

ADVISORY NOTE

As confirmed by the Constitutional Court, the Association/Community of Serb majority municipalities in Kosovo (A/CSMK) is a legal obligation for Kosovo deriving from the Law on Ratification of the First Agreement of Principles Governing the Normalisation of Relations.

Aside from the observations made by the Constitutional Court, the Kosovo authorities often highlight that the legal capacity of A/CSMK should be identical to that of the existing Association of Kosovo Municipalities, at present registered and acting as an NGO.

The legal teams advising the Kosovo authorities should have highlighted the flawed legal personality of the existing Association of Kosovo Municipalities. Unfortunately, the Constitutional Court also failed to highlight the flawed legal personality of the current Association of Kosovo Municipalities.

This paper recognises legal and political concerns related to establishing the A/CSMK. However, exploring possibilities to address these concerns can only occur after the interested parties resolve matters related to the legal personality of organisations founded by municipalities.

The flawed legal personality of the Association of Kosovo Municipalities

Kosovo authorities, the President included, argue that the legal personality of the existing Association of Kosovo Municipalities stems from the Law on Local Self-Governance.

Article 31 - Right of Municipalities to Associate

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

(source: official English version of the law)

Kosovo authorities claim that "law" refers to the Law on Freedom of Association in Nongovernmental Organisations since the existing Association of Kosovo Municipalities exists per the provisions and procedures of this law.

Kosovo authorities, the Constitutional Court included, have ignored the fact that the Law on Freedom of Association in Nongovernmental Organisations stems from article 44 of the Constitution.

Article 44 [Freedom of Association]

The freedom of association is guaranteed. The freedom of association includes the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization.

(source: official English version of the Constitution)

Article 4 of the law in question, chapter of fundamental principles, clearly reflects the same.

Article 4 -Freedom of Association

- 1. The freedom of association is a guaranteed right by the Constitution of the Republic of Kosovo.*
- 2. The freedom of association, including the right of each individual to establish an organization without needing to obtain a permit, whether to be or not a member of an organization, and to participate in the activities of an organization.*
- 3. Every person shall have the right to establish a non-governmental organization in accordance with the terms and conditions set forth in this Law.*
- 4. No person shall be required to associate against his own will.*
- 5. No person shall be discriminated in any way, because of any decision to associate or not to associate*

(source: official English version of the law)

We need to remind the interested parties that article 44 of the Constitution references the Freedom of Association as one of the fundamental rights and freedoms guaranteed by the Constitution of Kosovo. It is a fundamental right and freedom bestowed upon individuals and individuals only. Furthermore, this is rightfully reflected in the law as well.

Per this law, associations are established by free citizens. Article 16 of the Law on Freedom of Association in Nongovernmental Organisations states the following:

Article 16 – Association

- 1. An Association is a membership organisation, grouped on the basis of the free will of persons of common interest, for the realisation of legitimate goals for public benefit or mutual interest.*
- 2. The association shall be established by three (3) or more persons.*

(source: official English version of the law)

According to the official records, the existing Association of Kosovo Municipalities (Acronym AKK, NGO type Association, registration number 5101800-1) is an organisation established not by municipalities but by three individuals in their capacity as private citizens. Mr Faruk Spahija, Mr Lutfi Haziri and Mr Sali Gashi are listed as AKK founders.

How an organisation created by three private citizens can claim representation of Kosovo municipalities constitutes a legal mystery.

Article 13, point 1, of the same law states the following:

The NGO exercises its activity independently from state institutions.

(source: official English version of the law)

At this point, we should observe the widely accepted definition of what, from a legal point of view, a municipality is.

A municipality is a political subdivision of a state within which a municipal corporation has been established to provide general local government for a specific population concentration in a defined area.

Any legal/political scholar would wonder, since the municipalities are part of the state institutions, how can an organisation established by them be independent of the state?

As an integral part of the overall governing structure, municipalities do not enjoy the freedom of association bestowed upon individuals by the Constitution. Any notion that municipalities can establish an NGO to represent them constitutes brute legal nonsense.

Kosovo authorities should immediately revoke the registration of AKK since the existence of AKK, as an NGO, constitutes a flagrant violation of the law and a mockery of the fundamental democratic governing principles.

Conceiving the legal personality of organisations founded by municipalities

As noted by the Constitutional Court, the municipalities have the constitutional right of inter-municipal cooperation (art. 124.4).

In 2011, the Assembly of Kosovo passed the Law on Intermunicipal Cooperation (Law Nr.04/L-010). However, this law should have covered the right of

municipalities to associate, as noted in Chapter V of the Law on Local Self-Governance. Chapter V [*Intermunicipal cooperation and arrangements*] of the 2008 Law on Local Self-Governance lays the groundwork for exploring this right.

For the much-needed legal conceivment, the best course of action is to draft a new law titled "Law on Intermunicipal Cooperation and Coordination", which also covers municipalities' right to associate, and effectively nullifies Law Nr.04/L-010.

Since "cooperation" refers to the collective efforts of a group to accomplish particular objectives and "coordination" refers to an orderly arrangement of group efforts to provide unity of action in the pursuit of common objectives, including both particular and common objectives provides a broader scope.

Article 81 of the Constitution regulates that such a law would fall in vital interest legislation requiring a double majority rule¹. The double majority rule dictates the necessity for the active participation of Kosovo Serb MPs in the legislative process.

This law would provide a general framework for the organisational structure, objectives, governing legal acts, procedures to establish and to dissolve, relations with central authorities, budget, legal capacity and other aspects of organisations established by the municipalities for inter-municipal cooperation and coordination.

Common sense and Constitutional Court remarks should guide the legislators in the drafting process.

¹ Majority of all MPs, present and voting, and the majority of MPs, present and voting, holding seats reserved or guaranteed for representatives of non-majority communities.

The law should designate the Ministry for Local Administration and Governance (MLAG) as the oversight governing structure. MLAG would also serve as the registry office for the establishment and dissolution of these organisations. For this purpose, MLAG would need to adopt specific administrative directives.

This law would provide the necessary legal base for the proper legal personality of the existing Association of Kosovo Municipalities and any other future organisation, the A/CSMK included.

Other observations

One can argue that, in simplistic terms, the legal personality of the A/CSMK can stem only from the Law on Ratification of the First Agreement of Principles Governing the Normalisation of Relations. However, in an attempt to conceive the much-needed legal personality of organisations established by the municipalities, the Constitutional Court judgement KO130/15 of 23 December 2015 dictates broader legal thinking.

Article 19.1 of the Constitution states the following:

International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.

(source: official English version of the Constitution)

As seen in the past years, the Law on Ratification of the First Agreement of Principles Governing the Normalisation of Relations is not self-applicable. The promulgation of the Law on Intermunicipal Cooperation and Coordination falls in the category of necessary legal tools foreseen by article 19.1.

Promulgation of this Law would also fulfil the legal obligation foreseen in point 2 of the First Agreement on Principles, stating the following:

The Community/Association will be created by statute. Its dissolution shall only take place by a decision of the participating municipalities. Legal guarantees will be provided by applicable Law and constitutional law (including the 2/3 majority rule).

(source: official English version of the agreement)

As a law of vital interest, the Law on Intermunicipal Cooperation and Coordination could provide these legal guarantees.

The Law on Intermunicipal Cooperation and Coordination and the administrative directions deriving from this law could be presented to the Constitutional Court for final review.

Conclusion

Launching serious discussions/consultations on drafting and promulgating the Law on Intermunicipal Cooperation and Coordination is the best course to overcome the years-long deadlock.

Aside from solving the legal personality problem of the existing Association of Kosovo Municipalities, this law would also establish the principle of legal equality of all organisations established by the municipalities, the A/CSMK included.

The promulgation of the Law on Intermunicipal Cooperation and Coordination provides the framework to address the concerns raised by the Constitutional Court and simultaneously meet the 2015 agreement's objectives concerning establishing the A/CSMK.

These discussions/consultations could also prove helpful in finding formulas to address other concerns related to the A/CSMK.

By taking this course of action, Kosovo demonstrates its commitment to the rule of law and its seriousness as a credible partner of the international community.