

The Constitution of Kosovo or Ahtisaari?

A Qualitative Case-Study on the Process of Constitution-
Making

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Abstract

This thesis focuses on the process of constitution-making in Kosovo. It aims at giving an insight into the process and the negotiations leading up to the Constitution of the Republic of Kosovo, and the impact the international community has had on this. The purpose is to use the existing consociational theory of Arend Lijphart, as a template when analyzing this specific case. I therefore focus on the following four consociational key-notions when analyzing the process: *power-sharing*, *presidential vs. parliamentary systems*, *decentralization and electoral system*. In addition, I also use negotiation and mediation theories to analyze and explain the negotiations leading up to the Comprehensive Proposal on the Kosovo Status Settlement and the Constitution. By conducting interviews with a variety of persons associated with the constitution-making, as well as analyzing text-material, I hope that my analysis will give a small insight into the process of this complicated process. In the end, I argue that this constitution was formed under very specific circumstances, leading to the conclusion that its creation was a result of intense negotiations, and highly influenced by the international community. There were neither viable options to this specific constitution. There are however areas where the Kosovo leadership has decided on the outcome. The role of the President is one such area.

Key words: Kosovo, constitution-making, consociational theory, negotiations, international influence

Words: 9920

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1 Introduction

In November 2005, Marti Ahtisaari – the very man who got a peace signature from Milosevic during the war in 1999 - was appointed as a Special Envoy for the future status process for Kosovo. His mission was to find a suitable solution of Kosovo, which had been under UN-rule since 1999. The economy of Kosovo was deteriorating each year, due to its unclear status which in turn led to political instability. A final status was in other words needed in order to get a peaceful and stable region, working towards European integration. For over a year Marti Ahtisaari tried to find a suitable solution, by mediating (together with the Contact Group¹) in the so-called Vienna negotiations with Serbia (who was willing to give autonomy within Serbia) and the Kosovo leadership (who would accept nothing less than independence). Finally, in March 2007, Ahtisaari finished his work after some progress, but also deadlocks in the negotiations, by providing a report on the future status of Kosovo which outlined independence, supervised by the international community, for Kosovo. In this document Ahtisaari outlined some constitutional provisions, on which the Kosovo constitution should be based upon. He claimed that no other option was viable (Report of the Special Envoy of the Secretary-General on Kosovo's future status, 2007, 26 March). This proposal was blocked by Russia, in the UN Security Council, which in turn led to the continuity of Serbian and Kosovo negotiations for nearly six months. When these negotiations broke down, Kosovo declared independence, on 17 February 2008. By this time, the coordinated work of the Constitutional Commission of Kosovo, had already been working on forming a Constitution together with foreign advisors, since April 2007 (Manaj, 2008). It is against this background that this story begins.

1.1 Purpose and Problem Definition

This study will not focus on the political situation of Kosovo. I will not deal with the conflict or with the NATO intervention. The purpose of this thesis is to look into the sole issue of the newly formed constitution and hopefully grasp a part of the truth behind its process of the making. I want to know the reasons behind

¹ The Contact Group consisted of France, Germany, Italy, Russia, the UK and the United States (Weller, 2008: 661).

some of the choices in the constitution, which will determine the newly formed state's future. This thesis' key questions, which I will try to answer, are thus:

- *Why did the Kosovo leadership choose this constitution?*
- *What was significant for the process of negotiations leading up to this constitution?*
- *What kind of an impact did the international community have in the shaping of the constitution?*

The reason to why I have chosen this issue is first and foremost, that I find this matter very interesting and I was craving for more knowledge on this specific process of constitution making. I also realized, after reading about theories of constitution-making in post-conflict societies (such as Arend Lijphart's), that one now has a golden opportunity to apply such thoughts into practice (see Lijphart, 2002: 39). I thus noticed that there was a gap that needed to be filled, by trying to see whether the case of Kosovo could be applied on Lijphart's consociational theory (See Esaiasson et al., 2004: 29). The purpose of my research is thus not the theory but the case. By using and applying Lijphart's thoughts I can simplify the concepts and issues on which to focus, during my research. I realized quickly, however, that the constitutional process is deeply interconnected with the Vienna negotiations and the Ahtisaari Comprehensive Proposal on the future status of Kosovo. Therefore, negotiation theories and mediation theories also needs to be applied to this research.

I believe that I have the advantage of being the first researcher to apply these concepts and ideas on the specific case of Kosovo, since the Constitution of Kosovo has not been subject to any prior research, due to the fact that the Constitution was formed and approved just a few months before the writing of this thesis. I therefore think that this subject is a valid and a very interesting research topic. It should however be said that I do not strive to find the entire truth. Neither do I think that this is possible. The scope of this thesis allows only for one part of this.

2 Theory

This thesis is an empirical one, in the sense that it tries to explain and understand the reality (Lundquist, 1993: 81). My aim is to answer the questions outlined in the previous chapter by applying and using existing theories on this specific case. To start with, we must identify the characteristics of consociational theory to see if we can apply them on the constitution of Kosovo. Lijphart's consociational theory works as a direction-guide for constitution-making in post-conflict societies with minority divisions. This fits very well in to the case of Kosovo. Lijphart uses four different characteristics that are useful for constitutional designs in divided societies. First there should be a power sharing amongst the different groups or nationalities. Second, parliamentary systems are preferable to presidential systems in order to secure power sharing, since leaving the power in a number of hands rather than in just one. Third, decentralization is important to secure the participation and satisfaction of minorities. Last, proportional electoral systems are preferable to majoritarian methods where the "winner takes it all" (Lijphart, 2002: 47-54). As we shall see later, these four concepts fit in on the case of Kosovo quite well.

I will also be using negotiation theory when trying to explain why some of the decisions were made by the Kosovo leadership. The process of Constitution-making is very interconnected with the process of almost one-year negotiations between the Kosovo leadership and Serbia, mediated by the Special Envoy of the Secretary General, Marti Ahtisaari and the Contact-Group, followed by the publication of the Ahtisaari Comprehensive Proposal and further negotiations between Serbia and Kosovo (see Weller, 2008). Therefore this process also needs to be analyzed according to the theories of mediation and multi-party negotiations. I will on the one hand treat the process of negotiations as mediation by the international community. According to this theory, Ahtisaari could be seen as getting his mediation strength from the fact that he was a Special Envoy for the Secretary General. This means that he represents the UN, which has a legitimate power to mediate even though he may not have the coercive power or the power to reward the conflicting sides (Carnevale, 2002: 28). He did however have the power to produce a Comprehensive Proposal for the final status of Kosovo, after the parties had reached a deadlock in the negotiations. The Contact group, on the other hand get their power from the fact that they have coercive power (USA), the power to reward (the EU-countries can give carrots by drawing the parties closer to the EU) and the fact that Russia has relational power with Serbia (and was in fact present as a form of guarantee to the Serbs that nothing would pass the Security Council without their consent) (Carnevale, 2002: 29-30).

On the other hand, I will also treat the negotiations as a form of multiparty negotiations. Hopmann defines multilateral negotiations as follows: "Multilateral

negotiations involve three or more essentially independent parties with at least three different sets of interests and preferences about the outcome” (Hopmann, 1996: 244). The negotiations can be characterized as multilateral negotiations, since all the involved actors had interests of their own when negotiating on the outcome. For Kosovo it was independence and the formation of a new state, for Serbia the national sovereignty and the preservation of land were at stake. For UN, USA and the EU-countries the peace and stability of the region and the influence in the region made the negotiations important, especially since there had been open dissatisfaction with the slow-going process among the people in Kosovo (Weller, 2008: 669). For Russia it was important to support and protect their allies of Serbia by guaranteeing that nothing would pass the Security Council without their consent, while at the same time showing its importance in world politics.

The negotiations taken from the Kosovo leadership viewpoint can be explained as follows. On one hand, the Kosovo delegation negotiated between themselves, domestically. At the next level, they conducted negotiations with the Serbian counterpart on issues, such as decentralization, etc. At the third level, however, they also conducted negotiations with the international community, about an acceptable outcome for the international community, and about viable outcomes – e.g., Kosovo was advised by the USA to negotiate generously in the field of minority rights and decentralization, if it wished to see the goodwill of the international community when considering recognition of independence (Weller, 2008: 669). This leaves us to think of the negotiations - from a Kosovo-viewpoint - in what Putnam calls two-level games (see Putnam, 1988). During negotiations on Kosovo-status there are however these three levels. During the negotiations among the Constitutional Commission on the Constitution itself, a regular two-level game is applied, where they negotiate domestically and internationally (see Starkey et al., 2005: 102).

Since I am using Lijphart’s consociational theory and negotiation theory to try to explain my case, my thesis will mainly have the character of a theory-consuming study. This implies that the case will be in the focus, and that existing theories on that given field are used to explain the events of this specific case (Esaiasson et al., 2002: 40). One could however claim that my study will have some traits of an empirical “pilot case-study”, since this will be the first study conducted on the specific field (Esaiasson et al., 2005: 34).

The ontology of this study may be defined as realistic, in the sense that my assumption throughout this thesis can be characterized as one where the world exists independently of our knowledge of it. This means that there is a “truth out there” that is independent from the viewer (Lundquist, 1993: 67). From an epistemological viewpoint, my study will be realistic in the sense that we can make causal statements about the reality, but this reality may not always be observable due to deeply hidden structures that creates a biased illustration of the reality. Marsh and Furlong claims that:

“First while social phenomena exist independently of our interpretation of them, our interpretation/understanding of them affects outcomes. So, structures do not determine;

rather they constrain and facilitate. Social science involves the study of reflexive agents who interpret and change structures” (Marsh – Furlong, 2002: 31).

However, even if we can’t always observe and explain these structures, it is important to try to reveal and touch upon these issues, yet if knowing that one may never reach to a definite answer.

The interplay between agency and structure is important when dealing with constitution-making, especially in our case. We have to bear in mind that the very delicate post-conflict political situation in Kosovo and the constraints that the Kosovar leadership and the constitution commission felt from the international community, did in fact steer them into a given direction. However one must not neglect the impact of agents, since actors formulate their strategies on the basis of the knowledge of these structures. These strategies and choices will in fact have implications on the outcome. This author thus believes that action only takes place within a, already pre-existing, structured context. The actor then chooses the best strategy at hand, given these structural contexts (McAnulla, 2002: 280).

2.1 Preconceptions

As always, when one enters the process of writing a thesis on political science, one should think about one’s own preconceptions and enlighten the reader on the possible impact these may have on the research and on the results (Bjereld et al., 2002: 14). Since I myself originate from Kosovo, I will throughout this thesis have in mind the notion of intersubjectivity. I believe however that the nature of my research allows me to conduct this research without leaving doubts in the reader’s mind about objectivity. My research is focusing on the process of the constitution, and on the reasons behind the different choices. It will not in any way focus on the Nato-led intervention nor the recognition of Kosovo as a sovereign state. I therefore believe that this study will be conducted in a most scientific way, without many normative traits.

My preconceptions on the specific constitution, at the time when I chose this theme, were nearly none. I did not have information about the constitution or about its process, since it was yet to be adopted and approved when I decided on the topic. All I knew was that it was going to be approved and published in the near future, and I was under the impression that the international community had played its role in this process.

3 Method and Material

3.1 Method

The nature of this thesis will be a qualitative one, meaning that the techniques I will be using are not statistical or quantifiable, but instead context-related with an aim of understanding the specific case as opposed to making generalizations about the reality based upon a huge amount of quantifiable data (Devine, 2002: 197). I am well aware of the problems with case-studies and that far-reaching conclusions and generalizations can become problematic, since analyzing only one case (Esaiasson et al., 2005: 120). This thesis will however have some comparative traits as well, when entering specific issues, such as the president's role. Some of the comparisons are made in order for the reader to better grasp the nature of this constitution, but also to show impacts on specific matters, from the international community. My main task is however not to make any far-reaching generalizations about the theory or any other phenomenon. Instead I am looking at the specific case, by using existing theories to help me simplify the reality. The qualitative method is thus perfectly suitable for the nature of my research.

Since this thesis covers a very new field of events, the method which I chose to operate in was limited text-analysis based on previous written material, and a form in-depth interviews, or intensive interviews, with the similarities of a journalistic interview where I tried to get as much information about the process as possible from the interviewee. Esaiasson et al. claim that these kind of interviews are appropriate in situations where we – “the scientists” – have very limited knowledge about the subject of the research (Esaiasson et al., 2005: 280). This seems to be precisely the case with this study, since the constitution of Kosovo was formed and approved just recently, without much transparency or insight into the process (Ceku, 2008).

“In depth interviewing is based on an interview guide, open-ended questions and informal probing to facilitate a discussion of issues in a semi-structured or unstructured manner” (Devine, 2002: 198). The advantage of having open-ended questions has allowed me to get as much information as possible, by letting the interviewee talk about a set of topics. This of course means that I have not been able to interview many informants, but neither has that been my aim since there are only a limited number of people involved in the process and which had relevant information about the process of the constitution. One of the interviews have been conducted through e-mail, where I have asked the informant to talk and explain as much as he or she can about a series of events.

The purpose of my interviews, especially with the interviewees who were a part of the Constitutional Commission, was to get explanations and motives for their decisions and actions. This is something that Esaiasson et al. calls motive-analysis. This aims at exposing the conscious considerations an actor makes prior to a decision (Esaiasson et al., 2005: 317). By doing so one can understand why the actor acts as he/she does. The actor in this case will be the Kosovo leadership, represented by the Constitutional Commission, which in turn is represented by the interviewee's that were a part of this Commission. Esaiasson et al. further split these two conscious motives into two categories: the situation-adapted motives, and the generally applicable ones (Esaiasson et al., 2005: 321). The generally applicable motive that will be considered throughout this thesis is recognition of independence, since this was considered to be the fundamental requirement for independence. The second motive is to have a constitution that is in line with EU-standards, for future entering and thereby security from Serbia, which also ends up meaning independence from Serbia. These two motives are here believed to set the limitations and to act as a carrot for the formation of the Constitution. The Kosovo leadership knew how important recognition of their self-declared independence would be, since Kosovo had already declared itself a republic of Yugoslavia in the early 1990:s, but unsuccessfully so since no one recognized this declaration.

I have tried to interview a variety of persons, ranging from the political sector, to the civil society and intellectuals. I have however not been able to conduct an interview with any minority representative who has been a part of the process. I regret this but my hopes are that the interviews, since ranging from the political sector to the educational and civil society, will represent a somewhat broad spectra and represent one part of the truth, although not the entire.

The problems that I experienced during my two-week stay in Prishtina (the capital of Kosovo) were of the time-limitation nature. The second problem I experienced, well before my departure, was that the normal type of approaching a person you want to interview does not work in Kosovo. Esaiasson et al. claim that the best way to approach a person you wish to interview is to write in advance and ask them if you could conduct an interview (Esaiasson et al., 2005: 293). The politicians in Kosovo do however not plan many things far in advance, due to the very dynamic political situation in Kosovo. I was therefore not able to set a date for the interviews, but had to call the persons on a daily basis to see if they had the time to accept me for an interview.

Another problem discussed in Esaiasson et al. is the effect the interviewer might have on the interviewee. This can in fact lead to the interviewee correcting their answers to what they think the interviewer wants them to answer (Esaiasson et al., 2005: 262). This is of course not something that the interviewee can affect other than choosing persons from a wide range of environments to interview. Neither is it possible, from this author's perspective, to get totally objective interviews that reflects the truth. I can only acknowledge that there is a risk, but I have also deliberately tried to speak as little as possible during my interviews, without typical questions, but more discussion topics of the nature: "could you explain", "tell me about" and "why" – questions.

3.1.1 Operationalization

First, I would like to raise one issue which Lijphart himself acknowledges, namely the problems of definition and measurement. He mentions that the problem for which consociational democracy have received criticism about is that its basic characteristics are inherently stretchable and can assume a large number of different institutional forms:

“For instance, the most straightforward form of executive power-sharing is that of a grand coalition cabinet of ethnic parties in a parliamentary system, as in Malaysia and South Africa. Another possibility is a grand coalition in cabinets, defined not in partisan terms but more broadly in terms of the representation of linguistic or other groups in a pre-determined ratio, such as the equal representation of Dutch-speakers and French-speakers in Belgian cabinets...The above examples are all parliamentary systems, but grand coalitions can also occur in non-parliamentary systems” (Lijphart, 2002: 46-47).

We should however not dismiss the theory only because of its non-rigidity. In fact other theories and perspectives in political science, such as the rational-choice perspective, can be accused of the same conceptual stretching. This does not mean that the theory is a “one-size fits all solution” that doesn’t tell us much about the reality. “Conceptual stretching is an error to be avoided – but so is conceptual rigidity and conceptual timidity” (Lijphart, 2002: 47).

The next step is to apply Lijphart’s concepts on the constitution of Kosovo, to “simplify the reality” which will steer me in a certain direction in the following work of my interviews. To do so I shall very roughly explain and apply the concepts of consociational democracy on this case. The first principle that Lijphard uses is the notion of *power-sharing*. He defines power-sharing as “the participation of the representatives of all significant groups in political decision-making, especially at the executive level...” (Lijphart, 2002: 39). This is important since it is very unlikely that a minority will be willing to accept a system that doesn’t give them a chance of representation, but only offers majority representation. The Constitution of Kosovo was designed in a way which will include the minorities (or communities, as they are referred to in the constitution) at all levels. The assembly (parliament) has 120 seats, of which 20 are reserved for representation of communities that are not in the majority of Kosovo, if the number of seats won by each community is less than the number guaranteed² (Constitution of the Republic of Kosovo, Art. 64.2). During the first two elections (this mandate and the next), these numbers are enforced further by guaranteeing these communities the same number of seats, but adding to it the seats gained through elections as an addition to the number of seats reserved (Constitution of

² 10 seats are reserved for the parties, coalitions, citizens’ initiatives and independent candidates representing the Kosovo Serb Community and 10 seats are allocated to other Communities with the number guaranteed as follows: one seat; the Ashkali community, one seat; the Egyptian community, one seat; the Roma community; one additional seat will be awarded to either the Roma, Egyptian or Ashkali community with the highest overall votes, three seats; the Bosnian community, two seats; the Turkish community and two seats; the Goran community – if the number of seats won by each community is less than the number guaranteed.

the Republic of Kosovo, Art. 148.1). The constitution also states that one minister shall be chosen from the Kosovo Serb Community and one from another non-majority Community in Kosovo.

The second principle that Lijphart uses is that *parliamentarian* systems are more appropriate than *presidential*, in divided societies. This is also to ensure representation between different groups, since presidential systems often creates a winner-take-all situation. Lijphart defines the problem with presidential systems as being one where the president is directly elected by the voters and is not dependent on the confidence of the legislature, whereas the executive is selected by the legislature and is dependent on its confidence, in parliamentary systems (Lijphart, 2002: 49). The Constitution of Kosovo does not outline which system the state is going to have. However, it gives the president of Kosovo a number of powers which are not common in parliamentary systems, as we shall see later. But the fact still remains that the government is selected by the parliament, as is the president. The Government has a cabinet consisting of 12 ministers. This means that it still fits into the consociational model outlined by Lijphart.

The third principle outlined in consociational theory is the notion of *decentralization*. “Furthermore, in order to be able to make the federal dividing lines coincide as much as possible with the ethnic boundaries, consociational theory recommends a federalism with relatively many and relatively small constituent units” (Lijphart, 2002: 51). Since Kosovo is such a small country (10.900 sq. km), federalism was never a viable form of decentralization. Instead the constitution offers the municipalities a high degree of local self-governance and they are allowed to co-operate cross-boundaries, with other municipalities (Constitution of the Rep. of Kosovo, Art. 124).

Last, *proportional* electoral systems are preferable to *majoritarian* methods, since the former dictates a form of proportional representation (Lijphart, 2002: 52). The electoral system of Kosovo is a proportional one as outlined in the constitution (Constitution of the Rep. of Kosovo, Art. 64.1). The Constitution of Kosovo thus fits in to the consociational model for divided societies outlined by Lijphart. I have deliberately applied (although somewhat roughly) these four concepts on the case of Kosovo, to prove that this case fits with Lijphart’s model, in order to be able to have a template on which I can concentrate, in the remaining part of my study.

3.2 Material

As this research-topic covers a very new (and somewhat closed) set of events, there is not much written about the constitution-process. I realized this very quickly and therefore decided to travel to Kosovo, in order to collect information and conduct interviews. There is however a considerable amount of research written about constitution-design in post-conflict situations. I deliberately chose to focus on Lijphart’s consociational model when I realized that the nature of the constitution formed in Kosovo had many of the traits that Lijphart recommended.

I therefore decided to base my research around many of the key-concepts that Lijphart brings up. There are however other secondary sources written on Kosovo and its status. One such very helpful paper is Marc Weller's article that covers the Vienna negotiations, leading up to the Comprehensive Proposal. Another such paper prepared by the Center for Strategic and International Studies in 2003 outlines a roadmap for a final status settlement leading to a fully sovereign and independent Kosovo (Bugajski – Hitcher – Williams, 2003: 1). Other secondary sources that are worth mentioning are the news-articles which I managed to collect about the constitution process from the news-agency "Kosova Live" and also articles from The Economist, etc.

The first-hand material or primary sources that I have managed to collect can be classified into documents and interviews. The documents that I have mainly used in my research are; *"The Constitutional Framework for Provisional Self-Government in Kosovo"* – this was the "constitutional" document used up until 15 of June 2008, recognizing UN as the highest authority in Kosovo. The *Comprehensive Proposal for the Kosovo Status Settlement* has been used in a comparative matter to see how much this document resembles the final Constitution and thus what constraints the Kosovo leaders and its Constitutional Commission had from the international community. *The Constitution of the Republic of Kosovo* has of course been used in a frequent manner as this is the basis of my analysis. I have however also used other constitutions, such as the French Constitution when considering the role of the president in Kosovo, as a comparative example.

I have conducted 4 interviews of which one was conducted through e-mail. The interviewees were:

- Rame Manaj from the Kosovo Democratic Movement (LDK) – Deputy Prime Minister of Kosovo and member of the Constitutional Commission.
- Hajrullah Ceku, Project Coordinator – Forum 2015: Kosovo Foundation for Open Society.
- Dr. Visar Morina (e-mail interview) – Political Adviser to the Minister for Public Services, Dr. Arsim Bajrami (member of the Constitutional Commission). Former lecturer on the University of Pristina.
- Besnike Salihu – Journalist for the news-agency Kosova Live.

The following chapters will analyze the process of constitution-making and the reasons behind some of the choices. The next chapter will start by analyzing the notion of power-sharing. The following chapter will deal with the presidential vs. parliamentary debate. Chapter six will analyze the decentralization, and the reasons behind some of the choices made. Chapter seven will touch upon the electoral system, although this chapter probably is the least developed one, since the electoral law had yet to be published when I conducted my interviews. In the last chapter I will conclude this thesis by discussing my results and giving my own thoughts on the matter. It should once again be highlighted that these four consociational concepts will be guiding my work, but not restricting it, meaning that I will not limit myself to dealing only with these concepts. These will however act as a base.

4 Power-Sharing – Sharing in a Divided Society

The notion of power-sharing is something that shines throughout the entire Constitution of Kosovo. Article 4.1 states that Kosovo is a democratic republic based on the principle of separation of powers (Constitution of Rep. of Kosovo, Art. 4.1). As I have outlined earlier, the attempt to include minorities (communities) is something that is very characteristic throughout this Constitution. There are reserved seats for the minorities in the Assembly (parliament), as well as in the Cabinet. At the local level, the municipalities with residents adding up to at least 10 per cent of the population must have a post of Deputy President of the Municipal Assembly, for a representative of these communities (Constitution of Rep. of Kosovo, Art. 62.1). In addition, posts throughout the range of the state are regulated to include the Serb community and other communities, such as judges, police officer's etc. In other words, the inclusion of the communities is regulated and visible throughout the Constitution. How did this then, come about?

First of all, the so-called Ahtisaari proposal outlined some constitutional provisions, which the Constitution of Kosovo should include but not be limited to. The basic characters of these provisions were the protection of minorities and securing community representation at all levels of the society. The Deputy Prime Minister of Kosovo, Rame Manaj, claims that since the Kosovo Assembly accepted this Comprehensive Proposal made by Marti Ahtisaari, there was no viable option to implementing these principles and provisions in the Constitution of Kosovo. The Constitutional Commission based their work upon harmonizing the following three basic aspirations into the Constitution: the will of the people, the Ahtisaari comprehensive proposal, and a broad definition of minority rights. The two last aspirations go hand in hand and this was something that the Constitutional Commission and the leadership could not, and did not wish to refrain from, regardless of the fact that the Comprehensive Proposal did not pass in the UN Security Council (Manaj, 2008). "The Kosovo Status Settlement does not, as such, constitute a legal act of an international organization. It is only a political document" (D'Aspremont, 2007: 652). However, when the Assembly decided to endorse and base the Constitution on the Ahtisaari Comprehensive Proposal, it became a legal act to the Kosovo leadership. It is true that this document probably qualifies as one of the most extensive regulations of the emergence of a new state, since leaving Kosovo with very little leeway in determining the form of its institutions (D'Aspremont, 2007: 660). As we shall see though, the Kosovar leadership did in fact have some leeway if not deciding much upon institutions, then at least other important aspects in the Constitution.

The Constitutional Commission consisted of 21 members, six of whom were from the minority communities. The Serb delegation was, according to the Vice Prime Minister, present at first but then refrained from attending the meetings and boycotted the formal process (ibid.). There were however non-formal contacts and talks with the Kosovo-Serb community, in order to take into consideration their interests, especially on the issues of minority protection and minority rights (Kosova Live, 2008: 19 February). This indicates that the power-sharing concept, to a large extent was influenced by the international community. The non-participation of the Kosovo-Serbs might have harmed the credibility of the Constitution with the Kosovo-Serbs population, but as far as ensuring the minority rights and their participation in the civil society, these issues were secured at a very large extent (Salihu, 2008).

4.1 Power-Sharing – Issues During the Negotiations on the Status of Kosovo

During the so-called Vienna negotiations (the negotiations between the Kosovo leadership and Serbia, mediated by the international community and in particular the Special Envoy, Marti Ahtisaari) the Kosovo leadership, consisting of governmental and oppositional parties, were confronted with a dilemma in the area of power-sharing. “The experience of Bosnia and Herzegovina had taught the Kosovo delegation to be wary of short-term concessions in this area that would make territory ungovernable in practice” (Weller, 2008: 672). This hesitation extended the issue of guaranteeing ministerial posts and seats in the Assembly for the minority communities, which would lead to their numerical overrepresentation and to their veto-powers in legislative projects affecting their interests. “Kosovo was concerned that such an approach would entrench ethnic division and a system of ethnic politics, rather than providing opportunities for interest-based politics to develop across ethnic lines” (Weller, 2008: 673). As evident though, the mediators firmly held the line on power-sharing, by finally producing a Comprehensive Proposal with very large traits of power-sharing and securing participation from all communities. On the other hand, the mediators also rejected the attempts of the Serb delegation for further power-sharing for the Kosovo Serb community (ibid.). The final version of the Comprehensive Proposal, which very much laid the ground rules in the area of power-sharing for the Constitution of Kosovo, could therefore be seen as an attempt to find a solution acceptable to all.

5 Presidential vs. Parliamentary Systems

From 1999 until 2008 Kosovo was under UN rule and protecting. In 2001 the UN Mission in Kosovo (UNMIK) formed a Constitutional Framework which set out the rules and the authority of the provisional self-government in Kosovo. During this time, the president of Kosovo only had a limited number of duties, such as presenting awards and express gratitude, propose the Prime Minister in consultation with the political parties of the Assembly, take action in the field of external affairs in coordination with the Special Representative of the Secretary General (Constitutional Framework for Provisional Self-Government in Kosovo, Section 2, Art. 9.2). The Constitutional Provisions in the Comprehensive Proposal only regulates that the President of Kosovo shall represent the unity of the people and that he/she may return once to the Assembly for reconsideration of any bill he/she considers harmful to the interests of one or more Communities (Comprehensive Proposal for the Kosovo Status Settlement, Annex I, Art 4). This proposal however lays down the ground-rules for the Assembly of Kosovo, such as those discussed earlier about the reserved seats for the Communities that are in a minority. It indicates however that the Assembly has the legislative power in legislatures that are sensitive to minority Communities (Comprehensive Proposal for the Kosovo Status Settlement, Annex I, Art 3).

The Constitution of Kosovo does not define the system as parliamentary or presidential. It states however that the Assembly is the legislative institution elected directly by the people (Constitution of Rep. of Kosovo, Art 63). It also states that the Government exercises the executive power and consists of the Prime Minister, deputy prime ministers and ministers (Constitution of the Rep. of Kosovo, Art 92.1-2). The President is defined as being the head of state and represents the unity of the people (Constitution of the Rep. of Kosovo, Art 83). The competencies of the president are however far more powerful than the Constitutional Framework had outlined as well as the Comprehensive Proposal made by Ahtisaari. The President leads the foreign policy of the country, he proposes amendments to the constitution, is the commander-in-chief of the Kosovo Security Force, leads the Consultative Council for Communities, decides to declare state of emergency in consultation with the Prime Minister, appoints the chair of the Central election Commission, promulgates laws approved by the Assembly, signs international agreements, may refer constitutional questions to the Constitutional Court, appoints the Director, Deputy Director and Inspector general of the Kosovo Intelligence Agency (jointly with the Prime Minister), has the right to return adopted laws for re-consideration when he/she considers them to be harmful to one or more Communities, etc. (Constitution of the Rep. of

Kosovo, Art 84). These are some of the competencies outlined that gives the President a far greater role than during previous years and leads to the conclusion that Kosovo is not to be characterized as a pure parliamentary or presidential system explicitly. Implicitly, one can however say that the system of Kosovo is a semi-presidential one, since the President is the executive organ – with many added competencies compared to the system in force prior to that of June 2008, when the Constitution entered into force (Manaj, 2008). Salihu claims that the only thing that has been defined in the Constitutional document is that Kosovo shall be a democratic republic based on the division of powers and the checks and balance amongst them. Based on the competencies that have been given to the President, one can however define it as being a semi-presidential system (Salihu, 2008).

During the process of a nearly two-month public consultation, the Constitutional Commission eventually published a draft Constitution, very similar to the final version. The publishing of the draft Constitution was done in order to gain reactions from the public and to gain transparency and legitimacy. According to Ceku, the public debate surrounding the constitution was to a large extent more emotional than very practical, with reactions ranging from nationalistic arguments to those of religious beliefs (Ceku, 2008). The role of the President was however adjusted, adding further competencies to his table, such as promulgation of laws and the signing of international treaties (Constitution of Rep. of Kosovo, Art 84). The President thus was given even more competencies to his already very strong role. Why was this done?

5.1 The Power of Tradition

In the early 1990:s, when Kosovo was a Serbian province during the breakdown of Yugoslavia, Kosovo formed their own parallel government with the charismatic and non-violence resistance-leader, Ibrahim Rugova as an acting President. According to Hajrullah Ceku, the President has traditionally been the biggest and most important governmental figure. This de facto started from the non-violence resistance and carried on after the war, were Ibrahim Rugova – although not being a part of the armed forces who “won the war” in Kosovo – managed to win the first elections and took the position of President (although, this post was weaker than the post of the Prime Minister). This meant that the radical forces did not manage to “win the peace” although they had “won the war” (Ceku, 2008). This is crucial when trying to understand why the Kosovar leadership chose to give extending powers to the President, compared to his/her role during the post-war years. To the majority of the Kosovar-population (Albanians) the President was of emotional importance, since he/she symbolizes fight for freedom and resistance. In addition to this, there was also a tradition of having a powerful President in Yugoslavia, ranging from the post-world war II era, to the dissolution of Yugoslavia. These two factors surely played a role in the choice of Presidential powers.

5.2 The Importance of Party-Politics

One can also partly explain it as being a compromise between the political parties in government. According to Ceku, the strong position of the President could partially be explained as an attempt, by the political parties, of rehabilitating one another with different positions by making sure that there is a symmetrical balance of power. This was done after it became apparent that the two governing parties (LDK and PDK) needed one another to survive, and did in fact have a fruitful cooperation (Ceku, 2008). In order to be able to keep this cooperation they chose to add the competencies of the President, to make sure that both coalition parties have incentives to keep cooperating and governing together. This is apparent even though the President is forbidden to exercise any post in a party, since the distribution of the current government - but also during the UN protectorate years – was the Prime Minister post for the biggest party and the Presidential post for the second biggest coalition party (or the other way around). This does however not only extend to the two parties that are currently in coalition. This also acts as an incentive for other oppositional parties who might be a part of the government in the future, since there are several very important posts to be distributed.

5.3 “The Will of the People”

Another explanation to the fact that the president got an extended role and extended competencies (and in fact extended the competencies further after the public consultation), given by Deputy Prime Minister Rame Manaj, is that this was one of the most frequently debated issues and demands by the public, during the period of public consultation, but also during the formation of the Constitution. Often, during the public consultations, a large part of the comments were made about the role of the President. Most of the people wanted the system to be similar to that of the USA, with extremely large powers for the President. This was however not possible, since it would collide with the basic provisions outlined in the Ahtisaari Comprehensive Proposal. The Constitutional Commission did however try to add the competencies, as much as possible, compared to those of the President outlined in the Constitutional Framework. They therefore formed a system where the President has a domestic as well as a foreign policy role, where he/she has competencies in the field of law, acts as the unity of the people, has large competencies in the field of security (the commander-in-chief). This was thus done, considering two of their most important aspects: the will of the people and the application according to the Ahtisaari Comprehensive Proposal (Manaj, 2008).

A purely presidential system was thus not a viable option for the Constitutional Commission. But the fact that the people expressed their desire and

will to give large powers to the President did in fact have an impact on the Commission. This is why the Constitution extended even further the competencies of the President, compared to those of the Draft Constitution and before the period of public consultation.

5.4 Comparing the Role of the President

Since it has become apparent that the President of Kosovo in fact will enjoy many important competencies, which will make him/her a very strong political actor, it is viable to compare his/her role with that of the French President. I have chosen the French President, since this system is a semi-presidential one, but where the President is thought as being one of the most powerful Presidents in the world.

The first distinction is of course that the French President is directly elected by the people for a seven-year period, by an absolute majority. He also exercises the right to appoint the Prime Minister and presides over the Council of Ministers (Constitution of France Republic, Art 5-9). On the contrary, the Assembly elects the President of Kosovo in secret ballot by two thirds of majority (Constitution of the Rep. of Kosovo, Art. 86). They also elect the Prime Minister and the Government, as well as dismiss the President and expresses no-confidence in the Government (Constitution of Rep. of Kosovo, Art 65.7-8). Like the President of Kosovo, the President of France is the commander-in-chief of the armed forces and appoints ambassadors. The French President can however alone decide upon appointments on the civil and military posts of the state (Constitution of France, Art. 13). In contrast, the only posts which the President of Kosovo decides upon alone are the posts of the Governor of the Central Bank and its board, and the chair of the Central Election Commission. (Constitution of the Rep. of Kosovo, Art. 84). The other civil and military posts are decided jointly by the President and the Prime Minister (sometimes together with the Assembly). In addition to this, the French President can - just as the Kosovo President - ask the parliament to reconsider a law, before its promulgation. The difference is however that this is only possible when the President of Kosovo considers a law to be harmful to one or more of the communities. The French Council of Ministers, in which the President Presides, may declare martial law, without the consent of the parliament. After 12 days Council of Ministers however needs consent by the parliament (Constitution of France, Art 36). The Kosovo President may declare state of emergency upon consultation with the Prime Minister. This declaration needs, however, two thirds of the majority in the Parliament, within 48 hours, to have force or effect. Both the Kosovo and the French Constitution allow their Presidents to ratify treaties, with the exceptions of very important treaties dealing with the nature of financial obligations, membership in international organizations, peace, territory, political and military issues, etc. These treaties have to be ratified in the Parliaments (see Constitution of France., Art 52-53; Constitution of the Rep. of Kosovo Art. 18).

It is thus clear that the French president has a greater role and is a stronger political figure than his Kosovo counterpart. Nevertheless, I have compared the role of the Kosovo President with one of the most powerful Presidents in modern democracies. This shows that the Constitution allows for a fairly powerful political actor in a system which could be characterized as semi-presidential.

6 Decentralization

Lijphart prescribes decentralization as a mean of distributing some powers and competencies to the minorities- be it under territorial ways or ethnic/religious ways - in order to let minorities rule some of their own affairs (such as school, healthcare, etc). This is done to avoid dissatisfaction and promote inclusion in the society and social sphere.

The Constitution of Kosovo states that: “The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies” (Constitution of the Rep. of Kosovo, Art. 124.1). It also states that the law extends and delegates the municipalities’ competencies and that they have the right to inter-municipal and cross border cooperation (ibid.). The law regulates its basic forms and composition, but if one examines the Comprehensive Proposal it becomes clear that these laws were under strict influence from the UN Special Envoy and the international community.

The Comprehensive Proposal for the Kosovo Status Settlement states that an enhanced and suitable system of local self-government shall be established in order to address the legitimate concerns of the Kosovo Serbs and other communities that are not in the majority of Kosovo, to ensure their active participation in public life (Comprehensive Proposal for the Kosovo Status Settlement, Annex III). This document dictates, among other things, that a new law on municipal boundaries shall be formed, which will create new municipalities with Serb-majority population. It also outlines the municipal competencies which range from local economic development, local environmental protection, provision of public primary health-care, public housing, to issues such as, tourism, culture and housing (Comprehensive Proposal for the Kosovo Status Settlement, Annex III, Art. 3). There are however also enhanced municipal competencies for certain Serb- dominated municipalities. The municipality of Mitrovica North shall, for example, have competencies for higher education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators. The municipalities of Mitrovica North, Gracanica and Strpce shall have competence for providing secondary health care, including registration, payment of salaries and training of health care personnel (see map in Appendix 1). In addition, all municipalities in which the majority of the population is of the Kosovo-Serb community shall have:

- “a. Authority to exercise responsibility for cultural affairs, including protection and promotion of Serbian and other religious and cultural heritage within the municipal territory, as well as support for local religious communities...
- b. Enhanced participatory

rights in the appointment of Police Station Commanders...”(Comprehensive Proposal for the Kosovo Status Settlement, Annex III, Art. 4).

Municipalities may, according to Article 10, also cooperate, within the areas of their own competencies, with institutions in the Republic of Serbia after notifying the Ministry of Local Government in advance. Further, Article 11 also states that municipalities shall be entitled to receive financial assistance from the Republic of Serbia. The funding shall however be limited to the municipalities’ responsibilities in the area of their competencies (Comprehensive Proposal for the Kosovo Status Settlement, Annex III, Art. 10-11). These provisions have been regulated by Kosovo-law according to the directions in the Comprehensive Proposal (see Law on Local Self Governance, Art 19-23).

6.1 No Room for Leverage

In the political context, the chapters on decentralization were of great importance in order to attract and integrate the minority communities and in particular the Kosovo-Serb population, into the political and judicial sphere and into the local as well as central level of the state. This is why, the Constitution of Kosovo states that the official languages of Kosovo shall be Albanian and Serbian, although the official number of the Kosovo-Serb population amounts about five percent. This is also why the creation of new Serb-dominated municipalities in Kosovo has started to take its form (Manaj, 2008). As I have tried to illustrate in the previous section, however, the Kosovo leadership did not have much room for maneuver when developing the specific articles and chapters, covering the local self-government and decentralization. The Ahtisaari Proposal did in fact have very specific and detailed provisions of how the law and the Constitution should take its form. Since the Assembly of Kosovo accepted and committed whole-heartedly to this proposal, there was no margin in which the Constitutional Commission and the rest of the leadership could operate – they had to adopt a Constitution and regulations according to the provisions given in the proposal.

These provisions in the Ahtisaari Proposal did however not come upon sole decision by the UN. These date back to the years of negotiations between Serbia and the Kosovo leadership, mediated and co-negotiated by the UN and the Contact Group.

6.2 The Negotiations – Two-Level Games and Mediation

The negotiations on the issues of decentralization seem to have been fairly unproblematic during the process of Constitution-making. The Vienna-negotiations on the issues were however among the hardest and the most painful

concessions for the Kosovo leadership (Salihu, 2008). According to the notion of two-level games, international negotiations are negotiated at two different levels. Level one is the international level – bargaining between negotiators leading into an agreement. Level two is the domestic level – separate discussions within each domestic group about whether to ratify the agreement (Starkey et al., 2005: 101). The success of an agreement depends on the existence of overlap between perceptions of acceptable at both levels of a two-level negotiation. This overlap is called the win-set (Starkey et al., 2005: 104).

During the Vienna negotiations, the Kosovo delegation were very unwilling to allow Kosovo municipalities to form collective units or regions, since they feared that those territories consisting of mainly Serb-population would administer themselves, through parallel structures (Salihu, 2008: see Weller, 2008: 671). This issue made it difficult for the Kosovo delegation to stay united, since it consisted of a wide range of political parties both from the government and the opposition. The Kosovo delegation did however make concessions in this area, by treating it as a trade-off to independence, although this issue was not on the negotiating table due to Serb resistance. By hoping that generosity and cooperation with the international community toward the Kosovo-Serb community would eventually pay off in independence, both level one and level two stayed fairly united on these matters. “Kosovo was pressed into making concessions on the basis of a hope that an overall package would ultimately develop in favour of establishing final status” (Weller, 2008: 672). This does not only go for decentralization, but for the entire Comprehensive Proposal. A third layer was however also introduced since the Kosovo leadership had “backdoor negotiations” with USA, who advised them to negotiate generously if it wished to see its hopes for status fulfilled.

7 The Electoral System

The so called Ahtisaari Comprehensive Proposal does not decide upon the entire electoral system. It states however that the Assembly shall be elected by secret ballot, on the basis of open lists and that the seats shall be distributed proportionally to the number of valid votes (The Comprehensive Proposal for Kosovo Status Settlement, Annex I, Art. 3.1). The Constitution of Kosovo states that the electoral system is proportional and that the election conditions and procedures are regulated by law (Constitution of Rep. of Kosovo, Art. 64.1 & 66.5). The electoral law of Kosovo states that Kosovo is a single, multi-member electoral district and that elections shall be held on the basis of open lists. The voter shall cast one vote for the political entity (party), and may also vote for one candidate from the political entity's candidate list (Law on General Elections in the Rep. of Kosovo, Art 110). The electoral threshold that a party needs in order to get seats in the Assembly, is set to 5 percent from general number of the total votes (Law on General Elections in the Rep. of Kosovo, Art. 111.2 a).

7.1 Change in 2007

The electoral system does not seem to have been under hard negotiations with the international community or with Serbia, during the Vienna talks. The Comprehensive Proposal, which to a certain degree reflects these negotiations, simply states that the elections shall be held on the basis of open lists. This means that you vote for a party, but also for one or more of the candidates from the party lists. This system is thought to give more power to the people in deciding who gets in to the parliament. Prior to the November 2007 elections in Kosovo, this system was not in place. There were no open lists, and there was no electoral threshold for parties entering the parliament (Ceku, 2008). This system is believed to have been one of the driving factors behind the low voter turnout (less than 50 percent) in the 2004 elections (Gashi, 2007: September 19). It seems that the open lists were a result of the Ahtisaari proposal, which outlined this. The electoral threshold which landed on five percent, were however a result of domestic negotiations between the different parties in Kosovo. In fact Veton Surroi - the political leader of the then oppositional party ORA, and part of the negotiation delegation of Kosovo – insisted very strongly that the threshold be left at five percent. This was of course to eliminate smaller parties, which at this time caused some trouble in the Assembly since it consisted of 17 different parties, divided on the 100 seats that were not reserved for the Kosovo Serb and other communities. After the November 2007 election and with this new electoral

system this number only reaches to five parties, leaving the strongest supporter of the five percent-threshold, Veton Surroi outside, since his party did not reach this limit (Ceku, 2008).

It seems thus that the electoral system was more in the hands of the Kosovo leadership than decentralization and power-sharing. Hajrullah Ceku believes that this is a compromise from the international community, who chose to let the Kosovo leadership decide upon these issues as a tradeoff for dictating upon the issues of decentralization and power-sharing (ibid.).

8 Conclusion

I have throughout this thesis tried to touch upon some of the important issues that comes with constitution-building. There are of course many other aspects which could have been analyzed, such as the judicial sector, the economical provisions, etc. I have however chosen to use these four consociational concepts as a template when analyzing my case, since Lijphart's theory is tailor made for post-conflict societies with minorities. My aim has been to unveil and touch upon some of the characteristics during the process of constitution-making in Kosovo. I have tried to analyze the process mainly from the Kosovo leadership's position and viewpoint. I am sure that further studies will be able to take the viewpoint of the international community as complementing this study.

The Kosovo leadership and the Constitutional Commission formed this specific constitution, simply because there were no viable alternatives or other options available (Manaj, 2008; Salihu, 2008). The deadlocks in the Vienna negotiations followed by the publication of the Ahtisaari Comprehensive Proposal left little room for the Kosovo leadership to adopt a constitution other than the final result. The two primary goals of the Constitutional Commission was to form a constitution which was in accordance with European standards and suitable for European integration and to apply the Ahtisaari Comprehensive Proposal into this legal act. This is why the international community's touch upon this Constitution is highly visible (Dr. Morina, 2008). An example of the highly influence can be drawn from the fact that the President of the Assembly of Kosovo, after the constitution was adopted, told a group of experts from the USA that he had opposed some articles but that the UN, EU and Council of Europe representatives told him that these references put Kosovo's law in line with other European constitutions (Yoshihara, 2008: 18 April).

The process of negotiations was analyzed in several ways and the significant trait is that this was not a normal constitution-making process. The Vienna negotiations were not regular negotiations, since the international community and to certain extend Serbia, did set the rules of the game while the Kosovo leadership simply had to follow and try to resist some Serbian demands. Therefore the traditional trade-offs that is usually visible in negotiations were in fact not quite present at these negotiations (Weller, 2008: 671). But since backdoor negotiations with USA and the EU-countries had told the Kosovars to negotiate generously on the issues of minority protection and decentralization, these issues were in fact traded off, against the recognition of independence from these countries. The primary goal was therefore independence, but since the declaration was going to be univocally declared and not through UN-endorsement, the Kosovars needed recognition from these powerful states. Therefore, when the Kosovo Assembly

decided to endorse the Ahtisaari proposal, there was no other option left but to create the type of constitution that would be in accordance with this document.

There were however some important issues, such as the role of the President, where the Constitutional Commission actually made large adjustments compared to the role of the President during the period of protectorate-status. As noted, this could be explained by several decisive factors, such as the traditional importance of the President, power-sharing amongst the coalition-parties, and the people's desire. The proportional electoral system was partly decided by the Ahtisaari proposal, but issues such as the electoral threshold were left up to the Kosovo leadership to decide upon. In general, power-sharing and the decentralization seem to have been under the influence of the international community. The international community therefore had a huge and a decisive impact in the formation of this Constitution. The Kosovo leadership did not have any leverage to drive a hard bargain on these sensitive issues. The only issue, but the most important one, was the status of Kosovo and independence. This issue was however not negotiated upon very much due to deadlocks. Therefore, the impact of the international community was very significant, throughout the process.

As I have tried to show during this thesis, the creation of the Constitution of Kosovo was not a normal process. It involved several actors, all acting upon different reasons and interests. The room for maneuver, for the Constitutional Commission was very narrow. There were several series of events that led to the creation of this Constitution: first the so-called Vienna negotiations, which outlined many of the provisions in the Comprehensive proposal, the Ahtisaari Comprehensive Proposal, further negotiations and mediation, and finally the declaration of independence followed by the publication and formation of the Constitution.

This thesis does not imply that this is the entire truth behind this constitution-building, far from it. It does however outline one part of it, by explaining these series of events and the reason behind their outcome. I have only conducted interviews with Kosovo officials and members of the Kosovo civil society, and intellectuals. To grasp the entire truth, for example by trying to find out why the international community and the UN acted as they did and the reason behind their decisions would be a very big complement to this work. Therefore I would hope that further studies focus on EU-, UN- and international community-officials, by conducting interviews with some of them. This has however been out of this thesis' limitations.

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10 Appendix 1 – Municipal Map of Kosovo

