

Joint Constitutional Law Expert Report

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A. Relationship between domestic and international law

1. With the exception of international human rights conventions:

a) do international ratified agreements, have direct effect (or self-applicable) in the domestic legal system of Kosovo as a legal basis to criminalise conduct, in absence of a corresponding criminal prohibition in the Criminal Code, considering both Article 19(1) of the Constitution and Article 55 (1) of the Constitution?

b) can international ratified agreements criminalising conduct be applied directly when they are not self-applicable and there is no domestic law with the same criminal norm?

c) does customary international law have direct effect (or self-applicable) in the domestic legal system of Kosovo as a legal basis to criminalise conduct, in absence of a corresponding criminal prohibition in the Criminal Code, considering both Article 19(1) of the Constitution and Article 55 (1) of the Constitution?

d) can customary international law criminalising conduct be applied directly when they are not self-applicable and there is no domestic law with the same criminal norm?

The relationship between the domestic and international law in the Kosovo legal system is complex and distinctive from other domestic legislations. In principle, The Constitution of Kosovo, recognized the importance of international agreements by stipulating in article 19 that international agreements ratified by the Republic of Kosovo become part of the internal legal system and are directly applied in the Kosovo legal system. Accordingly, an international agreement that has been ratified in accordance with the procedure set out in the Constitution becomes a binding and has superiority over the laws of Kosovo. The Constitution goes one step further, by specifically including a set of International Agreements and Instruments in article 22

of the Constitution which are directly applicable regardless of Kosovo not officially being parties to these instruments.

Nevertheless, when considering whether international ratified agreements have direct effect in the domestic legal system, one must look at the two articles comparatively. For starters, article 22 explicitly stipulates that human rights and fundamental freedoms stipulated in the listed instruments are 'guaranteed by this Constitution, are directly applicable in the Republic of Kosovo'. The language used in the article is clear and decisive in the fact that the rights and freedoms guaranteed in the instruments at hand are directly applicable, regardless of the 'binding nature of the instruments itself. It should be noted that the instruments on the list that are no itself binding such as the Universal declaration of Human Rights. But the provision distinguishes between the binding nature of the instrument and the fundamental rights and freedoms therein. This shows that there was an express intent to have the rights and freedoms be directly applicable and have priority over the provisions of the acts and laws and other acts of public institutions in Kosovo. Hence there is no doubt that the human rights and fundamental freedoms stipulated in these instruments are binding for Kosovo courts, they create rights for individuals and supersede any conflicting norms within the domestic system.

Article 19 however, uses a different language when talking about the applicability of international agreements. The article makes a very significant distinction between self-applicable and non self-applicable. As the article clearly stipulates, only international treaties that are self-applicable or self-executive are directly applicable, whereas the non-executive agreements require the promulgation of law. Correspondingly only a self-executing treaty is directly applied in the courts and creates rights for individuals, whereas a non-self-executing treaty requires legislative implementation before it can create specific rights or obligations and be applied by the courts.¹ Accordingly, although an international agreement has been ratified and entered into force, it does not automatically mean that it creates obligations and is applicable to the courts unless it is self-executing.

Therefore, we turn to the question of when an agreement is self-executive or self-applicable. This has been a topic of discussion in international law and domestic law

¹ Carlos Vasquez, The Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law. PIL DISCUSSION GROUP. Available at: <https://www.law.ox.ac.uk/events/distinction-between-self-executing-and-non-self-executing-treaties-international-law>

of numerous countries. There are certain distinct features that make an international treaty self-executive. Sometime the nature of the treaty itself will determine whether it is self-executive. One of the key features is whether the treaty provisions define the rights and obligations of private individuals.² In absence of such clear provisions, one can argue that a treaty is not self-executive. Thus within the meaning of article 19 of the Kosovo constitution it would require additional promulgation by law to create binding legal obligations for the courts.

This provision should be read also in line with article 55 of the Kosovo Constitution, which stipulates that 'fundamental rights and freedoms guaranteed by this Constitution may only be limited by law'. Thus, non-self-applicable treaties, particularly when containing provisions that limit the fundamental freedoms, can only have effect if the rights or obligations arising out of them have been specifically promulgated by law. Therefore, only self-applicable treaties can have direct effect in the domestic legal system of Kosova as a legal basis to criminalise conduct. Whereas non-self-applicable agreements cannot be applied directly even in absence of domestic norms.

As regards the question whether customary international law has direct effect (or self-applicable) in the domestic legal system of Kosova as a legal basis to criminalize conduct, in absence of a corresponding criminal prohibition in the Criminal Code, we must look closely at the language of Article 19 (2) and 55(1), and analyze them comparatively. Article 19 (2) of the Kosovo Constitution, recognizes the applicability of the binding norms of international law. Given the nature of international law one may assert that these binding norms include rules of customary international law. Emphasis however should be put on the second part of that paragraph which stipulates that these international law norms have superiority over the laws of the Republic of Kosovo - not the Constitution itself. Following that, our attention turns to article 55(1) which notes that the limitation of the fundamental rights and freedoms guaranteed in this constitution can only be done by Law. In the case at hand, the right to liberty and security among other rights is clearly a Constitutional right. As such, this right and other rights listed in the Chapter II of the Constitution *can only be limited by law*. A limitation to these rights would only be enforceable if done by virtue of

² Legal Information Institute, When is a treat Self-executing. <https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/when-is-a-treaty-self-executing#:~:text=%E2%80%9CTreaty%20provisions%20which%20define%20the,are%20usually%20considered%20self%2Dexecuting.>

domestic law such as the Criminal Code, but in absence of a domestic law would not be applicable to the courts.

2. In view of Article 56(2) of the Constitution does Article 33(4) of the Constitution operate as *lex specialis* to any other legal norm, irrespective whether introduced via customary international law or domestic legislation?

Article 56(2) is an essential provision within the Constitution which is designed to be a safeguard of the most fundamental rights and freedoms specifically listed in this article. When reading the second provision of article 56 in light of the first provision, one can see the importance that the drafters intended to put on the fact that the specific rights listed under this provision cannot be derogated from under any circumstances.

The Principle of Legality and Proportionality in Criminal Cases which is stipulated in Article 34 forms part of those fundamental rights and freedoms, which cannot be derogated. Correspondingly, Article 33(4) is a rule that must be upheld as is. The principle stipulated in article 33(4) is a generally recognized principle of law that mandates that all punishments are to be administered in accordance with the law in force at the time the criminal act was committed. The following sentence makes a mandatory exception to that rule by stating that the general rule is applicable 'unless' the penalties in the subsequent applicable law are more favorable to the perpetrator. Therefore, the provision is indeed a *lex specialis* to any legal norm that determines the legal punishment for a certain criminal conduct. One may infer though that for this provision to be applied, the penal offence would have to be the same.



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Date



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