



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Pristina, 23 December 2015  
Ref.No.:MM878/15

Dissenting Opinion of Judge Bekim Sejdiu in the case KO 130/15

**I. General remarks**

In the Case KO130/15, the majority of the Court has decided:

- A) *TO DECLARE the Referral admissible;*
- B) *TO HOLD that the Association/Community of the Serb majority municipalities is to be established as provided by the First Agreement, ratified by the Assembly of the Republic of Kosovo and promulgated by the President of the Republic of Kosovo;*
- C) *TO HOLD that the Principles as elaborated in the “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” are not entirely in compliance with the spirit of the Constitution, Article 3 [Equality Before the Law], paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo;*
- D) *TO HOLD that the legal act of the Government of the Republic of Kosovo and the Statute implementing the Principles in order to be in compliance with the spirit of the Constitution, Article 3 [Equality Before the Law], paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo shall meet the constitutional standards and be in compliance particularly with Articles 3, 7, 12, Chapter II [Fundamental Rights and Freedoms] Articles 21 and 44, Chapter III [Rights of Communities and Their Members] Articles 57, 59, 60, 61 and 62, as well as with Articles 79, 81, 93, 101, 113, 123, 124 and 137 of the Constitution of the Republic of Kosovo as reasoned by the Judgment;*

.....

While I share the majority's view on the admissibility of the Referral, regrettably and with all due respect for the majority of the judges, my opinion differs fundamentally on the reasoning and some of the crucial conclusions reached by the Court, pertaining to the merits of the case. Consequently, I dissent from the decision reached by the majority of the judges in the Case KO130/15. My dissent is based on two essential reasons. First, I am of the opinion that by this decision, the Constitutional Court (hereinafter “the Court”) does not provide comprehensible and satisfactory answer to the question submitted by the President through Referral

KO130/15. Second, the majority made some erroneous interpretations and conclusions, which are not instrumental in preventing any further constitutional confusion on the pertinent constitutional issues presented by Referral KO 130/15. In this way this decision does not provide the necessary authoritative guidance for clarifying the constitutional controversy related to this Referral.

## **II. Background**

This request is submitted by the President of the Republic of Kosovo (hereinafter "the President,") pursuant to Article 83 and Article 84, paragraph 9, of the Constitution of the Republic of Kosovo.

The subject matter of this request is the interpretation of compatibility of the General Principles /Main Elements of the Association of the municipalities with Serbian majority (hereinafter "Principles of Association") with the spirit of the Constitution, Article 3 (1), Chapters II and III of the Constitution of the Republic of Kosovo.

In the Referral submitted by the President it is specifically requested from the Court to address the following question:

*"Taking into consideration that the Principles of Association regulate the creation and functioning of the Association of the municipalities with Serb majority in Kosovo, are these principles and elements compatible with the spirit of the Constitution, Article 3, paragraph 1 (multi-ethnic nature), Chapter II (basic rights and freedoms) and Chapter III (rights of communities and their members) of the Constitution of the Republic of Kosovo?"*

## **III. Legal nature of the document entitled: "Association/Community of Serb majority municipalities in Kosovo – general principles/main elements"**

The Court avoids delineation of the legal nature of the document entitled: "Association/Community of Serb majority municipalities in Kosovo – general principles/main elements." This hesitance inspires majority's reasoning throughout the decision, resulting thereby in a confusing and unclear interpretation of the nature of obligations arising from this "document."

In the Referral, the Applicant uses general terminology to delineate the legal nature of the document entitled: "the Principles of Association." This is indicated by the following paragraphs quoted from the Referral:

*"The Principles of Association, in the format of a legal act approved by the Prime Minister of the Republic of Kosovo..."*

*[...]*

*The Principles of Association is a document signed by the Prime Minister and represents the dedication of the Government to create a new legal entity which produces legal effects in the constitutional order of the Republic of Kosovo....*



[...]

....The “Principles of Association”, which is not an international agreement but an applicable legislation deriving from an international agreement..

[...]

The Principles of Association is an intermediary legal act, which stems from the “First International Agreement”, adds additional elements in the process of creating the legal entity itself (the Association/Community), and precedes the founding act (Decree of the Government of Kosovo on Establishment, as per Article 2 of the Principles of Association), hence having a conditioning effect on the founding act.

The above descriptions provide three elements for delineating the atypical legal nature of the document entitled the “Principles of Association”: First, the “Principles of Association” is a legal act; second, the “Principles of Association” derives from the “First Agreement” and it is aimed at implementing the obligations contained therein; third, the “Principles of Association” adds new element to the original obligations foreseen by the “First Agreement.”

Neither the general legal terminology nor the legal system of the Republic of Kosovo provides any conceptual venue for discerning the meaning of the term “intermediary legal act.” This is not the case, however, with the definition of “legal act,” as this is a very usual doctrinal endeavor in the legal theory and juridical practice.

One of the most commonly referred doctrinal sources for the definition of “legal act” is Hans Kelzen’s book “The Pure Legal Theory.”<sup>1</sup> Kelzen defines the legal act as “an act by means of which a legal norm is issued (figuratively speaking “created”) or applied.” Further, Kelzen clarifies that “an act is a law-creating or law-applying act only if it corresponds to the norms that govern the creation and application of the law within the legal system, that is, only if the act in question is based on the legal system.”

At this stage, the Principles of Association does not meet the criteria to be labeled as an international agreement – despite the resemblances (i.e., its text of the document has been agreed in an international political process and has been authenticated through the initials of the Prime Ministers of two countries, namely the Republic of Kosovo and the Republic of Serbia). In the formal sense, the legal obligations deriving from the Principles of Association, which have been assumed by the Republic of Kosovo, generate constitutional effects. Hence, this “document” represents a legal act, within the ambit of the domestic legal system of the Republic of Kosovo, by the virtue of the fact that it introduces new formal norms into the domestic legal system.

In my view, the complexity of the political and legal backdrop upon which the Principles of Association, as a legal act, came into the existence and subsequently referred to the Court for its evaluation, should not prevent the Court from addressing genuinely the legal question addressed to it by the Head of State, namely the

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<sup>1</sup> Hans Kelzen, *The Pure Legal Theory* (1960; Knight trans.), Berkeley 1967, Union (N.J.) 2002.

President of the Republic of Kosovo (I recall in this regard that the Government of Kosovo has also repeatedly stated that it will not undertake any step towards the implementation of the Principles of Association, prior to the evaluation of its constitutionality by the Court, and that it will respect any decision of the Court). Nor should the Court be prevented from addressing in an unambiguous and clear legal language the question of the constitutional (in)compatibility of the Principles of Association, by referring to the argument that Kosovo has an obligation to establish the Association/Community, arising from the First Agreement, which has been duly ratified and promulgated. It is important to note that even in the decision reached by the majority (Paragraph 104) it is rightly underlined that “...the questions raised in the present Referral are of utmost importance and relevant to the constitutional order of Kosovo. Moreover, there is no other institution in the Republic of Kosovo where to the Applicant could address them.”

#### **IV. Failure to answer the essence of the constitutional question submitted to the Court**

The decision reached by the majority does not answer the essence of the question, namely is the Principles of Association compatible with the spirit and Article 3 [Equality Before the Law], Paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their members] of the Constitution?

The decision rightly identifies some paragraphs of the Principles of Association which are in contradiction with the Constitution, but it falls short of qualifying them, clearly and unequivocally, as such. Moreover, the decision does not provide clear constitutional guidance to avoid the contradiction between these provisions of the Principles of Association and the Constitution.

- ***The unconstitutional provisions of the Principles of Association identified by the decision, but not appropriately addressed.***

A decision reached by the majority of the Court indicates, in a rather relative language, that some provisions of the Principles of Association are in contradiction with the Constitution.

Thus, Paragraphs 153 and 154 of the decision read as follows:

*“153. The Court notes that the Principles regarding the organizational structure of the Association/Community raise concerns regarding respect for the diversity of communities resident within the participating municipalities, and the reflection of this diversity in the staffing and structures of the Association/Community as required by the Constitution of the Republic of Kosovo.*

*154. The Court recalls that the First Agreement, point 3 determines the structure of the Association to be established on the same bases as the existing statute of the Association of Kosovo municipalities e.g. President, vice President, Assembly, Council”.*



The Court uses the flexible term “raises concerns,” regarding respect for diversity of communities municipalities, instead of establishing clearly that this fact contravenes the spirit of the Constitution, and, particularly, the Article 3.1 (as it will be elaborated below).

In relation to the above, in Paragraph 155, the majority of the Court makes another problematic suggestion, when concluding that:

*“...155. The Court finds that when these Principles on the organizational structure of the Association/Community are elaborated into a legal act and the Statute, they shall secure respect for the diversity of communities resident in the participating municipalities, in accordance with Articles 3, 7, 57.1, 61, and 62 of the Constitution.”*

This line of reasoning is repeated in other paragraphs of the decision reached by the majority, where the contradiction between certain paragraphs of the Principles of Association with the Constitution is “noted”: Paragraphs 137/138 (the objectives of the Association); Paragraphs 166/167 (the right of the Association to promote the interests of the Kosovo Serb community in relation with the Central authorities); Paragraph 166/1967 (legislative initiative); Paragraphs 180/181 (financial transfers from central government to municipalities and the right to decide on their expenditure).

Legal act, which, to use the language of the Decision “shall elaborate” the provisions of the Association, is primarily the decree, which is just an implementing act stemming from the Principles of Association (the Court in its decision mentions also the statute).

As the referral submitted by the President succinctly underlines that the Principles of Association have a conditioning effect on the founding act, namely the decree. It should be also underscored that the statute of the Association shall be infused into the legal system of Kosovo, only through the decree of the Government/Prime Minister. So, only the decree shall be eligible for direct review by the Court – pursuant to Paragraph 2 of the Principles of Association. As such, the decree cannot amend the Principles of Association in any fundamental way, as the decision reached by the majority suggests, but the opposite, the Principles of Association sets the general legal confines within which the decree shall be adopted. It transpires, therefore, that the decree cannot be in contradiction with the Principles of Association. Consequently, the decree cannot play the corrective function in terms of eliminating the provisions of the Principles of Association which are inconsistent with the Constitution.

The decision reached by the majority does not elaborate the causal legal relation between the Principles of Association with the decree and other corresponding legislative acts, which shall serve the purpose of establishing the Association/Community. It is worth emphasizing that in the paragraph 114 of the decision, it is provided that “the Referral is about the Principles upon which the Association/Community will be established as foreseen by point 1 of the First Agreement.” This indicates clearly that the Principles of Association clarify the legal boundaries for the establishment and operation of the Association/Community. As

such, they cannot be amended by the decree or the statute, as the decision of the Court wrongly suggests.

It is my believe that the outcome of this line of reasoning followed by the majority will be that in every important stage of the establishment and functioning of the Association/Community a need will arise to interpret and reinterpret the disharmony between the constitutional principles with the provisions of the Principles of Association and the corresponding legislation.

- ***Erroneous interpretations of certain key provisions of the Principles of Association***

I disagree with part of the conclusion reached by the majority and reflected in the decision, related to some of the key elements of the Principles of Association.

Thus, in elaborating the legal grounds for the establishment of the Association, the decision blurs the line between three different chapters/domains of the Constitution, namely, Article 12 [Local Government]; Chapter II [Fundamental Human Rights and Freedoms] and Chapter X [Local Governance and Territorial Organization]. This leads to incorrect corollary – at least in an indirect way, that the legal bases for the establishment of the Association/Community can be inferred from these three Chapters.

Thus, in elaborating the “legal framework” of the Principles of Association, the decision reads as follows:

*“The Court further recalls that the Association/Community is foreseen by the First Agreement, inter alia, point 3 provides that “The structures of the Association/Community will be established on the same basis as the existing statute of the Association of Kosovo Municipalities, e.g. President, vice President, Assembly, Council.”*

*[...]*

*“That implies that Article 12, Article 21.4 and Article 44, as well as Article 124.4 of the Constitution shall be taken into consideration.”*

Further, the decision reached by the majority concludes in an elusive language that:

*“..... the Court finds that in the elaboration of the chapter on Legal framework of the Principles into a legal act, the Government, has to meet the constitutional standards. Considering that this legal act defines the nature of the Association/Community to be established, it must be in compliance with Articles 12, 21.4, 44 of the Constitution, as well as Article 124.4 of the Constitution (136).*

Article 12 [Local Government] has two paragraphs, and it stipulates that the municipalities are the basic territorial unit of local self-governance in the Republic of Kosovo and the organization and powers of units of local self-government are provided by law.”



This Article does not provide any legal venue for any kind of association of municipalities to have the status of a separate unit of self-governance.

Article 21 of the Constitution [General Principles of Association] is an essential part of the Chapter II [Fundamental Rights and Freedoms]. Paragraph 4 of this Article stipulates that:

*“Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”*

Article 44 enshrines the right to the freedom of association, as one of the fundamental human rights and freedoms, which, by the virtue of Article 21, shall extend to the legal persons to the extent possible.

The freedom of association is a vital ingredient of the corpus of human rights and freedoms, which belongs to the individuals, either individually or by the virtue of their belonging to a collectivity/group.

However, contrary to the reasoning of the decision reached by the majority, the constitutional provisions dealing with the fundamental human rights do not apply to the public institutions, which deliver public functions – municipalities being one of them.

As an additional argument, Article 59 [Rights of Communities and their Members], paragraph 14 of the Constitution, which is referred in the decision, provides for the right of the members of the communities, individually or in community:

*“...to establish associations for culture, art, science and education as well as scholarly and other associations for the expression, fostering and development of their identity.”*

Again, this right belongs to the category of human rights recognized to the members of ethnic communities, individually or collectively, not to the municipalities, associations formed by them, or other public bodies of the government.

The reasoning of the majority of the Court fails to make clear distinction between the freedom of association, as a fundamental human right (Article 44), with the Article 124.4 [Local Self-Government Organization and Operation] of the Constitution, which provides for the inter-municipal cooperation and cross-border cooperation in accordance with the law.

There are three crucial legal facts, disregarded by the decision reached by the majority, which clarify the issue of the legal basis for the municipalities to create the Association/Community.

First, municipalities cannot rely on Article 21 and 44 of the Constitution, as the legal basis for the creation of the Association/Community, because the issue of human rights in the Constitutional order of the Republic of Kosovo cannot be subjected to the *ad-hoc* territorial-based legal regimes. Municipalities represent the basic unit of the local government, which have a territorial identity.

Article 4, paragraph 1, of the Law on Local Self-Government of Kosovo defines municipalities as:

*"...the basic unit of local self-government in Republic of Kosovo, made up of community of citizens of a specific territory defined by law and shall exercise all powers which are not explicitly reserved for the central institutions."*

Article 21 [General Principles of Association], paragraph 1 of the Constitution proclaims that: "Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo."

As a general principle, "indivisibility," as a fundamental feature of every modern legal regime for the protection of human rights, inhibits any kind of "divisibility," including a territorial-based one.

Second, Article 123, Paragraph 3 of the Constitution stipulates that:

*"The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government."*

The European Charter of Local Self-Government (Article 10, paragraph 1) establishes that in exercising their power:

*"local authorities shall be entitled to co-operate, and, within a framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest."*

According to this provision of the European Charter of Local Self-Government, the association of the municipalities is related to the exercise of their (public) functions. Consequently, the basis of cooperation and association can be the common interest of the municipalities – not the interest of particular groups within the municipalities, be they ethnic, religious, ideological or other (as it is the case with the Association/Community).

Third, Article 31 [Right of Municipalities to Associate] of the Law on Local Self-Government provides that:

*"For the protection and promotion of their common interests, municipalities may form and belong to associations that operate in conformity with the law."*

In a logical interpretation of this provision of this Law, which has the character of *Lex Specialis* for this legal domain, the association of the municipalities should be formed by the municipalities themselves, not by the central authorities. This is not the case with the Association/Community, which, according to the Principles of Association, shall be established by the decree of the Government/Prime-Minister (by this logic, nothing would prevent the Government of the Republic of Kosovo to use this precedent in the future to create, by decrees, other ethnically-based associations of municipalities, endowed with public functions).



In light of the above, the reasoning of the majority of the Court on the issue of the legal framework for the establishment of the Association/Community, as provided by the Principles of Association, is based on incorrect reading of articles 12, 21, 44 and 124 of the Constitution. I am of the opinion that neither Article 12 (which establishes the municipalities as the basic territorial unit of the local self-government); nor the Articles 21 and 44 (pertaining to the fundamental human rights and freedoms), nor Article 124 (related to the local self-government), provide the legal basis for the establishment of the Association/Community, in the legal format envisaged by the Principles of Association.

This, however, does not mean that the municipalities do not have the right to form associations. The Constitution and the respective laws of the Republic of Kosovo provide for the enjoyment of that right by the municipalities, and that right belongs also to the municipalities which are supposed to join the Association/Community of Serb municipalities in Kosovo. But, that must be done within the constitutional and legal confines in force at the time of their creation.

The majority has made another flawed interpretation of the right of the Association/Community to initiate proceeding before the Constitutional Court (Paragraph 11 of the Principles of Association). The Decision reached by the majority of the Court established that:

*“The Court finds that the Association/Community may only initiate proceedings before the Constitutional Court where the Association/Community, as an entity having legal personality, can claim to be a victim of a violation of its fundamental rights and freedoms guaranteed by the Constitution within the meaning of Article 113.7 of the Constitution.”*

This conclusion reached by the majority is based on misplaced legal correlation between the articles 21.4 and 113.7., of the Constitution.

This interpretation is contradictory in itself, because Paragraph 11 of the Principles of Association provides that:

*“The Association/Community will have the right to initiate or participate in proceedings before the competent courts, including to the Constitutional Court, against any acts or decisions from any institution affecting the exercise by the Association/Community of its powers in accordance with its Statute.”*

Article 113.7 of the Constitution, referred to in the decision reached by the majority, provides that:

*“Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution....”*

Even if the Association/Community would be qualified as legal person, within the meaning of the Article 21.4., which I think would be an incorrect interpretation, Article 113.7., would not grant the Association/Community the right to refer to the

Constitutional Court acts or decision of the public institutions which would affect the exercise by the Association/Community of its powers in accordance with its Statute.

Power of public institutions cannot be associated with the human rights of the individuals or collectivities, in terms of their standing before the Constitutional Court – as the above reasoning followed by the majority implies. In addition, the right of the Association/Community to initiate proceedings before the Court does not fall within the scope of Article 113.4., which authorizes municipalities, but not associations of municipalities, to contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.

**V. Incompatibility of the Principles of Association with the spirit of the Constitution, Article 3, paragraph 1 (multi-ethnic nature), Chapter II (basic rights and freedoms) and Chapter III (rights of communities and their members) of the Constitution of the Republic of Kosovo.**

The Principles of Association violate the spirit of the Constitution, Article 3 [Equality Before the Law], Paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their members] of the Constitution.

The spirit of the Constitution is defended through integrated and genuine interpretation of the basic provisions (which embody the fundamental principles of the constitutional order), as well as the systematic and consistent reading of the operative provisions (through which these fundamental constitutional principles are materialized). It is my belief that the Principles of Association stand in contradiction with some of the most fundamental principles of the constitutional order of the Republic of Kosovo.

- ***Constitutional tension between the Paragraph 8 of the Principles of Association with the principles of sovereignty.***

Paragraph 8 of the General Principles establishes a horizontal line of institutional interaction between the Association/Community with the central government. In addition to being in contradiction with the Article 93.6., of the Constitution, which gives the mandate to the Government of Kosovo “... *to guide and oversee the work of administration bodies*,” this Paragraph adds great confusion in terms of the vertical line of the distribution and delivery of the public authority in the Republic of Kosovo. Consequently, the Principles of Association blurs the line of the hierarchical order between the central authorities of the Republic of Kosovo and the Association/Community. The existence of a vertical institutional line according to which the public authority within a given country is delivered, forms the pivot of the principle of sovereignty.

Sovereignty represents one of the most essential principles guaranteed by the Constitution. In the most common and simplistic definition, sovereignty means that a state is the highest political authority within its borders and independent and equal, in formal sense, with the other states in the international realm. The internal dimension of the sovereignty is materialized through an integrated and hierarchical institutional structure.



It would be misplaced to conclude that the Principles of Association encroach directly on the principle of sovereignty. They do not. The Principles of Association provides that the Association/Community is bound by the Kosovo law. Yet, in the most basic illustration, the sovereignty is manifested through the dual process of creation and implementation of norms and policies. The fact that Paragraph 8 of the Principles of Association establishes the horizontal line of communication and cooperation has a potential for creating constitutional confusion in terms of the exercise of public authority. It should be noted, as an additional subjective factor, that the political positions of the two actors in the process of creation of the Association/Community, namely the Republic of Serbia and the representatives of the municipalities which are supposed to compose the Association/Community, aggravates the tension between the Principles of Association with the principle of sovereignty. I recall that both these two parties/actors openly voice their opposition to the statehood of Kosovo and reject its sovereignty.

- ***Principles of Association provides for a new unit of self-government - the Association/Community***

The Principles of Association envisages the establishment of the Association/Community with many elements and features of a distinct unit of self-government with, *inter alia*, executive-type of competences. The Principles of Association defines the Association as a “legal entity” with “distinct character” (paragraph 2). As opposed to the Association/Community, the Statute of the Association of the Kosovo Municipalities, for example, defines that Association as “nonprofitable organization which is a legal subject that represents general interests of its members – Local Authorities (Article 2.1., of the Statute of the Association of Kosovo Municipalities).

In defining the objectives of the Association, Article 4 of the Principles of Association stipulates that:

*“In accordance with the First Agreement, the Association/Community will have as its main objectives in delivering public functions and services...”*

Delivering “public functions” is an attribute of the government bodies, which, as a general rule, does not belong to non-government or private organizations. In line with this, the careful interpretation of the “Objectives” of the Association of the Kosovo Municipalities leads to the same conclusion, whereby the objectives of this Association is reduced to mainly providing services to its members (i.e., municipalities).

There are other elements of the Principles of Association which give to the Association/Community the traits of a separate unit of self-government vested with executive, in addition to supervisory and representative functions. Some of these elements are as follows:

- Municipalities do not have the right/legal possibility to leave the Association (Paragraph 17 of the Principles of Association) – as opposed to the Association of the Kosovo Municipalities, where, according to the Article 5.1.4., of the Statute, “Municipal Assembly can take decision to withdraw from the membership in the Association.

- The staff of the administration of the Association shall “benefit” from the Law on Civil Service (this Law applies to the employees in the public sector).
- The Principles of Association establishes that the Association/Community will be entitled to co—own companies that provide local services within the scope of the Association/Community as well as to have its own budget, which will be administered in accordance with the law on public procurement and will be subject to audits by the Auditor General.

All these elements, provided by the Principles of Association, grant to the Association/Community the attributes of a distinct unit of self-government, endowed with certain executive powers. This is not within the meaning of Article 12 and Article 124 of the Constitution [Local Self-Government Organization and Operation].

• ***Principles of Association are incompatible with the principle of multi-ethnicity and non-discrimination***

The Decision of majority fails to establish a clear contradiction between the Principles of Association with two essential principles of the Constitution, namely the principle of multi-ethnicity and non-discrimination.

In Article 3.1., of the Constitution it is stipulated that:

*“The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.*

Article 24 [Equality Before the Law] provides that:

*“1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.  
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.  
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.”*

Article 57 [General Principles of Association], paragraph 1, of Chapter III [Rights of Communities and Their Members] stipulates that:

*“Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in chapter II of this Constitution. “*

Article 58 [Responsibilities of the State] reads as follows:



*"1. The Republic of Kosovo ensures appropriate conditions enabling communities, and their members to preserve, protect and develop their identities.*

*[...]*

*4. The Republic of Kosovo shall adopt adequate measures as may be necessary to promote, in all areas of economic, social, political and cultural life, full and effective equality among members."*

In general legal doctrine and practice, discrimination is defined as the practice of unfairly treating a person or group of people differently from other people or groups of people.

Along these lines, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination defines "racial discrimination" as:

*"...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*

Article 4 of this Convention provides that:

*"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."*

The Principles of Association embraces a territorial-based approach to the rights of particular ethnic community in the Republic of Kosovo, namely the Kosovo Serbs. In conjunction, the two fundamental components of the Principles of Association, namely ethnic and geographic ones, produce a new legal reality in the Republic of Kosovo, whereby certain portion of the ethnic Serb community who lives in the Republic of Kosovo is granted collectively different, meaning more advanced, political and legal status in the country. This differentiation creates "more favored" and "less favored" socio-political collectivities - which are defined by the objective elements of ethnicity and geography. Consequently, the new legal reality that will be created with the Principles of Association and the legal acts deriving therefrom goes contrary to the principle of multi-ethnicity and non-discrimination, which are integral elements of the spirit of the Constitution and hence represent one of the basic tenets of the constitutional order of the Republic of Kosovo.

There are two layers of differentiation introduced by the Principles of Association.



The first layer of differentiation is between the Kosovo-Serbs who live in the municipalities which are included in the Association/Community and the Kosovo-Serbs who live in the other municipalities of the Republic of Kosovo, not included in the Association/Community. Apparently, only the Kosovo-Serbs who live in the municipalities where the Serbs are in majority-in demographic terms are “entitled” to benefit from the advanced political position granted by the Association/Community. Kosovo-Serbs living in other municipalities, for example, will not have any say in the election of the Assembly, as the main body of the Association/Community, and, by default, in other bodies of the Association (Paragraph 6 of the Principles).

The second layer of differentiation is between the Kosovo-Serbs living in the municipalities included in the Association/Community, with the citizens of other ethnic backgrounds, who live in these municipalities.

The Association/Community is ethnocentric and this is expressed also by its title: “Serb-majority municipalities,” instead of using other terminology that is not exclusionary along social identity lines (e.g., mentioning the municipalities by their official names).

As elaborated above, the legal framework as well as the applicable international standards, do not provide for the cooperation of the municipalities to be motivated by the objective of advancing the interests of particular groups, ethnic or other, who live or reside in those municipalities. The only legitimate and legal basis of cooperation between the municipalities, including in the form of association, is the advancement of the interest of the municipalities, as a whole, meaning all citizens living or residing within them, regardless of ethnic affiliation.

This is not the case with the Association/Community, and this is reflected in the Principles of Association. A Bosniak who lives in Leposavic, or a Roma in Gracanica, for example, although they may pay taxes and vote in their respective municipalities, they will not be entitled to be represented by the Association/Community, only because of their ethnicity. Moreover, they will be denied the enjoyment of the right to be elected or employed in certain positions and functions created by the Association/Community. I recall that according to Paragraph 9 of the Principles, “the Association /Community will promote the interests of the Kosovo Serb community in its relations with the central authorities.

Institutional differentiation between groups, including ethnic ones, is not only permitted but sometimes necessary to accommodate specific needs and socio-political aspirations. Yet, differentiation shall never embody or produce inequality. Separate but equal is not the formula applied by the Principles of Association. Consequently, difference in treatment between different groups based exclusively on racial elements, such as ethnicity, amounts to discrimination.

It is important to underline that the Constitution and the pertinent international legal instruments provide for treating specific groups separately, in positive sense. But, this can only serve two legitimate objectives: preserving certain specific rights and freedoms stemming from distinct social identities of particular groups, or reaching the goal of equality among different groups. In the case *SEJDIC AND FINCI v. BOSNIA AND HERZEGOVINA*, the European Court of Human Rights (hereinafter, “the ECtHR”), upheld that:



*“...Discrimination means treating differently, without an objective purpose and reasonable justification”, persons in similar situations. No objective and reasonable justification means that the distinction in issue does not pursue a legitimate aim or that there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”*

Further, after underlining that “*ethnicity and race are related concepts*,” the ECtHR established that:

*“...where a difference in treatment is based on a race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.”*

The ECtHR underlined that Article 14 of the European Convention of Human Rights:

*“...does not prohibit Contracting Parties from treating groups differently in order to correct factual inequalities between them. Indeed, in certain circumstances a failure to attempt to correct inequalities through different treatment may without an objective and reasonable justification, give rise to a breach of that Article.”*

The document entitled the Principles of Association provides neither the objective nor any reasonable justification for the two-fold difference in treatment it produces. Consequently, I hold the view that the two-layered differentiation established by the Principles of Association violates the principles of multi-ethnicity and non-discrimination of the Constitution.

**In conclusion,** I respectfully disagree with the decision reached by the majority of the judges in Case KO 130/15, and I dissent from this decision, as I am of the opinion that the Principles of Association, as a legal act, produces substantial effects for the constitutional order of the Republic of Kosovo. This effect is manifested through a constitutional incompatibility, stemming from the contradiction of many provisions of the Principles of Association with some of the core principles of the Constitution. The full implementation of the Principles of Association within the current constitutional order of the Republic of Kosovo would be a constitutional anomaly. Hence, in order to avoid this, either the Constitution should be amended, to create permissive constitutional framework for the implementation of the Principles of Association, or the Principles of Association (together with the implementation legislation) should be meaningfully amended and reframed, in order to be in compliance with the Constitution. In an attempt to set a middle ground, the majority of the Court has reached a decision, which, in my opinion, does not prevent the perpetuation of the constitutional discrepancy between the Principles of Association with the Constitution.

Respectfully submitted,  
  
Bekim Sejdiu  
Judge

