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Rule of Law Symposium

Rule of Law and the Kosovo Constitution

Judge John Tunheim*

Involvement in international rule of law development work has been an interest and a passion of mine for over a dozen years. Much of my work has been in central and eastern Europe and in central Asia. I received my initiation in this important service in newly democratized Russia in the 1990s courtesy of the American Bar Association's Central European and Eurasian Law Initiative ("CEELI"). CEELI, which is now part of the Association's Rule of Law Initiative, allowed American lawyers the opportunity to volunteer their skills to help develop democratic institutions and the rule of law in areas formerly controlled by the Soviet Union.¹ I took full advantage of the opportunities provided by this terrific program and have served for many years as a member of the CEELI Board of Advisors.

Most of my recent international rule of law development work has focused on the newly independent country of Kosovo, part of the former Yugoslavia in the Balkans region, on the Republic of Georgia in the Caucasus region, and on the former Soviet republic of Uzbekistan in central Asia. All are seriously infected by the decades of socialist or Soviet rule and all have had their own set of significant problems in achieving the rule of law. I do my best to fit in these rule of law projects to the extent that I have time, both because it is fascinating and important work and because I learn so much from my experiences.

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1. See American Bar Association Rule of Law Initiative, Europe and Eurasia (2009), <http://www.abanet.org/rol/europe and eurasia/> (last visited Mar. 8, 2009).

Interest and involvement in international rule of law programs have grown substantially in the past two decades. Although it has been seventeen years since the demise of the Soviet Union, and even longer since eastern European countries emerged from Soviet domination, the many new democracies in that part of the world have seen rocky times in the transition to the rule of law.² Such dramatic change does not come easy, particularly to people and cultures unfamiliar with democratic institutions.

Further, there is a heightened international consensus regarding fundamental legal and human rights and a passion for helping ensure that all people share in the benefits of this understanding. The very nature of a global economy, which affects business and law practice, has encouraged the application of rule of law concepts all over the world in an effort to level the playing field and ensure fairness in business relationships.³

And finally, the extraordinary advances in communications have made it quite simple today to participate across the world. Not only do we have an almost instantaneous understanding of problems everywhere, we can sit at our desks in Minnesota and participate in debate and help to draft new laws and procedures anywhere in the world. On my first visit to Russia it was nearly impossible and prohibitively expensive to place a call back to my office. Today, a mobile phone permits me to hold court hearings regardless of where I am.

I. THE INTERNATIONAL ADMINISTRATION OF KOSOVO

Although the countries I have visited all present extremely interesting rule of law issues, I intend to focus my remarks on my work in the newly independent country of Kosovo, the seventh new country to emerge from the former Yugoslavia and the disastrous ethnic wars of the 1990s in the Balkans region.⁴ In 1999, Kosovo, then the southernmost province of Serbia, in the country of Yugoslavia, exploded onto the world scene with

2. See generally *id.*

3. See, e.g., David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 91 AM. J. INT'L L. 901, 901-03 (2003).

4. On February 17, 2008, Kosovo declared its independence from Serbia. Dan Bilefsky, *Kosovo Declares Its Independence*, N.Y. TIMES, Feb. 18, 2008, at A1.

civil war and a NATO-led bombing campaign.⁵ The United Nations assumed administrative control over Kosovo in June 1996⁶ and faced numerous problems, not the least of which involved the startup of a new legal system.

Since February 2000, I have been a close observer or participant in much of the work that has been done in an effort to develop the rule of law in Kosovo, a region that has seen more than its share of ethnic violence and discrimination. I began by helping the U.N. administration try to figure out how to quickly establish a functioning legal system from the post-crisis vacuum that was left at the end of the NATO campaign. Over the years I have helped prepare a number of very detailed judicial assessments to assist both the Kosovo government leaders and international leaders to focus on needed changes and determine where additional resources were necessary. These assessments have included court administration, jurisdiction and structure of courts, judicial and prosecutorial training, new criminal laws and procedure codes, workload evaluations, and much more. The goal has been to improve dramatically the performance of the rule of law in Kosovo.

Since early 2000, the international administration in Kosovo has included what have been called “international judges” and “international prosecutors” to help handle difficult cases involving war crimes and ethnic violence.⁷ I am especially proud of the many Minnesota state court judges and prosecutors who have served in the legal system in Kosovo and worked closely with local judges and prosecutors in improving the criminal justice system.

My most recent work in Kosovo, contributing to the development of the new Kosovo Constitution that came into effect on June 15, 2008,⁸ has been by far the most extensive and detailed. My participation was the result of a request to serve as an advisor to the process, through the assistance of the United States Agency for International Development.

It is essential today in any new democracy to develop a detailed written constitution that provides the basic guarantees

5. See Jane Perlez, *Conflict in the Balkans: The Overview; NATO Authorizes Bomb Strikes; Primakov, in Air, Skips U.S. Visit*, N.Y. TIMES, Mar. 24, 1999, at A1.

6. See generally S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

7. Robert F. Carolan, *An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 9, 10 (2008).

8. See Dan Bilefsky, *Kosovo's New Constitution Takes Effect*, N.Y. TIMES, June 16, 2008, at A8.

of human rights and a government structure that will enhance and protect the rule of law. Although it can be argued that the most basic foundational documents in a new democracy today are the international covenants that protect human rights, a constitution is essential to enshrine the rule of law.

The remainder of my address will focus on how the Kosovo Constitution was developed with representatives of all of Kosovo's ethnic groups and other international advisors. How do you develop a process, draft a document, and implement a constitution that can ensure the rule of law? There are a number of important principles and questions that guided our process in Kosovo.

II. ADDRESSING KEY ISSUES TO USHERING IN THE RULE OF LAW IN KOSOVO

We started with a detailed assessment of the problems that needed to be addressed and the goals that were important for the Kosovo Constitution. Second, we discussed in some detail regional and cultural aspects of Kosovo society that needed to be respected. Third, we considered what process would facilitate not only the drafting of a document, but also the reaching of a consensus needed to make difficult decisions. Was there a higher-level political leadership team that could make decisions that commission members felt incapable of making? Fourth, in addressing the membership of the constitutional commission that would ultimately prepare the document, which individuals had the requisite legal and drafting skills as well as a sensitivity to the people of Kosovo? Who would be representative of the people and also have the knowledge and skills necessary to do the work? Fifth, we considered which foundational documents were essential to consult in the development process. International covenants, prior constitutions in Yugoslavia, and representative examples of constitutions utilized in the region were all important to review and utilize. Sixth, we needed to design a training program that would ensure that all options were considered and fully understood. It was important to make sure that all commission members were equally conversant in this process and that they understood both the possibilities and the limitations of their work. Seventh, we set out to determine how we could design and establish a decision-making process that would achieve consensus relatively quickly and eliminate serious and time-

consuming roadblocks to development of the document. Eighth, we needed to find how to ensure some level of public input into the process. This was a difficult question because the process was kept relatively secret. Kosovo was not yet a country and negotiations had not produced support from Serbia for the establishment of an independent country. The United Nations resolution intended to guide this process had not been adopted due to threats of a veto from Russia.⁹ Finally, we discussed how we could document the process and the decisions made so that Kosovo would have some written history of how the constitution was developed.

At the outset of the constitutional development process in March 2007, Kosovo had a number of very important goals. The first goal was to draft a document that would be broadly acceptable to the people of Kosovo—a document that not only “belonged” to Kosovo, but also was acceptable and impressive to the rest of the world. The second goal was to provide a constitution that would help ensure broad international acceptance of the new country and quick recognition of Kosovo’s independence. This was especially important due to anticipated opposition from Serbia, Russia, and others. And third, Kosovo hopes for eventual admission and membership into the European Union. Making the best decisions for the constitution could help speed that important process.

In addition, the new constitution needed to address the history of ethnic violence and the widespread belief that non-majority populations would not receive a fair shake or even protection from the new government. Also, the commission would have to deal directly with the U.N. mediation process that had attempted to secure an agreement for Kosovo independence. The U.N. mediator, former Finnish President Martti Ahtisaari, had drafted a report that had been expected to form the basis for the agreement between Serbia and Kosovo.¹⁰ It was an excellent document; we assumed that Kosovo expected many of its provisions, particularly those providing for the protection of

9. See Helene Cooper, *Rice Clashes with Russian on Kosovo and Missiles*, N.Y. TIMES, May 31, 2007, at A10 (“The Russian foreign minister, Sergey V. Lavrov . . . implicitly threatened to veto any United Nations Security Council resolution that, like the one proposed by the United States and its European allies, would recognize the independence of Kosovo.”).

10. See The Secretary General, *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, Comprehensive Proposal for the Kosovo Status Settlement, delivered to the Security Council*, U.N. Doc S/2007/168/Add.1 (March 26, 2007) (prepared by Martti Ahtisaari).

non-majority populations in Kosovo, to be in its constitution.

III. THE FIRST STEPS TOWARD A CONSTITUTION

With these considerations in mind, we began our work. The process in which I was involved started in March 2007 and was largely completed by December 2007, during which time Kosovo's bid for independence was still hanging in the balance. In March, it looked like the United Nations would act to authorize independence with a very short timeline for development of the constitution and key initial laws. U.N. approval was not forthcoming due to veto threats,¹¹ but our process proceeded. Meetings in March, April, and May focused on evaluating the situation, finalizing goals for both the process and the document, and actually devising the process, including identifying the Kosovans who would become the primary drafters of the constitution.

Once the commission was appointed by Kosovo's President and additional non-majority representatives were designated, we focused on designing a detailed training process that would address options and requirements and seek early consensus, to the extent that was possible. We met for much of a week in Skopje, Macedonia in June 2007, with broad participation including ethnic Serb representatives on the commission. We used this process to identify disputes that would require Kosovo's political leadership to resolve. The process remained under wraps—Kosovo was not yet independent and we were all keenly aware that the work was important preparation for independence should that day arrive. Meanwhile, the diplomatic issues remained unsettled as Kosovo and Serbia settled into further negotiations with little prospect of success. Kosovo Serb input into the constitution was vital during the process and we did our best to make sure their concerns and views were fully addressed.

By that point, in July 2007, we had reached the point in the process where more difficult decisions had to be made. How could the new government reflect power-sharing among the major political parties? In particular, power was to be shared between a President and a Prime Minister, but how the powers should be divided was a key point of dispute by the middle of summer. Working closely with the American Chief of Mission

11. See Cooper, *supra* note 9, at A10.

and the senior European representative of the transition office, I met alternately with the leaders of the two major parties until we reached an acceptable agreement on which powers would be given to the President and how the President would be selected. That agreement was essential—the commission could now begin serious work in drafting parts of the new constitution.

IV. DRAFTING THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

In late summer, sub-groups of the commission worked on drafting segments of the constitution. This work culminated in a very lengthy session in late October 2007 in Mitrovica, Kosovo, during which the entire commission and its advisors and international representatives carefully reviewed each of the drafts that had been submitted. The intent was to harmonize all of the sections into a single draft document. Some sections were very well done, and others were less polished and required more work. Some sections needed a total redraft. The follow-up to the large group meeting was a series of smaller group negotiation sessions with a representative group of the commission. These sessions finally produced a harmonized draft constitution. Members of the commission were the ultimate drafters and decision-makers. My role was that of an advisor, making sure that the commission had the best possible help in doing their important work.

I am asked frequently, how do you know what to include in a constitution? Following the goals and principles I have identified, we quickly reached an outline that seemed to work well. First, we included a section on general, fundamental principles that must be included in any constitution.¹² We followed that section with a fairly detailed set of rights and liberties guaranteed by Kosovo and the specific limitations on those rights.¹³ We tried to be as detailed as possible to eliminate any confusion and error.

The third large section detailed the structure of the new Kosovo government. This included sections on the Legislative

12. These basic constitutional principles included provisions for the Republic of Kosovo's sovereignty, constitutional supremacy, and citizenship qualifications. CONSTITUTION OF THE REPUBLIC OF KOSOVO ch. I, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Oxford Univ. Press 2008).

13. Among the defined fundamental rights protections are equality before the law, the right to life, the right to privacy, and criminal justice rights. *Id.* ch. II.

Assembly, a parliamentary body, and how it was to be elected, be organized, and do its work.¹⁴ I found that I needed to better understand a parliamentary democracy, which is not something that comes easy to an American. Sections then created the presidency, the judiciary, the constitutional court, the prosecutorial system, economic regulation, and the security sector. Provisions for emergency management and national defense were carefully written. We also drafted a series of transitional provisions for an anticipated limited period of European supervision, and we designed an amendment and ratification process. There were some minor disagreements at the end of the drafting process concerning the language of the preamble, but we were able to reach agreement. My final substantive work on the draft constitution occurred in late December 2007, when we worked through the draft document word-by-word making sure that the commission had covered all that it wanted and needed to cover. I would describe the draft as a thoroughly modern European constitution with the addition of some more American-style checks and balances.

The draft document was translated into all of Kosovo's many native languages and it was ready when independence day arrived in February 2008. It was published on a website within hours of the declaration of independence, and the process of gathering public input into the draft began. Commission members held public hearings and many additional suggestions were made and considered by the commission—some excellent suggestions were adopted before the commission handed a polished draft to the President and to the Prime Minister in April 2008. The draft constitution was quickly ratified and it became effective in June 2008, about fourteen months after the intensive, difficult, but satisfying process was started.

CONCLUSION

I want to re-emphasize that all of the rule of law work that I have done over the years, work that I have really enjoyed, has given me a far better understanding and appreciation for our American legal system. It has helped me to be a better judge and I have learned so much from my colleagues in foreign

14. *Id.* ch. IV; *see also id.* ch. V (describing the duties, qualifications, and election procedures of the President); *id.* ch. VI (describing the duties, qualifications, and other procedures of the Government).

countries. My understanding of how we do our own jobs in the United States is further sharpened by the questions and the reactions of the many wonderful people I meet and work with. Just the process of carefully explaining why we do what we do in our system is very insightful, I believe. It is important never to force the American system. Legal professionals throughout the world have a great curiosity about the American system, and I am always pleased to share thoughts, the good and the bad, about our system. But we always need to keep in mind that everyone marches to a slightly different drummer and it is important to both recognize and respect the differences. By sharing information and by understanding different cultures and legal traditions, we can all improve the rule of law—our great shared commitment to the protection of human rights and to the principles of democratic institutions.

Sometimes the work can be frustrating. Often it involves taking one step forward and two steps back; sometimes the steps forward are tiny and the steps back giant. For example, my earlier work in Uzbekistan ended abruptly in 2005 and we thought all the progress was lost. In 2008, however, we resumed working with government officials in Uzbekistan who are making substantial progress in developing a better understanding of the rule of law—forward steps again.

To conclude, I always try to remember the words of Sir Winston Churchill, who said, “we make a living by what we get, but we make a life by what we give.” That is a very good idea to live by.