WHOSE SECULARISM? WHICH LAÏCITÉ? NEGOTIATING TRANSNATIONAL AND NATIONAL CONSTITUTIONALISM IN KOSOVO

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> *"And how do you know that they will do it no harm?" the* hodja *broke in angrily. "Who told you? Don't you know that a single word can destroy whole cities; how much more then such a babel!"* [1]

INTRODUCTION

Those perusing their news feed on September 4, 2020, may have been surprised to learn amid inundating coverage about the pandemic and U.S. presidential election that the leaders of Serbia and Kosovo were convening in the White House to sign an "economic normalization" agreement.[2] Photos of the meeting in the Oval Office showed President Trump posed between a noticeably dour Serbian President Aleksandar Vučić and Kosovo Prime Minister Avdullah Hoti.[3] President Trump affectionately remarked, "there was a lot of fighting, and now there's a lot of love . . . . Economics can bring people together."[4] The agreement, subsequently referred to as the "Washington Agreement,"[5] was designed to facilitate economic

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1 IVO ANDRIĆ, THE BRIDGE ON THE DRINA 207 (Lovett F. Edwards trans., Univ. of Chi. Press 1977) (1945).

2 Richard Grenell, Opinion, *Serbia-Kosovo Agreement Results from Trump's Different Brand of Diplomacy*, THE HILL (Sept. 4, 2020), https://thehill.com/opinion/international/515125-serbia-kosovo-agreement-results-from-trumps-different-brand-of [https://perma.cc/YXW5-GNQV].

3 *Id.*

4 Remarks in a Meeting with President Aleksandar Vucic of Serbia and Prime Minister Avdullah Hoti of Kosovo and an Exchange with Reporters, 2020 DAILY COMP. PRES. DOC. 650 at 3 (Sept. 4, 2020).

5 Robert Muharremi, *The "Washington Agreement" Between Kosovo and Serbia*, AM. SOC'Y INT'L L. INSIGHTS, Mar. 12, 2021, at 1.

cooperation between the Balkan neighbors, reportedly including tariff cuts, energy and water resource sharing, and transportation and border crossing improvements.[6] But President Vučić of Serbia has since insisted that the Washington Agreement is merely bilateral—between the United States and Serbia—and that Kosovo was never recognized as a third party in the negotiations.[7] Therefore, some have criticized the Washington Agreement for being inconsequential and a short-term stunt for President Trump's re-election campaign.[8] More recently, hopes for using the Washington Agreement as a springboard for peacebuilding were hampered when a summit at the White House between Kosovo and Serbia was postponed after the President of Kosovo was indicted for war crimes.[9]

Nevertheless, the alleged détente has sparked renewed interest in resolving the Balkan peninsula's most intractable diplomatic contest. Kosovo recently celebrated the thirteenth anniversary of its declaration of independence, yet Serbia continues to refuse recognition of Kosovo statehood.[10] An independent Kosovo—once the heartland of the medieval Serbian kingdom—threatens the historical and religious identity of Serbia. Economic cooperation is certainly important, but the political and territorial conflict is also infused with religious meaning as Orthodox Serbians are frequently pitted against Muslim Kosovars in public discourse.[11] As a result, religious disputes have proven to be an especially significant obstacle to a political resolution between Serbia and Kosovo.[12] Any discussion of normalization

6 The official text of the agreement has not been released to the public. For a summary of Serbia and Kosovo's commitments, see *id.* at 2. *See also* Michael Fitzpatrick, *Serbia, Kosovo Agree to Normalise Economic Relations in US-Brokered Deal*, RFI (June 9, 2020), https://www.rfi.fr/en/europe/20200906-serbia-kosovo-agree-to-normalise-economic-relations-in-us-brokered-deal-trump [https://perma.cc/Q4LW-PF4N].

7 *See* Muharremi, *supra* note 5, at 4.

8 *See* French Press Agency, *Skepticism in Kosovo, Serbia over Trump-Brokered 'Peace' Deal*, DAILY SABAH (Sept. 19, 2020), https://www.dailysabah.com/world/europe/skepticism-in-kosovo-serbia-over-trump-brokered-peace-deal [https://perma.cc/GA8X-XCBE].

9 Patrick Kingsley, *U.S. Postpones Balkan Peace Summit, in Blow to Trump Foreign Policy*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/06/25/world/europe/serbia-kosovo-trump-hashim-thaci.html [https://perma.cc/45C2-Z78F].

10 Talha Ozturk, *Kosovo Marks 13th Independence Day*, ANADOLU AGENCY (Feb. 17, 2021), https://www.aa.com.tr/en/world/kosovo-marks-13th-independence-day/2148324 [https://perma.cc/DM4Z-D5HP] ("Serbia continues to see Kosovo as its own territory.").

11 Slobodan Milošević, President of Serb., 1989 St. Vitus Day Speech (June 28, 1989), http://www.slobodan-milosevic.org/spch-kosovo1989.htm [https://perma.cc/3X7R-7KZ4] (invoking the Serbian national sacrifice to repel the Ottomans from Europe: "Six centuries ago, Serbia heroically defended itself in the field of Kosovo, but it also defended Europe. Serbia was at that time the bastion that defended the European culture, religion, and European society in general.").

12 *See* Press Release, President of the Republic of Serb., Intrusion into the Protected Zone of the Visoki Dečani Monastery (Aug. 15, 2020), https://www.predsednik.rs/en

between Serbia and Kosovo must grapple with the legal framework governing the relationship between the Kosovo state and its religious communities. Many Orthodox Serbs who have remained in Kosovo feel persecuted,[13] while Muslim Kosovars have complained that the law gives preferential treatment to the minority Serb community.[14] Additionally, other minority religious communities in Kosovo—Roman Catholics, Jews, Protestants, and Sufi mystics—are discontented with the law's ambiguity regarding their legal status and rights.[15]

Several commentators have recognized the inadequacy and incoherence of Kosovo's religious freedom law and jurisprudence.[16] The source of these legal difficulties, however, is not merely a local issue. Kosovo's constitutional structure is special as it integrates international law[17] directly into its domestic legal system and often prioritizes these global norms over national ones.[18] Professor Paolo G. Carozza calls this "transnational constitutionalism."[19] However, Kosovo's preference for "transnational constitutionalism" has created

/press-center/press-releases/press-release-on-intrusion-into-the-protected-zone-of-the-visoki-decani-monastery [https://perma.cc/DW28-T2G7] ("[President Vučić] emphasised that Serbia perceives the works in the vicinity of Visoki Dečani as a means of pressure against our side and as a message that our cultural and religious heritage is a hostage of Albanian highhandedness."). To be sure, there are other economic and political disputes contributing to the antagonistic relationship between Serbia and Kosovo.

13 *See id.*; *see also* U.S. DEP'T OF STATE, KOSOVO 2020 INTERNATIONAL RELIGIOUS FREEDOM REPORT 6–8 (2021).

14 *See* Jeton Mehmeti, *Faith and Politics in Kosovo: The Status of Religious Communities in a Secular Country*, *in* THE REVIVAL OF ISLAM IN THE BALKANS: FROM IDENTITY TO RELIGIOSITY 62, 74 (Arolda Elbasani & Olivier Roy eds., 2015) ("[U]nder the current legal provisions, of the five recognized religious groups, only the status, organization and economic affairs of the Serbian Orthodox Church are regulated.").

15 *See id.* at 73–74; *see also* Instit. on Religion & Pub. Pol'y, Org. for Sec. & Co-op. in Eur., *Analysis of the Law on Freedom of Religion in Kosovo Adopted by the Assembly of Kosovo*, at 2, O.S.C.E. Doc. HDIM.NGO/376/06 (Oct. 10, 2006).

16 Jeton Mehmeti, *The Struggle of Kosovo Policymakers to Upgrade the Law on Religious Affairs*, OCCASIONAL PAPERS ON RELIGION E. EUR., Aug. 2019, at 108, 108–09; Kyle Woods, Comment, *Religious Freedom in Kosovo: Prenatal Care to a New Nation*, 2008 BYU L. REV. 1009, 1010–11; *Serbian Cultural and Religious Heritage in Kosovo a Sovereignty Issue for Both Belgrade and Pristina*, KOSSEV (May 27, 2020), https://kossev.info/serbian-cultural-and-religious-heritage-in-kosovo-a-sovereignty-issue-for-both-belgrade-and-pristina/ [https://perma.cc/LN7C-MBQE].

17 In this Note, "international law" will be used as shorthand to refer to international legal instruments "constitutionalized" in Kosovo's Constitution and the case law from the European Court of Human Rights.

18 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 22.

19 Paolo G. Carozza, *National and Transnational Constitutionalism, and the Protection of Fundamental Human Rights*, *in* NATION, STATE, NATION-STATE 83, 86 (Vittorio Hösle, Marcelo Sánchez Sorondo & Stefano Zamagni eds., 2020). This is in contrast to "national constitutionalism" which prioritizes "national history, political culture, legal norms, and institutional structures in determining and legitimating claims of fundamental rights." *Id.*

an incongruity between what Kosovo says it is (i.e., a secular or *laic* state)[20] and how it behaves toward religious communities (sometimes preferentially, other times with hostility).[21] As a result, religious communities in Kosovo have had trouble navigating the legal waters of the new republic. This uncertainty over legal status and its accompanying rights and responsibilities has generated vitriol against Kosovo's public officials, as well as distrust between religious communities.[22] Some scholars and commentators have proposed piecemeal legislative and administrative reforms to resolve the inefficiencies in the legal system's implementation of state secularism and treatment of religious individuals and communities.[23] While these proposals are certainly efficacious, they are not sufficient.[24] As Kosovo transitions further away from its supervised independence, there must be a deeper reckoning with the constitutional strictures of secularism and the rights of religious communities and individuals.

This Note will argue that Kosovo is not constitutionally bound by international case law, and thus it has greater autonomy to craft policy and law on matters of religion that are adapted to the particularities of the ethnic and religious communities within its borders. Kosovo must remain a secular state pursuant to Article 8 of the constitution, but it is not constitutionally required to import foreign and contradictory principles of secularism into its domestic law. Instead, Kosovo may consult the Ahtisaari Plan—a preconstitutional status agreement that was highly influential in constitutional drafting—which permitted a locally controlled approach to actualizing the flexible constitutional requirement of state secularism.[25] In doing so, Kosovo may also reconcile the equally authoritative yet incompatible translations of Article 8 in its constitution. This is surely not localism for localism's sake. Professor Carozza succinctly explains the "dialogue" between a regime's respect for universal human rights and commitment to national and local norms:

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20 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 8 ("The Republic of Kosovo is a secular state and is neutral in matters of religious beliefs.").

21 *See infra* Sections IV.A–C. But Kosovo is not the only constitutional regime struggling with making sense of the strictures of state secularism. András Sajó notes that constitutional secularism in many Western democracies is "fuzzy" and a "convenient façade" that "may not correspond to social realities." András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT'L J. CONST. L. 605, 617 (2008).

22 *See* U.S. DEP'T OF STATE, KOSOVO 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 5–6 (2020); *see also* Leonie Vrugtman & Diori Angjeli, *Country Snapshot Kosovo*, OCCASIONAL PAPERS ON RELIGION E. EUR., Aug. 2019, at 14, 16–17.

23 *See* Mehmeti, *supra* note 14, at 78; Woods, *supra* note 16, at 1054.

24 For background on continuing religious conflict in the region, see generally U.S. DEP'T OF STATE, *supra* note 13, at 1–12.

25 The Ahtisaari Plan is discussed in more detail below in Parts I–II.

> Efforts to integrate commitments to universal rights with stronger orientations toward national identity, self-government, and localism could help us to reach a more adequate equilibrium regarding fundamental rights and democracy in both international and in national constitutional systems. Such an integration would, to begin with, bring about a greater unity of the abstract idea of fundamental rights with concrete social life, a unity necessary if the common good is to be more a tangible reality than pious words.[26]

To be sure, the implications of this argument would not unmoor Kosovo from the international legal instruments enshrined in its constitution and the ancillary human rights commitments. This Note identifies a misunderstanding of the strictures of Kosovo's constitution regarding state secularism and demonstrates how this mistake has inhibited democratic dialogue within the country,[27] in addition to souring diplomatic relations with Serbia. The tension between international legal institutions and national sovereignty need not always be antagonistic; there can be a dialogic relationship grounded in mutual respect even amid passionate disagreement.

The subject of this Note is situated squarely within a debate about the principle of subsidiarity[28] and thus should be of interest even to those who have no prior familiarity with the Balkans. The principle of subsidiarity, as described by Russell Hittinger, "presupposes that there are plural authorities and agents having their 'proper' (not necessarily, lowest) duties and rights with regard to the common good—immediately, the common good of the particular society, but also the common good of the body politic."[29] Subsidiarity entails a "negative" dimension which prohibits the state from intervening in the domain of lower forms of social organization that are properly equipped to

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26 Carozza, *supra* note 19, at 104–05.

27 Professor Carozza identifies four problems that result from the "thinness of the cultural basis of human rights law." *Id.* at 101–02. First, it renders human rights law a "bare and unobserved formality" and liable to be maintained with significant coercive force. *Id.* at 102. Second, it is not self-sustaining and depends on "extra-legal sources of value and commitment." *Id.* Third, it diminishes the role of practical reasoning in the political sphere, which is substituted with "weak legalism and formalism." *Id.* at 103. Fourth, it "masks the deeper differences among cultures" and merely "defers disagreement on fundamental questions." *Id.*

28 For a discussion of the principle of subsidiarity and international human rights law, see generally Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).

29 Russell Hittinger, *The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation*, *in* PURSUING THE COMMON GOOD: HOW SOLIDARITY AND SUBSIDIARITY CAN WORK TOGETHER 75, 109–10 (Margaret S. Archer & Pierpaolo Donati eds., 2008) ("[T]he point of subsidiarity is a normative structure of plural social forms, not necessarily a trickling down of power or aid.").

undertake tasks directed toward the common good.[30] Subsidiarity also includes a "positive" dimension which presupposes that higher forms of social organization have the right and duty to intervene in the domain of lower forms of social organization when the lower form cannot adequately perform a task in pursuance of the common good.[31] The principle of subsidiarity then involves both immunity and intervention. This Note will explore how Kosovo's constitution has delegated authority between international, national, and local actors to imbue the ambiguous requirement of state secularism with material meaning. It is an attempt, as Professor Carozza describes, to "put subsidiarity to the test by seeking to apply it to concrete, 'real world' problems."[32] Kosovo may be small, but this constitutional debate is capable of significantly informing our understanding of the role of subsidiarity in international human rights law, and in turn, making secularism less foreign and more intelligible to people of all faiths.

This Note will proceed as follows: Part I will set the stage and briefly outline the history of Kosovo and its current political status. Part II will then introduce the Kosovo Constitution and the process by which international agreements (such as the European Convention of Human Rights)[33] were embedded in the text and made binding legal authority. It will show that, although the international agreements are binding, the Kosovo Constitution does not make international case law obligatory. Part III will then address different foundational documents drafted in anticipation of Kosovo's statehood and how judicial and administrative institutions should apply them to legal disputes involving religion. Finally, Part IV examines some case studies from the Constitutional Court of Kosovo, including a local headscarf ban, special protective zones, and religious-community autonomy issues. These case studies will demonstrate how Kosovo has interpreted and

30 Carozza, *supra* note 28, at 44.

31 *Id.*

32 *Id.* at 78.

33 According to Amnesty International:

> The European Convention on Human Rights (ECHR) is an international human rights treaty between the 47 states that are members of the Council of Europe . . . [and] [g]overnments signed up to the ECHR have made a legal commitment to abide by certain standards of behaviour and to protect the basic rights and freedoms of ordinary people.

What is the European Convention on Human Rights?, AMNESTY INT'L UK (Aug. 21, 2018), https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights [https://perma.cc/7RYW-Z2ST]. The Council of Europe is a human rights organization including forty-seven member states, twenty-seven of which are members of the European Union. The Council of Europe enforces the ECHR. *Who We Are*, COUNCIL OF EUR., https://www.coe.int/en/web/about-us/who-we-are [https://perma.cc/B8CM-KTYZ].

applied foreign understandings of secularism in its constitutional and domestic law.

I. HISTORY AND STATE BUILDING

Any attempt at a historical narrative of Kosovo will be highly fraught with disagreement and acrimony. History becomes a tool to legitimize territorial claims and further political agendas.[34] This Part of the Note does not attempt to adjudicate these historical disputes but rather provides a necessary foundation for the constitutional analysis that is to follow.

A. Medieval History and National Remembrance

Kosovo[35] encompasses a small, land-locked territory in the West Balkans (slightly smaller than Connecticut) and shares a border with Serbia, Montenegro, Macedonia, and Albania.[36] The population is estimated to be over 1.9 million, of which 93% are ethnic Albanians.[37] Bosniaks, Serbs, and Turks are the largest ethnic minorities with each group composing somewhere between 1% to 2% of the population.[38] The last official census was in 2011, and according to a 2019 U.S. State Department report, 95.6% of the population are Muslim, 2.2% are Roman Catholic, 1.4% are Serbian Orthodox, and less than 1% are Protestants, Jews, and persons not answering or responding "other" or "none."[39] The actual percentage of the population identifying as Serbian Orthodox is certainly higher, as many ethnic Serbs boycotted the census.[40]

Kosovo may be small on a map, but it holds an extremely significant position in Serbian history and culture. It is the place where a medieval Serbian army—composed of a coalition of regional forces—battled the advancing Ottoman army at the Field of Blackbirds

34 *See* TIM JUDAH, KOSOVO: WHAT EVERYONE NEEDS TO KNOW 18–29 (2008).

35 The sovereign-nation status of Kosovo is still disputed. Serbia does not recognize Kosovo as a sovereign state and claims sovereignty over the territory. Currently, roughly ninety-eight UN-member countries (51%) recognize Kosovo as an independent state. *Map & Analysis: Which Countries Recognize Kosovo in 2020?*, POL. GEOGRAPHY NOW (Sept. 23, 2020), https://www.polgeonow.com/2020/09/which-countries-recognize-kosovo-independence.html [https://perma.cc/J8B9-Q3BP].

36 JUDAH, *supra* note 34, at 127–29.

37 *Explore All Countries—Kosovo*, THE WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/kosovo/ [https://perma.cc/8RQ3-MA7G] (Sept. 23, 2021).

38 *Id.*

39 U.S. DEP'T OF STATE, *supra* note 22, at 2.

40 *Id.*

in 1389.[41] The battle is now remembered as a strategic defeat, or at least a tactical draw, but it is talismanic in the national imagination, at least since the nineteenth century during Ottoman decline and the ascendant Serbian nationalist ideology.[42] The Field of Blackbirds represents the Serbian sacrifice for Europe and Christianity. In epic poetry, the battle is compared to a Christ-like sacrifice on the Cross.[43] Kosovo was to become a spiritual, priestly kingdom, not a temporal one:

> [W]eave a church on Kosovo,
> build its foundations not with marble stones,
> build it with pure silk and with crimson cloth,
> take the Sacrament, marshal the men,
> they shall die,
> and you shall die among them as they die.[44]

Kosovo has even been described as the "Serbian Jerusalem"—destroyed and conquered by an invading army yet still the spiritual locus of the Serbian people.[45] This narrative of the Field of Blackbirds proved to be a useful tool in much more recent times and in a very different political climate. In 1989, Yugoslav politician Slobodan Milošević gave his infamous Gazimestan Speech to commemorate the sexcentenary of the battle.[46] Milošević stood in front of a crowd of perhaps a million and, while erasing the explicit Christian imagery, invoked the battle as exemplifying Serbia's "defen[se of] Europe" and referred to Serbia as "this unjustly suffering country."[47] Accordingly, the Field of Blackbirds—and Kosovo itself—may be described as a "mobilizing idea" that "pervades both high and low culture" useful to the agents that can best wield it to fit their specific political narrative.[48] Thus, any analysis of the modern conflict between Serbia and Kosovo must keep this background narrative in mind. It also provides a hint

41 Anna Di Lellio, *The Field of the Blackbirds and the Battle for Europe*, *in* DYNAMICS OF MEMORY AND IDENTITY IN CONTEMPORARY EUROPE 149, 149 (Eric Langenbacher, Bill Niven & Ruth Wittlinger eds., 2012).

42 *Id.* at 155JUDAH, *supra* note 34, at 20–21; NOEL MALCOLM, KOSOVO: A SHORT HISTORY 58, 79–80 (1998). Malcolm's book is controversial for its allegedly pro-Albanian bias, but it will only be used in this Note as a supplement to support claims made in other sources.

43 *See* JUDAH, *supra* note 34, at 23.

44 *Id.* at 22.

45 *Id.* at 24; *see also* MALCOLM, *supra* note 41, at 80 ("[T]he Serbs are often said to consider themselves as a 'heavenly people.'").

46 Milošević, *supra* note 11; MALCOLM, *supra* note 41, at 344.

47 Milošević, *supra* note 11; *see also* JUDAH, *supra* note 34, at 67–68.

48 Di Lellio, *supra* note 41, at 152–53; *see also* MALCOLM, *supra* note 41, at 344.

as to why seemingly trivial religious disagreements within Kosovo can transform into conflicts of international import.

B. Kosovo in the Twentieth and Twenty-First Centuries

The hope for a resurrected Kosovo was put on hold for over five centuries. It was only between 1912–13 that the Ottomans finally withdrew from Kosovo after their defeat in the First Balkan War.[49] On December 1, 1918, after the end of World War I, the former Balkan provinces of the now dissolved Hapsburg and Ottoman Empires created a new monarchical state named "the Kingdom of Serbs, Croats, and Slovenes," which included the territory of Kosovo.[50] During World War II, the Italians, Nazis, and Bulgarians split Kosovo between themselves.[51] In 1944, the Axis forces were expelled by General Josip Broz Tito's Yugoslav Partisans.[52] The Partisans dissolved the royal kingdom and declared Yugoslavia a republic on November 29, 1945.[53] Tito, now leading a one-party state, made Kosovo an autonomous region of the Republic of Serbia in order to appease the Kosovars and limit Serbian domination of Yugoslavia, which was composed of six constituent republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia).[54]

Yugoslavia in the 1950s and 1960s experienced an economic surge, political liberalization, cultivation of the arts, and an active foreign policy that made it an influential global power between the United States and the USSR.[55] This "golden era," however, was not distributed equally and simultaneously across the Yugoslav republics and provinces.[56] In the federal structure, Kosovo's economy lagged behind that of other republics and provinces; as one commentator put it, "Kosovo became the code word for the failure of Yugoslavia's policy of cohesion."[57] The Yugoslav federal government continued to invest huge sums in the development of Kosovo without much to show for its financial commitment.[58] The political situation began to spiral out of control after Tito's death in 1980, and the Albanians in Kosovo renewed calls for their own independent republic in Yugoslavia which

49 JUDAH, *supra* note 34, at 37–38; MALCOLM, *supra* note 41, at 264–65.

50 JUDAH, *supra* note 34, at 41; MALCOLM, *supra* note 41, at 264.

51 JUDAH, *supra* note 34, at 46–47; MALCOLM, *supra* note 41, at 290–91.

52 *See* MARIE-JANINE CALIC, A HISTORY OF YUGOSLAVIA 159–60 (2019).

53 *See id.* at 163–64.

54 *See id.* at 164, 167–68; JUDAH, *supra* note 34, at 49–51; MALCOLM, *supra* note 41, at 316.

55 *See* CALIC, *supra* note 52, at 176–92.

56 *See id.* at 213; JUDAH, *supra* note 34, at 55–57; MALCOLM, *supra* note 41, at 323.

57 CALIC, *supra* note 52, at 258–59.

58 *Id.*; MALCOLM, *supra* note 41, at 323.

were followed by brutal Serbian crackdowns.[59] Political unrest was accompanied by a severe economic downturn, calls for greater autonomy from the constituent republics, and the general withering away of trust in the foundational principles of Yugoslav socialism.[60] The country was in true crisis.[61]

Everything finally broke down in the early 1990s. The Slovenes and Croatians declared independence from Yugoslavia while internecine violence erupted in Bosnia.[62] In 1995, after years of fighting and stubborn negotiations about borders, the United States brokered a peace deal in Dayton, Ohio, between the warring ex-Yugoslav republics.[63] But demands for an independent Kosovo were largely ignored at Dayton.[64] In February 1998, having lost all faith in a satisfactory diplomatic resolution, the Kosovo Liberation Army launched a series of attacks against Serb targets; Serbia responded aggressively.[65] The war ended with a seventy-eight-day NATO bombing campaign against the Yugoslav Army that was the product of the international community's resolve to avoid a "second Bosnia."[66] On June 9, 1999, the Serb leader Slobodan Milošević agreed to recognize Kosovo as a UN protectorate in Yugoslavia.[67] The next day the UN Security Council passed Resolution 1244 (1999) which provided for Serbian troop withdrawal from Kosovo and replacement by a NATO peacekeeping force.[68]

The baton was then handed over to the United Nations Interim Administration Mission in Kosovo (UNMIK). Through Resolution 1244, the UN Security Council vested UNMIK with all legislative and executive authority in Kosovo and tasked it with preparing Kosovo to eventually be autonomous and self-governing.[69] The UN soon realized that postponing the decision to determine the final status of Kosovo was unsustainable as bloody and destructive conflict between Serbs and

59 CALIC, *supra* note 52, at 258; JUDAH, *supra* note 34, at 57; MALCOLM, *supra* note 41, at 334–35.

60 CALIC, *supra* note 52, at 251–58.

61 *Id.*

62 *Id.* at 297, 300–03.

63 *Id.* at 313–17.

64 *See id.* at 314–15; JUDAH, *supra* note 34, at 79–80; MALCOLM, *supra* note 41, at 353.

65 JUDAH, *supra* note 34, at 83–87.

66 CALIC, *supra* note 52, at 315–16; *see also* JUDAH, *supra* note 34, at 81, 87.

67 CALIC, *supra* note 52, at 315.

68 *Id.* at 316; *see also* JUDAH, *supra* note 34, at 91.

69 JUDAH, *supra* note 34, at 94; MALCOLM N. SHAW, INTERNATIONAL LAW 210–11 (9th ed. 2021).

Albanians continued unabated.[70] In 2005, the UN Secretary General Kofi Annan asked Martti Ahtisaari—the former Finnish president involved in ending the bombing of Serbia—to lead talks on the future of Kosovo.[71] The Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan) sought a solution to the deadlock in Belgrade and Priština and the unrestrained violence, riots, and pogroms throughout the region.[72] The Ahtisaari Plan was accompanied by a separate recommendation in favor of a "supervised independence" under a number of NATO-led international organizations.[73] Although the Ahtisaari Plan was successfully blocked in the Security Council by Russia, the Kosovo Albanians agreed in March 2007 to implement the Ahtisaari Plan in exchange for recognition from the majority of EU states and financial assistance.[74] Kosovo unilaterally declared its independence on February 17, 2008.[75] The declaration was closely coordinated with the Americans and Europeans—Kosovo first had to consent to enforcement of the Ahtisaari Plan and recognition that Resolution 1244 was to remain in operation.[76] Nevertheless, with its uncertain legal status, sluggish economy, and vocal minority of disgruntled Serbs, Kosovo set off from the starting line limping.[77] Kosovo's borders are still not stable as a land swap with Serbia has been considered as a possible path to achieve mutual recognition.[78] And although supervised independence by the international community ended in 2012, a NATO peacekeeping mission (the Kosovo Force, or KFOR) remains in Kosovo.[79] Kosovo has struggled to adapt to this new constitutional order.

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70 JUDAH, *supra* note 34, at 108–10; HENRY H. PERRITT, JR., THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN 221 (2010) ("Failure to adopt the Ahtisaari Plan would have meant an eventual guerrilla war . . . .").

71 JUDAH, *supra* note 34, at 108–11; MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE 189 (2009).

72 JUDAH, *supra* note 34, at 108, 113, 162 n.6; *see also* WELLER, *supra* note 71, at 205, 211.

73 JUDAH, *supra* note 34, at 113; WELLER, *supra* note 71, at 212.

74 JUDAH, *supra* note 34, at 115; *see also* WELLER, *supra* note 71, at 217–19.

75 JUDAH, *supra* note 34, at 140; WELLER, *supra* note 71, at 230.

76 JUDAH, *supra* note 34, at 142; WELLER, *supra* note 71, at 238.

77 JUDAH, *supra* note 34, 145–51. For further discussion of Kosovo's legal, economic, and social challenges after independence, see PERRITT, *supra* note 70, at 221–53.

78 CALIC, *supra* note 52, at 318. A land swap remains a possibility. *See* Sasa Dragojlo & Xhorxhina Bami, *Land Swap Idea Resurfaces to Haunt Serbia-Kosovo Talks*, BALKAN INSIGHT (June 16, 2020), https://balkaninsight.com/2020/06/16/land-swap-idea-resurfaces-to-haunt-serbia-kosovo-talks/ [https://perma.cc/H7MP-KNK4].

79 *See NATO's Role in Kosovo*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natolive/topics_48818.htm [https://perma.cc/MJF6-ZRE7] (Oct. 15, 2021) ("Today, KFOR consists of approximately 3,500 troops provided by 27 countries.").

II. KOSOVO'S CONSTITUTION AND CONSTITUTIONAL COURT

Part II sets out with a few tasks. It first lays out the history and drafting process for Kosovo's constitution. It then proceeds to explain the constitutional authority of international legal instruments and foreign case law. Next, Part II highlights how foreign conceptions of secularism (including Turkish, European, and American) have been institutionalized in—or at least exerted a heavy influence on—Kosovo's constitutional law and domestic legislation.

A. Introduction to the Ahtisaari Plan and Kosovo's Constitution

Serbian occupation of Kosovo had ended in the summer of 1999, but it would take almost nine years before Kosovo would be in a position to declare independence.[80] This interregnum presented the international community with a monumental task—constructing state institutions and legal frameworks almost carte blanche.[81] Over the course of years of drawn-out negotiations, a series of documents emerged that began to lay out the contours of Kosovo's political status. The most important document was the Ahtisaari Plan. It was the foundational document and literal blueprint for Europe's newest state, as "[w]ide portions of the constitution . . . were predetermined by the Ahtisaari plan."[82] A small expert commission of twenty-one members—a mix of Serbian and Kosovar deputies—relied on the Ahtisaari Plan to draft the constitutional text over a period of eight months in about 120 sessions.[83] They produced a document containing 162 articles, contained in fourteen chapters, and spanning over sixty pages of text.[84] The constitution was adopted on April 9, 2008—fewer than two months after Kosovo declared independence—and took effect on June 15 of that year.[85]

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80 JUDAH, *supra* note 34, at 90, 140, 143–44.

81 For the difficult position of European negotiators, see Marc Weller, *The Vienna Negotiations on the Final Status for Kosovo*, 84 INT'L AFFS. 659, 659 (2008) (claiming that the negotiators in Vienna were attempting to "square a circle").

82 ANDREA LORENZO CAPUSSELA, STATE-BUILDING IN KOSOVO: DEMOCRACY, CORRUPTION AND THE EU IN THE BALKANS 163 (2015); *see also* Special Envoy of the U.N. Secretary-General, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status: Comprehensive Proposal for the Kosovo Status Settlement*, art. 10.1, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) [hereinafter Ahtisaari Plan].

83 CAPUSSELA, *supra* note 82, at 162–63. The committee was composed of fifteen members appointed by the Kosovo President, three appointed by the Kosovo Serb contingent in the Assembly, and three members appointed by non-majority contingencies in the Assembly. *See* WELLER, *supra* note 71, at 246.

84 WELLER, *supra* note 71, at 249.

85 *Id.*

The international community was heavily involved in the drafting process. The constitutional commission received drafting assistance from the European-led International Civilian Office (ICO)[86] and the U.S. embassy.[87] Beside state actors, numerous international NGOs exercised influence on the drafting process.[88] The drafting of the Kosovo Constitution was thus an "international imposition of the Ahtisaari Plan."[89] To be sure, the process was not completely behind closed doors. The United States developed software to allow for the submission of suggestions and comments from the public. Additionally, the twenty-one members of the commission frequently visited communities throughout Kosovo to introduce the drafts and solicit comments.[90] Despite the efforts to incorporate public opinion, there have been legitimate concerns about the lack of local involvement in the drafting process.[91] For instance, to ensure complete compliance with the Ahtisaari Plan, the international experts insisted on adopting verbatim many of its mandatory provisions. This decision, although perhaps prudent, excluded some drafting recommendations from the general public.[92]

B. The Ahtisaari Plan as a Tool for Constitutional Interpretation

The Ahtisaari Plan, though, was more than a drafting document. The Kosovo Constitution endowed it with some degree of legal authority.[93] Article 143 of the 2008 Kosovo Constitution read:

> Notwithstanding any provision of this Constitution . . . [t]he Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement [the Ahtisaari Plan] dated 26 March 2007. *If there are inconsistencies between the provisions*

86 The ICO had no direct administrative role in Kosovo but was responsible for the implementation of the Ahtisaari Plan and oversight of the Kosovo public authorities. The ICO had very broad and discretionary powers including the ability to annul laws or decisions of public authorities that were deemed to conflict with the Plan, the power to remove any public authorities, and could appoint judges to the CCK. CAPUSSELA, *supra* note 82, at 104–06.

87 *Id.* at 163.

88 WELLER, *supra* note 71, at 241.

89 Paul de Hert & Fisnik Korenica, *The New Kosovo Constitution and Its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies*, 76 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 143, 151 (2016) (emphasis omitted).

90 WELLER, *supra* note 71, at 249.

91 *See id.* at 258; *see also* CAPUSSELA, *supra* note 82, at 163–64.

92 WELLER, *supra* note 71, at 250.

93 *Id.*; *see also* Ahtisaari Plan, *supra* note 82, annex I, art. 1 ("The Constitution of Kosovo shall . . . be interpreted in accordance with [the Ahtisaari Plan].").

> *of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the [Ahtisaari Plan], the latter shall prevail.*[94]

It may come as a surprise then to those well-adjusted to constitutional supremacy that, before 2012, the Kosovo Constitution was technically not the highest law of the land.[95] Article 143 ostensibly appeared to contradict Article 16, which stipulated that "[t]he Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution."[96] This was an unusual dialectic: did the Ahtisaari Plan have self-standing legal authority or is it completely parasitic on the Kosovo Constitution?[97] In any case, following the end of international supervised independence in 2012, the Kosovo Assembly amended the constitution and deleted Article 143 from the constitutional text.[98] As a result, the Kosovo Constitution is now the highest law of the land and does not include reference to the Ahtisaari Plan.[99] However, even though the Ahtisaari Plan no longer has constitutional authority, that does not preclude it as a tool for constitutional interpretation. The Ahtisaari Plan was integral in the drafting of the Kosovo Constitution, and recourse to that document may help elucidate the constitutional text when the language is ambiguous or contradictory.[100]

C. The Constitutional Court of Kosovo

Following the end of hostilities in 1999, the Kosovo legal system was in shambles. There were two different court systems: the UNMIK courts and the Serbian parallel courts.[101] The UNMIK courts were established by the international community and staffed mostly by

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94 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 143, *repealed by* CONST. OF THE REPUBLIC OF KOS. amend. 4 (emphasis added).

95 *Cf.* WELLER, *supra* note 71, at 250; de Hert & Korenica, *supra* note 89, at 151; Joseph Marko, *The New Kosovo Constitution in a Regional Comparative Perspective*, 33 REV. CENT. & E. EUR. L. 437, 446 (2008).

96 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 16.1; WELLER, *supra* note 71, at 250 ("Accordingly, contrary to Article 16 of the Constitution, the Ahtisaari document is in fact the highest legal authority in Kosovo.").

97 Arbëresha Raça Shala & Musa I. Bajraktari, *The Effect of European Convention and the European Court of Human Rights within Constitutional Order of Kosovo and Their Relationship*, MEDITERRANEAN J. SOC. SCIS., Nov. 2015, at 41, 43; *see also* Marko, *supra* note 95, at 446–47 (calling the Ahtisaari Plan "the 'paramount law'").

98 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, amend. 4 ("Article 143 shall be deleted.").

99 *See id.*

100 *See* de Hert & Korenica, *supra* note 89, at 150–51 ("Consequently, the drafting of the Constitution also was required to adhere to the [Ahtisaari] Plan.").

101 Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT'L L. 1, 1–2 (2007).

Kosovo Albanians to facilitate the rule of law and protect minority groups.[102] The Serbian parallel courts were extensions of Serbian sovereignty in Kosovo that applied Serbian law.[103] The parallel system of law generated several issues. First, the existence of the Serbian parallel courts—operating within the boundaries of Serbia and in Serbian enclaves *within* Kosovo—was an obvious impediment to Kosovo's sovereignty.[104] Second, the parallel system of justice also created uncertainty and disorder in the judiciary. The parallel courts often refused to recognize each other's judgments and did not share court records.[105] Litigants frequently had to pursue their claims in both courts to ensure enforcement, and criminal defendants could face trial for the same crime.[106] Third, ethnic bias in the parallel court system hampered UNMIK's goal of prosecuting human rights violations that occurred before and during the war.[107] In short, the parallel court systems had to go if Kosovo was to become a successful independent state.

The creation of a constitutional court was one step toward transitioning away from the parallel court system. Following the war, negotiators and constitutional drafters conceived of the constitutional court as a guarantor of the extensive individual rights enumerated in the constitution. The constitutional court would serve as an ultimate check on ethnic bias and corruption, as it would operate outside of the regular court system.[108] The Ahtisaari Plan presaged the constitutional court,[109] and the Constitutional Court of Kosovo (CCK) materialized in Article 112 of the Kosovo Constitution.[110] The constitution grants the CCK "the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution."[111] The court is given broad jurisdiction to decide the constitutionality of matters referred to it, including governmental decrees and regulations, municipal statutes, proposed referendums, and draft constitutional amendments.[112]

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102 *Id.*

103 *Id.*

104 *Id.* at 19–21.

105 *Id.* at 3.

106 *Id.*

107 *Id.* at 3, 45–48.

108 For discussion of the parallel court system in Kosovo, see NICOLAS MANSFIELD, E.-W. MGMT. INST., CREATING A CONSTITUTIONAL COURT: LESSONS FROM KOSOVO 2 (2013).

109 Ahtisaari Plan, *supra* note 82, annex I, art. 6.

110 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 112.

111 *Id.*

112 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 113.1–.2; Visar Morina, *The Legal Prospective Force of Constitutional Courts Decisions: Reflections from the Constitutional Jurisprudence of Kosovo and Beyond*, 25 NOTTINGHAM L.J. 16, 17 (2016).

The CCK's judicial appointment process is somewhat unusual. Article 152 of the Kosovo Constitution mandated that three of the nine seats of the CCK be reserved for international judges but not citizens of any neighboring countries.[113] Since the end of international supervision in 2012, the President of Kosovo must now appoint judges proposed by the Assembly for nonrenewable nine-year terms.[114] The ethnic divisions in the Assembly are also taken into account as two of the nine judges must receive approva1 from the majority of Assembly members representing minority communities in Kosovo.[115] The other seven judges require approval by two-thirds of the Assembly present and voting.[116]

The Kosovo Constitution has especially robust and detailed commitments to human rights; the CCK is tasked with protecting these rights. Drafters of the Kosovo Constitution bolstered these rights by embedding international human rights instruments directly into the text.[117] Most importantly, Article 22 of the Kosovo Constitution "constitutionalizes" a list of eight international treaties.[118] These international treaties, pursuant to Article 22, are binding legal authority within Kosovo.[119] The most significant international legal instrument for purposes of this Note is the European Convention on Human Rights (ECHR). The ECHR is an international treaty composed by Council of Europe in 1950. Its purpose was to "institutionalise shared democratic values and provide a bulwark against totalitarianism."[120] The European Court of Human Rights (ECtHR) located in Strasbourg, France, gives teeth to this document by adjudicating alleged violations by member countries of the ECHR.

But Kosovo is not a member state of the Council of Europe, nor is it a contracting party to the ECHR.[121] So citizens of Kosovo cannot

113 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 152.4. The International Civilian Office's supervision ended in 2012. *See* Pieter Feith, *Foreword* to INTERNATIONAL CIVILIAN OFFICE, STATE BUILDING AND EXIT: THE INTERNATIONAL CIVILIAN OFFICE AND KOSOVO'S SUPERVISED INDEPENDENCE 2008–2012, at v (2012).

114 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 114.2.

115 *Id.* art.114.3.

116 *Id.*

117 de Hert & Korenica, *supra* note 89, at 151.

118 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 22 ("[T]he following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions . . . (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.").

119 de Hert & Korenica, *supra* note 89, at 152–53; *see also* Shala & Bajraktari, *supra* note 97, at 43.

120 ALICE DONALD, JANE GORDON & PHILIP LEACH, EQUALITY & HUMAN RTS. COMM'N, RSCH. REP. 83, THE UK AND THE EUROPEAN COURT OF HUMAN RIGHTS 6 (2012).

121 Shala & Bajraktari, *supra* note 97, at 42, 45.

seek redress for human rights violations on the basis of the ECHR.[122] Nevertheless, the ECHR, through Article 22, has binding legal force in Kosovo with the CCK serving as a "linking bridge" between the Kosovo Constitution and the ECHR.[123] Provisions in the ECHR may supersede domestic legislation in Kosovo.[124] If there is a direct conflict between the ECHR and a Kosovo domestic law, then the domestic law is unconstitutional. The CCK affirmed this understanding of the relationship of the ECHR and Kosovo's domestic law in the 2010 case *Ćemailj Kurtiši v. The Municipal Assembly of Prizren.*[125] The CCK stated:

> The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, as earlier stated, were incorporated into the law of Kosovo at the Constitutional level, *it being given priority over provisions of laws and other acts of public institutions.* This Court must interpret the Constitution and the Convention in *a complementary manner* bearing in mind the necessity to protect the fundamental rights and freedoms enumerated in both.[126]

Therefore, if a domestic law is deemed to contravene an enumerated right in the ECHR, the domestic law must be invalidated.

This role of the ECHR in Kosovo constitutional interpretation appears uncontested. Much more controversial is the authority and precedential effect of the ECtHR *case law* in Kosovo constitutional interpretation.[127] Article 53, which has not been abrogated through the amendment process, specifies that the Kosovo Constitution "shall be interpreted *consistent with* the court decisions of the European Court of Human Rights."[128] It is unclear what "consistent with" requires. Is ECtHR case law obligatory, does it serve as a floor with the possibility for more expansive rights, or is it merely there for consultation without binding effect? The CCK has, so far, interpreted Article 53 to mean that the court has an obligation to refer to ECtHR case law but not to apply the same *ratio decidendi.*[129] The CCK could of course choose to base its ruling on the reasoning in ECtHR case law; however, it has a constitutional duty to do so.[130] In contradistinction, some have argued

122 *Id.* at 47.
123 *Id.*
124 *Id.* at 42.
125 Gjykata Kushtetuese [Constitutional Court] Mar. 18, 2010, KO 01/09 (Kos.) (judgment).
126 *Id.* ¶ 40 (emphasis added).
127 de Hert & Korenica, *supra* note 89, at 145–46.
128 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 53 (emphasis added).
129 de Hert & Korenica, *supra* note 89, at 161–62.
130 *Id.*

that the CCK should "Strasbourgize" its case law[131] and consider ECtHR case law as having *erga omnes* effect—meaning it would be legal authority for those nations that were not party to the particular case.[132] Proponents of this interpretation argue that construing CCK's constitutional role in "harmony" with ECtHR case law would give the CCK greater legitimacy and facilitate deference from lower courts.[133] They interpret the "central meaning" of Article 53 to be that "the jurisprudence of ECtHR is binding authority for constitutional interpretations by all institutions operating within Kosovo's legal order."[134]

Those that argue that Article 53 establishes ECtHR case law as *something less* than binding legal authority seem to have the better of the argument. There are two distinct constitutional provisions governing these sources of international law: Article 22 for treaties and Article 53 for case law.[135] The constitutional text affords these sources of international law different degrees of authority. Moreover, it appears the drafting committee held a similar interpretation of Article 53's nonbinding effect.[136] This historical evidence and the plain reading of the constitutional text supports the argument that Article 53 does not make ECtHR case law obligatory. Therefore, Article 53 would be better read to demand that the CCK *at least* consult or reference ECtHR case law in its decision making. Even if Kosovo became a party to the ECHR, it is debatable whether ECtHR case law would become binding on it as a third party because ECHR Article 46 would only seem to give case law *inter partes* effect.[137] In sum, "ECtHR case-law cannot

131 Fisnik Korenica & Dren Doli, *Constitutional Rigidity in Kosovo: Significance, Outcomes, and Rationale*, 2 PACE INT'L L. REV. ONLINE COMPANION, 1, 28 (2011).

132 de Hert and Korenica note that the Venice Commission takes this position. de Hert & Korenica, *supra* note 89, at 157–158; *see* Eur. Comm'n for Democracy Through L. (Venice Comm'n), *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, 53d Sess., Op. No. 209/2002, ¶ 10 (2002).

133 *See* Morina, *supra* note 112, at 24 ("In such situations, it is of course imperative for constitutional courts to depart from their own previous rulings in order to achieve harmony with ECtHR jurisprudence."); Shala & Bajraktari, *supra* note 97, at 45; *see also* Visar Morina, Fisnik Korenica & Dren Doli, *The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective*, 9 INT'L J. CONST. L. 274, 296 (2011) ("[This] paper also asserts that the constitution makes a direct linkage between ECtHR case-law and Kosovo's courts, obliging the latter to interpret and issue rulings in line with the ECtHR case law.").

134 Shala & Bajraktari, *supra* note 97, at 45; *see also* Morina, Korenica & Doli, *supra* note 133, at 296.

135 de Hert & Korenica, *supra* note 89, at 158.

136 *Id.*

137 *Id.*; *see also* David Thor Björgvinsson, *The Effect of the Judgments of the ECtHR before the National Courts—A Nordic Approach?*, 85 NORDIC J. INT'L L. 303, 320 (2016). *But see* Oddný Mjöll Arnardóttir, Res Interpretata, Erga Omnes *Effect and the Role of the Margin of*

be seen as a source of law from which one could directly derive rights,"[138] and there is the possibility that the CCK may contradict or deviate from ECtHR case law if that is necessary to defend a conflicting right in the Kosovo Constitution.[139]

III. MAKING SENSE OF ARTICLE 8

A pervasive foreign influence and presence is immediately apparent in Kosovo's capital of Priština. One finds while walking through Priština's broad streets an imperial Ottoman mosque, pods of NATO peacekeeping force patrolling the streets, and a statue of Bill Clinton waving from a lonely corner of the boulevard that bears his name. This menagerie of influences is also represented in Kosovo's constitution, legislation, and jurisprudence. Part III will turn to a particular instance where these influences have generated confusion regarding state secularism.

A. Secularism Versus Laïcité in Kosovo's Constitution

Kosovo's struggle with the church-state relationship is visible even on the surface of its constitutional text. Kosovo has several official translations of its constitution—Serbian and Albanian are official languages, while Turkish, Bosnian, and the Roma are official languages at the municipal level.[140] The English translation of Article 8 declares, "The Republic of Kosovo is a *secular state* and is neutral in matters of religious beliefs."[141] The Serbian translation uses an equivalent phrase: "sekularna država."[142] In contrast, the Albanian and Turkish translations use a phrase pregnant with a different meaning: "shtet laik" and "laik devlet," respectively.[143] The CCK has continued to use this discordant language in the English/Serbian and Turkish/Albanian translations of its decisions.[144] Moreover, the

Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights, 28 EUR. J. INT'L L. 819, 842–43 (2017).

138 de Hert & Korenica, *supra* note 89, at 160.

139 *Id.* at 166.

140 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 5.

141 *Id.* art. 8 (emphasis added).

142 *Compare id.* art. 8 (English translation), *with* USTAV REPUBLIKE KOSOVO [CONSTITUTION] Sept. 2020, art. 8 (Kos.) (Serbian translation).

143 KOSOVA CUMHURIYETI ANAYASASI [CONSTITUTION] Sept. 2020, art. 8 (Kos.) (Turkish translation); Mehmeti, *supra* note 16, at 109, 111 (citing KUSHTETUTA E REPUBLIKËS SË KOSOVËS [CONSTITUTION] Sept. 2020, art. 8 (Kos.) (Albanian translation)).

144 *Compare* Ustavni Sud [Constitutional Court] June 25, 2012, KO 45/12 & KO 46/12, ¶¶ 64–66 (Kos.) (judgment in English and Serbian), *with* Gjykata Kushtetuese [Constitutional Court] June 25, 2012, KO 45/12 & KO 46/12, ¶¶ 64–66 (Kos.) (judgment in Turkish and Albanian). CCK case law is available online in English, Serbian, Albanian,

former Deputy Foreign Minister compounded this confusion with his nine-point address on the relationship of the Kosovo state to religion. In his first point, Selimi affirmed that Kosovo is a secular state.[145] Then surprisingly, in his second point, Selimi also proclaimed that Kosovo is "shteti . . . laik."[146] One commentator calls this a form of double-speak—public officials are positing two different conceptions of Kosovo's relationship to religion.[147]

So why does the difference between *secular/sekularna* and *laik* matter? First, it should be emphasized that both translations of Article 8 should be treated as binding legal authority in Kosovo. There is no provision that expressly guides the CCK regarding how it should handle conflicting provisions between different translations of the Kosovo Constitution. Nevertheless, Article 5 of the Kosovo Constitution makes Albanian and Serbian official languages of the republic.[148] And domestic legislation is clear that all official languages have equal legal authority. The Kosovo Assembly passed "The Law on Languages" in 2006 which stated "[a]ll laws adopted by the Assembly of Kosovo shall be issued and published in the official languages. The official language versions are equally authoritative."[149] Additionally, Law 2004/47 "On the Official Gazette of PISG of Kosova" states that when there is a conflict between different official language translations of the Official Gazette, the versions are "equally authentic."[150] The CCK has never prioritized a single translation—nor is it clear the court could—and so must do its best to reconcile discrepancies between equally authoritative translations.[151]

These translations of Article 8 demonstrate vastly different approaches to the relationship of religion and the state. Laïcité (*laiklik*

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and Turkish. *See Decisions*, CONST. CT. OF KOS., https://gjk-ks.org/en/decisions/ [https://perma.cc/34YQ-4GTA].

145 Shpend Kursani, *Kosovo's 'Secularism' Is Being Confused—Especially by Those Trying to Defend It*, KOSOVO 2.0 (Feb. 16, 2018) (citing Petrit Selimi, *Debati mbi fenë, Kosovo, Turqia . .*, RES PUBLICA (Oct. 18, 2012)), http://www.respublica.al/arkiv-opinion/debati-mbi-fen%C3%AB-kosova-turqia [https://perma.cc/PVA7-6D6H]), https://kosovotwopointzero.com/en/kosovos-secularism-confused-especially-trying-defend/ [https://perma.cc/9DVA-J8JA].

146 Selimi, *supra* note 145.

147 Kursani, *supra* note 145.

148 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 5.

149 On the Use Languages, Law No. 02/L-37 §§ 2.1, 5.4 (2006) (Kos.); *see* MISSION IN KOS., ORG. FOR SEC. & CO-OP. IN EUR., IMPLEMENTATION OF THE LAW ON THE USE OF LANGUAGES BY KOSOVO MUNICIPALITIES 3 (2008).

150 On the Official Gazette of PISG of Kosova, Law No. 2004/47 § 3.2 (2006) (Kos.).

151 *Cf.* MISSION IN KOS., ORG. SEC. & CO-OP. IN EUR., MULTILINGUAL LEGISLATION IN KOSOVO AND ITS CHALLENGES 13 (2012) (suggesting that courts look to the minutes of the Kosovo Assembly to ascertain legislative meaning when there are material textual differences between different translations of the same law).

in Turkish) is frequently translated as "secular" or "secularism" and refers to a political principle developed in France and Turkey.[152] There is no established definition of laïcité, but, at its most basic, it is a "political notion involving the separation of civil society and religious society, the State exercising no religious power and the churches . . . exercising no political power."[153] However, there are two points to emphasize when examining laïcité: (1) it implies something different than the notion of "secularism" that is prevalent in the United States; and (2) it refers to a variety of state practices toward religion and takes on a different flavor in each nation that invokes the concept.[154] While religious freedom in the United States is more often associated with protecting the individual's religious expression from state interference,[155] in France laïcité is focused on the state "protecting citizens from the excesses of religion."[156] France seeks to protect the republican values of its citizens from ostentatious and intrusive exercises of religion; this may entail imposing targeted burdens on particular religions.[157] The French conception of liberty is markedly distinct from the American conception; France imposes a "thicker" conception of the good and sees liberty as being achieved, not in opposition to the State, but in cooperation with the State.[158] Wearing an Islamic headscarf, perceived as innocuous in the United States, could be understood as a symbol of female oppression in France.

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152 *See* Ahmet T. Kuru & Alfred Stepan, *Introduction*, *in* DEMOCRACY, ISLAM, AND SECULARISM IN TURKEY 4–5 (Ahmet T. Kuru & Alfred Stepan eds., 2012).

153 T. Jeremy Gunn, *Religious Freedom and* Laïcité*: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420 n.2 (quoting PAUL ROBERT, 5 LE GRAND ROBERT DE LA LANGUE FRANÇAISE 915 (2d ed. 1992)).

154 *Id.* at 420–22.

155 Secularism in the United States is often connected with state neutrality to religion—the state takes a neutral stance to religion rather than actively advancing secularism in its state policy. This conception of secularism, enshrined in the United States' Supreme Court jurisprudence, prohibits "the government from singling out specific religious sects for special benefits or burdens unless the action is necessary to promote a compelling interest." Ran Hirschl, *Comparative Constitutional Law and Religion*, *in* COMPARATIVE CONSTITUTIONAL LAW 422, 424–25 (Tom Ginsburg & Rosalind Dixon eds., 2011) (citing 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.1(a) (4th ed. 2008), Westlaw CONLAW); *see also* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990). *But see* Richard W. Garnett, *Mild and Equitable Establishments*, FIRST THINGS (Apr. 2019), https://www.firstthings.com/article/2019/04/mild-and-equitable-establishments [https://perma.cc/9FCR-2RUZ] ("Contrary to the formulations in some Supreme Court opinions, a liberal state does not need to be entirely neutral between religion and 'non-religion' (whatever that is).").

156 Frederick Mark Gedicks, *Religious Exemptions, Formal Neutrality, and* Laïcité, 13 IND. J. GLOBAL LEGAL STUD. 473, 476 (2006) (quoting Gunn, *supra* note 153, at 420 n.2).

157 *Id.* at 491.

158 *Id.* at 476, 492.

Turkey developed a variation of laïcité that was even more assertive and exclusionary than what appeared in France. In Turkey, Mustafa Kemal (Atatürk)—the founder of the Turkish Republic after World War I—led a reform program to weaken the influence of Islamic institutions in the new Republic and reorient society toward building a "Turkish nationalist ideology."[159] In order to do so, Mustafa Kemal looked to French laïcité for inspiration, which was part of his government's general "Westernization movement."[160] Early-Kemalist Turkish laïcité was "aimed at controlling religion and reducing it to a private affair instead of merely creating a separation between the state and the mosque. . . . [it] adopted an antagonistic stance vis-à-vis religion and . . . . viewed religiosity as the antithesis of secularism."[161] In contrast to France, Turkish laïcité was largely a top-down project that was the "pillar of the Westernization project" for the Kemalists.[162] This top-down imposition of laïcité emerged in Turkey because Islam's non-hierarchical structure was embedded and diffused throughout Turkish institutions and local communities.[163] As a result, Turkish administrations have sometimes treated religion with much greater hostility at the local level through targeted policies.[164]

In contrast, based on similar language in Serbia's constitution, the Kosovo Serb's interpretation of "sekularna država" in Article 8 would likely accord more closely with the American conception of secularism rather than French or Turkish laïcité.[165] Article 11 of the 2006 Serbian Constitution reads "Republika Srbija je svetovna država."[166] This provision can be translated "[t]he Republic of Serbia is a secular state."[167] The Morton Benson *SerboCroatian-English Dictionary*'s English translations of both "svètōvan" and "sekularān" is "secular."[168] Additionally, the Constitutional Court of Serbia has ruled that the principle of secularism in Article 11 of the 2006 Serbian Constitution

159 *See* M. Şükrü Hanioğlu, *The Historical Roots of Kemalism*, *in* DEMOCRACY, ISLAM, AND SECULARISM IN TURKEY, *supra* note 152, at 32, 41–45.

160 *Id.* at 44–46.

161 *Id.* at 44.

162 Ahmet T. Kuru & Alfred Stepan, Laïcité *as an "Ideal Type" and a Continuum: Comparing Turkey, France, and Senegal*, *in* DEMOCRACY, ISLAM, AND SECULARISM IN TURKEY, *supra* note 152, at 95, 104.

163 *Id.* at 103–04.

164 *Id.* at 102, 110.

165 *Cf.* Luka Mihajlović, Militant Secularism and Opposite Trends—Cases of Turkey, France and Serbia 46 (Apr. 2018) (LLM Short Thesis, Central European University).

166 USTAV REPUBLIKE SRBIJE [CONSTITUTION] Sept. 2006, art. 11 (Serb.).

167 CONST. OF THE REPUBLIC OF SERB. Sept. 2006, art. 11 (Serb.), http://www.parlament.gov.rs/upload/documents/Constitution_%20of_Serbia_pdf.pdf [https://perma.cc/JWC9-Q6F5].

168 *Serbocroatian-English Dictionary* 577, 632 (Morton Benson & Biljana Šljivić-Šimšić eds., 1971).

does "not mean an absolute division of church and state. It is a relationship of separation and co-operation."[169] Serbia has allowed for state subsidies to religion and religious education and protects the exercise of religious rights in public spaces.[170] All this is to say that Serbs, in Kosovo and Serbia, likely understand secularism and laïcité to be two different conceptions of the church-state relationship. The significant differences between laïcité and other Western conceptions of state secularism evince a fundamental confusion at the heart of the Kosovo's constitution. There must be a way out of this quagmire.

B. The Ahtisaari Plan as a Resource for Interpreting Article 8

The past Section explored the integration of foreign models of secularism into Kosovo's constitutional scheme. These models are not always consistent and are often used in a scattershot form by the CCK when handling state and religion disputes.[171] For instance, the CCK will frequently refer to ECtHR case law when it runs into an interpretive problem regarding the requirements of secularism.[172] As discussed in Section II.B above, the Ahtisaari Plan served as the foundation of the constitution and, until 2012, had been constitutionalized through Article 143. The constitution made the Ahtisaari Plan the bedrock of the new Kosovo republic and gave it authority over other constitutional provisions and domestic law.[173] Although the Ahtisaari Plan no longer has constitutional authority, that does not mean it is obsolete. The constitutional drafting commission relied heavily on the Ahtisaari Plan when it wrote the Kosovo Constitution.[174] Moreover, the CCK has continued to examine the Ahtisaari Plan's "'letter and spirit' in post-supervision Kosovo,"[175] and litigants have cited the Ahtisaari Plan when articulating their constitutional rights.[176] Kosovo and international actors should use the Ahtisaari Plan to better understand its constitution.

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169 Mihajlović, *supra* note 165, at 46 (translating the Constitutional Court of Serbia in case number IUz—455/2011).

170 *Id.* at 46–47; *see also id.* at 46 ("It is clear that [the Serbian] version of secularism is very different from French *laïcité* . . . and from the Turkish model. . . .").

171 *See infra* Part IV.

172 *See infra* Part IV.

173 *See supra* Section II.A.

174 *See supra* notes 80–89.

175 Enver Hasani & Getoar Mjeku, *International(ized) Constitutional Court: Kosovo's Transfer of Judicial Sovereignty*, 13 VIENNA J. ON INT'L CONST. L. 373, 381–82 (2019).

176 *See* Gjykata Kushtetuese [Constitutional Court] Aug. 29, 2019, KI 160/18, ¶ 14 (Kos.) (resolution on inadmissibility); Gjykata Kushtetuese [Constitutional Court] Feb. 1, 2017, KO 120/16, ¶¶ 50–51 (Kos.) (resolution on inadmissibility).

The Ahtisaari Plan provides that a future Kosovo Constitution shall "[a]ffirm that Kosovo has no official religion and that it shall be neutral on questions of religious beliefs."[177] There is no mention of "secular" in this provision nor, in fact, anywhere else in the Ahtisaari Plan. Nor is there mention of a laik state or laïcité. However, the constitutional commission inserted the term "secular" into Article 8 of the Kosovo Constitution.[178] The distinction between "no official religion" and "secular" is significant—the mandate that Kosovo shall not have an official religion is more constrained than the positive prescription that Kosovo *is* a secular state. Additionally, Article 8 *defines* Kosovo as a secular state; secularism is not simply a policy choice but inherent in the very nature of Kosovo's statehood. The Ahtisaari Plan, in contrast, does not attempt to *define* Kosovo in terms of secularism. Since the CCK must reconcile discrepancies in authoritative translations of the Kosovo Constitution, it could use the Ahtisaari Plan to reconcile the incongruity between secularism and laïcité. As a result, Article 8 is satisfied if government action accords with the Ahtisaari Plan; competing conceptions of secularism that may seem more hostile to religious exercise or state involvement in religion is not the baseline for the constitutional court. However, notwithstanding this "thinner" conception of state secularism, there are still significant restraints on a Kosovo administration that may be inclined to abuse its power. Kosovo is obligated to comply with the international treaties in Article 22 and cannot contravene other constitutional rights such as the right to education and freedom of thought and belief.

One objection to this model of interpretation is that Article 8 superseded the Ahtisaari Plan's provision on religion. In other words, the word "secular" and "laik" were chosen to be less capacious than the Ahtisaari Plan's requirement that Kosovo have "no official religion." But this would raise several concerns. The Ahtisaari Plan was not simply a drafting document; it had constitutional authority over the Kosovo Constitution until the end of supervised independence in 2012. Given the indefinite status of supervised independence and uncertainty regarding the Ahtisaari Plan's legal authority, it is doubtful that the drafters intentionally embedded both "thinner" and "thicker" church-state conceptions in Kosovo's foundational legal documents. Moreover, Article 143, which was later amended and abrogated, anticipated conflicts between the Ahtisaari Plan and Kosovo Constitution. If the drafters were aware of a conflict before the two texts before ratification of the Kosovo Constitution, it

177 *See* Ahtisaari Plan, *supra* note 82, annex I, art. 1.4; *see also* Mehmeti, *supra* note 16, at 111–12 (noting the different language in the Ahtisaari Plan but not reflecting on its significance).

178 CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 8.

would be odd to leave this one undisturbed. Furthermore, the central structural principles of the Ahtisaari Plan were decentralization and associative power sharing.[179] The thinner understanding of the church-state relationship in the Ahtisaari Plan better accords with these principles than the thicker conceptions of secularism and laïcité that are contained in ECtHR case law. All this suggests that the CCK and the international community understood the language in the different translations of Article 8 to mirror, not surmount, the corresponding language in the Ahtisaari Plan.

A second objection is prudential and gets at the heart of the principle of subsidiarity. Some have argued that the CCK should, even if not constitutionally required, conform its case law to that of the ECtHR.[180] They argue that strict conformity with ECtHR case law will promote ordinary courts' deference to the CCK[181] and effective protection of human rights.[182] These arguments, while perhaps convincing in other contexts, do not adequately account for the complex constitutional and local realities in Kosovo.[183] First, these arguments do not address how ECtHR case law will reconcile the two equally authoritative, yet diametrically opposed understandings of the church-state relationship in Kosovo's constitutional text.[184] It would be inappropriate for the CCK, as it appears to be doing now, to choose one of the foreign conceptions of secularism and then start gap-filling based on cherry-picked ECtHR case law. Next, even if the CCK interpreted Article 8 to coherently conform with ECtHR case law, it is not clear if it would conform with the other human rights in Kosovo's constitution. Professor Carozza notes that international tribunals "tend to interpret rights piecemeal and in isolation from the rest of the fabric of the law" while constitutional courts, like the CCK, "are more likely to try to bring into relationship and balance fundamental rights with one another and with the other parts of the normative order as a whole."[185] And given the reality that there are virtually no common European standards or practices in church-state issues, the

179 Michael Rossi, *Ending the Impasse in Kosovo: Partition, Decentralization, or Consociationalism?*, 42 NAT'YS PAPERS 867, 870–73 (2014); WELLER, *supra* note 71, at 280–81.

180 *See* Morina, *supra* note 112, at 24; Shala & Bajraktari, *supra* note 97, at 45–46.

181 Morina, *supra* note 112, at 24.

182 Shala & Bajraktari, *supra* note 97, at 45.

183 Professor Carozza, while recognizing the value of uniformity in human rights law, suggests that the process of importing and transplanting international legal norms and concepts into a national system is "like the movement of tectonic plates . . . it needs space and time in global and epochal proportions." Carozza, *supra* note 28, at 77.

184 *Cf.* Mehmeti, *supra* note 16, at 111 (noting that these two models of church-state separation are fundamentally different).

185 Paolo G. Carozza, *The Problematic Applicability of Subsidiarity to International Law and Institutions*, 61 AM. J. JURIS. 51, 59 (2016).

ECtHR has provided little concrete guidance to member countries that could help bring coherence to its case law.[186] As will be discussed in Part IV, in a number of cases the CCK has already relied heavily on ECtHR case law to interpret Article 8 in ways incongruous with other constitutional rights and obligations such as education, special protection zones, and legal registration of religious communities. Finally, the CCK is obligated, pursuant to Article 53, to consult and engage with the reasoning in ECtHR case law even if it is does not always conform to the *ratio decidendi*. Recourse to the Ahtisaari Plan as a tool in constitutional interpretation will facilitate reasoned dialogue between the CCK and European principles without rendering Kosovo's local and political realities irrelevant. To be sure, the results of this dialogue will not always be successful, but, at very least, respect for the principle of subsidiarity will permit Kosovo to flexibly respond to the complex and dynamic needs of its religious and ethnic communities.[187]

IV. CASE STUDIES AND IMPLICATIONS FOR RELIGIOUS FREEDOM IN KOSOVO

Part IV will explore three situations where the Kosovo government and the CCK have had to grapple with the intersection of Article 8 and ECtHR case law. These case studies will demonstrate how respect for the principle of subsidiarity may help alleviate religious and ethnic animosity in Kosovo.

A. Local Headscarf Ban

The CCK headscarf decision from 2011 may be the most insightful illustration of the laïcité conception of religious freedom in Kosovo.[188] A secondary public school in southern Kosovo issued a verbal warning to a female student and threatened to deny her access to the school if she refused to remove her headscarf.[189] The student alleged, inter alia, that the school's action violated her rights under Article 38 of the

186 I am grateful to Professor Paolo Carozza for bringing this to my attention. *See e.g.*, Lautsi v. Italy, 2011-III Eur. Ct. H.R. 61; Lorenzo Zucca, Lautsi*: A Commentary on a Decision by the ECtHR Grand Chamber*, 11 INT'L J. CONST. L. 218, 229 (2013) (calling the decision in *Lautsi* "a defeat for everyone . . . . [t]he quality of its reasoning is very poor and unsatisfactory . . . . [the ECtHR] does not articulate its reasons, its assessment is short and brutish . . . .").

187 Since subsidiarity, properly understood, is a "general principle, not a clear rule," conclusions cannot be drawn from it mechanically. *See* Carozza, *supra* note 28, at 78–79.

188 Gjykata Kushtetuese [Constitutional Court] Sept. 30, 2011, KI 36/11 (Sept. 30, 2011) (Kos.) (resolution on inadmissibility).

189 *Id.* ¶¶ 21–22.

Kosovo Constitution which protects the freedom of belief, conscience, and religion, and Article 47 which guarantees the right to education.[190] The CCK dismissed the claim on procedural grounds for lack of jurisdiction because the applicant had not exhausted her legal remedies in the lower court.[191] Nevertheless, in dicta, the court indicated how it would decide in this case. The court invoked Article 53 of the constitution, which obligates the court to interpret human rights and fundamental freedoms of the constitution "consistent with the court decisions of the European Court of Human Rights."[192] The Court then quoted at length from a 2008 ECtHR decision in *Dogru v. France*, which explicated the relationship of the State to religion under the laïcité model.[193] In *Dogru*, the ECtHR held that "the State may limit the freedom to manifest a religion . . . if the exercise of that freedom clashes with the aim of protecting rights and freedoms of others, public order and public safety."[194] Illustrations the CCK cites of regulations that impose on the freedom to manifest religion in the interests of public order and public safety are requiring a practicing Sikh to wear a helmet when driving a motorcycle and requiring those wearing a headscarf to remove it during an airport security check.[195]

It is, however, not intuitive why these examples of restricting manifestations of religious belief for public order and safety are analogous to the headscarf ban. Where is the conflict? The decision is based on years of ECtHR decisions finding that headscarf bans are justified, in the main, for three reasons: headscarves are threats to state secularism, violations of gender equality, and are a form of proselytization.[196] The ECtHR reasoning appears to have been such: the French and Turkish states rest on the principles of secularism and neutrality. These principles may require the state to protect democratic values in a pluralistic society from "ostentatious" manifestations of religious belief. The headscarf allegedly had a "proselytising effect" which was "hard to square with the principle of gender equality"; therefore, public authorities were justified in banning the headscarf in public institutions.[197] On this point, Turkish influence on the CCK is even more explicit when we consider an earlier ECtHR case, *Leyla*

190 *Id.* ¶ 3.

191 *Id.* ¶¶ 67–68.

192 *Id.* ¶ 76; *see also* CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 53.

193 Gjykata Kushtetuese Sept. 30, 2011, KI 36/11, ¶ 76.

194 *Id.* (quoting Dogru v. France, App. No. 27058/05, ¶ 64 (Dec. 4, 2008), https://hudoc.echr.coe.int/eng?i=001-90039 [https://perma.cc/V5XJ-BUQL]).

195 *Id.* ¶ 64.

196 Theresa Perkins, Note, *Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia, and Kosovo*, 30 B.U. INT'L L.J. 529, 532 (2012).

197 Gjykata Kushtetuese Sept. 30, 2011, KI 36/11, ¶ 76 (quoting *Dogru*, App. No. 27058/05, ¶¶ 61–72).

Sahin, regarding a headscarf ban in Turkey. In *Leyla Sahin*, the ECtHR actually deferred to Turkey's argument that it had a state interest in banning the headscarf because of the external pressure imposed on citizens when worn by women in public.[198] Neither the ECtHR nor the CCK provided a convincing explanation for the external pressure argument.[199] Therefore, a Turkish interpretation of secularism, that is, a robust form of laïcité displaying hostility to religion, had been adopted by the ECtHR and then imported into the Kosovo constitutional case law.

As discussed in Parts II and III, the ECtHR's interpretation of state secularism is not binding on the CCK. Once again, the Ahtisaari Plan only mandated that the Kosovo Constitution should "[a]ffirm that Kosovo has no official religion and that it shall be neutral on questions of religious beliefs."[200] Unfortunately, the CCK has not truly reckoned with the Ahtisaari Plan when adjudicating Article 8 disputes. Religious headscarves may contravene foreign principles of secularism imported through ECtHR case law but would not obviously violate Article 1.4 of the Ahtisaari Plan. In Article 53, "consistent with" should be read to afford greater flexibility to the CCK in crafting its judgment. For example, the CCK could have invoked the particular history and significance of Islam in Kosovo to differentiate the circumstances of the ban from those in France. Kosovo could thus avoid a rigid "Strasbourgization" of its domestic law and policy while still ensuring compliance with Article 8.

B. Special Protection Zones for Cultural and Religious Heritage

The local, national, and international conflicts over special protective zones in Kosovo provide another instance of the importation of inconsistent values of state secularism in Kosovo domestic law and CCK case law. Serbian religious sites were targets of violence during and after the war in 1999. Between June and October 1999, eighty Orthodox churches were damaged or destroyed.[201] Then during the riots that erupted in March 2004, twenty-nine Serbian churches and monasteries were damaged.[202] A major objective of the Ahtisaari Plan and the drafting of the Kosovo Constitution was to create a legal framework that would adequately protect the cultural and religious heritage of minority groups in Kosovo, particularly the

198 Perkins, *supra* note 196, at 542 n.61.

199 See *id.* at 541–42 for a critique of the principles underling the ECtHR's reasoning in *Leyla Sahin*.

200 Ahtisaari Plan, *supra* note 82, annex I, art. 1.4.

201 Mehmeti, *supra* note 14, at 73.

202 JUDAH, *supra* note 34, at 110.

Serbian Orthodox Church.[203] On February 20, 2008—only three days after Kosovo declared independence—the Assembly passed Law Nr. 03/L-039, On Special Protective Zones.[204] The law designated certain Serbian Orthodox monasteries, churches, and other religious sites as special protective zones that would be "safeguarded from any development or activity which could damage its historical, cultural, architectural or archeological context, natural environment or aesthetic visual setting."[205] The special protection provided to Serbian Orthodox sites and the privileges granted to the Orthodox Church have generated perceptions of unfairness and discrimination, particularly from the Bashkësia Islame e Kosoves (Islamic Community of Kosovo).[206] Mehmeti has noted this disparity: "Islamic heritage in general has received meagre legal attention although such heritage was severely damaged during the war."[207]

Some have already noticed the uncomfortable position of these special privileges for the Serbian Orthodox Church when judged against Article 8 and other equal rights guarantees of the Kosovo Constitution.[208] In 2012, the CCK considered the constitutionality of provisions in two special protective zone laws at the local government level.[209] A group of MPs from Kosovo's Assembly challenged the Law on the Village of Hoçë e Madhe / Velika Hoča and the Law on the Historic Centre of Prizren.[210] The laws were already predetermined by the Ahtisaari Plan, which required these special protections be passed into law as a precondition of Kosovo exiting its supervised independence.[211] These municipal-targeted laws granted the municipalities the power to each create a committee to oversee the promotion and protection of religious and cultural heritage in zoning and development plans.[212] The constitutional challenge related to the

203 Jelena Lončar, *Cultural Heritage in Kosovo: Strengthening Exclusion Through Inclusive Legislation*, *in* RETHINKING SERBIAN-ALBANIAN RELATIONS: FIGURING OUT THE ENEMY 180, 181 (Aleksandar Pavlović, Gazela Pudar Draško & Rigels Halili eds., 2019); *see also* Ahtisaari Plan, *supra* note 82, annex V.

204 On Special Protective Zones, Law Nr. 03/L-039 (2008) (Kos.).

205 *Id.* art. 2.

206 *See* Mehmeti, *supra* note 14, at 63, 78.

207 *Id.* at 72.

208 Lončar quotes a Kosovo MP, Nait Hasani, who criticized laws granting religious communities positions of power in municipal committees for the protection of cultural and religious heritage: "By requiring that religious communities become part of the law, this law violates Article 8 of the Constitution. It should be decided here whether we are religious state or a secular state." Lončar, *supra* note 203, at 186.

209 Gjykata Kushtetuese [Constitutional Court] June 25, 2012, KO 45/12 and KO 46/12 (Kos.) (judgment).

210 *Id.* ¶¶ 1–2.

211 Lončar, *supra* note 203, at 188–89.

212 Gjykata Kushtetuese June 25, 2012, KO 45/12 and KO 46/12, ¶ 21.

selection process of committee members. Article 4 of the Law on the Village of Hoçë e Madhe / Velika Hoča gave the Serbian Orthodox Church the right to select and appoint one member to the five-member committee.[213] Similarly, Article 14 of Law on the Historic Centre of Prizren created a seven-member committee and reserved the right to select one committee member to the Islamic Community of Kosovo, Serbian Orthodox Church, and the Catholic Church.[214]

The religious communities involved in the litigation and the Kosovo government rightly emphasized the mandates of the Ahtisaari Plan as legal support for the constitutionality of the laws.[215] The applicants made several claims against the law's constitutionality and alleged violations of Article 5 of the Law on Freedom of Religion in Kosovo.[216] First, they claimed the two laws violated Article 8 of the constitution by transgressing the secular and neutrality principles to the detriment of "the atheist and agnostic concepts."[217] The applicants argued that the laws are unconstitutional because they (1) favor a person or collective based on religious belief, and (2) include religious representatives in a public body.[218] Second, the applicants claimed the laws violated Article 24 by giving special privileges to religious communities and churches to appoint committee members.[219] Finally, applicants argued that the laws violated Article 5 of the Law on Freedom of Religion, No. 02/L-31, which demands that "religious communities shall be separated from public authorities."[220]

The applicants in this case, perhaps recognizing the international legal influence on the nascent CCK, cited both American and European precedent to support their claims. The applicants relied on *Epperson v. Arkansas* for the proposition that "[g]overnment must be neutral in matters of theory, doctrine and religious practice and that it cannot assist[,] encourage or promote a religion or religious theory

213 *Id.* ¶¶ 21–22.

214 *Id.* ¶¶ 28–31.

215 *See id.* ¶ 36. "The Catholic Church responded . . . by furnishing a copy of a public statement . . . . [t]he tenor and thrust of the Public Statement was one of support for the Articles of the Kosovo Status Settlement that provided for religious and cultural heritage," *id.* ¶ 36, and "[the Serbian Orthodox Church] also referred to the Comprehensive Status Settlement [Ahtisaari Plan] as supporting the constitutionality of these Laws," *id.* ¶ 41; *see also id.* ¶ 44 ("The Government . . . also referred to the Comprehensive Proposal for the Kosovo Status Settlement and Annex V thereof which provided for the special role of the Serbian Orthodox Church . . . .").

216 *Id.* ¶¶ 22–23.

217 *Id.* ¶ 24.

218 *Id.*

219 *Id.* ¶ 31.

220 *Id.* ¶ 23 (citing On Freedom of Religion in Kosovo, Law No. 02/L-31 § 5.2 (2006) (Kos.)).

against another."[221] *Epperson* concerned a 1928 Arkansas state law that made it unlawful for a teacher in a public school or university to teach evolutionary theory.[222] The United States Supreme Court held that the state law was a violation of the First Amendment's Establishment Clause, as it prohibited the teaching of a body of knowledge expressly because it conflicted with a specific religious doctrine.[223] The CCK, however, did not agree that *Epperson* was on point: "[*Epperson*] is not authority to exclude a consultation process with religious communities on planning issues in Municipalities when heritage is sought to be preserved."[224] The local government defended the law by noting that it only afforded the Orthodox Church members consultative rights without any actual executive power.[225]

The applicants also relied on the ECtHR judgment in *Hasan and Chaush v. Bulgaria*, which held that the Bulgarian government violated the law when it involved itself in a dispute to replace a national leader of the Muslim community.[226] The CCK, nevertheless, quickly dismissed this authority: "[*Hasan and Chaush*] cannot be relied on as authority . . . for providing a framework for certain religious communities to participate in the planning process."[227] The laws did not interfere with the internal affairs of religious communities; instead, the court framed the laws as providing religious communities a greater voice in municipal planning processes that affected them. The court provided one of the more extensive explications of Article 8 secularism in this case, and it is worth quoting in full:

> The principle of secularism, as provided for in Article 8, also contemplates that the State and religious organisations operate separately within each's own sphere and they do not exercise authority over the affairs of the other. Thus, secularism permits religious organisations to conduct their affairs without undue interference from the State and religious organisations cannot mandate what the state can or cannot legislate for. That is not to say that religious organisations are excluded from debate within issues in the public sphere or to say that the State is forbidden to regulate matters within its constitutional remit. Each ought to have respect for the other and recognise that they have different remits.[228]

221 *Id.* ¶ 34 (citing Epperson v. Arkansas, 393 U.S. 97 (1968)).
222 *Epperson*, 393 U.S. at 98–99.
223 *Id.* at 103.
224 Gjykata Kushtetuese June 25, 2012, KO 45/12 and KO 46/12, ¶ 69.
225 Lončar, *supra* note 203, at 187.
226 Gjykata Kushtetuese June 25, 2012, KO 45/12 and KO 46/12, ¶ 67.
227 *Id.*
228 *Id.* ¶ 65.

This relatively boilerplate definition of secularism has not clarified Kosovo's status as a secular state. It has also inhibited peaceful coexistence in Kosovo. Take one example. Visoki Dečani is a fourteenth-century Serbian Orthodox monastery located in western Kosovo and was designated as a Special Protective Zone with special cultural and religious meaning.[229] The interior of the church is densely covered with beautiful frescoes, and the monastery sheltered civilians during the war.[230] The municipality of Dečani approved construction of a road that would connect it to Montenegro and serve as a major route for commerce.[231] Unfortunately, to the chagrin of the monks, the road would be built adjacent to monastery land.[232] In 2016, the CCK held that the judgments of an Ownership Panel—which found the affected land belonged to the monastery—were binding on all parties and courts.[233] Nevertheless, the municipality of Dečani refused to implement the CCK judgment and continued to build the road.[234] The dispute caught international attention and the President of Serbia, Aleksandar Vučić, even demanded that the construction be halted, describing the behavior as "a means of pressure against our side and as a message that our cultural and religious heritage is a hostage of Albanian highhandedness."[235] Only in November 2020 was the dispute resolved in an Italian-mediated agreement that approved the construction of a new road bypassing the monastery lands.[236]

This refusal to enforce the CCK's judgment over a four-year period bodes poorly for the protection of minority groups in Kosovo. It should also be cause for self-reflection on the part of the CCK and a reassessment by the international community of how it engages ethnic and religious communities in Kosovo. Western notions of secularism are not always suitable to the Kosovo legal framework that painstakingly defines special protections and privileges for the Serbian

229 On Special Protective Zones, Law Nr. 03/L-039, arts. 2, 7 (2008) (Kos.).

230 Zenel Zhinipotoku & Llazar Semini, *Kosovo's Rival Communities Reach Deal on World Heritage Site*, U.S. NEWS (Nov. 12, 2020), https://www.usnews.com/news/world/articles/2020-11-12/kosovos-rival-communities-reach-deal-on-world-heritage-site [https://perma.cc/88S6-377A].

231 *See* Xhorxhina Bami, *Kosovo Road Construction Sparks Row with Serbian Monastery*, BALKAN INSIGHT (Aug. 19, 2020), https://balkaninsight.com/2020/08/19/kosovo-road-construction-sparks-row-with-serbian-monastery/ [https://perma.cc/T3JK-DYKX].

232 *Id.*

233 Gjykata Kushtetuese [Constitutional Court] May 20, 2016, KI 132/15, ¶¶ 32, 37, 90–91 (Kos.) (judgment).

234 Bami, *supra* note 231.

235 Press Release, Vučić, *supra* note 12.

236 Zhinipotoku & Semini, *supra* note 230.

Orthodox community.[237] Kosovo's public officials have their hands tied behind their backs using ECtHR case law to defend and justify action that preferences certain religious communities. But again, since Article 8 need not be interpreted to accord perfectly with the ECtHR's case law regarding secularism, the CCK should exercise its authority to develop its own jurisprudence better suited to the ethnic and religious realities on the ground in Kosovo.

C. Legal Status of Religious Communities in Kosovo

Another area of law where Kosovo should be more willing to depart from the labyrinth of foreign secularism discourse is in the legal status of religious communities. Currently, Kosovo's laws do not provide a path for religious communities to acquire a legal form.[238] As a result, religious communities will run into legal obstacles when attempting to own or lease property, maintain bank accounts, hire workers, or seek protection from potential liabilities.[239] A 2019 U.S. Department of State report noted that all religious communities in Kosovo operate bank accounts in a name other than that of their community, and the Kosovo Protestant Evangelical Church reported that it was taxed as a for-profit business.[240] The Islamic Community of Kosovo has complained that its employees were not included in the general government pension fund because its legal status remains uncertain.[241] Religious communities have attempted to bypass this legal hurdle by registering as NGOs, but this process comes with its own requirements and does not afford religious communities the intangible benefits of state recognition.[242]

Nearly every year since 2011, a specific Draft Law that would amend the current law on religious freedom in Kosovo has been circulated in the legislature.[243] This Draft Law would create a government office tasked with registering religious communities and endowing them with a legal status.[244] The Draft Law would create a two-tier registration system. First, Article 4 of the Draft Law would

237 *See* Lončar, *supra* note 203, at 192 ("[A]lthough international actors had a crucial role in initiating and passing the laws, they were not successful in changing the 'hearts and minds' of the Kosovo citizens, nor the attitudes towards minorities.").

238 Mehmeti, *supra* note 14, at 73.

239 *See* Mehmeti, *supra* note 16, at 113.

240 U.S. DEP'T OF STATE, *supra* note 22, at 5.

241 XHABIR HAMITI, THE HISTORY OF THE ISLAMIC COMMUNITY IN KOSOVO 4.4.16 (2010).

242 Woods, *supra* note 16, at 1028–32.

243 Mehmeti, *supra* note 16, at 108.

244 Draft Law on Amendment and Supplementation of Law No.02/L-31 on Freedom of Religion in Kosovo (Kos.); Mehmeti, *supra* note 16, at 108.

automatically grant legal status to six religious communities: the Islamic Community of Kosovo, the Catholic Church, the Serbian Orthodox Church, the Jewish Religious Community, the Protestant Evangelical Church, and the Tarikat Community of Kosovo, which encompasses a number of Sufi orders.[245] Then "new" religious communities would be eligible for registration if they meet certain criteria, including having at least fifty members and possessing "the basic principles of faith community religious."[246]

Religious communities in Kosovo have generally supported the Draft Law's provisions to provide a procedure for obtaining legal status,[247] but the Kosovo Assembly has consistently refrained from amending the current law and even failed to discuss the Draft Law in 2019.[248] The Assembly's hesitancy to approve the amended religious freedom law is partially attributable to the lack of confidence in what it means to be a secular state. For instance, there are concerns that the new government registration office would violate the neutrality provisions of the religious freedom law[249] and Article 8 of the Kosovo Constitution. Moreover, passage of the Draft Law would disrupt the demographics of certain religious communities. The Islamic Community of Kosovo remonstrated against the recognition of the different Sufi communities as separate religious communities.[250] Sufi orders, like the Bektashi Community, were traditionally part of the Islamic Community of Kosovo, so the Draft Law would inevitably disrupt its organizational structure.[251] Finally, the two-tier registration system could implicate the Article 8 requirement of neutrality in matters of religious belief and the antidiscrimination provision in the Law on Freedom of Religion. However, as the law stands right now, the Serbian Orthodox Church receives special recognition and has greater legal tools at its disposal.[252] This has generated feelings of animosity and mistreatment from other religious communities in Kosovo, particularly from the Islamic Community of Kosovo.[253]

245 Draft Law on Amendment and Supplementation of Law No.02/L-31 on Freedom of Religion in Kosovo, art. 4 (Kos.).

246 *Id.* art. 7B.

247 Mehmeti, *supra* note 16, at 108.

248 U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., CIVIL SOCIETY REPORT ON HUMAN RIGHTS IN KOSOVO IN 2019, at 15 (2020).

249 Woods, *supra* note 16, at 1026.

250 Mehmeti, *supra* note 16, at 115.

251 *Id.*; *see also* U.S. DEP'T OF STATE, *supra* note 22, at 6. I am grateful to Theo Knights for his helpful explanation of Islam and Sufism.

252 *See* On Special Protective Zones, Law NR. 03/L-039 (2008) (Kos.), art. 2; *see also* Ahtisaari Plan, *supra* note 82, annex V.

253 Mehmeti, *supra* note 14, at 74.

The Venice Commission—an advisory body to the European Council—has produced the most in-depth legal analysis of the Draft Law.[254] The Commission recognized that differential treatment for the registration of religious communities does not per se violate the ECHR as long as (1) there is an objective and reasonable justification, and (2) there is not a disproportionate impact on the exercise of religion.[255] The Draft Law describes the six religious communities to receive automatic legal status as constituting the "historical heritage, cultural and social life" of Kosovo.[256] The state registration office, though, "must apply the criteria in a neutral way and on an equal basis" when determining whether a religious community constitutes the "historical heritage, cultural and social life" of Kosovo, and as a result receive automatic legal status under Draft Law Article 4A.[257] The Venice Commission, however, seemed to vacillate on the question of recognizing the Sufi orders which compose the Tarikat Community. The CCK has already defended principles of church autonomy and state non-interference in two judgments from 2016[258] and 2019.[259] But it is unclear how much deference it would give to the Assembly if it decided in the Draft Law that the Tarikat Sufi orders would constitute

254 *See* Eur. Comm'n for Democracy Through L. (Venice Comm'n), *On the Draft Law on Amendment and Supplementation of Law N° 02/L-31 on Freedom of Religion of Kosovo*, 98th Sess., Op. No. 743/2013 (2014) [hereinafter Venice Commission Opinion].

255 *Id.* ¶ 52.

256 Draft Law on Amendment and Supplementation of Law No.02/L-31 on Freedom of Religion in Kosovo, art. 4A (Kos.).

257 Venice Commission Opinion, *supra* note 254, ¶ 62.

258 *See* Gjykata Kushtetuese [Constitutional Court] Jan. 22, 2016,, KI 63/15 (Kos.) (resolution on inadmissibility). There, an employee challenged a decision of the Disciplinary Committee of the municipal Council of the Islamic Community in Vushtrri. *Id.* ¶ 2. The Committee ruled to decrease his salary by 20% for a nine-month period. *Id.* at ¶ 10. The CCK relied on two sections of Law No. 02/31 On Religious Freedom in Kosovo: § 5.2 ("Religious communities shall be separated from public authorities."), and § 7.2 ("Religious communities shall independently regulate and administer their internal organization."). *Id.* at 3. The Court held that the referral was inadmissible because "the internal organization of the religious communities is not under the jurisdiction of the Constitutional Court." *Id.* ¶ 17.

259 *See* Gjykata Kushtetuese [Constitutional Court] Aug. 26, 2009, KI 133/17 (Kos.) (resolution on inadmissibility). A chief imam for the Islamic Community Council in Peja challenged an ICC decision that terminated his pension. *Id.* ¶¶ 18–21. The Court held, "[g]iven that the public authorities in the Republic of Kosovo are separate from Religious Denominations, [public authorities] cannot be used to enforce internal rules and decisions of Religious Denominations." *Id.* ¶ 68. Critical to this decision was that the pension decision was wholly independent of civil law. The Court did not foreclose the opportunity for employees of religious denominations to bring claims as long as "the dispute derives and is regulated by applicable state law." *Id.* ¶ 67.

a separate religious community.[260] Ultimately, the Kosovo Assembly remains paralyzed and has been unable to provide a clear path forward for religious communities seeking to obtain official legal status.[261]

In Strasbourg, the ECtHR has been moving away from a more robust principle of church autonomy, and the CCK ought to be aware. The Venice Commission cited to a 2001 ECtHR case *Metropolitan Church of Bessarabia v. Moldova*.[262] That case involved Moldova's refusal to recognize a splinter church seeking independence from the Metropolitan Church of Moldova.[263] The splinter church alleged that the refusal to grant separate legal status violated their right to freedom of religion under Article 9 of the ECHR.[264] The government of Moldova argued that its denial of legal status to the splinter church furthered the legitimate aim of maintaining the integrity of the Orthodox Church to ensure that the "population [would] come together within that Church" and contribute to political stability.[265] The ECtHR decided the case in favor of the splinter church holding that Moldova's refusal to grant separate legal status was not a proportionate means toward furthering the legitimate aim of political stability in a democratic society.[266]

More recently, in the 2019 case of *Tothpal and Szabo v. Romania*,[267] the ECtHR found that criminal convictions brought against two Evangelical priests in Romania were unlawful.[268] The two priests—one of the Evangelical Lutheran Church and the other of the Reformed

260 The Venice Commission warned Kosovo that it must "carefully and coherently" determine whether the Tarikat Community "form[s] part of the 'historical, cultural and social heritage of the country.'" Venice Commission Opinion, *supra* note 254, ¶ 63 (quoting Draft Law on Amendment and Supplementation of Law No.02/L-31 on Freedom of Religion in Kosovo, art. 4A (Kos.)). According to a Kosovo government memo on the Draft Law, the Tarikat Community has existed for 350 years in Kosovo and has approximately 60,000 members. *See* Mehmeti, *supra* note 16, at 114.

261 *See* Serbeze Haxhiaj, *Kosovo Religious Groups Still Divided on Law Offering Legal Status*, BALKAN INSIGHT (Feb. 11, 2021), https://balkaninsight.com/2021/02/11/kosovo-religious-groups-still-divided-on-law-offering-legal-status/ [https://perma.cc/5VA4-PWBE] (quoting a local imam: "There are many things we can't do because of being an undefined community; we function like an NGO, while we are not one.").

262 *See* Venice Commission Opinion, *supra* note 254, ¶ 64 (citing Metro. Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81).

263 *See Metro. Church of Bessarabia*,¶¶ 2, 9.

264 *Id.* ¶¶ 94–96.

265 *Id.* ¶ 111.

266 *Id.* ¶ 130. "State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion." *Id.* ¶ 117.

267 Tothpal & Szabo v. Romania, App. Nos. 28617/13 and 50919/13 (Feb. 19, 2019) http://hudoc.echr.coe.int/eng?i=001-191344 [https://perma.cc/TX3P-UEUC].

268 *Id.* ¶ 53.

Church of Romania—had been removed from their parishes but continued to preach and administer the sacraments in their respective churches.[269] Romanian authorities charged the priests with illegally exercising the ministries of a priest without authorization from their religious hierarchy.[270] The ECtHR ruled that the criminal convictions violated the priests' right to freedom of religion and that these restrictions had the effect of forcing dissident religious communities under a single hierarchy.[271]

This recent ECtHR case law on principles of religious freedom and church autonomy could significantly impact constitutional interpretation in Kosovo. If the CCK were *bound by* ECtHR case law or decided to apply the case law mechanically, it would greatly disrupt the Islamic Community of Kosovo. The CCK may then be obligated to alter the balance between pluralism and church autonomy to accord with the ECtHR, putting a greater emphasis on the principle of pluralism in a democratic society.[272] The Islamic Community of Kosovo asserted that the "Tarikats . . . should . . . be represented in organizational structures of the [Islamic Community of Kosovo] in the Republic of Kosovo. . . . while respecting the orders and their specific norms."[273] Granting automatic independent legal status to the Sufi communities would disrupt the internal organization of the Islamic Community of Kosovo and potentially implicate Article 39 of the Kosovo Constitution, which protects the autonomy of religious denominations.[274] It is an open question whether the CCK should grant Sufi orders, like the Bektashi Community, legal status separate from the Islamic Community of Kosovo. But if the CCK were to unreflectively adopt ECtHR case law for purposes of legal conformity and predictability, it may only cause further chaos within and between religious communities.

CONCLUSION

Ethnic and religious tensions have been a source of immense conflict between Serbia and Kosovo. The spiritual and nationalistic narrative dating from the Field of Blackbirds has continued to inform the rhetoric surrounding secularism and pluralism in Kosovo. The current legal regime was designed, in the main, to address the contingent problems of a war-torn province transitioning into

269 *Id.* ¶¶ 7–10, 20–21.
270 *Id.* ¶¶ 12, 22.
271 *Id.* ¶¶ 52–53.
272 *Id.* ¶¶ 51–52.
273 *See* HAMITI, *supra* note 241, at 4.4.10.
274 *See* CONST. OF THE REPUBLIC OF KOS. Sept. 2020, art. 39.

statehood—threats to cultural and religious heritage, human rights abuses, and access to an impartial justice system. The international actors involved in the peace process and state building believed that integration of international legal instruments into the constitution would be the best guarantor of stability and peaceful coexistence in Kosovo. To be sure, this plan stabilized Kosovo and warded off impending guerrilla warfare; however, abstracted international legal principles explicating secularism and religious freedom are not well-suited to the new legal frontier. The CCK, and other government actors in Kosovo, should consult the Ahtisaari Plan to reconcile the secularism versus laïcité divide in Kosovo's equally authoritative Albanian and Serbian translations of the constitution. ECtHR case law ought to be consulted, but its foreign articulations of secularism and religious freedom do not legally bind the CCK.

The result would help mediate between "transnational" and "national" constitutionalism, bringing Kosovo's law and policy on religious freedom and secularism more in line with the strictures of its constitution. It would also help restore the principle of subsidiarity to universal human rights law, maintaining the proper delegation of authority between international institutions, state actors, and religious communities. Then Kosovo could more freely address the local problems of its religious communities without the confusing restraints of competing foreign jurisprudence and political philosophies on matters of religion. The virtue of this interpretation is that it does not unmoor Kosovo constitutional law and judicial interpretation from European commitments to human rights; Kosovo must still abide by the legal and moral values in these instruments. Perhaps Kosovar politicians and judges may have already internalized and accepted the foreign understandings of secularism, but it should be clear that those positions are individual policy decisions and not binding constitutional mandates.[275] Kosovo would then be better equipped to coherently justify its particular state policy toward religion while maintaining its status as an Article 8 secular state—one with no official religion and neutral on questions of religious belief. This approach would facilitate an honest and good-faith discourse between the state and religious communities while also helping Serbia and Kosovo overcome obstacles to normalization.

275 For example, Kosovo is a potential candidate for EU membership, and some Kosovo political leaders may want to avoid legal chasms that could pose obstacles to accession to the EU. *See Where Do Western Balkan Nations Stand with Their EU Membership Bids?*, EURONEWS: BRUSSELS BUREAU (June 10, 2021)https://www.euronews.com/2021/10/05/eu-facing-crisis-of-credibility-in-western-balkans-as-leaders-meet-for-regional-summit [https://perma.cc/44WA-9ELU].