

THE LEGALITY OF THE PRISTINA - BELGRADE POLITICAL DIALOGUE: THE QUEER CASE OF THE HISTORIC AGREEMENT

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Abstract: In order to fulfil the preconditions set by the European Union vis-à-vis Western Balkans, countries of the latter must meet numerous criteria to show that they are ready to adhere in the EU. One of those conditions as stipulated in the Stabilization and Association Agreement is the regional cooperation, which entails the good neighbouring relations between candidate and/or potential candidate countries. In order to help both Kosovo and Serbia fulfil partially these criterions, EU has decided to step in and facilitate a high level political dialogue between the two countries. However this is being done by the EU in ambiguous terms, and uncovering a risk of constitutional crisis in Kosovo.

The dialogue is meant to provide a fast track mechanism for reconciliation and good neighbouring relations, however this needs to be done at the cost on finding a creative approach and often violating provisions of the Constitution of one side, Kosovo, since it doesn't recognize it as a state but rather as a territorial entity still in line with the Resolution 1244 of the UNSC (1999).

The paper provides an analytical approach of the agreements signed and binding legal documents, such as the Constitution of the Republic of Kosovo (2008), in order to point out key elements of constitutional infringement. Further, the paper argues briefly the imposing provisions of the agreement by the EU in the Europeanization context, concluding that the Europeanization process cannot be fitted universally without carefully analysing the legal as well as the cultural and historical context.

Keywords: dialogue, state-building, Europeanization, kosovo, serbia, EU, constitution.

1. Introduction

After years of struggle and opposite views on the legal status of Kosovo, both Kosovo and Serbia, have decided that the best way to move forward is to engage in a mutual dialogue about issues pertaining the citizens of respective countries.

The dialogue on technical talks, to be later transformed into high political dialogue between the representatives of both Governments started in 2011 under the sponsorship and mediation of the European Union, in order to achieve normalization of relations between the two countries – both committed to the EU integration path.

These talks, facilitated by the EU - who has used their stimulating tools to incentivize both parties in implementing the reached conclusions, albeit some more than the other for which it shall be subsequently discussed throughout the paper, has reached its highlight in April 2013, when the two Prime Ministers, Hashim Thaci of Kosovo and Ivica Dacic of Serbia signed the document on normalization of relations between the two countries.

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The 15 points agreement on normalization of the relations signed between Kosovo and Serbia on April 2013, for the normalization of their relations to be more in detail elaborated and analyzed in the Kosovo domestic legal infrastructure, also known as the Historic Agreement of Brussels (further “the HA”), foresees the creation of the Association of Kosovo Serb municipalities, agreements on Energy and Telecom as well as the Judiciary i.e. Rule of Law.

Taking the dialogue mediation responsibility very seriously, the EU uses Henry Kissinger’s famous “constructional ambiguity”¹ especially when dealing with Kosovo, as a result of its, as it is known, “status neutrality” as a consequence of the five member states that don’t recognize Kosovo as an independent state, in a – what Visoka and Doyle argue – a neo-functional peace approach for resolving disputes through deconstructing highly political issues into technical meanings in order to achieve mutually acceptable agreements.²

However, this approach has proven to leave space for ambiguous interpretation and lack of transparency by both Governments, since their positions sitting at the table are diametrically opposed, i.e. Serbia still sees Kosovo as its integral part, and does everything in its power to block the signing of any document where Kosovo’s statehood is being referred to, while on the other hand, Kosovo authorities proclaim that every agreement signed is a de-facto recognition of its statehood not only by the EU but by Serbia as well. The interpretation maneuverability leased by the EU to both parties, has proven to polarize not only the difficult relations between the Government of Kosovo and that of Serbia, but also the political scene in Kosovo, where the Kosovo Serb political parties represented both in the Government and in the Parliament do act as instructed by Belgrade that hinders the normal political life flow in the country.

The dialogue between Pristina and Belgrade as it started bears in itself several inconsistencies and fallacies. Several key facts were not taken into consideration when two sides signed off to the European Union facilitated dialogue, and the first being primarily – Kosovo has not been, and still is not treated as an independent state in the dialogue. The EU cannot sign off to such actions, because of its five non-recognizing member states³ while Serbia remains in its position treating Kosovo as a part of its territory as they stipulate it even in their Constitution preamp. Thus the negotiations take place in a neutral terrain, with no state symbols, and no official insignia, nonetheless, being treated unequally. Serbia as a state, a candidate country for the EU, and Kosovo⁴ as a territorial entity.

¹ MICHAL, SHUR-OFRY – OFER, TUR-SINAI: Constructive Ambiguity: IP Licenses as a Case Study, in *University of Michigan Journal of Law Reform*, Vol 48. Issue 2. (2015) 391-435. <http://repository.law.umich.edu/mjlr/vol48/iss2/3>.

² VISOKA, GEZIM – DOYLE, JOHN: Neo-Functional Peace: The European Union Way of Resolving Conflicts, in *JCMS*, Vol. 54. N. 4. (2016) 862–877.

³ Five member states of the European Union still don’t recognize Kosovo’s declaration of Independence: Spain, Greece, Slovakia, Romania and Cyprus.

⁴ In 2012, Kosovo and Serbia technical negotiators struck a deal for Kosovo’s unhindered regional representation. According to the agreement reached on February 2012, Kosovo will be represented with a footnote accompanied with the text This label [ie “Kosovo”] does not

Imposed better saying than mediated, some of the agreements, such as the creation of the Association of Serb Municipalities which represents the fundament of the HA, did bring an enormous division gap within the political scene of Kosovo, manifested by blocking the work of the Parliament by the opposition parties using protests on the streets and tear gas within the Parliament chamber.

Ultimately, the President of Kosovo, Madam Atifete Jahjaga, did halt the process by sending the agreement to an interpretation by the Constitutional Court, which ruled that some of the provisions in this agreement are inconsistent with the Constitution of Kosovo, thus should be redacted.⁵ This action was seen unfavorable by the Serbian Government as well as the Kosovo Serbs, who boycotted their participation in the Parliament.

The agreements, if seen from a state functioning perspective have had an impact. Kosovo authorities have nominally extended their reach in the anarchic and lawless northern part of Kosovo, dominated by the minority Serb population who have been constantly disobedient to the Government, regardless the fact that its full integration still remains a wishful thinking as Belgrade refuses to instruct either the political representatives or the citizens into cooperation with the authorities in Pristina.

This article begins by bringing the most important milestones of the dialogue process, the way how it started and its proceedings, concentrating on the approach used by the EU in this dialogue, as well as the postulate upon which it was set. It will also briefly analyze the agreements reached, focusing further on those contested for the creation of the Association of the Serb municipalities and the allocation of the Kosovo country code by the ITU. The article in its central part shall theoretically as well as empirically argue that in these cases, the Europeanization top to bottom approach as argued by Radaelli is a slippery slope where the constitutional order of Kosovo has been undermined, allowing another State (Serbia) to possess nominal control over a part of Kosovo's territory. Moreover, the constructive ambiguity approach used by the EU in the negotiations, especially with the case of allocating a country code to Kosovo by the ITU, where according to the action plan of implementation Serbia had to give its consent, while Austria did apply for the code, so Kosovo is just a user and not a full owner of it, is seen as an direct interference of one sovereign state in the internal affairs of the other.

Borzel argues fairly that limited statehood is the main cause of ineffective implementation of EU-induced reform⁶ when talking about the Western Balkan countries, part of which is Kosovo as well – however it fails to mention the fact that some of the imposed prerogatives from EU, do add to the limit of the statehood in Kosovo as we have seen in the case of the Parliament blocking because of the ASM – deemed by all, including the Constitutional Court of Kosovo as unfit with the

prejudge the status of Kosovo and is in accordance with Resolution 1244 and the opinion of the ICJ on Kosovo's declaration of independence.

⁵ Verdict number KO130/15 of the Constitutional Court of Kosovo. http://www.gjks.org/repository/docs/gjk_ko_130_15_shq.pdf.

⁶ BORZEL, TANJA A.: *When Europeanization hits limited statehood: The Western Balkans as a test case for the transformative power of Europe*, 2011, KFG Working Paper series. No. 30. Kolleg – Forschergruppe, Freie Universitat Berlin.

Constitution, So, in one hand, if the EU imposes reform for compliance with its request, the question remains, why it insists in implementing agreements that are of a clear breach of the Constitutionality?

2. From UN to EU – the dialogue endeavors of Kosovo and Serbia

There was a great impatience of the majority Albanian population in Kosovo 5 years after the UN administration first installed itself in the country. The bar of resentment towards the indolence of the United Nation Mission in Kosovo (UNMIK) for resolving the question of the final status was raised high, and the violence outbreak of March 2004 did prove that the status-quo maintained by the UN was not viable anymore. Despite the diametrically opposite positions of Serbia and Kosovo at the highest level dialogue table in Vienna, in what is referred to as the “meeting of the elephants”, Serbia offering substantial autonomy to Kosovo within the auspice of Serbia still claiming Kosovo as part of its territory, and Kosovo agreeing to nothing less than independence, negotiations did proceed facilitated by the UN, EU and US, in a spark of hope for achieving a mutually agreed solution. But the prospect for such a conclusion was far of reach.

After years of negotiations, and with an ideal solution acceptable to both parties nowhere in sight, in 2007, the UN special envoy Marti Ahtisaari presented the Ahtisaari Package or also known as the Comprehensive Status Proposal for Kosovo (CSP),⁷ which foresaw a limited time supervised independence for Kosovo, with some strong provisions for the Serb minority protection.

On the day of 17 February 2008, the Parliament of Kosovo without the Serb minority members present, declared the independence and the final secession from the remainders of Yugoslavia – which was followed by the recognition of more than 50 states, including the US and the vast majority of the EU member states – however without the support of the UN Security Council – which created a parallel legal universe with the Resolution 1244 (1999) in place and added to the ambiguity in the subsequent operations launched by the EU the European Union Special Representative (EUSR) and the EU Rule of Law Mission (EULEX).

Unhappy about the declaration of independence, Serbia turned to the International Court of Justice to seek for the opinion on the, what they call it, “unilateral declaration of independence” of Kosovo. The International Court of Justice (ICJ) in its opinion⁸ did rule in very clear terms that the declaration of independence did not violate international law nor the Resolution 1244 of the UNSC, however did not confirm whether Kosovo is a de-facto and de-jure a state.

From the ICJ the debate shifted to the UN again, where Serbia demanded that the issue of Kosovo is to be returned to the Security Council – however, learning from the

⁷ UN presents key plan for Kosovo: BBC News 26 January 2007. <http://news.bbc.co.uk/2/hi/europe/6300999.stm>.

⁸ Accordance with International law of the unilateral declaration of independence in respect of Kosovo. Advisory opinion of 22 July 2010. <http://www.icj-cij.org/docket/files/141/15987.pdf>.

mistakes in the past, the UN referred the issue to the EU, as they said “this is an European matter” – and at the same time adopting a resolution⁹ which called for technical dialogue between Kosovo and Serbia with the mediation of the European Union. This mandate was a straightforward and truthful way of explaining what we were doing and why. “Cooperation ... to improve the lives of ordinary people” reflects what people sometimes call “the European method” – seeking peace through practical cooperation rather than through grand rhetoric about the brotherhood of mankind – though sometimes we cannot resist that temptation too. This is the method invented with the Coal and Steel Community. The last objective, “bringing Serbia and Kosovo closer to the EU” is essentially about enlargement: the Thessaloniki promise which the EU will one day make good.¹⁰

Nevertheless, the postulate upon which the dialogue has started has been wrong. The EU was aware that because of the opposition because of several crucial points. EU, because of the 5 non recognizing members,¹¹ cannot make a fully-fledged promise on the integration path for Kosovo despite its will. Nonetheless, again in a vague and transcendent language it established some sort of contractual relationship, especially with the signing of the Agreement for Stabilization and Association.

Serbia who sits at the opposing side of the table does consider Kosovo still part of its territory, contesting its statehood, thus undermining the equal dialogue position.

Last, but not least, apart from myriad of problems faced by the boycott of the Serbian political representatives in the Government and the Parliament, Kosovo authorities do not control the entirety of its territory. The northern part inhabited by the Kosovo Serbs, show disregard to the Kosovo legal order, resentment towards any kind of EU presence and existing in a lawless and anarchic environment, abide by the rules of Belgrade only.

It is very important to mention the factuality of the ethnic division line and how did that occur. The division of the country was manned immediately after the war in 1999, when a protest of Mitrovica – the divided city – inhabitants from the Albanian majority escalated in strive to take over the occupied territory of the northern part. This did trigger a NATO/KFOR intervention which in order to prevent the escalation of the conflict set up a security parameter around Mitrovica north, effectively making it a safe haven for Kosovo Serbs from all around Kosovo. In addition, this was also done in order to retain the multiethnic character of the country but it led to a clustering effect in which the north of the river Ibar emerged as a Kosovo Serb space while the south as a Kosovo Albanian space.¹²

⁹ UN General Assembly Resolution 298/64
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/298.

¹⁰ COOPER, ROBERT: *The Philosophy of the Belgrade-Pristina Dialogue*, Posted on 16.07.2015. in Belgrade - Pristina, EWB Op-eds, <https://europeanwesternbalkans.com/2015/07/16/sir-robert-cooper-the-philosophy-of-the-belgrade-pristina-dialogue/>.

¹¹ Spain, Greece, Cyprus, Slovakia and Romania have refused to recognize the statehood of Kosovo till the day the paper was presented.

¹² GUSIC, IVAN: Contested democrac(ies): disentangling understandings of democratic governance in Mitrovica, in STRÖMBOM, LISA – BJÖRKDAHL, ANNIKA (eds.): *Divided Cities: Governing Diversity*, 2015, Nordic Academic Press, 215-234.

Nonetheless, Kosovo made a strategic choice backed by its international friends to rely on Belgrade to deliver the local Serbs to the Kosovo legal order; this worked and ended years of unrest, but it also produced a new Serb political elite that is somewhat inexperienced and tightly bound to Belgrade. The elected Serbs will have to carve out a role for themselves, an identity that goes beyond faithful servants of Serbia and focuses on the people that elected them.¹³

3. Agreements reached so far and their state of implementation

Taking into consideration the nature of the relations between Kosovo and Serbia, despite the yielded paradigm that the negotiations were focused on technical issues, and not political – this for the matter of the fact that political talks would entail the tough questions of recognition, the North and the political relations between Kosovo and Serbia – the dialogue has been political from the day it has started. Sir Robert Cooper who has facilitated these technical talks confirms it. The Dialogue fell into two parts: the first, at official level, was about practical issues. Sometimes it was referred to as “the technical dialogue” by people who wanted to emphasize that the issues were not political. This is nonsense. All issues have both political and technical aspects.¹⁴

The negotiations which started in March 2011, did actually concentrate on purely technical issues that have largely hindered the citizens of both states in their everyday life – which again was declaratively the primary concern of the EU officials. Negotiations started on the topics of return of cadasters and the civil registry; free trade (membership in CEFTA, custom stamps); electricity and telecommunication; issues related to freedom of movement (ID and travel documents, car insurance, driver's license and license plates, air traffic); mutual recognition of diplomas; missing persons; cultural heritage; crossing points and integrated border/boundary management; regional cooperation.¹⁵

The negotiations continued after the elections in Serbia, and in 2013 the following agreements were reached in the, what is being referred to as, the Historical Agreement (HA), i.e. the creation of the Association/Community of Serb majority municipalities; integration of police and security structures; integration of judiciary; holding elections in northern municipalities in accordance with Kosovo laws and energy and telecommunication.¹⁶

¹³PRELEC, MARKO – RASHITI, NAIM: *Balkan Policy Research Group Report. Serb Integration in Kosovo after the Brussels Agreement*, 2015, <http://balkangroup.org/wp-content/uploads/2015/03/Serb-Integration-Kosovo-19-March-2015.pdf>.

¹⁴COOPER: *op. cit.*

¹⁵OROSZ, ANNA: *Implementation of the Belgrade-Prishtina dialogue: results, controversies and prospects*, 2016, Institute for Foreign Affairs and Trade, 13-32. http://kki.gov.hu/download/a/b5/71000/kki_v4_kosovo_beliv_crop.pdf.

¹⁶Law Nr. 04/L-199 for the ratification of the first international agreement of the principles that regulate the normalization of the relations between the Republic of Kosovo and the Republic of Serbia

Year 2014, was characterized as a lost year for the dialogue because of the Kosovo general elections taking place, and the 6 months of a stalemate because of internal political clashes.

In the meeting between the two Prime Ministers, Mustafa and Vucic in August 2015, both parties agreed on the last document about the action plan on the implementation of the provision from the HA. The delegations initialed the general principles/main elements of the Association/Community of Serb majority municipalities in Kosovo, the Telekom Action Plan, the Action Plan on energy issues and the Bridge in Mitrovica.¹⁷ The last point was imposed on the political dialogue table by the local Kosovo Serbs, keeping barricades on the main bridge that divides the city between the Albanian inhabited South and the Serb majority inhabited North part.

For the purpose of this paper, I will focus only on two them, which is the Telekom agreement and its implementation as well as the creation of the ASM. In tackling also the problem of the EU's soft approach, especially towards Serbia, a portion of the following chapter will be dedicated to the organizing elections of Serbia within the territory of Kosovo.

As per the state of implementation, currently the +383 country code has been allocated to the Republic of Kosovo for use, as the decision has been published in the International Telecommunications Union (ITU) on December 15, 2016¹⁸ only after Serbia on December 3, 2016 has sent a letter of consent where it has requested for the ITU to allocate a in international code for the geographical area of the Autonomous Province of Kosovo and Metohija¹⁹ which has represented the first strike on the undermining of the Kosovo's statehood with an official document by a UN agency. The lack of transparency in the process has fueled different interpretations to the agreement. Serbia officials insist that with this agreement they have preserved their telecommunications property in Kosovo and have only allocated a geographical area code, the Government of Kosovo has claimed that this is one of the most important steps towards the consolidation of the statehood. Moreover, the opposition political parties in both states have also diametrically diverse opinion. In Serbia, the nationalists parties do claim that with these acts "Serbia is giving away Kosovo and recognizing its existence as a state", while in Kosovo they claim that the Government has brought Serbia back in Kosovo by agreeing to have a geographical code for Kosovo.

<http://www.kuvendikosoves.org/common/docs/ligjet/Ligji%20per%20ratifikimin%20e%20marrevshjes%20se%20pare%20per%20normalizimin%20e%20marredhenjeve%20Kosove%20Serbi.pdf>.

¹⁷ Summary of the Brussels Agreement package. Internal document sent to the Government of Kosovo, by the Minister for Dialogue in the Government of Kosovo, Mrs. Edita Tahiri. 27 August 2015.

¹⁸ ITU-t telecommunication standardization sector of ITU complement to recommendation ITU-T E.164 (11/2010). Annex to ITU Operational Bulletin No. 1114 – 15.XII.2016. https://www.itu.int/dms_pub/itu-t/opb/sp/T-SP-E.164D-2016-PDF-E.pdf.

¹⁹ ITU Secretary General letter to Rasim Ljajic, Minister for Trade, Tourism and Telecommunications in the Government of Serbia. Geneva, 7 December 2016.

One of the most troublesome issues to have been discussed in Brussels, and for which still a functioning modality has not been found, is undoubtedly the creation of the Association of Serb Municipalities.

The dialogue, as said earlier, it was presumed that it shall entail difficult political questions – such as the extension of the Kosovo Government authority in the Northern part, something which was lacking since 1999 i.e. since the declaration of Independence. The north has been troubled and out of wither international reach or Governmental authority since 2008. Illegally operating parallel structures, barricades and illegal security bodies have been operating with the funding from Belgrade for years, and those are seen as the only credible organizations fully to be trusted by the local Serbs. However, the dialogue between Kosovo and Serbia did conclude that these structures must be dismantled and Kosovo authorities should take the control over that part.²⁰

Nonetheless, this Agreement was anticipated with grave opposition by the other political parties represented in the Parliament, those forming the political opposition block, with protests and tear gas in and out of the Parliament chamber.

In order to ease the internal political tensions lacking the potential to bring the parties together for a mutually accepted solution, the President of Kosovo, Atifete Jahjaga sent the Agreement to be evaluated for its Constitutionality to the Constitution court, while the opposition parties still claiming that the creation of this entity in Kosovo, is a de-facto division of the country amongst ethnic lines, just as it is in Bosnia and Herzegovina.²¹

The Agreements have truly been vague in their wording and interpretation, creating an additional impetus for misinterpretation or sparking conflicts between the two countries that are present at the dialogue table. As it will be subsequently discussed, the Visoka and Doyle implied neo-functional peace approach of the EU, has had in terms of integration a positive impact of the Europeanization process, however it has seriously undermined the functionality of Kosovo – and this just because of the fact that Kosovo is not being treated as a state neither by EU nor by Serbia.

4. The ASM an NGO or executive body? Its Legal and Constitutional impact within the Europeanization prism

The Association of Serb Municipalities is still unclear what will represent. Just another non-governmental body aimed at quasi institutional cooperation between some legal entities i.e. municipalities, or a fully-fledged executive association with rights overarching to the autonomy of one ethnic group in Kosovo.

²⁰ *Summary of the benefits from the package of the Agreements concluded in Brussels*. Report by the Ministry for Dialogue in the Government of Kosovo to the Government of Kosovo and the Parliament. 27 August 2015. http://www.kryeministri-ks.net/repository/docs/Perfitimet_shteterore_te_Kosoves_nga_Pakojat_e_marrveshjeve_ne_Bruksel__270815.pdf.

²¹ ECONOMIDES, SPYROS – KER-LINDSAY, JAMES – PAPADIMITRIOU, DIMITRIS. Kosovo: Four Futures, in *Survival*, Vol. 52. no. 5., (October–November 2010.) 99–116.

Being that the EU has backed up, facilitated and yielded the implementation of the provision of this agreement strongly always using the incentives method for both Serbia and Kosovo on their integration path, it is important to analyze it contested provisions through the eye of the Europeanization theory in parallel to the constitutional and legal accords in Kosovo.

4.1. The Constitutional Court verdict

The Agreement on the creation of the ASM brought political violence and turmoil in Kosovo. Its implementation do require the 2/3 majority vote in the Parliament, something which the current ruling coalition partners do not have – while the Agreement on the ASM, together with other arrangements such as the Demarcation with Montenegro were seen as substantially damaging to Kosovo, the former implying that it will give more enhanced responsibilities to the Serbian minority in Kosovo in a mono ethnic boundary line drawn amongst the municipalities where the Kosovo Serbs do represent the majority of the population, thus divide the country even more.

In the course of the action in order to block the Constitutional changes, the Vetevendosje! (Self-determination!) political party – the biggest opposition one, joined by the other opposition block parties used tear gas and pepper spray to impede the work of the Parliament. Moreover, street protests were organized on almost daily basis, some of them resulting in violent clashes between the protesters and the Kosovo Police with an aftermath of lot of injured from both sides and hundreds of thousands of euros damage to the movable and immovable government property.

To resolve the crisis, President of Kosovo, Mrs. Atifete Jahjaga turned to the Constitutional Court with the request of interpretation whether the agreement of 25 August 2015 on the principles of the ASM²² reached between the two prime-ministers in Brussels, is in compliance with the Constitution of Kosovo (October 2015).²³

In addition, the President requested that the Court establishes a provisional measure, meaning that “every action and effect produced by the Principles of the Association to be suspended, thus it is requested that the Court imposes a temporary / provisional measure on the matter raised, until a final verdict is reached”.²⁴

In its reasoning, Amicus Curiae of the Constitutional Court of Kosovo, on the case of the Constitutionality of the ASM, has stipulated that even though the European Charter of Local Governance foresees the municipal cooperation, nowhere can be

²² Association/Community of Serb majority municipalities in Kosovo – General Principles/main elements. Agreed and signed on 25 August 2015, in Brussels by the Prime Ministers of Kosovo and Serbia, mediated by the EU.

²³ Request for assessment of the compatibility of the principles that the document titled “Association / Community of the municipalities with a majority Serbs in Kosovo – The guiding principles/the main elements” with the Constitution, in the Articles 3 (equality before the Law), par. 1 in Chapter II (the fundamental rights and freedoms) and Chapter II (Rights of the communities and its members) of the Constitution of the Republic of Kosovo. 30 October 2015. Office of the President of Kosovo, Legal Affairs.

²⁴ Constitutional Court of Kosovo. Verdict – reference number AGJ877/15 on the case number K0130/15. 23 December 2015.

found what the point 4 of the General Principles says that the ASN will “exercise full overview”, a terminology that is vague and inexistent in the legal practice. Further, the Agreement (2013) unlike the General Principles (2015) does not define the Association/Community as a legal entity of a specific character, it doesn’t foresee its establishment with a Government decree and it doesn’t specify the budget, the administration and the competences as stipulated in the General Principles.²⁵ The Agreement (2013) foresees that the ASM shall be in line with the European Charter on the Local Self-Governance and the structures of the ASM will be on the same basis as the Association of Kosovo Municipalities.

In addition, the General Principles use the phrase “municipalities with majority of Serb population”, in the title and the text as well. This is in contradiction to the article 3, par. 1 and article 124, par. 4 of the Constitution of Kosovo, as well as the Article 10, par. 1 of the European Charter on the Local Self-Governance.

In its verdict, albeit in a very vague language using legally ambiguous terms such as “not entirely compatible” or “not fully fulfilling the constitutional standards”, has ruled that the judicial act and the Statute have to be in compliance with the Articles 12, 21.4, 44 and 124.4 of the Constitution,²⁶ thus suspending the further processing of the Agreement and untying the political knot in the country.

The Constitutional Court verdict was not well perceived by the Serbian side in the dialogue. They have insisted that the ASM should be formed as soon as possible as agreed in Brussels, since it allows for the Government of Serbia to legally have in control the municipalities of mono-ethnic composition, including the northern part of the country. However, at this point, on the basis of the verdict, the European Union’s reaction has been mild, thus allowing to insist that the dialogue should continue on other matters – allowing the three sides to contemplate in finding alternate resolution or wait for the bad bloods among the political parties in Kosovo to cool off and ultimately to adopt the ASM General Principles of 2015 in its current form.

4.2. The Europeanization, the EU and the agreement

The European Union entails the fundamental principles of respect of human rights, democracy and rule of law as a basic pillar of its functioning – and with that, they represent the bare minimum that the aspiring member countries need to fulfil to even begin thinking about entering into contractual negotiations with the EU.

Schimmelfenning *et.al*, stipulates the principle of “political conditionality” that the EU imposes on the member states using the accession incentive as not always productive, since the cost of adoption of EU imposed rules for the domestic government is high, politically and economically.²⁷

²⁵ Constitutional Court of Kosovo. Verdict – reference number AGJ877/15 on the case number K0130/15. 23 December 2015. Pg. 9.

²⁶ Ibid. Pg. 14.

²⁷ SCHIMMELFENNING, FRANK – ENGERT, STEFAN – KNOBEL, HEIKO: The impact of EU political conditionality, in SCHIMMELFENNING, FRANK – SEDELMEIER, ULRICH (eds): *The Europeanization of Central and Eastern Europe*, 2005, Cornell University Press. 29-50.

Borzel and Risse further argue that in order to achieve the process of Europeanization there must be a, some degree of misfit between the European level processes and domestic ones which ultimately leads to adaptational processes that have a cost – social and political one.²⁸ In the case of the Constitutional changes regarding the creation of the ASM, it is clear that the EU imposed actions are not necessarily mandated to the integration path, but rather an internal Constitutional order. Furthermore, as Kosovo has both legislatively and practically fulfilled as well as exceeded the criterion of respecting the fundamental rights and freedoms for minorities, it can be concluded that the EU is not taking into consideration the historical context of the creation of a mono-ethnic layered institution within the Constitutional order of Kosovo, which contrary to what the aspirations of the EU are – it might get Kosovo further back from its integration path, rather than moving it forward.

The dialogue and the Agreement in this form, poses a threat of creating a parallel constitutionally forbidden category of territorial autonomy, which as it is said above, will endanger the multiethnic composition of the country, its fragile relations with the Belgrade authorities and detriment its EU integration path.

In this context it is argued that whereas territorial autonomy is appropriate to the long-established states and consolidated democracies of the West, it is far less workable in a CEE context marked by historic disputes over territorial borders, continued geopolitical insecurities and recent or still ongoing processes of democratisation. These inherited communist and pre-communist legacies mean that governments in the region have been reluctant to endorse far-reaching territorial autonomy for national minorities, seeing this as a barrier to successful state-building and state consolidation or even as a potential threat to state integrity.²⁹

5. Conclusion

Kosovo's international legitimacy was contested since it declared its independence. It did not have the support of the UN Security Council facing an opposition from Russia and China. Thus, its consolidation and recognition as a state has moved and still goes in a slow pace. Surroi argues that even today, since the Declaration of Independence there have been three layers of contestation, territorial – Serbia claiming that Kosovo still belongs within its borders, the European identity – the non-recognizing members of the EU resulting in a hybrid relation between the two, and the third, however the least important for this paper, is the global/ideological tug-of-war in which some countries

²⁸ BORZEL, TANJA A. – RISSE, THOMAS: Conceptualizing the Domestic Impact of Europe, in RADAELLI, CLAUDIO M. – FEATHERSTONE, KEVIN (eds): *The politics of Europeanization*, 2003. Oxford University Press, 57-83.

²⁹ SMITH, DAVID J.: *Minority Territorial and Non-Territorial Autonomy in Europe: Theoretical Perspectives and Practical Challenges*,
http://bgazrt.hu/_dbfiles/htmltext_files/7/0000000177/David%20J.%20Smith.pdf.

see Kosovo as a product of either US or Western unilateralism and without a UN membership.³⁰

But the question remains, what did the dialogue brought up until today since 2011? Did it help Kosovo on its path towards consolidated statehood or its integration path, or was just an excuse to sit on the same table with Serbia so that the latter will ultimately be rewarded with membership. Sir Robert Cooper, one of the first mediators in the talks between the two sides concludes: The Dialogue was never just about Serbia. It was also about Kosovo learning to act like a mature state. That means giving the welfare of the people more importance than the symbols of the state. If Kosovo wants to persuade the world that their independence was justified they should make their treatment of the Kosovo Serbs a model of how different ethnic communities can live together. One day that might even impress Serbia.³¹

However, in Kosovo the reality is different from what the EU perceives. The myriad provisions of protection of the minorities, including an effective veto powers in the Parliament, the Serbian minority can paralyze the decision making in the central level on any issue that is of a vital interest or subject of a constitutional amendment.

The ASM will have full oversight on the economic development, education, health, urban and rural development, as well as security wise where the list of the names for the police commanders in the respective municipalities will be end by the ASM. It shall have a political elected representation with a president, vice-president, Assembly and a Council. These are all elements of a political territorial autonomy – a third layer of power in Kosovo, which is between the central government and the municipalities. The European Union has imposed the process of “Europeanization” to the Kosovo legal infrastructure since the negotiations for the final status commenced. To an extent, it has brought Kosovo to the limits of normal functionality, while maintaining its status neutrality. On the other hand it has rewarded Serbia with its candidacy status and opened the negotiations for accession, at the same time minimizing the nationalist role of the euro-skeptic parties in Serbia, those of which the high representative for Foreign Policy and Security, Frederica Mogherini did feel on her own skin when addressing the Serbian parliament in March 2017, where the representatives of Vojislav Seselj radicals were booing and chanting “Serbia! Russia! We don’t need the Union!” referring to the EU.³² Kosovo in this context has just recently only signed the Stabilization and Association Agreement with the EU, the very first step towards normal contractual relations with the Union.

With this in mind, the approach of the EU vis-à-vis the dialogue should change, and a clear integration perspective to Kosovo should be given, anchoring both countries in the membership path in parallel thus imposing a change of dynamics in the “normalization of relations dialogue between Pristina and Belgrade”.

³⁰SURROI, VETON. The unfinished state(s) in the Balkans and the EU: the next wave, in RUPNIK, JACQUES (ed.): *The Western Balkans and the EU: The hour of Europe*, June 2011, Chaillot papers – EUISS.

³¹COOPER: *op. cit.*

³²EU’s Mogherini booed in Serbian parliament ahead of Balkan summit. Reuters report 3 March, 2017. <http://www.reuters.com/article/us-eu-balkans-serbia-idUSKBN16A2A0>.

Both International Relations and International Law scholars are witnessing a competing trend in international life, signaled by the rise of a group of phenomena most often explained in terms of "globalization," "transnationalism" or the "new medievalism." These include the emergence and increasing importance of sub-state and non-state actors, increasing international economic and political interdependence, the perceived transformation or disintegration of state sovereignty, the ascendancy of difficult "global" issues that require coordinated responses, and the continuing financial and administrative crises of the United Nations Organization. In this increasingly complicated environment, students of international order are embracing international "governance" as an alternative to international "government," the traditional liberal internationalist ideal of formal international institutions displacing domestic sovereigns in specific issue-areas.³³

In Kosovo this was proven. The constitutional court ruling on the ASM, presented with a very vague and ambiguous language, didn't merely solve the question of the (un)Constitutionality of the agreement, but it was an definite impetus for the satisfaction of the EU officials to ensure that the dialogue will continue smoothly – and the legal acts will just prove to be of a secondary nature and possibly subject of amendment. Is this what Europeanization should actually look like?

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³³SLAUGHTER, ANNE-MARIE – ANDREW S. TULUMELLO – AND STEPAN WOOD: International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, in *American Journal of International Law*, 92. (1998), 367-397.

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