

Constitutional Court of the Republic of Kosovo

CASE No. KO 130/15

REFERRAL OF THE PRESIDENT OF THE REPUBLIC OF KOSOVO, HER EXCELLENCY
MADAM ATIFETE JAHJAGA

*“REQUEST FOR INTERPRETATION OF THE COMPLIANCE OF GENERAL PRINCIPLES/MAIN
ELEMENTS OF THE ASSOCIATION/COMMUNITY OF SERB MAJORITY MUNICIPALITIES WITH
THE SPIRIT OF THE CONSTITUTION, ARTICLE 3 (1), CHAPTER II AND CHAPTER II OF THE
CONSTITUTION OF THE REPUBLIC OF KOSOVO”*

***AMICUS CURIAE* BRIEF FOR THE
CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

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Summary¹

Instruments concerning the right of municipalities to associate predominantly trigger constitutional provisions related to territorial organization of the State, units of self-government, and interrelations between local and central authorities. The instrument examined in the present *Amicus Curiae* brief, namely the “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” (the General Principles) concern this category of constitutional provisions.

This *Amicus Curiae* brief finds that some of the provisions of the General Principles, in their explicit or ambiguous wording, raise constitutional concerns and are not in harmony with, *inter alia*, Article 12, Chapter X, Article 113 and the spirit of the Kosovo Constitution. At the same time, some other provisions of the General Principles, including paragraphs a, g, h, i, j, k, l, m of Point 4 are compatible with Articles 123.3, 123.4 and 124.4 of the Kosovo Constitution.

This brief further identifies that the constitutional review of some of provisions of the General Principles, may amount to an *indirect review* of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia (the Agreement) as ratified by the Kosovo Assembly Law No. 04/L-199 in the form of a binding international treaty. In particular, such *indirect review* could take place through the review of some of the provisions of the General Principles which are also laid down in the Agreement, in particular its Articles 1 to 6 and Article 9.

¹ This *Amicus Curiae* brief has been prepared on the request of the Constitutional Court of the Republic of Kosovo. It addresses the questions posed by the Constitutional Court. This brief has been prepared from 13 to 26 November 2015.

1 The meaning and scope of the term ‘constitutional question’ under Article 84.9 of the Kosovo Constitution

1.1 Case-law of the Kosovo Constitutional Court

In its previous case-law the Constitutional Court has interpreted the term ‘constitutional question’ under Article 84.9 of the Constitution giving it a broad meaning.² In particular, in the case concerning the resignation of the Mayor of Rahovec Municipality, it stated as follows:

the ... facts at the outset appear to raise a constitutional question. That is in particular because it relates to two constitutional provisions, i.e. Article 123 [General Principles of Local Government and Territorial Organization] and Article 45 [Freedom of Election and Participation] of the Constitution.³

It further declared the referral in that case admissible and held that “there [was] no need for the Court to elaborate admissibility grounds provided by Article 113.1.2 of the Constitution”⁴.

From the aforementioned reasoning of the Constitutional Court it emerges that the ‘constitutional question’ is any question which relates to a constitutional provision.⁵

In the case of the Acting President of the Republic, the Constitutional Court further clarified the meaning of the ‘constitutional question’ under Article 84.9.

In that case it considered whether a question regarding the steps that the Acting President could take or the actions that he could be called upon to perform while holding the position of Secretary-General of the PDK was a ‘constitutional question’.⁶

The Constitutional Court held as follows:

In accordance with Article 112.1 of the Constitution, “the Constitutional Court is the final

² In addressing the question raised by the Constitutional Court, it is author’s opinion that the meaning of the term ‘constitutional question’ under Article 84.9 should not be considered in isolation of the other provisions of the Kosovo Constitution. In particular, Article 93.10 and Article 113.2 and 113.3 should be seen as provisions *ejusdem generis*, or in other words as provisions of the same kind as Article 84.9. Article 113 should be seen as a rule of coordination. This is not to suggest that Article 113 prevails over Articles 84.9 and 93.10. Instead they stand in a horizontal relationship. At the same time, and considering that the Kosovo Constitution contains both, specific and general provisions, the horizontal relationship between them is ought to be understood in such a manner that the normative content of a more specific provisions is precisely a better specification of a more general provisions. See Humberto Avila, *Theory of Legal Principles* (Springer, 2007), at 88; Richard A. Posner, *Overcoming Law* (Harvard University Press, 1996), at 233. This interpretation, however, would constitute a departure from the Constitutional Court’s current case-law.

³ Case No. KO 80/10, Judgment of the Constitutional Court of the Republic of Kosovo, 7 October 2010, para 24.

⁴ Case No. KO 97/10, Judgment of the Constitutional Court of the Republic of Kosovo, 22 December 2010, para 26.

⁵ See also Case No. KO 97/10, Judgment of the Constitutional Court of the Republic of Kosovo, 22 December 2010, para 13 holding: “the facts outlined in that case satisfied the Court that the matter was of sufficient importance to be rendered admissible”.

⁶ Case No. KO 97/10, Judgment of the Constitutional Court of the Republic of Kosovo, 22 December 2010, para 12.

authority for the interpretation of the Constitution” and because of that there is no other body from whom the Applicant may seek an answer to these constitutional questions. The Court is of the opinion that the questions raised by the Applicant are "constitutional questions" that are contemplated by Article 84 (9) and that the questions raised are fit to be addressed by the Court.⁷

The Constitutional Court went on to conclude that “Article 84 (9) of the Constitution [did] not prescribe a time limit within which questions [could] be referred to the Court ... therefore ... all the requirements for the admissibility of the Referral [were] met”.⁸

It therefore follows that according to the Constitutional Court the ‘constitutional question’ is not limited in scope or time. Any question as long as it relates to a provision of the Kosovo Constitution qualifies.

In this connection, it should be noted that the practice of some other jurisdictions reveals that their higher courts have used the term ‘constitutional question’ to describe a legal matter governed by the respective constitution.

By way of example, the United States Supreme Court used it with regard to a question of whether or not a corporal punishment by public school teachers was consonant with the due process requirements of the Fourteenth Amendment of the US Constitution.⁹ Also the practice of the German Federal Constitutional Court reveals a similar understanding.¹⁰ In the context of the European Union (the EU), Advocate General Wathelet used the term ‘constitutional question’ in a case raising matters of division of powers, responsibilities and competences of the EU institutions.¹¹ The European Court of Human Rights applied this and similar terms in the context of protection of individual rights.¹²

In the light of the foregoing, the terms ‘constitutional question’ or ‘constitutional matter’ have been used at least with regard to matters triggering fundamental rights or powers of public organs regulated by the respective constitution.

1.2 ‘Constitutional question’ in the present case

The Referral asks the Constitutional Court to examine whether or not the General Principles comply with the spirit of the Constitution, Article 3.1, Chapter II and Chapter III of the Constitution. It appears that a reference to the spirit of the Constitution is made with a view to a systemic reading of the Constitution. The

⁷ Case No. KO 97/10, Judgment of the Constitutional Court of the Republic of Kosovo, 22 December 2010, para 14.

⁸ Case No. KO 97/10, Judgment of the Constitutional Court of the Republic of Kosovo, 22 December 2010, para 16.

⁹ *Ingraham v. Wright*, 430 U.S. 651 (1977), No. 75-6527, U.S. Supreme Court, 19 April 1977.

¹⁰ 2 BvR 2236/04, Dissenting opinion of Judge Lübke-Wolff on the judgment of the Second Senate of 18 July 2005, para 165; 1 BvR 1444/01, Order of the First Chamber of the First Senate of 29 November 2005, para 17.

¹¹ Case C-425/13 *European Commission v Council of the European Union*, Opinion of Advocate General Wathelet delivered on 17 March 2015, para. 2.

¹² See e.g. *Gorraiz Lizarraga and Others v. Spain*, App. No. 62543/00, Judgment of the European Court of Human Rights, 27 April 2004, para. 41.

Referral further raises a broader constitutional issue regarding the compatibility of General Principles with the Constitution as a whole (see paragraph 14 of the Referral).

While the question has not been formulated in a precise manner, its scope while broad may be identified. In the light of the Constitutional Court's established case-law, the matter to be examined is whether or not the document referred to by the President, namely the General Principles, complies with the Kosovo Constitution. This referral requests constitutional review of an act of the Government without prejudging its outcome.¹³ This form of review, known as *abstract review* allows "a court ... to examine the actions of the legislative and executive bodies of government before or after promulgation and to determine if these actions are in accordance with the country's constitution"¹⁴. There are practices of abstract review even in the absence of an actual case of controversy.¹⁵

The present Referral may therefore be seen as a request for review of the compatibility of the General Principles with the Constitution as a whole.

¹³ See Case No. KI82/12, Resolution on inadmissibility of the Constitutional Court of the Republic of Kosovo, 25 January 2013, paras 33-34.

¹⁴ Nicola Ch. Corkin, *Europeanization of Judicial Review* (Routledge, 2015), at 11.

¹⁵ Donald W. Jackson and C. Neal Tate, *Comparative Judicial Review and Public Policy* (Praeger, 1992), at 7.

2 Legal issues concerning associations of municipalities

It is a *domaine réservé* of each State to determine the model of territorial organization, the units of local or regional self-government and interrelations between such authorities. Where constitutions or laws recognize towns, provinces, municipalities, cantons, regions or other legal units of self-government, the local authorities in such units of self-government have the right to associate.

The Kosovo Constitution recognizes municipalities as the basic unit of local self-governance. It does not provide for regional or other distinct units of self-government.¹⁶

The right of municipalities to associate under Article 10 of the European Charter of Local Self-Government includes the right to form or join associations of municipalities and the right to inter-municipal cooperation.

2.1 The right to form or join associations of municipalities

The right to form and join associations of municipalities, provides “[t]he entitlement of local authorities to belong to an association for the protection and promotion of their common interests”.¹⁷ This right, according to the explanatory report of the Council of Europe, “is concerned with associations whose objectives are ... general ... and which normally seek to represent all local authorities of a particular kind or kinds on a regional or national basis”.¹⁸

From the legal standpoint, these associations are predominantly established as edifices for exchange of knowledge and experiences, and to voice concerns regarding local democracy, efficiency, resources and economic development, to name a few. In this connection, Article 32.3 of the Law No 03/L-040 on Local Self-Government of Kosovo provides that association of municipalities “may offer to its members a number of services, including training, capacity building, technical assistance as well as research on municipal competencies and policy recommendation in accordance with law.”¹⁹

Associations of municipalities represent the interests of its members also to central authorities. In this capacity, they may lobby to increase the budget and promote other interests of local government. For example, the National Association of Municipalities in the Republic of Bulgaria is entitled to “[represent and defend] the interests of its members before the National Assembly, the President of the Republic of Bulgaria, the Council of Ministers, the ministries and central government agencies,

¹⁶ Article 12 of the Kosovo Constitution.

¹⁷ Article 10.2 of the European Charter of Local Self-Government.

¹⁸ *European Charter of Local Self-Government and explanatory report*, Council of Europe, (Council of Europe Publishing, 2010), at 43.

¹⁹ Article 32.3 of the Law No 03/L-040 on Local Self-Government. See also Article 6 and 7 of the Statute of the Association of the Municipalities “Association of the Units of Local Self-Government of the Republic of Macedonia – ZELS” of 2013.

whose activities have a bearing on local government”²⁰.

Such representation role of these types of associations does not however extend to the right to establish units of self-government authorized to perform public functions.

The explanatory report of the Council of Europe on the European Charter of Local Self-Government clarifies that “[t]he right to belong to associations of this type does not however imply central government recognition of any individual association as a valid interlocutor”. The activities of the association of municipalities do not therefore reduce or substitute the constitutional and legal arrangements of cooperation and supervision of municipalities by central authority.

The associations of municipalities within the meaning of Article 10.2 of the European Charter on Local Self-Government are predominantly established as non-profit and non-governmental organizations with no public powers. As an example, Article 1 of the Statute of the Association of Municipalities in the Republic of Croatia clarifies that “[t]he Association represents a voluntary alliance of municipalities and acts as a non-government and non-partisan organization”. Given this legal form, laws governing public institutions do not apply to the administration and employees of such associations.

2.2 Inter-Municipal Cooperation

Under the right of municipalities to associate, the European Charter of Local Self-Government provides for the right to inter-municipal cooperation. Pursuant to its Article 10.1 “[l]ocal authorities shall be entitled, in exercising their powers, to cooperate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest”. The explanatory report of the European Charter of Local Self-Government clarifies as follows:

[t]his paragraph covers co-operation between local authorities on a functional basis with a view in particular to seeking greater efficiency through joint projects or carrying out tasks which are beyond the capacity of a single authority. Such co-operation may take the form of the creation of consortia or federations of authorities, although a legal framework for the creation of such bodies may be laid down by legislation.²¹

Legal forms of inter-municipal cooperation have been designed to amalgamate certain public functions and services exercised by municipalities into an institutionalized form of governance.²² According to Rudie Hulst and André van Montfort, inter-

²⁰ Article 3.2.1 of the Charter of the National Association of Municipalities in the Republic of Bulgaria as amended by 3 December 2014.

²¹ *European Charter of Local Self-Government and explanatory report*, Council of Europe, (Council of Europe Publishing, 2010), at 42.

²² Rudie Hulst and André van Montfort, *Inter-Municipal Cooperation in Europe* (Springer, 2007), at 7, 8 and 13. Inter-municipal cooperation is particularly useful for countries with smaller municipalities lacking means to fulfill their local public services. For example in Hungary, one-third of 3,100 municipalities have fewer than 500 inhabitants. See e.g. Local and regional democracy in Hungary, CG(25)7FINAL, 25th Session of the Congress of Local and Regional Authorities, 29-31 October 2013, para 68.

municipal cooperation has “operational and coordination tasks... Operational tasks refer to the joint production of public services... Coordination tasks refer to the regulation of externalities of local policies and to an allocation of resources and costs that is rational from a supra-local perspective”.²³

Article 162.4 of the Belgium Constitution provides for the possibility of local authorities, if they so desired, to jointly exercise public functions in certain areas of common interest.²⁴ On this basis, Belgium municipalities have set up an entity called *Intercommunale* to perform certain *public* services in the areas including but not limited to waste collection, distribution of water and gas. This form of inter-municipal cooperation can be extended to other areas of public service if not limited by the Constitution or law.

In exercising public services under the concept of inter-municipal cooperation, the inter-municipal body may also take the form of a public entity and, if provided by law, the law on civil service may cover its employees.²⁵ In this context, bodies of inter-municipal cooperation may exercise certain executive functions.²⁶

This form of inter-municipal cooperation, however, does not extend to creation of a new self-government unit exercising public functions independently and without the control of its members. Furthermore, in inter-municipal cooperation, “[i]rrespective of the form it takes, there is no permanent transfer or loss of local tasks or competences, and somehow local government keep control over the decisions and services that result from cooperation”²⁷.

A body established for the purpose of inter-municipal cooperation is founded by and operates for municipalities. Hence, municipalities delegate their competencies and resources to this body. Furthermore, municipalities cannot delegate competences, which by Constitution or law are to be exercised only by democratically elected bodies of the municipalities.²⁸ This is a key element of local self-government.

²³ Rudie Hulst and André van Montfort, *Inter-Municipal Cooperation in Europe* (Springer, 2007), at 11.

²⁴ Prior to 1993 constitutional reform, Belgium central authorities determined the scope of inter-municipal cooperation. In this regard see the Belgium Law on Intercommunales of 22 December 1986, available at:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1986122247&table_name=loi. From 1993 onwards, the regions became competent to regulate inter-municipal cooperation.

²⁵ See e.g. Alain Verriest, *Le statut du personnel des ASBL <<communales>>*, in Michel Marée et Philippe T'Kint (red.), *ASBL et missions de service publics* (Edipro, 2008) at 177-202.

²⁶ It must be noted that the term ‘executive function’ has sometimes been misapplied in the Kosovo legal system. This term has been used to describe *exclusive or primary competences or mandates*. For example, the exclusive or primary mandate of EULEX judges and prosecutors to investigate, prosecute and adjudicate certain international crimes was erroneously explained as part of executive function or mandate. According to Eric Barendt, *institutions and persons* exercising executive functions include any public organ and civil service. In his view “[e]xecutive functions and powers, therefore range from the taking of crucial and sensitive political decisions to detailed administration involving little or no exercise of discretion. Indeed, it would perhaps be right to regard anything done by government, or a public authority as executive, unless it falls within the categories of legislative or judicial power”. See Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press, 1998), at 107-108. The Kosovo Constitution also provides in Article 93.11 that executive functions are exercised not solely by the Government, as a single entity, but also by other central or local level bodies.

²⁷ Rudie Hulst and André van Montfort, *Inter-Municipal Cooperation in Europe* (Springer 2007), at 9.

²⁸ See e.g. 123.2 of the Kosovo Constitution.

It is also undisputed that municipalities cannot delegate to inter-municipal body more competences than they have and cannot shy away from their responsibilities under the law.

Lastly, because inter-municipal bodies are formed to perform certain municipal functions or services, the central government continues to monitor and review the work of such bodies through the laws and principles of local self-government.²⁹

Overall, the two foregoing rights of local authorities to associate are exercised separately, through establishment of separate institutions and guided by different domestic laws. The right to form or join an association of municipalities of a general character is predominantly exercised through setting up of a non-governmental body governed by laws other than those relevant to the public institutions.³⁰ On the other hand, the inter-municipal cooperation for the purpose of functional cooperation may involve establishment of an institution to perform certain public functions or services.³¹ Laws on public institutions govern this latter form.

²⁹ See e.g. Article 8 of the European Charter of Local Self-Government.

³⁰ For this form of the right of local authorities to associate see e.g. Statute of the Association of Municipalities in the Republic of Croatia of 2 December 2008, Statute of the Association of Kosovo Municipalities of June 2015, the Charter of the National Association of Municipalities in the Republic of Bulgaria as amended by 3 December 2014.

³¹ See e.g. Alain Verriest, *Le statut du personnel des ASBL <<communales>>*, in Michel Marée et Philippe T'Kint (red.), *ASBL et missions de service publics* (Edipro, 2008) at 177-202.

3 Self-government and devolution

The fact that the ‘Association/Community of Serb majority municipalities’ contain the words ‘association’ and ‘municipalities’ does not necessarily reflect the true legal character of this entity. It is by reference to the General Principles that its legal nature should be considered.

Some constitutional law scholars suggest that instruments of self-government in relation to minority groups at times serve to regulate forms of territorial devolution.³² Solomon Sersso and Francesco Palermo observe that some constitutions “provide minority inhabited territories with special status compared to the rest of the country, precisely to provide compact minority groups with more advanced instruments of self-government”³³. In this context, it may not be easy to distinguish when an instrument of self-government, irrespective of its name, has features of autonomy.³⁴ Professor Yash Ghai has commented as follows:

the choice of labels is not important for purposes of negotiation, and some deliberate fudging may indeed be beneficial, especially if the constitution seems to prohibit some options or where there is particular sensitivity about ‘sovereignty’ ... Labels often refer to legal status – matters such as the degree of entrenchment and the method of division of subjects/powers – which may not always be a true guide to the scope of autonomy. Even when it is possible to be specific about labels, a legal form may not exist to the exclusion of other forms....

These developments ... have helped in the devising of arrangements for forms of self-government to suit varying circumstances and contingencies. In addition, there are variations in detailed arrangements within each category, such as in the division of powers between different layers of government, structures of government, the relationship between these structures at different levels, and the distribution of financial and other resources. While this flexibility is important in the negotiation process and facilitates compromises, there is the danger that it may lead to complex arrangements and systems, producing a lack of cohesion and the difficulties of governability.³⁵

From the legal standpoint, the foregoing arrangements are predominantly exercised by establishing regional-type units of self-government.³⁶

According to the Opinion of Committee of the Regions of the European Union, “[a]ny declaration concerning regional self-government must cover four key points: the

³² Solomon Sersso and Francesco Palermo, ‘Minority Rights’ in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds) *Routledge Handbook of Constitutional Law* (Routledge, 2015), at 163; Yash Ghai, *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000) at 10; Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press, 1998), at 59-64.

³³ Solomon Sersso and Francesco Palermo, ‘Minority Rights’ in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds) *Routledge Handbook of Constitutional Law* (Routledge, 2015), at 163.

³⁴ Yash Ghai, *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000) at 10.

³⁵ Yash Ghai, *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000) at 10.

³⁶ In legal literature there are also other terms that denote these forms of autonomy arrangements. See e.g. Henry J. Steiner, ‘Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities’, 66 *Notre Dame Law Review* (1991), at 1539; Christopher McCrudden and Brendan O’Leary, *Courts and Consociations* (Oxford University Press, 2013), at 6-10.

competences of these bodies, the powers or other means of exercising them vis-à-vis the outside world, financial resources and how they are organised, and defence of their autonomy”³⁷. A more detailed definition of regional self-government is provided in the draft Charter of Regional Self-Government of the Council of Europe (the “draft Charter”):

Regional self-government denotes the right and the ability of the largest territorial authorities within each State, having elected bodies, being administratively placed between central government and local authorities and enjoying prerogatives either of self-organisation or of a type normally associated with the central authority, to manage, on their own responsibility and in the interests of their populations, a substantial share of public affairs, in accordance with the principle of subsidiarity.³⁸

The region, according to the draft Charter, serves as “an intermediate tier between central government and local authorities”,³⁹ has the right to initiate cases before the courts and has its own resources, including the right to collect taxes.⁴⁰ In addition, the relevant parts of Article 13 of the draft Charter read as follows:

1. Regions shall have their own assets and their own system of administration, as well as such bodies of their own as they may set up and their own staff

...

3. Regions may determine the conditions of service of their staff within the limits of such general principles as may be laid down by the central ... authority in the matter.

In the light of the foregoing, the regional self-government is a distinct unit empowered to exercise public powers. According to Professor Tove H. Malloy, “this [draft] convention has not found endorsement among many member states, as the political climate for substate-level self-government is no longer as open as it was”.⁴¹ This observation hints at possible implications of these types of units of self-government. For these reasons, they are predominantly governed by domestic constitutions.

³⁷ Opinion of the Committee of the Regions on the "Recommendation of the Congress of Local and Regional Authorities of Europe on a European Charter of Regional Self-Government" (2001/C 144/02) of 13 December 2000, point 1.1.

³⁸ Article 3.1. of the Recommendation 34 (1997) on the draft European charter of regional self-government. According to Tove H. Malloy “this [draft] convention has not found endorsement among many member states, as the political climate for substate-level self-government is no longer as open as it was”. See Tove H. Malloy, ‘Minority Rights’ in (ed) David P. Forsythe, *Encyclopedia of Human Rights: Volume 1* (Oxford University Press, 2009), at 518.

³⁹ Opinion of the Committee of the Regions on the "Recommendation of the Congress of Local and Regional Authorities of Europe on a European Charter of Regional Self-Government" (2001/C 144/02) of 13 December 2000, point 1.5.

⁴⁰ See e.g. Articles 15-17 of the Recommendation 34 (1997) on the draft European charter of regional self-government

⁴¹ See Tove H. Malloy, ‘Minority Rights’ in David P. Forsythe (ed), *Encyclopedia of Human Rights: Volume 1* (Oxford University Press, 2009), at 518.

4 Provisions of the General Principles that are compatible with the Constitution

The Kosovo Constitution recognizes the right of inter-municipality cooperation. This is guaranteed by Article 123.3 of the Constitution which provides for respect and implementation of the European Charter of Local Self-Government.

In addition, Article 124.4 of the Constitution guarantees that “[m]unicipalities have the right of inter-municipal cooperation and cross-border cooperation in accordance with the law”. This provision does not specify the limits or the forms of cooperation but only requires that it is in accordance with law.⁴²

The foregoing provisions should be construed in a way that enable inter-municipal cooperation in certain areas of common interest and particularly in the context of non-majority communities in Kosovo. This is consistent with Article 123.4 of the Kosovo Constitution which provides as follows:

Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services *having due regard for the specific needs and interests of the Communities not in the majority and their members*.⁴³

In the light of the Kosovo Constitution, inter-municipal cooperation may take place particularly where the Constitution or laws promote such cooperation.

For example, Article 9 of the Agreement explicitly provides that four mayors of the northern part of the Republic of Kosovo shall propose the police regional commander. This form of inter-municipal cooperation may extend to other areas of public functions and services, including communal services, if so provided for by law and desired by the relevant municipalities.

Through the form of inter-municipal cooperation, the Association/Community may perform at least the functions under paragraphs a, g, h, i, j, k, l, m of Article 4 of the General Principles.

This does not, however, mean that an inter-municipal body can exercise control over those areas in a form of a distinct unit of self-government. As outlined above, the right to inter-municipal cooperation does not include a permanent transfer or loss of municipality competences.

⁴² This implies that inter-municipal cooperation cannot be determined by a decree or other sub-normative acts.

⁴³ Article 123.4 of the Kosovo Constitution.

5 Provisions of the General Principles that are incompatible with the right of local authorities to associate under the Constitution

This *Amicus Curiae* brief finds that the following provisions of the General Principles, in their explicit or ambiguous wording, raise constitutional concerns and part of them are not in harmony with, *inter alia*, Article 12, Chapter X, Article 113 and the spirit of the Kosovo Constitution.⁴⁴

Association/Community as a legal entity of distinct character – Point 2 of the General Principles

Given the broad competences of the Association/Community, the term ‘legal entity’ of ‘distinct character’ provided in Point 2 could also imply recognition of a distinct unit of self-government empowered to exercise public functions.⁴⁵ Such a distinct and higher form of self-government exceeds the limits of the concept of inter-municipal association or cooperation under the Kosovo Constitution.

Established by decree of the Government - Points 2 and 15 of the General Principles

According to Article 124.4 and Article 12.2 of the Kosovo Constitution only a law can govern the matters of inter-municipal cooperation. Once a law outlines the competences of an inter-municipal cooperation, its bodies can operate by form of a statute.⁴⁶

Delivering public functions and services – Point 4 of the General Principles

According to Point 4 of the General Principles, the Association/Community will perform public functions and public services in a wide range of areas, including local economy, education, health, urban and rural planning.

The ability of the Association/Community to perform ‘public functions and services’ indicates that its administration would possess some executive functions. With regard to exercise of these functions, there remain ambiguities as to the degree of power vested in the Association/Community. The terminology “exercise full overview” used in Point 4 is particularly unclear.

‘Exercise overview’, whether ‘full’ or ‘partial’, could not be found in legal literature

⁴⁴ These findings do not exclude the possibility that also other provisions of the General Principles may be incompatible with the Constitution. They require a further clarification and can be assessed once the Statute defines the exact legal character, competences and other institutional arrangements of the Association/Community.

⁴⁵ For the concept of ‘community self-government’ see Christopher McCrudden and Brendan O’Leary, *Courts and Consociations* (Oxford University Press, 2013), at 7-8.

⁴⁶ The Law No 03/L-040 on Local Self-Government in its Chapter V regulates certain forms of inter-municipal cooperation.

or jurisprudence.⁴⁷ Similarly dictionaries do not provide a useful guidance for the understanding of the meaning of these words. The *Oxford Dictionary* defines the word ‘overview’ as a “survey, inspection; supervision; overlooking... summary, or comprehensive review of facts or ideas; a concise statement or outline of a subject”,⁴⁸ and over’viewer - “to view from a superior position ... to look (a thing) over or all through; to examine, inspect, peruse”⁴⁹.

Since a similar term is embedded in Article 4 of the Agreement, it could be relevant to clarify the scope and meaning of this term.

Relations with Central Authorities – Point 8

Point 8 of the General Principles places the Association/Community in a horizontal level of cooperation with the central government. This in turn resembles a form of confederation where territorial units cooperate on a horizontal level based on mutual cooperation and information sharing. No form of local self-government or even regional self-government recognizes such horizontal relationship with central authorities.⁵⁰ Pursuant to Article 93.6 of the Constitution, the Government of Kosovo has a constitutional mandate to guide and oversee the work of administration bodies.

Association/Community as an authorized party before the Constitutional Court – Point 11

In the light of Article 113 of the Kosovo Constitution, the Association/Community is not qualified as an authorized party to make referrals to the Constitutional Court. The Association/Community as a body exercising public functions neither qualifies as an individual to initiate cases before the Constitutional Court pursuant to 113.7 of the Constitution.

Inability to leave the Association/Municipality – Point 17

Associations of municipalities are formed on a voluntary basis. Each municipality should therefore have the right to withdraw from it. As the General Principles do not provide for this possibility they raise a constitutional concern of a regional self-government in that certain municipalities may have a pre-determined belonging to such an edifice.

⁴⁷ The terms ‘exercise full overview’ does not appear in the database of the European Court of Human Rights, Court of Justice of the European Union or in any other legal text available on Internet.

⁴⁸ J.A. Simpson and E.S.C. Weiner, *The Oxford English Dictionary* (2nd Edition, Clarendon Press, 2989), at 1134.

⁴⁹ J.A. Simpson and E.S.C. Weiner, *The Oxford English Dictionary* (2nd Edition, Clarendon Press, 2989), at 1134.

⁵⁰ See Article 19 of the Recommendation 34 (1997) on the draft European charter of regional self-government.

6 Constitutional review of the General Principles should not amount to *indirect review* of the First Agreement on the Normalization of Relations

6.1 Indirect Review of ratified international agreements

Articles 1 to 6 and Article 9 of the Agreement govern the status and competences of the Association/Community. As recognized by the Kosovo institutions, the Agreement constitutes a binding international agreement.

While the provisions of the Agreement and the General Principles may not be identical, they are related.

Accordingly, the Constitutional Court should be mindful that the review of the General Principles may amount to *indirect review* of the Agreement. This in turn may lead to violation by Kosovo of its ratified treaty obligations.

It should therefore be considered whether or not the Kosovo Constitution authorizes the Constitutional Court to review ratified international agreements.

Article 113 of the Kosovo Constitution vests the Constitutional Court with the jurisdiction to review the compatibility of laws with Constitution.⁵¹ An argument could be raised that international agreements once adopted by the Kosovo Assembly constitute a law and thus can be reviewed by the Court. This argument however does not stand in a systemic interpretation of the Kosovo Constitution as it distinguishes laws from binding international agreements at least in so far as constitutional review and hierarchy of norms are concerned.

In Article 113.3.4, the Constitution uses the term ‘binding international agreement’ separately from that of a law. Article 19.2 of the Constitution also refers to “ratified international agreements” as a separate source of law, and furthermore provides for their “superiority over the laws”. In that light and considering Kosovo’s receptive approach to international law,⁵² the Kosovo Constitution does not provide for indirect review of ratified international agreements.

To conclude, if the Referral is declared admissible, the constitutional review should not extend to the provisions of the General Principles which are identical to the provisions of the Agreement.

6.2 Differences between the Agreement and the General Principles

Unlike the General Principles, the Agreement does not define the Association/Community as a “legal entity” of a “distinct character”; does not provide for its establishment by a decree of the Government; and does not specify its resources, budget, administration and competences contained in the General

⁵¹ Article 113.2.1 of the Kosovo Constitution.

⁵² See Kushtrim Istrefi and Visar Morina, ‘Judicial Application of International Law in Kosovo’ in Sinisa Rodina and Tamara Perisin (eds) *Judicial Application of International Law in South East Europe* (Springer, 2015), at 165-166 and 170-171.

Principles. Instead, it provides that the competences of the Association shall be exercised in accordance with the European Charter of Local Self-Government and that the structures of the Association/Community shall be established on the same basis as the existing statute of the Association of Kosovo Municipalities.⁵³

Another provision hinting at association of municipalities is Article 6 of the Agreement providing that “the Community/Association shall have a representative role to the central authorities”. As discussed above, the representative function in the meaning of the right of local authorities to associate does not imply that the Association/Community should act as the sole valid interlocutor with central authorities.

Lastly, Article 4 of the Agreement provides that “municipalities shall be entitled to cooperate in exercising their powers through the Community/Association collectively”. This form of cooperation, as outlined above, is not incompatible with the right of inter-municipal cooperation under Article 123.3 and 124.4 of the Kosovo Constitution.

⁵³ Article 3 of the Agreement.