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THE CONSTITUTIONAL COURT'S DECISION ON THE ASSOCIATION/COMMUNITY OF SERB MAJORITY MUNICIPALITIES

On 23 December 2015, the Constitutional Court of the Republic of Kosovo published its judgment concerning the compatibility of the General Principles and Main Elements of the Association/Community of Serb Majority Municipalities (hereafter: Principles) within the spirit of the Constitution.

The judgment came on the request of President Jahjaga to judge the constitutionality of the agreement on the principles for the Association reached between the governments of Kosovo and Serbia on 25 August and to suspend each activity produced by the agreement until a judgment was reached. President Jahjaga's request was a result of consultations with political parties, following a series of opposition-led protests and incidents in Parliament designed to block the ratification of the agreement.

In its judgment, the Constitutional Court argues that it does not have the jurisdiction to review the agreement on the principles itself as a legal act, because the agreement is neither a law nor a decree issued by the President or the Prime Minister, nor a regulation of the Government, nor a municipal statute. However, the Court finds that the referral made by the President falls within the scope of a constitutional question, because the Principles – as part of the implementation of the First Agreement of 19 April 2013 – relate to the governance of the state and more particularly the division between central and local level governance. Such constitutional questions, the Court argued, fall within the authority of the Court.[1]

An important part of the judgment by the Court is that the Association is part of the constitutional order of the Republic of Kosovo as a result of the ratification of the First Agreement of 19 April 2013 by the Assembly of the Republic of Kosovo. As such, the Court argues that the Government of Kosovo is legally obliged to proceed with the establishment of the Association.[2] On this basis, the Court evaluated the chapters of the Principles against the light of Kosovo's constitutional standards. The reasoning and conclusions made by the Court that the Principles do not entirely meet Kosovo's constitutional standards and therefore, should be reflected in the final legal act and statute of the Association, which will be the subject of review by the Constitutional Court.

[1] CONSTITUTIONAL COURT OF KOSOVO. 'Judgment in Case No. KO130/15' (23 December 2015), Arts 87–110.
[2] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 112–13.

The Court's evaluation of the Principles: Not entirely in accordance with constitutional standards

Though the Court confirmed that the Association/Community of Serb Majority Municipalities is part of Kosovo's constitutional order and noted that it should be formed, its judgment is quite severe in certain areas regarding its competences.. For each of the chapters in the four-page agreement, the conclusion is that the principles and elements do not entirely meet the constitutional standards.

Legal Framework

The legal source for the Association will be a decree by the Government of the Republic of Kosovo, which is to be reviewed by the Constitutional Court. In addition, the Association will be defined by a Statute, to be adopted by the voting members of the participating municipal assemblies and to be endorsed by decree. The Court judges that the legal framework of the Association should recognise the freedom of association of all participating municipalities and exclusive authority of municipalities – as basic units of self-governance – to decide on inter-municipal cooperation.[3]

Objectives

With regard to the Principles on objectives of the Association, the Court makes two interesting remarks. First, it notes that the Principles do not meet constitutional standards which state that municipalities are the basic units of self-government and retain constitutional responsibility for municipal competences. In particular, the Court cited the objectives which read that the Association shall "exercise full overview" in the domains of education, health and social care, coordination of rural and urban development, and development of local economy breach the competences of municipalities in these areas. The Association cannot take the place of nor undermine the status of the participating municipalities as basic units of democratic local self-government.[4]

Second, the Court criticises the ambiguous language used in the agreement of 25 August and its versions in three different languages, especially the wording "full overview". The Court notes that the language used in the final legal act in all three languages should be clear and concise and that it should follow the language of the First Agreement, that is, "have full overview" instead of "exercise full overview" (the former meaning "being informed" according to the Court).[5]

Organisational structure

The Court argues that the final legal act should ensure that the organisational structure and staffing of the Association respect the diverse communities living in the participating

[3] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 120–36.
[4] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 140–49.
[5] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 143–47.

municipalities. In its current form, the Principles raises concern on whether the Association will uphold the principle of ethnic diversity and representation.[6]

Also, administrative staff of the Association cannot be considered part of the Civil Service, as the latter only applies to public bodies of the government administration.[7]

Relations with central authorities

The Constitution allocates special rights to communities to promote and protect their interests. The Association cannot be vested with full and exclusive authority to promote the rights of the Kosovo Serb community at the central level and shall not undermine the authority of existing associations or central-level representatives protecting and promoting the right of communities. In other words, the Association cannot replace or undermine existing mechanisms to ensure the protection and promotion of community rights at the central level.[8]

In addition, the Association is not entitled to propose legal amendments, as stated in the Principles. It can be a member of the Consultative Council for Communities, and as such, suggest initiatives for legislation.[9] The Court also restricts access of the Association to the Constitutional Court to cases where its fundamental rights as a legal person are breached. The Association can thus not turn to the Court to protect the rights of the Serbian community in Kosovo.[10]

Budget

Municipalities have the constitutional right to receive and decide on the spending of municipal revenues, but cannot transfer this right to other bodies of local self-government. The final legal act should clarify that the financing and expenditures of the Association will not undermine the participating municipalities' constitutional right to decide on spending of municipal revenues.[11]

In conclusion, the Constitutional Court clearly evaluated the Agreement on Principles of 25 August as a weak legal basis for the Association of Serb Majority Municipalities. The Court, in fact, by and large circumvented the Principles and obliged the Government to establish the Association on the basis of the First Agreement. It also singled out the elements from the Agreement on Principles that are not in line with the Constitution.

What about the First Agreement on the Association?

The crucial question at this stage is whether the substance of the First Agreement itself provides a constitutional basis for the establishment of an Association of Serb majority municipalities. Previously in 2013, the Constitutional Court was asked by 12 opposition Members of Parliament to declare the First Agreement—and the subsequent law ratifying said agreement—invalid and void. In a judgement issued on 9 September 2013, the Court rejected the request with the explanation that "no Article of the Constitution provides for a review by the Court of the

[6] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 153–56.
[7] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 157–59.
[8] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 164–67.
[9] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 168–73.
[10] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 174–76.
[11] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 180–81.

constitutionality of the substance of international agreements." Thus, the Court at the time declared that it has no jurisdiction to review the constitutionality of international agreements. It did judge that the Law on Ratification and the First International Agreement was adopted in line with the Constitution.[12]

In its recent judgment, the Court argues that the First Agreement should be the basis for the final legal act on the Association, which is part of Kosovo's constitutional order as a result of the ratification of the international First Agreement of 19 April 2013.[13] In the conclusion, the Court summarises the provisions from the First Agreement that determine the Association. It should be established by Statute; its structure should follow that of the existing Association of Kosovo Municipalities; it should establish municipal cooperation in line with the European Charter for Local Self-Government and Kosovo Law; it will have full overview in the areas of different activities (education, health and social care, local economic development, and rural and urban development); and it will exercise other competences delegated by central authorities.[14]

The Court also provides an interpretation of two contentious elements in the First Agreement, namely Article 4 on "full overview" of competences in the domains of education, health care and social care, rural and urban development, and local economic development, and Article 6 on the Association's representative role to the central authorities. For Article 4, the Court argues that "have full overview" should be interpreted as "being informed" and is not the same as "exercise full overview", as mentioned in the Principles.[15] The Association's representative role to the central authorities will be realised through representation in the Consultative Council for Communities, in line with Article 6 of the First Agreement. The Association will not have the right to propose amendments to legislation and regulations or to access the Courts of the Republic of Kosovo as representative of the Kosovo Serb community.[16]

An increasing number of analysts and politicians are, however, arguing that the concept of an Association for Serb majority municipalities is unconstitutional because it is mono-ethnic and thus in violation with Kosovo's multi-ethnic character.[17] ECMI Kosovo has continuously supported the establishment of the Association, provided that it is preceded by an inclusive dialogue which involves the Kosovo Assembly and provided that it guarantees representation and protection for all communities. The Association can be a valuable mechanism enabling Serb majority municipalities to perform services in the fields of own or enhanced competencies in a more efficient and transparent manner, including financial support from the Republic of Serbia (which is allowed for and regulated by the Ahtisaari Plan and Kosovo legislation).[18]

[12] CONSTITUTIONAL COURT OF KOSOVO. 'Judgment in Case No. KO 95/13' (9 September 2013), Arts 97, 99, 101.
[13] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 112–13.
[14] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Art. 189.3.
[15] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Art. 144.
[16] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 168–71.
[17] For example, VETON SURROI. 'Afërsia e humnerës politike'. *KOHAnet*, 8 January 2015.
[18] ECMI KOSOVO. 'The Association/Community of Serb Majority Municipalities: Obligation or Opportunity?' (17 December 2015).

How to move forward?

The Court's judgment provides three important directives for further work on the establishment of the Association. First, the Association should be formed on the basis of the First Agreement. Second, in evaluating the Principles, the Constitutional Court should provide additional legal basis for the elaboration of the final legal act on the Association, more in particular by clarifying what the Association *cannot* be if it is to accord with the Kosovo legal framework. And third, the final legal act must use clear and concise language that will define and delineate the status, competences, and internal and external organisation of the Association.

In another phase, an inclusive dialogue is needed to take these directives into consideration and come up with a solid legal basis for the Association. Thereby, the focus should be redirected to how the Association can be an effective form of inter-municipal cooperation that will allow Serbian majority municipalities in Kosovo to bundle competences with the aim to improve the provision of municipal services and to make support from Serbia more transparent. The crucial directories presented in the Court's judgment should be taken in mind: (1) Municipalities remain the basic units of local self-government and that they cannot transfer their rights and responsibilities to associations of municipalities, be it with regard to budget, execution of competences, or relations with central authorities; (2) the Association should respect and reflect the multi-ethnic character of Kosovo.

Attention should be redirected toward the documents that are mentioned in the First Agreement – the European Charter for Local Self-Government and Kosovo Law. As confirmed by the Court in its recent judgment, the Association falls within the scope of inter-municipal cooperation and should follow the respective legislation, namely: the Law on Local Self-Government and the Law on Inter-Municipal Cooperation can serve to provide additional legal basis for the elaboration of the final legal act on the Association.[19] Remarkably enough, up to now these laws have apparently not been taken into consideration in the process of elaborating the legal act for establishing the Association.

[19] CONSTITUTIONAL COURT: 'Judgment KO 130/15', Arts 134, 140; See also ECMI KOSOVO. 'The Association/Community of Serb Majority Municipalities: What Is (Im)Possible Within the Legal Framework?' (16 April 2015).

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