

BALKAN DIALOGUES

ESTABLISHMENT OF THE ASSOCIATION/COMMUNITY OF SERB MAJORITY MUNICIPALITIES IN KOSOVO: CHALLENGES AND OPPORTUNITIES

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Since 2011 when the EU-led dialogue for normalization of relations between Belgrade and Prishtina started, it has been characterized by important milestones as well as controversies. In this sense, no other agreement resulted with a highly sensitive process for both Kosovo and Serbia, and understandably has generated some level of controversy. In this context, the most controversial idea of the process so far has been the 2013 and 2015 agreements on establishing an Association/Community of Serb majority municipalities in Kosovo (ASM). These agreements have also been the most politicized within the Brussels Dialogue, undermining the intent to be a path towards integration of the Serbian community in Kosovo.

There is general consensus that within the framework of the Brussels Dialogue, a compromise solution must be found that resolves the dispute between Kosovo and Serbia in a sustainable and legally binding manner, and it is in the framework of this debate that the ASM has gained renewed attention. Had Kosovo established the ASM in timely manner in 2013, perhaps the situation would have been different, with arguably greater progress in European integration process and confidence raised among the Serbian community in Kosovo in public institutions and their future. However, the protracted process of establishment of the ASM has been understood as a lack of willingness on the part of Kosovo to do what is necessary to ensure the full integration of the Serbian community in the society and institutions. What is striking is that in Kosovo, the debate over ASM seems to hold that this is something optional for the government, ignoring the fact that there is a law adopted by 2/3 of the Kosovo Assembly that requires its establishment, and there is a judgement by the Constitutional Court of Kosovo that requires its establishment. Therefore, while the process can be delayed, establishment of the ASM is not an option for the government of Kosovo, but a legal and international obligation.

The delays in the process of establishment of the ASM are causing significant harm to Kosovo. Citizens want a solution: recent public opinion polls show that over 75 percent of the citizens in Kosovo are not at all satisfied with the status-quo. In Serbia, 70 percent of the public see ASM as an integral and important part of the final agreement. However, while citizens say that they want a solution, reactions to the recent US-sponsored "economic normalization" in Washington D.C. show that public opinion in both countries is not yet ready to accept one. Populism continues to dominate the discourse and analysis over the content of any agreement between Kosovo and Serbia. This means that while parties might be able to agree in Brussels, securing the necessary support for implementation of the agreement can be an entirely different challenge.

Grounded in the belief that ASM constitutes a quintessential part of the comprehensive legally binding agreement between Kosovo and Serbia and it is essentially a path towards integration of the Serbian community, especially in the north of Kosovo, this brief paper considers different options on how to move forward with the establishment of the ASM.

One option is to proceed with the **establishment of the ASM in accordance with the ruling of Kosovo's Constitutional Court** from 23 December 2015. While this should be the most effective way in establishing the ASM, as it should have minimal resistance, it is unclear if this would be acceptable to parties in the framework of the Brussels Dialogue as a central feature of the compromise.

Second option is to move forward with the establishment of the **ASM as a hybrid mechanism**. This option is seen as being more acceptable and a more likely outcome. In this option the ASM retains core responsibilities from the 2015 agreement and is formulated in a way that does not create legal challenges

Third option discusses the **establishment of the ASM with some executive competencies in accordance with the 2015 agreement**. In order to accommodate this option, Kosovo would be required to change its constitution. This option is seen as less realistic as opening the Constitution for change would be potentially dangerous, but also very difficult to do for political parties in power in Kosovo. However, it is considered as a potential requirement from the Brussels Dialogue, in order to turn the ASM into a central feature of the compromise solution in the comprehensive legally binding agreement between Kosovo and Serbia.

2. Introduction

In a recent public opinion poll over 75 percent of the Kosovo citizens are not at all satisfied with the current status-quo in Kosovo-Serbia relations and want a solution¹. The same report shows that around 70 percent of citizens do not support the continuation of the status-quo in the next five years. While within the Kosovo Serb population, especially south of Ibar, as well as among nationally-oriented opposition in Serbia, status quo is a viable option, both the governing majority and most of the international community feel that the status quo will lead to destabilization. Therefore, the time is of the essence in solving the Kosovo-Serbia dispute in a manner that is sustainable and comprehensive. In order to reach the deal Serbia insists there must be a compromise, while Kosovo authorities and the majority population feel the compromise was already made by the acceptance of the Ahtisaari package and its incorporation in the Constitution. However, should a compromise within the EU-led negotiations be considered, the question is what would be that compromise solution, that is acceptable to both Serbia and Kosovo, that would lead to an agreement? This paper examines one such possibility, the Association/Community of the Serb majority municipalities in Kosovo (A/CSM) and discusses different policy options in dealing with the impasse that has characterized the process of its establishment.

² Office of the Prime Minister of Kosovo. (2013a). Documents/Dialogue Agreements for Normalizations. Retrieved from https://kryeministri-ks.net/wp-content/uploads/docs/First_agreement_of_principles_governing_the_normalization_of_relations_April_19_2013_Brussels_en.pdf

³ The European Commission. (2013). Serbia and Kosovo*: historic agreement paves the way for decisive progress in their EU perspectives. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_13_347

⁴ Office of the Prime Minister of Kosovo. (2013b). Documents/Dialogue Agreements for Normalizations. Retrieved from https://kryeministri-ks.net/wp-content/uploads/docs/Implementation_Plan_-_First_Agreement.pdf

⁵ Official Gazette of Kosovo. (2013). Law no. 04/L-199. Retrieved from <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8892>

⁶ Constitutional Court of Kosovo. (2013). Case No. KO 95/13. September 9, 2013. Retrieved from https://gjk-ks.org/wp-content/uploads/vendimet/gjkk_ko_95_13_ang.pdf

⁷ Balkans Policy Research Group. (2017). The Association of Serb Municipalities: Understanding conflicting views of Albanians and Serbs. Retrieved from http://k-s-pag.org/wp-content/uploads/2020/03/BPRG_Pub-02_ASM_ENG_InsidePages_PRINT.pdf

However, the 2013 agreement and in particular the idea of establishing the ASM has been protracted as a result of a very divisive political climate in Kosovo and fierce rejection of the process by political parties from the opposition as well as civil society organizations. To the local Serbian community in Kosovo debate over ASM was seen as antagonistic towards them and as a message of the majority community lacking will to support their integration in the country⁷. However, they also feel that Belgrade had betrayed them with ASM because it represented integration into Kosovo system which went against their expectation to remain under Serbian jurisdiction, an idea established and perpetuated by the election slogan of Belgrade-backed Srpska list - "Danas glasamo za Srpsku, sutra gradimo Srpsku" (Today we vote for Srpska, tomorrow we build Srpska) which alluded that the result of the implementation of the parts of the agreement related to integration of the remaining Serbian government institutions would lead to the level of self-governance akin to the Republic of Srpska in Bosnia and Herzegovina⁸. This narrative only deepened the already existing Kosovo-Albanian perspective which feared ASM can potentially lead to a 'dysfunctional and ethnically divided state'.⁹ This fear is a reference to the so-called 'Bosnianization of Kosovo', which, according to a local think-tank is "a term exclusively used by the opposition parties when referring the danger that the agreement on Association of the Serbs Municipalities may pose to the constitutional order."¹⁰

Those speaking against the 2013 agreement believe that the ASM represents more than an association, snubbing the EU and government discourse around the concept¹¹. Political leaders have argued it represented a third level of governance and that it was part of a plan to create a "mini Serbian parliament."¹² Legal experts invited to comment on the matter saw the ASM as a step outside the Ahtisaari Plan and the Constitution of Kosovo¹³.

⁷ Balkans Policy Research Group. (2017). The Association of Serb Municipalities: Understanding conflicting views of Albanians and Serbs. Retrieved from http://k-s-pag.org/wp-content/uploads/2020/03/BPRG_Pub-02_ASM_ENG_InsidePages_PRINT.pdf

⁸ Branišlav Nesović and Riccardo Celeghini. (2015). Community/Association of Serbian Municipalities: The Sum of All Fears. NGO Aktiv.

<http://www.goaktiv.org/uploads/files/Community%20of%20Serbian%20Municipalities%20-%20The%20Sum%20of%20All%20Fears%20-%20Eng.pdf> p. 15

⁹ Balkans Policy Research Group. (2017). p. 10

¹⁰ Përparim Kryeziu. (2018). Who sets the agenda? Preliminary remarks on border revision and territorial exchange between Kosovo and Serbia. Group for Legal and Political Studies (GLPS). Retrieved from <http://www.legalpoliticalstudies.org/wp-content/uploads/2018/08/Who-sets-the-agenda-GLPS-Policy-Note.pdf>

¹¹ Ilir Deda. (2013, March 2). Deda: Asociacioni i komunave serbe nuk është OJQ. Radio Evropa e Lire. Retrieved from <https://www.evropaelire.org/a/24917284.html>

¹² Zijadin Gashi. (2013). Asociacioni i komunave, apo "mini-parlament" serb? Radio Evropa e Lire. Retrieved from <https://www.evropaelire.org/a/24909874.html>

¹³ Ibid.,

In contrast to this, ASM is integral part of any scenario of the comprehensive agreement that is acceptable to the public in Serbia where over 70% find it an important aspect of the final agreement¹⁴. This is also true of Kosovo Serb community, although the percent of the population that believes it will be formed is decreasing¹⁵. The positions are largely shaped by messages of its importance and necessity coming from across the political spectrum in Serbia, but also from the aspirations of the Serb community in Kosovo to maintain the current structure of primarily healthcare and education systems even after the integration.

However, the Ahtisaari Plan clearly states that based upon the principles of the European Charter of Self-Government municipalities are entitled to form and participate in an association of Kosovo municipalities. It is important to note that constant demonization of the ASM by media, civil society and political leaders in Kosovo was also translated by Serbian community in Kosovo as antagonistic and a message that they are not desired in the country.

Part of the reason for mischaracterizations of the ASM in Kosovo's public debate was the highly ambiguous language of the 2013 agreement. The August 2015 agreement between Kosovo and Serbia, signed by then PMs Aleksandar Vučić and Isa Mustafa on "Association/Community of Serb majority municipalities in Kosovo – general principles and main elements" (hereinafter: The 2015 agreement) aimed at providing greater clarity and properly define what ASM would be. In terms of mandate the agreement established 12 key areas of competencies for the ASM, which included among other competencies in local economy, education, healthcare, urban and rural planning, returnees, delivery of public services, etc. In terms of organizational structure the agreement stipulates that the ASM will have an Assembly whose members are appointed by assemblies of participating municipalities, a President that represents the ASM, a Council of 30 members in advisory capacity, a Board composed of 7 members and an administration headed by Chief of Administration who is appointed by the Board. The ASM is foreseen to be established by a decree of the government as well as have its own budget.

¹⁴ Center for social dialogue and regional initiatives. (2019) Normalization of relations between Belgrade and Pristina from citizens perspective. Retrieved from http://www.belgradeforum.org/wp-content/uploads/2019/10/Serbian-Hearts-and-Minds-on-Kosovo-October-2019.pdf?fbclid=IwAR2d-6YxRPQThHFzopqTfHNFp1odKwRRplySsCM4kJ3wGhG9x9BAgG_Tkg

¹⁵ NGO Aktiv. (2019). Trend Analysis 2019. Attitudes of the Serbian Community in Kosovo. Retrieved from <http://ngoaktiv.org/uploads/files/Trend%20Analysis%202019.pdf>

¹⁶ See: Annex II-The Right of Communities and their Members, Article. 3 and Annex III-Decentralization, Article. 9 of the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan).

¹⁷ Office of the Prime Minister of Kosovo. (2015). Documents/Dialogue Agreements for Normalizations. Retrieved from https://kryeministri-ks.net/wp-content/uploads/docs/150825_02_Association-Community-of-Serb-Majority-Municipalities-in-Kosovo-General-principles-Main-elements_en.pdf

To follow the apparent renewed political commitment to the idea, another Management Team for the Establishment of ASM was named and presented in Brussels in 2016, even though Management Team for the Establishment of ASM was named for the first time back in 2013 when the agreement defined that the Team will cease to exist by October 2013, the date by which, according to the Brussels Agreement, the ASM should have been established.

According to the agreement, the Management Team for the Establishment of ASM was to be comprised of four representatives of northern municipalities and a Coordinator; however, by the report prepared by Edita Tahiri's cabinet¹⁸, the composition of this Team was revised in late 2015, and at the request of Kosovo's delegation for the precise reasons that it represented only the four Serb-majority municipalities of northern Kosovo.

Management Team for the Establishment of ASM presented in Brussels in September 2016 replaced two previous members with representatives of the municipalities south of river Ibar, but the Coordinator remained Ljubomir Marić, then Minister of Administration and Local Government in the Government of Kosovo. Management Team for the Establishment of ASM was the only attempt to institutionalize the role of Kosovo Serbs in the Brussels process.

¹⁸ Office of the Prime Minister of Kosovo. Ministry of Dialogue. "Brussels Agreement Implementation State of Play (a brief report on progress and challenges)". Retrieved from http://www.kryeministri-ks.net/repository/docs/KOSOVO_BRIEF_REPORT_ON_BRUSSELS_AGREEMENTS_STATE_OF_PLAY_251115.pdf

The 2015 agreement in practice made things worse, and again the main source of controversy was terminology and language. Then President of Kosovo Atifete Jahjaga requested the Constitutional Court to review the compatibility of the 2015 agreement with the Constitution of Kosovo, arguing that "implementation of the obligations of the Principles of Association produces a legal effect in the constitutional system of the Republic of Kosovo."¹⁹ Among others, the term 'exercise full overview' that would be the competence of the ASM was considered by the 2015 judgement of the Constitutional Court of Kosovo to be a major concern. This particular framing seemed to provide legitimacy to those concerned that ASM would be a third level of governance in Kosovo, whereby ASM would exercise main authority over its members to the detriment of the mandate of the central government. The framing 'exercise full overview' was slightly different from the text of the 2013 agreement which stated, 'will have full overview.' The Court held that the term means 'being informed' and the legal act and statute on ASM should reflect this and neither the Albanian translation of the term which meant 'observing' or the Serbian version which meant having the power of audit.²⁰

The Constitutional Court judged that the 2015 agreement was not entirely in compliance with the spirit of the Constitution and key to this judgement seems to be related to the definition of the main role of the ASM vis-à-vis its participating municipalities²¹. The first point of the judgement of the Constitutional Court that is often ignored is that it requires establishment of the ASM, it specifically states: "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."²² This means that establishment of the ASM is both an international and legal obligation for the government of Kosovo.

¹⁹ Constitutional Court of Kosovo. (2015). Case No. K0130/15. DECISION ON INTERIM MEASURE. November 10, 2015. Retrieved from https://gjk-ks.org/wp-content/uploads/vendimet/KO130-15_ANG.pdf p.4

²⁰ Constitutional Court of Kosovo. (2015). Judgement. Case No. K0130/15. December 23, 2015. Retrieved from https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf

²¹ Constitutional Court of Kosovo. (2015). Judgement. Case No. K0130/15. p. 39

²² Judgement. Case No. K0130/15. December 23, 2015, p. 39

However, the Constitutional Court in its judgement establishes a set of criteria in order to determine the kind of ASM that would pass the constitutional filter. It sets 18 articles from the constitution as standards against which to assess the substance of the legal act and the statute for the establishment of the ASM. However, it seems that these guidelines do not meet the expectations of the Serbian community in Kosovo, of the type of power-sharing mechanisms that would provide the necessary assurances for their integration. This is especially relevant if the ASM is to be a central piece of the compromise solution between Kosovo and Serbia for normalization of relations. In this case it is clear that from Belgrade's perspective, and more importantly, from the perspective of the local Serbs in Kosovo it needs to be more than an NGO.

In the debate about the ASM following the judgement KO 130/15 of Kosovo's Constitutional Court, one key issue emerged in terms of the substance of the ASM, and involves the concept of 'executive competencies' which is generally taken to mean that the ASM would have autonomous authority to exercise competencies in certain areas as defined in the 2013/2015 agreements which include: economic development, education, health, urban and rural planning. The issue of the 'executive competencies' is central to the fate of the ASM and it is about defining its role and mandate. It is also a relevant confidence building mechanism. For instance, currently both Serbs and Albanians seem to believe that the competencies of the ASM are detached from the Kosovo's legal framework, but the reality is that most of what the ASM should be is already covered by the law on local-self-government (03/L-040).²³ Therefore, for the ASM to be acceptable, it is required that it is a product of a certain level of compromise over its authority. However, again the issue is language and ambiguity, in the sense of how to define the authority of the competencies that will be exercised by ASM. In this context, there are two issues.

²³ Adrian Zeqiri, Pieter Troch, Trim Kabashi. (2016). The Association/Community of Serb-majority municipalities: Breaking the Impasse. European Centre for Minority Issues Kosovo (ECMI). Retrieved from <https://www.paxforpeace.nl/media/files/ascm-pax-breaking-the-impasse-eng.pdf>

First, what would be the authority of the central government over the ASM and in which areas should executive competencies apply to the ASM. For instance, issues such as education and healthcare are not seen as a problem for the ASM to have executive competencies, however in areas such as urban and rural planning there is concern how the executive competencies for ASM can lead to dysfunctionality of the state. In addition to this, for the Kosovo side maintaining uniformed command of the security sector is seen of vital importance. This should not be an issue since neither the 2013 nor 2015 agreement include competencies in security sector. While rural and urban planning is a competence of municipalities in accordance with the law on local self-government (03/L-040), the central government has the final authority on the matter. Executive competence in this case is feared because it is taken to mean that that authority of the central government is removed. Also, there are concerns with respect to economic development competence and how would that be translated vis-à-vis resources of national relevance, such as Trepca mines or the Gazivoda/Ujman Lake.

Contrary to this, when it comes to the Serbian community in Kosovo, while there is an insistence on executive competencies over education and healthcare which are, according to the law on local self-government (03/L-040) already extended to municipalities of Severna Mitrovica/Mitrovicë, and Graçanicë/Gračanica and Shtërpçë/Štrpce for secondary healthcare, the debate on the management of the resources in relation to the ASM is absent. Even though both Trepca mines and Gazivode/Ujman have separate ethnic and geographic management, Trepca management in the north is barely profitable, while Gazivode water supplies cannot be withheld without major consequences for everyone in Kosovo, including the Serbian community itself. Regardless, both have been used multiple times by politicians, both Serb and Albanian as manifestations of alleged power over the region.

Based on the above, there are clear political and legal hurdles for the establishment of the ASM. The ambiguity that leads to agreement in Brussels has become a pebble in the shoes of Kosovo in the process of fulfillment of an international and legal obligation that is expected to lead to progress in normalization of relations between Prishtina and Belgrade. The (often unethical and ill informed) debate in Kosovo, as well as the lack of a professional and meaningful engagement of the government in the debate around the ASM has reinforced the perception that establishment of the ASM in accordance with the 2013 agreement and the judgment KO 130/15 of the Constitutional Court would represent an NGO-like mechanism. Therefore, from the political point of view it is clear that it will be difficult to present the ASM as a central piece of compromise solution between Kosovo and Serbia if it does not exercise executive competencies. However, this will be a problem. Public opinion poll shows that 84 percent of Kosovar-Albanians and 19 percent of Kosovo-Serbs strongly disagree with granting extended executive powers to the ASM even if it means de-facto acceptance of Kosovo by Serbia.²⁴ Therefore one key challenge in establishment of the ASM will be to convince the public. Another key challenge from the legal perspective is that establishing the ASM with executive competencies will mean violating judgement KO 130/15 and therefore Constitution, which no government in power would be willing to pursue. It would also be a meaningless effort, since the judgment KO 130/15 requires the legal act and the Statute establishing the ASM to be reviewed by the Constitutional Court. The same is also the requirement of the 2015 agreement in relation to the "decree directly applicable" envisaged to be adopted by the Kosovo Government.

From this brief review, it becomes clear that in order for the ASM to be established it is essential that the following stakeholders are taken into consideration: the Serbian community in Kosovo and the government in Serbia, as well as the government in Kosovo as key stakeholders in defining the ASM. The Constitutional Court in Kosovo is another important actor in the process, because it will review the legal act and the Statute of the ASM. Civil society in Kosovo and the opposition parties also represent an essential stakeholder because they participate in shaping the public opinion on the subject. It is essential that they are included and consulted.

²⁴ RIDEA Institute. (2020). Vox Populi on the 'Grand Finale' between Kosovo and Serbia (Volume III). p. 23

In examining different options how to move forward with the establishment of the ASM, there seems to be two fundamental criteria that must be adhered in order to meet the general expectation of Albanians and Serbs in Kosovo. The ASM has to be a meaningful power-sharing mechanism for the Serbian community that provides the necessary guarantees for protection of their interests in areas such as education, healthcare, social welfare, and economy. In addition to this, the mandate and responsibilities of the ASM cannot jeopardize functionality of the state institutions and undermine their authority. Another important issue to note is that the role and competencies for the ASM would be potentially different for participating municipalities from the north of Kosovo, and those in the south.

To break the impasse, the following seem to be the main options. First, establishing the ASM in accordance with the judgement of the Constitutional Court of Kosovo KO 130/15. Two, establishing the ASM with some executive competencies, which will require changes in the Kosovo's constitution. The third option is thinking outside the box and establishing the concept of ASM as an independent institution in accordance with the chapter XII of the Constitution of Kosovo. These options are individually examined in the next sections.

Option 1: Establishment of the ASM in accordance with the judgement of the Constitutional Court

This policy option is very straight forward. The government already has established a working group on drafting the legal act and Statute of the ASM, although it is unclear what the group has done and if they still have credibility. The establishment of the ASM in accordance with the judgement of the Constitutional Court KO 130/15 is an obligation for Kosovo and in terms of process, best option is restoring the implementation plan from 2013 with necessary changes to account for the situation. In order to establish the ASM in accordance with the 2013 agreement and the judgement of the constitutional court, there are certain changes that need to be agreed between Kosovo and Serbia on the 2015 agreement, and they include:

- 1> ASM shall not replace or undermine the status of the participating municipalities as the basic units of democratic local self-government;
- 2> The ASM cannot circumvent or avoid the administrative review by central authorities;
- 3> Participating municipalities need to have an obligation to respect the Constitution and the laws of Kosovo;
- 4> The membership in ASM cannot be exclusive only to Serb majority communities;
- 5> The staff of the administration of the Association/Community shall not to be considered part of the Civil Service per se;
- 6> The Association/Community cannot be entitled to propose amendments to legislation and other regulations, as indicated by Principle #10 of the Principles, and
- 7> They also shall not replace or undermine the rights of the participating municipalities to receive and decide on the spending of municipal revenues and appropriate funding from the central government.

The ASM established in accordance with the judgment of the Constitutional Court would have the primary responsibility to support and coordinate inter-municipal cooperation, but not have competencies over them or to deliver public functions and services. However, in the context of operational responsibilities of ASM when it comes to public services, there is some space for creativity. In this sense, the concept of One-Stop Shop should be considered to accommodate a role for the ASM. This concept is new to public administration in Kosovo, and it has started to be implemented as a pilot project in Prizren municipality in 2019. The idea here is that services offered by participating municipalities in the 12 areas of responsibility defined in the 2015 agreement, can be potentially offered via a one-stop shop that would be under management by ASM. This arrangement would be regulated in the framework of inter-municipal cooperation, which is supported by the constitution. Overview responsibilities of the ASM can be upheld as long as they constitute an act of informing of the ASM on the part of the participating municipalities.

The ASM can also take an expanded role vis-à-vis participating municipalities by establishing a program for technical assistance for policy development and a funding scheme. On specific areas of responsibility, the ASM can have also a role in overseeing the process of developing long-term strategic frameworks in education, healthcare, local economy, social welfare, culture, etc.

Education is essential to Serbian community and their future in Kosovo. Kosovo's legal framework allows for the Serbian schools to use the Serbian textbooks and curricula. The ASM can facilitate inter-municipal cooperation between Serbian language schools in Kosovo, including through funding schemes. With respect to healthcare, Kosovo legislation allows municipalities to regulate secondary healthcare system. The ASM can potentially support, through technical assistance on policy development and funding schemes improvement of the infrastructure as well as facilitating integration of healthcare workers in the Kosovo system which should also reduce the financial burden for Belgrade, which can be reoriented in supporting ASM to fund other projects.

Option 2: Establishment of the ASM as a hybrid institution

ASM, regardless the “association” in the title is not necessarily envisaged as such, and as defined by the Articles 31 and 32 of the law on local self-government. On the contrary, a public institution/administrative body that has a legal basis in the form of inter-municipal cooperation as envisaged by Article 28 and 29 of the law on local self-government and the law on inter-municipal cooperation (04/L –010) is formed. The body's forming acts are the Agreement on municipal cooperation initiated by the mayors and/or local assemblies and approved by the Government of Kosovo recognizing its „distinct character” and reviewed by the Constitutional Court.

To accommodate the 2013 and the 2015 agreements, the institution also has the bodies listed in the agreements - President, vice President, Assembly, Council. No act of the institution however can be applicable without the procedure already in place regarding the adoption of municipal acts, in other words without the final approval of the legality of the act by the Legal Office of the line ministry or the Prime Minister Office.

The administrative body formed by the municipalities themselves, whose competencies and tasks are clearly defined by the Agreement of the intermunicipal cooperation would be much different than an Association of municipalities. Most notable difference is the fact that the employees of the administrative body formed in accordance with the Article 11, paragraph 7 of law on Inter-Municipal Cooperation (04/L –010) are public servants appointed by the member municipalities.

The appointed administrative staff allows for the following provision of the 2015 agreement “the participating municipalities shall be entitled to cooperate in exercising their powers through the Community / Association collectively” and is also in line with Article 5, paragraph 1.2 of the law on inter-municipal cooperation where it is stated that municipal cooperation is based on “performance of one or more own or extended competences of the municipalities”.

The body however is also allowed to draft sub-legal acts in relation to the organization of the education system, healthcare system and a separate healthcare fund the contributions to which are solely on the voluntary basis for any citizen of Kosovo regardless the municipality of residence. The fund partly finances the costs of medical treatment in the member municipality of ASM healthcare institutions of the beneficiaries of the fund, the unemployed members of the immediate family of the beneficiaries as well as the retired former beneficiaries of the Serbian Pension and Disability Fund.

The sub-legal acts regulate and legalize the current organization of the pre-primary, primary and secondary education – 4+4 years in the primary education institutions and another 4 years in the secondary level institutions but are approved by the line ministry which is the guarantor of its compliance with the law on education in municipalities (03/L-068). The ASM may also regulate the minimum number of students that form a class in order to ensure the operation of Serbian-language schools in rural area which fall below minimum number of students per teacher in the current sub-legal acts of the line ministry.

To avoid discrimination of taxpayers and other publicly funded schools, any operational costs of the education system in the municipalities belonging to ASM that go beyond the standards prescribed in Kosovo laws are paid from sources other than the municipal/ASM budgets.

The role of the assembly of the ASM, however, is advisory. The members of the assembly, as per agreements are delegated members of the elected assembly members of the participating municipalities. The delegates are not directly elected and thus cannot have legislative powers. Instead, the delegates monitor the work of ASM, report back to their municipal assemblies and if and when necessary, inform the municipal assembly they are the member off of the necessity to change the points on the Agreement on municipal cooperation based on which the ASM is formed and its delegated competencies and goals described.

Accordingly, any acts drafted by the ASM are those of its administrative staff who are aided by other representatives and departments of the member municipalities, but they cannot be adopted by the assembly. Instead, they are promulgated by the line ministry.

Any licensed education or healthcare institution on the territory of ASM can opt out of being subject to the regulations of the line ministry proposed by the ASM and be only under the jurisdiction of the municipal departments and line ministries.

In this setup, ASM would have competencies the municipalities have in primary, secondary and tertiary healthcare and education, urban planning and infrastructural projects, cross-border cooperation and social services, but ASM also establishes Public Utility Companies which service several neighboring municipalities, if required.

Option 3: Association of Serb majority municipalities in Kosovo with some executive competencies

As argued in the previous section, in order for the ASM to be accepted as central piece of the compromise solution between Kosovo and Serbia it will require some executive competencies in selected areas and the only way to accommodate this considering the judgement KO 130/15 is to change the Constitution of Kosovo. The Constitutional changes would be focused in order to make the 2015 agreement implementable, and more concretely to accommodate the principle #4 on ASM pertaining to objectives, with respect to the capacity to deliver public functions and services, without the need to replace the municipalities as basic units of local governance. The constitutional changes to accommodate executive competencies for ASM need to respect one fundamental criteria for the Albanian majority in Kosovo, and that is that they do not impede or interfere with the functionality of the state. This is the essential criteria.

The ASM would be the same as defined in 2013 and 2015 agreements in terms of the structure and procedures of establishment. Based on the 2015 agreement, the ASM is foreseen to deliver public functions and services in 12 areas that are exercised by municipalities:

- a)** strengthen local democracy;
- b)** exercise full overview to develop local economy;
- c)** exercise full overview in the area of education;
- d)** exercise full overview to improve local primary and secondary health and social care;
- e)** exercise full overview to coordinate urban and rural planning;
- g)** adopt measures to improve local living conditions for returnees to Kosovo;
- h)** conduct, coordinate and facilitate research and development activities;
- i)** promote, disseminate and advocate issues of common interest of its members and represent them, including to the central authorities;
- j)** provide services to its members in accordance with Kosovo law;
- k)** assess the delivery of public services to its members and their residents as to support the Association in forming positions of common interests for the participation to the work of the central authorities;
- l)** conduct monitoring as required for the implementation of its objectives;
- m)** establish relations and enter into cooperation arrangements with other associations of municipalities, domestic and international.

To deliver public functions and services in these respective areas means that the ASM will require some executive competencies. Therefore, it is important to define what this means in practice, and in accordance with the spirit of the 2013 and 2015 agreements. In this sense, the ASM is meant as a power-sharing mechanism and to ensure that public policies in the 12 respective areas with respect to Serbian community in Kosovo are well protected. To do this the ASM needs to have the power to issue regulations and policies in the respective areas as well as monitor their implementation by participating municipalities. In this sense the ASM is foreseen as a combination of operational and coordination tasks grounded in the concept of inter-municipal cooperation.²⁵

It is important to note that the exercise of full overview is different from one area to another. For instance, for urban and rural planning it is specified that it means coordination; this is important since assigning executive competencies to ASM in this field can be potentially seen as interfering with functionality of the state. The KO 130/15 judgement clearly states that the ASM cannot supplant the municipalities or undermine their authority. In this sense constitutional changes that change this rule are highly unlikely, however changes to accommodate the executive competence of ASM are more realistic.

Based on article 144 of the Constitution the Government of Kosovo, the President or one fourth (1/4) of the deputies of the Assembly of Kosovo can propose changes and amendments to the Constitution, which require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in majority in Kosovo. However, for a prior assessment by the Constitutional Court the respective proposals are required to ensure that "the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II."²⁶

²⁵ Adrian Zeqiri, Pieter Troch and Trim Kabashi. (2016).

²⁶ Constitution of Kosovo. (2008). Official Gazette of Kosovo. Retrieved from <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

The judgement KO 130/15 of the Constitutional Court judges that the 2015 agreement is not in compliance with articles 21 and 44 of Chapter II. Therefore, potential proposals for changing and amending the Constitution to accommodate the ASM with executive competencies, have to be in accordance with Chapter II of the Constitution. In this sense, some principles of the 2015 agreement need to be revised, including principles #9, #10, #11. The Constitutional Court found that the ASM cannot claim to "be vested with full and exclusive authority to promote the interests of the Kosovo Serb community in its relations with the central authorities."²⁷ The Court notes that the rights of communities in Kosovo are "granted to individuals and groups by virtue of belonging to a community within the meaning of Article 57.1 of the Constitution. As such, the Court finds that these rights are inalienable and inviolable attributes of these communities and their members."²⁸

However, the Constitution can be changed or amended in other chapters to accommodate the exercise of executive competencies by the ASM, concretely with respect to principle #4 of the 2015 agreements, in areas such as education and healthcare. Article 12 of the Constitution on Local Government is comprised of only two points: "1. *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.*" The article 12 can be amended to include a right of municipalities to accept overview over the exercise of their competencies by an association that they have become a member of based on free will, which would not supplant the administrative review of the central authorities guaranteed by article 124.7, as well as the right of municipalities to require support in implementing some of their responsibilities in coordinated and organized manner with other municipalities. In this sense article 124 would also be amended to include the right of municipal associations to support implementation of responsibilities by participating members and exercise overview responsibilities – this is in addition to central government - should participating members accept such an authority. Central government retains the ultimate authority of administrative review.

²⁷ KO 130/15 Judgment. p.33, para. 166.

²⁸ KO 130/15 Judgment. p.33, para. 165.

This overview can be defined as a policy overview towards participating members. In practice this would mean ASM can issue policies to its participating members on selected areas, such as education, healthcare, etc. However, the administrative overview of the central authorities would be maintained. A more detailed legal analysis of this option would be required to ensure full compliance with the Chapter II of the proposed changes. The support from the Kosovo-Albanian majority for constitutional changes to enable executive competencies in selected areas for the ASM can be exchanged for a support for amendments to the Constitution that would change the mandate of the Kosovo Security Forces into an Armed Forces. The presence of the KSF in the north part of Kosovo, can also be regulated, and a potential compromise can be that for a certain period of time, the presence of KSF in the north can only be under the supervision from NATO/KFOR. This would be in addition to credible benefits for Kosovo in relations with Serbia and the Euro-Atlantic integration, mainly: acceptance of the status of Kosovo from Serbia, recognition from the remaining five EU member States, candidate status in accession process to the EU, and fast-track membership to NATO membership.

The ASM would also be funded using a certain percentage from the Customs revenues collected from the border crossings in the north of Kosovo. Additional areas of responsibilities such as energy and telecommunication can be added via special agreements. However, police and judiciary cannot be considered as they would jeopardize the principle of uniformed approach and therefore interfere with the criterion of functionality of the state. The ASM would have a seat in the north of Kosovo and maintain direct ties with the Serbian government.

There are important pros and cons to this option. The most important pro of having the ASM with some executive competencies is that it potentially fulfills the conditions to be accepted as a compromise solution by Serbia and the local Serbs in Kosovo. The cons to this option are that it opens the Constitution of Kosovo for amendments and that can become an uncontrolled process that can potentially undermine Chapter III on the rights of communities and their members. For a successful process of establishment of the ASM with constitutional changes it is important to avoid increasing the extent of changes and amendments required to the Constitution. For instance, to accommodate principle #4 of the 2015 agreement on ASM, constitutional changes can be focused and potentially minor.

The controversial alternatives. This section provides an overview of different ideas, albeit controversial alternatives, that have been floated as models for resolving the question of the north of Kosovo. The term controversial is used to denote that these ideas have been met with high criticism and opposition, or represent a radical conceptual approach to solving the issue of the north of Kosovo that is in contradiction with normative commitments based on which the state building process in Kosovo was supported by international community, which largely refers to the principle of multi-ethnic society.

The first of such ideas is the so-called 'land swap' which is also often referred to as 'border correction' perhaps in an attempt to improve the public image of the idea. In a nutshell, based on the public debates on this option, it includes annexation by Serbia of parts of the north of Kosovo that have predominantly Serb population. This encompasses to a large degree, the municipalities of: North Mitrovica, Leposavic, Zubin Potok and Zvecan. In exchange Kosovo would annex parts of the Presevo and Bujanovac that have predominantly Albanian population. More concrete details of what space this option would encompass are blurry. It is unclear why Serbia would agree to give Kosovo additional territory, but this option it is considered to have been the preferred compromise solution for some leaders in Serbia and Kosovo.

The option is considered that gives Serbia face-saving as it restores some territory from Kosovo. And for Kosovo it means it gets recognition of its independence. In other words, land-swap is considered in many circles as a required or necessary compromise for a divorce agreement between Kosovo and Serbia. It is unclear how this would be implemented in practice. One option in this context of implementation, that would rather make it a technical process, involves a border demarcation agreement, which would involve a border correction element. However, the implications of such corrections are big and would definitely require Kosovo to change its flag which features as a central piece the map of the country.



The land-swap idea so far has been dismissed outright by key EU member States, including Germany, out of fear for regional implications especially vis-à-vis Bosnia and Herzegovina. It was also fiercely opposed as an idea in Kosovo even if it meant recognition by Serbia. Currently there is no political movement in Kosovo that has the necessary political capital and support to deliver on such an agreement, in the sense of it being voted in the Kosovo Assembly. There are other practical issues to this idea, which concern the question of the Serbian community living in the south of Kosovo. In this sense, the ASM would be established but with more limited scope of work and responsibilities.

In addition to land-swap, there is also the idea of 'partition' of Kosovo, which would mean that in exchange for recognition north of Kosovo would join Serbia. This option was considered early on in the aftermath of the war in 1999 as a compromise solution for settlement of the status of Kosovo. It is examined in the report of the Independent International Commission on Kosovo in 2000. In their report Commission explains that this idea "would seek to consolidate the remaining Serbs in the province into a contiguous area north of the Ibar/Libar river in the region, adjacent to the frontier with Serbia."²⁹ In the report this option, also implies population transfer, arguably of the Serbian community living in the south, however with special provisions for protections of cultural and historical monuments, including compensation for property. By agreeing to this option, Serbia would renounce its claims over the remaining territory of Kosovo.

²⁹ Independent International Commission on Kosovo. (2000). Kosovo Report: Conflict, International Response, Lessons Learned. Retrieved from <https://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf> p. 266

A more modern contemporary interpretation of this idea as a compromise solution for recognition of independence, implies annexation of the north of Kosovo by Serbia, without population transfer, and with special provisions that protect religious institutions and guarantee rights and representation for the Serbian community remaining in the south part. However, as noted by the Independent Commission twenty years ago, there are several challenges with this option. First, "It is difficult to see how an international community, which refused to approve formal partition in Bosnia, could approve or initiate such a move in Kosovo."³⁰ Secondly, it is a contradiction with the normative commitments of the EU that promote a multi-ethnic society. Thirdly, it would "would deprive the majority population of the northern parts of the Trepce/Trepca mine complex. Even if the commercially exploitable mineral resources in this complex were less valuable than is popularly supposed, losing Trepce/Trepca would deprive an already poor province of a source of employment and revenue."³¹ And lastly, it would sow the seeds of future conflict by creating a permanent source of grievance.

Territorial autonomy for the north of Kosovo, is another idea that has been floated as a compromise solution. In terms of definition, territorial autonomy is defined as asymmetrical or symmetrical self-government of a territorial entity within a state. For instance, an example of such an arrangement can be South Tyrol.³² This would imply creation of two separate state entities in Kosovo. In practice this would require an entirely new constitution in Kosovo, and a rethinking of Ahtisaari proposal, based on which Kosovo declared its independence. Territorial autonomies in ethnically divided societies, as the case of the Bosnia and Herzegovina shows, have strengths and weaknesses.³³ In terms of strengths, it provides the highest assurances for protection of rights and interests for the Serbian community in the north of Kosovo. It would also lead to formal recognition of Kosovo as an independent country by Serbia.

In this sense, territorial autonomy as a power-sharing mechanism is especially important arrangement in the context of an active and systematic efforts by a central authority or the dominant group in the state to undermine or violate the rights of another community. With the extremely strong footprint of the international community in Kosovo this is highly unlikely scenario.

³⁰ Ibid. p. 267

³¹ Ibid.

³² See: Elisabeth Alber and Carolin Zwilling. (2016). South Tyrol. Retrieved from http://www.world-autonomies.info/tas/styrol/Documents/South%20Tyrol_2016-01-15.pdf

³³ Soeren Keil. (n.d.). The granting of territorial autonomy in the Balkans means that large scale violence is now near-impossible. But small scale conflicts continue. Retrieved from <https://core.ac.uk/download/pdf/9695285.pdf?repositoryId=67>

In terms of weakness, as Keil holds, “While the arrangements for territorial autonomy have contributed to some transformation of the conflicts into political disagreements rather than violent conflicts, they have however failed in establishing functional and saturated states.”³⁴ Also, in the context of Kosovo it could potentially signify regional ramifications for North Macedonia and Presheva Valley. The behavior of the leader of the Republika Srpska in Bosnia and Herzegovina exacerbates such scenarios, and especially the fears that in the near future both Republika Srpska and an autonomous north of Kosovo would join Serbia proper.

Other options

One policy option outside the box is establishing the concept of the ASM as an independent agency in Kosovo to regulate inter-municipal cooperation. In Chapter XII the Constitution of Kosovo provides for the establishment of independent institutions and more concretely the article 142 regulates independent agencies. This option is especially important for the regulatory and oversight responsibility that the ASM is foreseen to have in the spirit of the 2015 agreement. In this option, an independent Agency for inter-municipal cooperation of Serbian community in Kosovo would be established with the mandate to oversee and regulate policies in the 12 areas of responsibility as defined in the 2015 agreement.

3. Conclusions and general recommendations

This paper holds that the establishment of the Association/Community of the Serb majority municipalities is an international obligation for Kosovo stemming from the 2013 agreement reached in Brussels, which was ratified as an international agreement by the votes of the 2/3rd of the members of the Kosovo Assembly in 2013 (Law 04/L-199). It is also a legal and arguably a constitutional obligation based on the judgement of the Constitutional Court of Kosovo (Case No. K0130/15. December 23, 2015), which calls for the government to establish the ASM. Therefore, the option before the Kosovo government is not if it should establish the ASM, but rather the kind of authority and mandate the Association/Community of Serb majority municipalities would be vested with. This will be determined if the ASM will constitute the central feature of the compromise solution between Kosovo and Serbia in the framework of the Brussels Dialogue and a comprehensive legally binding agreement.

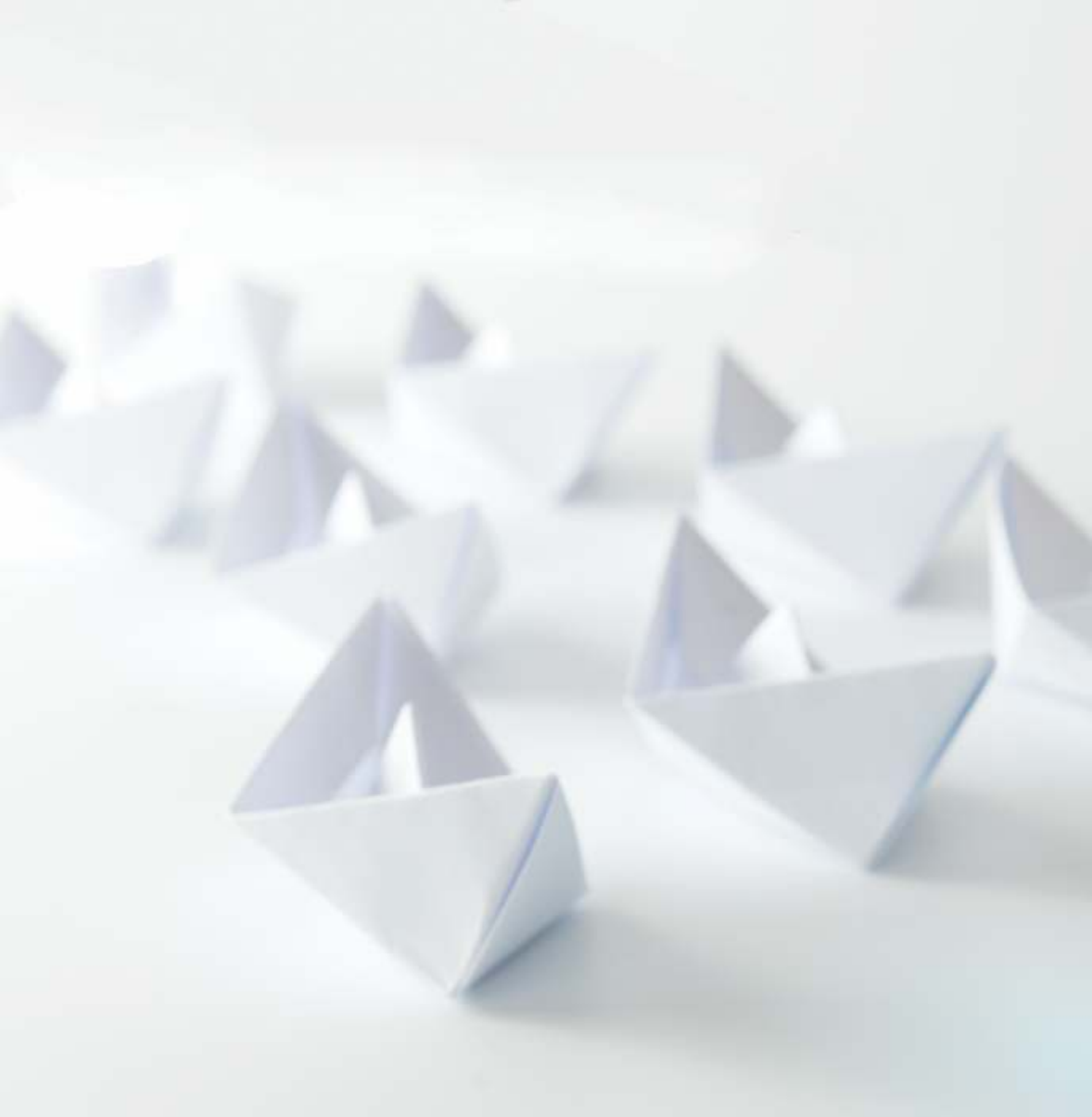
³⁴ Ibid. p. 2

In this paper we have noted that the debate in Kosovo surrounding the idea of the ASM and the process of its establishment, have further deepened the distrust among the Serbian community in Kosovo, and especially in the north part, of a lack of willingness from the Albanian majority to implement necessary measures for their integration in the society and institutions. The government, civil society and other stakeholders in Kosovo, must do more, to counter the antagonistic and divisive discourse towards mechanisms that are designed to help integration and consolidation of Kosovo as an open and multiethnic society.

This paper holds that a hybrid option whereby the ASM is established with some overarching authority over its participating municipalities in selected areas of responsibilities, in the framework of inter-municipal cooperation, should constitute a compromise solution between Kosovo and Serbia in the context of a comprehensive legally binding agreement. The paper also holds that arrangements and authority of the ASM should not undermine the authority of the central level institutions in Kosovo. The ASM would have the mandate to issue sub-legal acts in the area of education, healthcare, social welfare, and culture, in accordance with the principle of administrative review by the central institutions. In addition to this, this paper considers that any solution to the north of Kosovo should also have highest regard for the principle of preservation of ethnic composition, with full respect of rights of returnees of any ethnicity. Also, the ASM, should be able to have membership in EU's Committee of Regions.

The hybrid option for establishing the ASM can be potentially achieved in accordance with the judgement KO 130/15 of the Constitutional Court. However, should the ASM constitute a central feature of the compromise solution between Kosovo and Serbia, than it is highly likely that it will be required to have some executive competencies. As the legal situation stands this would be impossible without making some changes to the constitution of Kosovo. Nonetheless, it will be a mistake that should be avoided to insist on constitutional changes that undermine functionality of the state of Kosovo, and its uniformity, as such an approach would be highly unsuccessful and would only further aggravate the situation on establishing the ASM.³⁵ In this sense, potential minor and targeted constitutional changes to accommodate ASM, must not be detrimental to the functionality of the state.

³⁵ Ramadan Ilazi. (2020). The necessity of a leap of faith. Retrieved from Sbunker.
<https://sbunker.net/raioni-2020-bilogje-tematike/90440/the-necessity-of-a-leap-of-faith/>



BALKAN DIALOGUES

ESTABLISHMENT OF THE
ASSOCIATION/COMMUNITY OF SERB
MAJORITY MUNICIPALITIES IN KOSOVO:
CHALLENGES AND OPPORTUNITIES