

KOSOVA/O AND THE CHALLENGES OF RECOGNITION

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Abstract

Kosova si a new state in the Balkans created during the process of dissolution of the former Yugoslavia. The creation of this new state was very difficult and complicated, as well. This from both perspectives: internationally and locally. The process of Kosova independence differs from the approaches we may have, but we all agree that it was a difficult process and that Kosova would not have achieved independence, without strong international engagement. The project/ion of Kosova independence is not a pure Kosovar Albanian projection. It is also an international project as well, at least to a determined extent. Kosova since its Declaration of Independence has been recognized by a considered number of states but still the challenges of recognition are being met by Kosova people and Kosova institutions. International Community regarding the right of Kosova to self determination was split to some extent whereas also we could see different approaches within the academia and scholars regarding the right to self determination of Kosova. This has made the process of Kosova recognition to be a difficult process from international perspectives even though Kosova is already recognized from more than 100 states of the World. In addition International Court of Justice didn't find Kosovo Declaration of Independence violating the International Law.

Kosova institutions also have not shown to be enough strong in the process of lobbying for more recognitions. Therefore needs for recognitions are crucial and Kosova institutions have still a task to ensure as much as possible recognitions using arguments about the right of Kosova to self determination and explaining that Kosova is a sui generis case that can not be a precedent for other people aspiring self determination.

Keywords: Recognition, international, independence, Kosova, federation

Introduction

Process of dissolution of jugoslav federation resulted with the creation of new states. Thus from this federation that had eight federal units (six republics and two autonomous provinces) seven new states are created. The first from these federal units that proclaimed independence was Slovenia followed by Croatia, Bosnia and Herzegovina, Macedonia, Monte Negro, Serbia (Vojvodina remains within Serbia) and finally Kosova with its declaration of independence.

Process of creation of the state of Kosova was a long and a difficult one, whereas this paper will not cover in details reasons of why and how Kosova became the part of Yugoslavia. But a part of paper will deal with the Kosova status within Yugoslavia and with the treatment Kosovar Albanians had from Yugoslavia and Serbia since the creation of the federation.

According to the 1946 Constitution

The foundations of Yugoslav federation were created during the Second World War, whereas the federation was sanctioned by the Constitution of the People Republic of Federative Yugoslavia, adopted on 1946. According to this Consitution Yugoslavia was

constituted of six republics and two provinces⁹⁶ whereas Kosova was integrated within this federation without being asked and without the respect about what Kosovars declared⁹⁷ and without respecting promises given to Kosovar Albanians during the anti fascist war. Nonetheless Kosova became a part of Yugoslav federation and at the same time becoming the part of constitutional system of Republic of Serbia. This constitutional position of Kosova hadn't ensured equal position of Kosovar Albanians with the people from other Yugoslav republics. Even though during some determined phases the Albanian position noted improvements, it anyway, most of the time brought Albanians into the position of the second hand citizens.

Since the Constitution of 1946 until the second constitution was adopted in 1963, Kosova continued to be the most economically undeveloped part of Yugoslavia and the most oppressed part as well. The security system of Yugoslavia degenerated extremely and Albanians were object of continual illtreatment. They for a long period of time were pushed to leave the country and go to Turkey⁹⁸ and thus a big number of them left the country forever. Albanian Constitutional position continued to shrink even more, based on the Serb insistence and this resulted with the adoption of 1963 Constitution that divested Kosova from the federal constitutive element of the Yugoslav federation.

According to 1963 Constitution

Famous Communist Yugoslav leader Tito, finally in the so called Brione Plenum⁹⁹ managed to clean bad-famed structures led by Rankovich. By this, a wave of communist freedom and democracy overflowed Yugoslavia including Kosova as well. In 1968 Albanians organized demonstrations and protests asking for equality with other people of Yugoslavia, requiring the free use of national symbols, etc . Afterwards preparations for adoption of the new constitution begin. Thus the 1963 Constitution was amended and finally Yugoslavia adopted the new Constitution in 1974 that, in a way made the position of Kosova equal to those that other republics had¹⁰⁰.

According to 1974 Constitution and on

The Constitution advanced constitutional position of Kosova but nonetheless Kosova remained the most undeveloped part of Yugoslavia. But this situation that was a good basis for development and equality didn't have a long life. Tito died in 1980 and it was clear that things would change. In 1981 students being unpleased with their economic situation demonstrated asking for beter living conditions. From economic requests demonstrations got dimensions of political requests asking for advancement of Albanian position and asking for the status of Republic of Kosova. The reactions against demonstrations were extremely huge and against Albanians were taken draconinc measures using military and police special units.

⁹⁶ See 1946 Constitution - Federal Republic of People of Yugoslavia

⁹⁷ On December 31, 1943 and January 1-2, 1944 in Bujan was held the Constitutive Conference of the Kosova Council for Liberty that is more known as Bujan Conference and where a document was adopted (Resolution) by which the aspirations of people were expressed to join Albania. This, according to the Resolution would be achieved more easily by joining the antifascist war together with the people of Yugoslavia. More about this see in: Rezoluta e Konferencës së Bujan.

⁹⁸ Noel Malcolm, Kosova një histori e shkurtër, Koha-Prishtinë&Shtëpia e librit-Tiranë, 2001

⁹⁹ The IV Plenum of Central Committee of the Yugoslav Communist League was held in Brione, on July 01, 1966 where some high level officials of security (UDBA) were accused for misuse of position. This made that Rankovich fameke resign from the party and UDBA and from this plenum a clime for improvement of Albanina position in Kosova.

¹⁰⁰ The SFRY Constitution, article 2, stipulated that the federation was comprised of the Republic of Bosnia and Herzegovina, Macedonia, Montenegro, Croatia, Slovenia and Serbia and the autonomous provinces Kosovo and Vojvodina.

Kosova was put under the extraordinary measures. Many young people were killed, extremely a big number were arrested and imprisoned and thus measures against Albanians took extraordinary sizes. Meantime Serb Academy of Sciences came up with a program¹⁰¹ by which they asked for restructuration of federation and according to this program “ the biggest evil for Serb nation was established by the text of the 1974 Constitution, a constitution that not only divided Serbia in three parts but it created also an environment for genocide against Serbs in Kosova”¹⁰². This program was almost completely anti Albanian whereas changes within the communist party of Serbia brought Solobodan Miloshevich at the top of the party.

Arrival of Miloshevich at the top leadership of the communist party noted the beginning of the end of the Yugoslav federation. He started practically to implement tendencies of creating Greater Serbia with the activities of oppression in Kosovo where situation was anyway economically underdeveloped and politically very difficult. The first intention was elimination of federal status of both Kosova and Vojvodina. Afterwads the next phase would start toward Greater Serbia creature. Thus the process for changes of the constitution started under the very tense situation whereas the position of Miloshevich was strengthening more and more in almost daily basis. Measures against Albanians were increasing continually and these measures were having a support by other federal republics as well. This because they had a perception that by changing the Kosova status Miloshevich would be satisfied and thus he would stop with his politics. On the other side they didn't want to have someone from Kosova to be Miloshevich's satellite in the federal bodies, since there were no more Albanian representatives in the federal structures. All that came from Kosova at that time was not representing of Kosova. They came to vote on the Republic of Serbia interest.

Changes of the Kosova Constitution were made under the extraordinary measures and oppression agains majority population of Kosova. Practically with these changes Kosova lost almost all rights. Albanians tried to oppose changes of the Constitution but they were not listened by other republics. Many protestors were killed, a huge number were imprisoned, illtreated, arrested, expelled from their jobs, etc. No matter of this Kosova Constitution changed (this is known as Bloody Constitution) and Kosova status was changed completely. With the Constitutional changes during 1989/90 the process of Yugoslavia eneterd into the final phase of dissolution. From this until the end of of NATO intervention in 1999 Kosova was a country, very similar to occupied countries. In one side there was a Serbian state apparatus executing its power by the use of force against the majority, establishing a system of segregation and violence where every one could be an object of illtreatment, etc. On the other side Albanians with their political leadership created a parallel system and at the same time the political leadership prepared platform for the future. In this way several constitutional and political acts were adopted and undertaken based on which the Republic of Kosova was born. Professor A.Bajrami enumerates the following acts:

- Constitutional Declaration – June 02, 1990;
- Constitution of the Republic of Kosova – September 07,1990;
- Referendum for Kosova as a sovereign and independent state organized on Septeber 26-30, 1991;
- Resolution of Kosova Parliament for Kosova as a sovereign and independent state – October 19, 1991;
- Amandments on the Constitution – October 19,1991;

¹⁰¹ A document produced by Serbian Academy of Arts and Science (SANU) known more as Memorandum, by which there was intended a restructuration of Ygugoslavia Federation.

¹⁰² Victor Meir: Fundi i Jugosllavisë – goditja në Kosovë, Lubjanë – Liria, pg.82

- Multy Pary Elections for the Parliament of Kosova and Presidential Elections twice: On May 24 1992 and on March 22, 1998¹⁰³

Measures undertaken against majority could not stand forever and it was clear that Kosovar Albanians would change their means of resistance, since it was clear that with only nonviolent resistance their aspirations were not going to be reached. It was a matter of time when the conflict would take other dimensions. And the conflict produced big consequences. Some consequences will be mentioned in the further text.

The war started

When tendencies of Serbian politics became more apparent, the Western Republics of Yugoslavia began to prepare for defense and got ready for secession. Very strong federal army dominated by Serbs under the pretext of protecting the integrity of Yugoslavia undertook an attack against Republic of Slovenia. Miloshevic and Serbian politics were not showing any interest for Slovenia and therefore it had to be allowed to take the direction of independence.

The war in Croatia was longer and terrible whereas war in Bosnia and Herzegovina is characterized to as the most terrible wars happened in Europe.

Two Western Republics gained international recognition followed by Bosnia and Herzegovina that paid very high price.

International Community has been active trying to find peaceful solution of the conflicts in former Yugoslavia but it did not manage to prevent the bloodshed and war. The engagement of the International Community during the war in Croatia and Bosnia and Herzegovina seemed to have forgotten the difficult situation in Kosova where a silence was being seen, and that, for practically two reasons: first, the Albanian political leadership was determined for a nonviolent resistance and second, the Serbian measures undertaken against Albanians established a silence that in fact was more a silence of expectation and the hope that the International Community would intervene and stop violence and oppression in Kosova. But it was obvious that this would not last forever.

Noninclusion of Kosova in the Dayton Conference¹⁰⁴, where a solution for stopping the war in Bosnia and Herzegovina was found, in Kosova made a situation where other options appeared vis-a-vis nonviolent resistance that was present for a long period of time. On the other side, Miloshevic due to the Dayton Conference being treated as a factor for peace, expended repression in Kosova. Kosovar Albanians were anyway outlawed and they were not protected by any mechanism. They were now being kept forcefully within a creature called Federal Union of Serbia and Montenegro.

It continued in Kosova

A new option appears in Kosova – an option of active resistance, according to which only war would bring liberty and only if there is a war the International Community would engage. Thus military formations appear in Kosova with the name UCK.

Under these (non)constitutional and (i)legal circumstances Serbia undertook various discriminatory acts and activities against Kosovo Albanian where every Albania could be an object of treatment by Serbian police and military forces. Arrests, interrogations, beatings, trials, expelling from jobs, closing schools, killings, and segregation became a phenomenon

¹⁰³ Arsim Bajrami, Sistemi Kushtetues i Kosovës, CIP 2011, Prishtina pg.56

¹⁰⁴ Conference was held in November 1995, where chaired by Holbrooke and co-chaired by EU special Representative Carl Bildt and the First Deputy of Foreign Russian Minister Igor Ivanov. After 21 General Framework Agreement for Peace in Bosnia and Herzegovina, was reached. See more at <http://www.britannica.com/EBchecked/topic/153203/Dayton-Accords/285655/The-road-toward-peace>

and the daily reality.¹⁰⁵ Oppression time after time was more intensive whereas at the end of 1998 and early 1999 made finally the International Community decide for and joint action against Serbian forces, results of which are in general known: it has been estimated that, by June 09, 1999 over 90% of the Kosovo Albanian population - over 1.45 million people – were forcibly displaced. In the period 1998-1999, numerous UN and other international agencies expressed dismay at the atrocities being committed by Serbia in Kosovo and demanded that they cease immediately. It should be noted that these mass expulsions of Albanian civilians from their homes in Kosovo, involving the threat of force and the actual use of force (including artillery bombardment and arson), began long before the start of NATO military action in March 1999. Figures compiled by the UNCHR showed that by August 1998, there were 260,000 internally displaced people within Kosovo and 200,000 refugees outside Kosovo; again, the UNHCR noted that between 150,000 and 200,000 new refugees were driven from their homes between the beginning of January 1999 and in mid-March 1999¹⁰⁶.

The war in Kosova ended with an agreement signed in Kumanovo (Macedonia) named Military Technical Agreement, between Serbian Government and NATO in June 09, 1999. A day after the UN Security Council adopted Resolution 1244 that brings new era in Kosova with the international civil administration established (UNMIK).

Kosova spent several years under the UNMIK administration whereas on February 17, 2008 it declared its independence.

Independence and recognition

After a long process of negotiations in Viena led by former President of Finland Marti Ahtisari and based on his proposed Comprehensive Proposal, Kosova Parliament adopted Declaration of Kosova Independence. Thus, Prime Minister Hashim Thaqi, during the session of the Parliament addressing MPs and the opinion cited the Declaration: "we leaders of our people democratically elected, through this Declaration declare Kosova as a sovereign and independent state. This reflects the will of our people and is totally in accordance with the recommendations of the UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal of solving the final status of Kosova".

Kosova Declaration of Independence is a very important document of constitutive character on creating the state of Kosova. It is very important to explain main parts of the Declaration before dealing with the recognition and the debate within scholars, academia, diplomacy and within a part of the International Community about whether Kosovo fulfilled the criteria of being a state or whether Kosova has the right to ask for recognitions.

In the Declaration it is clearly stated that Kosova is a special case that came up from a process of nonconsensual dissolution of Yugoslavia and it doesn't create any precedent to be used in whatever situation in the world. Declaration further mentions the war and violence in Kosova; it expresses appreciations to the International Community for the military intervention in 1999; it mentions negotiations mediated internationally; expresses commitment to fulfil international obligations and confirms readiness of Kosova to respect Ahtisaari recommendations; it appreciates contributions of all men and women for their sacrifices for determining a better future for Kosova and based and through this Kosova declares itself a sovereign and independent state.¹⁰⁷

¹⁰⁵ Bashkim Rrahmani and Majlinda Belegu, The engagement of the Republic of Slovakia is very important, Bratislava October 2013, 10 Years of SlovakAid Conference

¹⁰⁶ *Written contribution of the Republic of Kosovo, submitted to the International Court of Justice, April 17, 2009, pg. 60-61*

¹⁰⁷ Arsim Bajrami, Sistemi Kushtetues i Kosovës, Prishtina: CIP 2011, pg. 129

Did Kosova fulfil the criteria of being a state? According to the Montevideo Convention (1933) there should be fulfilled the following criteria in order to an entity be treated as a state: - a defined territory,-a permanent population,-a government and capacity to enter into international relations.¹⁰⁸

Answer for each of the Montevideo criteria regarding Kosova is not difficult to be found. Kosovo territory was clearly and historically defined. Even when it was treated as an autonomous province within Yugoslavia federation it was an entity within exactly this territory it has today. Majority of population has always been compact and Albanian. It had a democratically elected government that indeed showed capacities to enter into international relations. Moreover the process of negotiations for the Kosova status and preparations for declaring independence were coordinated with the International Community.

At the day when the Declaration of Independence was adopted Kosova start to receive recognitions from various states and from various parts of the world. But there were states that opposed Kosova independence and debate started about the rightfulness of Kosova to create the state and to be recognized.

What does recognition means and is tha so important?

Recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation.¹⁰⁹From this in relation to Kosova we see that more than 100 international legal persons based on a factual situation that was valid for them issued statement regarding the status in the international law. Once recognition has occurred, the new situation is deemed opposable to the recognizing state, that is the pertinent legal consequences will flow. As such, recognition constitutes participation in the international legal process generally while also being important within the context of bilateral relations and, of course, domestically.¹¹⁰

Efforts of Kosova institutions for as many as possible recognitions are based on what is mentioned with the above paragraph and these may be further explained. International Law considers that creation of new states is factual issue and not a legal issue and it is considered that by its creation the state becomes the subject of the international law. But from the point of view whether the recognition is a conclusion of a fact or it becomes a subject of the international law there were created two theories of recognition: *constitutive* and *declarative*. The first, considers that the state is not a member of the international community unless it is recognized by the other states or by the international community. The second, considers the new state becomes a member of the international community (before recognition) if it has fulfilled the required conditions. The current international practice remains between two these theories whereas practically it is discretion of a state to decide on recognizing or refusing to recognize a newly created state.

What are arguments when opposing recognition of Kosova

The issues of self determination and the right to secession are the basis of a debate where pro-s and con-s derive. International Law has reserved the right for self determination and secession is reserved only to post colonial era and these rights were reserved only for the former colonies. Kosovo according to them was not a colony and therefore it had the right to inner self determination and the right to secession did not belong to Kosova. In addition they consider that Kosovo has unilaterally declared independence.

¹⁰⁸ See Montevideo Convention on the Rights and duties of States, 1933, available at: <http://www.oas.org/juridico/english/treaties/a-40.html>

¹⁰⁹ Malcolm N. Shaw, International Law, Cambridge University Press, fifth edition, 2003 pg. 368

¹¹⁰ Id. At 368

It is an understanding that the first attitude, seems to see the international law as a static creature that doesn't change, whereas international order undergoes changes based on an evolution of international norms. On the other side it is a question if Kosova Declaration of Independence was simply unilateral.

The fall of Soviet Union and the dissolution of former Yugoslavia brought many changes in the world map not only geographically but also politically. From these two big creatures there were created new states and they were not colonies. And the needs for recognitions appeared. Europe took needed steps in this regard. The European Community adopted a Declaration on 16 December 1991 entitled "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" in which a common position on the process of recognition of the new states was adopted.¹¹¹ It was noted in particular that recognition required:

- *Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially human rights;*
- *Guarantees for the right of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of CSCE;*
- *Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;*
- *Acceptance of all relevant commitments with regard to disarmament and nuclear proliferation as well as to security and regional security;*
- *Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes*¹¹².

These new requirements set up to be fulfilled for the new countries related to recognition, note a new set of rules for new emerging states. Related to Yugoslavia on the same date, European Community adopted a Declaration on Yugoslavia in which the Community and its member states agreed to recognize Yugoslav republics fulfilling certain conditions¹¹³. Thus some additional requirements were drafted for the Yugoslav republics to be fulfilled so they could be granted recognition.

These new rules created by the EU clearly established new/additional standards states have to fulfill in order to be equal partners within the international community. An analysis of the Kosova Declaration of Independence shows concretely Kosova commitment to fulfilling all international obligations that derive from EU documents, as are: respect for human rights and minorities; all guarantees that there are no territorial claims from the other countries in the region; commitment for dialogue and peace in the region, other obligations from the Ahtisari Comprehensive Plan for Solving the Kosova Status, etc. And actually all of these obligations were measured in a way through a long period of time by the international bodies and after the negotiations were concluded in Vienna a sign was given that Kosova could take its own direction toward building Kosova new state. Debates whether Kosova was equal to former republics of Yugoslavia federation may lead to an unlimited discussion using various legal and political arguments, but there are no strong arguments that prove opposite. Kosova entered into the federation not to be part of Serbia. Since that federation was dissolved and since almost all units declared their independences, it was the definite right that Kosova take its direction towards building the state as per the will of its people.

In addition to this, Kosova could not afford living as: in cases of the lack of representation from one side and the continual repression on the other side, then we have to

¹¹¹ Malcolm N. Shaw, International Law, Cambridge University Press, fifth edition, 2003, p. 374

¹¹² Malcolm N. Shaw, International Law, Cambridge University Press, fifth edition, 2003, p. 374

¹¹³ Id. at 375

deal with that that comprises the “remedial self determination”¹¹⁴. The concepts of remedial determination strengthen Kosova right to self determination and is additional argument that Kosova had a strong right to establish its own state and should avoid doubts to the states for recognition Kosova state.

Was the Declaration of Independence purely unilateral?

The process of Kosova independence was not purely unilateral. It is also a product of a long international process and strong engagement of the International Community. Kosova especially after 90's has been in various ways part of the international community activities. Many declarations, resolutions, conferences, etc were held regarding Kosova. Yugoslavia firstly and afterwards SRJ neglected and refused all the times requests made by International Community. SRJ delegation, for example refused to sign the Rambouillet Conference¹¹⁵ documents that hypothetically could have been the last chance of convincing Kosovar Albanians to be somehow part of SRJ creature. The NATO intervention and UN civil administration created a new environment opening a space for democracy and a process of state building for Kosova being internationally supervised. The process of establishing democracy and in building state responsible and accountable institutions was done in complete accordance and under international supervision. “Standards before the status” introduced by Michail Shteiiner (SRSG) on December 2003 is a document by which a series of conditions were to be fulfilled by Kosovo Provisional Institutions before the negotiations for final status talks. In 2005 Special Envoy of UN Secretary General, Kai Eide monitored the fulfillment of standards and based on his report the negotiations between Serbia and Kosova delegation led by Marti Ahtisaari (UNOSEK)¹¹⁶ were held in series of rounds and this finally opened doors to the Kosovo Institutions to coordinate with the International Community and Declare the Declaration of Independence. Thus Kosova Declaration of Independence is not exactly unilateral.

Thus as noted Kosova is a unique and sui generis case not to be used in any place of the world as a precedent.

Conclusions

The process of recognition of Kosovo from the states that did not recognize it yet is not expected to be an easy process and it needs quite more efforts: both nationally and internationally. Kosova state institutions and not only them should strengthen their structures in order to better use the arguments that go in favor of recognition. Responsible for lobbying within state structures should better coordinate and work internationally spreading Kosova arguments favorising recognition based on the new rules and attitudes that exist under the current international law, especially in the new rules created based on the breach up of former Yugoslavia. International Law (*ius cogens*) is not at all violated by the Kosova Declaration of Independence and this is confirmed with the International Court of Justice with its opinion. Kosova is a sui generis case and there are no similarities between Kosova and other entities that aspire independence thus no precedent can be built upon Kosovo case. Kosovo is

¹¹⁴ Marc Weller, Shtetësia e kontestuar: Administrimi ndërkombëtar i luftës së Kosovës për pavarësi, Koha 2011, p.441

¹¹⁵ After “Recak Massacre” where innocent villagers were massacred by Serbian military and police forces, the Contact Group organized the Rambouillet Conference held from February 6-23 1999 and from March 15 – 18 1999. The document for solution of Kosova Crises offered to both parties, was refused by SRJ delegation and due to this International Community opened the doors for military actions against SRJ forces that indeed were executed by NATO allies. See more about: Rambouillet Conference, at; Marc Weller-The Rambouillet Conference on Kosovo, Royal Institute of International Affairs 1999, article first published online: 16 December 2002, DOI:10.1111/1468-2346.00069

¹¹⁶ More information about negotiations and the Status Proposal available at www.unosek.org

recognized by 23 EU member states and it is already a member of IMF and the World Bank, and many other arguments that should be used in a much better way always coordinated with international mechanisms. The priorities and the needs for recognition should be more designed and with them should be approached international organizations and the lobby groups. It is crucial to enter into the public opinion of Serbia and in some other states that stand strongly against Kosova recognition with the arguments showing commitment on fulfilling international obligations and readiness to enter into all forms of cooperation with these countries. Definetely there was no breach of international law by proclaiming independence even if we rely in the strong principles of Westphalian legal order.

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