

## Views from the Field

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### On Constitution Writing: The Case of Kosovo

*Interview with Professor Louis Aucoin*

**I**n March of 2007, Professor Louis Aucoin served as a key figure advising the Constitutional Commission of Kosovo. *PRAXIS* editors Margherita Zuin and Kallissa Apostolidis interviewed Professor Aucoin about the process of constitution writing and his experience in other post-conflict transitions.

**What role have you played in the Kosovo constitution-making process?**

In March of 2007, I was approached by the United States Agency for International Development. They asked me if I would serve, along with two other people, advising on questions relating both to the process of setting up the Kosovo constitution and the substance of the constitution itself.

**Were any currently existing constitutions used as models?**

Yes, absolutely, we looked at many different constitutions as models. When we first started dealing with the Kosovan drafters of the constitution, we said that we would be acting as a resource and we would offer information about other constitutions. They said they preferred to try, as much as was possible, to reference constitutions from within the region. We looked a lot to the constitutions of Croatia, Albania (which was very influential, as the vast majority of Kosovans are ethnic Albanian), Slovenia, Greece, to certain extent, and Bulgaria. I also suggested that it would be good idea to look at the French and German constitutions just because they are such influential constitutions in the civil law world, and Kosovo is a civil law country. But it was certainly useful for all of us to look at some of the other constitutions in the [Kosovo] region itself.

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**Professor Louis Aucoin** is currently an Associate Research Professor at the Fletcher School. Before coming to Fletcher, Professor Aucoin was a Program Officer in the Rule of Law Program at the United States Institute for Peace. He has also served as a Supreme Court Fellow and worked as a consultant for the Justice in Times of Transition Project. He has previously taught at Boston University School of Law, ESSEC (Ecole Supérieure des Sciences Economiques et Commerciales), Université de Poitiers, and Ecole des Hautes Etudes Internationales, Paris. Professor Aucoin's research interests include rule of law, constitution-making, tribal law, and peacekeeping

**What were considered to be desirable characteristics?**

[The Kosovans] were the ones really directing that process. One of the issues they were very, very interested in trying to figure out was what kind of political regime they wanted to set up. This was the subject of a great deal of controversy among them, and also in the society in general. This raised the question of whether they wanted to have a purely parliamentary system, a presidential system, or semi-presidential system, and they really wanted our help in assessing the full range of the implications of each of these systems for them. So we tried to reverse the course, suggesting that the way we characterized the system was not as important as determining what they actually wanted to accomplish. Then they focused on deciding which specific powers they wanted each branch of government to have. Once they started focusing on those kinds of questions, it made the process much easier.

The US government organized a three-day conference in Macedonia for all of us to examine this and a host of other substantive issues. One of the major points we as foreign advisors made is that there is no international law that says that power has to be organized in any particular way, and we made this very clear to our Kosovan colleagues: there is no international law that dictates how their constitution needs to be. We also pointed out that it is getting more and more difficult to classify systems, as they do not really fall into distinct categories. Some systems which refer to themselves as 'parliamentary' also have presidents: we know that in "parliamentary" systems like Italy or Germany, the president is largely ceremonial. But some of the new systems that are being created are really somewhere in between a purely parliamentary system and a purely presidential system. The president, while not as powerful as the prime minister, has some pretty significant powers nonetheless. This is true, for example, in Croatia, and even in Albania. There were many other questions: we also looked into issues like how to protect human rights; decentralization; and how they would like to set up their security sector, which is really important to them. They had some important decisions to make.

**Given that ethnicity played a major role in the conflict, does the current constitution draft contain any references to ethnicity?**

Absolutely, yes, it does. It is important to note that there was, prior to the adoption of the constitution, the proposal of an international solution, proposed by the former President of Finland, Martt Ahtisari That was going on last summer when we were involved in the constitutional process. As a matter of fact, that plan is the reason why this constitution came about. If that plan had been adopted, it would have required Kosovo to come up with a constitution. So when the plan had been proposed, the Kosovans started to act on that immediately, and started to develop the constitution in anticipation of the adoption of that plan. The reason why I am mentioning that plan in response to your question is that that plan is very specific in terms of creating power-sharing on the basis of ethnicity, and it built in many protections of the minorities. Unfortunately, before that plan could actually be presented before the United Nations Security Council for a vote, Russia made it very clear that it would veto the plan. That's why it never became law. But, as a matter of fact, all of us, internationals and locals, agreed, after the refusal by Russia, that we would include every provision of the plan in the constitution. So everything that was proposed in the plan

was incorporated into the constitution. That means there is a lot of protection of the ethnic minorities.

**Did you consult representatives of the minority groups?**

Under the Ahtisari plan, the constitution was supposed to be developed by a 21-member commission which was to include a certain number of all the minorities (including the Serb, Turkish, and Bosnian minorities). The commission was appointed, before it even had a real status, because the Kosovans were really anxious about the constitution. They figured that they would follow the plan even before the plan was adopted. But even though Serb members were actually named to the constitutional commission, they never came to any of the meetings. But as foreign advisors to the process we made an effort to meet with the Serbs independently. The other thing is that when we had the conference in Macedonia, the reason we held it there was in an effort to allow the Serbs to participate. And several important Serb leaders did come to that conference, and they did participate.

**Which members of society were included in the drafting process?**

**How participatory was it? How effective was the website that was designed to allow public feedback?**

Once the Commission had reached agreement on the major issues to be addressed in the Constitution and had prepared a draft, they conducted a comprehensive program of civic education and subsequently conducted 50 town hall meetings throughout the country. The website proved to be very effective. There were two million hits on the site, and responses came from other sources as well. In the end, the Commission changed 30% of the Articles of the draft based on public comment.

**What was the role of the Diaspora? Did it play a role?**

No, they did not have any role whatsoever, though they would not have been prevented from submitting their ideas through the website during the period of public consultation.

**During drafting, was there any attention given to how the international community might view Kosovo's constitution, and how it might be a tool to increase its right to exist?**

The Constitutional Commission made every effort to make the Constitution fully compliant with the Ahtisaari plan. I think we all realized that other countries would be more likely to recognize Kosovo if it could be shown that the Constitution was consistent with the plan since there was broad consensus internationally with respect to the plan with some notable exceptions—namely Russia, Spain, Romania and Greece. Those countries which opposed the plan opposed it as illegal under international law, but neither the international nor the local actors working on the Constitution debated that question. However, there was also a major effort to address not only the requirements of the Ahtisaari plan but to fully address European standards as well. In the end, the Commission opted in my view for the most progressive choice imaginable. We felt that this increase the likelihood of the state being recognized as well, and we did learn that in diplomatic circles certain European countries had clearly indicated that at a very minimum their recognition would be conditional on the existence of a Constitution

**Is it true that you have worked predominantly in Francophone countries?**

On constitutional development, no. On law reform, perhaps, yes.

**How do you take into account cultural differences? Were culture experts, like anthropologists, involved in the process?**

I personally very much encourage that, but in this case, that was not included at all. We did not have any anthropologists. However, we did take culture into consideration in our discussions on human rights, as the locals brought up cultural issues very often. In some of the other law reform work I have done in other places, I have worked very closely with anthropologists, and I believe in that very much.

**The new constitution has set up a president who is much more powerful than the parliament. What was the motivation for doing this?****Could this create conflict within Kosovo?**

One of things that ended up being very important in this constitution was the model that had been used in some other countries, such as Croatia. In this model, the president represents the unity of the people, so the idea is that the president is supposed to rise above all party politics and be responsible for protecting the minorities in society. Many other constitutions—such as South Africa's, for example, which the commission really liked—give the president that role because they did, quite clearly, want to create a multi-ethnic society in which the rights of the minorities are protected.

**What about declaration of martial law? In the event that a future conflict breaks out, how does this constitution handle it differently from before?**

We talked about the issue of a state of emergency at length, and the 'state of emergency' is very strictly limited under the constitution. So the potential for abuse of 'state of emergency' is very small, and meaningfully limited. And they did look to other constitutional models for this issue.

**What potential does the constitution have for creating a lasting peace?**

There have been some strong reactions to the constitution because it allows the EU to administer Kosovo for a transitional period of time. There is an extremist group in Kosovo who are strongly in favor of self-determination, and who have been vocally resentful of this constitution. But that is a minority view. As the Serb minority has not been very vocal, we cannot be sure what their reaction is, but the population in general seems to be fine with the constitution.

That said, I think the constitution does have good potential for creating peace in the long run. The reason I say this is that there are significant human rights that it guarantees to everyone in Kosovo, and there are significant protections of minorities. And there are very well-thought-out mechanisms of implementation that have been included in the constitution, including a constitutional court which will have broad authority to protect rights under the constitution. Will individuals become adequately educated about their rights under the constitution? Will they actually exercise those rights? I don't know. But I am rather optimistic, because there seems to be a real political will to educate people on the constitution. And when the constitutional court is created, I don't think the people will be shy about using it. I don't think this will be immediately felt; it is more of a long-term process.

**Is sexual orientation protected in the Constitution?****How was it possible to include such a difficult topic?**

Earlier in the process of the commission, we had broken up into sub-groups dealing with some of the major topics of the constitution, and one of the topics was human rights. I had a very interesting conversation with the woman who was the president of the sub-group on human rights: interestingly enough, she explained that she had recommended that sexual orientation be included in the anti-discrimination provision of the constitution, but that had created considerable controversy in that sub-group. A few people had even walked out because the argument was so controversial. But when it came to [the human rights] deliberation on the text, I mentioned the fact that the South African constitution includes a protection against discrimination on the basis of sexual orientation, and there was no opposition at all.

**Can you tell us a bit about your current role in Haiti?****Is it going to be something similar to what you have done in Kosovo?**

Unfortunately, I don't really have any specific role at the moment. I should say that I have constantly been involved in Haiti since 1996. Every time there has been movement toward a law reform in Haiti, I somehow get involved in one way or another, and it seems that a reform movement in Haiti is imminent. The reason why I say that is I know that the international community, and particularly the United States, is very encouraged at the moment with the Preval regime. Preval himself has expressed a strong desire to engage in various areas of law reform and USAID has very recently put out a request for proposals to do law reform in Haiti, and I think it is fairly likely that I will be involved. The other thing is that I have also been working for the US Institute for Peace, in a very preliminary way, to see whether the international community will support reform of the constitution in Haiti. Haiti has a very good constitution in some ways. The 1987 constitution is an extremely democratic constitution, and, as a matter of fact, I would say in some ways, perhaps *too* democratic. It really incorporates some of the flaws, for example, of the Third and Fourth Republics of France, problems that were corrected in the current Constitution which governs France<sup>3</sup> It is very much influenced by the spirit of the French revolution. And the constitutions in other civil law countries have had to correct their constitutions to remove some of that excessive zeal of the power of the people. The Haitian constitution has not yet done that, and yet the president himself says that it's time to reform the constitution. That had to come from him because a foreigner could never say to Haiti, "you should reform your constitution." Because they love that constitution, and that is a good thing; that means the constitution has a great deal of legitimacy. But, it does not mean it is not in need of being reformed. Now the problem for us has been that when some of us who were interested in encouraging constitutional reform go to international donors, none of the international donors are yet interested in helping the Haitians in reforming the constitution. Until there is international funding to support them to do it, I don't think [reform] is going to get off the ground. I don't know where it is going to end.

