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Material Constitution and the Kosovo Context

Enver Hasani

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Editor's Notes

The Austrian National Defence Academy is glad to present this publication by the renowned lawyer and law professor Enver Hasani in its "Study Group Information" series. It touches upon important constitutional challenges in Europe's youngest country, Kosovo.

Professor Hasani is a longstanding member of the Study Group "Regional Stability in South East Europe" within the framework of the Partnership for Peace Consortium of Defense Academies and Security Studies Institutes. He has an impressive biography with various high-level positions both as scholar at the University of Pristina and as advisor on political level. For more details about the author, the readers can find his curriculum at the end of this book.

Our thanks go to several (former) members of the Austrian National Defence Academy who made this publication possible. Andrea Grausenburger from the academy's language institute polished the English version, supported by several colleagues. Miriam Zeug and Agathe Formanek acted as facilitating editors and did a wonderful job in proof-reading and formatting. Finally, we want to thank the members of the media and printing section withing the academy for their highly professional support.

Foreword

The concept of material constitution is brand-new in the public discourse in Kosovo. It no longer refers to a set of normative structures regulating power relations but includes the position and role of individuals in society. Besides this standard meaning, the expression 'material constitution' has an entirely different meaning and deals with regulatory forces supporting the legal and constitutional order of states. In view of this meaning, which is our object of study, the concept 'material constitution' focuses on the constitutional material that constitutes legal and constitutional order, which is different from constitutional material in the formal sense. The former contains regulations that are the pillars on which entire legal and constitutional orders rest and within which there exists a hierarchy based on the primacy of values contained therein. Such regulatory forces are political unity, fundamental political goals, institutions and social relations. Political unity and fundamental political goals are intertwined to such a degree that they cannot be dealt with in isolation. They represent the top pillars of material constitution. Their destruction or elimination is a clear indicator of the change in the material constitution of a politically organized society. Institutions and social relations are mechanisms and processes within which material constitution is created, promoted, developed, transformed or eliminated (destroyed).

The political unity of a state is forged during an initial constitutional project and is the result of a formative process created by societal forces – first and foremost politically organized ones – and non-political forces such as family, tribe, and social groups with religious, cultural, trade, business and other backgrounds. Via political action, these groups impose certain viewpoints as a form of unity and present certain political goals as generally acceptable for the whole society. The object of such political unity may be the way in which a state is organized, i.e. the **form of government** (monarchy and republic with all its ramifications), the way how sovereign political leaders are appointed, i.e. the **political regime** (democracy and autocracy with all their ramifications), whether a state is organized in one or multiple ways, i.e. the **forms of state connections** (whether a state is unitary, regional, a federation/confederation, an empire, a protectorate etc.) and, finally, the relationship between legislative, executive and judiciary and the forms of state power (parliamentary or presidential systems, mixed systems, assembly/convention

systems etc.). Apart from creating political unity, social groups determine and impose the fundamental political goals they intend to realize via an initial constitutional project. It is, really, political unity that contains political goals. Yet, fundamental political goals need to be expressed in clear terms, making them distinguishable from political unity. A change of political goals in the initial project necessarily causes a change in political unity and vice versa, although the fundamental political goals remain the same: a republic can be transformed into a monarchy, yet the fundamental political goals of national unity remain the same.

This book gives an almost exhaustive overview of all jurisprudential views on material constitution, including the difference between the legal meaning of material constitution as described above and material constitution in terms of a totality of regulatory forces, representing the constitutional material from which the legal and constitutional order results. At the beginning, I will comment on Italian and German authors before and after the Second World War. Their views will be compared to similar approaches of other authors. Finally, they will all be analyzed and common ground identified. The respective conclusions can be found at the end of this book, and readers will then be able to understand the material constitution of Kosovo, which emerged after February 17, 2008, and compare it with the one that began to take shape after the conclusion of the agreements of 2023. Through the latter, Kosovo committed itself to establishing territorial autonomy on behalf of the local Serbs, covering their national, cultural and religious heritages.

By concluding two agreements in **Brussels** and **Ohrid** in 2023, Kosovo made entirely new commitments, which are at odds with the political unity and fundamental political aims proclaimed by the **Declaration of Independence** of February 17, 2008, and the **Constitution of Kosovo** of April 15, 2008. In view of the radical consequences of those agreements on the constitutional and legal order of Kosovo, which will likely be felt once the draft Statute of the European Union is implemented, the 2023 Agreements should have been ratified in the Assembly of Kosovo. The obligations and commitments resulting from them touch upon the foundations of the constitutional and legal order of Kosovo and cannot, therefore, be ratified by the Head of Executive. Those agreements involve the exercise of **original constituent power**, which can only be exercised by the people of Kosovo and its representative – the **Assembly of Kosovo**. Yet, this parliamentary

ratification has never occurred, due to the lack of political will of the Kosovar Head of Executive. From an international legal perspective, things remain clear: Kosovo cannot avoid its responsibility for an eventual breach of the agreements it concluded willingly. It is well known that the Head of State, the Head of Executive, and the Minister of Foreign Affairs (the 'Big Three', according to international treaty law) commit the state, regardless of the form in which they express its will. The legal nature of those agreements and how they might affect the legal and constitutional order of Kosovo will be extensively discussed in this book.

Introduction

In the decades after 1970, the hegemony of a normative approach towards constitutional law emerged under the influence of the American doctrine. It says that a constitution is only what the (constitutional) courts say it is. This results from the fact that the judicial review of constitutionality as an instrument generally accepted on both sides of the Atlantic has forced constitutionalists to focus on offering hermeneutic guidelines while discussing the reasonings of judicial decisions. In **Europe**, this position is closely associated with the **Federal Constitutional Court of Germany** (FCCG) and has become the general standard for measuring the scale of realization of national constitutions. The latter is understood as a means of limiting the arbitrary exercise of political clout and empowering individuals by defining their rights and liberties. This situation, characterized as "juristocracy" by constitutionalists, has called into question **normativism** as a standard for measuring the scale of realization of the pillars of Western constitutionalism, which is based on the limitations of political power and the empowerment of the individual through human rights.

Perfected in the U.S, the **normative approach** has a long history, first appearing in the second half of the nineteenth century. It was the birth of legal positivism, which further developed through the works of Hans Kelsen (1881–1973), an Austrian jurist and legal philosopher. Like any approach, normativism, too, has shown its weaknesses and the limits of its explanatory force regarding law as a social phenomenon. They were the result of the strong focus on the constitutional status of existing normative structures and their implementation via judicial review. This became particularly obvious during revolutions and other social upheavals. In such extraordinary situations, answers to fundamental problems and to the dilemmas of constitutionalism began to be looked for elsewhere; more specifically, in the material upon which the entire constitution of a country is based. This approach is not new, either: it developed during the second half of the nineteenth century, especially during the interwar period. There are historical and epistemological reasons for the development of a material approach to constitution or, as originally termed by its author, **constitution in the material sense**. These reasons are most often to be found in the crises of liberal states,

the discrepancy between liberal trends, and in the radical political and economic changes of the time, starting with universal suffrage and the dramatic economic crisis of 1929. This led scholars to shift the focus of their studies and to consider the constitutional order of interwar Europe in more substantive terms. It was particularly important to study political parties – the main instruments of expressing the will of the people – as they were organized and governed according to clear principles, values and goals. Their empowerment as well as that of other social forces had been unknown in Europe until then.[1]

The 'substantive' approach, focusing on the entire constitutional material, coexisted with the normative approach endorsed by **Hans Kelsen** and others. Covering all the dimensions of constitutional material, the former can be considered a **non-normative approach** to constitution. It covers all dimensions of constitutional material: the legal, extra-legal, and extra-constitutional dimensions. In other words, in no way is it a nihilistic approach like the one described by **Ferdinand Lassalle** (1825–1864), based on sociological theories of constitution, according to which constitution only refers to actual social processes. As a legal and institutional one, our approach is quite different, as it focuses on constitutional material as a dimension of material constitution as well as on constitution in a material sense, according to **Costantino Mortati** (1891–1985), **Hans Kelsen** and other authors.

The generally accepted definition of material constitution includes all normative structures regulating power relationships and the position of individuals in society, regardless of form (oral or written), hierarchy (they may take the form of laws, by-laws and other legal enactments of less legal force), and other characteristics of a formal constitution. The situation is different when referring to a constitution in a material sense, i.e., not only as framework of normative structures that regulate power relationships and the position of individuals in society, but also as a system of social forces, institutions and political processes, straining, inhibiting or promoting the realization of a material constitution. The two dimensions are the result of a comparison, i.e., material constitution can only be understood by taking into account both

[1] See also: Goldoni, Marco and Wilkinson, Michael A.: "The Return of the Material Constitution". In: Goldoni, Marco and Wilkinson, Michael A. (eds.): *The Cambridge Handbook on the Material Constitution*. (Cambridge University Press: Cambridge 2023), pp. 1–21, at p. 5.

dimensions. For this reason, both expressions – material constitution and constitution in a material sense – have the same meaning in literature and convey the same message. As mentioned above, this is because in this book we do not focus on the normative structures of material constitution alone, but also on social forces, institutions and political processes straining, inhibiting or promoting the realization of the material constitution. In other words, the focus here is laid on the entire material a constitution comprises. Only with this focus can the exact meaning of a constitution be explained and interpreted at any time and under all circumstances. This holds true, particularly when dealing with emergency situations, social upheavals, such as revolutions, military coups and other situations, during which the fundamentals of social order are challenged. The components of **constitutional material** can only be understood by considering the conditions of the creation and development of a constitutional order, including any material changes, causing the suspension or modification of normative constitutional structures. To understand these phenomena, special attention should be paid to the material context, i.e., to the political, economic, cultural and social conditions for the realization of constitutionalism and the dynamics of constitutional regress and change. This means an in-depth analysis of the societal context, which forms the framework of constitutional development and constitutionalism, the latter always referring to a limitation of political power through the empowerment of individual rights and liberties.

There are four layers that constitute constitutional material. They are the object of analysis of this study, aiming to define material constitution (MC), a term used throughout the text, referring to both material constitution and constitution in the material sense as described above. The first layer refers to **political unity**, whose dominant form is the nation state. The second layer comprises the **entirety of institutions**, including not only the legislative, executive and judiciary branches but also administration, institutions, and independent and regulatory agencies. The third layer consists of the network of **social relationships**, including class, other interests and social movements. Finally, the fourth layer refers to all **fundamental political objectives** (***teloi***).

MC does not refer to extra-legal knowledge or legal norms but to closely and mutually connected constitutional dynamics. The concept is an **interpretation tool**, enabling a better understanding of constitutional reality. With its help, the mechanisms of constitutional development become apparent, depending on political and social vectors rather than on formal legal institutions, in particular judicial ones. As an interpretation tool, it simply prevents scholars from focusing excessively on normativism, drawing their attention towards processes, categories and phenomena residing within the legal-institutional framework of the formal constitution. Resting on the four layers described above, constitutional material is formed through formal processes regarding the development of positive constitutional law and its relationship with those processes. In this light, MC equals the totality of regulatory forces, creating political unity and forming the entirety of institutions, social relationships and fundamental political objectives. Together, they form constitutional order.[2]

Other non-formal concepts of constitutional order differ substantially from the concept of MC. In this context, concepts such as political constitution, living constitution, mixed constitution or historical constitution come to one's mind. They also serve as interpretation tools used to generate knowledge on constitutional order. In the case of **political constitution**, a British tradition, the focus is on the limitations on the arbitrary exercise of political power through the empowerment of individuals in society via democratic political processes. The roles of political parties, media and other actors of civil society within a constitutional system are of paramount importance for political constitution. The meaning of **living constitution** has evolved continuously in a way that made it partially independent of its formal source, creating a discrepancy between the text and its original meaning. As an instrument of interpretation, living constitution in most cases enables scholars to detect signals coming from within society, particularly those from political parties, movements and various social groupings. The concept of **mixed constitution** considers constitutional order as a balancing factor between various social strata coexisting in a harmonious manner. This supposed harmony is based on the consensus of three social classes (aristocracy, clergy and commoners) and belongs to the pre-modern constitutional history

[2] See also: Goldoni, Marco and Wilkinson, Michael A.: "The Material Constitution". In: *Modern Law Review*, Vol. 18 No. 4 (July 2018), pp. 567–597.

of states. Over time, it has been absorbed into the concepts and experiences of the doctrine of control and separation of powers, functioning as a constitutional invention and serving as a standard of Western constitutionalism. Finally, **historical constitution**, sometimes referred to as **domestic constitution**, is the manifestation of the basic idea in modern legal thinking that there are norms whose contents represent fundamental values and are to be treated as such by the legal system. At the times of written constitutions, these norms are mostly included in their texts, becoming positive law. A case in point are constitutional norms regulating the nature of constituent power and forming the core of the doctrine of **unconstitutional constitutional amendments**, known also as **eternity clauses**. The doctrine serves as a ban on the formal change of certain parts or aspects of formal positive constitution.

The common idea connecting all four non-formal concepts mentioned above is that a change in the constitutional order does not necessarily have to be the result of a formal change of constitution. Yet, apart from this common characteristic, these concepts do not have much in common with the concept of material constitution. They have a specific interpretative weight at times of peace and constitutional tranquillity, prevailing within the formal institutions of constitutional order. The situation is different with MC, which, as an interpretative tool generating knowledge on constitutional order, plays an important role, particularly during crises, revolutions and other major social upheavals, in short – in extraordinary situations. It is under those circumstances that MC proves useful in theory and practice regarding its explanatory force, while, at times of peace and tranquillity, its role remains negligible. This is very important for our readers to remember. Extraordinary situations (crises, revolutions and other major social upheavals) refer to everything that inhibits the normal functioning of the constitutional order; they can also occur during social peace and tranquillity.

Kosovo is a good example. The functioning of its constitutional order has been negatively affected for some years now, as far as the local Serb community is concerned. Officially, there has been no war, revolution or any other extraordinary situation. This will be discussed in the second part of this study, focusing entirely on MC within the Kosovar context. In fact, since the

emergence of the concept of MC as an interpretative tool regarding constitutional order, most scholarly work has taken place during times of peace and tranquillity, not formally qualifying as extraordinary or situations of war and conflict. Social upheaval can be caused using non-violent means and produce legal infrastructure typical of times of revolution, war and conflict.

Following those preliminary clarifications, the first part of this study will be devoted to theoretical elaborations on MC since its beginnings, whereas the second part will deal with Kosovo and its constitutional order. The latter specifically aims at analysing the creation and development of the MC of Kosovo, a gradual process that occurred within the institutional structures of the **Constitution of Kosovo** (CK), adopted by the Assembly of Kosovo on April 9, 2008. Readers are invited to study the first part of this study carefully for a thorough understanding of its second part. An integral read of the book is strongly recommended.

1. Theoretical Background and Regulatory Forces as Constitutional Material of Material Constitution

As with every practical project, the development of MC did not take place in a vacuum, outside any context or without any practical reason, in Hegelian terms. It was the inevitable result of the malfunctioning of the liberal state during the interwar period. Looking at the political history of nineteenth-century Europe, one notices two parallel ramifications of the development of MC: the development of the liberal state on the one hand, and the rise of the administrative and welfare state on the other. Both types of state cooperated and coexisted side by side. There was the liberal state, with its focus on civil and political rights, formal equality and the empowerment of the individual. The administrative and welfare state seriously challenged the premises of the liberal state through its own empowerment, thus transforming the state into an actor, interfering with all spheres of life and serving as an arbiter of the social disagreement caused by the Industrial Revolution and rapid population growth.

This century marked the birth and formation of nationalism, which was the result of major social changes, and the state became an ideal instrument for pushing political and constitutional projects. The arms race that commenced after the Italian and German unifications demonstrated the huge role played by the state regarding social mobilization. A new type of state, the administrative and welfare state, showed tendencies of totally absorbing society, thus becoming one and the same with it. This was the beginning of the general debate of, and theoretical work on, the role and position of the state in society. In hindsight, of course, the following century exposed all the weaknesses and dysfunctionalities of the liberal state. World War I and the Balkan Wars (1912–1913) before it showed that nationalism – with the state apparatus with all the sheer physical power behind it – rather than class or solidarity, based on the premises of the liberal state, was their driving force. After the end of World War I, the Austro-Hungarian, German, Russian and Ottoman empires collapsed. From their ashes new states arose, which were as multi-ethnic and multi-cultural as their predecessors. Again, the state was a main force in managing all sorts of social conflicts: with nationalism dominating in those new states, the state apparatus was used to suppress any ethnic, linguistic, religious and other discontent. The **Constitution of Weimar** (CW),

an amalgamation of the liberal and administrative and welfare states, remained an oasis in Europe: the winners of World War I dictated very harsh terms of peace on Germany and its allies. This proved to be fertile soil for the birth of illiberal monarchical states, particularly after the Nazis' rise to power in 1933. Social forces in Europe reflected constitutional orders different from those existing in the original constitutional projects of most of the states. In extreme cases, there was no constitutional order at all. That was the case with Nazi Germany, in which the duality between formal and material order did not exist, as the country's leadership was based on the *Führer* principle. For this reason, there is a general agreement that **Nazi Germany** did not have an MC: the *Führer* ruled by his will only.[3]

It is within this political environment that scholarly work on MC emerged. It flourished particularly in Italy and Germany, focusing on the analysis of the relationship between politics and positive constitutional law and their mutual influence. The analysis was aimed at discovering certain causalities in the political and constitutional developments of these countries. In some cases, the analysis was extreme, denying that there was any relationship between politics and positive constitutional law. This denial incorporated two dimensions: the first is outlined by **Carl Schmitt** (1881–1985), the second by **Hans Kelsen**. For Schmitt, a constitution only represents the first decision-creating concrete political unity and is, therefore, labelled decisionism. According to Schmitt, constitutional law is considered the totality of normative structures that emerge after this first decision. Unlike the latter, those structures can be amended. According to Kelsen, constitutional law is based on a *grundnorm*, a basic norm that renders all other legal norms valid. The existence of this basic norm equals the existence of God and cannot be denied. Any normative structures produced after this first norm are considered autonomous, hierarchic, and independent of any political influence.

The theory of MC constitutes a third dimension, whose development was not influenced by any of the abovementioned theories. Its key proponents are **Costantino Mortati** and **Hermann Heller** (1891–1933). Like Schmitt and Kelsen, they base their theoretical observations on the intellectual pre-

[3] See also: Vinx, Lars: "The Material Constitution of the Dual State". In: Goldoni, Marco and Wilkinson, Michael A. (eds.): *The Cambridge Handbook on the Material Constitution*. (Cambridge University Press: Cambridge 2023), pp. 100-111.

cursors of the time, their work relating to the context of the **CW**. To distinguish them from the positivists and jurists who heavily relied on normativism, Mortati and Heller are referred to as institutionalists. This, however, does not seem to suffice: Schmitt and Kelsen were themselves institutionalists, since their analyses were based on the institutional framework of the Weimar era. Differences between them should be searched for outside the institutional context, i.e., in their attitudes to politics and law. The answer to the basic question, whether there exists an autonomous sphere of law independent of politics, can be found by comparing the scholars who endorse the doctrine of MC with those who do not. Scholars who endorse MC do not deny the importance and specific weight of normative constitutional structures, regardless of the form in which they appear: their focus is on certain regulatory forces of constitutional order that comprise the constitutive material necessary for any research and serious analysis of constitution and its meaning. The respective scholars and constitutive material will be dealt with in detail in the following part.

1.1. Classical Theory

The term MC was coined by Hans Kelsen. The meaning he attributes to MC neither factors in social or political relationships nor does it consider the state as a legal-political and sociological entity. The entire focus here is on legal norms and their congruence with the state, which, in turn, represents the personification of legal and constitutional order. Now, let us deal with the legal concept of MC. There are two sub-variants: the first distinguishes structural elements (**material structural constitution**) and defines constitution as a set of rules regulating the production of general legal norms, in particular laws. According to Kelsen, these norms are identified by legal science. This approach is also embraced by **H. L. A. Hart** (1907–1992). The essence of this variant of the legal concept of MC (of constitution in all its manifestations) is that a legal system is considered an autonomous field, i.e., that law itself decides on its own validity. The second variant focuses on substantial elements of constitution (**material substantial constitution**). This applies particularly to countries where courts exercise judicial review of laws.[4] In

[4] For a discussion of the difference between formal and material constitution in the work of Hans Kelsen, see also: Vinx, Lars: *Hans Kelsen's Pure Theory of Law. Legality and Legitimacy.* (Oxford University Press: Oxford 2007), pp. 158–160.

such countries, MC is revealed through substantial contents that are authorized or banned by the constitution. Here the key word is 'constitutionality test': the contents of normative structures contradicting current constitutional norms and values are bound to fail.

Material structural constitution refers to the legal concept of MC, while **material substantial constitution** is another name for the legal-formal concept of MC. The legal-material and the legal-formal concepts are useful, particularly for clarifying the meaning of 'European Union (EU)' and 'Great Britain'. This is so because, formally, the EU and Great Britain have no written constitutions, while, in a substantive respect, they have structures and procedures that constrain political power by limiting its arbitrary use in a highly effective manner. Above, we referred to it as 'political constitution', preventing the arbitrariness, subjectivity and abuse of power. This is realized through the mechanisms of separation, the balance of powers, and the effective protection of the rights and liberties of individuals. In this context, **Karl Loewenstein** (1891–1973) and **Carl Joachim Friedrich** (1901–1984), a renowned Western constitutionalist, should be mentioned.[5]

To better understand the material on which a constitution is based, we had rather move beyond the concepts of material constitution described above. We need to shift our focus towards the less formalistic concepts of Kelsen's contemporaries, who question Schmitt's decisionism. Less formalistic theories, which have been depoliticized and focus on constitutional material as described above, were formulated by **Hermann Heller** and **Costantino Mortati**. As renowned lawyers, they both focus on the connection between constitutional order and society to avoid the entrapments of orthodox liberalism, regarding the relationship between law and politics or between society and the modern state. Those concepts were forged through their work at crucial moments of constitutional history in **Weimar Germany** and **Italy** during the rise of **fascism**. **Mortati** belongs to a group of highly influential scholars who researched the meaning of constitution outside the legal context. His approach was a reaction to the crisis and disease of the liberal state, which became most apparent during the economic crisis of 1929.

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[5] See also: Hasani, Enver/Gruda, Përparim and Çerkini, Zahir: *E drejta kushtetuese.* (Fakulteti Juridik i Universitetit të Prishtinës "Hasan Prishtina": Prishtinë 2023) [*Constitutional Law.* (Faculty of Law of the University "Hasan Prishtina": Pristina 2023)], p. 32.

This crisis was followed by efforts to discover the modalities of the liberal state and search for explanations pertaining to them. This was a result of universal suffrage and the huge influence exercised by political parties and syndicates. Consequently, the concept of formal constitution, established by the liberal state, could not comprise all constitutional developments of the time. However, Mortati was not the only one focusing on the connection between social and constitutional order. The institutionalist **Carl Schmitt**,[6] but also **Hermann Heller**[7] and **Santi Romano** (1875–1947) concerned themselves with this issue during the interwar period. Each one of them, in their specific manner, argued that MC was the result of major transformations within the contemporary state, particularly universal suffrage, changes in the field of human rights, and the creation of social, economic and cultural rights. There were calls for the latter to gain constitutional status to include excluded strata of society in the political and constitutional system. Without this specific context, the theories of those authors are difficult to grasp. They consider the entirety of constitutional material upon which formal constitution rests and according to which it is implemented.

H. Heller offers a third alternative to Kelsen and Schmitt. According to him, scholars are required to approach the concept of constitution dialectically as political power always requires a certain legal form, which, in turn,

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6 See also: Schmitt, Carl: *On Three Types of Juristic Thought.* (Praeger Publishers: Westport, Connecticut 2004), (first published in 1934).

7 See also: Bookbinder, Paul: "Hermann Heller Versus Carl Schmitt". In: *International Social Science Review,* Vol. 62 No. 3 (Summer 1987), pp. 119–127. (The author counters views of H. Heller and C. Schmitt; H. Heller was a social democrat and a proponent of representative parliamentary democracy, quite contrary to the view of C. Schmitt, who was a proponent of the dictatorial and totalitarian state; a special passage in this article is devoted to the arguments of these two scholars at the time of the commencement of the trial against Prussia, following its being taken over by the German Reich (Federal Government); at the time, the Federal Government was headed by the right-wing nationalists of Franz von Papen (1879–1969); at the Supreme Federal Court of the German Reich, known as **Reichsgericht**, C. Schmitt defended the Reich's decisions to oust the legal and legitimate government of Prussia, while H. Heller defended Prussia and its social-democratic government, as a symbol of Weimar liberal and democratic constitutionalism; in the end, the **Reichsgericht** decided that the **Reichspräsident** had the right to take control of the Prussian Government whenever public order and security were violated; the author of the article presents and analyses the arguments of both parties to this lawsuit in detail).

needs to be supported and protected by the state. Heller argues that politics represents an activity in which conflict is turned into social cooperation. He claims that politics can no doubt be a conflict situation. Contrary to Schmitt's decisionism, Heller thinks that politics is developed and implemented within common normative structures previously adopted by society. According to him, this is the most essential constitutive material of formal constitution. Apart from normative structures, the ethical rules and principles of politics must be taken into account. Morals and ethics impact political processes by opening up new possibilities of transforming potential conflicts into cooperation and social arrangements. This is due to the fact that MC is influenced by external social, political, cultural and other factors, all operating within the same legal framework and infrastructure.[8] Nevertheless, this is not the very essence of Heller's alternative: the interdependence of politics and legal norms has a dynamic side of its own, as it is pushed and developed by ethical endeavours to achieve a certain legitimacy, including the goals of a successful constitutional project. Taking into account the social function of the relationship between norms and politics, Heller argues that power should not only be based on legality in a technical sense, but also on legitimacy if it wants to continue to prevail and maintain certain ethical and moral standards of its own normative structures.[9] In its entirety, constitution not only depends on material order, i.e. normative activity, tradition and political benefit but also on the social and economic power constellations within the state.[10] In this light, constitution is a *modus vivendi* based on political compromise and on a balance of interests of all actors within a society, which also has to have normative characteristics. This applies to both constituent and constituted powers – a prince or a population possess the right to grant a constitution based on a normative authorization[11] – but deviates from Kelsen's *grundnorm* theory and Schmitt's **decisionism**. According to Heller, a constitution must be applicable at least to a section of society that implements it and abides by it, but not out of selfish interests but because they accept it as it is. He does not

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8 See also: Malkopoulou, Anthoula: "Hermann Heller on politics: discipline, sphere and activity". *History of European Ideas,* Vol. 46 Issue 4 (2020), pp. 393–404.

9 Heller, Herman. "Political Democracy and Social Homogeneity". In: Jacobson, Arthur and Schlink, Bernhard (eds.). *Weimar: A Jurisprudence of Crisis.* (University of California Press: Berkeley, CA 2000), p. 272.

10 Ibid., pp. 275–276.

11 Ibid., pp. 277–278.

specify which section of society exactly he is referring to.[12] By associating constitutional authority with acceptance, Heller supports the democratic view that political power is a result of the will of the people.[13] A point of reference of this approach is the **CW**, which was the first constitution in German history to recognize universal suffrage. For Heller, democracy has nothing to do with determining identity by differentiating between those ruling (governing) and those being ruled (governed), but with the requirement of relative social homogeneity. This homogeneity cannot only be achieved through political power but can also be based on cultural, religious and nationalist elements. Thus, the concept of social homogeneity falls within the category of socio-economic relationships: what counts is not an ideological superstructure but real social and economic relationships. At all times, there should be a certain level of social and economic equality or, at least, the prospect of it as a precondition for people to be transformed into the unity of *a* people. Similarly, Heller rejects radical forms of equality, where formal democracy turns into a dictatorship of the ruling class. At the same time, he denounces Schmitt's decisionism. For Heller, **political unity** is neither the result of one high-level decision taken in a legal vacuum nor the dictatorship of the ruling class. It is rather a result of a conscious bottom-up process accomplished by social forces, which is not reached by making a distinction between "us" and "them", as Schmitt does, but through a political process which channels conflicting requests into a general good. This requires institutions and, particularly, political parties. From the beginning, a people's homogeneity is formed on a daily basis.[14]

As for the role of the state in economy, Heller does not propagate a separation of politics and economy but an increase of their interdependence. With regard to economy, social homogeneity cannot be maintained in case of widespread poverty. As a result, the state should act with a certain amount of authoritarian socialism if it wants to maintain homogeneity. This is labelled **authoritarian liberalism**: on the one hand, the welfare and administrative state should be contained; on the other hand, the industry, big banks

12 Ibid., p. 273.
13 Ibid., p. 273.
14 Ibid., pp. 260–261.

and agricultural enterprises should receive support on a large scale.[15] However, this type of liberalism should not be implemented by way of a political process: according to Heller, it should be implemented unobtrusively and appear as market justice. Prior to that, a parliamentary debate should take place and ensure a legitimate, democratic and bottom-up redistribution of wealth. Heller's conclusion is clear: the abandonment of social homogeneity paves the way for dictatorship.

Mortati was a contemporary of Heller's. His scholarly views pertain to an era in which the Italian state was fundamentally transformed (consolidation of the fascist regime). Contrary to Heller, Mortati tends towards a realist interpretation of constitutional order, but not in terms of Schmitt's decisionism. His opposition to Schmitt is expressed in his first articles, describing political regimes that emerged after World War I. Like Schmitt, he disagrees with Kelsen and **Vittorio Emanuele Orlando** (1860–1952), one of the best lawyers of his time. The essence of Mortati's theory is that normativity in society exists in a grey zone between law and politics. It is through the analysis of this zone and the relationship between law and politics as well as by looking beyond the formal aspects of law that proper knowledge of a constitution can be obtained. Law is not valid simply because it is supported, as legal formalists say, but because there is a certain grey zone in which the interaction between law and politics produces constitutional normativity during certain periods of human development. Contrary to the postulates of legal positivism, norms are valid because their origins are rooted in a socio-political relationship. Politics cannot be separated from law: Normativity is to be found in a grey zone between law and politics.[16] The concept of MC, which should be seen in the light of formal constitution in theory and practice, is key to detecting this grey zone.

The dichotomy of formal and material constitution is essential for understanding two of the main aspects of Mortati's work: it enables the researcher

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15 Heller, Herman: "Authoritarian Liberalism?". In: *European Law Journal*, Vol. 21 No. 3. (May 2015), pp. 295–301, at p. 300.

16 Rubinelli, Lucia: "The Constitution in the Material Sense According to Costantino Mortati". In: Goldoni, Marco and Wilkinson, Michael A. (eds.): *The Cambridge Handbook on the Material Constitution*. (Cambridge University Press: Cambridge 2023), pp. 89–99, at pp. 90–91.

to analyse the relationship between formal texts and the material context within which they operate. Through this approach, scholars have been able to discover the importance of **political aims** and the **social forces** that support these aims. At the same time, this shift from formal legal texts to socio-political relationships, forming the basis of such texts, makes it possible to highlight the advantages of institutional and organizational aspects over other extra-legal dimensions. **Mortati** believes that the validity of law may only be attributed to **extra-legal sources**, which have always been socio-political by nature. This belief reflects his commitment throughout life to a **realist legal methodology**, which consists in the identification of the reality of a state and its system of organized social forces, which have superior status compared to other normative institutions, including formal constitutions. If the reality of a state is based on a certain hierarchy of social forces, the normative validity of law cannot be separated from the efficacy of this hierarchy: both depend on a material reality, on whose basis they came into being and in which they operate; a reality that reflects a specific organization of social forces capable of expressing one or several political goals. The validity and efficacy of a state's legal system relies on the capability of social forces to establish **unity regarding specific political projects** and present them as **political goals of general importance**. Once they have been successfully realized and the rest of society is aware of their existence, such projects become the source of legal and political normativity. In this light, the validity of law is not derived from the basic norm but from the analysis of the factors outside a legal system that constitute the reality of a state, i.e., the diverse social forces that operate in it. Contrary to legal positivism, the **political source of normativity** can neither be derived from the legal system nor from a hypothetical norm bearing no relationship with the material and contextual reality of a state.[17]

Formal constitution is not normative in itself. According to Mortati, **the essential content of the constitution** cannot be defined from the constitutional text alone, which consists of a list of organizational and technical provisions, which say nothing about the political orientation of the constitutional system or its political goals and aims. Consequently, the constitutional text cannot impose obedience and subservience. Its legal force is limited to

[17] Rubinelli, Lucia: "The Constitution in the Material Sense According to Costantino Mortati", pp. 91–92.

describing legal systems, i.e., constitutional normative structures, regardless of their form; still, it is little more than a photographic description of an existing legal order, which does not reveal **the essential content of a constitution**. Thus, the role of a formal constitution is limited to imposing simple tasks of organizational and technical natures. What confers validity and normative power on a constitution, referred to as **the true essence of the constitution** by Mortati, can be found in the material reality to which it applies. This material reality, shaping MC, is composed of two distinguishable pillars: the first one is called **typical essential element of the constitution** or, according to Mortati, ***fine politico*** (political goal). The second is composed of **normative material elements**, which shape the essential content of a constitution. These elements refer to the specific socio-economic relationships from which specific political goals arise and which frame these goals as the general will of the population. For Mortati, society as an abstract notion is not a **normative material element** that defines ***fine politico***, because nation, people, community and other elements constituting society are not legal subjects. Such legal subjectivity is only attributed to **social forces** that define the ***fine politico*** of a country. Political goals never emerge from the general will of an unidentified, abstract totality as predicted by **Jean-Jacques Rousseau** (1712–1778), who said that the general will or *volonté générale* is never wrong, appears directly, without the mediation of a subject or social forces, is always on the right side of history, and constitutes the source of all political legitimacy. According to Mortati, it is **social forces** that unite around basic organizational elements, create organizational structures within society and speak on behalf of their members. Within these structures, some individuals exercise power and influence over others, gaining their loyalty and obedience. Consequently, **normative material elements** underlie certain power configurations, which is reflected by a specific organization of social groups. These configurations, in turn, are reflected in power relationships, with one or more groups emerging as the dominant one(s); the latter finally shape the ***fine politico*** and provide the constitution with normative substance. Moreover, these power configurations create two types of social forces: the powerful or dominating and the powerless or dominated. The latter either passively accept the situation or immediately begin to challenge and actively contest the power configurations imposed on them. It is the movements caused by the intense competition between dominant and dominated social forces that explain the changes in the meaning, efficacy and normative value of constitutional texts. Apart from the **normative material**

elements, MC possesses another defining feature, which Mortati terms **essential content** of the constitution. While normative material elements refer to the material relations forming the basis of the constitutional normativity of every constitutional order, essential content refers to the content of this normativity, exposing its very nature. The latter, like the other concepts described, contains expressions and language relating to the grey zone be-tween politics and law. Within this zone, potential political projects are developed, reflecting the power configurations of socio-economic groups, which finally transform them into concrete projects valid for society as a whole. According to Mortati, the **essential content of the constitution** should not be confused with the "general will" according to Rousseau. Mortati's concept of "essential content" deals with the basic and initial interests of social dominant groups, occupying a dominant position compared to the rest of society, with the capacity to transform their specific vision into a power centre of all social activities that are important to them. In other words, dominant social groups are deemed successful if they manage to transform their political vision into a matter of general interest and, in this way, determine the **essential content of the constitution**. This content reflects the fundamental principles of the order of certain political communities and institutionalizes the relationships between dominant social groups on the one hand and dominated social groups on the other.[18]

Although MC is not characterized by permanent stability, its content tends to remain unmodified during long periods of time. Mortati exemplifies this from a historical perspective by illustrating the changes of the MC of his country. He shows that a simple revision of the constitution, simple changes in the government or a shift in the balance of forces between political parties in parliament do not necessarily lead to a change of the content of MC. In this case, we are dealing with superficial constitutional changes, pertaining to the composition of dominant elites, unimportant norms or constitutional procedures. All this falls within normal or standard changes of formal constitutions, following regular procedures. However, a change of MC requires more than this. The most important sign of such a change would be a radical shift in the political vision impacting a constitutional and political system in its entirety. In the case of a constitutional liberal state, which has always been

[18] Rubinelli, Lucia: "The Constitution in the Material Sense According to Costantino Mortati", pp. 93–94.

Mortati's point of reference, this would mean, for example, the abandonment of the principles of the rule of law or political pluralism in favour of a fascist government or another authoritarian regime. As mentioned above, this does not happen very quickly, as a change of MC takes time. It requires dominated social groups embracing an alternative political vision as well as a shift in power configurations strong enough to change the constitutional *status quo*. This is a slow process, requiring structural changes at the level of the organization and the distribution of power in society: the content of MC is open and ready for challenges, but its close connection with the deeply stratified relations upon which it is built makes it extremely resilient.

Mortati does not see the people as a source of the constitution. This is because, despite admitting that society is the material basis of all political and legal norms, he refuses to see it as a uniform, rational actor with a national, homogenous consciousness. According to Mortati, the legal norms of a society or a people constitute generalizations that cannot be used to explain the power relations behind constitutional norms. For Mortati, there is no such thing as a people; what exists is a variety of groups who find themselves in a permanent state of conflict and competition. It is within this sphere of conflict and competition that collective will is born, which might translate into a constitution, laws, by-laws and other normative structures. According to Mortati, the fundamental units of **material democratic constitution** are **intermediary communities** that operate as intermediary structures between the governing and the governed. These social groups are created to satisfy their needs in relation to the state. In a democratic state, the presence and work of communities are key to transferring personal and collective preferences into state institutions and political decision-making.

As for intermediary communities, Mortati considers the following as the most important ones: family, religious communities, cultural organizations of all sorts, professional associations, and workers' syndicates as well as territorial communities such as regions, provinces and cities. Citizens are usually members of such communities and create organizations relating to common values, interests etc. In this context, the role of intermediary communities is to raise citizens' awareness of the increasingly complex demands of living in a community and to increase the scope of human activity. In other words, the intermediary communities are at the root of the **essential content of the**

constitution, reworking and negotiating the latter. This does not mean that the presence of intermediary communities itself guarantees the realization of the **essential content of a constitution**, but that specific instruments should be provided to make a constitution effective and institutionalize democratic participation. Such instruments are institutional mechanisms that are to be included in the constitutional text, providing citizens with a means to act based on the values and strategies developed by the intermediary communities. Thus, the citizens themselves determine the direction and priorities of the state.

There are two types of instruments: instruments of **representative democracy** on the one hand, and practices inspired by **direct democracy** on the other. The instruments of the former type embrace the idea that popular participation should be mediated by a certain expertise. According to Mortati, the most important institution to ensure this is the **political party**. He strongly prefers the proportional system, relying on every vote and thoroughly reflecting the structure of society and its organization into social groups and intermediary communities. This enables a maximum representation of MC in all its complexity. Instruments of direct democracy are, according to **Mortati**, the **right to petition**, **right to legislative initiatives**, and **the right to referenda**. They give intermediary communities the possibility to exercise direct influence on the formulation and realization of political goals, regardless of the work of elected representatives. For Mortati, referenda are a valuable tool because they expose discrepancies between formal sources of constitutional law and MC.[19] He therefore rejects the limits of formal constitution – that is, constitutions, laws, conventions, customs, bylaws, and court decisions –, arguing that formal sources alone do not sufficiently define constitutional reality.

Apart from questioning the limits of a formal approach to constitution, Mortati's work deals with other, still unexplored dimensions of constitution such

[19] Rubinelli, Lucia: "The Constitution in the Material Sense According to Costantino Mortati", pp. 98–99.

as its governing function and discretion of administrative action. These issues will be discussed in the following part.[20] It is not by accident that Mortati's deliberations start with the governing function, with a focus on the constitutional structure of fascist regimes. The latter were a response to the obvious crisis of the liberal state, which resulted from the pressure of the centrifugal force of popular masses on the political system. This pressure, in turn, was a consequence of universal suffrage and the empowerment of trade unions. The same crisis was addressed earlier by **Santi Romano** in his essay 1910, which served as a basis for Mortati's research.[21] In the 1930ies, Romano refers to Schmitt, explaining his institutionalist position. Schmitt himself labels this institutionalist approach **"theory of concrete order"**. Both Romano and Schmitt criticize the normativist approach to law and constitution, which was a dominant feature of the **legal positivism** of the time. In opposition to it, they develop an institutional approach considering legal norms to be secondary phenomena and instead focusing on the importance of institutional order. According to them, this order simultaneously forms, formalizes and represents the essence of legal and constitutional norms. The crisis of the modern state can only be overcome by recognizing the legal character of non-state institutions and their order. Contrary to Romano, Schmitt relies on the **theory of concrete order**, which exists in a legal vacuum and can be recreated in times of social upheavals (wars, revolutions, military coups etc.). In this context, Schmitt advocates a purely ideological interpretation of law. An extreme example of this view is the **National Socialist *Führerprinzip*** (leader principle). Based on this concept, Schmitt invited German judges to reinterpret the so-called general clauses of the CW and German laws in the spirit of Nazi ideology. His views are characterized by obscure theoretical reasoning on totalitarian states, which is alien to Romano, who stresses the neutral and descriptive nature of his institutionalist

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20 See also: Mortati, Costantino: *L'ordinamento del governo.* (Giuffrè Editore: Milan 2000 [orig. 1931]); Mortati, Costantino: *La volonta e la causa nell'atto amministrativo e nella legge.* (De Luca: Rome 1935); Mortati, Costantino: *La costituzione in senso materiale.* (Giuffrè Editore: Milan 1998 or 1940); La Torre, Massimo: "The German Impact on Fascist Public Law: Costantino Mortati's Material Constitution", In: Joerges, Christian and Ghaleigh, Navraj Singh (eds.): *Darker Legacies of Law in Europe.* (Hart Publishing: Oxford 2003), pp. 305–320; Della Cananea, Giacinto: "Mortati and the Science of Public Law". In: Joerges, Christian and Ghaleigh, Navraj Singh (eds.): *Darker Legacies of Law in Europe.* (Hart Publishing: Oxford 2003), pp. 321–336.

21 See also: Romano, Santi: *Lo Stato moderno e la sua crisi.* (Tipografia Vannucchi: Pisa 1909).

approach. Romano claims that non-state institutions and legal orders can never be fully absorbed by or incorporated into the state – they continue to exist quasi in its shadow.[22] By contrast, Schmitt advocates the absorption and full integration of any institutional order into the totalitarian state.[23]

Mortati, who contradicts all scholars of his time, searches for constitutional material beyond the three classical state powers, i.e., legislative, executive and judiciary. He discovers the governing function, which cannot be reduced to the executive power as it forms the political unity of the state. This new function is described as crucial, autonomous and distinguishable from the three classical functions of the liberal state: above all, it is capable of shaping social development.[24] This capability of the governing function represents the essence of Mortati's theory on constitution. It depicts society as in need of organization, which is not taken for granted. The governing function serves as a political incentive for pushing the organization of society, which is based on two different but interdependent principles: first, the **principle of differentiation** and, second, the **principle of specification**. Differentiation is a necessary feature of every constitution, which is based on the distinction between those who govern and those who are governed.[25] The second feature pertains to Mortati's refusal to categorize constitutional actors into **friend and enemy** (cf. Schmitt). For **Mortati**, this categorization serves to disintegrate society.[26] He sees differentiation as an essential tool, because legal order is shaped only by ensuring the organization of society through the assignment of roles and specific positions to social actors. In this way, the roles and social positions in society are specified. The artificial character of this process is understood only when certain groups become dominant within political systems in the form of organized political parties that are supported by the masses. Mortati shares Heller's view on the importance of

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22 See also: De Wilde, Marc: "The dark side of institutionalism: Carl Schmitt reading Santi Romano". In: *Ethics and Global Politics*, Vol. 11 Issue 2. (2018), pp. 12–24.

23 See also: Croce, Mariano and Goldoni, Marco: *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati.* (Stanford University Press: Stanford, California 2020), pp. 51–135.

24 Mortati, Costantino: *L'ordinamento del governo*, pp. 14–15.

25 Mortati, Costantino: *La costituzione in senso material*, pp. 56–61.

26 Mortati, Costantino. "Brevi note su costituzione e politica nel pensiero di Carl Schmitt". *Quaderni Fiorentini per la storia del pensiero giuridico.* Vol. 2 No. 1. (1973), pp. 511–532, at p. 518.

political representation for the process of social renewal: political unity can never be achieved via abstraction or general laws.[27] Society is a product of the differentiated integration of intersubjective relations, which are mediated through political parties.[28] This mediation by political actors operates as a regulatory factor of MC: political forces create and shape political unity on the basis of differentiation and specification. What Mortati has in mind here is the **political party** – the only actor capable of translating the life of a state into concrete action by organizing and mediating social relations, effectively incorporating various societal interests while excluding opposing viewpoints.[29]

This is necessary for the consolidation of the political unity of a state. In fact, only through the mediation of political parties, which Mortati considers **organs of state**, can differentiation and specification be achieved and, thus, political unity created. For this function to be realized, political parties should promote general political goals, i.e., goals that have to do with society (or at least with a substantial majority of social relationships).[30]

Mortati does not deny the existence of constitution – neither in a legal, strictly formal sense, i.e., codified into one or few texts of superior value (formal constitution in the classical sense) nor in an informal sense, i.e., as a body of legal norms without superior force, scattered over different sources (material constitution in the classical sense). The difference between formal and material constitution is explained in the introduction of this study. Mortati's views on MC are different, as he tries to prove the existence of the specific phenomena of which MC is composed. He reveals the existence of other regulatory forces that impact the implementation and realization of constitutional order. For this reason, constitution should be understood as the embodiment of the **fundamental goals of social forces** that exists in

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27 Mortati makes it clear that society in its entirety cannot provide a general principle of unification to guide the reconciliation of opposing interests and steer the state toward its ultimate goal, even if it develops specific legal views regarding certain relations. Mortati, Costantino: *La costituzione in senso materiale*, p. 138.

28 Mortati, Costantino: "Brevi note su costituzione e politica nel pensiero di Carl Schmitt", p. 514.

29 Mortati, Costantino: *La costituzione in senso materiale*, p. 71.

30 See also: Croce, Mariano and Goldoni, Marco: *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati.* (Stanford University Press: Stanford, California 2020), pp. 136–183.

every positive order. The goals defining a constitution are identified and expressed by organized political forces, which, at a certain historical moment, manage to actively interpret the general interests of a political community. These forces actively empower and concretize **formal constitution**, aiming to present it as a coherent unity. They are politically conscious and comprise structures upon which a legal constitution rests in its entirety. According to Mortati, these structures refer to the roles and positions of political parties and their intermediary communities. This means that MC is not a sovereign, concrete decision determining the form of political existence (Schmitt) but a series of decisions and political dynamics that, willingly and consciously, give direction to state and society within a certain previously determined legal framework. This differs from Schmitt's views on concrete decisions, which, according to him, take place outside any normative context, i.e., where the original constituent power has absolute priority and knows no limits, including normative ones.[31]

In addition to political parties, syndicates and other influential social forces, Mortati regards **political elites** as **particularly important**, because formal constitution is merely a product created by winning political elites. In terms of constitutional material, constitution includes **all forces** as well as all **goals pursued and realized** within a society, although they sometimes contradict formal constitution.[32] The pursuance of fundamental political goals through the **function of governance**, which is a result of the competition among political parties, represents the essence of a constitution. In this sense, constitution is equivalent to constitutional order, as it reflects the norms regulating society in its fundamental dimensions, irrespective of political and formal sources.[33] Clearly, this refers to the political **meaning of the constitution**. Just like during the interwar period, it has now been fundamentally reconceptualised due to the **September 11** terrorist attacks, the **Eurocrisis** (2009), and other recent political developments. This is because of the inter-

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31 See also: Wenman, Mark: *Agonistic Democracy Constituent Power in the Era of Globalisation.* (Cambridge University Press: Cambridge 2013), pp. 8, 50, 59, 61, 216.

32 See also: Fioravanti, Maurizio: "Le dottrine della costituzione in senso materiale". In: *Historia Constitucional,* No. 12 (2011), pp. 21–30.

33 Lavagna, Carlo: *Istituzioni di diritto publico. Volume primo.* (Unione Tipografico – Editrice Torinese: Torino 1970), p. 201.

nal dynamics of MC and the relationship between extra-constitutional factors and the existing constitutional order, based on the legal concept of constitution as described in the introductory part of this book. These determinative factors are the result of the **differentiation** and **specification** of political forces, processes that determine the final goals of a legal order and are key to a proper understanding of MC.

Despite the central role of **social forces** and **political elites**, Mortati insists on the legal nature of the formative processes behind MC. This is a crucial point, since it enables researchers to avoid constitutional dualism, that is, a strict distinction between facts and law. To be able to shape MC, social and political groups must be organized and possess organizational principles and concrete objectives. In this light, MC could be described as the object of legal knowledge, because these principles and objectives can be transformed into legal norms. This dimension cannot be neglected: political objectives have legal importance because they are controlled by the **governing function** and, at the same time, serve as the primary sources of legal order.[34] In this manner, Mortati describes the emergence of MC as the formation of a number of political groups around certain fundamental political objectives, aiming to realize them through the help of legal institutions. This is not **decisionism**, a process based on a concrete decision informing and promoting legal and constitutional order, because fundamental political objectives are selected in an environment characterized by the existence of regulatory factors. On the other hand, this process is not entirely **normative**, because the norms of MC are labelled "political law" (*diritto politico*): their content results from the integration of political objectives into these norms.[35] Consequently, the true nature of a constitution is not defined by specific decisions, as Schmitt suggests, nor by legal norms structured around a "*Grundnorm*" at the top, as Kelsen proposes. According to Mortati, this essence is identified through the **normative fact**, which itself is law, guaranteeing its survival for the future.[36] In other words, a normative fact comprises the totality of political goals/objectives and social forces aiming at the implementation of these very goals and objectives.

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34 Mortati, Costantino: *La costituzione in senso materiale*, p. 110.

35 Ibid., p. 106.

36 Mortati, Costantino: *Raccolta di Scritti. Studi sul potere costituente e sulla riforma costituzionale dello Stato. Vol. 1.* (Giuffrè Editore: Milan 1972), p. 12.

Mortati is not a **legal** but a **constitutional realist**: in his view, law cannot be reduced to an instrument of political hegemony. Assuming that MC is the product of differentiation and specification processes, based on complicated compromises regarding political objectives, those in power cannot use or manipulate positive law at their discretion for two reasons: first, because the balance achieved through differentiation and specification is based on an agreement reached earlier, which is usually the final result of compromises between the subjects of MC; second, usually the hegemonistic political block creates formal institutions safeguarding the **material essence of a constitution**.[37] Therefore, MC is never merely the simple proof of the factual superiority of an elite in a given place at a given time. While MC is part of a

[37] An example from after World War II illustrates the second point: constitutional courts (or other equivalent courts with exclusive jurisdiction on constitutionality) may not only be considered the guardians of formal constitution but of MC as well. This logic is revealed in the so-called doctrine of **counter-limits**. This doctrine was created by EU member states (first and foremost, the constitutional courts of Germany (CCGe) and Italy (CCIT)) to preserve fundamental principles of their constitutions and the unalienable right to sovereignty with regard to EU encroachments. Based on the principle of the superiority of EU law, EU law prevails in cases of conflict between it and the laws of members states. The essence of the doctrine of **counter-limits** is an exception to this principle. As such, it outlines certain fundamental principles of national constitutions as unalterable by EU law. The latter does not override national constitutional law or fundamental constitutional principles. The doctrine of **counter-limits** – drawn up out of concern for the protection of the crucial interests of member states alongside the concern for the EU legal system – does not actually contradict EU legal order. In fact, it facilitates the development of European integration as it allows for a certain balance between the interests of the members states and EU interests in general and in cases of conflict. This doctrine was gradually built based on the dialogue between the **Court of Justice of the European Union** (CJEU) and the highest national courts with jurisdiction regarding constitutionality and the question whether EU law contradicts fundamental principles of their constitutions. See also: Barsotti, Vittoria/Carozza, Paolo G./Cartabia, Marta and Simoncini, Andrea: *Italian Constitutional Justice in the Global Context.* (Oxford University Press: Oxford 2016), pp. 214–217; Cartabia, Marta: "The Italian Constitutional Court Between the Italian Legal System and European Union". In: Slaughter, Anne-Marie/Stone Sweet, Alec and Weiler, Joseph H. H. (eds.): *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context.* (Hart Publishing: Oxford 1998), pp.133–146; Murkens, Jo Eric Khushall: *From Empire to Union. Conceptions of German Constitutional Law Since 1871.* (Oxford University Press: Oxford 2013), pp. 203–206; Menéndez, Agustín José: "The 'Terrible' Functional Constitution of the EU. 'Sound' Money, Economic Freedom(s) and 'Free' Competition". In: Goldoni,

broader system, also requiring a formal constitution, it cannot be used arbitrarily or manipulated endlessly by the political elites in power at any given moment. However, if a formal constitution is (mis-)used, this is not the result of the change of **political goals** and **power configurations**.

According to Mortati, the material essence of a constitution does not change during **extraordinary situations**: he stresses the normalizing effect of the horizontal application of constitutional principles to society, including the management of such extraordinary situations. In fact, it is MC that ensures the proper understanding of an extraordinary situation – not as a constitutional rupture but as a discrepancy between formal constitution and political reality, which must be normalized. **Mortati** has discussed **extreme configurations of constitutional law**, including all types of emergencies. He admits that formal parts of the constitution may be suspended temporarily, except constitutional principles of permanent validity. This limits the suspension of a constitution (suspension cannot touch upon the essence of MC) as well as extraordinary internal shifts. In both cases, these limits serve as the integrative and comprehensive potential of a formal constitution.

Mortati insists on the possibility of managing extraordinary situations ***contra legem*** but ***secundum constitutionem***. Consequently, in situations where formal constitution does not provide rules, MC might offer criteria for identifying the organ in charge of managing extraordinary situations. The philosophy behind such criteria is to avoid any confusion between emergency situations and constitutional change. The essence of addressing a situation of crisis in this way is not to secretly change constitutional order but rather to maintain its integrity. On this basis, Mortati concludes that the competent organ for managing emergency situations should equal the one assuming the **governing function**. In fact, both **emergency** and **governing function** – pursue the same final goals: protection and consolidation of **fundamental political aims**. In cases where conflicts escalate, **Mortati** does not opt for radical means to eliminate destabilizing factors. Instead, he gives constitu-

Marco and Wilkinson, Michael A.: (eds.): *The Cambridge Handbook on the Material Constitution.* (Cambridge University Press: Cambridge 2023), pp. 351–366, at p. 365.

tionality to them, making them part of the ideology of Western constitutionalism. In this way, emergency situations could be interpreted as an opportunity for a further inclusion of destabilizing factors into MC.[38]

1.2. Beyond Costantino Mortati

As to constitutional law, both the positivists and naturalists cultivate the methodology of distinction between facts and norms, between the factual and the normative. This approach does not lend itself to a proper understanding of how a constitution works or to tracing its development back in time, including the interaction between facts and norms in the past. Those views are considered dualist, because they separate facts from norms. Such examples include the **normativism** of Kelsen and the **decisionism** of Schmitt. They are in mutual denial by framing their initial views in absolute terms, either as the logical form of a transcendent supposition – as I explained earlier, Kelsen claims that a *grundnorm* exists, just like God does, – or as a concrete existential order. According to Schmitt, the decisions concerning political unity and its form are the same; they are taken by the people through its representatives and have existential character, determining its form of existence as a political people.

Heller and **Mortati** avoid this methodological dualism by offering dynamic approaches, reflecting the interaction between facts and norms. In the case of Heller, this interaction is intended to democratically manage social homogeneity. For Mortati, the interaction relates to the emergence of hegemonic forces capable of pursuing fundamental political goals. Despite their valuable contribution, their efforts remain not entirely material. Their constitutional doctrines are anchored in the state and its institutions and are similar in that they try to integrate social formations, institutional powers and constitutional order and are marked by a touch of formalism. According to Mortati, **material essence** is lastly specified by the hegemony of the governing bloc and its political fundamental goals. For Heller, this essence is determined by individual conscience, framed as an ethical issue serving the common good. The teleological unity of MC itself is subject to the influence of *mores* and circumstances of a purely political nature or, in the best of cases, to an ethical

[38] Croce, Mariano and Goldoni, Marco: *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati*, pp. 181–182.

conscience. In both cases, social relations should be transferred into political considerations and then translated into a constitution. Neither Mortati nor Heller considers them material forces creating constitutional order autonomously. Therefore, it is necessary to establish a complete theory on MC, including its substantial regulatory forces. By focusing on the substantial content of the regulatory forces of MC, the vicious circle of conflicting constitutional theories is disrupted. This approach integrates key elements such as the *grundnorm* (H. Kelsen), concrete political decisions (C. Schmitt), democratic and principles of legitimacy grounded in ethics (H. Heller), and the governing bloc's political objectives (C. Mortati). The connection of these ideas results in a more comprehensive understanding of constitutional law.

1.3. Focusing on the Regulatory Forces of Constitutional Order

The factors influencing the creation and lifespan of a constitution are varied: social relations, religion, political economy, political culture, geopolitical factors and the nature of international relations. All of them are dealt with by the standard literature on political and legal theory and have become necessary for the work of contemporary political scientists, lawyers and historians. According to reference literature on the **typology of constitutions**, some of these factors and dimensions influence the creation of constitutions and constitutional orders to a certain extent. The development of modern constitutions should not simply be considered the result of the influence of external factors on existing constitutional orders. They rather act jointly to create constitutional orders, thus conditioning constitutional development through processes of constitutional regulation and deregulation. As such, these factors should be part of any research on constitutions, and any analysis should focus on their relationship with the respective constitution. From a socio-political perspective, it becomes clear that material conditions and constitutional regulations are created by constitutional politics and norms, which, in turn, create constitutional policy and norms. In constitutional regulation, a dynamic interaction between these elements has taken place from the beginning. Thus, **constitutional power** always manifests itself both as

constituted power (*pouvoir constitué*) and as constituent power (*pouvoir constituant*).[39] How is this legal and constitutional order fixed? Can it be regulated or will it, otherwise, turn into disorder?

The following sections shed some light on how the process of constitutional regulation should be organized and conceptualized. There are **four blocks of analysis**, referred to as **regulatory forces of material constitution**. These forces represent the constitutional material that should be considered when assessing MC. Among them, **political unity** stands out as the most important one, because constitutional regulation starts and ends with the creation and recreation of political unity. It is political unity that gives meaning to a constitution. In addition, political unity enables us to discuss the constitutions of Germany, Egypt, Italy, the U.S., etc. as they are based on political unity rather than being abstract normative systems. According to the standard narrative, political unity is not based on material contents. This is not true at all, since the mere fact that politics has superiority over the teleological sphere allows for constitutional regulation. This has been proven in all cases of constitutional transformation, starting with the historical transformations at the end of the 18th century, when a shift towards constitutionalism based on written constitutions, i.e., written texts codifying power relationships, including the roles and positions of individuals in society, took place. This was the result of successfully excluding religion from the processes through which political unity is formed – a transformation synonymous to the **process of secularization**, where modernity was defined as a rejection of religious justifications for political authority. The latter took centuries, but two revolutions at the end of the 18th century are considered turning points: from that time onwards, "We, the people" represented the foundation of legitimate authority. From this we can infer that the formation of political unity requires a material process: political integration, disintegration or reintegration of an existing political community.

Constitutional order as the result of **political unity** refers to a certain political form known as the **modern** or **territorial state**. This concept bears the stamp of the Peace of Westphalia (1648), which was labelled "**nation state**",

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[39] See also: Lindahl, Hans: "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood". In: Loughlin, Martin and Walker, Neil (eds.): *The Paradox of Constitutionalism.* (Oxford University Press: Oxford 2007).

as its political unity was established by imposing the national will, based on political representation, on a people living in a particular territory. This political unity of nation and territorial state has taken different forms in Europe. In some cases, nations have formed the state; in other cases, the state has formed and framed the nation. These processes are explained in the following section. It does not matter whether political unity takes the constitutional form of a unitary state, a multinational federation, a confederation, a supranational union or an empire or whether it is marked by permanent violence, secession, authoritarianism through constitutional means, revolutions, putsches and other major social upheavals. It always represents a specific route towards institutional and social development and, consequently, a particular route towards constitutional regulations.[40] Formal constitution and its interpretation by official organs, too, may have an important influence on the way to political unity.

The concept of the **nation state** remains paradigmatic, despite the variations of political unity that emerge in the process of constitutional regulation, which is entirely **Eurocentric**. This is because it emerged in Europe and, via colonial expansion and decolonization, was introduced the world over. For this reason, its internal relationship with the regulatory forces of MC deserves special attention. The ideal nation state is consolidated as a **political unity**, based on a community of equal values. Historically, modern constitutions served as a tool to secure the political form of nation states, which were

[40] López Bofill, Hèctor: *Law, Violence and Constituent Power. The Law, Politics and History of Constitution Making.* (Routledge: London and New York 2021), pp. 170–214. (The author discusses recent experiences with **constituent power** and its forms of manifestation in some places and the supranational structures of the **EU**: initially, he deals with constitutional transformations in federations and the role of the constitutions of federal units, which coordinate and maintain the exercise and realization of **constituted power** at the federal level; after this, he cites **Iceland as an example** of constituent power that never ends; the **Republic of Ireland** is considered from its first constitutional project until current constitutional changes; in the cases of **Bolivia**, **Ecuador** and **Venezuela**, the author focuses on the violence of electoral majorities; by contrast, democratic debates in **Chile** resulted in a form of constitutional authoritarianism, achieved through the means of formal constitution; a substantial part is devoted to **Catalonia** and its failed secession as a result of the definition of constituent power at the level of Spain as a whole).

formed as communities of people sharing the same fate, due to their imaginary belonging to a nation.[41] The connection to a constitution can in itself play an important role in the formation of a collective identity, reflected in the ideal of **constitutional patriotism**. However, this concept remains foreign to the constitutional experience of Central and Eastern European countries, except to Germany after World War I, where it was introduced by the German philosopher **Jürgen Habermas**. In these European countries, **cultural constitution** is considered more important than political constitution as far as the limits of arbitrary power through the empowerment of the roles and positions of individuals in the state and society are concerned. This shows that traditions as well as political and constitutional experiences continuously frame the way in which the essence and function of a constitution are viewed. For those countries, a nation state is not only a political form that can be exchanged for another, based on the ideal of **constitutional patriotism**. Constitutional traditions in Central and Eastern Europe reveal that, in those countries, constitution is mainly regarded as subordinate to the nation conceptualized in cultural terms and not vice versa, as the proponents of constitutional patriotism might propose. The fundamental principles of the nation state emerged two centuries ago, aiming at protecting citizens' rights. Today, nations and ideologies clash with constitutional projects, which view them as anachronistic phenomena to be overcome.

When modern states were formed as nation states, the nations had been in place before the constitutions. In the case of the EU, however, there are differences between the member states regarding the relation between their constitutions and their nation states. According to many scholars, the nationalism of former communist countries of Europe is very different from the **nationalism** of Western Europe. In the latter case, political developments have moved the state towards a nation, while former communist countries underwent a cultural renaissance before being able to gain statehood. This important circumstance exacerbated the problem of cultural identity: the formation of Central and Eastern European nations was a consequence of major cultural transformations, bearing all features of a **cultural revolution**. Historians of these countries do not speak of revolutions, but the emergence of new nations in this region can only be described as such.

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[41] See also: Anderson, Benedict: *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso: London 1983).

Their unique path towards political independence commenced with the development of their cultural self-awareness. Universal enlightenment, education and access to high culture were promising for the lower classes of society. In this part of Europe, the nation state emerged not only as a political form: its roots can be found in the fight for national identity. The leaders of national movements, who wanted to create a unique cultural identity for their countries, promised revolution. Similarly, the U.S. constitution resulted from the fight for a new state. This model is alien to Central and Eastern European nations, which were not directly involved in political revolution as they had to fight for their cultural identity, a struggle that was key to the emergence of new states in this part of Europe.

Political aspirations have always followed claims to cultural identity. The process that led to a changed form of government in France started as a fight for cultural identity in Central and Eastern Europe. In this context, the term **national renaissance** referred to a cultural revolution: the goal of **national movements** was to determine new players who might later become political sovereigns. Only if people with a common culture form a unique community may this entail the foundation of an independent state. When the names of new nations capable of protecting their cultural identities became known, the names of the contenders for sovereignty did, too. Nation building was considered more important than drawing up constitutions. Nations were forced to identify their cultural constitutions before being able to adopt political constitutions. Central and Eastern European nations, in particular small ones, believed that even if they lost their political independence, they could continue to exist by protecting their cultural identity. This historical experience makes it difficult for scholars to understand these countries' policies without considering the cultural dimension. Every political discussion about those countries has to taken into account the cultural aspect. In this part of Europe, the concept of **nation state** was very powerful for two centuries and closely connected with the notion of national culture. Thus, a discussion of the nation state in those cases also requires a discussion of political and cultural issues. In this context, nation state is seen as a double phenomenon

in which the universal principles of constitution are to be harmonized with national culture, the latter being of a particularistic nature.[42]

In modern societies, a general agreement regarding the legal content of the constitution and, consequently, regarding political unity does not exist. Nevertheless, the notion of constitution remains central to the political reasoning of contemporary liberal theories.

This reasoning is rooted in constitutional patriotism, a shared feeling resulting from a people's moral assessment of their country. According to this assessment, the country, in good faith, pursues some regulatory political ideals backed by the constitution.[43] Consequently, patriotism does, in most situations, not coincide with the cultural fabric of a state. **Constitutional patriotism** constitutes as a good example to show that constitutions have the potential and capacity to transcend nation and nationalism. According to its advocates, loyalty to the constitution can prevail over loyalty to the nation. In the words of its architect, **Jürgen Habermas**, the political culture of a country forms around its constitution; every culture develops its own constitutional principles, based on its own national history; similarly, these principles are embedded in republican constitutions, for instance, the sovereignty of the people and human rights.[44] Compared to constitution, nation is given less weight. Nation and its cultural features disappear from the political and legal horizon, because constitutional patriotism operates only through the concept of the political nation. Scholars advocating the political nation endorse the importance of a universal constitutional norm, while, in their book, cultural specificities do not count. According to this train of thought, constitution is a tool to neutralize the political importance of national cultures. The

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42 See also: Jokubaitis, Alvydas: "Can the Constitution Do Away with Nation State?". In: Górnisiewicz, Arkadiusz and Szlachta, Bogdan (eds.): *The Concept of Constitution in the History of Political Thought.* (De Gruyter: Warsaw/Berlin 2017), pp. 32–44, at pp. 32–37.

43 See more in: Müller, Jan-Werner: *Constitutional Patriotism.* (Princeton University Press: Princeton and Oxford 2007); Müller, Jan-Werner: "A General Theory of Constitutional Patriotism" In: *International Journal of Constitutional Law,* Vol. 6 No. 1 (January 2008), pp. 72–95; Breda, Vito: "Constitutional Patriotism". In: Sardoč, Mitja (ed.): *Handbook of Patriotism.* (Springer: Switzerland 2020), pp. 179–191.

44 Habermas, Jürgen: *The Inclusion of the Other. Studies in Political Theory.* (Cambridge: The MIT Press: Cambridge, Massachusetts 1998), p. 118.

goal is to transform citizens into constitutional patriots, disregarding nationalist patriotism. At the time of national renaissance, patriotism was a concept alien to constitutional patriotism: identification with the nation was seen as a private decision, while constitutional identity and the affiliation of individuals with the political nation remain cornerstones of political life.

This does not mean, of course, that, in a **nation state**, the tension between universalism and particularism disappears: the specific identity of the nation comes into conflict with cosmopolitical constitutional norms. A case in point is the experience of former communist countries after becoming members of the **EU**: they had to accept that universal legal norms had more weight than national sovereignty. In this regard, a shift is currently taking place from the nation's sovereignty to the sovereignty of law. In this context, it also becomes clear that **two different revolutions** have taken place in **Europe** – a cultural and a political one. The former had to do with the creation of new nations, the latter with the creation of new states. We are now witnessing a **third revolution**, which might be termed **counterrevolution,** as the nation state is disregarded in political life.[45] This results from the actions of certain players who exercise state-like jurisdictions, including various governmental and non-governmental organizations, multinational companies, terrorist movements, national liberation movements etc., which constitute a serious challenge to the nation state as the unitary player in international relations.

On the basis of these considerations, it becomes clear that in the case of **constitutional patriotism**, collective identity is understood as something politically, consciously and willingly shaped, often in opposition to cultural and social structures within the state: constitution has more weight than politics, self-government and cultural identity.[46] This shared identity is, without any doubt, a precondition for liberal constitutionalism, which can serve as both a driving force and as an obstacle to constitutional regulation.[47] Historically, the nation state was consolidated as constitutional order only after it had become a sovereign political entity (cf. above). This happened in two ways that

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45 Jokubaitis, Alvydas: "Can the Constitution Do Away with Nation State?", pp. 40–42.

46 Ibid., pp. 44.

47 See, for example, in: Grimm, Dieter: "Does Europe Need a Constitution?" In: *European Law Journal,* Vol. 1 No. 3 (November 1995), pp. 282–302.

go beyond the cultural factors explained so far. Internally, the European **nation state** had a monopoly on the legitimate use of physical force. This started with the French Revolution and ended with World War I. Externally, the nation state was universally recognized as the sole legitimate entity to maintain international relations, with the right to decide about war and peace. Actions of such dimension were and continue to be regulated by the material a constitution is based on. This regulation was substantial during the last two centuries. Internally, the **nation state** underwent radical changes: different varieties of the modern state were founded, such as the **constitutional state**, which remains the epitome of the **ideal state**: here, power is defined by, and exercised on the basis of, clear legal provisions, human rights and liberties that set limits to the arbitrariness of state power. Externally, international relations were radically transformed as a result of the conscious activities of key state actors, such as the imposition of war bans, the use of force as a means to resolve disagreements between states, the implementation of regional entities, and the start of integration processes hitherto unheard of. These material processes and developments have had an enormous impact on constitutional regulations, mainly through the transfer and migration of ideas and constitutional experiences from one place and region to another.

In the context of the **regulatory forces of constitutional order**, we now want to discuss another force – **institutions**. The formation of political unity and constitutions depends very much on the work of institutions, i.e., not only on powerful entities such as courts, parliaments, executives, administration, central banks etc. but also non-governmental, informal, social and cultural institutions such as the family, language, property, syndicates, trade unions, myths and symbols. All of them have a unifying effect and exercise enormous regulatory power over **MC**. Clearly, these institutions possess autonomy and exist independently of regulatory forces and political unity. The very idea that such institutions have their internal regulatory principles because they are "social organizations" was postulated by **Santi Romano** a long time ago.[48]

Institutions are components of **MC**. They are established based on social interactions and develop their own independent normativity in the form of **customs** and **conventions**. Their existence is important for the formation

[48] Romano, Santi: *The Legal Order.* (Routledge: Abingdon 2017), pp. 19.

of constitutional order. However, they might as well lead to fragmentation and instability within this order. Consequently, **institutions** exercise **regulatory function** only if they can be combined and fit into a **concrete form of political unity**. Combining institutions to support constitutional order is part of the art of governance. The establishment of social order is an artificial political activity carried out purposefully. There is no natural link between a certain political community and the institutions defended and promoted by the legal order of that community. The identification and selection of institutions is to a great extent ensured by political activity. These identification and selection processes are contextual and, of course, never neutral: according to **Mortati**, the interpretation of political order via institutions should always be in accordance with a certain ideology.[49] This political activity may be shaped by socialization and learning processes. The awareness of this stratification of the material order of society is addressed in the early work of **Heller**, in which he describes one of the five concepts of MC. He notes that the fundamental ethical problems do not become comprehensible to either the governing or the governed through a *Grundnorm* but, amongst other things, through "tradition, political benefits, situations of power and legal culture".[50] To implement this consolidating function, political and legal institutions should protect and promote social institutions and their substantive identities. These processes should not be regarded as isolated. Establishing constitutional order is a dynamic process: from a material perspective, it should, to a certain extent, be possible to adapt to challenges and international conflicts. Institutions are very sensible human achievements. They are the result of top-down pressures such as forces of political unification or economic material expansion, but also of bottom-up pressures, e.g., when established social relations threaten their stability. Even if the belief in institutions is destroyed, the need to recreate them will re-emerge. The history of constitutional law in Europe in the second half of the 20th century is an extraordinary history of institutional rebuilding, based on new forms of political 'reckoning' and accountability, very often of a non-majoritarian and technocratic nature. Due to the significance of constitutional courts and the rising importance of institutions and independent agencies, the role of institutional mediation in governance was generally regarded as substantial.

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49 Mortati, Costantino : *La volonta e la causa nell'atto amministrativo e nella legge*, pp. 126.

50 Heller, Herman: "Nature and Function of the State". In: *Cardozo Law Review,* Vol. 18 No. 3 (1996), pp. 1139–1216, at p. 1213.

This was mainly a reaction to the failure of interwar liberal-democratic institutions. This technocratic institution-building process not based on any majority continued at the supra-national and international levels: there were huge projects of integration, such as the European integration or the creation of sophisticated normative regulations concerning human rights and liberties. Similar processes took place in **Africa**, **Asia**, **Latin America** etc.; however, they were of a different scale, intensity and quality. Meanwhile, non-governmental institutions developed a certain autonomy, and their detachment from the basis on which they originally operated raised questions concerning their constitutional legitimacy. The expansion of institutions caused new complex challenges, and the conflicts between national, supranational and international institutions multiplied. A particularly obvious case in point is the conflict between national judiciaries and the **Court of Justice of the European Union (CJEU)**. Other examples of this development are the conflicts between market legality and rationality, competition and solidarity, political and social forces.

Since institutions mediate in conflicts between state and society, but without solving them permanently, it seems reasonable to examine another regulatory factor – **the regulatory force of horizontal social relations**. The latter has to do with individuals and groups forming a political unity, which itself represents the **constituent power of society**. This power not only entails social conflicts but also forms cooperation and solidarity. Institutions and horizontal social relations – two incentives for social reproduction – should always be considered together. To further our analysis of **regulatory forces**, we will elaborate on basic horizontal social relations in their entirety as well as on material conflicts as a precondition for constitutional development. The fundamental material of a constitution exists beneath the institutional level. It consists of interactive subjective social relations and conflicts, which together form **basic social relations** as one regulatory force of constitutional order. **Social relations** mean both those developing nationally and internationally. They are both created and conditioned, sometimes destroyed and rebuilt or set in motion, by solidarity and competition. The factors impacting constitutional formation also include social relations in the spheres of economic policy, political culture, religion as well as geopolitical configurations and considerations and imperial forms of domination. Research into the typologies of constitution shows how modern constitutions are created

and developed based on the influence of the factors mentioned on existing constitutional orders. They operate in combination, creating a constitutional order and conditioning constitutional development via processes of constitutional regulation and deregulation. Consequently, these factors should be integrated into any study and analysis of a constitution, focusing on their mutual relationship. With regard to the abovementioned **geopolitical**, **political** and **social** dimensions, one may conclude that material conditions and social relations are created on the basis of norms and politics and that, at the same time, they create norms and politics. A dynamic interaction between these elements has always existed within constitutional arrangements and accompany every form of constitutional development. Forming a part of **social relations, international relations** – and particularly their geopolitical dimension – have always played an important role. Pertinent literature highlights cases in which foreign influence on a country's national constitution resulted in a radical change of the country's geopolitical orientation, e.g., concerning its **mining industry**[51] and **foreign investments**.[52] The same applies to imperial forms of domination: it suffices to note that most of the

[51] See also: Lander, Jennifer: "The Material Constitution and Extractive Political Economy: Lessons from Mongolia". In: Goldoni, Marco and Wilkinson, Michael A. (eds.): *The Cambridge Handbook on the Material Constitution*, (Cambridge University Press: Cambridge 2023), pp. 313–324. (By discussing constitutional transformation in **Mongolia** after the fall of communism, the author sheds light on material factors that have framed constitutional order over the last three decades; according to her, two things are important with regard to the reevaluation of the MC of Mongolia in the 21st century: first, its decision to transform its political economy into an economy of mine extraction; second, the network of transnational norms and rules that the national constitutional order was forced to pursue such a goal; in this chapter, she further identifies objectives such as reorientation of the economy towards mining and, most importantly, the creation of opportunities for foreign investments – a main catalyst of the constitutional conflict in this country; its resolution has resulted in major social changes, without constitutional formalization; the author concludes that a study of Mongolian constitutional order that does not take into account the pillars of its political economy and the international actors involved therein is doomed to fail).

[52] Lawrence, Jessica and Flynn, Tom: "The Material Constitution of International Investment Law". In: Goldoni, Marco and Wilkinson, Michael A. (eds.): *The Cambridge Handbook on the Material Constitution*. (Cambridge University Press: Cambridge 2023), pp. 335–350. (The authors discuss the role of political economy, more precisely, the role of international political economy in the MC of **international investment law** (IIL); their analysis follows the idea that specific subsystems of transnational law can have their MCs, despite the fact that they owe their existence to, and depend on the material constitution of the state; the authors express their anger, particularly, because the majority

countries of the **British Commonwealth** were modelled on the British constitution; the **French-speaking** countries of **Western Africa**, formerly part of the French Empire, also developed their constitutional projects under the influence of the French constitution.[53] Similarly, in Balkan countries such as Bosnia-Herzegovina and Kosovo, geopolitical factors were decisive in defining their national constitutions in much the same way as in Iraq after Saddam Hussein's removal from power. In all these cases, constituent power was implemented through the cooperation of domestic and foreign players. Similarly, after World War II, Germany and Japan developed their constitutions under the dominant influence of the American occupation forces. These constitutions were implemented within conditions and social relations totally foreign to the countries' norms. Over time, the German and Japanese societies underwent deep social transformation due to the constitutions imposed on them from outside. In both countries, a regular judiciary with constitutional jurisdiction (**Japan**) and a separate constitutional judiciary (**Germany**) played a crucial role in the creation of MC, and, before long, their MCs were accepted by all social players. Moreover, political, structural and cultural factors played a very important role in defining MC.[54] To conclude, it is not necessarily bad if constituent power is exercised with the help or via pressure

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of reform proposals only concern formal aspects of the constitution, including their improvement, without touching on the substantial social relations in which **domestic investment law** (DIL) is embedded; the authors also illustrate basic features of the **material constitutional law of IIL**: a political unity that forms around an international project, advocating free movement of capital, the capacity to pursue transnational political objectives, as well as a group of subject-investors, interested in securing their investments through the modification of the country's positive constitutional law and of the national laws implementing it; this analysis is to support the authors' proposal of a path for the transformation of transnational regimes).

53 Nanopoulos, Eva: "The Material Constitution and Imperialism". In: Goldoni, Marco and Wilkinson, Michael A. (eds.): *The Cambridge Handbook on the Material Constitution*. (Cambridge University Press: Cambridge 2023), pp. 171–187.

54 For the material constitution of countries, with a focus on the role of constitutional judiciary, see: Kawagish, Norikazu: "The birth of judicial review in Japan". In: *International Journal of Constitutional Law,* Vol. 5, No. 2 (2007), pp. 308–331, at pp. 316–331; Yokodaido, Satoshi: "Constitutional Stabiolity in Japan is not Due to Popular Approval". In: *German Law Journal,* (2019), Vol. 20 Special Issue 2 (April 2019), pp. 263–28, at pp. 277–278; Gluck, Carol: "Japan's Constitution Across Time and Space". In: *Columbia Journal of Asian Law,* Vol. 33 No. 1 (2019), pp. 41–63, at pp. 48–63; López Bofill, Hèctor: *Law, Violence and Constituent Power. The Law, Politics and History of Constitution Making*, pp. 68, 126, 168 (footnote no. 12), pp. 134–169.

from outside.[55] In fact, the West had in mind **Germany** and **Japan** – and the substantial role of their formal constitutions in framing political unity and national political objectives, as interpreted by the highest national judicial instances – when it started to implement its constitutional projects in **Bosnia-Herzegovina**, **Kosovo** and **Iraq**. An institution of crucial importance in this regard has been the **Venice Commission**, which has been supporting former communist countries, Third World- and other countries, in shaping their constitutional systems according to the standards of Western liberal constitutionalism.[56]

Due to their unificatory function, **institutions** also rein in, quell, shift and transform social conflicts, due to political unity and fundamental political goals. Such conflicts, however, never entirely disappear. In this light, the relationship between the governing and the governed should be seen as something simple and formal: **constitutional subjects** should not be reduced to the status of artificially created and abstract subjects. On the contrary, constitutional analysis should focus on **processes of subjectification**, i.e., processes of the formation of **collective political actors** and their contribution to constitutional change. The production and reproduction of material order is the result of a series of interactions and social, political and geopolitical conflicts, through which social groups form. They offer incentives to the dynamics of political formation and institutional development. Consequently, the focus should be shifted from the individual and the institution as abstractions towards **processes of subjectification** and their potential for inclusion and exclusion. This requires constant political action. Contrary to the views of **Heller** and **Mortati**, political actions in this context do not

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55 For a comparative perspective on the Kosovar context, see: Hasani, Enver: "Constitutionalism in Kosovo and the Relationship Between Constitutional Justice and the Supreme Court". In: Hasani, Enver/Paczolay, Peter and Riegner, Michael (eds.): *Constitutional Justice in Southeast Europe. Constitutional Courts in Kosovo, Serbia, Albania, and Hungary between Ordinary Judiciaries and the European Court of Human Rights.* (Nomos: Baden-Baden 2012), pp. 50–69; Hasani, Enver: "Constitutional Protection of the Head of State: The Case of Kosovo". In: *Vienna Journal on International Constitutional Law,* Vol. 7 No. 2 (2013), pp. 128–149; Hasani, Enver: "Two Chapters on Human Rights and Fundamental Freedoms in the Constitution of Kosovo". In: *Mediterranean Journal of Human Rights,* Vol. 19 No. 3 (2014), pp. 35–68.

56 See also: Hasani, Enver and Brahimi, Muhamet: *Gjyqësia Kushtetuese.* (Fakulteti Juridik i Universitetit të Prishtinës "Hasan Prishtina": Prishtinë 2021). [Hasani, Enver and Brahimi, Muhamet: *Constituional Justice.* (Faculty of Law of the University of Pristina "Hasan Prishtina": Pristina 2021)], pp. 285–298.

only refer to actions taken by political parties within an institutionalized framework but also to actions taken by informal groups and social movements, including disorderly and anti-system forces, such as workers' movements, women's movements, anti-colonial movements, etc. MC is a network of differentiated and conflicting elements, which dominant subjects try to shape and use for the implementation of **fundamental political goals**. From this angle, MC is dynamic and concrete: dynamic, because during the formation and separation of, and the conflict between, social strata, the increase and multiplication of interests always leaves room for fundamental material change; it is concrete, because MC is based on the material conditions of social existence and reproduction. In other words, what makes social differentiation possible has a direct impact on the constitutional order. MC is rooted in modern processes of social specialization and differentiation between the governing and the governed. This should not be limited to the creation of political systems but also relates to political economy, whose organization requires the establishment of production methods and relations as well as the regulation and protection of market economy.

Although the study of **political economy** is essential for understanding the formation of constitutional material and the creation of society, the structure and content of constitutional material are not determined by economic factors but connected with the actual organization of political economy. Even though the study of MC cannot be reduced to the study of its economic basis, and the latter cannot be regarded as a key determining factor of MC, there is a connection between them. Political economy is superior compared to existing forms of order, its trajectory advanced through a series of political actions, including those connected with the formation of **political unity**. In this way, political actors are crucial for the formation and preservation of a particular political economy as well as for driving change by pressuring for a reform of the political-economic structure through acts and movements of solidarity and competition.

If with increasing social and economic inequality social relations become materially heterogeneous, constitutional regulation itself becomes difficult, particularly if such inequalities reflect a gap between the governing and the governed. At the same time, social relations become tense and burdened, with instability and revolts surfacing. This is described by **Heller** in the context

of the financial crisis of **Weimar Germany**. He rightly observes that the struggles driving MC emerge from a series of subjects whose positions are conditioned, but not determined, by existing forms of production. Clearly, subjectivity does not directly arise from social relations of production and reproduction. It is rather mediated through political organizations and institutions as well as through political strategies. Economic forces should not be considered to have a huge impact on MC. It is generally accepted that they actively regulate different aspects of MC, but their nature and content are subject to permanent tensions and conflicts produced by non-economic forces, including **political unity**, **institutions** and **fundamental political goals**. It is these three regulatory forces that determine and define MC.

In the following section, the focus will be on the regulatory force of **fundamental political goals**. This force conditions material constitutional order. It can hold this order together, even in cases of social conflict, political disunity and institutional weakness. This has to do with material goals ("telos" or "teloi"): constitutional subjects and institutions determine fundamental political objectives, sometimes even final future goals. This naturally excludes other constitutional goals. These political goals are sometimes in harmony and sometimes at odds with formal constitution. It is essential to remember that the three regulatory forces mentioned above pursue their internal logic of regulation. However, they should be understood as part of an equilibrium whose boundaries are ultimately determined by fundamental political goals.

Political unity, institutions and social relations as regulatory forces are not ends in themselves. Their creation and specification are guided and dictated by fundamental political goals. Of course, this is not a smooth process, headed in only one direction: the trajectory dictated by one regulatory force sometimes collides with the trajectory of another. In this manner, constitutions evolve based on the complex interaction of political, institutional and social changes. They also evolve in relation to trajectories, which are determined by **formal constitutions**, official bodies, organs, and institutions. At the same time, the creation of political unity, the consolidation of institutions, and the development of social relations are constrained by **fundamental political goals**.

The totality of implicit and explicit constitutional goals reflects the structure of dominant social, political and geopolitical forces, which simultaneously serve as incentives. This perspective offers an alternative to classical constitutional doctrines and most modern political philosophy, according to which a constitution inherently possesses all the energy necessary for the creation and development of constitutional order. Here, the origins of a constitution appear as external, with the original constitutional act activating the constitutional form, like from outside. Our approach regarding MC is, of course, different. We believe that social development is always political in nature and that a constitution does not appear out of the blue to determine the nature of a state. Social development is determined by certain social and political forces and their capacity to enforce those goals as well as mediated by existing institutions. As mentioned earlier, extraordinary and emergency situations are addressed within a constitution, which is understood as a material order that governs the structure and functioning of society. On the other hand, the level of intensity of general social and institutional support is a key indicator of the strength of MC.

The stronger the support for political goals, including the support for a regime's final goals, the more solid MC is. In the opposite case, MC would have difficulty persisting, particularly if fundamental (and final) goals directly collided and democratic contestation became impossible. It is worth noting that these goals do not have to be in accordance with each other: divergences exist, and sometimes even existential battles take place regarding the determination, preservation, change or modification of fundamental (and final) political goals. At times, an equilibrium may arise in which no hegemonic (dominant) force exists, and opposition forces do not pose an existential threat or create a constitutional crisis. In such situations, only a few opportunities for formal constitutional change remain, opportunities which are fluid and unreliable, paving the way for the establishment of new blocs of dominant forces and new equilibria.

The notion of **constitutional teleology** is very old. We find it in **Aristotle**, when he says that constitution is a way of life that reveals the very goals of

the city state.[57] This may seem enigmatic, but the minimal implicit goal relates to the survival of the state, its political organization and, ultimately, to the very project of political unity.

Formal constitutions, too, always express substantial aims by directly stating a goal or the totality of fundamental political goals. This is particularly true for the constitutions of Western Europe enacted after World War II, which promote specific values that affect the character of the state and of political power, such as democracy, rule of law, judicial independence, federalism, human rights, and social welfare.

The same applies to the founding treaties of the EU. Their focus on certain political goals sheds light on the nature of governance, which, as noted by **Mortati**, cannot be reduced to the three classical functions (legislative, executive and judiciary). The notion of function, however, should not distract the reader: the **teleologic dimension** of the art of governance is formed by political action rather than by pure functionality. With the rising complexity of constitutional structures, it has become more difficult to equate the governing function with one single goal or institution. Since the final goal of governance in a society is not limited to the survival of the latter but also includes the realization of other specific goals, the goal of MC must be pursued across a wide institutional spectrum and beyond, extending to the dimension of social relations.

In conclusion, unlike formal constitution, constitutional teleology is material in nature as it has to do with all the regulatory forces of constitutional order.

1.4. Regulatory Forces and Formal Constitution

After an elaboration of the regulatory forces of constitutional order which represent constitutional material, it is now time to address their relationship with formal constitution. The latter is understood as the entirety of written texts and conventions, practices, and customs, but also the unwritten principles that contain norms regulating power relations as well as the position of

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[57] Aristotle: *Politics*. Second Edition. Translated and with an Introduction, Notes, and Glossary by Carnes Lord. (University of Chicago Press: Chicago 2013), [I.1.1252a1–7], [IV.1.1289a17–18].

the individual within the state and society. This is not simply a relationship between form and content or form and function: the analysis of the function and content of constitutional normative structures is of utmost importance for any research and study of constitution. Constitutions do not only create and regulate the formal process of norm production, but they also protect various **material interests** such as freedom of thought and expression or a balanced budget. Thus, the content of a constitution may be considered the totality of aspirational goals as well as of political and social objectives. Constitutional material is more than the simple content of a formal constitution, understood as the entirety of constitutional normative structures. It can challenge, replace, or oppose formal constitutions and influence political actions and judicial reviews.

This becomes particularly evident in times of crisis and emergency and in other extraordinary situations, when positive norms are sidelined and the letter of the law is ignored due to identified material forces and other material limitations. Such critical times, when **material forces** take opposite directions and create opportunities for constitutional change, demonstrate the relative indeterminacy of **material order**. In times of peace, however, material regulatory factors tend to be accommodated to the normative structures of an existing formal constitution as well as to the parameters based on the authorities' interpretation of such normative structures. In this sense, formal constitution reflects the horizon of MC in times of peace, but both are part of the broader constitutional order.[58] Without a corresponding MC or a pulling political and social force, formal constitution remains dead letter, a list of desires, a scam. In such cases, constitutional form and material may diverge to such an extent that the discourse on constitution and constitutionalism become questionable.

The difference between constitutional form and material is fuzzy and cannot be defined thoroughly. This is because the relationship between formal and material constitution is an internal one: even a false, fictitious and empty constitution can have certain civilizational effects on official discourse and actions. The same applies to constitutional regimes: even authoritarian regimes can use constitutional means to ensure their legitimacy and efficiency. A proper understanding of MC and its relationship to formal constitution

[58] Mortati, Costantino: *La costituzione in senso materiale*, pp. 138.

provides scholars and the practitioners of constitutional law with important knowledge. First, it prevents the idea of constitutional change from being reduced to a formal constitutional amendment: not every constitutional change represents a material transformation of constitutional order, as the latter can happen even without the formal constitution being modified. The two following examples testify to the importance of MC: **Switzerland** enacted its latest constitution in 1999. No one, however, suggested that this entailed a material transformation of Switzerland's constitutional order: the principles and goals of the **Swiss constitution** remained the same. Another interesting example is **German Basic Law** (GBL): following the German unification of October 3, 1990, i.e., the integration of former East Germany into the Federal Republic of Germany, millions of Germans came under GBL, yet no material or substantial change ensued after this event. This may also happen vice versa: important changes in constitutional order may not be integrated into formal constitution. When Italy was ruled by Benito Mussolini, it was formally governed by the **Statuto Albertino**, which had been granted to the **Kingdom of Sardinia** on March 4, 1848, by **King Charles Albert of Sardinia** and was written in French and Italian. Despite this, the country's material constitution had radically changed to a point where its regime was labelled fascist. This very transformation of the Italian constitutional order served as a basis for Mortati's work.[59] In the case of Italy, the old constitution was still considered valid but operated within quite a different constitutional order. The same can be said for the US: very few amendments to the original constitution have been made since 1787; however, the changes in the constitutional order have been profound and extensive.[60]

Furthermore, the analysis of the relationship between the material and formal constitutions can shed light on the legitimacy of constitutional change. Many constitutions around the world and many constitutional and supreme courts have set express limits on constitutional amendment over the last decades. Sometimes, these limits were set by constitutional or regular courts with a final say in matters of constitutional review. They did not rely on formal

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[59] Mortati points out the innovation that the fascist regime brought about in *L'ordinamento del governo* (Giuffrè Editore: Milan, 2000), pp. 62–68, and afterword in his text on comparative constitutional law entitled *Forme di governo* (Cedam: Padua 1973), pp. 82–85.

[60] See also: Ackerman, Bruce: *We the People: Transformations*. Vol. 2. (Harvard University Press: Cambridge, MA 1998).

constitutional texts *per se* but on the general constitutional order and its principles. In other cases, limits were set from the beginning, resulting from the conscious and planned actions of national designers of the constitution, with the purpose of preserving and promoting certain constitutional values and principles for generations to come. Concepts such as **unconstitutional constitutional amendments** and **eternity clauses** were intended to manage conflicts between the key principles and values of an existing constitution and its amendments. To achieve this, concepts such as the basic structure of a constitution and constitutional identity have been used as a reference. Grasping them means looking beyond constitutional normativism and formalism, delving into the foundations of a country's social order and uncovering the fundamental political goals of society as a whole.

Apart from national courts, constitutional texts themselves may impose limits on formal constitutional changes. This is true for many constitutions globally. The limits are imposed via **preambles**, in which the basic characteristics of MCs are clearly spelt out, aiming to contain constitutional modification in the future.[61] Preambles describe the essential pillars of a constitutional order, defining the characteristics of the constitutional identity of a country. From this perspective, MC defines the conditions for situations that lead to the creation of a concrete constitutional order. By understanding these conditions, one recognizes the difference between the parts of a constitutional order whose change represents a transformation of constitutional identity and other parts whose change, no matter how important, may be considered a constitutional reform or an addition to an existing constitutional order, which does not touch upon constitutional identity. As a result, regulatory forces may be considered to be in a permanent relationship with the basic constitutional agreement. Their formation and sensitivity towards basic constitutional texts cannot be overlooked, as they breathe life into constitutional order and, simultaneously, condition its development.

Each of these forces gives direction to constitutional norms. Law does not push political decisions inside and outside of legal orders nor does it restrain political action, and regulatory forces alone do not account for the stability

[61] See also: Voermans, Wim: *Constitutional Preambles: Comparative Perspectives*. (Elgar: Cheltenham 2017). Carl Schmitt, too, discusses the legal importance of preambles. See: Schmitt, Carl: *Constitutional Theory* (Duke University Press: Durham, NC 2008), pp. 78–79.

of a legal order. Quite on the contrary, its movement, conflicts and dynamics show that it depends on various, sometimes contradictory forces, which together condition the processes of political unification and institution-building as well as the establishment of social relations and the pursuance of fundamental political goals. For this reason, MC can be strengthened through the **institutionalization of material contest and conflict**. Such a conflict, however, can be both threatening and existential. For a better understanding, we would like to draw the readers' attention to two types of conflict. The first could, if properly institutionalized, lead to the consolidation of constitutional order. This order may be strengthened if it proves capable of managing the conflict and expressing an understanding of social forces, particularly of those unforeseeable at the beginning of a constitutional project. In this process, constitutional order frames society by allowing for new situations. On the other hand, this provides MC with elasticity and sustainability. This does not mean that everything can be accommodated to a constitutional order. This type of conflict usually includes the pressure that social and political forces put on the limits of institutions and political and social players, thus testing their capacity to allow for new demands. All these pressures do not necessarily challenge the fundamental political goals of a constitutional order or give rise to the creation of new social and political players, but they do give direction to existing constitutional dynamics.

The second type of conflict is of a different nature: it threatens MC by testing the essence of the norms embedded within the dominant social and political forces of society. This happens if dominant forces are no longer capable of exerting influence on a political community, for instance, if there are no common political goals left or if political goals contradict each other, and no compromise can be achieved. In such cases, conflicts cease to be productive for MC, making radical and far-reaching changes in the material and formal orders necessary. In this context, we particularly think of **extraordinary and emergency situations**, which are a signal that MC and the relative consolidation of social and political forces supporting it are in great danger of dissolving. Thus, extraordinary political action is required. In other words, **extraordinary and emergency situations** are not unexpected external dangers threatening the normalcy of legal order. On the contrary, MC is seriously

threatened from within. A situation is considered legitimate if it aims at protecting and preserving MC. In such a case, it may not be considered an extra-legal moment.[62]

The same logic applies in other cases where the essence of MC is called into question. Within the EU context, this becomes apparent in contestations between the highest national courts and the **CJEU** regarding cases where EU law and national constitutional systems are at odds with each other. Faced with the risk that these very EU legal enactments might affect certain aspects of the social structure and, as a result, essential dimensions of constitutional identity, national judges of EU members states felt that limits were required to protect national constitutional orders, based on national constitutional principles. No EU norms were able to infringe on those limits.[63] The development of the **doctrine of counter-limits** by some national constitutional courts can be read as an exercise of guardianship regarding the pillars of the MCs of EU member states, which do not only concern political unity (national identity) and institutional authority but the very nature of social relations. The reference to MC rather than to formal constitution in this regard helps to identify the limits of constitutional revision or transformation. Consequently, not only the highest national courts should be considered guardians of the constitution but also players (formal and informal ones) such as parliaments, peoples – themselves organized in social movements –, political parties, syndicates, and referenda.

For both the abovementioned concepts in the context of the relationship between the EU and the domestic law of its member states, the recognition of MC has obvious consequences. First and foremost, it enriches the analytical aspect of the material relationship between law, politics, and society – the three pillars of formal constitution. This includes the study of extraordinary and emergency situations, the doctrine of counter-limits, constitutional identity and, finally, key concepts of constitutional law, such as constituent power and its significance.

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62 Loughlin, Martin: *Foundations of Public Law*. (Oxford University Press: Oxford 2010), p. 280.

63 See, in particular, the decision of the CCGe on the Treaty of Lisbon: BVerfG, Judgement of the Second Senate of 30 June 2009 – 2 BvE 2/08. Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (retrieved March 2024).

The concept of MC comprises the relationship between constitutional order and society, without disregarding its evolutionary and conflicting nature. It is through this dynamic that constitutional change occurs. From this angle, the relationship between MC and constituent power may be considered of crucial importance: while constituent power serves to protect MC from constitutional institutions of power – including those authorized to amend formal constitution – MC in its entirety is in accordance with the existence of an **extra-legal constituent power**, whose presence it presupposes. In other words, MC can only be changed by **creative extra-legal forces**, because regular constitutional institutions cannot cause this change. If an entity responsible for formal constitutional amendment is not also a constituent subject, there should be limits on its powers to amend the constitution. Such limits cannot be found in MC itself. Due to its connection with the material content of the constitution, constituent power can protect certain constitutional norms.

Not all positive constitutional law has material character. What is not material can be changed by standard amendment authorities, known as constituted powers.[64] According to Schmitt, this represents the other side of the story: he distinguishes between **constitution** (as material constitutional content created by an extra-legal player) and **constitutional law** (as positive constitutional law, which does not have material character). It is worth noting, however, that Schmitt does not differentiate between constituent and constituted powers.

[64] Colón-Ríos, Joel: *Constituent Power and the Law.* (Oxford University Press: Oxford 2020), pp. 187–188.

2. The Material Constitution of Kosovo

As mentioned above, MC represents the totality of regulatory forces and their relationship with formal constitution. This definition is more general than the legal concept of material constitution in a broader sense; it comprises all normative structures, regardless of their form: customs, mores, conventions, oral or written constitutions, laws and other legal acts of constitutional relevance. What counts here is that those normative structures regulate power relationships as well as the roles and positions of individuals in state and society. In the case of MC as described in the introduction above, the focus of analysis goes beyond these normative structures and is rooted in the forces regulating the entire constitutional order. These regulatory forces are the pillars that support, resist, change or confirm constitutional normative structures in practice. The balance between regulatory forces and formal normative structures is presented as an internal and dynamic relation. Formal constitution with its normative structures is dictated by the regulatory forces of MC – political unity, fundamental political goals, institutions and social relations.

Whether the normative structures of material constitution in a broader sense are confirmed, defied, modified, and/or totally revised, depends firstly on which regulatory force undergoes changes and, secondly, on the scope of these changes. In this context, **political unity** and **fundamental political goals** stand out when compared to other regulatory forces. If the original content of one of them is changed compared to the original constitutional project, this causes a change and/or revision of a country's constitution. Simple constitutional amendments, routine changes in the government or shifts in the balance of political parliamentary forces do not constitute a change of MC. These are merely apparent constitutional changes, affecting the ruling elite as well as unimportant constitutional norms or procedures. A change of MC requires more: the only and most important signal of such a change would be a **change of political visions** no longer supported by a constitutional and political system. In a liberal constitutional state, this would mean the abandonment of the principles of the rule of law, of political pluralism, and of free elections, for instance, in favour of a dictatorial or fascist regime. Changes of the political system mean changes of MC, not only in the context

of theorizing about state and political power but also with regard to a practical understanding of MC in each situation or historical moment. For this reason, we have been discussing it extensively. The practical benefits of this study become obvious in the example of Kosovo. A change in the MC of the State of Kosovo (SK) would occur if there were a redefinition of the form of its political unity and of the fundamental political goals of the initial constitutional project of February 17, 2008 (from now on referred to as Project 2008).

However, it takes time for an MC to change: a new political unity has to form around an alternative political vision, and a new configuration of powerful social forces has to emerge. In the case of Kosovo, this means the emergence of a new configuration of social forces, in which the local Serbs position themselves as the governing and dominant force in their municipalities, creating an **asymmetric relationship** with central authorities and the initial constitutional project, expressed in the **Declaration of Independence** (DI) and its derivate – the **CK**, which is currently in force. The DI and the CK are components of **Project 2008**. These documents legitimize another version of MC, different from the one that emerged in 2023 as the result of various regulatory forces. Every change to what was laid down in **Project 2008**, determining Kosovo's political unity and fundamental political goals, represents a change in the MC of Kosovo.

Two other regulatory forces – institutions and social relations – clarify the country's political unity and fundamental political goals. This fact is mirrored by every decision of the **Constitutional Court of Kosovo** (CCK), in which it interprets the CK, in view of power relations and its relationship with other social forces (political parties and other intermediary players). The character of these institutions and their social relations with regard to the CK are also referred to by the **International Court of Justice** (ICJ) in its advisory opinion on Kosovo, dated July 22, 2010.[65]

The **ICJ** stresses that the institutions that enacted the DI were not the same as those formed according to **Resolution 1244** of the UN Security Council:

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[65] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. Advisory Opinion. I.C.J. Reports 2010. http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf (retrieved March 2024).

the Kosovar institutions acted outside the legal order established by the United Nations (UN). This means that the positive constitutional law based on the DI is different from the law regulating power relations in Kosovo between June 10, 1999, and February 17, 2008. The normative structures enacted after June 10, 1999, reflect the will of the international community, as expressed in Resolution 1244 of the UN Security Council. Its legal force is based on Chapter VII of the UN Charter. The power installed in Kosovo after June 10, 1999, – exercised by the United Nations Interim Administration Mission in Kosovo (UNMIK) authorities, acting in the name and on behalf of the UN – was that of an international administration and did not involve the people. There were no mechanisms to control and balance the powers of the UNMIK, including the lack of judicial control of its administrative actions. The **Special Representative of the Secretary General** (SRSG) was the supreme authority, vested with legislative, executive and judicial power. The regulatory forces and pillars of the MC of Kosovo at that time did not in any way reflect the will and aspirations of the local population. UNMIK institutions and the social relations regulated by its legal order were alien to, and at odds with, the local spirit.

The political unity and fundamental political goals – two pillars of MC – during the time of the **UNMIK** strived to preserve the sovereignty and territorial integrity of the **Federal Republic of Yugoslavia** (FRY, Serbia and Montenegro), later **Republic of Serbia** (following the secession of **Montenegro** in 2006), as well as the preservation of the status quo, pending a political solution for the final status of Kosovo. UNMIK institutions and the legal order sanctioning social relations during that period (June 10, 1999 – February 17, 2008) were entirely governed by the official position of the UNMIK regarding the country's political unity and fundamental political goals. Those regulatory forces were at odds with the will and aspirations of the local population. However, the normative structures created by the UNMIK were not *per se* damaging for **Project 2008**. This is also true concerning MC, largely overlapping and in agreement with the formal constitution and the constitutional project emerging at the time. This is reflected in the DI and the transitional provisions of the CK, which recognize the legal validity of existing UNMIK normative structures until their replacement by new ones, enacted by independent and sovereign Kosovar authorities, provided that the former was not at odds with the new legal order of Kosovo. Common to UNMIK

normative structures and those enacted by independent and sovereign Kosovo, including the CK, was their nature of **transitional laws**. This type of specific law, which is very different from other laws, will be discussed in the following section.

In constitutional systems modelled on Western standards of constitutionalism, the only function of law consists in regulating social relations for times to come. It is this basic premise upon which the civilizational principle of banning the retroactive effect of laws is based, except in rare and necessary cases. This predictability of the primary and most sublime function of law in a democratic society creates legal security. Law as the cause and legal security as the consequence represent the key components of what is known as the rule of law. Together with the limitation of powers and the guarantee of the rights and liberties of the individual, the rule of law forms the backbone of the theory and practice of Western constitutionalism. It goes without saying that predictability is not the only function of law in society. This is because, in modern times, law may have another function which has neither to do with the regulatory effects concerning the future nor with its retroactive effects. In some societies, this is referred to as the 'schizophrenic' or 'double' role of law, i.e., exceptional situations governed by law that simultaneously have retrospective and prospective effects. Here we are dealing with the regulation of two situations at the same time. The third function is referred to as the "function of law in transition" by renowned American scholar **Ruti Tietl**.[66] This term relates to situations in which law is part of a transition process and, at the same time, a product of that very transition. Thus, justice based on the laws of transition is contextual justice, justice of the moment, aiming at overcoming social difficulties and social transformation via the legal means it has created. The CK and the laws enacted following Kosovo's independence are no exception. In fact, the path taken by the country during its transition is no different from other former communist countries, except for a few particularities, owing to Kosovo's tragic recent history. They mainly concern the Milošević era and the period of the UNMIK administration.

[66] Tietl, Ruti: "Transitional Rule of Law". In: Czamota, Adam/Krygeier, Martin and Sadurski, Wojciech (eds.): *Rethinking the Rule of Law After Communism.* (CEU Press: Budapest 2005), p. 279.

Conceptually, the social function of law and justice during a transition – characterized by the dual role described above – was the same in Kosovo as in the former communist countries. As mentioned above, the differences were of structural nature, rooted in the very origins of Kosovo's transition following its liberation in June 1999, and a direct consequence of the country's tragic history in the years after the Cold War, of the nature of Yugoslav communism, and of the special circumstances surrounding the breakup of former Yugoslavia. These factors created an extremely discriminatory, brutal, and illegitimate system, implemented by Serbian dictator **Slobodan Milošević** (1989–1999) and later replaced by the system installed by the UNMIK in June of 1999. Legal chaos resulted from the fact that the two systems produced different legal structures for the same social relations. Due to the sparse legal infrastructure of Kosovo during the transitional period (1999–2008), its normative structures partly continued to be used even after the initiation of Project 2008. The latter rendered the 'schizophrenic' role of the law in Kosovo before and after independence even more legitimate.

The transitional law had to conform to the standards of Western constitutionalism, particularly concerning equality before the law, non-discrimination and, above all, gender equality. The latter is not a concept rooted in the natural (biological) gender of individuals but represents a specific type of social relation on which the present and future of society are built. Did Kosovar law conform to those standards in the case of the non-male victims of the last war? In other words, did Kosovar law in transition implement contextual, prospective and retrospective justice, ensuring the basic principles of modern constitutionalism such as gender equality? This would be a topic of further research, which goes beyond the scope of this study. The latter is intended to elaborate on the basic pillars of the MC of Kosovo in both the past and the present. It aims at clarifying that the normative structures of Kosovo both before and after Project 2008 were and are based on **constitutional patriotism** and the **sovereignty of law**, not on the sovereignty of a cultural nation as described above. In other words, the constitutional order of Kosovo and the pillars supporting it rest upon the loyalty to constitutional values, principles, norms, and the sovereignty of law rather than on the loyalty to cultural values, principles and norms or national-cultural sovereignty.

2.1. The Fundamental Political Aims of the Declaration of Independence and the Constitution of Kosovo

The conceptualization of the DI in this book is based on H. Kelsen's and C. Schmitt's constitutional approach. The DI is, therefore, a ***grundnorm*** or **first historic constitution** (Kelsen) and a **concrete political decision** of the people of Kosovo through which it defines its political status (Schmitt). According to their concepts, the CK represents constitutional law, i.e., the entirety of all normative structures codified into one which regulates power relations and the role and position of the individual in state and society.

Together, the constitutional concepts of Kelsen and Schmitt represent, as **Mortati** would put it, elements of the essential content of the MC of Kosovo: the **fundamental political aims** and **material normative elements**. From the point of view of legal realism, which we share, society is an abstract concept rather than a **material normative element** determining the ***fine politico***: the parastatal situation of Kosovo before February 17, 2008, was not legal. This was implicitly confirmed by the ICJ in its advisory opinion on Kosovo. Only social forces, first and foremost Kosovar political parties, were of such nature. As normative material elements of the MC of Kosovo based on Project 2008, these social forces – except the ones of the Serb community – reflected their relative strength, power, and organizational stance. This configuration was the expression of a power balance in which the social forces of the Albanian majority population dominated. These forces managed to impose a new *fine politico* and give normative substance to MC, prevailing over other forces, such as the local Serb community, which was dominated and remained outside the power competition. From the start, the Serbian social forces challenged the foundations of **Project 2008** and their status of a dominated social force. Consequently, with the support of the **Republic of Serbia**, they actively challenged the validity of Project 2008: after the ICJ's decision of 2010, Serbia gradually and formally became an active and legitimate player in Kosovar politics and home affairs. This status was institutionalized upon the request of the United Nations General Assembly. In very neutral wording, Paragraph 2 of Resolution A/RES/64/298 of October 13, 2010, stipulates:

> 2. (…) welcomes the readiness of the European Union to facilitate a process of dialogue between the parties; the process of dialogue would itself be a factor for peace,

> security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people.[67]

However, the story of the MC of Kosovo does not end here. There is an essential content to Kosovo's MC beyond Project 2008 which should in no way be equated with the general will. This content relates to the initial interests of the dominating social forces of Kosovo on February 17, 2008. Owing to their dominant position in society, they managed to transform their political vision into a new political power in Kosovo. The **essential contents of the MC of Kosovo** did not only reflect the **fundamental principles** of the constitutional order of the Kosovar political community in general but also institutionalized the relationship between **dominant** and **dominated** social groups. It was the moves, actions, and political resistance of the Serb social forces as the dominated group as well as their competition with the dominant social forces of the non-Serb community that explain the changes in the meaning, efficacy, and normative value of the formal texts of the DI, the CK, and of all normative structures of Kosovo.

The change in this balance of forces and the emergence of new power configurations within Kosovo took place gradually and via a dialogue process, which commenced in 2011. In 2023, it resulted in two agreements, which are discussed in the following section. In its advisory opinion on Kosovo, the ICJ referred to the representatives of Kosovo's dominant social forces as the Authors of the Declaration of Independence (ADI). These individuals acted outside the existing legal framework, established by the UNMIK authorities on June 10, 1999. As previously mentioned, this legal order did not reflect the history or culture of the majority of the Albanian population. In fact, it did not reflect the history and culture of any of the Kosovar communities. Cultural and historical differences between communities were declared irrelevant by Project 2008: after the country's independence, ***lex*** became ***rex***, i.e., the **positive constitutional law of Kosovo** did not mirror the culture and history of all those communities in Kosovo who now live in a single nation and in a single state, forming the nation state of Kosovo. It did not matter that the majority population, the Kosovo Albanians, had been the victim of

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[67] A/RES/64/298: *Resolution adopted by the General Assembly on 9 September 2010*. Date: 13 October 2010. 120th plenary meeting on 9 September 2010. https://digitallibrary.un.org/record/692019?ln=zh_CN (retrieved March 6, 2024).

attempted genocide, which was interrupted by NATO intervention. The SK is new and based on the norms, values and principles of **constitutional patriotism**, leaving behind its bitter past and suffering. The modern constitutional principles of sovereignty in Kosovo are not expressed in ethnic/national terms, but ones pertaining to state: sovereignty refers to the SK, not to its communities and their will, particularly not to the will of the Albanian majority population. The DI and the CK do not reflect the will of the majority population: all communities constitute one new people and are considered the source and foundation of the legitimacy of the SK. Through this separation from the people's will, the DI and the CK fulfil their inner logic of being totally alien to local historical and cultural circumstances, particularly as far as the Albanian majority is concerned. This circumstance causes tensions between the Albanian community and the values, principles and norms of the new MC.

Before we look at how the regulatory forces supporting Kosovar constitutional order, above all **fundamental political goals** and **political unity**, are dealt with in **Project 2008**, we would like to reiterate some conclusions as to the exercise of constituent power in the context of international influence. Wherever the international community has an important role to play – such was the case in Bosnia-Herzegovina, East Timor, Germany and Japan after 1945, Iraq, Kosovo and others – constitution is understood as a process in which multiple political goals are realized. In such cases, constitution is not a final product – contrary to where **original constituent power** is realized entirely within the national framework and without interference from abroad. In the case of Kosovo, the former applies. Such a process includes the implementation of **multiple goals** and **multiple political unities**, according to the provisions of Project 2008.

As the first component of Project 2008, the DI consists of two parts: the preamble and the operational part. The preamble introduces the fundamental political goals of the DI. It deals with the theory of how regulatory forces support the new constitutional order in Kosovo. The first paragraph informs readers that its adoption occurred during an extraordinary session of the Assembly of Kosovo, held in Pristina on February 17, 2008. The second paragraph emphasizes that individual citizens and their dignity rather than nation/ethnicity, religion, linguistic or other social groups are the very basis of

the SK. This marks the point of departure for the **political unity** of the SK. The third paragraph speaks of Kosovo's unilateral commitment to reconciliation and forgiveness. It is followed by the promise to promote and respect the diversity of the people of Kosovo. Kosovo's full integration into the Euro-Atlantic community is stated in paragraph five. The following paragraph expresses the desire of the **ADI** to consider the case of Kosovo as *sui generis* rather than as a precedent for future situations in other parts of the world. Paragraphs seven to ten refer to facts that occurred before the creation of the CK: conflict and violence in the country, affecting the conscience of civilized people (paragraph seven); **NATO's** military intervention to free Kosovo from Serbian dominance and the ensuing UN administration (paragraph eight); the development of functional institutions by the UNMIK, multi-ethnic democracy, expressing the will of the people of Kosovo (paragraph nine); and the many years of internationally sponsored negotiations over the future status of Kosovo (paragraph ten). While paragraph eleven expresses regret over the failure of talks concerning the future status of Kosovo, paragraph twelve draws the conclusion that the **Ahtisaari Plan** for Kosovo represents a comprehensive framework for its future development, in line with the highest European standards on human rights, fundamental freedoms, and good governance. However, the **Ahtisaari Plan** did not include such a provision on the country's independence and sovereignty. Such a provision was only part of a letter by **Martti Ahtisaari** (1937–2023) to the UN Secretary General.[68] This means that the **Ahtisaari Plan** only represented a normative framework of norms, values and principles of Western constitutionalism, intended to serve as a key reference point for Kosovo's future governance. In paragraph thirteen, the ADI express their determination to reach a solution regarding the political status of Kosovo and to provide the people of Kosovo with clarity as to their future, as to how to overcome past conflicts, and as to how to realize the full democratic potential of

[68] The Ahtisaari Plan was the standard for the first and most important step in the creation process of the SK and its MC. It reflects the dominant position of Kosovo's majority population. Based on it, Kosovo declared its independence, i.e., its political unity, and defined its fundamental political goals. It served as the basis for the CK and all major legislation of the Kosovo Assembly regarding constitutional democracy, the rule of law, and the respect for human and minority rights. Until September 2012, when the supervised independence of Kosovo ended, the Ahtisaari Plan enjoyed absolute supremacy over the CK and all other Kosovar legislation.

Kosovar society. Finally, paragraph fourteen pays tribute to all men and women who made huge sacrifices to build a better future for Kosovo.

Each paragraph of the **operational part** contains the personal pronoun "we", a constitutional subject speaking in the name of the people, based on a supposed popular authority. Following the tradition of the declarations of independence of US federal states and other democratic countries, the formulation "We, the People" reveals the authors' identity and the entity they create. This declaration of sovereignty was not based on actual sovereignty at the time it was issued: behind it was the intention to create a new and distinct sovereignty, apart from the **inherent sovereignty of the people**. In this part of the **DI**, several political goals are stated. The first and the most sublime is **political unity** – a sovereign and independent state of Kosovo (first paragraph). From its provisions, it becomes clear that the process of the country's independence was a long and well-prepared one, with the participation of international players exercising Kosovar constituent power, culminating in the Declaration of Independence on February 17, 2008. There, it is expressly stated that the Declaration reflects the will of the people of Kosovo and that it fully conforms to the **Ahtisaari Plan** as well as its recommendation that the independence and sovereignty of Kosovo was the only possible political status at that time. Chronologically, the **Ahtisaari Plan** precedes the DI. At present, however, it has no operative legal force, because its provisions were incorporated into Kosovar laws. Its enactment was an international obligation of Kosovo during the phase of supervised independence (from February 2008 to September 2012). This obligation is addressed in the third paragraph of the DI. The second paragraph stipulates that the SK should be a **democratic republic**. It then details the character of the SK, defining it as a unitary state. This paragraph also mentions **political goals of a republican form of government** based on "metapolitical" values, which in literature are termed the **new trinity**: democracy, human rights and liberties, and the rule of law.[69] Furthermore, readers are informed that Kosovo is to be democratic republic, secular and multi-ethnic, guided by the principles of non-discrimination and equal protection before the law, and that it is to provide for the protection and promotion of the human

[69] See also: Walker, Neil: "Three Registers of the Material Constitution". In: Goldoni, Marco and Wilkinson, Michael A. (eds.): *The Cambridge Handbook on the Material Constitution*. (Cambridge University Press: Cambridge 2023), pp. 210–222.

rights of all communities, including the creation of the necessary conditions for their effective participation in political and decision-making processes. Regarding the protection of the values of Western constitutionalism, Kosovo is not an exception: all former communist countries embraced these values within the framework of their newly defined political unity and fundamental political goals, which were determined by new constitutional projects after the fall of **communism**. In the case of some of those countries, the newly defined **political unity** was determined for existing states (Albania, Hungary, Mongolia and Romania); in the case of others, the definition of political unity was part of the creation of new states (e.g., former Soviet republics, including Russia, former Yugoslav republics, the Czech Republic, Slovakia and Kosovo).

Political unity and fundamental political goals are not synonymous: democracy, human rights and liberties, and the rule of law can be installed in any form of state and by any political power; thus, these concepts do not prevent the realization of fundamental political goals and vice-versa. **Political unity** does not manifest itself in one constitutional form only; there may be several constitutional forms, from the unitary state without decentralization to the confederation as a loose alliance of sovereign and independent states. The same applies to **fundamental political goals**, which can be expressed in terms other than meta-political values, as described above, and change from one country to the other. As we noted earlier, they sometimes have to do with political economy, such as foreign investment, mining industry, etc. In the case of Kosovo, political and cultural Euro-Atlantic integration was added to the trinity of fundamental goals (cf. paragraph five of the preamble of the DI).

As mentioned above, the third paragraph of the DI contains the commitment of the SK to functioning according to the provisions of the **Ahtisaari Plan**. This commitment is found in the preamble of the DI as well. This paragraph focuses on the major role of the international community in giving momentum to the creation of independence on February 17, 2008, presenting it as the result of a long process that had started a long time before. This process started with a report by Kai Aide, a Norwegian diplomat working on behalf of the UN, and ended with the Ahtisaari Plan. The **Kai Aide** report of 2004 concluded that negotiations on the political status of Kosovo, as

provided for in **Resolution 1244**, should immediately start.[70] During that period, Kosovo's political goals as well as its political unity as a sovereign and independent state were gradually framed and forged under the auspices of international players. Another commitment in paragraph four pertains to the adoption of a constitution, reflecting this new political unity of the **SK**, in which the values of the new trinity and the relevant principles of the **Ahtisaari Plan** are enshrined. In this paragraph, the **European Convention on Human Rights** (ECHR) is taken as a point of reference and benchmark for the respect of human rights and liberties. The fifth paragraph is connected to the previous one as it determines the mechanisms of implementing the rule of law as well as the security of peace. The **ADI**, nevertheless, expressed some caveats: first, the implementation of the **Ahtisaari Plan** and the rule-of-law mission, later to be known as **EULEX Mission in Kosovo**, should be supervised by the EU, thus avoiding any role of the UNMIK in this matter; second, they recognized the continuance of the military presence of NATO, based on Resolution 1244, until Kosovar institutions were ready to take over responsibility for peace, security and stability. The sixth paragraph refers to Kosovo's integration into the EU as an exclusive goal of the country's foreign policy, albeit in a restrained manner: "For reasons of culture, geography and history, we believe our future lies with the European family." It should have stated in clear terms that Kosovo's future has no alternative and that any other path would be fatal for Kosovo, as history shows.

Paragraph seven does not express a political goal but Kosovo's appreciation of the support of the UNMIK in its reconstruction and in the rebuilding of its democratic institutions after the war. Here, too, Kosovo expresses its readiness to further cooperate with the remaining UNMIK structures, but without allowing it to act as public authority and exercise executive or other state powers. The following paragraph refers to the global geopolitical and geostrategic goals of Kosovo, regarding the SK's international commitment. Its statements equal unilateral commitments: first, Kosovo fully implements the content of all international and regional legal documents, from the UN Charter to the Helsinki Final Act; second, it respects the territorial integrity

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[70] For a full report, see: *UN Security Council Resolution S/2004/932* of 30 November 2004: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/kos%20S2004%2093 2.pdf (retrieved 30 March 2024).

of other countries and makes no territorial claims; third, it renounces any use of force or threat thereof inconsistent with UN goals. The statements regarding the global orientation of Kosovo in paragraph nine, concerning contractual obligations assumed on its behalf by UNMIK authorities, and the obligations towards the **International Criminal Tribunal for Former Yugoslavia** (ICTY) are of a similar nature. The latter should be distinguished from the Hague Tribunal, based on Constitutional Amendment No. 24 of August 3, 2015 (now Article 62 of the CK). This amendment establishes the constitutional legal basis for the **full transfer of Kosovo's jurisdiction**, including constitutional matters, to external authorities; this also includes war crimes and crimes against humanity, allegedly committed both within and outside Kosovo during the war between 1999 and the end of 2000.

The court's official name is **Kosovo Specialist Chambers and Specialist Prosecutor's Office**, also known as **Special Court**. Following the constitutional review of this amendment, based on Judgment KO 26/15 of April 15, 2015, new legal acts (both domestic and international) were adopted to implement its provisions. The Special Court was founded following the accusation of Swiss prosecutor **Dick Marty** (1945–2023). Marty's accusation came in the form of a report, which had been endorsed by the **Parliamentary Assembly of the Council of Europe (PACE)** via Resolution No. 12462 of January 7, 2011. The latter was turned into an international obligation of Kosovo through its endorsement by the **Kosovo Assembly** on April 23, 2014. Contrary to the Special Court, the creation of the **ICTY** was based on **Chapter VII** of the **UN Charter** of 1993 and ended its mission in 2017. The jurisdiction of the ICTY covered the whole territory of former Yugoslavia and any crimes committed there. Both courts acted on the basis of approximately the same substantive law, except for genocide: the Special Court only handled indictments for war crimes and crimes against humanity and international law, but no indictments for genocide. In fact, the creation of the Special Court did not challenge any of the fundamental political goals of Project 2008 and will not do so in the future, as it deals with the transfer of judicial power – as a part of Kosovo's sovereignty – to another country, the Netherlands. The transfer of sovereignty is a prerogative of sovereign and independent countries, which does not, in all cases, challenge the **fundamental political aims** of a country's MC. The establishment of the Special Court did not challenge the fundamental political goals of Project 2008,

especially not those related to political unity, as it deals with individual crimes.

Paragraphs ten and eleven also address Kosovo's geopolitical and geostrategic orientation at a regional level. Paragraph ten refers to Kosovo's commitment to promoting peace, stability and cooperation in Southeast Europe, while paragraph eleven refers to Kosovo's neighbours, particularly Serbia, aiming at mutual reconciliation. The last paragraph concludes with Kosovo's unilateral commitment to implementing the **Ahtisaari Plan**, international law, and United Nations Security Council (UNSC) resolutions, including **Resolution 1244**. Further on in this paragraph, Kosovo declares that all states have the right to rely on the DI, appealing for their support and their endorsement of its statehood in the future. Even a lack of this provision would not have diminished the importance and particular legal weight of the DI, since – according to international law – the latter represents **a unilateral act**, which has legal effects from the moment of its adoption and its successful communication to third parties. Those legal effects are *erga omnes*, i.e., any party with a legal interest can invoke them in its dealings with the state that issued the declaration of independence.[71]

The political goals of the DI outlined above can be divided into three categories: first, global geopolitical and geostrategic goals; second, goals of ideological character (the modelling of political unity and governance in Kosovo after Western standards of constitutionalism, regarding democracy, the rule of law, and human and minority rights); third, goals of economic character. None of these political goals pushes the specific national, ethnic, religious, linguistic or other interests of any community in Kosovo. With the adoption of the DI, the Ahtisaari Plan took effect. It did not promote other political goals than those enshrined in the DI. On the other hand, the DI and the CK are derived from the Ahtisaari Plan, not vice versa. However, the legal force of the latter does derive from the DI, like the duty to enact a constitution to implement the provisions of the DI and the **Ahtisaari Plan**. The CK was

[71] For an excellent and extraordinary review of the nature of unilateral acts and their significance for international law, see: Degan, Vladimir D.: *Sources of International Law*. (Martinus Nijhoff Publishers: The Hague 1997), pp. 253–338. (It also includes declarations of independence).

adopted in April 2008, entering into force in mid-June of the same year. Together they form Project 2008 and represent the constitutive elements defining the **political unity of Kosovo**, which emerged on February 17, 2008. Apart from local self-government – which is referred to later in this book – neither of these legal-constitutional acts contains an obligation to push political and constitutional projects that promote national, ethnic, religious, linguistic and other interests of certain communities of Kosovo.

As a result of the Ahtisaari Plan, legislation regarding the position of the **Serbian Orthodox Church** (SOCH) and the preservation of Serbian cultural heritage on Kosovar territory was enacted, which itself does not aim at advancing the particular interests of Kosovo's Serbian population but simply at preserving and protecting the latter's spiritual and cultural rights on Kosovar territory. The same applies to the formation of associations, which is addressed in Article 9 of Annex III ["Decentralization"] of the **Ahtisaari Plan:**

> 9.2 Based upon the principles of the European Charter of Local Self-Government, municipalities shall be entitled to form and participate in an association of Kosovo municipalities for the protection and promotion of their common interests, in accordance with the law.
>
> 9.2.1 Membership in such associations shall be limited to Kosovo municipalities. Such associations may cooperate with their international counterparts.
>
> 9.2.2 Such associations may offer its members a number of services, including training, capacity building, technical assistance, research related to municipal competencies and policy recommendations.[72]

These provisions make it very clear that the associations referred to are not meant to be different from the associations in other European countries. The only difference regarding European standards is the political and constitutional orientation of the **Ahtisaari Plan**, which aims at creating certain municipalities based on ethnic criteria and mainly for the purpose of accommodating the demands of the Kosovo Serbs. Apart from the Serbs, only the local Turkish community managed to create a new municipality based on ethnic criteria, the **Mamusha Municipality** near Prizren. This constitutes a conscious deviation from the European standards of local self-government,

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[72] UN Special Envoy for Kosovo: *Comprehensive Proposal for the Kosovo Status Settlement*. 2 February 2007, p. 27. Available at: https://old.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf.

according to which the main goal of self-government is to provide services to citizens rather than to cater to the nationalist interests of certain ethnic communities. The **CK** further operationalizes the concepts of political unity and fundamental political goals stated in the DI in its first chapter, titled "Basic Provisions". There, the nature, position, form and content of the SK as well as the role and position of the individual in society are defined. It goes without saying that not all articles of this chapter (Articles 1–20) contain provisions on political unity and fundamental political goals. Some of them state constitutional facts, while others clarify and define categories and constitutional moments that bear no reference to any form of political unity or any specific political goal. In this context, the preamble of the CK is clearer than its basic provisions, despite its merely supportive role when it comes to interpreting the CK's operational part. In other words, all constitutional preambles include hints at how constitutions are to be interpreted, save the cases where the operational part or the preamble itself determines otherwise. The preamble of the SK states some goals and the general orientation of Kosovo nationally and internationally. This becomes obvious in its very first paragraph, which declares Kosovo as a state of its citizens, thus confirming the position of the DI. The second paragraph refers to equality before law, as part of the new trinity discussed above. The third paragraph makes a commitment to social welfare and prosperity. Paragraphs four and five outline the geopolitical and geostrategic orientation of Kosovo at the global, European and regional levels. Part of this orientation is the **Euro-Atlantic integration**, stipulated in the penultimate paragraph of the preamble.

Regarding the definition of **political unity** in Article 1 of the CK, three components are important: first, a republican form of democratic government, i.e., a unitary and indivisible state. This means that the self-government of municipal units is a form of decentralization, as expressly stated in the provisions of Article 1. They define local self-government by determining municipality as its basic territorial unit. This is further emphasized in Chapter X, which focuses on the local self-government and territorial organization of Kosovo. Second, the individual citizens are the bearers of sovereignty, while human rights and liberties are the standard measure for evaluating to what degree sovereignty is realized, including the relation with non-citizens of Kosovo, who fall under the same jurisdiction. Third, this political unity is both fundamental and conclusive, because the SK could neither join any other state nor make territorial claims to its neighbours.

This definition of political unity is further detailed in Article 2, which regulates sovereignty by defining its constituent elements. In this Article, sovereignty, as the totality of rights and duties of states in a certain place at a certain time, consists of two core elements: the first defining element relates to the origin of political power in a state with a republican democratic form of governance: the people is the source of all political power. Moreover, this power is to be exercised based on Western standards of constitutionalism, through elected representatives, referenda and other forms recognized by the CK. The second defining element refers to the constitutional regulation of the SK's right to survival, recognized by international customary law. This includes the right to prevent any other sovereign public authority from exercising sovereign jurisdiction within the territory of Kosovo or from placing Kosovo under its sovereign authority. This equals Kosovo's right to use all appropriate means it considers necessary for the protection of the material element of its statehood – the territory.

Article 3 of the CK refers to one part of the new trinity: equality before law. According to this provision, citizens and their individual or collective rights and liberties limit the arbitrary use of political power and represent a benchmark for the quality of public power exercised within the territory of Kosovo. Article 4 regulates another element of the trinity: it stipulates that the form of governance and the separation of powers are necessary pillars of the rule of law. This Article emphasizes that the balance and separation of powers represent crucial components of Kosovo's political unity. In this Article, the **CCK** is distinguished and separated from the three powers: it is defined as the protector of constitutionality and the final instance interpreting the CK. The CCK has interpreted the provisions of this Article in cases where central institutions **encroached upon each other's constitutional powers** and on each other's interactions with local authorities.

While Articles 5 and 6 regulate the official languages and symbols of the SK, Article 7 lists **constitutional values** as meta-concepts, to be implemented by those interpreting the CK, first and foremost the CCK and the regular judiciary. These values of Kosovar constitutional order in their entirety reflect the character of political unity, i.e., the form of state organization underlying this order. Their implementation clearly shows that Kosovo's form of governance is republican with a democratic political regime of the following qualities: the citizens and the people composed of citizens hold the

power, the latter being exercised on the basis of the CK; powers are balanced and separated, while human rights and liberties limit the arbitrary use of power; political and economic pluralism are additional crucial factors in political unity. A separate paragraph focuses on gender equality as a constitutional right within the political unity of Kosovo, ensuring that everyone is equal regarding the formation and development of political unity.

The initial constitutional project, **Project 2008**, did not only exclude factors like nation, ethnicity, and language with regard to the creation and development of political unity and the definition of fundamental political goals but also all religious denominations and movements. In this context, Article 8 defines political unity as **secular** and neutral in religious matters, which means that the SK has a duty to protect the public sphere from being dominated or usurped by any religion. This is **the essence of laicism**: religion and its practice remain a private issue. As to the relationship between religion and state, all countries on both sides of the Atlantic embrace one of two constitutional models, which is reflected in their constitutions, laws and religious practices: either **laicism** or **secularism**. The difference between them is huge and reflects the historic experience of the revolutions in **America** and **France** at the end of the 18th century. In the first case, the state has an active and decisive role in protecting the individual from religion and its negative impacts. In the second case, the state is passive and guarantees religious liberty, as enshrined in the famous "non-establishment clause". French laicism, as noted by **Hannah Arendt** (1906–1975) in "On Revolution", has its origins in **Jean-Jacques Rousseau's** (1712–1778) famous "Emil or On Education". There, Rousseau claims that it is primarily the state's responsibility to shelter and protect individuals from religious dogma through public education. This later became a standard regulation in constitutions worldwide. In other words, laicism is the protection of citizens from the excesses of religion. In the US, the spiritual leader of the revolution, John Locke (1632–1704), understood liberty in **libertarian** terms, in view of the lack of religious freedom of immigrants who fled religious prosecution in Europe and settled in America. Their desire was the freedom of religion and belief, without external interference. Later, this approach became known as secularism, closely associated with the US, where there is more understanding for the freedom of religion and where the state's influence on religious affairs is minimal, i.e., it does not interfere at all with religious freedom. For instance, religious freedom in France is implemented in close cooperation with the state, while in

the US the exact opposite is the case: there is minimal state interference regarding religious freedom. The ideas of **John Locke** were further developed by the founding fathers of the US and its constitution (Alexander Hamilton, James Madison and John Jay), in the **Federalist Papers** (1788). In these articles, the authors systematically develop key categories regarding state and constitution, rights and liberties, the separation and balance of powers, and many more. Here, the minimal role of the state in matters of religion is described, and the "non-establishment clause" doctrine expounded in detail.

Kosovo endorses laicism. This is very clearly stated in Article 8 of the CK: "The Republic of Kosovo is a secular state and is neutral in matters of religious beliefs." Both the English and Serbian versions use the expression "secular", which does not properly reflect and describe the status of religious freedom in the CK. Only the Albanian version employs a term reflecting the approach of laicism, including the role of religion in society and the freedom of religion. The **Ahtisaari Plan** is different as it expressly endorses a secularist approach towards religion, anticipating that the SK cannot have any official religion.

The preservation and protection of cultural and religious heritage, provided for in Article 9, resembles a constitutional guarantee rather than a fundamental political goal or a definition of political unity. This differs from the definition of economy in Article 10, since without a free market and free competition as the very pillars of the political economy of Kosovo it is difficult to see how the political unity according to Project 2008 could have taken place. Without the dimension of political economy, such unity could have taken a different form, for instance that of an undemocratic, autocratic state, without the balance and separation of powers, without a rule of law, without respect for human rights and individual freedom, etc. As mentioned earlier, the type of political economy itself is not an element of political unity as it can be part of every economic system, but it plays a considerable role in the definition of fundamental political goals. In some cases, like in Mongolia's foreign investments,[73] political economy of a certain type serves as a point of reference for the geostrategic orientation of the country, despite a lack of formal constitutional provisions.

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[73] See footnote no. 51.

In this Article, Kosovo makes it clear that its MC in the spheres of foreign investment and international political economy supports the original constitutional provisions of Project 2008. The same can be said about the currency, regulated in Article 11, although it does not specify which currency it is referring to. Constitutional orientation towards one currency is an element of state sovereignty, as are the determination of the capital city of the SK (cf. Article 13), citizenship (cf. Article 14), the protection of citizens abroad (cf. Article 15), and the superiority of the CK (cf. Article 16, stating that Kosovo neither formally nor legally depends on any other public authority or state); further elements of sovereignty are: international agreements and their ratification (cf. Articles 17 and 18, referring to Kosovo's full ability to contract under international law), the application of international law (cf. Article 19, implementing DI, and conferring agency on Kosovo with regard to international law and all commitments made under it) and, finally, the transfer of sovereignty, a standard sovereign prerogative, conceded to states according to customary international law and part of all national constitutions (cf. Article 20).

In the implementation of political unity and the fundamental political goals according to Project 2008, social forces and **central institutions** – particularly the CCK – played an important role. Its decisions were crucial as they dictated the political and legal-constitutional actions of all institutions of Kosovo at all levels, including those of the regular judiciary. It set clear standards regarding human rights and liberties, including community rights, democracy and the rule of law, which had been unknown until then. The CCK operated within **social relations** of an extremely rigid and primitive nature, dominated by the political and constitutional culture of the time of communism. Pertinent literature rightly observed that post-communist constitutional justice emerged against the backdrop of communist legal and constitutional culture. This should not be understood as a "way of life", a term used in common parlance, but as a more structured concept with a different content. This can be explained as follows. First, legal-constitutional culture itself contains the mental products and reflections of individuals and society in general regarding certain political objects. **Mental products and reflections** refer to orientations, i.e., the population's beliefs, values and stances regarding political objects. **Political objects** are incentives intended to generate political orientation. They relate to the following categories: first, to the political sys-

tem as a whole (its history, location, internal power, constitution, and distinguishable features of the state); second, to organizations and institutions (political parties, interest groups, media, legislation, and other power branches and structures), which convey demands and public support into the system, converting them into state/public policies; third, to the administrative-bureaucratic apparatus and to courts and other institutions in charge of law enforcement and the implementation of state decisions; fourth, to the role and position of individuals in society and the way in which their rights and liberties are implemented within the state. The structure and very essence of a concrete constitutional culture consists in the views and reflections of individuals and society regarding the following matters: the role and position of political parties; constitutions; the state itself and its history of formation and development; the organization and institutions that channel and support demands by converting them into state/public policies; the administrative-bureaucratic apparatus, including courts and other law-enforcement authorities; and, finally, the implementation of state decisions. In other words, the orientation of the people towards the political objects described above represents the structure and content of the political and legal-constitutional culture of a country. This culture differs from one place to another, depending on the historical period and a country's level of development. Changes in the orientation of a people and individuals concerning political objects, i.e., not only a political system but also its components (state organs, organizations, human rights and liberties, administration and bureaucracy etc.), represent a change in the political and constitutional identity of a country. Considered from the point of view of a concrete legal-constitutional culture, a constitution is no longer a simple written document but something resembling its Aristotelian meaning: a politically organized **system or way of life**. In sum, constitution is a system of values and positions orienting society towards existing political objects in a given place and at a given time. Such a system is defined by the constitution and itself contains premises for concrete political action. These premises result from circumstantial factors such as traditions, historical memory, norms, customs, emotions and symbols. In connection with the four categories mentioned above, they represent the legal-constitutional culture of a concrete society.

Due to this clarification of the basic concepts regarding political and legal-constitutional culture, readers will now be able to understand how this culture has developed in the context of Kosovo. There is a substantial difference between Kosovo today and the country during the communist era. During that time, legal-constitutional culture was characterized by views according to which constitution did not have any normative force: it was believed to be a programmatic and propagandistic corpus that could not be implemented through judicial or other legal mechanisms. At that time, the constitution was merely a communist party document, expressing goals and objectives for the general development of society. The stipulations of communist constitutions regarding the origins, form and organization of power were meant to be a reminder to citizens that a certain (communist political and constitutional system was in place. They did not provide any constitutional guarantees regarding the form and organization of power, human rights and liberties, and they did not have any normative effects. Every guarantee stipulated in such a constitution only served the propagandistic purposes of official communist ideology. This political and legal-constitutional culture and the views based on it regarding the political system and its components were part of the curricula of law faculties and taken for granted. It suffices to look at the literature on constitutional law of that time, reflecting the views mentioned. The situation was particularly dramatic regarding the fourth category of political objects – **the individual**. In the legal-constitutional and political culture of communist states, individuals were considered passive subjects who were to be subordinated to the highest ideals and goals of socialism and a classless society – communism. The same was true for individual and societal discourse on political parties and other constitutionally relevant matters. These categories of political objects and their promotion and cultivation were regarded as existential threats to communist constitutional systems. They could not coexist with or be tolerated under the political and ideological rule of a Communist Party as the avant-garde of society and all its strata. The party state was the dominant political form of organization, not tolerating political pluralism or differing or unofficial views. The same applied to constitutional justice – where it existed (former Yugoslavia, Poland and Czechoslovakia) – and other institutions of the third category of political objects, where communist public discourse prevailed, promoting a specific belief system and values: when interpreting and applying the law, courts and other institutions of this category were seen as mechanisms justifying the

principle of the unity of power; the constitution did not have to be interpreted at all as it was not considered a legal text with normative value; on top of this unity of power was the Assembly as the highest organ of state power; individuals were in an inferior position with regard to the state and its coercive apparatus, with no possibility to claim the rights and liberties allegedly guaranteed by the national constitution. In fact, human rights and liberties in communist systems served as mere décor, which could be entirely changed or diminished by simple laws. This was an express constitutional stipulation of all former communist constitutions. They always guaranteed human rights and liberties, but without any mechanisms for implementing constitutional or regular judiciary. The constitutional provisions that formally guarantee human rights and liberties included clauses authorizing legislators both to determine the content of a particular right and liberty and to reduce or destroy its very essence.

Everything said so far about political objects applies *mutatis mutandis* to the state and its conceptualization. The state at that time was conceptualized as an instrument of psychical coercion, supported by the working class and aiming to protect the communist way of production and the social relations based on it. Other aspects of state building were suppressed: no factor other than class was taken seriously in the communist state envisioned. The national dimension was subordinated to a particular version of self-determination – communist self-determination. This type of self-determination was inspired and directed by the Communist Party: its final aim was to build a classless society, called communism, in which national identities would disappear. In fact, the interpretation of the constitution equalled blind adherence to the Communist Party's standards rather than the interpretation of law. This explains why constitutional amendments by communist regimes were always considered a way to conform to the changed circumstances: they were assessments of the Communist Party rather than of other constituted state organs, representative bodies or judiciaries. Had the judiciary, including the constitutional one, enjoyed the prerogative of interpreting the constitution with a view to its adaptation to changed circumstances, there would have been no need to justify the constitutional amendments in the first place.

The debate so far equals a **macro-treatment** of legal-constitutional culture and its components, whose structure and dynamics develop when interacting

with each other over a certain time and within a confined political context. There are also **micro-** or local levels of general legal and political culture. They are of utmost interest for the following considerations. Research in former communist countries shows that the **institutional design** of constitutional justice, i.e., jurisdiction and the constitutional mechanisms for settling constitutional disputes, is as important as the text subject to constitutional interpretation. Of equal importance is the political ambiance in which constitutional interpretation takes place, i.e., first and foremost, the general legal culture at the local level, which is rooted in national legal developments. The legal-constitutional culture on the local or micro-level dictates the intensity and quality of constitutional justice. The legal culture, which reflects the relationship between, and the orientation of, mental products of a certain type (beliefs, values, and stances) towards certain political objects in essence represents the **DNA** of the constitutional courts of a concrete country. At the same time, **general legal culture** is an indivisible part of political culture, inclined to political action of a certain nature and direction. Such a culture is not only based on legal tradition, which is important at any rate, but on other momentary institutional and systemic factors. The latter appear particularly in societies in transition, i.e., in all former communist societies. In these countries, individual orientation is largely determined by past legal culture: institutions and processes, created momentarily following the radical change of political and constitutional systems after the fall of communism, constituted an influential factor due to the integration of inherited legal culture into such newly established institutions. One of those highly influential processes was **constitution-making**, the process of creating a new constitution – not as the cause but as the consequence of a change in the orientation towards existing political objects. In other words, former communist societies did not experience structural changes merely as a result of a shift in their orientation toward the existing political objects of the time. This is why **constitution-making** and institution-building in former communist countries were of an extremely elitist nature, i.e., they only obtained legitimacy *post festum*, mainly through the active and constructive role of constitutional courts, limiting and controlling the new powers and, at the same time, protecting and promoting human rights and liberties in new and structurally changed environments.

In philosophical and conceptual terms, Kosovo represents a similar case. Practically, however, the situation there is slightly different, due to the country's tragic history: after the fall of communism, it came under the Milošević regime, with all the characteristics of a harsh colonial rule. Conceptually and philosophically speaking, past legal culture also played a decisive role in Kosovo, despite its being abandoned under the rule of Milošević. In this context, two characteristics, reflecting the differences between Kosovo's constitutional order and the period following the implementation of Project 2008 stand out: first, Kosovo's constitutional order and justice system emerged and developed against the backdrop of the Yugoslav communist system; second, it was abandoned for the relatively long period of almost two decades under the repressive **Milošević** regime from 1989 to 1999. After 1999, Kosovo came under the **UNMIK** administration, which might be considered benevolent authoritarianism. Apart from those two objective factors, there is a third one, referring to the work of the CCK and its extensive jurisdiction, which is similar to other former communist countries in Europe and beyond.

In Kosovo, like elsewhere in the world, culture represents one of the crucial objective factors impacting the public perception of the work of constitutional judiciary. In this context, legal culture plays a special role as it is based on empirical studies on former communist societies. In the case of Kosovo, its impact has to be considered in the light of both the rule of **Slobodan Milošević** and the period between its liberation in June 1999 and the declaration of independence.[74] The first difference between Kosovo and other communist societies is that constitutional justice, as the key mechanism for constraining political power, emerged and developed against the backdrop of former Yugoslavia and its values. The second difference is that constitutional justice in Kosovo saw an interruption of almost two decades due to its repression under Milošević, followed by the UNMIK administration.[75] When the CCK started its work in June 2009, Kosovar legal culture almost did not exist. Many of the legal community frequently questioned the right of the CCK to pass judgment in public as they were still deeply rooted in the legal culture of former Yugoslavia, where constitutional justice did not resolve matters through judgments but rather through decisions. The same lawyers also questioned

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74 Hasani, Enver and Brahimi, Muhamet: *Gjyqësia kushtetuese* ["Constitutional Justice"], pp. 678–682.

75 Ibid., pp. 681–682.

the jurisdiction of the CCK because, in their books, a constitutional complaint was an ***actio popularis***, i.e., the right to request the annulment of laws and other legal acts of Kosovar public authorities that were not constitutional. Such views showed that Kosovo's legal culture was deeply rooted in communism. All the documents drawn up by lawyers rep-resenting parties in the CCK reflected the old communist culture and were therefore very often ignored by the courts.[76] When in 2010 and 2011 the CCK ousted two presidents of Kosovo through decisions, many lawyers rooted in the old system wondered how a constitutional court could do this. The surprise was similar when the speaker of the Kosovo Assembly, a prime minister, and the chief public prosecutor were removed from office and the property rights of the Deçan Monastery recognized, based on CCK judgments. There are other judgments in which the CCK as a central institution interprets the parameters of MC concerning the fundamental political goals clearly defined in Project 2008.[77]

With the initiation of Project 2008, political parties and all non-Serb social and political groups united, embracing the fundamental political goals and political unity that were proclaimed at the time. From among the political forces of the Albanian majority population, only the **Lëvizja Vetëvendosje** (LVV), currently in power, embraced a different fundamental political goal and quite a different political unity. The LVV then was committed to the unification of Kosovo and Albania, which contradicted the fundamental goals of Project 2008. The **LVV** abandoned this goal for good when taking power in February 2021. Project 2008 was seriously challenged a second time between 2018 and 2019, when former Kosovar President **Hashim Thaçi** and Albanian Prime Minister Edi Rama wanted to divide Kosovo. All **social forces** in Kosovo fervently opposed this plan as well as an exchange of territories with Serbia. Based on this project, Serbia would allegedly have ceded territories of southern Serbia for the northern part Kosovo. With regard to the regulatory forces of the material constitution of the country, both the partitioning of Kosovo and its unification with Albania would have yielded the same result: in the eyes of the international community and its representatives, this

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76 Hasani, Enver and Brahimi, Muhamet: *Gjyqësia kushtetuese* ["Constitutional Justice"], pp. 386–387.

77 Ibid., Chapter 16: "Mbi vendimet kryesore të Gjykatës Kushtetuese në dekadën e parë" ["On Key Decisions of Constitutional Court in Its First Decade"].

would have seriously challenged the fundamental political goals of the SK, as if the political unity of the SK were something that could be changed whenever the circumstances allowed. This proved right in 2023, when Prime Minister **Albin Kurti** of Kosovo concluded new agreements in **Brussels** and **Ohrid** (North Macedonia). They will be elaborated on later in this book.

From everything mentioned so far, it becomes clear that Project 2008 was not only challenged **by Serb social forces**. Social and political forces of the local Serbs did not join Project 2008, which was implemented by other non-Serb social and political forces. The Serbs positioned themselves on the opposite side, signalling their intent to challenge their newly acquired status within Kosovo's constitutional order. This explains their resistance to any serious integration into the MC of Kosovo and its constitutional order and the maintenance of their social and political forces and parallel institutions within the territory of Kosovo, which they never recognized as sovereign and independent. At the same time, the social and political forces of the Kosovar majority population failed to make serious efforts to integrate the local Serbs. This is evident when considering the lack of employment opportunities, the limited use of language, the restrictions on freedom of movement south of the Ibër River, and other rights denied to the **local Serbs**. Moreover, rather than accepting the Serbs' right to vote, the Albanian majority considered this a necessary evil imposed by the CCK which only needed to be formally respected. Local Serb political forces have always been considered the 'fifth wheel' within the SK. All this has resulted in the local Serbs' total isolation and resistance, making them turn to Serbia with their grievances. This trend has been reinforced by the dialog with Serbia, which the local Serbs consider a means to legitimize and legalize their parallel structures within Kosovar territory. This goal was achieved in 2023 with the above-mentioned agreements of **Brussels** and **Ohrid**, which seriously challenged the fundamental political goals and political unity of the SK.

2.2. Agreements with Serbia of 2013, 2015 and 2023: Their Legal Status and Relationship with the Constitution of Kosovo

The CK defines the country as a unitary state with significant decentralization, based on the **Ahtisaari Plan**. The provisions of the latter were entirely incorporated into the CK, directly and through laws and other legal acts regulating the constitutional role and position of Kosovar communities. This

decentralization is extensive. It started back in 2002 and was entirely based on the **Ahtisaari Plan**, mostly with the local Serbs' interests in mind, who are its greatest beneficiaries. The founding of a huge number of new municipalities between 2002 and 2008[78] did not change the unitary character of the SK. Kosovo remained a unitary state with a high degree of decentralization at the municipal level.[79] This situation started to be called into question in 2011, when the first international agreement (A2013) between Kosovo and Serbia was concluded in Brussels[80] and further operationalized in August 2015 by the agreement A2015.[81] Although neither the **A2013** nor the **A2015** contains provisions contradicting the fundamental political goals and political unity determined by Project 2008, major parts of the A2015 were declared unconstitutional in a CCK judgment (Judgment KO 130/2015). Only Kosovo's obligation to establish an **Association/Community of Serb-majority municipalities in Kosovo** (A/C)[82] remains in effect.[83] While the A2013

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78 For the criteria applied on the foundation of these new municipalities, also cf.: OSCE: *From Pilot Municipal Units to Fully Fledged Municipalities: First Year Review* (Pristina, 2010). https://www.osce.org/files/f/documents/5/6/67465.pdf (retrieved March 2024).

79 At present, there are 38 municipalities, among them ten controlled by the local Serbs, one by the Turkish Kosovo community. See also: Beha, Adem: "Decentralization in Kosovo: A Challenge to Deal With?". In: *Journal of Peace, Conflict and Development,* Vol. 1, Issue 17 (August 2011), pp. 23–42; Dalipi, Samet and Shala, Krenar: *The Role of Decentralization on Security Improvement and Peace – Building in Kosovo.* (Friedrich Ebert Stiftung: Pristina October 2016).; Dahlman, Carl T.: "Faire frontière dans la paix: le Kosovo et la décentralisation de la concurrence ethno-politique". In: *L'Espace Politique* [Online], 33/ 2017-3. https://journals.openedition.org/espacepolitique/4424?lang=en (retrieved April 2023).

80 A2013 was ratified by the Kosovo Assembly with two thirds of the votes, based on the constitutional procedures for agreements in Article 18.1 of CK. For the full text of A2011, cf.: Law No. 04/L-199. On Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia. In: *Official Gazette of the republic of Kosovo,* no. 38. 17 September 2011, Pristina.

81 *Association/Community of Serb majority municipalities in Kosovo – general principles/main elements*. 26 August 2015. https://dialogue-info.com/wp-content/uploads/2020/09/ASM-General-Principles-Main-Elements-25-August-2013.pdf (retrieved April 2023).

82 In this book, both ASM and A/C refer to the same institution: the Association of Serb Municipalities (ASM), which is sometimes also referred to as the Community of Serb Municipalities (CSM).

83 *Judgement in Case No. K0130/15*. Applicant: The President of the Republic of Kosovo, concerning the assessment of the compatibility of the principles contained in the document entitled "Association/Community of Serb majority municipalities in Kosovo,

established legal-constitutional grounds for the creation of an **A/C** without determining its content, the A2015 represents a legal act implementing the A2013 and further operationalizing the content of an **A/C**. However, according to **Judgment KO 130/2015**, the **A2015** has no legal effect and is not part of the legal system of Kosovo and its constitutional order.

The A2013 consists of fifteen paragraphs. Paragraphs one to six extensively detail the formation of an Association/Community of Kosovar municipalities with Serb majority. Paragraph three reads: "The structures of the Association/Community will be established on the same basis as the existing statute of the Association of Kosovo municipalities, e.g., president, vice-president, assembly, council." In paragraph four, the nature of this new body is defined:

> In accordance with the competences given by the European Charter of Local Self-Government and Kosovo law, the participating municipalities shall be entitled to cooperate in exercising their powers through the Community/Association collectively. The Association/Community will have full overview of the areas of economic development, education, health, urban and rural planning.

The essence here is the right of Serb-majority municipalities to cooperate in exercising existing competences according to European and Kosovo law. Paragraph six confers a representative role on this body before central authorities as well as a seat in the Communities' Consultative Council.

The **A2015** consists of twenty-two paragraphs meticulously operationalizing the provisions of the A2013. **A/C** refers to Association/Community, which exclusively protects and promotes the interests of the local Serb population

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general principles/main elements" with the spirit of the Constitution, Article 3 [Equality Before the Law], Paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo. (The Constitutional Court of the Republic of Kosovo. Ref. No.: AGJ 877/15. Pristina, 23 December 2015). For comments, see: Hasani, Enver: "The Case of the Serb Association before the Constitutional Court of Kosovo". In: Szmyt, Andrzej and Banaszak, Boguslaw (eds.): *The Transformation of Law Systems in Central, Eastern and Southeastern Europe. Liber Amicorum in Honorem Prof. Dr. Dres. H.C. Rainer Arnold,* (Gdansk University Press: Gdansk 2016), pp. 493–518; Hasani, Enver: "Rasti i Asociacionit serb në Gjykatën Kushtetuese të Kosovës". ["The Case of the Serb Association before the Constitutional Court of Kosovo"]. In: *E Drejta/Law,* Viti XLI – Nr. 1–4 (2015), pp. 7–33.

and enjoys a legal status equal to a legal entity under Kosovar public law, with all legal rights and obligations connected with this status. Yet another novelty was that the **Government of Kosovo** (GK) retained the right and authority to ratify the Statute of the Association/Community with an individual decision, the latter being drafted by a managing commission. The CCK received the additional competence to review the constitutionality of the Draft Statute of the Association/Community. At first sight, the A2015 deviates substantially from the framework established by the A2013, creating new statutes, rights and obligations at the local level, which could have seriously damaged the basic principles of Kosovo's constitutional order. The A2015, however, is neither in effect nor part of the legal and constitutional order of Kosovo: as noted, the agreement was declared unconstitutional by **Judgment KO 130/2015** a few months after being concluded in Brussels.

As mentioned above, none of those agreements infringed upon the constitutional order of Kosovo. This happened later, in 2023, when Kosovo concluded two agreements that represented a radical break with the past as they laid the international legal foundation for significant legal and constitutional changes in Kosovo, providing for a change of the nature of the SK from a unitary, decentralized state into a specific form of **regional state**. The obligations to which Kosovo committed itself in **Ohrid** on March 18, 2023, are international obligations of a supra-constitutional nature, containing **fundamental political goals** that completely contradict those of the DI and the CK, i.e., Project 2008 (from now on referred to as the **AO23**). Its character is doubtlessly that of an international agreement regulated by international customary law.[84] This agreement has the legal status of an implementing act, i.e., effectuating the basic agreement concluded in Brussels on February 27, 2023 (referred to as the **AB23**).[85] Both documents showcase and approve some fundamental political goals that entirely contradict Project 2008. As such, they operate entirely outside the constitutional order of Kosovo's MC, stipulated in the DI and the CK 2008. The best proof of this is the **Draft Statute of the EU** (EUS), an implementing act which is still not in effect as it has not been endorsed by the CCK. The **EUS** was drafted by EU experts

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84 EEAS Press Team: *Belgrade-Pristina Dialogue: Implementation Annex to the Agreement on the Path to Normalization of Relations between Kosovo and Serbia.* (18 March 2023).

85 EEAS Press Team: *Belgrade-Pristina Dialogue: EU Proposal – Agreement on the path to normalization between Kosovo and Serbia.* (27 February 2023).

upon the request of the **GK** and contains provisions of a constitutional nature that are at odds with both the **DI** and the **CK**. The EUS equals an independent material constitution of Kosovo whose fundamental political goals and political unity contradict Project 2008. The EUS aims at implementing the agreements of 2023 with provisions that fundamentally alter the regulatory framework supporting Kosovo's **MC**, established in 2008. It should be noted that neither the A2013 nor the A2015 provided the content of the EUS: its structure and form were meant to be similar to the existing statute of Kosovo municipalities. The CCK **Judgment KO 130/2015** determines what provisions the future statute of the Association/Community of municipalities with Serb majority should not contain.

There was a tendency in Kosovar public discourse to relativize the AB23 and the AO23, presenting them as 'soft laws' without legal effect. This was a grave mistake, and the following section gives an extensive account of the legal nature of these two agreements concluded by the Kosovar head of executive. These agreements fall within the category of so-called **non-treaty agreements** (NTA). Their legal framework is now governed by the **Vienna Convention on the Law of Treaties** of 1960 (VCLT), based on a distinction between non-treaty agreements and **international treaties** (IT). This distinction was referred to in 1934 by famous German lawyer Karl **Strupp** (1886–1940). In both cases, international-treaty law applies. NTA were often associated with **soft law** during the 1970ies and 1980ies. Their role in international treaty law is extensively discussed in articles, books, treatises, and other scholarly work and is now addressed briefly in the following section, especially for those in Kosovo who deny the legitimacy of Kosovo's 2023 agreements. Their main argument is that the 2023 agreements are soft law containing only moral and political commitments as Serbia did not recognize Kosovo and the **Constitutional Court of Serbia** (CCS) rejected their constitutional review, arguing that Kosovo was part of Serbia and its sovereign jurisdiction. However, this line of argumentation is inaccurate and out of touch with international legal order: the commitment made by Kosovo in its dialog with Serbia since 2013 falls within the international legal category of **NTA**. K. **Strupp** describes this type of international obligation in detail, i.e., obligations that do not have the form of IT according to Article 38 of the Statute of the ICJ (then known as Permanent Court of International Justice). NTA are concluded by states and other players of international law such as international organizations, freedom fighters, resistance movements, rebels,

etc. NTA are frequently used, for instance because of the parties' desire to avoid formally complicated procedures such as registration with the UN Secretariat required by international treaty law, or to prevent any grudges that states harbour when negotiating IT; various other reasons have to do with prestige, constitutional obstacles, the balance of forces, a decrease of responsibility in case international law enshrined in NTA is breached, the need to increase the confidence among parties and incite positive developments among parties, and so on and so forth.

There is no doubt that both the AB23 and the AO23 and all agreements concluded in the dialog with Serbia since 2013 fall within the category of NTA. The 2023 agreements are also **agreements on novation** both in their content and legal nature. This makes them different from all previous NTA. In fact, more than five hundred NTA have been concluded between states or between states and various non-state actors. Their content and legal nature have been addressed by scholars such as Christine Bell.[86] A distinction should be made between NTA and legal acts under international law known as "gentlemen's agreements", which are concluded temporarily and on an *ad hoc* basis. All NTA of Kosovo contain very general provisions, leaving room for misunderstanding and malicious interpretation. But this changes nothing as an international agreement is regarded as a commitment, even if it contains vague and dubious provisions that are difficult to implement. Therefore, those who interpret them rely on certain established rules and principles of international treaty law. The first rule of interpretation is the identification of the parties' goals, which relies on the text of the agreement (textual interpretation as an instrument). Thus, when Article 5 of the NATO Treaty says that a party performs its actions "as it deems necessary", this does not mean that the member states are free to do whatever and in whatever way they want.

In all situations, the interpretation is based on the parties' will (*bona fide*). This standard never changes, because this will is subject to evaluation, tangible rather than abstract and thus accessible to those interpreting it. In the case of Kosovo's agreements, the official interpreters are EU officials. After a certain time, many agreements of this type (soft law) turn into strong legal

[86] See also: Bell, Christine: *On the Law of Peace: Peace Agreements and the Lex Pacificatoria.* (Oxford University Press: Oxford 2008).

commitments. This was the case after the unification of Germany, when it unilaterally committed itself to implementing the Human Dimension Standard of Copenhagen (1990) with regard to Poland, which had the nature of a soft law. On the other hand, state parties concluded agreements under the VCLT but failed to apply Article 102 of the UN Charter, requiring registration with the UN Secretariat. The same happened in the case of the **Helsinki Final Act** of 1975 or when the **Agreement between NATO and Russia** was concluded in 1997. In both cases, the impact was immense. There are a lot of similar examples, such as the **Atlantic Charter** (1941), the **Colonial Declaration** of the UN General Assembly (1960), the **Friendly Relations Declaration** of the UN General Assembly (1970), and the **Charter of Paris for a New Europe** (1990).

The abovementioned cases illustrate the differences between IT and NTA. However, the common denominator results from the fact that commitments made via NTA cannot be considered extra-legal: they cannot be unilaterally denied by the parties without consequences. NTA, too, are interpreted according to the rules and principles of the VCLT, which outline two main approaches to interpreting an agreement – a subjective and an objective one. The subjective one focuses on the parties' goals, while the objective one describes the circumstances of the agreement, created by the parties' actions and interaction and their traces, which can be judged and interpreted objectively. The subjective approach first and foremost relates to establishing the parties' will, based on the general standard that all obligations should be made in good faith (*bona fide*). The second approach pertains to the Roman principle of *venire contra factum proprium*, which does not allow a party to act against its own former behaviour, thus preventing any inconsistent behaviour of the parties. In Anglo-Saxon law, this is known as ***estoppel***, but we shall not further elaborate on this concept. Now, which of those two interpretations prevails? In practice, the subjective approach does: if the goal of the parties constitutes a key factor in expressing their free will, international law poses no obstacles to whatever form this may take. The aim is to remove any obstacles that might hamper the expression of a party's will to make international commitments. The international commitment of the state remains unaffected; eventual compensation for non-execution remains in place; sanctions and other procedures for enforcement are the same as in IT, including the right to retorsion (countermeasures).

Another important principle of interpretation, which reflects both principles above, is the principle of ***pacta sunt servanda*** (agreements are binding on the parties). Once the parties' will in relation to the text of an NTA is fixed, the interpretation focuses on finding out to what extent the parties' commitments overlap, with all the consequences according to the **VCLT**. In this case, the rule that an agreement is either valid under international law or does not exist at all applies as well. This distinction is made by the parties themselves, who mutually express their will in clear terms, determining whether there is agreement between them. The parties' goal is revealed afterwards by those who interpret the scope and nature of the will expressed by the parties, taking into account not only what the parties said but also the testimonies of witnesses to what the parties negotiated and agreed on. In the negotiating phase, the parties decide on the nature of their obligations. This flexible approach to determining the scope and nature of international obligations was confirmed by the ICJ in the **Gabčíkovo Nagymaros** case between Hungary and Slovakia (1997). Despite the fact that the legal basis of the dispute was an IT registered with the UN Secretariat, the court refused to apply the classical standards for withdrawal from a treaty and compensation for the damage caused to the other party: instead, it focused on the object and purpose of the treaty, with the aim to maintain existing obligations and prevent the parties' relationship from being damaged. This was not expected of the ICJ, but when it happened, it was welcomed by all: at present, this decision of the ICJ constitutes a solid standard reflecting the distinction between NTA and IT and emphasizing that commitments should be honoured and fully implemented, in accordance with their original purpose and objective.

In other words, the standards of the VCLT regarding the interpretation of the parties' will entirely apply to NTA. Sanctions, as one of the countermeasures authorized by international law, also apply to this type of commitment. Ironically, though, sanctions themselves initially emerged as an example of soft law during the **Congress of Vienna**, as explained by the famous Harold Nicolson (1886–1965). They affected Russian Tsar Aleksandr I Pavlovich (1777–1825), who insisted on the continuation of slave trade, an ugly habit Europe and the West wanted to abandon for good. The Tsar had a

huge reserve of slaves from the Ottoman Empire and other eastern territories, who immensely contributed to imperial revenues.[87]

This historical excursion was intended to show that commitments made by **NTA** are not of the same nature as political and moral obligations. They are obligations to be honoured and taken seriously just like any other international obligation. Used by the Organization for Security and Cooperation in Europe (OSCE) and the UN in the 1970ies and taking the form of resolutions, declarations, final acts, etc., they have greatly influenced the development of international law. If parties do not want to enter into an IT regulated by the provisions of the VCLT, this does not mean that the moral and political commitments made in NTA can be ignored and changed unilaterally. No limits exist as to the ways in which an agreement is reached: the only limits parties face is that they cannot conclude agreements and, at the same time, violate the norms of ***jus cogens***. The latter is a peremptory norm of general international law and recognized by the international community as a standard which does not allow for deviation and cannot just be modified by a subsequent norm of general international law of the same character. Such norms regulate genocide, war crimes and crimes against humanity and international law, slavery, apartheid, piracy, torture, etc. No agreement that violates such norms can be concluded. Of course, parties to NTA are free to make use of the provisions of the **VCLT**, strictly applying Article 2 (1)(a), which requires the written form as well as registration with the UN Secretariat. In this sense, states are free to decide that their **NTA** be treated as **IT** and validated using the respective constitutional procedures. Kosovo acted along these lines in the case of the A2013 except for registration with the UN Secretariat: the A2013 was ratified as an international agreement as it has the character of a treaty. The constitutions of European countries, including the CK, explicitly or implicitly distinguish between NTA and IT. If the **VCLT** is used, all that is required for the validity of an agreement is for it to conform to Article 2(1)(a). The US has a long-standing practice of concluding agreements that do not fall within the category of IT to bypass ratification by the Senate, which is a constitutional requirement. The focus here is on the freely, honestly expressed will of the parties bound by a treaty.

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87 Nicolson, Harold: *The Congress of Vienna. A Study in Allied Unity: 1812–1822.* (Constable and Company: London 1946), pp. 211–216.

Kosovo has always freely expressed its will to be bound by NTA through its representative, i.e., the head of the executive. In the following section, we will first discuss the A2013 as the basic agreement and then address the agreements concluded in 2023. Apart from being an NTA, the AB23 has substantially renewed all previous international obligations of Kosovo. Under international customary law, it has the status of an **agreement on renovation**, legally known as ***novatio***. The purpose of **novation agreements** in international treaty law is to increase the efficiency of some or all provisions of an existing treaty or to improve the content of a treaty as a whole. In novation agreements, existing obligations are replaced or recreated. Thus, novation agreements may replace old agreements entirely or only in some parts. Such new agreements are intended to replace some or all parts of an old agreement. **Novation** does not mean revision, in which case no new agreement is concluded.[88]

It is the **novation** undertaken by Kosovo in the AB23 that overturned the fundamental political goals and political unity as defined in **Project 2008**. In fact, the most important change relates to political unity, which is substantially redefined in the AB23: Kosovo renounces its sovereignty and independence by recognizing the right of Serbia to contest its statehood. Five members of the European Union do not recognize Kosovo's independence and sovereignty, either. This Serbian right is enshrined in paragraph four of the preamble of the AB23, stating that it was "proceeding from the historical facts and without prejudice to the different view of the Parties on fundamental questions, including on status questions." Kosovo has, therefore, committed itself to issues regarding Serbia that are of existential nature as they refer to Kosovo's sovereignty. Serbia possesses the right to deny, contest and potentially destroy Kosovo's statehood, which was declared on February 17, 2008. This provision, like all provisions of the AB23 and the AO23, may only be interpreted by the EU, not by the parties to the agreement. According to the preamble, the provision has already been interpreted in the **EUS**, which will be discussed in great details at the end of this section. EUS quotes **Resolution 1244** and ignores **Judgment KO 130/2015**. The latter eloquently defines the framework of the MC of Kosovo, within which statutes

[88] Cf.: Ilyinskaya, Olga I.: "Novation of Treaties". In: *Kutafin Law Review*, 2017 Vol. 4 No. 1 (2017), pp.157–166.

are to be drafted in the future. Various commentators contend that paragraph three of the preamble of the AB23, regulating the inviolability of the border and the respect for territorial sovereignty and integrity – a standard formulation of the UN Charter – strengthens Kosovo's position and renders paragraph four invalid. This is incorrect as Serbia has the right to deny, contest and ignore the statehood of Kosovo, which invalidates all other stipulations on sovereignty and integrity. Rather than referring to an ***inter partes*** commitment, the wording of the third paragraph reflects an ***erga omnes*** commitment, which both parties made to the world by affirming principles of territorial integrity and sovereignty in general.

EU officials have justified the nature of the provisions of the AB23, saying that they were modelled on the **Basic Treaty** (BT) concluded on December 21, 1972, between East- and West-Germany. As we shall demonstrate below, the AB23 does not relate to the BT in any way. Any similarity between them is spurious and fictitious. In the BT, the parties refer to each other using their constitutional names, without questioning that they are both sovereign and independent states: they mutually recognize their territorial sovereignty and integrity, not ***erga omnes*** but ***inter partes***. Similarly, Article 4 of the BT states, "The Federal Republic of Germany and the German Democratic Republic proceed on the assumption that neither of the two States can represent the other in the international sphere or act on its behalf." This is different from the wording of Article 4 of the AB23, which reads, "The Parties proceed on the assumption that neither of the two can represent the other in the international sphere or act on its behalf." Dissimilarities also exist concerning *de facto* recognition: in the case of the two Germanies, *de facto* recognition was understood to refer to the equal treatment of the parties, a position confirmed by a decision of the **Constitutional Court of Germany (CCGe)**. The essence of this decision was that the **Federal Republic of Germany** (FRG) enjoyed the right to represent the whole German Nation (in ethnic or national terms) but without denying the **German Democratic Republic** (GDR) sovereignty and independence under international law. For the sake of exactness, we will quote part of the decision, which reflects the legally sophisticated approach of the CCGe:[89]

[89] BVerfGE 36, 1 2 BvF 1/73 *Grundlagenvertrag-decision East-West Basic Treaty*. 31 July 1973. Reproduced with permission in: *Foreign Law Translations*. University of Texas at Austin,

> […] The GDR is a state in the sense of international law and, as such, a subject of international law. This statement is independent of any recognition of the GDR under international law by the FRG. Such recognition has not only never been formally pronounced, but on the contrary, has repeatedly been expressly refused by the FRG. If one evaluates the conduct of the FRG in the course of its policy of detente toward the GDR, and in particular the conclusion of the Treaty, as factual recognition, then it can be understood only as a factual recognition of special kind. What is special in this Treaty is that it is a bilateral treaty between two states to which the rules of international law apply and which has the force and validity like any other treaty under international law, but between two states that are parts of a comprehensive state of all Germany which still exists, even though it is incapable of acting because it is not yet reorganized, with a unitary population, within borders which it is not necessary here to define more precisely […].[90]

In fact, the FRG did not contest the statehood of the GDR under international law. The opposite is true as well. While the FRG explicitly granted the GDR ***de facto*** recognition, it denied it ***de jure*** recognition. This position is reflected in other provisions of the BT, such as those of Article 6, regulating the recognition of each country's sovereign jurisdiction within its territory as well as its independence and internal and external autonomy. On September 18, 1973, both countries joined the UN, and the GDR was recognized by the US and other Western countries. The only reservation concerned eastern Berlin, which was not recognized as the capital of the GDR.[91] Since both countries were not considered foreign in their reciprocal interactions but two states of a single German nation – one of which (the FRG) was the successor of the **German *Reich*** – their diplomatic relations were not considered accordingly in terms of the **Vienna Convention on Diplomatic Relations** (VCDR) of 1961. Their relations were, therefore, not at embassy level.[92] Similarly, the Head of the Permanent Mission of the GDR communicated

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School of Law. Online: https://law.utexas. edu/transnational/foreign-law-translations/german/case.php?id=589#to (retrieved March 2024). Cf.: Simma, Bruno: "Legal Aspects of East-West German Relations". In: *Maryland Journal of International Law,* Vol. 9 No. 1 (1985), pp. 97–115, at pp.105–110.

90 Cf.: Kommers, Donald P. and Miller, Russell A.: *The Constitutional Jurisprudence of the Federal Republic of Germany.* Third Edition. (Duke University Press: Durham and London 2012), pp. 304–312.

91 Simma, Bruno: "Legal Aspects of East-West German Relations", pp. 110–113.

92 Ress, George: "Germany. Legal Status After World War II". In: Bernhardt, Rudolf (DIR.): *Encyclopedia of Public International Law*, Vol. 10 (North Holland, Amsterdam, New York, Oxford, Tokyo 1987), p. 198.

through the Office of the Prime Minister of the FRG as the latter was recognized as the sole legitimate representative of the whole nation, while the head of the executive was not. This position was reserved for the head of state, except in the cases where the head of the executive acted as the head of state. However, these different roles did not diminish the scope and quality of the privileges and immunities of the diplomats of both states, which were entirely regulated by analogy under the VCDR.[93] At first sight, the provisions of Article 8.1 of the AB23 and the BT are similar. The former stipulates that, "The Parties shall exchange Permanent Missions. They shall be established at the respective Government's seat", while the latter states that, "The Federal Republic of Germany and the German Democratic Republic shall exchange Permanent Missions. They shall be established at the respective Government's seat." In the case of the AB23, the VCDR clearly does not apply. This means that privileges and immunities are functional and within the scope of the guarantees offered by the EU, under whose auspices the current **liaison office of Kosovo** in Belgrade is operating. This is why the second paragraph of Article 8 does not refer to bilateral agreements, which are the very basis for the establishment of bilateral diplomatic relations between sovereign and independent states. Instead, it stipulates that, "Practical questions relating to the establishment of the Missions shall be dealt with separately." Identical wording is found in Article 8.2 of the BT. In the case of the two Germanies, a bilateral treaty regulated the scope and quality of privileges and immunities, based on interpretation by analogy under the **VCDR**. This is not possible in the case of Kosovo, since the BT will serve as an institutional umbrella for Kosovo's mission in Belgrade, as it is doing presently, resulting from Serbia's neither ***de facto*** nor ***de jure*** recognition of Kosovo, which leads to a situation entirely different from the German one.

Both ***de facto*** and ***de jure*** recognitions have the same aim – the recognition of statehood of the entity claiming it. The recognition does not concern national symbols, passports, various public documents, licenses, national anthems, etc. Only statehood can be recognized. Both ***de facto*** and ***de jure*** recognitions are accorded expressly and in writing. The only difference between the two is that ***de jure*** recognitions are complete and irrevocable and comprise all relations between sovereign and independent states. ***De facto***

[93] Simma, Bruno: "Legal Aspects of East-West German Relations", p. 114.

recognitions, on the other hand, are provisional and temporary, can be withdrawn any time, and do not comprise all relations between sovereign and independent states. Therefore, all those who believe that the third paragraph of the preamble of the AB23 refers to a *de facto* recognition of Kosovo and its statehood are wrong. The only thing granted in this paragraph is Serbia's right to deny Kosovo statehood. This is further reflected in Article 2 of the AB23, which only appears to be similar to Article 2 of the BT. As mentioned above, the FRG enjoyed the right to act as the sole and only representative of the whole German nation and the only successor to the **German *Reich*** (1871 to 1945). The GDR refused to be the successor of the German *Reich* and the representative of the whole German nation, both internally and internationally. Both countries were considered to be entities operating under the same roof, known as the **German *Reich*** with its borders of 1937, which has never ceased to exist after the occupation in 1945. Since the GDR renounced the two rights mentioned, the FRG continued to be recognized as the **successor state to the German *Reich***.[94] This explains why after the German reunification on October 3, 1990, there was no need to apply international rules regarding the succession of states. Reunification meant that the GDR was absorbed by the FRG, the latter becoming the sole representative of the whole German nation and the only successor to the German *Reich*.[95] In the case of Kosovo, the abovementioned provision of Article 8 has an entirely different meaning: its first part has the same meaning as the third paragraph of the preamble, while the subsequent sentence has a very concrete constitutional meaning and refers to the constitutional order of Serbia, not Kosovo. The categories **autonomy** and **self-determination** mentioned there are only meaningful in relation to the constitutional order of Serbia and pertain to the autonomy and self-determination of Kosovo and Vojvodina, which are treated as Serb provinces. In the currently effective

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94 Cf.: George Ress, "Germany. Legal Status After World War II". In Rudolf Bernhardt (DIR.), *Encyclopedia of Public International Law*. Vol. 10: States. Responsibility of States. International Law and Municipal Law. (Max Plank Institute for Comparative Public Law and International Law: North Holland, Amsterdam, New York, Oxford, Tokyo 1987), pp. 191–206.

95 Cf.: "Taking Reichs Seriously: German Unification and the Law of State Succession". *Harvard Law Review* Vol. 104, No. 2 (December 1990), pp. 588–606; Oeter, Stefan: "German Unification and State Succession". In: *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* [ZAÖRV], Vol. 51 (1991), pp. 349–383; also cf.: Quint, Peter E.: "The Constitutional Law of German Unification". In: *Maryland Law Review,* Vol. 50, No. 3 (1991), pp. 475–631.

Constitution of Serbia (CS) of 2006, Kosovo is pejoratively labelled as "Kosovo and Metohija", which corresponds to a form of internal self-determination. In the German case, however, autonomy refers to the independence and sovereignty of both states under international law. The same pseudo-similarity exists between Article 6 of the AB23 and Article 7 of the BT: the comprehensive cooperation provided for in Article 7 of the BT refers to sovereign and independent states. This is also reflected in the wording of article 9 of the BT:

> The Federal Republic of Germany and the German Democratic Republic agree that the present Treaty shall not affect the bilateral and multilateral international treaties and agreements already concluded by them or relating to them.

It is against the backdrop of these pseudo-similarities that the 2023 renovation of the previous international commitments of Kosovo should be evaluated. The renovation has degraded Kosovo's international legal status vis-à-vis Serbia and the international community, as the fundamental political goals and the political unity of Project 2008 have been turned upside down. If one compares the radically changing **political unity** to the one defined in the DI and further elaborated on in the CK, the guarantees given to the local Serbs, who are now in a specific legal position with regard to all other communities of Kosovo, are now of utmost importance. Their special, legally protected status includes their churches, monasteries and entire cultural heritage. The 2023 renovation agreement laid the foundations for a new autonomous territory within Kosovo: Article 7.1 of the AB23 refers to it as an "appropriate level of **self-management** for the Serbian community in Kosovo." For the sake of clarity, it is important for our readers to see the whole text referring to this autonomous structure, disfiguring the political unity and destroying the fundamental political goals of the people of Kosovo as expressed in Project 2008. Article 7.1 in its entirety states that:

> Both Parties commit to establish [sic!] specific arrangements and guarantees, in accordance with relevant Council of Europe instruments and by drawing on existing European experiences, to ensure an appropriate level of **self-management** for the Serbian community in Kosovo and ability for **service provision** in specific areas, including the possibility for financial support by Serbia and **a direct communication channel** for the Serbian community to the Government of Kosovo.

This Article includes one additional provision, sanctioning the very special legal status of the religious, cultural and historical heritage of the local Serbs and discriminating against all other communities of Kosovo. This paragraph

first and foremost refers to the SOCH: "The Parties **shall formalize the status of the Serbian Orthodox Church in Kosovo** and afford a **strong level of protection** to the Serbian religious and cultural heritage sites, in line with existing European models."

It can be inferred that there are two areas of special protection: the SOCH on the one hand, and Serb religious, cultural and historical sites in Kosovo on the other. These guarantees are meant to be implemented under the legal-political umbrella of the EU and its institutions, i.e., within its political and constitutional regime. This is made very clear in the implementation act of the AB23, i.e., in the provisions of paragraphs five and six of the **AO23**. Paragraph five states that,

> To implement Article 7, Kosovo launches immediately negotiations within the EU-facilitated Dialogue on establishing specific arrangements and guarantees to ensure an appropriate level of self-management for the Serbian community in Kosovo, in compliance with relevant previous Dialogue agreements as determined by the EU Facilitator.

This stipulation makes it abundantly clear that it is the EU Facilitator who will decide about the content and nature of the previous agreements. In fact, this paragraph operationalizes the provisions of Article 7.1 of the AB23, concluding that previous agreements between the parties, particularly the A2013, are of primary importance regarding the self-management of the Serb community in Kosovo. **Judgment KO 130/2015** is totally ignored. Paragraph six refers to the development of mechanisms for implementing the renovation agreements of 2023: "The Parties agree to set up **a Joint Monitoring Committee**, chaired by the EU, within 30 days. The implementation of all provisions shall be ensured and supervised by the Joint Monitoring Committee."

On the basis of the commitments undertaken by the parties in 2023, Kosovo's European path was from then on determined by the level of fulfilment of the obligations they took on voluntarily in the AB23 and the AO23. The same applies to Serbia, but in a different manner, as it has an advanced status regarding its EU integration path. This is reflected in the last paragraph of the AO23:

> Kosovo and Serbia recognize that any failure to honor their obligations from the Agreement, this Annex or the past Dialogue Agreements may have direct negative consequences for their respective EU accession processes and the financial aid they receive from the EU.

As for the nature of the parties' commitments, Serbia has really made only one commitment, i.e., the commitment not to act, contrary to Kosovo, which has committed itself to actively honouring certain obligations. This different treatment of Serbia, reflecting its privileged legal status, is sanctioned in Article 4 of the AB23: "The Parties proceed on the assumption that neither of the two can represent the other in the international sphere or act on its behalf. Serbia will not object to Kosovo's membership in any international organization." A possible active duty of Serbia could be inferred from the fourth paragraph of the **AO23**, which states that, "The Parties agree to endorse the Declaration on Missing Persons, as negotiated under the EU-facilitated Dialogue, as a matter of urgency." This declaration placed a heavy burden on Kosovo, which Prime Minister **Albin Kurti** did not seem to be aware of. The burden consisted in Kosovo's obligation to disclose places where missing persons might be found. In fact, Kosovo was not a state when it fought for its liberation from Serbia (1998–1999). The wording of this provision puts Kosovo on an equal footing with Serbia: it obliges both to disclose places where missing persons might be found. This equation of the parties' status is absurd and unjust! The last paragraph of AO23, however, clarifies that the **EU** and its organs, institutions and mechanisms are the **new regulatory forces of the MC of Kosovo**, and not the political forces of Kosovo according to Project 2008. It is the **EU** that dictates the content of the new legal and constitutional status of the local Serbs, of the **SOCH**, and of Serb cultural, historical and religious heritage.

The AB23 and the AO23 are not the last agreements aiming at normalizing the relations between Serbia and Kosovo. They represent neither a *de facto* nor a *de jure* recognition of Kosovo. This becomes obvious from the wording of the provisions of Article 6.1 of the AB23:

> While the present Agreement constitutes an important step of normalization, both Parties will continue with new impetus the EU-led Dialogue process, which should lead to a legally binding agreement on comprehensive normalization of their relations.

These provisions do not contain anything resembling a future recognition of Kosovo by Serbia, neither *de facto* nor *de jure*. They merely refer to the normalization of relations between the two parties. This normalization could be achieved in various ways that do not involve the recognition of Kosovo's statehood. What forms of cooperation the parties will pursue to normalize

their relationship remains to be seen. It might be the current form of cooperation, based on the political unity of each country. It might as well be a cooperation within the framework of Euro-Atlantic structures. We have discussed the aspects of cooperation to demonstrate the difference between the AB23/AO23 and the BT. In the case of the BT, the two German states did not question each other's statehood: this treaty differentiated between the issue of statehood under international law on the one hand and the cultural dimension of the entire German nation and its representative on the other. In the case of Kosovo, Serbia's fundamental aim is to deny Kosovo statehood and independence as well as to question the representatives of Kosovo and its population in international relations. Since the BT allegedly served as a legal basis for the AB23 and the AO23, the crucial question would be, who is the **FRG's** equivalent – Serbia or Kosovo? Based on our analysis so far, it seems obvious that those drafting the 2023 agreements considered Serbia to be the equivalent of the FRG: these provisions protect the sovereignty and territorial integrity of Serbia, assigning Kosovo the inferior position of a parastatal entity which seceded from a sovereign and independent state, the Republic of Serbia. This position should be kept in mind by Kosovo's representatives whenever they speak and negotiate on behalf of Kosovo in the years to come. It is very difficult to invalidate the AB23 and the AO23 due to existing nonsensical views in public discourse that they are political and moral obligations of Kosovo.

Another important issue is the legal status of the A2013 and the A2015. There is no doubt that – regarding the **novation** that took place in 2023 – the latter should be evaluated in the light of Article 10.2 of the AB23, which states, "Both Parties confirm their obligation to implement all past Dialogue agreements, which remain valid and binding."

However, just like **Judgment KO 130/2015**, the A2015 was invalidated and never managed to become part of the legal and constitutional order of Kosovo. In its operational part, this judgment reaffirmed Kosovo's obligation to establish an **A/C**. At the same time, it determined the tasks of this new organ via negative enumeration, i.e., by stating what it should *not* be. According to the judgment, an **A/C** could not be another public authority in addition to those constitutionally mandated, neither vertically as a third layer, nor

horizontally in relation to the Central Authorities. This stipulation was entirely annulled by the **AB23**, which transformed the **Association of Municipalities with Serb Majority**, originally designed by the **A2013**, into the **Community of Serb Municipalities** (CSM). This is because the Serb municipalities have fixed territorial boundaries, creating a politically and territorially autonomous unit. For this reason, the Serbs insisted from the beginning that the entity to be formed should be called "community" ("*zajednica*") and not "association" ("*asociacija*").[96] As mentioned above, the A2023 provided for the form and structure of the new entity to be the same as that of the existing association of Kosovo municipalities. Apart from the substantial change in name of the institutional framework within which the new entity was to implement the local Serbs' self-management, the second sentence of Article 7.2 of the AB23 confers a special role on the Republic of Serbia. In addition to offering services, the **CSM** was to receive direct financial support from Serbia. The same provision states that the **CSM** is to create a direct communication channel between the Serb community and GK. That was the first time a communication channel between the CSM and the local Serb population had been established, although the latter were supposed to be citizens of the sovereign and independent state of Kosovo, whose constitutional government was supposed to represent the whole territory and population. This also meant that the Serb community of Kosovo could not appear before the Central Authorities of Kosovo in any form other than through the CSM.

For a better understanding of the nature of Serb Autonomy in Kosovo governed by the AB23 and the AO23, the basic categories of autonomy in comparative constitutional law need to be clarified. The part discussing governance equates **self-management** with non-territorial autonomy, which is defined as a community's right to manage its own affairs while simultaneously assuming an advisory role on behalf of the community protected through this type of autonomy. The institutions implementing **non-territorial autonomy** are mainly found at the local level and in places where minority

[96] This was confirmed by the EU mediator of the time, who said that the Serbs had always insisted on naming the new entity **Community of Serb municipalities**, while the Albanian side had insisted on **Association of municipalities with Serb majority population**. Cf.: Ashton, Catherine: *And Then What? Inside Stories of 21st-Century Diplomacy.* (Elliott & Thompson: London 2023), pp. 109–145.

communities live. These places are very often labelled 'fatherland', although the communities themselves have no defined territories. They are defined with regard to the people who use the institutions of autonomy to advance their interests. Such institutions are usually part of one single **umbrella organization**, which operates based on **non-territorial autonomy**. They are set up to protect ethnic-cultural minority groups dispersed over the whole country. Since the members of such communities do not live together within a confined territory, they obviously cannot create territorial rights. Regardless of this fact, such groups may have a close connection with certain geographical territories within the state, which, in most cases, they do. Minority groups can easily be defined as groups of a certain ethnic-cultural, ancient, religious, linguistic, or cultural identity. At the same time, **non-territorial autonomy** may involve special political rights such as participation in decision-making on issues concerning the minority group's identity like culture and education. For this reason, such autonomies are sometimes called cultural autonomies. This means that **non-territorial autonomy** is based on the rights arising from a **special personal autonomy**, offered to members of specific national, ethnic, religious, linguistic and indigenous groups. Numbers do not play any role here, as minorities neither strive for dominant positions nor want to become majorities. In fact, they are both minorities and numerically non-dominant.[97]

These purely theoretical observations on non-territorial autonomy are very general and theoretical. In practice, however, the situation is different and more complicated. Within this type of autonomy, **three standard forms of autonomy** have emerged:

- traditional non-territorial autonomy,
- administrative non-territorial autonomy,
- functional non-territorial autonomy.[98]

The **traditional form of non-territorial autonomy** is very similar to that of territorial autonomy. It is usually based on an agreement of constitutional status and other primary legal instruments governing all relevant spheres of

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97 Cf.: Malloy, Tove H.: "Territorial or non-territorial autonomy: The tools for governing diversity". In: Fong, Brian C. H. and Ichijo, Atsuko: *The Routledge Handbook of Comparative Territorial Autonomies*. (Routledge: New York, NY 2022), pp. 48–66, at pp. 49, 55–56.

98 Ibid., pp. 58–60.

autonomy. Like territorial autonomy, the creation of traditional non-territorial autonomy requires a well-defined and comprehensive legal and institutional framework as well as a form of power-sharing, including the distribution of competences between non-territorial self-government units (national, ethnic, linguistic, religious, and indigenous groups) and a central government. This autonomy is created in a process leading to an agreement that outlines the competences and powers of self-government units.

The category of **administrative non-territorial autonomy** differs from the abovementioned in that it is not based on one act only but may include several dimensions of cultural autonomy, provided for in the constitution or other general administrative acts. These may be acts relating to language or education. This autonomy pertains to rights that protect and implement the paradigms of non-territorial autonomy, are dispersed over the whole legal framework of a state, and usually take the form of legal provisions regulating certain sectors of public administration. In this case, general legal acts and specific legal provisions together form a parcel of rights and powers held by individual beneficiaries of non-territorial autonomy.

The last category, **functional non-territorial autonomy**, mainly rests upon actors and institutions governed by private law who exercise their rights on behalf and in the name of a certain community. This kind of autonomy is based on guarantees of a constitutional nature and pertains to arrangements in which opportunity and pragmatism enable the local management of relevant functions. Contrary to the abovementioned autonomies, this one is not implemented by specific general or individual legal acts. The regulations implementing functional non-territorial autonomy take the form of public-law provisions (subsections or additional clauses) that regulate the relevant sectors of public administration and are usually scattered over the whole legal framework of a nation. At the same time, this autonomy is based on a series of rights. If the organizations implementing this autonomy are incorporated under private law, the legal provisions governing these institutions indirectly provide public administration services to its beneficiaries. In this case, competences are not granted explicitly but distributed implicitly between the central authority and the units of **functional non-territorial autonomy**.

This excursion on autonomies and their comparison with the provisions of **self-management** in the AB23 and the AO23 proves that the idea and purpose of self-management is not confined to non-territorial autonomy. The latter is rather a combination of traditional **non-territorial autonomy** and **classical territorial autonomy**. This combination resembles the one prevailing in the five autonomous regions of Italy (Aosta Valley, Friuli-Venezia Giulia, Sardinia, Sicily and Trentino Alto Adige/South Tyrol). These autonomies in essence equal self-management in the Kosovar context. In negotiations, EU facilitators and Western diplomats have always stressed the similarities between Italian autonomies and the one provided for Kosovo in 2023. In practice, Serb municipalities have clearly determined boundaries that cannot be changed without their consent. Their membership with the CSM **defines the extent** of classical territorial autonomy, similar to the one in the Italian constitutional system.

This combination of territorial and non-territorial elements of self-management is characteristic of the autonomy of a specific region within Kosovo, the **Serb Region**, which is anchored in the North of Kosovo, but whose beneficiaries are all Kosovo Serbs, i.e., members of the **CSM**. The SOCH, and any religious, historical and cultural Serbian heritage fall under the autonomy of this **Serb Region** as they are of specific and asymmetric nature.

The AB23 and the AO23 prepared the ground for a **new MC of Kosovo**, which is in total competition with the CK, the constitution of a sovereign and independent state. This will directly impact the constitutional nature and form of the SK: based on this new MC, Kosovo will be transformed into a unitary state with **advanced decentralization**, i.e., territorial autonomy as regards the SOCH and non-territorial autonomy with a right to self-management as regards the Serb community of Kosovo. Both autonomies are in competition with the Central Authorities of Kosovo, residing in Pristina. The essence of decentralization in Kosovo is a form of asymmetric regionalism: the local Serbs enjoy a very high degree of territorial and non-territorial autonomy, while the rights of other communities continue to be based on the parameters of non-territorial autonomy stipulated in **Chapter Three** of the CK. The reason why Kosovo, after the 2023 agreements, could not be called a regional state in the proper sense of the term – just like **Italy** and **Spain** –

is that the relationship between Serb Autonomy (particularly the one referring to the SOCH, but also the one referring to the self-management of the local Serbs, their culture, history and religious heritage) and the central government in Pristina is an **asymmetric relationship**. Usually, the relationship between the regions and the central government in regional states is **symmetric**. Based on the 2023 agreements, Kosovo does not qualify as a federal state either, since the relationship between the Central Authorities and the authorities of the local Serbs, both in civic and spiritual terms, is not intended to be hierarchical: the institutions provided for in the AB23 and the AO23 are not subordinate to the institutions established by the CK. If Kosovo is neither a regional state, like Italy or Spain, nor a federal state, what are the MC of Kosovo and its constitutional order going to be like after 2023? Could it remain a unitary state as provided for in Project 2008? Of course not, since the central institutions and organs of the SK will not control the constitutionality and legality of the institutions provided for in the AB23 and the AO23. The latter are intended to operate in competition with the Central Authorities and will not be subordinate to the institutions established by the CK. They are fully supported by the normative and political structures of the Republic of Serbia with regard to all spheres of life, apart from hard security and military affairs.

As a third mechanism, an Arbitration Commission is to be established, based on the provisions of the **EUS**. It is meant to serve as an institution in charge of controlling the constitutionality and legality of the actions and omissions of the CSM. Kosovo's normative structures will only serve as a temporary legal and constitutional basis until the transfer of the institutional memory from after June 10, 1999, to the organs and institutions of **Serb Autonomy** has been completed. Institutional memory refers first and foremost to personal documentation regarding the local Serbs, such as civil registers and other administrative records. Once they have been set up, the institutions and organs of Serb Autonomy will form a state within a state and act in competition with central authorities in every branch of power. The organs and institutions of the CSM provided for in the **EUS** are specified as to their physiognomy and competences in relation to the Central Authorities. Although the **EUS** quotes the CK and the laws of Kosovo, it also confers special status on the extra-legal and extra-constitutional acts approved by EUS organs concerning the constitutional and legal order of Kosovo. To prevent any interference of the Central Authorities in the process of implementing

Serb Autonomy, Article 45 of the EUS establishes an arbitration mechanism that is intended to solve any disagreement between the Central Authorities and the organs and institutions of **Serb Autonomy**. The EUS faithfully operationalizes the provisions of the AB23 and the AO23, which confer on the **institutional umbrella** (CSM) the status of a steering body of **Serb Autonomy**. This body is expected to operate in the field of Kosovo public law with clearly defined powers, totally independent of the SK and closely linked to Serbia.

As a result of everything mentioned so far, the model of the SK established by Project 2008 will suffer radical changes once the 2023 agreements have been implemented. The scope of these changes remains to be seen. From a present perspective, it seems fair to predict that the AB23 and the AO23 will doubtlessly create a Serb Autonomy along two dimensions: first, along a **territorial dimension** concerning the SOCH, involving the right of Serb municipalities to connect within the umbrella institution CSM; secondly, along a **non-territorial** dimension regarding civil aspects of Serb community life in Kosovo, including their cultural, historical and other heritage. The role of the judiciary in the north of Kosovo and in other parts of the CSM also remains to be seen. The A2013 provides for a **particular Appeals Chamber for the north of Kosovo** to operate within the Court of Appeals of Kosovo. At present, there is one single judiciary for the whole SK. This special **Appeals Chamber** has set a standard according to which the local Serbs should be tried, and their cases are decided by panels (judicial bodies) with Serb majority.[99] This is a clear sign of **asymmetric regionalization** in the sphere of the judiciary, in place since 2013 and thus also part of the MC of Kosovo. According to the AB23 and the AO23, it seems very likely that this Chamber will **be transformed into a body that operates at all judicial levels and exclusively deals with matters of the CSM.**

[99] For the history of this fragmentation of the Kosovar judiciary along ethnic and national lines since 2013, favoring the local Serbs, see also: Ashton, Catherine: *And Then What? Inside Stories of 21st-Century Diplomacy*, pp. 109–145. For the special appeals chamber for Kosovo Serbs, see also the extraordinary and eloquent paper of: Haxhaj, Rafet, "Integrimi i institucioneve paralele gjyqësore të veriut të Kosovës, realitet kushtetues apo integrim mbikushtetues". ["Integration of Parallel Judicial Institutions of the North of Kosovo"]. In: *Acta Scientiarum*, Vol. 8 (2015), pp. 680–683.

Based on our analysis so far, but also on the memories of **Baroness Catherine Ashton**, who was key EU facilitator in 2013, it seems like the initial idea of a dialog between Kosovo and Serbia did not envisage the creation of an autonomous Serb structure but rather the creation of a coordinating body for municipalities with Serb majority, similar to the one created for existing Kosovar municipalities.[100] This changed with the AB23 and the AO23, according to which **Serb Autonomy** is not to be confined to non-territorial autonomy but constitutes a combination of traditional non-territorial autonomy and classical territorial autonomy. This will be achieved by implementing **self-management** and by **formalizing the status of the SOCH** within the territory of Kosovo. For security reasons, the seat of the CSM is to be established in the north of Kosovo. According to the AB23 and the AO23, the umbrella institution implementing **Serb Autonomy** will not, as initially planned in 2013, be "an association of Serb majority municipalities" but a state-like entity. At the time these lines are being written (March 9, 2024), the scope of Serb Autonomy is very clear, according to the provisions of the EUS.

Those who are well acquainted with the history of Serbia and its Kosovo myth will also be aware that this is not the final goal of Serbian policy regarding Kosovo. For Serbia, the 2023 agreements do not have final character. They are a means to an end – the restoration of Serb sovereignty over Kosovar territory. From this perspective, the asymmetric decentralization provided for in the 2023 agreements represents a success for Serbia and a further step to realizing its final goal. This type of decentralization and Serb Autonomy continues to push the SK into making more and more concessions to the local Serbs. It seriously undermines **social cohesion** within the SK and discriminates against non-Serb communities for two reasons: first, the territorial dimension of the **SOCH's** autonomy, which is expected to enjoy full extraterritoriality and represents a comprehensive form of religious autonomy. Second, the non-territorial component of Serb Autonomy, which consists in the right to full self-management of all affairs of the local Serbian community, represents a *sui generis* **system of capitulations**, which existed in the **Ottoman Empire** (from the 15th century) and the **Chinese and Japanese empires** (from the 19th century), and which ended after the First

[100] See: Ashton, Catherine: *And Then What? Inside Stories of 21st-Century Diplomacy*, pp. 109–145.

World War.[101] Serb Autonomy, as the most advanced form of **asymmetric decentralization** in the Balkans, is just another step towards Serbia's sovereignty over Kosovo. Its final aim is to bring the Serbian military back to Kosovo, based on its weird and obscure interpretation of **Resolution 1244**. A sub-goal is to prevent the formation of a uniform Kosovar military for the whole territory of Kosovo. Serbian nationalists nourish hopes that one day the status of Kosovo before the ICJ and other important international forums will be reversed. These destructive goals are reflected in every provision of the EUS, based on Resolution 1244 as its ***grundnorm***, and employ a hybrid Arbitration Commission as a mechanism for the resolution of dispute.

The CCK, on the other hand, remains paralyzed. Based on the CK, the CCK's jurisdiction encompasses conflicts of competence between the organs and institutions of Kosovo, both at the central and the local levels, which is common to constitutional courts in various European countries. The **EUS**, however, transfers this jurisdiction to an Arbitration Commission.

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[101] For capitulation systems, see also: Thayer, Lucius Ellsworth: "The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States". In: *The American Journal of International Law,* Vol. 17 No. 2 (April 1923), pp. 207–233. (Starting with the Roman Empire, the author describes the origins of capitulation as a *modus vivendi* for different cultures, races and religions, not based on territory but on citizenship, i.e. on the personal qualities of certain groups; the article deals with the legal consequences of capitulation within the Ottoman territories, mainly with regard to Christians and their rights and liberties); Ahmad, Feroz: "Ottoman Perceptions of the Capitulations: 1800–1914". In: *Journal of Islamic Studies,* Vol. 11 No. 1 (January 2000), pp. 1–20. (The author shows that the Ottomans regarded capitulation as an extraordinary privilege granted to third parties; it could be revoked at any time and without difficulty. In practice, however, this was not always the case, as it persisted for four hundred years until being abolished upon the formation of the Republic of Turkey on October 29, 1923); Fidler, David P.: "A Kinder, Gentler System or Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization". In: *Texas International Law Journal,* Vol. 35 No. 3 (July 2000), pp. 387–414. (The author discusses capitulation as a privilege, through which Christians in Europe and the US were excluded from administrative, civil, criminal and other jurisdiction by the Ottomans; they were subject only to the laws of their countries of origin; according to the author, capitulations were a standard in Western hegemonies, compared to the cultures and peoples of Eastern countries; they were imposed together with the Western way of life and socio-political development); Bell, Christina: "Capitulations". In: *Max Planck Encyclopedia of Public International Law,* (July 2009). https://opil.oupLaw.com/display/10.1093/Law:epil/9780199231690/Law-9780199 231690-e260 (retrieved April 2023).

In other words, this body represents another institution of the MC of Kosovo, established by the EUS to honour the commitments of the AB23 and the AO23. The **EUS**, as a **by-law**, excludes the CSM from the legal and constitutional order of the SK. This is at odds with the fundamental political goals of the DI and the CK and perverts the political unity defined in **Project 2008** on February 17, 2008. Once the EUS, based on the commitments of the AB23 and the AO23, has been formally adopted, the jurisdiction of the Central Authorities regarding the constitutionality and legality of the acts and omissions within Serb Autonomy will become ineffective.

The AB23 and the AO23 reveal new regulatory forces as part of the MC of Kosovo, with the EU as a new social force instead of Kosovo's political representatives. The new arbitration body does not belong to Kosovo. It is an EU instrument, a new social force, used for advancing entirely different political goals and a political unity entirely different from that in Project 2008. Now, the local Serbs and their municipalities are a dominant force, while others are the dominated ones. This new Autonomous Serb Region has its own normative structures, operating independently of those installed by Project 2008 and outside the legal and constitutional order of Kosovo. It is another example of the **constituent power** of the local Serbs. However, rather than confining itself to exercising fundamental rights and liberties, this autonomy aims at forcefully advancing Serbia's formal sovereignty over Kosovo by defunctionalizing Kosovo's statehood and forcing it to form new state connections with Serbia within the framework of **Euro-Atlantic integration** (a goal formally shared by Kosovo and Serbia). In this way, the local Serbs can effectively implement their goal to gain autonomy, while retaining their constitutional privileges under Chapter 3 of the CK, including the right to block issues of vital interest to the SK as well as amendments of the CK. It is important for the reader to understand how all this is reflected in EUS provisions. In the following section, we examine each single provision to understand how it implements and operationalizes the AB23 and the AO23 by outlining the basic characteristics of the new **MC of Kosovo**, which replaces the one established in Project 2008.

2.3. The EU Statute Implementing the Agreements of 2023

The following analysis of the provisions of the EUS regarding political-territorial autonomy of the local Serbs in Kosovo and the CSM as its institutional umbrella is based on the methodologies of positive law, comparative law, and the constitutional history of autonomies in Europe. Our points of departure are not only the BT, the AB23 and the AO23 but also international acts and national constitutions regulating autonomies in Europe such as **South Tyrol** (Italy), the **Oland Islands** (Finland), **Sami indigenous people** (Scandinavia), and Catalonia (Spain). All of them will be compared to the DI, the CK (Project 2008) and **Judgment KO 130/2015**. The AB23 and the AO23 served as legal bases for the EUS, which implements and operationalizes the provisions of these agreements in detail. Apart from procedural aspects, the A2013 and the A2015 have nothing to do with the EUS; they sanction Kosovo's international obligation to form an A/C based on the interpretation of **Judgment KO 130/2015**. The latter clearly outlines Kosovo's constitutional and international obligation to form an **A/C** based on **A2013**.

In our analysis, we will examine the structure of the EUS, drafted by legal experts of the Quint Countries (Britain, France, Germany, Italy and USA). Finally, we will state our findings based on the abovementioned methodology. The EUS was made public in Kosovo on December 1, 2023. In the following section, we will refer to this version.

Preamble

The preamble defines the legal entity to be created by the EUS: it has the form of the CSM – not of an association of Serb majority municipalities in Kosovo, as initially provided for in A2013. The CSM formally maintains the term "association", although the EUS provisions make it abundantly clear that it must legally represent a community-type entity. This is why we continue to refer to it as the CSM. In fact, the second paragraph of the Preamble refers to autonomy within Kosovo. Presently, autonomy does not exist within Kosovo, since Article 1 of the CK defines Kosovo as a unitary state. This is confirmed in Article 12.1 of the CK, which unequivocally stipulates that, "Municipalities are the basic territorial unit of local self-governance in the Republic of Kosovo." It is obvious that the second paragraph of the

Preamble expresses malicious intentions as to the nature of the SK, declaring it as a state with a composed structure and of regional or quasi-regional nature. Further evidence of this can be found in the first paragraph of the Preamble, where fictitious laws and acts of Kosovo are quoted, without referring to them in name or saying which of their provisions control the constitutionality and legality of the EUS. The laws and acts quoted there have nothing to do with the existing legal entities of Kosovo: they are fictitious and meant to serve as a justification for the EUS to operate within the realm of public law. The Preamble clearly states that the EUS creates the CSM as an institutional framework and mechanism for maintaining, promoting and developing a Serb Autonomy of political-territorial nature.

The Framework Convention for the Protection of National Minorities (FCNM) and the **European Charter of Local Self-Government** (ECHLS) are meant to serve as framework instruments. Both documents contain very few self-executing provisions in the sense of Article 19.1 of the CK. They state the commitments of the member states and their obligation to implement the provisions via legislative and other legal measures. According to the CK, both documents are part of Kosovo's constitutional and legal order. Kosovo courts, including the CCK, directly apply their self-executing provisions. Most of those provisions, however, are not self-executing, i.e., their implementation requires additional legislative, administrative and judicial activity on the part of the SK. This is the reason why quoting them is meaningless without mentioning the legal instruments for their practical implementation. In other words, the ECHLS has nothing to do with self-management, although it regulates self-government at municipality level and the cooperation of the basic units of self-government in the sovereign and independent countries of Europe. Neither of these instruments can be directly applied to Kosovo, and the same is true for other countries: the practical implementation of these documents' provisions requires intense legislative, administrative and judicial activity on the part of the states.

The aims of those drafting the EUS become most obvious in the final sentence of the first paragraph of the Preamble, which, before quoting the CK, refers to UN Security Council **Resolution 1244** as a legal basis. It does not require much legal knowledge to understand that this legal document protects the integrity and territorial sovereignty of the Republic of Serbia,

allowing for substantial autonomy for Kosovo within it. In other words, this document recognizes Serbia's sovereignty over Kosovo, the latter being referred to as an autonomous region within the former. Consequently, the guarantee of Kosovo's independence and territorial integrity in the same Preamble is fake if mentioned together with Resolution 1244. This typically discloses the hypocrisy on the part of those drafting the EUS. Non-legal experts or those playing a false game claim that Resolution 1244 is also referred to in the DI and the CK. However, this argument is unfounded since the DI and the CK are no by-laws but the most basic legal acts of Kosovo. As such, they regulate the transitional period between two legal regimes – one based on the legal structures of the UNMIK and the UN, the other based on the new constitutional and legal provisions of the DI and the CK. This transition took place between February 17, 2008, and the time when new enactments replaced the UNMIK and other normative structures of the old legal order. Both the DI and the CK serve as a ***grundnorm*,** validating the application of the old regulations during the transitional period. The mention of Resolution 1244 in the DI and the CK has, above all, to do with the obligations of Kosovo created by the UNMIK administration and their transfer to the SK as a responsible and new player under international law and in international relations. However, the EUS has nothing to do with any of that. Its reference to Resolution 1244 is meant to regulate the social relations and forces within Kosovo in the future, i.e., to serve as a valid ***grundnorm*** for the new constitutional order of Kosovo, which the **EUS** aims at establishing as part of the MC of Kosovo.

According to Chapter VII of the UN Charter, UN Security Council resolutions, such as **Resolution 1244**, overrule national law and national constitutions. Its mention in the EUS' preamble shows that the legal order provided for has constitutional character. Therefore, it may be regarded as a norm not only parallel to but also in opposition to Kosovo's legal order. This is corroborated by Article 42 of the EUS, which establishes an Arbitration Commission to resolve disagreements over the future implementation and interpretation of the **EUS**. The creation of this tribunal implies that no organ or institution of the SK, including the CCK, retains jurisdiction or competence regarding the implementation and interpretation of the EUS.

Based on Resolution 1244, and in view of the Arbitration Commission according to Article 42, the legal order based on the EUS constitutes a closed

and self-contained order, entirely autoreferential and self-sufficient. This is also reflected in the preamble of the EUS, which stipulates the foundations of this new legal order. The wording of and the order in which these foundations are outlined leave no doubt that the EUS represents a **second constitution of Kosovo**, a new MC, since it regulates the same constitutional matters, but with reference to the local Serbs, their rights and liberties, separating them from the other communities and their rights and liberties guaranteed by **Project 2008**. In other words, until recently, the power relations within Kosovo were governed by the CK and other legal acts in connection with **Project 2008**; from now on, these power relations will be separated from and independently regulated for the local Serb community, who will enjoy full autonomous status as regards political, civil, ethnic, national, social, economic, cultural, historical, and other rights.

The Preamble reflects the operationalization of Kosovo's commitments in the AB23 and the AO23: they recognize Serbia's right to influence Kosovo's status, **renounce** Kosovo's right to seek mutual *de jure* recognition between the two states, and ultimately sanction Serb autonomy and the unusual term "national minority" – a concept that did not exist in the legal-constitutional order based on Project 2008. Furthermore, rather than guaranteeing territorial integrity and sovereignty to Kosovo, the AB23 and the AO23 guarantee these rights to Serbia, as the Preamble refers to the autonomy and territorial integrity of all states with consolidated international-legal status. For this reason, the border with Serbia is referred to as an "administrative border" both by the NATO-led international force **KFOR** and by other EU institutions and structures. There are no signs that this border will be transformed into an international frontier in the near future. Kosovo has identified and fixed its borders with North Macedonia (NM) and Montenegro. However, the border between Kosovo and Serbia will be managed based according to considerations of peace and security rather than based on an international agreement between two sovereign and independent countries. Those who consider the current situation a ***de facto*** recognition of Kosovo by Serbia simply because Serbia recognizes Kosovar car plates, symbols, documents and actions, including border patrols along the administrative border with Serbia, fundamentally misunderstand the basic issues of international law and relations. Serb authorities have so far rejected both a *de facto* and a *de jure* recognition of Kosovo, a position firmly cemented by the AB23 and the AO23 and further operationalized by the EUS.

These are not the only legal consequences of the AB23, the AO23 and the EUS: the local Serbs retain all constitutional privileges, rights and liberties under the CK. In other words, they enjoy the protection of three constitutions at the same time: the CS, the EUS and the CK. The first two constitutions form the new MC of Kosovo. With the implementation of the EUS, the CK is mainly intended to regulate the rights and liberties of non-Serb communities in Kosovo. The local Serbs will only draw on the CK if it serves their intention of blocking the consolidation of Kosovo's statehood and good governance. The provisions of the Preamble reflect this objective.

General Provisions

Article 1 (Definitions)

The term "central organ" in the EUS only refers to political organs, not to the organs of the Supreme Court of Kosovo (SCK) and the CCK. This demonstrates that the legal-constitutional order based on the EUS is both constrained and in total opposition to the legal order based on Project 2008. Neither the SCK nor the CCK has any bearing on the legal-constitutional order established by the EUS. Any disagreement regarding the implementation and interpretation of the EUS will be decided on by the Arbitration Commission provided for in Article 45. The CCK does not review the amendments of the EUS, except if they pertain to the decision allowing for the creation of the CSM. No other jurisdiction of the CCK regarding the EUS has been retained. This becomes obvious from the wording of Subparagraph e, which defines the law applicable within the territory of Kosovo, not mentioning the CK at all. Thus, according to the EUS, the legal order is of constitutional nature as far as the local Serbs are concerned. It is self-contained, self-sufficient, and at odds with every dimension of the current constitutional order based on Project 2008.

Article 2 (Background and Objectives)

Paragraph one defines the Serb community in the same way Article 57.1 of the Kosovo Constitution does, where the definition applies to all communities. However, this definition is selectively applied through a by-law, removing it

from the broader legal-constitutional framework of Kosovo. As a result, the local Serb community is granted extra-constitutional status.

According to the same paragraph, only the local Serbs enjoy special rights. This means that merely one community in Kosovo receives extra-constitutional status, not only vis-a-vis the Albanian community but vis-a-vis all other non-Serb (Turkish, Egyptian, Roma, Ashkali, Bosnian, Croat, Montenegrin, etc.) communities. This constitutes **clear discrimination** against or the ethnicisation of the relations of Kosovo's communities. This is not very different from Bosnia-Herzegovina, where rights and liberties are linked to ethnic origin. The only difference is that in Kosovo, this status is only granted to the local Serbs. This aim was not kept secret by those drafting the EUS: paragraph two states that Chapter 3 of the CK is incorporated into the EUS, **applying exclusively to the local Serb community**. The wording of paragraph three is quite similar: not only does it stipulate that the CSM serve as a framework for the self-government of the local Serbs, but it also states that,

> The framework includes the support of coordinated service provision in specific areas, with the possibility for financial support by Serbia, and an effective direct communication channel for the Kosovo Serb community to GK through the Ministry of Local Government Administration.

The last paragraph of this Article states that, "The Association has the overall objective of assisting its members to cooperate in partnership, within their areas of competence, in order to carry out functions of mutual interest." This overall objective is not accurate as evidenced by the jurisdiction and competences of the organs and institutions of the CSM. Equipped with the jurisdiction and competences specified by this Article, the CSM cannot be an association. According to this Article, the CSM must have a territory, including Serb municipalities. This reflects the difference between Bosnia-Herzegovina and Kosovo: the famous **Sejdić-Finci** case (2009), in which the European Court of Human Rights (ECtHR) found discrimination in Bosnia-Herzegovina, reminds us of the EUS and the practices to emerge in its wake. In the abovementioned case, the ECtHR ruled that the ethnicisation of rights and liberties provided for discrimination as it excluded all but three communities from being considered constituent nations of Bosnia-Herzegovina.

Now this Dayton-like standard is being introduced in Kosovo, entirely contradicting the judgment in the above case.[102]

Article 3 (The Statute)

This Article implies that the EUS, not the CK, is the highest-level legal act governing the CSM. According to the first paragraph of this Article, the Statute "regulates the competences, scope of work, organization and functioning of the bodies, and all other affairs of the Association." The EUS thus enables the creation of norms and of a constitutional system independent from the CK. In this regard, the Article deviates from the Preamble, which deceptively refers to the CK. In paragraph 2, the EUS grants additional jurisdiction to the CCK: "This Statute shall be submitted to the Constitutional Court for review of its constitutionality before it is established." The parameters for constitutional review are set in the Preamble. **Judgment KO 130/2015**, however, is not listed among them. But why? Because this judgment poses an unsurmountable obstacle to the very validity of the EUS, which creates a state within a state. No lawyer can justify the constitutionality of the EUS based on the findings of **Judgment KO 130/2015**. For this to happen, the judgment would have to be replaced by a new ruling of the CCK. While the CCK could eventually rule in such a way, it would not do so based on the CK or legal professional standards. Instead, it would rely on political, moral, and sociological criteria, in short, on extra-constitutional standards. For this reason, the drafters of the EUS deliberately omitted Judgment KO 130/2015 in the Preamble, preventing it from serving as a parameter for constitutional review.

Article 4 (Procedures for Establishment)

Paragraph one of this Article is particularly conspicuous as it states that the procedure for constitutional review by the CCK are to be based on Article 3. This means that the EUS dictates and structures the procedures of constitutional review before the CCK. Furthermore, this Article assigns the GK –

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[102] See also: European Court of Human Rights (Grand Chamber): *Case of Sejdić and Finci v. Bosnia and Herzegovina (Applications nos. 27996/06 and 34836/06).* Judgment, Strasbourg, 22 December 2009. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-96491%22]} (retrieved April 2024).

in particular, the ministry responsible for self-government – a transitional and temporary role in supporting the establishment of the CSM.

The members of the CSM are Serb municipalities. This means that the EUS constitutes a clear institutional framework for the political-territorial autonomy of the local Serbs, with a special connection to their mother state – the Republic of Serbia. The Central Authorities of Kosovo will be at the service of this autonomy, but not as powers reviewing the constitutionality and legality of the work of its organs and institutions. No specific article of the EUS states which concrete provision of the CK or Kosovo law applies to the EUS. This is obvious when considering that the CK is not included in applicable law, as mentioned earlier.

Article 5 (Membership)

However, it is paragraph one of this Article that reflects the ultimate hypocrisy and cynicism of the drafters of the EUS: According to it, CSM membership is open for Serb municipalities and, once it has been established, others can join, but only if the membership is approved by a two-third majority of the existing members. This equals a **Serb veto** regarding future membership.

Paragraph three states that the EUS cannot touch upon the rights and authorizations of existing municipalities. This is correct, as none of the competences it refers to are regulated either by the CK and Kosovo laws or by the international conventions listed in the Preamble or paragraph three. The **competences and jurisdiction of the CSM are entirely original**, with additional powers granted by central authorities. As we shall argue, these powers do not fit in with the nature and character of municipalities as basic self-government units. Instead, they resemble the prerogatives of central authorities as they have nothing to do with local self-government.

Paragraph five deals with the membership of CSM members in foreign associations and structures, quoting Article 10.3 of the European Charter of Local Self-Government (ECHLS). This provision is the only one that accurately describes what member municipalities of the CSM can do. It is, however, a redundant provision, since the CK regulates the same issue. It is further operationalized by the Law of Kosovo on Self-Government. Such a right has never been denied to municipalities. Their cooperation should be

governed by law, not by the EUS, as it insists it should. This provision aims at regulating a matter of clearly constitutional nature, effectively removing it from Kosovo's legal-constitutional framework.

Article 6 (Amendments to the Statute)

Paragraph two of this Article assigns the CCK an additional competence: a by-law regulating the competences of the guardian of the constitution of Kosovo! Article 113.10 of the CK states that only law can assign the CCK additional competence. Even if such a law existed, there would not be an authorized party, as only municipalities are authorized to appear before the CCK. No entity of the type of the CSM can be a party to such procedures, except under Article 113.7 of the CK, i.e., in the case of individual complaints.

In addition, paragraph one of this Article grants the right to municipalities and the CSM to initiate constitutional amendments. Subsequently, the President of the CSM or the Minister of Local Self-Government may submit these amendments to the CK for constitutional review. Once these amendments have been successfully reviewed by the CK, they take effect and are published in the Official Gazette. This is unimaginable for a by-law. This Article grants the President of the CSM the status of the President of Kosovo and of the President of the Assembly of Kosovo, who are entitled to have any proposed amendment reviewed by the CKK. Moreover, this Article empowers municipalities and the EUS itself to initiate constitutional amendments. These rights and authorizations can only be granted by the CKK, not under legal acts or by-laws. Formally, the EUS is a by-law. However, as far as its content is concerned, it represents a second constitution for Kosovo, assigning the CKK jurisdiction and competences and creating new authorized parties, entitled to appear before the CCK – all of which requires constitutional amendments.

Article 7 (Administrative Issues)

Paragraph one defines the territory of Serb **political-territorial autonomy** in Kosovo. Paragraph two determines Mitrovica as the temporary seat of this autonomy, though members may decide otherwise. This is another sign that the CSM can neither serve as nor be a governmental agency as provided for by the EUS' drafters, since such agencies do not operate on territorial but

exclusively functional principles. This has been the case since 1602, when the first agency in the field of banking and finance was founded in Great Britain. The country has been the cradle of independent agencies and institutions with high expertise since the early 16th century.

The provisions of this Article put the GK in the position of an institution at the service of the CSM until it is formed. After its formation, the CSM will oppose the GK whenever there are disagreements over the interpretation and implementation of the EUS.

Article 8 (Official Name)

According to Paragraph 1, the association's official name is **Association of Serb-Majority Municipalities**. As described above, this name does not fit its nature at all. An association can never enjoy rights and authorizations under public law as it is formed under the legal provisions governing the NGO sector. This rule applies in all Western democracies. The CSM, by contrast, is an institutional umbrella, ensuring the implementation and development of Serb political-territorial autonomy in Kosovo. Existing associations of Kosovo municipalities bear no resemblance to the CSM, because their statutes differ substantially from the EUS' provisions, pertaining to the private sphere and dealing with the coordination of the work of Kosovo municipalities. The same is true for other associations in Balkan countries, including Serbia itself. Rather than referring to the cooperation of associations, the **ECHLS** (European Charter of Local Self-Government) refers to the cooperation of the public authorities of local self-government. Consequently, the abovementioned name hardly reflects reality and should be changed into the CSM in the first session of the Assembly of the Association of Serb-majority Municipalities.

The commitment to non-discrimination in paragraph two is obviously fictitious, as other communities living within CSM territory have little opportunity to enjoy their constitutional rights and liberties based on the principle of **consociational democracy**, enshrined in the CK and pertaining to all communities. In other words, the Serb community will continue to enjoy privileges under Chapter 3 of the CK, independently of other communities.

The latter will not have the same privileges once they fall under the jurisdiction of the CSM, as the EUS rather than the CK applies in that area.

Article 9 (Legal Status and Proprietary Rights)

Although quoting applicable law, Article 9.1 does not specify which law or provisions it is referring to but thoroughly defines the nature and character of the CSM as an entity governed by public or state law:

> The Association has legal personality, in accordance with the applicable law, and the legal capacity necessary under Kosovo law to perform its objectives, including the right to own movable and immovable property, to co-own companies that provide local services within the scope of the Association and to conclude contracts, including employment contracts, as well as to sue and be sued.

These competences and rights also pertain to the **Ujman/Gazivoda Lake** in the north of Kosovo and any property to be found within the territories of CSM member municipalities: Once established, the CSM is to possess its own property, which is distinct from that of the member municipalities. It will be managed separately from the property of municipalities and newly created upon the formation of the CSM. This is specified in the following paragraphs of this Article, which does not legitimize the transfer of existing property of Serb municipalities into the CSM.

Article 10 (Rights of Communities)

This Article has three paragraphs. Paragraph one assures other communities that the CSM will not replace, supersede or reduce the existing rights of the communities residing within the territory of Serb Autonomy. In other words, a by-law guarantees Kosovar communities the constitutional rights stipulated in Chapter 3 of the CK. Similarly, paragraph three refers to the language to be used: "The use of languages in the Association shall be regulated with applicable law on the use of languages." No provision of the CK is mentioned, although the latter should enjoy supremacy over other legal acts in Kosovo. In fact, this provision undermines the SK as it cross-references to the applicable law on languages. It continues to replace the last paragraph of the CK, which regulates the representation of other communities: "Other (non-Serb) communities should be represented in all bodies of the Association reflecting the ethnic diversity of member municipalities."

Article 11 (Official Symbols)

In a misleading manner, this Article quotes the laws of Kosovo. Paragraph one quotes Article 7.3 of the Law on Self-Government, regulating the use of symbols. In fact, this Article refers to the municipalities, not the Association. The deception becomes obvious in the following paragraph, which requires that the Association should "endeavor to ensure that symbols enhance efforts to support improved social relations, the inclusion of all communities and societal cohesion in accordance with the Constitution." While this provision requires that efforts be made, it does not refer to the necessary steps ensuring that societal cohesion is not damaged. How can societal cohesion be guaranteed with one community being separated from others and enjoying special protection? Who decided this? Most likely, the Arbitration Commission provided for by Article 45 of the EUS. Paragraph three provides the CCK with additional jurisdiction:

> Upon adoption by the Assembly of the proposed Association's symbols by a majority of all delegates, the President of the Association shall submit the proposed symbols, through the Ministry of Local Government Administration, to the Constitutional Court for review.

Thus, the CCK decides on the symbols of the CSM based on parameters imposed by the EUS rather than by the CK or national laws. This represents a further dismemberment of the constitutional order of Kosovo established by Project 2008. Paragraph five of this Article deceptively determines a law applicable to municipalities as a parameter for constitutional review. However, in the CCK this is not feasible, since this law has nothing to do with the CSM or associations but pertains to municipalities. As noted above, the CSM serves as an institutional framework for the political-territorial autonomy of the local Serbs in Kosovo: its symbols cannot be constitutionally reviewed based on parameters applying to municipalities.

Article 12 (Cooperation)

Paragraph four of this Article proves that any cooperation of the CSM with foreign bodies equals the cooperation with foreign states as well as foreign and domestic public authorities, based on bilateral agreements; the CSM is referred to as an independent party not subject to the authority of the Central Authorities of Kosovo. No limits are set for such cooperation

other than that it must be in accordance with the applicable law of Kosovo, without naming even one legal source. Had the CK and Kosovo laws been considered, the agents and competences would have been clear. In this case, a by-law empowers the CSM to act as a public authority of its own in international relations, without the authorization of central authorities.

Article 12.2 authorizes the CSM to represent municipalities vis-à-vis third parties. This creates a particular problem. There are no precedential cases in Europe – including South Tyrol, the Oland Islands, the Sami people, and Catalonia – in which autonomies and their populations are considered partners in international relations in the areas mentioned in paragraph two of this Article. According to European standards, the Central Authorities are always the last instances to authorize cooperation. Contrary to this, paragraph two states:

> Such cooperation may take the form of the provision by Serbian institutions of financial and technical assistance, including equipment, in the implementation of municipal competencies. Donations of goods and equipment from Serbia shall be exempted from any taxes or duties, in accordance with the applicable law. Any equipment or other commodities imported into Kosovo for use by the Association must conform with applicable law.

Although paragraph three of this Article refers to the oversight and audit of the CSM by central authorities, this does not mean that the latter exercise power and guidance within a certain constitutional and legal framework. In this context, oversight and audit refer to the prevention of criminal and other illegal activities rather than to the setting of standards for a hierarchical relationship between central organs and those at a lower echelon, as should be the case. The same is true for paragraph five, which refers to cooperation with domestic and international non-governmental bodies. Even though such cooperation is governed by both the CK and the Law on Self-Government, the provisions of this paragraph exclusively address municipalities, thereby trying to obscure the goal of Article 12 of the **EUS** to establish a strong connection between the Republic of Serbia and the CSM in all areas concerning the organs and institutions of the SK.

Article 13 (Objectives and Competences)

Paragraph one assigns the CSM general competence regarding coordination and intercommunal cooperation. This means that no issue within the competence of Serb municipalities can be decided without CSM authorization. Paragraph two assigns the CSM the role of advocate-general, representing all Serb municipalities and the Serb population nationally and internationally, particularly in matters of Chapter Three of the CK. In other words, the CSM is to become a party before the CCK regarding all issues of Chapter Three. Paragraph four regulates competences that clearly fall within the public sphere: science and research are intended to further the objectives and competences of the CSM, for example the pollution of the **Ibar** river and the measures to prevent or reduce it. The same paragraph determines the normative sphere of the CSM. Its normative acts have general rather than individual character. Paragraph five confers full competence to the CSM in the spheres of education and health, taking it away from municipalities and excluding the latter from exercising their classical competences under Article 40.2 of the Law on Self-Government. According to paragraph five, education and health are exclusively governed by the EUS rather than the CK or the laws of Kosovo. Consequently, the legal regime established by the EUS is of constitutional nature and character: the CSM is the only institution in charge of education and health regarding Serb municipalities. According to paragraph seven, additional competences are governed by the CK and Kosovar law. However, neither the CK nor any law of Kosovo includes provisions granting associations additional or other competences in the sphere of public law. Nowhere in **Europe**, whose autonomies allegedly served as models for the EUS, **do associations have similar competences.**

Article 14 (Management of Education and Healthcare Institutions Established and Financed by Serbia)

This Article, too, comprises wrongful quotations, trying to manipulate domestic and international legal instruments and acts. For instance, paragraph one quotes Article 13 of the **Framework Convention for the Protection of National Minorities** (FCNM). The latter regulates the right of minorities to establish private institutions in the field of education, but not in that of healthcare. In other words, Article 13 of the FCNM only refers to institutions of private education, excluding healthcare institutions (be they

private or public). Serbian education and healthcare institutions in Kosovo are established by Serbia and, thus, are not private. The FCNM constitutes a framework document regulating issues on a general level and, just like the **ECHLS**, does not refer to the competences of the CSM, which are of constitutional character. Why, then, does Article 14 of the EUS try to transform institutions established by Serbia into private institutions of education and healthcare?

To answer this question, one might turn to Resolution 1244, which guarantees and protects Serbia's sovereignty over Kosovo. By refusing to recognize Kosovo as a sovereign and independent state, Serbia aims at operating freely in those two public fields, through institutions that only appear to be private. In this way, the EUS provides for Serbia to confer some of its state functions on private actors, based on the logic that, under the CS, Kosovo is part of Serbia and, as such, recognized by Resolution 1244. It does so to avoid the subordination of Serbian public authorities to Kosovar education and health organs and institutions. In Serbia's book, this would compromise its sovereignty over Kosovo and territorial integrity, based on Resolution 1244. This is why, according to the drafters of the EUS, diplomas and other qualifications awarded by those institutions should be eventually issued by Serbian state authorities, based on Serbian laws (cf. paragraph one of this Article). This means that education and healthcare documents are to bear the official seal of the Republic of Serbia, not of the SK. In other words, according to this Article, the Serbian network of education and healthcare is intended to operate like an agency commissioned by Serbia, its responsibilities being governed by international law, owing to the mention of Resolution 1244 in the EUS preamble and to the AB23 and the AO23. The latter, as already mentioned, recognize Serbia's right to prejudice and contest the status of Kosovo as a sovereign and independent state and deny Kosovo the right to request mutual *de jure* recognition with Serbia.

Article 15 (Additional Responsibilities Relating to Education), Article 16 (Additional Responsibilities Relating to Health and Social Care)

Articles 15 and 16 detail the competences of the CSM in a very exhaustive manner. Both education and health and social care are to be controlled by

the CSM, with central authorities having no say at all. The CSM is to offer advice regarding all dimensions, from curricula to infrastructure. Regarding the latter, the CSM will be the financing and controlling authority. According to Article 16, the CSM acts totally independently of central authorities during pandemics and other extraordinary situations, only relying on the Republic of Serbia. As to social benefits for the local Serbs, a joint commission is to be formed, parallel to the central authority, only handling social benefits coming from Serbia. All financial transactions must be processed by the Central Bank of Kosovo (CBK) and controlled by the General Audit (GA) to prevent potential money laundering and financial crime. In this way, these two Kosovar institutions are practically transformed into institutions at the service of the CSM, since they are not granted other authorities.

Article 17 (Local Democracy)

This Article introduces a unique form of local democracy, which differs entirely from the system outlined in Chapter 10 of the CK. It conforms neither to Chapter 10 nor to Chapter 3 of the CK, as its implementation is not included in the constitutional framework of the CK. The newly established entity CSM is presented as an institution intended to facilitate, support, promote, and finance Serb democracy and guarantee Serb Autonomy. However, no provision of the CK allows for the regionalization of Kosovo, let alone the ethnic representation of a single community in municipalities where it constitutes the majority. In such unprecedented manner, the EUS creates a form of democracy that is based neither on the CK nor any other Kosovo law.

Article 18 (Culture)

This Article contains constitutional provisions that apply to all communities of Kosovo, including municipalities with Albanian minority; however, these provisions are now to apply to Serbs only. According to Articles 58 and 59 of Chapter 3, CK, and Article 123.3 of Chapter 10, CK, the Republic of Kosovo is competent in cultural matters. In contrast to the CK, Article 18 confers the respective state functions on the CSM, without any constitutional or legal basis. In all neighbouring countries, including the Republic of Serbia, those are state competences.

Article 19 (Economic Development)

This Article seems even more presumptuous: paragraph one addresses the overall supervision of the CSM, which means that it is to regulate, organize, coordinate and conduct the affairs within its municipal competences related to developing the local economy, i.e., the **CSM** is fully responsible for the economic development of the **Serb Autonomy**. This is further detailed in the subsequent paragraph, which governs the funding and promotion of economic activity. The last paragraph grants the CSM the exclusive right of representation before central organs and institutions and vis-à-vis economic players within the administrative borders of Serb municipalities.

All these are classical state functions, exercised by states rather than at lower levels of government, even in countries with a developed regional autonomy, such as South Tyrol, Catalonia, the Oland Islands or the Sami people.

Article 20 (Urban Planning)

The transfer of state functions to the CSM becomes particularly obvious in the provisions of this Article: the CSM is to exercise functions such as revision, organization, coordination, leadership, and overall supervision concerning issues like **urban and rural planning and economic development**, all of which were once in the **competence of municipalities**. Subsequently, this Article lists activities falling within this competence, which are now to be carried out by the CSM. All this equals a transfer of the competences from central constitutional bodies, first and foremost those of the Assembly and Government of Kosovo, to the CSM.

Article 21 (Returnees to Kosovo)

This Article confers two competences to the CSM that are really those of the Ministry for Communities and Return (MCR): first, the competence regarding returnees and, second, the competence to implement projects. In this way, the CSM is transformed into an authority implementing such projects. The description of these competences shows that they formerly belonged to the MCR, which now has no competences left, neither concerning returnees nor concerning any projects on their behalf or for their benefit. Moreover, this matter now seems ethnically unbalanced in favour of the Serbs, as it

exclusively deals with the return of Serbs, excluding Roma, Ashkali, Egyptian, Bosnian and other communities who suffered from recent conflicts and war in Kosovo and who are still living in foreign countries. Particularly the Roma, Ashkali, and Egyptian communities are affected by this provision, as thousands of them are living in Serbia and Montenegro and remain outside the scope of the future **Serb Autonomy** in Kosovo.

Article 22 (Research and Development)

This Article refers to every single competence and function of the CSM, aiming to provide a legal basis for research and development, although both can be exercised by the municipalities themselves. Now, both research and development will be centralized and conducted by the institutions of Serb Autonomy, the latter positioning itself as in competition with the Central Authorities in the field of research and development within CSM territory. This is specified in paragraph 2:

> The Association shall promote, disseminate and advocate issues of common interest of its members and represent them, including to the Central Authorities. In the fulfilment of this objective and in addition to the activities outlined under the objectives above, the Association shall promote and advocate issues of common interest of its members and, where relevant, represent them with the Central Authorities.

Article 23 (Joint Public Enterprises)

This Article grants the CSM the right to create public enterprises rendering services for the municipalities in the name and on behalf of its members and in all areas of competence of the CSM. This means that it may set up an unlimited number of public enterprises for **Ujman/Gazivoda Lake**, the **Trepca Coal Mine** (part of it found within the territory of Serb municipalities) and on other public property currently managed by the Kosovo Privatization Agency.

The same Article deceptively uses the phrase "according to applicable law", without referring to a specific law or provision and without specifying the competence of administrative review. Moreover, it does not provide for a judicial or constitutional review of the huge number of acts of the CSM. This lack of control allows for unparalleled freedom of action and potential arbitrary exercise of public power on the part of the CSM.

Article 24 (Organs)

This Article outlines the organizational structure of the CSM, which exercises its competences with the purpose of implementing Serb Autonomy in Kosovo. Even though the structure appears acceptable, the competences conferred on the CSM regarding public (state) law constitute a serious problem, since they should be reserved for other constitutional bodies at the central level.

Article 25 (Assembly: Competences)

In section c of this Article, the EUS authorizes the CSM to enact "special regulations". According to this provision, the Assembly will adopt "regulations, special regulations, rules of procedure, decisions, statements, and declarations." In other words, the right to enact special regulations is enshrined in a basic legal act. This is a very serious problem, since special norms derogate general ones. In other words, the Assembly may use those **special regulations** to abrogate constitutional and legal norms that represent an obstacle to the implementation of the competences of the CSM. The CCK is not authorized to decide in such cases. They will be decided by the **Arbitration Commission** under Article 42. Consequently, the CCK has no jurisdiction or competence regarding the constitutionality of normative acts based on this Article.

Another state competence of the Assembly of the CSM is to be found in section j of this Article. It confers full control over infrastructural investments and projects exceeding the value of €50,000 to Serb Autonomy, which is really the competence of the representative body of a sovereign and independent state.

Article 26 (Election of Delegates),
Article 27 (Meetings of the Assembly and Decision-Making Procedure)

Article 26 entirely changes the election system and constitutional democracy in Kosovo by introducing the outdated **delegation system** of the communist era. As a result, the **rules of political representation** – governed by

the CK and Kosovar election laws – do not apply to the local Serbs. **Consociational democracy**, encompassing all state bodies and institutions, does not exist for them and is replaced by a delegation system according to which certain bodies delegate certain people to represent them to certain other bodies. This is a classic example of **indirect representation**. This system prepares the ground for foreign actors, including the Republic of Serbia, taking total political control of the CSM. It is intended to ensure the loyalty of the local Serbs to Serbia and control their unified political will, which is bound to happen with the implementation of the delegation system when-ever and wherever it is applied. No country in Europe uses this system. Former Yugoslavia was the last one.

Conceptually, Articles 25, 26 and 27 are entirely identical with the normative structures regulating the work and competences of national parliaments. The Assembly of Kosovo is not an exception. The Assembly of the CSM determines and controls the budget policies of the CSM, its agreements with third parties, etc. An assembly with political representation that determines policies, decides and enacts special regulations, oversees the executive (which it creates and which it tasks with the implementation of its policies), has a budget and may make unlimited (domestic and foreign) investments exceeding €50,000 can only be considered a state-like entity.

Article 28 (President and Vice-President: Election and Mandate)

This Article reflects the delegation system described earlier, which is discriminatory: the two offices mentioned can only be obtained by former municipal councillors or former mayors of a municipality. This creates double loyalty and control: first, in direct elections for councillor and mayor and, second, in presidential campaigns within the CSM. This system creates representation structures that are entirely unconstitutional compared to the Central Authorities and other communities of Kosovo. There cannot be any political representatives in public bodies other than those determined by the CK and the laws of Kosovo. No other country in the region would allow for anything similar: all forms of political expression are first and foremost determined by the national constitution, while the way in which political will is formed is implemented via laws and by-laws.

Article 29 (Competences)

According to paragraph four, the President serves as representative institution or entity, authorized to act in relation to all constitutional powers of Kosovo and other foreign and domestic actors. The latter can be state and non-state actors. Under paragraph two, the President is competent to oversee and manage all organs of the CSM, including the Assembly. His/her competences also encompass the implementation of the budget, control of expenditures, issuance of documents of property, representation in courts and vis-à-vis third parties, and all other competences relating to the proper functioning of the CSM.

In this case, however, the same principle applies as for the Assembly: there cannot be any **political representatives** in public bodies other than those determined by the CK and other relevant laws of Kosovo implementing political representation. No other country in the region would allow for anything similar: all forms of political expression are first and foremost determined by the national constitution, while the ways in which political will is formed is operationalized through laws and by-laws.

Article 30 (Advisory Council: Election and Competences),
Articles 31 and 32 (Board: Election and Competences)

While the Council has an advisory role, the Board is described as the typical government of an autonomous region, with clear competences under public (state) law. It has the right to manage everything, from finances to the CSM's property, it executes the decisions of the Assembly, and each of its policies is transformed into norms and decisions. All its functions are executive by nature and character.

Article 33 (Chairperson of the Board)

The Chairperson of the Board is the highest executive official and holds other competences than the Board itself. He/she is in charge of managing and coordinating the work of the Board as well as human resources, and he/she concludes contracts and reports to the Assembly.

Article 34 (Administration: Competences),
Article 35 (Staffing)

The nature and role of the Administration differ from **Judgment KO 130/2015**, as is the case with most of the EUS' provisions. Accordingly, they are in line with the nature and character of the CSM's competences, which resemble that of a state and cannot be compared to other bodies of the non-public sector. The Administration is typically detail-oriented and professional, and it operates according to established rules and merit-based principles.

Articles 34 and 35 stipulate the respect for ethnic diversity and gender equality, quoting the applicable law of Kosovo. They do not refer to a particular law, because there is no legal framework at present allowing for the establishment of such an Administration, including the CK, which governs civil service in Kosovo as a whole. In several places, Articles 34 and 35 quote Labor Law, without specifying whether they are referring to Kosovar or Serbian law: they merely commit the CSM to making efforts to respect labor law.

Article 36 (Complaints Office: Competences)

This Office serves as an administrative appeals authority for all complaints of member municipalities, civil society groups, professional associations, commercial entities, etc. living within Serb Autonomy. However, only CSM member municipalities of Kosovo can complain, which makes this Office an entirely unconstitutional entity. This Article creates a complaints organ, bestowing on it the attributes of an administrative appeals authority, for matters that are in the competence of existing constitutional bodies, i.e., municipalities as basic self-government units in Kosovo. According to paragraph three of this Article, the decisions of this Office can be appealed against in Kosovo courts, but it does not specify in which ones. Once again, the EUS, as a by-law, intends to assign the courts of Kosovo additional competences. Nowhere can courts be assigned competences via by-laws, only constitutions and **primary legislation** can confer such responsibilities.

All legal acts that provide for new organs and institutions sharing competences under public law require constitutional amendments to the CK and laws regulating self-government in Kosovo. This means that without constitutional

changes, it is difficult to establish the basic framework necessary for the implementation of Serb Autonomy as stipulated by the EUS.

Article 37 (Legal Aid Office)

Our analysis concerning Article 36 applies *mutatis mutandis* to this Article.

Article 38 (Budget and Funding)

Paragraph one of this Article stipulates that the budget and finances of the CSM be administered according to the principles of transparency and responsibility, not according to the CK and the respective laws of Kosovo.

While this Article regulates the control of the CSM's budget and finances by the General Audit (GA), in view of the necessity to control potential money laundering and financial mismanagement, the provision of paragraph three is entirely unconstitutional as it authorizes EU control and supervision of the CSM's funds. This equals the delegation of sovereignty to an international organization and the transfer of public power to a foreign agency, regulated in Article 20.1 of the CK. Moreover, from an international perspective, the CSM does not have any responsibility since it is not an entity under international law. Based on the latter, it is the SK that is held responsible internationally. According to this Article, any financial or other obligation of the CSM to third parties makes Kosovo liable to foreign states and creditors for such obligations.

Article 39 (Official Bulletin)

Clearly, a political-territorial autonomy of this scale with extensive normative authority, including the creation of special regulations for specific matters as provided for by the EUS, must have an official bulletin to publish its normative acts and other important documents for its members and the public in general.

Article 40 (Relations with the Central Authorities: Administrative Oversight)

This Article assigns competences normally held by constitutional bodies. For instance, the CK and the laws of Kosovo, rather than by-laws, govern the competence of the administrative review of legality.

Paragraph one states that the EUS will neither undermine the constitutional and legal order of Kosovo nor impair the relations between central and local authorities. Governed by a by-law, this commitment is neither constitutional nor legal. Administrative review can only be regulated in the CK and further operationalized in sectorial laws. The subsequent paragraph assigns competences of administrative review, based on Chapter 10 of the Law on Local Self-Government (LSG): paradoxically, it **allows a by-law**, a lower-order legal act, **to dictate the implementation of a law**, a legal act of higher order.

In addition to these competences, the President of the CSM is presented as a coordinator between municipalities and the Central Authorities regarding the implementation of Chapter 10 of the LSG.

Article 41 (Relations with the Central Authorities: General Principles)

This Article deals with general principles, but without specifying which principles exactly it is referring to or to whom they apply. Finally, it transpires that it deals with the delegation of the sovereign competences of the SK. The EU, rather than the SK, is to supervise the work of the CSM in the beginning phase, based on the EUS. It is very difficult to imagine a sovereign and independent state accepting the delegation of its own sovereign and independent competences to another state or international organization based on a by-law.

Other provisions of this Article put the CSM on par with the Central Authorities of the SK as regards every single constitutional organ and institution of Kosovo. Furthermore, paragraph six grants the CSM the right to initiate procedures before the CCK, which is at odds with Article 113 of the CK. In other words, a by-law is supposed to determine who may initiate procedures before the CCK. Other provisions of this Article confer the right on the CSM to initiate procedures, should it be a victim of constitutional violation

under Article 113.7 of the CK. However, the CK guarantees this right, and neither by-laws nor primary legislation can decide if someone has suffered a constitutional violation. This decision falls within the competence of the CCK.

Article 42 (Settlement of Disputes between the Association and the Central Authorities)

As mentioned earlier, the Arbitration Commission is authorized to decide and settle disputes and disagreements over the implementation and interpretation of the EUS. Neither the CCK nor the laws of Kosovo play a role in disputes and disagreements between the CSM and the Central Authorities. Therefore, this organ is intended to act as a **supra-constitutional court of Kosovo**.

In terms of unconstitutionality and illegitimacy, this Article ranks second after the EUS' Preamble, stipulating that Resolution 1244 apply to purely internal constitutional matters. The same Article authorizes the EU to appoint one member of the Arbitration Commission if the parties cannot reach an agreement. This new body decides with a two-third majority, whereby two votes suffice to outvote the representative of the GK.

This proves that the drafters of the EUS did not have much confidence – neither in the local members of the **Arbitration Commission** nor in the ability of constitutional bodies to decide in constitutional disputes between public institutions of Kosovo. The mere creation of this institution equals the destruction of Kosovo's constitutional order as well as disregard for all public powers. The Arbitration Commission will have a similar status as the Special Court, not in criminal matters but in all matters relating to the implementation and interpretation of the EUS.

Article 43 (Police)

This provision grants the CSM the authority **to propose a list of candidates for the Chief of Police of the northern municipalities**. It was allegedly drafted with reference to Article 9 of the A2023, but it does not reflect the content of his article, which stipulates something quite different. According to Article 10 of the A2023, the Chief of Police is to be appointed by the Ministry of Internal Affairs (MIA) rather than according to a list

drafted by Serb municipalities in the north of Kosovo. Now, under Article 43, the MIA plays no role in the appointment of the Chief of Police of northern Kosovo and is merely intended to be at the service of the CSM, just like all other constitutional organs and institutions of Kosovo at the central level.

Article 44 (Constitutional Review)

This Article grants the CSM advisory competence, as an incentive for member municipalities to bring charges before the CCK, based on Article 113.4 of the CK. The provision itself does not have any negative constitutional or legal implications since member municipalities enjoy advisory competence anyway under Article 113.4 of the CK. However, the fact that this provision is part of the EUS shows the intention of the EUS' drafters of interfering in an unconstrained manner with all constitutional and legal issues, just to accommodate the interests of one Kosovo community – the Serbs. In other words, the creation of a new **MC** on behalf of the local Serbs is mirrored by every single provision of the **EUS**.

Article 45 (Transitional and Final Provisions)

In our estimation, this Article is one of the most archaic and unprofessional of all provisions, as it does not refer to final provisions at all despite its title. Little is said about transitory provisions, only referring to the CK and applicable law in Kosovo in a highly abstract manner: for instance, it does not specify which law is to apply in the case of membership issues. This Article clearly shows that the drafters of the EUS had no knowledge about transitional provisions or about the difference between transitional and final provisions. Finally, we found it difficult to identify the goals and aims of the drafters of the EUS.

What, in Lieu of a Conclusion, Can Be Said About the Nature and Character of the EUS and its Umbrella Institution, the CSM?

In the A2013 and **Judgment KO 130/2015**, the Government of Kosovo formally committed itself to forming an A/C. This commitment is of a constitutional character and international nature. Continuous resistance to its implementation by other governments over a longer time finally led to the conclusion of new agreements, creating new commitments, which constituted a violation of the commitments of 2013 and 2015. The AB23 and the AO23, concluded in 2023, constitute the most conspicuous deviance, as it transformed the A/C into the CSM. The EUS, as the founding document of the CSM, created a new MC of Kosovo which exists parallel to the MC of Kosovo established by Project 2008. In fact, this new MC is the nemesis of the MC of Kosovo, as it holds original jurisdiction and competences that compete with the very foundations of Project 2008.

The EUS was drafted within a very specific context: the prime minister of Kosovo, **Albin Kurti,** accepted that EU legal experts would draft a statute implementing the commitment he made in 2023. He made this commitment in the presence of French President **Emmanuel Macron** and German Chancellor **Olaf Scholz**, among others. The very existence of this commitment is a typical result of Balkan politics: leaders hope and believe that they can deny their oral commitments made in the backrooms of certain summits, much like **Pontius Pilatus**. The EUS constitutes a radical deviation from the A2023 and **Judgment KO 130/2015**. The latter is presently the only constitutional document specifying the content and nature of the A/C and its jurisdiction and competences. It does so via elimination, telling future drafters of an A/C statute what it should *not* contain. Conversely, the content of the EUS is informed neither by **Judgment KO 130/2015** nor by any part of the CK but constitutes the result of the commitments made in the AB23 and the AO23, whose provisions it faithfully implements. However, the EUS is in total contradiction with **Judgment KO 130/2015** – each of its provisions is at odds with **Judgment KO 130/2015** – which is why the latter is mentioned neither in the EUS' Preamble nor in its operational part.

The essential content of the EUS implies that the matters it regulates are ***materiae constitutionis***. As such, the EUS represents a second constitution of Kosovo, applying to the local Serbs only and referring to their rights and liberties under Chapter 3 of the CK, including their religious, cultural and historical heritage. The EUS arbitrarily appropriates Chapter 3 of the CK, presenting it as exclusively applicable to the local Serbs, excluding all other communities. Through the EUS, which is a by-law, the local Serbs gain a **supra-constitutional position**: on the one hand, they maintain their privileges under Chapter 3 of the CK regarding political and other representations at all levels of central power; on the other hand, they are granted additional rights, liberties and privileges based on the EUS – the very epitome of their MC. This equals pure discrimination and contradicts all European standards of equality regarding individuals and collectivities.

The quotations of the CK and other laws in the EUS are deceptive and betray reality. The few concrete cross-references are false and have no bearing on the CSM as they refer to municipalities and public authorities. This explains why the majority of the EUS' provisions are bare of constitutional value. Moreover, the EUS contains provisions of **eclectic nature**, picked randomly from different legal and constitutional sources. To justify entities that exist nowhere else in Europe, the EUS' drafters refer to existing legal provisions in an eclectic manner and deceptively quote the CK, the laws of Kosovo, and applicable law. In fact, the CK is the least frequently quoted legal source in the EUS since it very rarely refers to specific European legal categories and institutions, which the drafters of the EUS invoke to justify the creation of the CSM. This approach was chosen because there are no legal sources or institutions on European soil supporting the formation of an entity like the CSM. They cannot be found in European constitutional history, either. Consequently, provisions were randomly inserted, which do not correspond to the legal and constitutional reality of **Project 2008** or European constitutional history. Surely in no European country does a by-law regulate ***materiae constitutionis***, from the vertical and horizontal division of powers to basic human rights and liberties, or allow one community to exercise original constituent power while excluding all other communities. The fact that the EUS, as a by-law, regulates social relations of a deeply constitutional nature seems to have prompted drafters to make use of a certain eclecticism, to the detriment of professionalism and ethics. The EUS established new political goals and fundamental political objectives different from those laid down in

Project 2008. There is no historical precedent in existing European normative structures regulating autonomies, individual and collective rights and liberties, and good governance.

As far as good governance is concerned, the MC sanctioned by the EUS inevitably marks the beginning of the dismemberment of the SK, based on Project 2008. The EUS confers more than executive power on the CSM, as an umbrella institution of Serb political-territorial autonomy in Kosovo. It provides for legal mechanisms that provide for powers competing with those enshrined in the CK. These competitive powers are to be established both horizontally and vertically. Horizontally, the EUS distributes responsibilities among the organs of Serb Autonomy. As for the judiciary, ethnicity-based representation is now coordinated by the structures of Serb Autonomy. At the same time, a Serb majority is maintained at the Appeals level for all cases and controversies involving the local Serbs. Finally, at the vertical level, the EUS divests the Central Authorities at municipality level of the review of constitutionality and legality, transferring it to the organs and institutions of the CSM.

Resolution 1244 exclusively protects the integrity and territorial sovereignty of Serbia, ruling out any such possibility for the SK. By including Resolution 1244 into the EUS, a mutual ***de facto*** or ***de jure*** **recognition** of Kosovo and Serbia was ruled out. This is also reflected in border management: based on Resolution 1244, KFOR treats the Kosovo border as an administrative border not protected under international law. Since negotiations started between Kosovo and Serbia, there has been no discussion concerning border demarcation. The latter would require a mutual *de jure* recognition of the two countries. Unless this happens, Kosovo's border with Serbia will remain an administrative border. Furthermore, **Resolution 1244** grants Serbia the right of interference with any sphere of public law if it considers it useful and necessary for its own state interests. This is based on the premise that the sovereignty of Serbia as an aggressor state has been suspended rather than annulled. With a focus on education and healthcare, the EUS establishes organs and institutions with additional jurisdiction and competences in the public sphere.

Another immediate consequence of the mention of **Resolution 1244** in the EUS has to do with applicable law. It states that applicable law refers to the

applicable law of Serbia, as can be inferred from our earlier elaboration on education and healthcare. The same applies to civil service and administration within the CSM. If referring to professional administration based on merits, the regulations of a labour code should be applicable. In other words, nobody will be a civil servant unless their contract is governed by labour law. However, the mere fact that the EUS does not specify applicable law is a serious problem. Nowhere does the EUS state which law exactly the administration of the CSM is governed by. It only mentions labour law, without concretely naming the law or its provisions. In fact, labour law does not refer to a specific legal act but to the totality of all legal sources regulating labour relations. Moreover, diplomas in education and healthcare are to bear the insignia of "Kosovo and Metohija" (as the SK is referred to by the CS), considering it to be part of the Republic of Serbia. This is a direct consequence of the implementation of Resolution 1244 by the EUS. Further consequences are: first, diplomas in the field of education and healthcare are issued because this is stated in the EUS; second, the EUS stipulates that Kosovo accept those certificates, without being able to influence their form and content; finally, those diplomas are Serb documents, issued within the Serbian territory called "Kosovo and Metohija". All of this does not only concern the local Serbs but also Albanian, Bosnian, Roma, Ashkali, Egyptian and other non-Serb communities in Kosovo that constitute minorities within the CSM. The latter includes them in its jurisdiction as "new subjects", but non-Serb citizens living within the CSM do not have any right to education and healthcare. What remains the most contentious issue is whether diplomas and similar certificates should be issued by Kosovar or CSM authorities; will they then be considered as issued by the SK or the Republic of Serbia? Whose sovereignty will be at stake?

In every single section regulating the jurisdiction and competences of CSM bodies, the EUS introduces new competences that should be governed by the CK and the laws of Kosovo, not by by-laws of any sort. In some cases, the EUS confers new competences on the CCK itself, while elsewhere it creates entirely new administrative bodies, which only municipalities can be assigned. Nowhere, however, does the EUS stipulate procedures and guarantees regarding the administrative, judicial or constitutional review of the work of the CSM. As mentioned above, the CSM is an institutional umbrella of the political-territorial autonomy of the local Serbs, sanctioned by the AB23 and the AO23 and operationalized by the EUS. Readers might imagine

the consequences of the creation of a political entity without the administrative, judicial or constitutional review of its powers. This is the reason why the CSM has destroyed the unitary character of the SK as well as its fundamental political aims and political unity defined by Project 2008. Such a lack of reviews can only result in rivalry and fierce opposition between the Central Authorities and CSM bodies. The latter will be both equal and in competition with the institutions of the Central Authorities. When exercising the same public rights, duties and responsibilities, the two sides will find themselves in a permanent power conflict. This awkward relationship between the Central Authorities and **CSM** bodies is to be addressed, quite unconstitutionally, by an **Arbitration Commission**, a **supra-constitutional court** identical to the Special Court at The Hague, which is to resolve any disagreements regarding the interpretation and implementation of the EUS' provisions. In other words, the SK is equated with the CSM, a non-state entity which serves as an institutional umbrella for the Serb Autonomy in Kosovo. The composition of the Arbitration Commission – one EU member and two Kosovar citizens – and its two-third majority decision-making process imply that the SK was not expected to function smoothly once the new MC becomes reality. At the same time, the local Serbs will enjoy all existing privileges under Chapter 3 of the CK, including their right to participate as equals in central organs and institutions, and the right to veto any law and constitutional amendment they consider to be infringing upon their constitutional rights and liberties.

From a legal-constitutional perspective, the question arises with what authority a prime minister could possibly establish a new MC on behalf of the Serb community of Kosovo. Prime Minister **Albin Kurti** exercised this authority in a clandestine and secretive manner, hidden from the public. Kurti's illegitimate exercise of the constituent power of the people of Kosovo ushered in a new era, marked by the destruction of political unity and the fundamental objectives set up in Project 2008. With what authority Mr. Kurti accepted the AB23 and the AO23 and, finally, gave his consent to the drafting of the EUS on behalf of the SK remains unclear. These questions should and will be central in future public discourse in Kosovo. The next generations will be asking how it was possible for one single person to exercise original constituent power in the name of the people of Kosovo. Such existential questions

will remain unanswered for some time. When, one day, they are answered, it might be too late, and the damage to the SK done.

Conclusions

The doctrine on the MC emerged between two wars, in a specific social context and as an attempt to explain the Italian and German constitutional orders of that time. The MC has been a very useful interpretation tool which provides us with knowledge about the origins and characteristics of a specific constitutional order at a given time. Its main advocates are **Herman Heller** and **Costantino Mortati**, who studied the constitutional order of Germany and Italy during the rise of the fascist and Nazi regimes. Their focus of analysis is on certain **regulatory forces** that constitute the **constitutional material** necessary for constitutional research and the analysis and meaning of constitution. The two authors did not deny the importance and the role of formal constitution and other normative structures representing constitutional order. However, even though they recognized the importance of formal constitution, they insisted that formal constitution and other normative structures be embedded within the reality of constitutional material. The study of this reality represents the very essence of formal constitution and other normative structures.

According to Heller's classical approach, constitution in its entirety depends on a certain material order, which does not only emerge from norms, tradition and political opportunity but also from the configuration of social and economic power. From this perspective, constitution is a ***modus vivendi*** based on a political compromise and a fortunate balance of interests, which should always be of normative value and reflected in social relations. This quality applies to both constituent and constituted power. Heller does not believe that social homogeneity can be achieved, let alone managed, without the competition and interaction of political forces; according to him, it arises from cultural, religious, ethnic, and national factors. To achieve social cohesion, the state itself has to play a certain role, even in the economic sphere: in order to maintain social order, it should establish authoritarian socialism. This approach is referred to in literature as **liberal authoritarianism**, which fights the welfare administrative state and supports big banks, large, powerful industries, huge agro-industrial enterprises and the like.

Mortati's views on MC differ substantially from Heller's: he searches for normativity in the grey zone between law and politics, in social-economic

relations and the reality of the state. Like Heller, he is not in denial regarding the importance of formal constitution. On the contrary, his elaborations are based on the dichotomy between formal and material constitution, within which exists a material reality, characterized by social forces and their political goals. Normativity is rooted in social-political relations, which influence both the institutional and organizational aspects of a formal constitution as well as its extra-legal dimensions. Not the legal norms themselves are hierarchic but the societal forces, whose effectiveness determine the validity of those norms. The validity and efficiency of a state's legal and constitutional system is based on the capability of dominant social forces to establish unity regarding a specific political project and present it as a political goal of general importance. Once successfully implemented and recognized by society, this project entails legal and political standardization, as it shapes the form of unity and coherence of a legal system. The core content of a constitution cannot be determined by a formal text. The latter is a list of organizational and technical stipulations, which say nothing about the political orientation of a legal system as a whole or its political goals and intentions. As such, formal constitutions do not have normative force, they bind no one and merely represent a photographic description of an existing constitutional order. According to **Mortati**, formal constitutions simply determine the organizational duties of constitutional subjects: the **essential content of a constitution** is to be found elsewhere, i.e., in the material reality in which formal constitutions operate. Material constitution contains such a reality and is formed by two different elements: the first element is the ***fine politico* or typical essential content of a constitution**; the second element are **normative material elements**, which formalize the essential content of a constitution. They consist of specific socio-economic relations, which frame and formalize a political goal, develop it and, finally, impose it on society. This implies that normative material elements are characterized by a specific power configuration, reflecting the relative strength and organization of social groups. In other words, within those power relationships, one or more social groups dominate others. The **dominant forces** finally frame and formalize the ***fine politico***, giving normative substance to the constitution, whereas the **dominated** forces remain outside the political picture.

The **normative material elements** of MC are defined by another characteristic, which **Mortati** terms **essential content of the constitution**. Whereas normative material elements mean the material relations at the roots

of constitutional normativity, **essential content** refers to the very substance of this normativity. Dominant social groups successfully transform their political vision into a general interest, thus determining the essential content of a constitution. This content refers to the fundamental principles of order of a political community, institutionalizing the relationship between **dominant and dominated social groups**.

Just like formal constitution, MC is not set in stone but subject to changes. However, the difference between those changes is substantial. In the case of MC, there is no organ or formal procedure effectuating the alterations: they are the result of the altered material conditions in which formal constitution operates. A change of MC – which is a very long process – requires the redefinition of the political goal, i.e., the abandonment of the initial political goal. This occurs when social forces within a state shift, disrupting the original hierarchy. In other words, such a change requires an alternative political vision and a new configuration of social forces, powerful enough to impose such a vision. The term social forces, first and foremost, refers to political parties, syndicates, regions and other territorial units able to impose a certain political will on the other part of the population and their social forces. For Mortati, a people is not an entity with a single political will, but the latter is formulated and expressed by social forces, at which point the content of a constitution begins to take shape and is deliberated for the first time. This content is implemented via the instruments of representative and direct democracy. In both cases, social forces mediate between the people's will and the essential content of the constitution. **Mortati** himself was in favour of proportional representation. This does not mean that he opposed direct democracy. In fact, he offered certain instruments for its exercise: the **right to petition**, the **right to legislative initiative**, and the **right to organize referenda**. They provide communities with direct influence on the definition and realization of political goals beyond and, sometimes, in contradiction with the intentions of elected representatives. **Mortati** considered referenda a particularly desirable instrument, since they provide an update of changes in MC, operating within the parameters of formal constitution. Put another way, referenda help to identify the discrepancies between a formal constitution, on the one hand, and a changing MC, on the other hand.

Mortati searches for constitutional material beyond the three classical state functions, legislative, executive and judiciary. He discovers the **governing function**, which cannot be reduced to the executive function as it forges the political unity of the state. This new function is described as essential, autonomous and distinguishable from the three classical functions of a liberal state. As such, it is capable of forging and framing political unity.

The pursuit of fundamental political goals through the governing function represents the essence of constitution. Governance results from the competition between political parties and other social actors who serve as mediators between the people and the will of the individuals. Governance relies on two principles: the **principles of differentiation** and **specification. Differentiation** is an immanent quality of every constitution and refers to the basic distinction between the governing and the governed. Within a legal order – the concrete and tangible organization of society – the roles and positions of social actors emerge via processes of **differentiation** and **specification**. This results in the individualization of social and political groups, their holding certain positions and playing certain social roles. When the essential content of a constitution is concretized via the instruments of direct and indirect democracy, this entails a process of social reconstruction. Political unity is never achieved through abstraction or general laws, and society is a product of the differentiated integration of intersubjective relations, mediated by political parties and other relevant social actors. This mediation – political forces establishing political unity by way of differentiation and specification – constitutes a **regulatory factor of MC**: these forces actively empower and substantiate a formal constitution with a view to presenting it as a coherent, balanced whole. They are politically conscious forces, featuring structures upon which legal-constitutional order is based in its entirety. According to **Mortati**, these structures consist in the roles and positions of political parties and intermediary communities such as the family, elites and other social groups, regions, etc. He tried to demonstrate that MC is not a single sovereign decision, determining the form of political existence, as Schmitt put it, but a series of decisions and political dynamics, consciously giving direction to the whole society within a given normative framework.

For **Mortati**, the material content of a constitution is eventually determined by the hegemonial governing block and its fundamental political aims. For **Heller**, social homogeneity is not established via competition and interaction

between social forces but based on cultural, religious and national elements. Neither of them provides a general theory on social relations creating a legal-constitutional order independently. Such a theory would have to focus on the regulatory forces of MC, avoiding the traps of other theories on constitution focusing on only one dimension such as norm (Kelsen), decision (Schmitt), democratic principle and legitimacy based on ethics (Heller), and hegemony of the governing block and its fundamental goals (Mortati). For a proper understanding of MC, one must consider the regulatory forces that constitute constitutional material. These forces are generally socio-economic and geopolitical in nature, encompassing factors such as social relations, nation, religion, political economy, political culture, geopolitical dynamics, international relations, imperial influence, and other forms of domination. All of them contribute to the formation of **political unity**: constitutional regulation starts with the creation of political unity and ends with its recreation. It is this very political unity that gives substance to a constitution. Throughout history, political unity has been created via political processes and on various legal bases. At one point, those were religious and divine bases. With the emergence of nations in the wake of secularism, the legal bases became secular and were codified into written texts, aiming at limiting the arbitrariness of political power by integrating it into a legal framework within which it was to be exercised. This new, secular political unity took various forms both in European and transatlantic countries: in some cases, it led to the creation of nations (France); in other cases, new states were founded (e.g., the USA, Germany, Italy, countries of Central and Eastern Europe).

Historically, the **nation state** had to become a sovereign political entity before being able to establish itself as a constitutional system governed by laws, rights, and institutions. This happened regardless of cultural factors and in two ways: from an internal perspective, the nation state gained the monopoly of the legitimate use of physical force; this development started with the French Revolution and ended with the First World War; from an external point of view, the nation state was recognized as the sole legitimate actor in international relations, with the right to decide on war and peace. Those dimensions formed the material upon which constitutions were based. Internally, the nation state suffered radical changes, and several varieties of it were established; among them the constitutional state, which remains the epitome of the ideal state, where power is legally framed and exercised based on clear

rules, while rights and liberties serve as limits to the arbitrariness of political power. Externally, international relations were radically transformed, due to the planned and conscious activities of states as key actors in international relations. As a result of this transformation, states could no longer legally use force to solve disagreements, and regional entities with immense social, political, economic and culturally integrative power were created. These material processes had enormous consequences for constitutional integration, mainly because of the transfer and migration of constitutional ideas and experiences between regions. This resulted in a shift of loyalty: loyalty to the nation and ethnic nationalism was replaced by loyalty to the constitution and its values. This is reflected in the constitutions of all former communist societies. In a constitutional state, loyalties and patriotism are based on constitutional values. The very idea of **constitutional patriotism** serves as a good example of how constitutions have the power to overcome nationalism. Moreover, according to the advocates of constitutional patriotism, loyalty to the constitution can trump the loyalty to the ethnic nation.

Another regulatory force of MC are **institutions**. Finding institutions that reflect culture, tradition and other internal and external circumstances represents a tremendous challenge. Institutions, in this context, do not only refer to constitutional bodies such as parliaments, governments, courts and other organs but also to factors like family, ethnicity, religious and linguistic affiliations, a country's geography and location, its alliances and types of international relations, etc. Among them, political organizations, institutions and their strategies have the most important impact on MC. It is worth mentioning that economic institutions and forces do not have a huge impact on MC. They no doubt actively regulate certain aspects of MC; however, due to their structure and character, they remain in constant tension and conflict with other forces, first and foremost with **political forces** and **fundamental political goals**.

Constitutional subjects and institutions articulate fundamental political goals, sometimes even envisioning ultimate future objectives. This inherently excludes other potential constitutional goals. Formal constitution may be either in conflict or in harmony with these goals. It is essential to remember that the regulatory forces mentioned are themselves subject to an internal, regulatory logic. They are part of an equilibrium whose limits are finally deter-

mined by **fundamental political goals**. Political unity, institutions and social relations do not constitute ends in themselves: their formation and specification are influenced by a teleological orientation, itself dictated by fundamental political goals. This regulatory force represents the outer limits within which MC operates. Social formation is inherently political and takes shape within a defined space, facilitated by existing institutions and driven by specific social and political forces that are connected through the same fundamental political objectives. These forces possess the capacity to affirm and implement such objectives. Even states of emergency and other extraordinary situations are dealt with according to the constitutional framework, understood as the material order underpinning the legal-constitutional system.

The level and intensity of general social and institutional support are an important indicator of the force of MC. The more powerful the support of political goals, including the final objectives of a regime, the more solid the MC. Without such support, MC would struggle to maintain unity, especially if fundamental goals and ultimate objectives directly conflict with one another and the space for democratic contestation and deliberation is closed. We are, therefore, dealing with a regulatory force of MC that **Aristotle** called the way of life that reveals the goals of the city-state. Formal constitutions often refer to fundamental objectives by stating all of them. This is particularly true for the constitutions of Western Europe after the Second World War: they stipulate values such as the character of a state and its power, democracy, rule of law, independence of the judiciary, federalism, human rights and liberties, social welfare, etc. Upon the end of the Cold War, almost all former communist societies embraced this constitutional approach. Kosovo is not an exception. **Constitutional teleology** does not only refer to a constitution securing the physical existence of political unity but also to its realizing other specific political goals. The latter are not limited to the character of a state and its power, democracy, the rule of law, independence of judiciary, federalism, human rights and liberties, social welfare, etc. They include objectives beyond national borders, such as embedding the state in international alliances and activities. In this way, the constitutional framework not only addresses domestic concerns but also reflects the state's role in the global context, emphasizing its international obligations, partnerships, and broader political engagements. As a result, the goals of MC should be searched for and found throughout the institutional spectrum and beyond – in the dimension of social relationships. This means that constitutional tele-

ology is material rather than formal and has to do with all regulatory forces of a constitution: **political unity**, **institutions**, **basic social relations**, and **fundamental political goals**.

It is crucial to understand the relationship between formal constitution and MC. Without an underlying MC, i.e., political and social forces, a formal constitution remains a dead letter, a list of wishes or falsities. Therefore, a separation between constitutional form and constitutional material, if taken to the extreme, would call into question every discourse on constitution and constitutionalism. Of course, the distance between constitutional form and constitutional material remains a scaling issue, which leaves little space for analytical accuracy. The space metaphor, too, does not accurately describe the phenomenon of MC, as the relationship between formal constitution and MC is internal by nature. Analysing this relationship helps identify the state of an MC and prevents it from being equated with constitutional amendments. MC emerges even without constitutional amendments and vice versa: no constitutional change may take place, despite constitutional amendments. For example, the German constitutional order remained the same after the integration of the Democratic Republic of Germany into Federal Germany in 1990. Conversely, although the constitutional order of Italy underwent tectonic changes after World War One, the ***Statuto Albertino*** of 1848 remained in effect until the end of World War Two. Thus, regulatory forces remain in an internal relationship with the basic constitutional agreement. Their formation and sensitivity cannot be ignored since they simultaneously breathe life into constitutional order, conditioning its development. Each of these forces pushes constitutional norms into a certain direction. Law neither is a conveyor belt of political decisions made outside and inside of legal order, nor is it a force constraining political action. Focusing on regulatory forces does not mean that legal order is easily contained within the framework of MC. On the contrary, its conflicts and dynamics show that it depends on various and often contradictory forces, which combine during political unification, institution building, the creation of social relations, and the pursuit of fundamental political goals. For this reason, a constitution may be strengthened via the institutionalization of material contestation and conflict. However, such conflict and contestation may present existential threats to constitutional order itself. For a better understanding, let us explore two types of conflict. The first one is properly institutionalized and may lead to

the consolidation of constitutional order. The second one is of a different nature: it really threatens MC, challenging its normative content endorsed by dominant social and political forces. This occurs when dominant forces are no longer able to exert any influence within a political community. One reason for this could be the absence of common political goals or political objectives contradicting each other, making a compromise seem impossible. If a conflict ceases to be productive for MC, substantial changes in material and formal constitutional order become necessary.

The concept of MC deals with the relationship between constitutional order and society, including its conflicting and evolutionary nature. In this way, dynamic constitutional change is made possible. In this context, the relationship between MC and **constituent power** is crucial: while constituent power serves to protect MC from constitutional institutions of the state, including those authorized to make formal amendments, MC is in conformity with **extra-constitutional constituent power**, whose presence it takes for granted. In other words, MC changes only through the action of extra-constitutional constituent power, because regular institutions cannot effectuate its change. MC is the totality of regulatory forces and their relationship with formal constitution. These regulatory forces are the pillars underpinning, contradicting, changing or confirming existing normative constitutional structures. The relationship between regulatory forces and the normative structures of formal constitution is an internal and dynamic one. It is formal constitution that is dictated by the regulatory forces of MC – **political unity**, **fundamental political goals**, **institutions** and **social relations**. Whether constitutional normative structures are confirmed, contradicted, modified and/or totally revised depends on which regulatory force has undergone changes and to what extent. In this context, **political unity** and **fundamental political goals** emerge as the most important regulatory forces. If political unity is distorted and the fundamental political goals outlined at the outset of the constitutional project are undermined, this leads to a change and/or complete revision of the constitution. Simple constitutional amendments, a change of government, or a shift in the balance of forces in parliament do not constitute a change of MC. They represent superficial constitutional changes concerning the composition of elites, unimportant norms or constitutional procedures. A change at the level of MC requires more than just a change of political unity or of political goals. It necessitates a change in the balance of institutions and the character of social relations, particularly

regarding political unity and the fundamental political goals projected in the original constitutional arrangements.

In the case of Kosovo, institutions and social relations are key factors, clarifying and shaping political unity and fundamental political goals. They help to define and reinforce the foundational principles of the constitutional framework. This position is expressed in almost every decision of the CCK concerning constitutional provisions on power relations and the relationship between the CK and social forces (political parties and other intermediary actors). The ICJ expresses a similar view in its advisory opinion on Kosovo. It holds that the institutions declaring independence on February 17, 2008, are not as same as those installed by the UNMIK based on Resolution 1244. According to the ICJ, the ADI acted outside the legal order created by the UNMIK administration and the social relations formed on its basis. This means that positive constitutional law, which took effect with **Project 2008**, represents a law utterly different from the normative structures sanctioning power relations until February 17, 2008. Similarly, any change of the nature of the political unity and the fundamental political goals according to Project 2008 represents a change in the MC of Kosovo. Both the DI and the CK sanction and embed an MC very different from the one that emerged in 2023, due to new regulatory forces acting on behalf of the community of the local Serbs.

The change in the political unity of Kosovo results from the creation of Serb political-territorial autonomy, which constitutes a new Serb entity separated from other communities. The CSM, as its institutional umbrella, is intended to be in competition with the Central Authorities. It takes care of political, territorial, social, economic, cultural and historical matters concerning the local Serb community. This results from the provisions of the AB23, the AO23, and the EUS. Before February 17, 2008, the people of Kosovo existed within a parastatal entity and had no clear legal status. This was also confirmed by the ICJ in its advisory opinion. Only social forces, primarily Kosovar political parties, possessed such a status, while the social forces of the Serb community and the LVV were excluded from this framework.

The latter were openly and strictly against Kosovo's independence and favoured unification with Albania. As the material normative elements of Kosovo's MC, according to Project 2008, the social forces of the time reflected the relative strength and specific organization of Kosovo's social groups. This configuration expressed power relations in which the Albanian majority population of Kosovo dominated. Those forces were able to frame and impose their political agenda as well as their ***fine politico*** against others, giving normative substance to the CK. The dominant social forces, which might be referred to as non-Serbs, were challenged by Serb social forces from the very beginning. As the dominated ones, the latter had remained outside the picture. However, they continued to contest Project 2008, relying on the unconditional support of the Republic of Serbia. The MC of Kosovo based on Project 2008 essentially contained the fundamental principles of the constitutional order of a political community called the SK, institutionalizing the relations between the dominant and dominated social groups of Kosovo. The normative structures of Project 2008 and Kosovo's positive constitutional law reflect neither the culture nor the history of the communities that now together form the nation state SK. When the SK was founded, the Albanian sacrifice, which almost amounted to genocide, was not taken account of. The modern principle of sovereignty in the CK does not refer to ethnicity – not to the will of communities, particularly not to the will of the Albanian majority – but to the SK and its citizens. The DI and the CK do not reflect the will of the majority population, although they are considered the basis of legitimacy of the SK. As a result, these documents distance the SK from the country's history and culture. This distance is the main reason why the Albanian majority has reservations regarding the values, principles and norms stated in the CK. This is a typical case where a country embraces constitutional patriotism as a standard of governance.

The exercise of constituent power in Kosovo on February 17, 2008, was not a single and isolated act but the start of a process continuing until today. In cases where the international community plays an important role, like in Bosnia-Herzegovina, Iraq, Kosovo, East Timor, as well as in Germany, Italy and Japan before World War Two, constitution is understood as a process during which many political goals are realized, rather than as a final result. The latter only comes into being if **original constituent power** is exercised in its entirety within a national framework, without interference from outside. Ko-

sovo falls within the former category: the DI and the CK reflect the configuration of the forces at work at the time of their enactment, sanctioning **constitutional patriotism**, not patriotism based on ethnic nation, religion, language and other group qualities. Both the DI and the CK constitute the foundations of the SK, determining its form and content as well as the power relations, roles and positions of individuals in Kosovar society. Together with the **Ahtisaari Plan**, they form Project 2008, comprising the elements and defining structures of the political unity of Kosovo that emerged on February 17, 2008. Except local self-government, none of these structures includes any obligation of Kosovo to encourage political and legal-constitutional projects promoting the national, ethnic, religious, linguistic and other interests of a single community of Kosovo. To implement the **Ahtisaari Plan**, new laws pertaining to the **SOCH** and all Serbian cultural and historical legacy were enacted. These laws do not particularly intend to advance the interests of the Kosovo Serbs but simply to protect their cultural and spiritual rights in Kosovo. The same applies to the association provided for in Article 9.2 of Annex III of the **Ahtisaari Plan**: this entity was not intended to have any powers derived from public law; it was meant to be yet another association of municipalities in Kosovo, promoting their common interests in harmony with the CK and Kosovo laws.

The CK further operationalizes the concept of **political unity** and **fundamental political goals** proclaimed in the DI. Due to its still applying normative force, its provisions are worth a closer look. Its definition of political unity contains three elements: first, a republican form of democratic government in a unitary and indivisible state; this means that the self-government of municipal units represents a form of decentralization, later specified in the CK (Article 12 defines local self-government and determines municipality as a basic territorial unit of self-government, whereas Chapter 10 regulates local self-government and territorial organization); second, citizens are the bearers of sovereignty, while human rights and liberties are standards according to which the level of realization of this sovereignty is measured; third, the defined political unity is not only fundamental but also conclusive, as the SK has neither the right to join another state nor to make any claims to the territories of its neighbours.

Not only Serb social forces rejected and challenged the fundamental political goals and the political unity of Kosovo. The current prime minister of Kosovo and leader of the LVV, **Albin Kurti**, openly and fervently advocated Kosovo's unification with Albania while in opposition. He openly rejected the existence of the SK. Between 2018 and 2019, the political unity of Kosovo and its fundamental political goals were challenged in yet another way that had nothing to do with the Serbs. This time, the challenges came from then President of Kosovo, **Hashim Thaçi**, and the current prime minister of Albania, **Edi Rama**. They were both engaged in negotiations regarding territorial swaps with Serbia. In both cases, Kosovo's statehood was seriously challenged, as it was **subject to ongoing political shifts and substantial changes in power dynamics.** In short, they transformed Kosovo's statehood into a temporary project to be changed at will, including its potential destruction. At the same time, Serb social and political forces never joined the non-Serb social and political forces which created Project 2008. They stayed in opposition, clearly signalling that they would contest their new position as dominated community in the SK. This explains their resistance to any serious endeavour to integrate them into the MC of Kosovo and their maintenance of social forces and parallel institutions in Kosovo, which they do not recognize as a sovereign and independent state. At the same time, the social forces of the Albanian majority made no serious efforts to integrate the local Serbs: they continued to undermine their rights to employment, language, free movement south of the **Ibar** river, representation with the Central Authorities, property rights etc. On the other hand, Albanian political forces never considered the Serb voters of Kosovo to be political partners; they regarded them as a necessary evil imposed by the CK, whom they needed to respect only for the sake of appearances. All this contributed to the local Serbs' dissatisfaction and made them turn to Serbia for help. This situation was the subject of all serious international reports regarding Kosovo's communities. The last among them is the report of the former foreign minister of Greece, Meme by **Dora Bakoyannis**, who was the rapporteur to the **Parliamentary Assembly of the Council of Europe** (PACE). Her report was issued in March 2023 as part of the evaluation of the qualification of Kosovo for membership in the **Council of Europe** (CoE), focusing on the rule of law, democracy, and the status of Kosovo's communities, particularly the Serb community. Further recommendations came from eminent European lawyers who had studied the legal-constitutional system of Kosovo thoroughly, concluding that the position of the local Serbs in Kosovo

was not appropriate and substantial improvements were required to close the gap between normative commitments and practical reality.

Based on the **Ahtisaari Plan,** whose provisions were completely integrated into Kosovo's legal framework by way of laws and other legal acts regulating the role and position of communities, the CK defines Kosovo as a unitary state with **substantial decentralization**. The latter, which started in 2002 and was further endorsed and elaborated by the **Ahtisaari Plan**, first and foremost concerns the local Serbs, who are its main beneficiaries. Despite their large number, the formation of new municipalities between 2002 and 2008 did not destroy the unitary character of the SK. The latter remained unitary until March 2024, with substantial decentralization at the municipal level. This status is first called into question by the A2013 and further elaborated on by the A2015. However, neither of the two documents contains any provisions contradicting the **fundamental political goals** of Project 2008. The A2015 was effectively invalidated by **Judgment KO 130/2015**, declaring most of its provisions unconstitutional; following the principle of exclusion, the CCK states what the new statute of an A/C should *not* look like; according to it, only Kosovo's obligation to establish an A/C, based on the model of the existing Association of Municipalities of Kosovo, remained in effect. The A2023 lays the foundations for the creation of an A/C, without determining its jurisdiction and competences, while the A2015 constitutes an implementing norm, further operationalizing the A2013. **Judgment KO 130/2015** invalidates the provisions of the A2015, confirming Kosovo's obligation to form an A/C, whose jurisdiction and competences were to be determined later on in a negotiating process between the parties.

None of the agreements mentioned interferes with the constitutional order established by Project 2008. This is not true for the commitments that Kosovo made in 2023. They signify a major shift in the SK's constitutional order, providing for a change in the nature and character of the SK and transforming it from a unitary state into a specific form of **regional state**. The AB23 and the AO23 are **supra-constitutional** and international by nature, as they contain **fundamental political goals** and sanction a **political unity** which totally contradicts the norms enshrined in Project 2008. These goals are in no way part of the constitutional order of the MC of Kosovo. This is evidenced by the fact that the EUS, whose provisions do not relate to the DI and the CK in any way, implements the AB23 and the AO23. Even

though merely a by-law, the EUS contains provisions of constitutional character that have nothing to do with the DI and the CK. As such, it reflects and implements another material constitution of Kosovo, with **fundamental political goals** and a **political unity** that totally contradict the MC based on Project 2008. The EUS, the AB23 and the A023 destroy the regulatory forces underpinning the MC of Kosovo, first and foremost the political unity and fundamental political goals expressed therein. This did not occur before 2023, as neither the A2013 nor the A2015 outlines the content of a future A/C Statute, meant to be modelled on the existing statute of the Association of Municipalities of Kosovo.

Kosovo has always followed its Declaration of Independence and expressed its clear will to negotiate with the Serbs. In 2013, it concluded its first non-treaty agreement with Serbia. Both the AB23 and the AO23 are of the same nature. Since the AB23 is a basic agreement, we will discuss it before turning to the AO23. In addition to being a non-treaty agreement, the AB23 played the role of a novation agreement, renewing all international commitments of Kosovo *au fond*. According to international customary treaty law, novation agreements (***novatio***) intend to increase the effectiveness of some or all provisions or the whole content of an existing treaty. Each single provision of the AB23 radically changed Kosovo's fundamental political goals and its political unity. The biggest change was the radical shift in the definition of political unity: Kosovo renounces its sovereignty and independence by recognizing Serbia's right to contest its statehood, declared on February 17, 2008. This is stipulated in paragraph four of the Preamble of the AB23 and was extensively elaborated in the EUS, which refers to Resolution 1244 as the legal basis of its own validity. **Judgment KO 130/2015 is not mentioned at all**. As noted above, the latter laid the foundations for a material constitution of Kosovo in relation to any A/C statute that might be drafted in the future.

The Kosovar public was told that the BT served as a model for drafting the AB23. This is not true: there is no (organic) connection between them at all, and any similarity is fictitious. In the BT, the parties refer to each other by their constitutional names, never questioning each other's sovereignty or independence. This equals an *inter partes* or mutual recognition, with an *erga omnes* or general effect on the external world. By contrast, the wording of the AB23 is different. According to it, the parties recognize that their states are

sovereign and independent in principle, but without acknowledging each other's sovereignty in their mutual relations. Their recognition is addressed to the international community, without creating legal effects on the relationship between the parties. Regardless of whether Serbia and Kosovo explicitly affirm it, the sovereignty and independence of these states remain established facts with or without their mutual acknowledgment.

The AB23 does not constitute a ***de facto* recognition** of Kosovo, as claimed by Kosovo officials. The reciprocal *de facto* recognition of the two Germanies was based on the parties' equality, which was also confirmed in a decision of the **CCGe**. In essence, the FRG enjoyed the right to act on behalf and in the name of the whole German nation, without denying that the GDR was a sovereign and independent state under international law. By contrast, the AB23 excludes any mutual recognition of the parties under international law. Consequently, the legal quality of the relations between Kosovo and Serbia must be considered much lower than that of those between the two Germanies: diplomatic privileges and immunities are not to be based on the VCDR but remain at the mercy of the EU, which serves as an umbrella institution under which "diplomatic" relations between Kosovo and Serbia are to be maintained. The 'Kosovo Mission' in Belgrade is to be conducted under the EU's umbrella. This was different with the BT, which served as a basis for a bilateral agreement between the two Germanies and for setting up diplomatic missions, with the provisions of the VCDR applying through analogy. Besides, the GDR was an internationally recognized state and a member of the UN.

The AB23 and the AO23 further degrade Kosovo's position in relation to Serbia and the international community: they overturn the fundamental political goals of, and the political unity stipulated in Project 2008. In this political unity – which is not radically different from that provided for in the DI and the CK, – the guarantees for a specific position of the local Serbs, the SOCH, and all the cultural and historical heritage of the Serbs in Kosovo are crucial. These guarantees form the basis of the establishment of a new autonomous region within Kosovo, reflecting an appropriate level of self-management of the local Serbs. An outline of this new region is found in Article 7.1 of the AB23. The provisions of paragraphs five and six of the AO23 further detail the nature of Serb Autonomy. Paragraph five stipulates

that all previous agreements between the parties, first and foremost the A2013, are of primary importance for the establishment of the self-management of the local Serbs. The legal and constitutional significance of the A2015 and **Judgment KO 130/2015** is totally ignored. A further step is taken in paragraph six: supporting Article 10 of the AB23 and contrary to the A2013 and the A2015, this paragraph provides for the creation of a Joint Monitoring Committee (JMC) within thirty days. The JMC, chaired by the EU, is to monitor the implementation of the AB23. These commitments imply that Kosovo's path to European integration will be determined by the degree to which the obligations under the AB23 and the AO23 are honoured. This is stipulated in the final paragraph of the AO23:

> Kosovo and Serbia recognize that any failure to honor their obligations from the Agreement, this Annex or the past Dialogue Agreements may have direct negative consequences for their respective **EU accession processes** and **the financial aid they receive from the EU**.

The AB23 and the AO23 will not be the last agreements aiming to normalize the relationship between the two countries or at least a *de jure* or a *de facto* recognition of Kosovo, as propounded by certain Kosovar officials. This is also implied by the provisions of Article 6.1 of the AB23, which refer to future developments. All these agreements merely represent steps in the process of normalization, which, from now on, excludes the obligation of both parties to mutually recognize each other. The normalization of relations can take different forms and different contents, including the establishment of other state forms, apart from the cooperation of two sovereign and independent states. For the time being, one necessary condition for normalization is the establishment of the CSM, which has all features of a Serb political-territorial autonomy and serves as an umbrella institution, directing the work of this autonomy. This is evidenced by the fact that **Judgment KO 130/2015** was eliminated as a parameter for the constitutional review of the EUS, while Resolution 1244 was included. The role of the CCK was diminished as well, and a new mechanism is to solve disputes regarding the implementation and interpretation of the EUS. In other words, all disputes between the Central Authorities and authorities established under the EUS will be decided by an Arbitration Commission, which is to be established under Article 42 of the EUS. As a result, the institutional and legal framework provided for by the CK will no longer be competent in solving conflicts of com-

petence between constitutional bodies. The CCK has no more role whatsoever in preventing any power excesses within the CSM. In other words, the AB23 and the AO23 set the stage and laid the foundations for a **new material constitution for the benefit of the Serbs of Kosovo**. It will exist parallel to, and in competition with, the MC of Kosovo established by Project 2008. This has also a direct bearing on the form of the SK: based on this **material constitution of the local Serbs**, Kosovo is being transformed into a unitary state with advanced decentralization, accommodating a political-territorial autonomy with territorial self-management and excluding all other non-Serb communities. Totally at odds with Project 2008, this new constitution is the very essence of decentralization in Kosovo, taking the form of asymmetric regionalization: Serbs enjoy a high-level political-territorial autonomy, while other communities continue to enjoy their rights and liberties based on the parameters of non-territorial autonomy, sanctioned in Chapter Three of the CK. The very reason why Kosovo could not be labelled a regional state is that the relationship between the Serb Autonomy and the Central Authorities is an asymmetric one. However, due to the AB23 and AO23, Kosovo could not be termed a federal state either, since the relationship between the Central Authorities and the powers of the CSM is non-hierarchical. If Kosovo is neither a regional state, based on the Italian and Spanish models, nor a federal state, for the reasons stated above, then what is the SK at present? Can Kosovo be considered a unitary state, as defined in Article 1.1 of the CK? Certainly not, as the Central Authorities have no authority at all to review the legality and constitutionality of acts, omissions, and the work of the organs and institutions of the CSM. They operate in competition with the Central Authorities, with full institutional support by the Republic of Serbia in all spheres of life and work. A third mechanism to be formed under the EUS, a hybrid **Arbitration Commission** is to take care of the 'constitutionality and legality' of the acts, omissions, and the work of the organs and institutions of the CSM.

It should be noted that Serb Autonomy in Kosovo is neither Serbia's final goal nor are the AB23 and the AO23 final agreements: they are just a means to an end – the restauration of Serb sovereignty over Kosovo. As can be inferred from our elaborations so far, it seems likely that Kosovo is heading towards asymmetric decentralization, favouring the Serb community. This

would seriously threaten social cohesion and discriminate against other communities. The provisions of the EUS imply the highest possible level of **asymmetric decentralization** in favour of one ethnic and religious community – the local Serbs. This decentralization has two components: first, political-territorial autonomy, including the SOCH, which is expected to enjoy full extraterritoriality as a comprehensive form of religious autonomy; second, non-territorial autonomy for the local Serbs, with the right to full self-management – a model similar to the system of capitulations in the Ottoman Empire and other Asian empires of the nineteenth century (Japan, China).

The fundamental goals of the Serbs outlined in the AB23 and the AO23 are fully operationalized by the EUS. Its ***grundnorm*** is Resolution 1244, and its mechanism for solving disputes over the implementation and interpretation of the EUS is not the CCK but a hybrid **Arbitration Commission**. According to the CK, the CCK is the only organ competent to interpret the constitution and solve disputes over conflicts of competence between state organs and the organs and institutions of local self-government. Nevertheless, the EUS does not assign the CCK any role whatsoever in the areas mentioned. In other words, the Arbitration Commission represents a new body of the new MC of Kosovo, whose functions are elaborated on in detail by the EUS, an act implementing the AB23 and the AO23. Despite being a by-law, the EUS exempts the CSM from the legal and constitutional order of the SK. This equals the destruction of the fundamental political goals of the DI and the CK and the political unity created on February 17, 2008: once the EUS takes effect, the Central Authorities are no longer authorized to review the constitutionality and legality of the acts, omissions, and the work of **Serb Autonomy** in Kosovo. The AB23 and the AO23 represent new regulatory forces of the MC of Kosovo, with the EU replacing Kosovo's political representatives as a social force. Rather than being an institution of Kosovo, the new Arbitration Commission is an instrument of the EU, intended to implement **fundamental political goals** entirely different from the ones proclaimed in the DI and enshrined in the CK. In this new **political unity**, the local Serbs and their municipalities constitute a separate, autonomous region, its normative structures enacted outside the legal and constitutional order of the CK. In essence, this represents an exercise of constituent power by the local Serbs to the detriment of other communities and the normative essence

of the MC of Kosovo. Other communities, including Albanians, can exercise this right only jointly with others and based on Article 144 of the CK. This Article grants Serbs and other communities veto power over any constitutional change; in other words, Serbian constituent power may prevent non-Serb communities from exercising their constituent power. This equals pure discrimination against non-Serbs, while the SOCH and any cultural and historic heritage of Serbia in Kosovo enjoy extraterritorial status. Albanians and other non-Serb communities will not be able to exercise their constituent power under Article 144 of the CK in case they want to redefine their concrete and current constitutional standing. No regulatory force of the MC of Kosovo favours the constitutional redefinition of the position of non-Serbs, while the new MC of Kosovo only benefits the local Serbs and their constitutional position. This might have the following practical consequences: first, the political unity of the SK takes the form of an **asymmetric regionalization**; second, the **fundamental political goals** include a Serb component, with different fundamental political goals, totally at odds with those stipulated in Project 2008; third, the **institutions** of the new MC of Kosovo cannot be controlled and are in a position to destroy, without hindrance, the constitutional and legal order provided for by Project 2008, since the CSM holds original jurisdiction and the competences once reserved to the Central Authorities; finally, due to the EUS, a novel kind of social relations emerges in certain parts of Kosovo, namely the competitive relationship between the Central Authorities and the CSM.

All in all, the future situation in Kosovo is likely marked by tensions between the majority population and the local Serbs as well as between the Central Authorities and the powers of the CSM; consequently, there will be constant interference of the EU and other international players, trying to solve the daily disputes resulting from the implementation of the new MC of Kosovo. The final consequences of these solutions remain to be seen and will determine the long-term impact of this process. For now, however, it is evident that the current approach primarily focuses on accommodating the interests of the local Serb community, potentially to the exclusion of other communities. Serbia aims to use Kosovo's new MC to assert formal sovereignty over the region. If pursued consequently, this path may well lead to the formation of a new formal state union between Kosovo and Serbia, since Serbia's final goal is not the normalization of relations or the recognition of Kosovo's sovereignty and statehood: the AB23 and the AO23, including the EUS as

their implementing act, represent a temporary solution, aimed at paralyzing the functioning of the SK and the MC established by Project 2008. Whether all this will lead to the formation of a formal state union between Kosovo and Serbia remains to be seen. In such a case, the normalization of relations between the two countries will come to an end, a development that only coming generations will be able to bear witness to. Such a scenario can only occur in the context of a new political representation of the Albanian majority, with new regulatory forces that rely on Islamist ideologies and creed. A Salafist-Wahhabist ideology is key in this regard, as it seems to have been the main cause for re-Islamization in Kosovo since 1999. Only an Islamist interpretation of the fundamental political goals and political unity of Kosovo can lead to a formal state union between Kosovo and Serbia, due to the cosmopolitan nature of Islam (like with every missionary religion). If that were the case, the political legacy of a Serbian nationalist and architect of a project aiming at the extermination of Albanians, written in 1937 under the name "Expulsion of Albanians" (Vaso Čubrilović: 1897–1990), would become reality: he claimed that high-degree Islamization of both the Albanian population and its leadership was the safest path towards their final subjugation.

Abbreviations

A/C	Association/Community of Serb majority municipalities in Kosovo
ADI	Authors of the Declaration of Independence
ASM	Association of Serb Municipalities
BT	Basic Treaty between two Germanies, concluded on December 21, 1972
CBK	Central Bank of Kosovo
CCGe	Constitutional Court of Germany
CCIT	Constitutional Court of Italy
CCK	Constitutional Court of Kosovo
CCS	Constitutional Court of Serbia
CJEU	Court of Justice of the European Union
CK	Constitution of Kosovo
CoE	Council of Europe
CS	Constitution of Serbia (2006)
CSM	Community of Serb municipalities
CW	Constitution of Weimar
DI	Declaration of Independence
DIL	Domestic Investment Law
DNA	Deoxyribonucleic Acid
ECHLS	European Charter of Local Self-Government
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
EUS	EU draft-Statute implementing AB2023 and AO2023
FCCG	Federal Constitutional Court of Germany
FCNM	Framework Convention for the Protection of National Minorities
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
GA	General Audit
GBL	German Basic Law
GDR	German Democratic Republic
GK	Government of Kosovo

ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Former Yugoslavia
IIL	International Investment Law
IT	International Treaties
JMC	Joint Monitoring Committee
KFOR	NATO-led military forces in Kosovo
LSG	Law on Self-Government
LVV	Lëvizja Vetëvendosje (Political Party in Kosovo)
MC	Material Constitution
MCR	Ministry for Communities and Return
MIA	Ministry for Internal Affairs of Kosovo
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NM	North Macedonia
NTA	Non-Treaty Agreements
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
SCK	Supreme Court of Kosovo
SK	State of Kosovo, declared on 17 February 2008
SOCH	Serbian Orthodox Church
SRSG	Special Representative of the Secretary General
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
US/USA	United States of America
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
WUS Austria	World University Service Austria

Additional Terms

A2013	The First International Agreements of Principles Governing the Normalization of Relations Between the Republic of Kosovo and the Republic of Serbia
A2015	Association/Community of Serb majority municipalities in Kosovo – general principles/main elements (Aug. 26, 2015)
AB23	Belgrade-Pristina Dialogue: EU Proposal – Agreement on the path to normalization between Kosovo and Serbia (Feb. 27, 2023)
AO23	Implementation Annex to the Agreement on the Path to Normalization of Relations between Kosovo and Serbia (March 18, 2023)
Grundnorm	Basic norm
Judgment KO 130/2015	CCK judgment assessing the constitutionality of A2015
Project 2008	Constitutional Project of SK, comprising the Ahtisaari Plan, DI and CK

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About the Author

Professor Dr. Enver Hasani served as the first President of the Constitutional Court of the Republic of Kosovo (2009–2015). On 12 June 2014, he was appointed as Kosovo's first representative to the Venice Commission, becoming its first full member from Kosovo, a position he held until 2018. Previously, Professor Hasani served as Rector of the University of Prishtina "Hasan Prishtina" and as Dean of its Faculty of Law (2006–2009).

Throughout his distinguished career, Professor Hasani has held several other senior public positions in Kosovo. He was the founding Head of the Office for Foreign Relations, established in 2004 as the institutional predecessor of Kosovo's Ministry of Foreign Affairs, serving in that capacity until 2006. In 2000, Professor Hasani played a leading role in establishing the Department of Political Science and Public Administration at the University of Prishtina "Hasan Prishtina", serving as the project manager responsible for its creation and subsequently becoming its inaugural Head.

Between 2000 and 2002, he held the position of founding director of the Center for Human Rights of the University of Prishtina, financed and supported by the Finnish Human Rights Project and World University Service (WUS) Austria.

Between 1992 and 1997, Professor Hasani worked as legal adviser to the Albanian Ministry of Foreign Affairs. In this capacity, he was also part of the Kosovo delegation participating in the Rambuillet Peace Conference (February–March 1999).

Enver Hasani graduated from the Faculty of Law in Pristina in 1984 with an honorary degree, achieving an average grade of 9.13 (out of ten). He also completed postgraduate studies in the field of civil and economic law in Pristina, writing a Master Thesis by the title of "Ne Bis in Idem in Civil Procedure".

Between 1984 and 1986, Professor Hasani pursued postgraduate studies in International Law at the Faculty of Law of the University of Belgrade. He

subsequently continued his postgraduate education at the prestigious Bilkent University in Ankara, Turkey, where he completed a two-year programme in International Law and International Relations (1996–1998). Upon completion of this programme, he enrolled in the PhD programme at the same university in 1998. Although the doctoral programme was designed to span five academic years, Professor Hasani successfully completed all its requirements in just three years (1998–2001). Having passed all the required doctoral examinations, including the comprehensive PhD examination, he successfully defended his doctoral dissertation in June 2001, entitled *Self-Determination, Territorial Integrity and International Stability: The Case of Yugoslavia*.

During his professional career, Professor Hasani has published dozens of articles in the fields of civil and constitutional law as well as international law and relations in local, regional and international journals. He has published several books on the same topics, two of them in English, including his PhD dissertation. This is his fourteenth book. He has also co-authored many professional publications and acted as editor in cooperation with prestigious publishing houses abroad. His articles appear in the following academic journals:

- The Fletcher Forum of World Affairs
- Journal of Constitutional History
- Mediterranean Journal of Human Rights
- Perceptions
- Review of Central and East European Law
- Tomas Jefferson Law Review
- Vienna Journal on International Constitutional Law
- Südosteuropa
- German Law Journal
- International Journal of Public Law and Policy etc.

Books Authored or Co-Edited by Professor Hasani (in chronological order):

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Books to which Professor Hasani contributed:

"The Case of the Serb Association before the Constitutional Court of Kosovo", published in Andrzej Szmyt and Boguslaw Banaszak (eds), The Transformation of Law Systems in Central, Eastern and Southeastern Europe. Liber Amicorum in Honorem Prof. Dr. Dres. H.C. Rainer Arnold (Gdansk University Press: Gdansk, 2016).

"Constitutional Justice in Central and Eastern Europe", published in Mario Lucia Amaral, Selma Pedroso Bettencourt (eds.), Estudos em Homenagemao Senhor Conselheiro Presidente Rui Moura Ramos. Vol. II (EDIÇÕES ALMEDINA, S.A.: Lisboa, Portugal, 2016).

"Basic Features of the Constitutional System in Kosovo", published in Rainer Arnold, Jose Ignacio Martinez-Estay (eds.), Rule of Law, Human Rights and Judicial Control of Power. Some Reflections from National and International Law (SPRINGER International Publishing AG: Switzerland, 2017).

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"Constitutional Review of Democracy: Key decisions of the Constitutional Court of Kosovo", published in Rainer Arnold, Ingrida Danėlienė (eds.), The Concept of Democracy as Developed by Constitutional Justice (The Constitutional Court of the Republic of Lithuania: Vilnius, 2020).

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This book examines the material constitution in Kosovo, based on European theory and practice, referencing scholars from Mortati and Kelsen to recent authors. The dialogue with Serbia, ongoing since 2011, initially led to vague obligations. In 2015, an agreement granted broad rights to the local Serb community but was declared unconstitutional by Kosovo's Constitutional Court. After delays, the 2023 Ohrid Agreement granted the Serbs political and territorial autonomy, including sovereignty over their religious and cultural heritage. The autonomy was further operationalised through a Statute for the Association/Community of Serb Municipalities, drafted by EU experts and awaiting Kosovo Constitutional Court approval. This effectively created a new material constitution for Kosovo.

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