

# BIG DEAL

## AWKWARD JUGGLING:

Constitutional insecurity, political instability and the rule of law at risk in the Kosovo-Serbia dialogue

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## Introduction

BIG DEAL began in March 2014 as a collaboration between BIRN Kosovo, Internews Kosova and the Belgrade-based Center for Research, Transparency and Accountability. All three organizations are committed to presenting the public with the unvarnished truth in times when governments exert too much influence over mainstream media.

In the face of frustration that the messages about the on-going Kosovo-Serbia dialogue being sent by politicians in Prishtina are often different than those received by the Serbian public from Belgrade, and that Brussels remained tight-lipped while emphasizing the deals as a common foreign policy success, the two organizations teamed up to provide the first form of civic oversight over the agreements made in Brussels by leaders of their two countries.

At the launch of our first report in April 2014, we invited members of the Kosovo and Serbian negotiating teams to sit together at the same table alongside a representative from the EU External Action Service. Our events are consistently the only time that members of both negotiating teams and EU facilitators appear together in public instead of behind closed doors in the boardrooms of the Berlaymont. While we may not approve of the content of all of the agreements, we fervently believe that it is important that those who sign them remain accountable to the public, and that their implementation should bring tangible benefits to the lives of ordinary citizens.

In these two years, BIG DEAL has grown. We welcomed as partners the north Mitrovica-based Advocacy Center for Democratic Culture (ACDC), the Belgrade-based Center for Euro-Atlantic Studies (CEAS), the Berlin-based Democratization Policy Council (DPC), and BIRN Serbia to launch a platform for organizations interested in civic monitoring of the implementation of the agreements, and we welcome organizations interested in joining us. This monitoring has taken the form of comprehensive reports assessing the level of completion of each of the agreements, TV debates, video packages, and investigative articles. BIG DEAL has also made presentations of our research and advocacy in Prishtina, Mitrovica and across Kosovo, as well as in Belgrade, Brussels, New York, Madrid, and Barcelona.

Our persistent monitoring and advocacy has also shown results both in implementation and transparency. After our reporting on how expensive and onerous the “freedom of movement” agreement made travel between Kosovo and Serbia, insurance companies from both countries agreed to recognize one another’s insurance plans. After a feature about the devastation faced by young people whose diplomas remain unrecognized, Prishtina and Belgrade recommitted themselves to implementing agreements they made for mutual recognition in 2011. After our continuous insistence that the European Union should not leave it only to the parties to publish the agreements, the EEAS published the full texts of the agreements reached in August 2015 for the first time.

On the third anniversary of the 19 April 2013 agreement, we are re-focusing the debate on one of the centerpieces of the on-going dialogue with Kosovo and Serbia, the planned Association/Community of Serb-majority municipalities and the precarious position its formation will put on Kosovo's rule of law.

In our latest report, "Awkward juggling: Constitutional insecurity, political instability and the rule of law at risk in the Kosovo-Serbia dialogue," written in cooperation with the Democratization Policy Council, we urge that Kosovo's Constitution be respected by all parties in the implementation of the agreements. Although these are political negotiations, it is imperative that all parties, especially drafters take more care with the legal elements of the deals, or risk deeper political instability and very real threats to Kosovo's precarious rule of law.

On this anniversary, BIG DEAL is also launching a web portal for all of our reports, stories and materials related to Kosovo-Serbia relations. It is accessible at: <http://prishtinainsight.com/category/big-deal/>

## Executive Summary

If Kosovo President Atifete Jahjaga had sincerely hoped to end the political crisis in her country by submitting the August 25 Agreement to the Constitutional Court in autumn 2015 for constitutional review, these hopes proved to be dashed on December 23, the day the Court published its ruling. The Agreement, an intermediary step towards the establishment of the Association/Community of Serb majority municipalities signed by the governments of Kosovo and Serbia under the auspices of the EU was accompanied by severe controversies from the outset. Leaving the negotiation table in Brussels, government representatives from Prishtina insisted they had prevailed in assuring the form of an NGO for the Association/Community, while their Belgrade counterparts announced success in getting the future institution executive powers. Kosovo opposition accused its government of having agreed to a Serb ethnic entity that formed a new layer of governance in violation of the country's constitution.

In its judgment, the Constitutional Court rejected the President's office's notion that the Agreement is a legal act, but nevertheless considered the request for constitutional assessment admissible. It assessed five out of the six parts of the August 25 Agreement and identified points in each of them not (fully) in line with the constitution. It ordered the Kosovo Government to comply with this assessment in the future drafting of the Association's/Community's statute. The Court's ruling immediately drew selective readings from all political actors in Kosovo in accordance with their starting positions, but also from representatives of the EU and the US. The judgment indeed is a confusing decision and a difficult read. Throughout the text, very vague language is used in its key parts like "do not entirely meet the constitutional standards" or "raises concern." At the same time, the key questions on the Association/Community – whether it represents a discrete level of governance with executive authority, and whether its linkage between ethnicity and territoriality violates the fundamental constitutional principles of non-discrimination – remain unanswered. Yet the irritating ruling seems to only make sense when read against the background of the constitutional judges' (including the three foreign judges') traditional struggle between their impartial judicial role and political pressure from domestic elites and the international community in politically sensitive cases, including those related to the dialogue.

Read as a middle ground decision between constitutional law and politics, the judgment reveals a different rationale. By not characterizing the August 25 Agreement as a legal act on which it has jurisdiction to assess the constitutionality – in direct contradiction to a September 2013 decision that declared an opposition request to assess the constitutionality of the April 2013 Agreement inadmissible – the Court created the conditions to demand putting problematic provisions in line with the constitution without having to demand a revision of the very August Agreement. In addition, the judges attempt to assess the constitutionality of the principles and elements of the future Association/Community, as defined in the August 25 Agreement, and at the same time to avoid any

assessment of the April 2013 Agreement – on which the August Agreement’s provisions are based on. This turns into a juggling act that inevitably produces awkward results. Thus, when the Court assesses the constitutionality of some of the Association/Community’s future competences vaguely defined in both the August 25 and April agreement as “full overview” over certain areas like local economic development and education, it ends up translating “overview” as “being informed.” However this interpretation substantially departs from the spirit of both agreements.

How the EU intends to handle the Constitutional Court’s December 23 ruling remains unclear. It is also difficult to draw any conclusions given the fact that the first version of the August 25 Agreement had been drafted in Brussels. Judging from scarce official and unofficial reactions however, one can assume that the EU is satisfied with the Court’s middle course that seemingly provides for a smooth continuation of the dialogue. It can be presumed that legal concerns will be secondary, at best.

The existing constitutional law-politics nexus however can hardly remain without serious political consequences in the continuation of the dialogue. The Constitutional Court’s middle ground approach will most likely not prevent serious complications in negotiations over the Association’s/Community’s statute – starting from the Court’s interpretation of key competences of “full overview” as merely “being informed.” In addition, the Court’s partially compromising of its role as guardian of the Constitution – a role the EU neither is willing to, nor could substitute – risks throwing Kosovo into a permanent state of constitutional uncertainty as the dialogue continues. Finally, such a development would invite domestic and international actors to continue taking a selective approach to legal and constitutional questions, with serious consequences for the rule of law and democracy in Kosovo

In order to avoid such a scenario, the EU and the US should undertake a few important steps:

- The EU and the US need to demonstrate full commitment to and respect for the constitutional and legal foundations of the state of Kosovo in the framework of the Serbia-Kosovo dialogue. This implies a change of approach toward past and future agreements, ensuring that agreements are fully in line with the constitutional order by either adjusting these agreements where necessary or amending the constitution accordingly. To that respect,
  - The EU and the US should launch an initiative aimed at getting the support of both the government and the opposition in Kosovo for a constitutional amendment that explicitly demands that international agreements be reviewed by the Constitutional Court prior to their adoption.
  - The EU and US need to find forms and formats for a dialogue with *all* political forces in Kosovo on their core reservations towards the Association/Community of Serb majority municipalities.
- EU and US diplomats in Kosovo need to – while eschewing interference into the work of the judiciary in any fashion – signal robust support

for the work of the Constitutional Court and its independence, including in politically sensitive cases like those related to the dialogue, independently of whether a Court ruling might complicate the dialogue process or not.

- The EEAS needs to engage international experts on constitutional law, forms of positive discrimination in multi-ethnic polities and on local self-governance to participate in the process of drafting the Statute of the future Association/Community of Serb majority municipalities.
- The EEAS needs to ensure it has sufficient legal expertise related to the issues at hand at its disposal should it again come into a position in the future to draft agreements in the framework of the Kosovo-Serbia dialogue.
- EU and US diplomats need to send clear signals to both Prishtina and Belgrade that the implementation of all other pending agreements is just as important as the one on the Association/Community. No new topics should be opened in the dialogue unless all the 16 agreements signed so far have been fully implemented.

## A controversial ruling on a controversial agreement

Christmas Eve 2015 was an unusual date for the EU Office/ EUSR in Prishtina to issue the following statement:

“The EU Office in Kosovo/EU Special Representative has taken note of the decision of the Constitutional Court concerning the assessment of the principles on the establishment of the Association/Community of Serb majority municipalities. The Constitutional Court has held that the Association/Community of the Serb majority municipalities is to be established as provided by the First Agreement, in accordance with the Constitution. We expect all parties to respect this decision, so that the legal act of the Government of Kosovo implementing this Agreement and the following Statute can be elaborated as rapidly as possible.”<sup>1</sup>

The day before, Kosovo’s Constitutional Court had ruled on a submission by the President of Kosovo to assess whether the agreement signed by the Prime Ministers of Kosovo and Serbia under the auspices of the EU in Brussels on August 25, 2015, and entitled “Association/Community of Serb majority municipalities in Kosovo – general principle/main elements,”<sup>2</sup> was in line with the spirit and letter of the Kosovo state’s constitution. The court in a six-to-one majority decision of the seven sitting judges, in a nutshell, had ruled that the Agreement is *not* fully in line with the constitution and ordered that the future acts that will embed the Association/Community in its final institutional form into the legal system of Kosovo – the Association’s/Community’s statute and an accompanying legal act by the government – be in full compliance with the constitution.<sup>3</sup>

The signing of the August 25 Agreement, which resulted from only two rounds of negotiations in the political dialogue in Brussels in summer 2015, came as a surprise to most observers. The establishment of an Association/Community of Serb majority municipalities presents the cornerstone of the EU-brokered “First Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia,”<sup>4</sup>

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1 “EU Office/EUSR statement on the Constitutional Court decision concerning the Association/Community of Serb majority municipalities,” December 24, 2015, available at: [http://eeas.europa.eu/delegations/kosovo/press\\_corner/all\\_news/news/2015/20151224\\_en.htm](http://eeas.europa.eu/delegations/kosovo/press_corner/all_news/news/2015/20151224_en.htm).

2 Association/Community of Serb majority municipalities in Kosovo – general principles/main elements, August 25, 2015, available at: [http://eeas.europa.eu/statements-eeas/docs/150825\\_02\\_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements\\_en.pdf](http://eeas.europa.eu/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf).

3 Judgement in Case No.KO 130/15, Concerning the assessment of the compatibility of the principles contained in the document entitled “Association/Community of Serb majority municipalities in Kosovo general principles/main elements” 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, Constitutional Court of the Republic of Kosovo, Prishtina December 23, 2015, available at: [http://www.gjk-ks.org/repository/docs/gjk\\_ko\\_130\\_15\\_ang.pdf](http://www.gjk-ks.org/repository/docs/gjk_ko_130_15_ang.pdf). Irritatingly, both the wording of the August 25 Agreement and the President’s submission to the Constitutional Court in its reference to Agreement speak of a government “decree.” Yet according to the Constitution, the Government of the Republic of Kosovo has no authority to issue decrees. The Constitutional Court implicitly corrects this mistake by speaking of a “legal act.”

4 First Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia, April 19, 2013, available at: <http://www.kuvendikosoves.org/common/docs/ligjet/Law on ratification of agreement –normalization of relations between Kosovo and Serbia.pdf>.



signed in April 2013. There had been virtually no progress on this part of the so-called April Agreement, the implementation of which had been officially foreseen to be completed by the end of 2013. Also, the First agreement did not foresee a document like the August 25 Agreement, only the drafting of a Statute for the future Association/Community. The short negotiations were accompanied by the usual spin from both governments' representatives that made it hard to identify what was in fact negotiated over, but also what the essence of the achieved agreement was. Belgrade insisted they want an Association/Community with executive powers, while Kosovo Government negotiators wanted it to take the form of an NGO, comparable to the existing association of municipalities in Kosovo. Both sides stated after the signing of the agreement that they had prevailed.<sup>5</sup> In Prishtina, the parliamentary opposition accused the government of having agreed to establish a Serb ethnic entity with executive powers that formed a new layer of governance, undermining the sovereignty and territorial integrity of the state and thereby violating the country's constitution.<sup>6</sup> On the background of the antagonizing of relations between ruling and opposition parties that resulted from the 2014 government formation crisis, the opposition insisted on the agreement's annulment (together with that of a Kosovo-Montenegro agreement on border demarcation<sup>7</sup>) and started a violent campaign in autumn 2015 that has largely blocked the Assembly's work since. Government officials and a growing number of Western diplomats accused opposition parties for using criticism of these two agreements as a mere pretext to come to power by extra-institutional means.

If President Atifete Jahjaga had sincerely hoped that submitting the August 25 agreement to the Constitutional Court would end the political crisis, these hopes proved to be dashed by the reactions following the December 23 ruling, which merely reflected the political confrontation. All political actors emphasized those parts of the judgement that suited them most. Government officials stated that the Constitutional Court had freed the way for the establishment of the Association/Community. Some opposition representatives announced before the decision that they would not respect the ruling of the Court as it had proved in the past to judge under political influence. Those same representatives nevertheless afterward accepted the ruling as a proof for their accusation that the government had violated the constitution, and based on the judgement demanded the government's resignation. At the same time, other opposition representatives rejected the Court's instructions on how to form the Association/Community in line with the constitution as being outside the jurisdiction of the Constitutional Court – that is the part of the judgement that stood against the opposition's insistence the establishment of the Asso-

5 "Dogovor u Briselu: Vučić – ZSO široka ovlašćenja, Tači – Asocijacija nalik na NGO," *RSE*, August 25, 2015, available at: <http://www.slobodnaevropa.org/content/dogovor-u-briselu/27208665.html>.

6 „Opozicija tvrdi: Legalizovana podela Kosova," *RSE*, August 26, 2015, available at: <http://www.slobodnaevropa.org/content/opozicija-tvrdi-legalizovana-podela-kosova/27210017.html>.

7 The agreement on border demarcation was a condition imposed by the EU for Kosovo to attain visa free travel.

ciation/Community as such was against the constitution.<sup>8</sup> Serbian government officials on the other hand declared the court ruling an internal Kosovo matter and insisted that the government in Prishtina stands up to its commitments signed on August 25.<sup>9</sup> EU and US diplomats, generally reluctant to comment on the issue, reacted in a similar way as government officials, accentuating the positive. Asked during a New Year's interview with the daily *Zeri* about the Constitutional Court ruling that the August agreement was partly not compliant with the constitution, US Ambassador to Kosovo Greg Delawie gave his assessment of the judgement. His openly selective reading of the court decision makes the statement worth citing in its entirety:

"I know that that's what the opposition has said...Regarding the Court's decision, we read the Court's decision carefully. It's long and legal and the things that *I picked out* [author's emphasis] from the Court's decision were that that having the Association of Serb-majority municipalities is consistent with the Kosovo Constitution. The Court gave the government specific directions on how the statute for this association could be drafted so that it would be consistent with the Kosovo Constitution, and it is also said it wanted to see the statute again when it is done. So I hear that people are saying that the Court said this idea was inconsistent with the Constitution, but I think if you read carefully you see the Court that (a) such a body could be created, and (b) this is how you create it so that it is consistent with the Kosovo Constitution."<sup>10</sup>

As for the EU, there have been no more public statements by officials than the brief one published on Christmas Eve on how the Union assesses the judgement and its implications for the dialogue, that is, the establishment of the Association/Community. In private talks, EU representatives have also stated they *have no position* on the Constitutional Court's judgement and stressed the need to implement the August agreement by next drafting a statute of the Association/Community.<sup>11</sup> Despite the fact that the EEAS had compiled the original draft on which the August 25 agreement was based, it remains completely unclear how the EU's lead institution in the dialogue sees the implications of the Constitutional Court's judgement and how it intends to handle them.

So where is the dialogue, and more specifically the process of establishing the Association/Community, heading towards after the December 23 ruling? It may be useful to first take a look at the judgement and try to make sense of it before returning to the question of the future performance of the EU.

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8 "Ustavni sud: ZSO nije u skladu sa Ustavom Kosova, ali se može uskladiti," RSE, December 23, 2015, available at: <http://www.slobodnaevropa.org/content/ustavni-sud-zso-nije-u-skladu-sa-ustavom-kosova/27445612.html>

9 "Đurić: Sporazum o ZSO se mora dosledno poštovati," Beta, December 29, 2015, available at: <http://www.kim.gov.rs/lat/v1110.php>.

10 US Ambassador Greg Delawie interview with Prishtina daily *Zeri*, December 28, 2015, English translation available at: [http://pristina.usembassy.gov/amb\\_interview\\_zeri\\_1\\_2015.html](http://pristina.usembassy.gov/amb_interview_zeri_1_2015.html).

11 Interview with EU official, Prishtina February 2016.

## Analyzing the December 23 Constitutional Court ruling

In its judgement, the Constitutional Court first deals with the admissibility of the President's request.<sup>12</sup> The Court rejects the President's office's categorization of the August agreement as a legal act and instead simply characterizes it as a "document." It nevertheless considers the request to interpret parts of the constitution in assessing the constitutionality of the agreement admissible, based on the Court's role as the "final authority for the interpretation of the Constitution." It concludes that "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 whereto the Applicant could address them."<sup>13</sup>

The Court briefly refers to the legal basis of the August agreement and the establishment of the Association/Community, explaining that the April agreement, as an international agreement correctly ratified by the Kosovo Assembly, has become part of the internal legal system of Kosovo and that the establishment of the Association/Community was thus "part of the constitutional order."<sup>14</sup> Concerning procedural issues, the Constitutional Court then explains that it will review the August agreement "chapter by chapter for compliance of each chapter with the Constitution." Its "reasoning and the conclusions shall serve as a basis for the elaboration of the legal act and the Statute" – a task that falls not on the Constitutional Court, but on the Government.<sup>15</sup>

Accordingly, the Court in the major part of the ruling assesses five out of the six parts of the agreement and in each finds points that are not (fully) in line with the constitution or raise serious doubts about their constitutionality.

Concerning the chapter on "Objectives," which deals with the Association/Community's competences, the Court refers to several core points that refer to the "exercising of full overview" in the areas of local economy development, education, health and social care and urban and rural planning. The Court notes the ambiguity of the wording and demands clarification in the definition of objectives.<sup>16</sup>

When it comes to the organizational structures of the future Association/Community the Court questions whether the constitutional principles of respect for the ethnic diversity of the inhabitants of the participating municipalities are respected in "staffing and structures" –as there are no indications in the August Agreement that the Association/Community's institutional structure takes the fact into account that there is also a substantial number of non-Serb citizens living in the ten Serb majority municipalities. Moreover, concerning the provision that the Association/Community administration shall enjoy employment status in accordance with the Law on Civil Service, the Court clarifies that

<sup>12</sup> Judgement in Case No.KO 130/15, Art. 87.-104.

<sup>13</sup> Ibid., Art. 104.

<sup>14</sup> Ibid., Art. 113.

<sup>15</sup> Ibid., Art. 115.-119.

<sup>16</sup> Ibid., Art. 137.-149.

the administrative staff “shall not be considered part of the Civil Service *per se*.”<sup>17</sup>

In reviewing the chapter on “Relations with the central authorities” the Constitutional Court reviews point 9) that assigns the Association/Community the role to “promote the interests of the Kosovo Serb community in its relations with the central authorities.” The Court clarifies that this authority cannot be full and exclusive (as it would territorially limit the Serb community in Kosovo to the ten municipalities).

It further entirely rejects point 10) of the agreement that authorizes the Association/Community to “propose, in accordance with Kosovo law, amendments to the legislation and other regulations relevant for the performance of its objectives” as not being covered by the Constitution.<sup>18</sup>

Finally, related to the chapter on “Budget and support” the Court entirely rejects point 17)c), which regulates that the Association/Community, be financed, among other sources, from “transfers from the central authority,” arguing that according to the constitution, “these rights belong exclusively to the municipalities.”<sup>19</sup>

It is worth comparing these problematic provisions singled out by the Constitutional Court with the original critique of Kosovo’s opposition and elements of civil society, the list of provisions from the August agreement singled out by them as not being in compliance with the constitution from their point of view.<sup>20</sup> It turns out that a large part of those listed points found their confirmation in the Court’s ruling, but not all of them. For instance, the insistence on part of the opposition that the establishment of a Serb majority Association/Community of municipalities is against the constitution *per se* was not confirmed by the Court.

Nevertheless, the December 23 ruling remains a confusing decision that is a difficult read for a non-lawyer (such as the author).

In its assessment of the constitutionality of the August 25 agreement, the Constitutional Court throughout the text of the judgement uses vague language such as “do not entirely meet the constitutional standards” or “raises concern.”<sup>21</sup> It is basically impossible to identify the Court’s assessment of the key questions that form the core of the political dispute over the Association/Community – whether it is vested with executive authority and comprises a separate governance level, and whether the way of linking ethnicity with territoriality is in line with the fundamental constitutional principles of non-discrimination.

<sup>17</sup> Ibid. Art. 150.-160

<sup>18</sup> Ibid., Art. 161-177

<sup>19</sup> Ibid., Art.178.-188.

<sup>20</sup> See for example: Republic of Kosova: The resistance against a semi-authoritarian regime, chapter “The new Brussels Agreements of August 25th, 2015, between Kosova and Serbia,” Vetevendosje, October 21, 2015, p.7-9, available at: [http://www.vetevendosje.org/wp-content/uploads/2015/10/Report-on-Kosova\\_Movement-for-SELF-DETERMINATION.pdf](http://www.vetevendosje.org/wp-content/uploads/2015/10/Report-on-Kosova_Movement-for-SELF-DETERMINATION.pdf).

<sup>21</sup> Judgement in Case No.KO 130/15, for example Art. 136., 149., 153.

However, the lack of a constitutional legal educational background may not be the key to making sense of this inaccessible judgement. Based on the reading of the Court's most important rulings in recent years, dissenting opinions, background interviews with international and domestic constitutional legal experts and sources close to the Court, it appears that judges straddle between their impartial judicial role on the one side, and political pressure from the domestic ruling elites and interests of the international community on the other side. This practice seems to especially relate to court referrals that are connected with major internal political conflicts and crisis and the political dialogue with Serbia (cases like the ones related to the 2013 amnesty law and the April agreement, the 2014 government formation crisis or issues of immunity etc.). In many of these cases a conservative, narrow reading of the letter of the constitution, not of its spirit, seems to have served as a welcome bridge between the competing legal and political imperatives. And in many rulings, dissenting opinions, mostly authored by one of the three foreign judges on the Constitutional Court, US judge Robert Carolan, served as helpful indicators of the extent and technique of such conformist maneuvers.<sup>22</sup>

If the Constitutional Court's December 23 decision is read against that background, a threefold rationale behind the judgement can be identified. First, only by rejecting categorization of the August 25 agreement as a legal act, but nevertheless declaring jurisdiction over assessing its constitutionality, the Constitutional Court could put itself into a position to demand fixing provisions (through the future statute) not in compliance with the constitution without demanding a revision of the very agreement.

Second, the Court declares the establishment of the Association/Community to fall within the scope of "inter-municipal cooperation"<sup>23</sup> as foreseen by the Constitution and then takes a look at which principles and elements need to be fixed, adjusted to the Constitution in the future drafting of the statute. In this way, the Court avoids being forced to assess whether the Association/Community as designed in the August agreement takes the legal form of an additional layer of governance in between the municipalities and the central state with genuine executive competences and whether its ethnic character is in line with basic principles of the constitution.

This rationale is well illustrated when the judgement is contrasted with the opinion of Judge Bekim Sejdiu<sup>24</sup> dissenting from the majority decision: Judge Sejdiu assesses the August agreement as a legal act that has clear legal and constitutional implications. He criticizes the vague wording in the judgement as falling short of clearly and unequivocally qualifying the identified provisions of the agreement as in contradiction with the Constitution and thus sees

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<sup>22</sup> Interviews and conversations with EULEX officials, EU representative and legal experts and other Western legal experts, domestic legal experts, journalists and politicians, Prishtina-Brussels, 2013-16.

<sup>23</sup> Judgement in Case No.KO 130/15, Art. 140.

<sup>24</sup> Dissenting Opinion of Judge Bekim Sejdiu in the case KO 130/15, Prishtina December 23, 2015, available at: [http://www.gjk-ks.org/repository/docs/gjk\\_ko\\_130\\_15\\_mm\\_ang.pdf](http://www.gjk-ks.org/repository/docs/gjk_ko_130_15_mm_ang.pdf).

a failure of the majority in giving “clear guidance to avoid the contradiction between these provisions and the Constitution.”<sup>25</sup> By taking a different approach, Judge Sejdiu ends up with reviewing the August agreement based on the question whether the Association/Community as defined ends up being a separate unit of self-governance and of its ethnic character.

The third element of the judgment’s rationale lies in the judges’ attempt to assess whether the principles of the establishment of the Association/Community as enumerated in the August 25 agreement are in compliance with the Constitution, and at the same time avoid assessing the constitutionality of the First agreement – on which the August 25 agreement is based. This refers back to a 2013 Constitutional Court decision to reject the request brought forward by Vetevendosje opposition party MPs to review the constitutionality of the First Agreement.<sup>26</sup> The Court back then insisted that the Constitution provides it with no jurisdiction to assess the substance of ratified international agreements. Apart from the fact that the First agreement, unlike any traditional international agreement, not only regulates the relations between the two signing states, but pertains to the internal regulation of Kosovo itself, the Constitutional Court completely disregarded one of the arguments by which it two years later declared the request to review the August 25 Agreement admissible: that there exists no other institution to which the applicants could address their constitutional question (of the compliance of the April agreement with the country’s constitution). Judge Carolan in his separate opinion on the 2013 judgement picks up this very argument in painting a hypothetical scenario in which an international treaty violates fundamental rights and freedoms as guaranteed by the Constitution and the treaty based on the Court’s majority view remains unreviewed – and warns that in such a case the Constitution would be rendered “meaningless.”<sup>27</sup>

The majority of judges’ self-prescribed exercise to interpret the provisions of the August 25 agreement without interpreting the First agreement thus becomes a juggling act which produces awkward results – as is clearly visible in the December 23 judgement. Thus, when the Court reviews the provisions that define some of the main objectives of the Association/Community as “delivering public functions and services to exercise full overview” in certain areas (economic developments, education etc.), and criticizes the meaning of the term “exercise full overview” as ambiguous, it runs into troubles as similar wording is already used in the First agreement. The Court here runs into the additional problem that it can neither grasp, nor is it the Court’s business to do so, that the ambiguity of the term “overview” is part of what EU represen-

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<sup>25</sup> *Ibid.*, p.4.

<sup>26</sup> Judgement in Case No. KO 95/13, Constitutional review of the Law, No. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this agreement, Constitutional Court of the Republic of Kosovo, Prishtina September 9, 2013, available at: [http://www.gjk-ks.org/repository/docs/gjkk\\_ko\\_95\\_13\\_mk\\_ang.pdf](http://www.gjk-ks.org/repository/docs/gjkk_ko_95_13_mk_ang.pdf).

<sup>27</sup> Concurring Opinion of Judge Robert Carolan, Case No. KO 95/13, p.2, available at: [http://www.gjk-ks.org/repository/docs/gjkk\\_ko\\_95\\_13\\_mk\\_ang.pdf](http://www.gjk-ks.org/repository/docs/gjkk_ko_95_13_mk_ang.pdf).

tatives have privately advocated as the “creative ambiguity” approach of the dialogue – by agreeing on ambiguously worded provisions, the EU provides both negotiating sides with enough maneuvering space to interpret agreements according to their needs and interests, while it leaves the concrete issues at hand to be solved at a later stage in the dialogue.<sup>28</sup> It seems within the scope of this dialogue logic that the Court found that the wording “exercise full overview” in the English language version of the August agreement, the only version actually signed in Brussels, does not comply with the wording in the Albanian language translation, which the Kosovo government declared to be the official one for them as Albanian is the first official language in Kosovo, nor does it comply with the wording in the Serbia language version. Faced with this mission impossible, the Court opts for a twofold solution. It orders that the wording used in the future statute and government decree that will establish the Association/Community complies with the wording in the First agreements – “to have full overview” – and to assure that all three language versions are identical. But as the attested ambiguity is not located in the slightly varied verb, but in the noun “overview,” the Court additionally opts for another solution – it translates “have full overview” as “being informed.”<sup>29</sup> This is awkward in a double sense – first because this “translation” amounts to a half-hidden, *de facto* interpretation of the First agreement, and second because what the signing parties of the first (and of the August 25) agreement have negotiated as the Association/Community’s main objectives and put down as “full overview” is by all accounts far away from meaning merely “being informed.”

The consequences and implications of the Constitutional Court’s December 23 ruling with its confusing interpretations and its underlying, hidden rationale are best described by the dissenting Judge Sejdiu. In his dissenting opinion, he concludes that “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.”<sup>30</sup>

## So how will the EU cope with the Court ruling?

In order to answer, it is worth elaborating some background of the signing of the August 25 agreement.

This unforeseen document was not hastily drafted and agreed upon because the EU considered it to be the best way to secure a legally and constitutionally sound establishment of the Association/Community, but for entirely different reasons. The agreement was intended to serve as a bridge from having no progress on the establishment to palpable results, enabling the EU to open the first chapters in accession talks with Serbia before the end of

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<sup>28</sup> Interviews with EU officials, Prishtina–Brussels 2013.

<sup>29</sup> Judgement in Case No.KO 130/15, Art. 142.-144

<sup>30</sup> Dissenting Opinion of Judge Bekim Sejdiu in the case KO 130/15, p. 15.

2015. Serbian government officials had put constant pressure on the EU from early 2015 on by unilaterally announcing various dates for the opening of the first accession chapters. As the German parliament had earlier conditioned the opening of Chapter 35 on Kosovo to be among the first chapters, and the German government had conditioned some progress on the establishment of the Association/ Community in order to open Chapter 35, there needed to be some agreement before the summer break, while there was far too less time to draft a statute in order to meet the deadline self-imposed by Belgrade.<sup>31</sup>

The value of the court ruling for Brussels lies in the fact that it enabled the dialogue process to ostensibly move forward. This becomes clear when one takes a look at the alternative routes the Constitutional Court could have taken in its assessment. They are portrayed in Judge Sejdiu's dissenting opinion. By identifying the August 25 agreement as a legal act that produces legally binding obligations he assesses that there are no legal possibilities to simply fix those provisions not in compliance with the constitution in the upcoming statute and decree. Instead, Sejdiu offers two legally sound alternatives – either to amend the August 25 agreement or to amend the constitution. Both scenarios would be unthinkable in the eyes of the EEAS and the whole EU. The first option would represent a watershed in the dialogue, because it enforced the re-opening of negotiations over the agreement and discredited the EEAS' work. In addition, it would confront the Serbian Government with accepting the ruling of the Constitutional Court of a state it doesn't recognize. The latter option would probably be even worse, as it would open a full-fledged constitutional debate in Kosovo, while in Serbia it could lead to its constitutional court finally reviewing the First Agreement with a foreseeable outcome – taking into account that the April agreement contains a *de facto* recognition of the independent state of Kosovo.

Given that background, it is only natural to expect from the EU that it will accentuate the continuation of the dialogue, the implementation of the April Agreement rather than seriously analyze the problems of partial non-compliance of the August 25 agreement with the Kosovo constitution and draw the necessary conclusions and lessons. The fact that the EU institutions' only official comment on the Constitutional Court ruling, that of the EU Office/ EUSR in Prishtina, was released on Christmas Eve – only a day after the publication of the complex, 40 pages-long judgement already points into that direction. In addition, the Brussels bureaucracy has demonstrated on many occasions that its efforts to keep a certain political process, designed to lead to a certain end, alive can degenerate into a dynamic in which the very process turns into the end in itself. This risk is especially high in times when certain influential EU member states' governments which drive a policy weaken their commitment and focus, consumed with other, higher policy priorities. At a time when Germany is overburdened with the refugee crisis, the UK is preparing for its

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<sup>31</sup> Interviews with EU officials, Prishtina 2015-16.



Brexit referendum, and the Obama administration is on its way out, such risks are obviously high.

## What does this all mean for Kosovo? - Conclusions and Recommendations

The Constitutional Court has sought a compromise between the imperatives of constitutional law and the interests of Kosovo's government, the EU, and US in a smooth continuation of the dialogue. By doing so, the Court has in effect given up on its role as the guardian of the Constitution, its role as the sole "authority that interprets the Constitution and reviews compliance of laws with the Constitution."<sup>32</sup> Instead, it de facto has (partly) outsourced this function to external actors – the West, particularly the EU institutions (EEAS) in Brussels – that don't really want it. Because the EEAS is not only ill-prepared to take on that role, but judging from available sources also indifferent to the legal aspects and implications of the dialogue. And even if the EEAS were willing and equipped with sufficient legal expertise, it could hardly make up for the role of a constitutional court.

This constitutional law-politics nexus can hardly remain without serious political consequences.

First, it is not at all certain that the Constitutional Court's setting a "middle ground" will in the end prevent serious complications in the establishment of the Association/Community of Serb majority municipalities. For example, it seems to be almost unimaginable that the Court's awkward interpretation of the Association/Community's key competencies of "full overview" in certain areas as merely "being informed" will not lead to serious conflicts between Prishtina and Belgrade in the further negotiations over the future statute.

Second, if the Constitution Court continues to avoid fulfilling its role as guardian of the Constitution, ensuring that the Association/Community does not render the Constitution "meaningless" by violating fundamental constitutional rights and freedoms, the dialogue could throw Kosovo into a permanent state of constitutional uncertainty. This would be a perfect breeding ground for lasting internal political tensions and instability.

And finally, such a setting would invite all domestic and international political actors to continue to take a selective, rule by law approach to legal and constitutional questions, the functioning of the judiciary and other state institutions – just as it did with the December 23 judgement. Yet it is exactly such a selective approach that discredits political actors from the EU and the US in their attempts to contribute to a solution of the current political crisis by calling on the opposition to return to the institutional framework of parliamentary democracy and the rule of law.

In order to avoid such a scenario, the EU and the US should undertake a few important steps:

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<sup>32</sup> Judgement in Case No.KO 130/15, Art. 119.

- The EU and the US need to demonstrate full commitment to and respect for the constitutional and legal foundations of the state of Kosovo in the framework of the Serbia-Kosovo dialogue. This implies a change of approach toward past and future agreements, ensuring that agreements are fully in line with the constitutional order by either adjusting these agreements where necessary or amending the constitution accordingly. To that respect,

- The EU and the US should launch an initiative aimed at getting the support of both the government and the opposition in Kosovo for a constitutional amendment that explicitly demands that international agreements be reviewed by the Constitutional Court prior to their adoption.

- The EU and US need to find forms and formats for a dialogue with *all* political forces in Kosovo on their core reservations towards the Association/Community of Serb majority municipalities.

At the same time,

- EU and US diplomats in Kosovo need to – while eschewing interference into the work of the judiciary in any fashion – signal robust support for the work of the Constitutional Court and its independence, including in politically sensitive cases like those related to the dialogue, independently of whether a Court ruling might complicate the dialogue process or not.

- The EEAS needs to engage international experts on constitutional law, forms of positive discrimination in multi-ethnic polities and on local self-governance to participate in the process of drafting the Statute of the future Association/Community of Serb majority municipalities.

- The EEAS needs to ensure it has sufficient legal expertise related to the issues at hand at its disposal should it again come into a position in the future to draft agreements in the framework of the Kosovo-Serbia dialogue.

- The EEAS needs to ensure, in cooperation with governments in Kosovo and Serbia, quality translation in the dialogue in order to avoid discrepancies among the English, Albanian and Serbian language versions of future agreements and subsequent legal implications.

- EU and US diplomats need to send clear signals to both Prishtina and Belgrade that the implementation of all other pending agreements is just as important as the one on the Association/Community. No new topics should be opened in the dialogue unless all the 16 agreements signed so far have been fully implemented.



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