia remains currently the name of the internationally-recognised Macedonian state.

Control of the borders of the state territory constitutes a sovereign territorial right for the existence of the state, whereby the concept of the territorial integrity of a state, as a principle:

Prohibits the breaking of states, violation or use of force against their territory, interference and interference with internal affairs and is closely related to the state as a legal subject whose main objective is to secure its perennial existence in a certain territory whose boundaries have been established in accordance with International Law. (Abdelhamid, 2012)

Aspects of the territorial integrity of Kosovo were also encapsulated in the Declaration of Independence of Kosovo, which expressly stipulates that:

With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbours. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations. (Declaration of Independence, 2008; paragraph 8)

From the content of this paragraph of the Declaration of Independence of Kosovo, it is noticed that Kosovo will respect the principles of international instruments such as the UN Charter and the Helsinki Final Act. In exercising the self-determination of the people of Kosovo through its representatives, and in fact and in law, this implies that the right of the Serbian state to exercise territorial sovereignty on the territory of Kosovo has been lost (Margaret, 2003).

The most senior legal and political act, the Constitution of the Republic of Kosovo (2008), also defines the principle of territorial integrity as a fundamental principle of state subjectivity. The Constitution of the Republic of Kosovo defines its territorial integrity, expressly stipulating that:

The Republic of Kosovo shall have no territorial claims against, and shall seek no union with, any State or part of any State. (Constitution, 2008; Article 1(3))

Regarding the protection of the territorial integrity of the Republic of Kosovo, and therefore also the basis of state sovereignty, the Constitution of the Republic of Kosovo expressly states that:

The sovereignty and territorial integrity of the Republic of Kosovo is intact, inalienable, indivisible and protected by all means provided in this Constitution and the law. (Constitution, 2008; Article 2(2))

This means that:

No state body, political organization, group or individual can violate the sovereignty of the population, nor impose power against the freely-expressed will of the citizens. (Hasani and Cukalovic, 2013)

Borders with states directly neighbouring the Republic of Kosovo are guarded and controlled by the competent authorities. For this, the Assembly of the Republic of Kosovo has adopted its Law on the Control and Supervision of the State Border, which stipulates that:

Border control is within the competence of the Ministry of Internal Affairs. Border control work is carried out by the Border Police within the Police of the Republic of Kosovo. (Law 04 / L-072)

The constitutional possibilities of transferring Kosovo's sovereignty to the EU

Regarding the basic conditions for accession to the EU which a state must fulfil, the Treaty on European Union provides for three basic conditions, which are: to be a state; to be a European state; and to respect the principles referred to in Article 6 Paragraph 1 of the Treaty on European Union, which stipulates that:

The EU relies on the principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law; these principles are common to all Member States. (Treaty on European Union, Article 49 and Article 6, paragraph 1)

After the fulfillment of these three basic conditions, the procedure begins with:

The candidature declaration addressed to the Council, which is unanimously declared to be a candidate following the opinion of the Commission and the opinion in accordance with the European Parliament by a majority of its members. (Jean Paul, 2010)

State membership of international organisations is also the subject of constitutional regulation; in constitutional terms, states with their constitutions determine the particularities of membership and, in particular, the transfer of state sovereignty. The Republic of Kosovo, as the newest state in Europe and its newest constitution, has defined the issue of the transfer of state sovereignty generally in terms of membership of international organizations, but there is no specific provision referring to membership of the EU.

Nevertheless, the Declaration of Independence sets out the intention of the Republic of Kosovo to join international organisations, and especially the EU, by stating that:

For reasons of culture, geography and history, we believe our future lies with the European family. We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration. (Declaration of Independence, 2008; paragraph 6)

The Constitution of the Republic of Kosovo regulates the issue of the transfer of state sovereignty to international organisations by expressly stipulating that:

The Republic of Kosovo may on the basis of ratified international agreements delegate state powers for specific matters to international organizations. (Constitution, 2008; Article 20(1))

Such a definition is generalised and abstract, but nevertheless the term 'certain issues' can be understood in the sense of future membership of the EU, NATO and other organisations in which Kosovo may transfer state competencies, precisely for certain issues, and indeed it has the power do so under this same provision without requiring additions or other constitutional changes. Regarding the way in which certain state competences will be transferred to international organisations, the Constitution of the Republic of Kosovo stipulates that:

If a membership agreement ratified by the Republic of Kosovo for its participation in an international organization explicitly contemplates the direct applicability of the norms of that organization, then the law ratifying the international agreement must be adopted by two thirds (2/3) vote of all deputies of the Assembly, and those norms have superiority over the laws of the Republic of Kosovo. (Constitution, 2008; Article 20(2))

Comparing here with the way in which the Republic of Albania's membership of international organisations has been regulated, the basic provisions of its Constitution refer to the obligation to implement international law, setting out that:

The Republic of Albania applies international law that is binding upon it. (Constitution, 1998; Article 5)

In contrast, regarding the transfer of state powers to international organisations, the Constitution regulates this issue under a heading referring to international agreements, stipulating expressly that:

The Republic of Albania delegates to international organizations state powers for specific issues on the basis of international agreements. (Constitution, 1998; Article 123(1))

The content of the text of this provision is the same as the content of the text of the provision of the Constitution of the Republic of Kosovo referring to the same issue, i.e. the transfer of state competences to international organisations, except in that in the Constitution of the Republic of Kosovo the power to delegate is permissive while it is mandatory in that of the Republic of Albania; and there is also a difference in 'specific matters' in the Constitution of Kosovo while the Constitution of Albania refers to 'certain issues' although in both cases this can be interpreted in terms of the transfer of competencies to the EU and NATO.

The Constitution of the Republic of Serbia refers to generally-accepted international law, and in particular to treaties when it comes to international organisations, stipulating that:

The foreign policy of the Republic of Serbia shall be based on generally accepted principles and rules of international law. (Constitution, 2006; Article 16)

The Constitution only indirectly refers to membership of international organisations by stipulating that the rules of international law and the ratification of treaties are part of the juridical system of the Republic of Serbia and are directly applicable, laying down that:

Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. (Constitution, 2006; Article 16)

Compared with the constitutional definitions contained in the Republic of Albania and the Republic of Kosovo documents, it is noticeable that there is a difference in terms of the way in which the membership of international organisations is regulated, most notably in connection with the term ‘transfer of/transfers to state powers’, particularly the transfer of state sovereignty to international organisations.

In central European states, their constitutions apply a completely different approach to the question of membership of international organisations. The model of the Slovak Republic is one of the most specific models in terms of membership of international organisations, specifically the EU. The Constitution of the Slovak Republic, adopted in 2001, regulates the issue of membership of the Slovak Republic of the EU quite expressly:

The Slovak Republic, through an international treaty, which has been ratified and proclaimed in the manner prescribed by law, or on the basis of such treaty, shall transfer the exercise of a part of its powers to the European Communities and to the European Union. Legally binding acts of the European Communities and the European Union will have priority over the laws of the Slovak Republic. The transposition of mandatory legal acts requiring enforcement shall be effected by a law or regulation of the Government pursuant to Article 120, paragraph 2.⁵

Such a constitutional regulation in detail regarding EU membership does not come up in the constitutional arrangements of other European states regarding the European integration process.

The practice of the Czech Republic as regards the transfer of state sovereignty to international organisations is a special model but, in comparison with the Republic of Slovakia, it turns out that there are some similarities with regard to preparations and changes in respect of EU membership, the main difference being that the Constitution of the Czech Republic more widely addresses ‘international organisations’ while

5 See the Constitution of the Slovak Republic (2001), Article 7, paragraph 2, at: <https://www.prезидент.sk/upload-files/46422.pdf>. Article 120, paragraph 2, provides that: ‘If provided by law, the Government is also empowered to issue regulations for the implementation of the Agreement establishing relations between the European Communities and their Member States on the one hand and the Slovak Republic on the other, and in the implementation of international treaties under Article 7, paragraph 2.’

the other difference is that, for constitutional changes, a more complicated procedure is required under which approval by the two chambers of parliament is required (Albi, 2005).

Regarding the model of constitutional regulation applied under the Constitution of the Czech Republic in terms of membership, i.e. the participation of the Czech state in international organisations, which differs from the Slovak model, this was achieved through an amendment to Article 10 of the Constitution. This expressly stipulates that:

Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution. (Constitution, 1993; Article 10a(1))

It is understood that the reference is general to international organisations, approximating to the models of constitutional regulation in the Republic of Kosovo, the Republic of Albania and the Republic of Serbia. The Accession Treaty requires the Czech Parliament's consent, as well as consent through a referendum, with the Constitution of the Czech Republic requiring that:

The ratification of treaty under paragraph 1 requires the consent of Parliament, unless constitutional act provides that such ratification requires the approval obtained in a referendum. (Constitution, 1993; Article 10a(2))

Conclusion

The constitutional definitions in the Constitution of Kosovo as regards the process of the membership of international organisations are two dimensional, reflecting the historical-political circumstances of the adoption of the Constitution and the relationship between these and the creation of an independent state of Kosovo. Consequently, such a formulation of constitutional provisions aims to facilitate the membership of international organisations while defining state sovereignty in a process in which:

The aim was to ensure that [state sovereignty] was defined in a way that allows the transfer of sovereign powers to international organizations. (Morina, 2016)

In contrast, in the strictest sense of Article 2(2) of the Constitution of Kosovo, the meaning of sovereignty appears to be non-transferable and such a definition of state sovereignty could appear to have an absolute meaning. However, in terms of the European integration process, the lack of a concrete provision regarding the EU does not prevent integration because there is a clause in the Kosovo Constitution referring to the transfer of state sovereignty (under Article 20).

Consequently, the present Constitution does not have any obstacles in terms of Kosovo's integration into the EU because, furthermore, a definition of the integration process is also proclaimed in the Preamble, which states the new state's firm direction is:

With the intention of having the state of Kosovo fully participating in the processes of Euro-Atlantic integration. (Constitution, 2008)

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