**Transitional Constitutionalism and Minority Rights in Kosovo: Making Sense of the *Association of Serbian Municipalities (John Cipperly, November 30, 2015)***

**Introduction**

Through an E.U.-brokered commission, the governments of Kosovo and Serbia are engaged in a series of negotiations to promote cooperation among the two neighbors. Notwithstanding their disagreement over Kosovo’s status, the start of the talks have been heralded by the international community as a crucial step on the long path towards normalization of relations. Serbia’s negotiating team is chiefly concerned for the autonomy of the Kosovo-Serb majority municipalities in Kosovo, including the rights of municipalities to associate, and to conduct cross-border cooperation with Serbia through a proposed *Association of Serbian Municipalities*. However, the proposed legislation that would lay the groundwork for the Associationis hotly contested in Kosovo. Opposition groups fear that the Association will result in fragmentation and the loss of sovereignty over state territory. While minority rights and commitments to decentralized local government are clearly enshrined in Kosovo’s constitution, the extent to which municipalities may associate and conduct relations jointly, across borders, is less clear. Following months of opposition protests in Kosovo that have blocked the passage of the law in the Assembly, (and stalled negotiations with Serbia), Kosovo’s President has referred the proposed legislation to the Constitutional Court for judicial review.

This paper takes a socio-legal approach to Kosovo’s transitional constitutionalism as it relates to the proposed Association and the rights of minority communities to self-govern and to associate. The paper will illustrate how the rights of minority communities, the rights to local self-governance, and the freedom of association, are all set forth in Kosovo’s Constitution as building blocks in support of the constitutionality of the proposed Association. Nevertheless, in Kosovo’s transitional context, the limits, conditions or qualifications placed on the rights of minority communities can be understood as an exercise of sovereignty, weighed against the interest of competing constituencies. Opposition groups have a well-founded fear of fragmentation and seek to avoid limits to sovereignty,[[1]](#footnote-1) having only recently gained independence, which is conditioned by international oversight. E.U. observers, who themselves were champions of guarantees for minority rights within Kosovo’s Constitution, are continually weighing concerns for rights against their own interests in stability. I will argue that in the absence of consensus among the diverse constituent groups involved, the opportunity for constitutional review of the Association may enable the Constitutional Court to apply proportionality *stricto sensu* to balance the competing interests of constituent groups in Kosovo as well as the interests of E.U. observers.

**The Rights of Communities and Their Members**

Kosovo’s Constitution is an output of an internationally-mandated status settlement proposal.[[2]](#footnote-2) It is unique in a number of ways, but it is perhaps most unique by the number of rights made explicit for minority communities short of a Federalist framework. The reasons for this can be explained in the context of the transition to independence that gave way to the drafting of the Constitution, and the shared interest of parties to avoid the scenario played out in Bosnia and Herzegovina, where parsing of ethnic enclaves across the federation has inhibited the functioning of the state. The 2007 status settlement proposal for Kosovo prescribed guarantees for minority communities upon which recognition of Kosovo’s independence would be conditioned, but explicitly called for a single, non-Federal territory that would “be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by *all Communities and their members.”[[3]](#footnote-3)* The Constitution goes on to provide rights of minority communities and their members in more than one article. Eight international agreements and instruments guaranteeing fundamental freedoms are incorporated directly under Article 22, while Articles 53, 54, 55 and 59 all relate to the rights of minority communities specifically.

The multiplicity of rights guarantees to minority communities and their members is important to the constitutionality of the Association, but even with numerous and redundant rights provisions, there is ambiguity and room for interpretation that may need to be addressed by the Constitutional Court. Article 59.12[[4]](#footnote-4) prescribes the rights of community members to enjoy unhindered contacts among themselves, to establish and maintain free and peaceful contacts with persons in any State, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage, in accordance with the law and international standards. Article 59.12, however, does not address whether contacts are limited to individual persons, or whether “any persons” extends to organizations or government(s) or relations between organizations and governments.

Article 59.14 prescribes the rights of communities and their members to *establish associations* for culture, art, science and education as well as scholarly and other associations for the expression, fostering and development of their identity. The lack of definition of “other associations for the expression, fostering and development of their identity” is problematic here, not only because of the failure to specify limits on what Associations could cover but also because there is no expressed limitation on whether Serb-majority municipalities are equivalent to communities or individuals, and whether an association of governmental organizations could be joined in a non-governmental organization.

**The Right to Local Self-Governance**

Kosovo’s Constitution, and the status settlement proposal that preceded it, commits to “local self-governance” in a way that implies not only that governance would be decentralized, but also that disparate communities would have the space to govern themselves. The commitment to local self-governance is important to the discussion of the constitutionality of the proposed Association. The Constitution incorporates the European Charter on Local Governance explicitly, based on the principle of subsidiarity. The concept of subsidiarity in the EU has occurred through the decentralization of a central power in consolidated democracies, in a shift from statism to federalism.[[5]](#footnote-5) No such history exists in Kosovo, where no national identity existed previously, and where there is little willingness to share sovereignty with another level of government. As such, Kosovo does not lend itself to a willing, functional federation of communities.[[6]](#footnote-6) The commitment to local self-governance is made more complex given the expressed interest of the Constitution to avoid a federal conceptualization of the state. In this sense, the commitment to subsidiarity as expressed in Kosovo’s Constitution could best be clarified not by the use of subsidiarity as it is understood in modern Europe, but on more basic understanding of subsidiary forms of government that relates to self-sufficient *polis* in the framework of larger governance structures.[[7]](#footnote-7)

**Freedom of Association**

The Freedom of Association is provided for in Kosovo’s Constitution. Making matters more complex, the terminology in Albanian and Serbian colloquial language is understood as “Community” as well as “Association” which understandably clouds discussion of what the nature of an association would be, in terms of its identification as a community and potential to threaten sovereignty. While Freedom of Association is expressed as 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, there are certain limitations. If the purpose of the organization or its activities can be deemed to infringe upon the constitutional order or is seen to encourage racial, national, ethnic or religious hatred, the organization may be prohibited. ‘Non-governmental’ is the operative term—a non-governmental organization of members of Serb-majority communities could associate with minimal impact to governance, and this a key missing piece in the conceptualization of the Association that could be clarified by constitutional review. To remain within the bounds of constitutional order, the Association must be non-governmental in nature, and this is a piece of the puzzle that the Constitutional Court could clarify that would enhance understanding of the intended aims and constraints of the association.

**Constitutional Court: A Balancing Act**

In its review of the constitutionality of the proposed Association, the Constitutional Court must weigh the content of the agreement on the Association, the content of the legislation proposed, and the provisions set forth in Kosovo’s Constitution which clearly allow for the Association as an expression of the rights of minority community and their members, the rights to local self-governance, and the freedom of association. The Court can serve an added benefit to understanding of the Association by clarifying both the extent to which governmental bodies (municipalities) are afforded the same rights as minorities as individuals, and the extent to which an association, even of municipalities, must remain non-governmental. Further, the Constitutional Court could express the limits to the purview of the Association which would clarify what activities would be considered within the constitutional order and what would be seen as an infringement, in accordance with the limits to freedom of association set forth in the Constitution. With principled reason, the limits to the Association would have the effect of inhibiting potential future changes in the character of the Association that could allay fears that the Association is a step toward loss of sovereignty.

Former Justice of the Supreme Court of Israel, Aharon Barak, states that Proportionality creates a conceptual framework in which to define the appropriate relationship between human rights and considerations that may justify their limitation.[[8]](#footnote-8)

Paul Blokker notes, that “One of the essential ideas behind the constitution is to channel the political will of citizens, or, in other words, to express popular sovereignty.”[[9]](#footnote-9) Because of the unique circumstances in which Kosovo’s Constitution came to be, the contents of the Constitution may be more of approximation than the actual will of the people. To be sure, the Constitution reflects as much input from outsiders as from the majority and minority groups that make up Kosovo’s Government and its citizens. To date, neither the legislature nor the executive branches of government have been able to shape consensus or to lead consensus-building in the country. The Constitutional Court, although an unelected body, is thus an effective venue from which the popular will can be *advanced*, if not fully expressed without conditions. As the Court strikes a balance between the constraints of international agreements, and the will of the people, it is exercising the sovereignty of the state in ways in which other branches of government have proven incapable to do.

It is not accidental that Kosovo’s President would refer a law to the Constitutional Court, particularly an important law that impacts Kosovo’s standing at home and abroad. The authority of the Constitutional Court to conduct constitutional judicial review, to assess and invalidate laws enacted by the legislature, is exercised regularly. Often, these laws or legislative actions are the result of international interventions that go against the grain of public sentiment, and ex ante review by the Constitutional Court makes it possible, or at least palatable, for politicians to accept or endorse laws in times of turmoil. Just as often, the Court is called upon to act in a political vacuum, when weak political coalitions fall apart, fail to achieve quorum, or otherwise fail to observe Assembly procedure. Notably, the judgements of the Court have removed two Presidents, even against the will of E.U. observers who are so vital to the country’s aspirations for a future in the Euro-Atlantic community. While the legislature has proven unable to achieve consensus among these groups, the Constitutional Court has the opportunity to prove a stabilizing force, particularly with a well-reasoned review of the Association, including the constitutional basis for it, and the limits of its character as a non-governmental organization. The Constitutional Court may look for a balance that may put limits the Association in a way that results in the least possible infringement on the freedom of association, while crafting a workable solution that makes it possible to elevate political discourse and move closer towards the consolidation of democratic institutions, as have often been the work of Constitutional Courts in times of transition within Central and Eastern Europe.[[10]](#footnote-10)

1. Sadurski, Wojciech, *Nationalism, Sovereignty and Human Rights in the Transitional Central and East European States After Democratic Revolutions of 1989 (October 2012),* Page 3, *Sovereignty Conundrum*. Sydney Law School Research Paper No. 12/79.  [↑](#footnote-ref-1)
2. Comprehensive Settlement Proposal (2007). Marti Ahtisaari. [↑](#footnote-ref-2)
3. Constitution of the Republic of Kosovo, Chapter 1 Basic Provisions, Article 3.2, Equality before the law. [↑](#footnote-ref-3)
4. Constitution of the Republic of Kosovo, Article 59, Rights of Communities and their members. [↑](#footnote-ref-4)
5. Elazar, Daniel (1995). “From Statism to Federalism: A Paradigm Shift” Publius 25 (2). pp. 5. [↑](#footnote-ref-5)
6. Kleibrink Alexander (2008). “Federalism in the Balkans: Doomed to fail?” *L'Europe en Formation*, No. 3, pp. 71-79. [↑](#footnote-ref-6)
7. Aroney, Nicholas (2007). “Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire.” *Law and Philosophy*, Vol. 26, pp. 161-228; University of Queensland. No. 07-06. pp. 179. [↑](#footnote-ref-7)
8. Aharon Barak. (2012). Proportionality stricto sensu (balancing). In: Proportionality. Cambridge: Cambridge University Press. pp. 340-370. [↑](#footnote-ref-8)
9. Blokker, Paul. (2015). *Constitutional Reform in Europe and Recourse to the People* in J. Gerkrath, & X. Contiades (eds.),*Participatory Constitutional Change: The people as amenders of the Constitution*, Ashgate Publishing Ltd p. 18. [↑](#footnote-ref-9)
10. Sadurski, W. “Conclusions: On the Relevance of Institutions and the Centrality of Constitutions in Post-Communist Transitions,” in Jan Zielonka. ed., *Democratic Consolidation in Eastern Europe, Vol. 1 Institutional Engineering.* Oxford University Press. 2001. p. 473. [↑](#footnote-ref-10)