

BRUSSELS TREATIES, CONSTITUTIONALITY, RULE OF LAW, AND THE MINORITY RIGHTS

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Abstract:

Kosovo and Serbia have been engaged in ongoing dialogue for more than ten years. The proclaimed goal of the dialogue was to normalise relations between these two states as a contribution to bringing sustainable peace and stability to the region. However, the entire EU-mediated dialogue was characterised by ambiguities related to its content, the parties involved, and the role of the EU as facilitator/mediator. During the decade of dialogue, around forty agreements have been achieved. The focus of the main pressure for implementing these agreements was primarily on the following two treaties: the Treaty for Normalisation of Reports (2013) and the Treaty on the Path to Normalisation (2023). Both agreements, when implemented, will have an impact on the Constitution of Kosovo and the principle of the rule of law, including equality and human/minority rights. This paper aims to provide insight into the most recent developments regarding the dialogue and an analysis of the targeted agreements under the constitutional principles of equality, community rights, and the rule of law. The paper analyses the Constitutional Court judgement in accordance with the 2013 agreement. It contextualises the 2023 agreement within the Constitution of Kosovo, raising various questions about how and whether this agreement can be accommodated within Kosovo's constitutional system. For this paper, the authors employed a combined methodology, incorporating the methods of legal analysis, comparative analysis, and theological analysis. The paper will adopt a complementary approach, updating the work in this field and contributing to further discussion between scholars and practitioners in the field of law.

Keywords: dialogue; constitution; agreement; EU; Kosovo; Serbia

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1. INTRODUCTION

The Kosovo-Serbia dialogue is not a phenomenon that emerged after Kosovo declared independence. Negotiations between Kosovo and Serbia were initiated during the dissolution of the former Yugoslavia, culminating in the Rambouillet Conference in 1999. Negotiations were also created during the time Kosovo was under the international civil administration known as the Vienna/Ahtisaari negotiations, which preceded Kosovo's Declaration of Independence, and finally negotiations (more known as dialogue) started after the International Court of Justice Opinion regarding Kosovo's Declaration of Independence.

Regarding the prewar (or those held during the war) negotiations, the most important are considered to be those held in Rambouillet (France). Refusal to accept the proposed settlement by Serbia opened the door for NATO intervention, which brought the end of the war and made it possible to establish the International Civil Administration in Kosovo. During a limited period, Kosovo was administered internationally. During this time, negotiations were held between Kosovo and Serbia. These negotiations, led by former President of Finland, Martti Ahtisaari, resulted in a Comprehensive Proposal for Kosovo Final Status, which foresaw for Kosovo a supervised independence.¹ Kosovo's Parliament accepted the Ahtisaari Proposal and expressed its readiness to implement it.² However, Serbia rejected the Comprehensive Proposal for the Kosovo Status Settlement (2007) relying on the support it received from the Russian Federation.³ The Declaration of Independence by the Republic of Serbia (and for some states, hesitant to recognise Kosovo) was considered a unilateral act, which, as such, will not be recognised. Other states are hesitant to recognise Kosovo – some due to their internal problems and others because they consider Kosovo's Declaration of Independence to be a unilateral declaration of independence. However, this was not merely a unilateral act. This is not the reality. Professor Weller rightfully argues that: *“Contrary to popular myth, the Republic of Kosovo did not gain its independence unilaterally. It participated fully and constructively in the final status process conducted by former President of Finland Martti Ahtisaari on behalf of the United Nations. The Republic of Serbia refused to sign the resulting comprehensive proposal for a settlement. Kosovo nevertheless implemented all the obligations contained in the instrument that had been negotiated, even without obtaining recognition of its status from Serbia. These included the most far-reaching provisions for the protection and promotion of the rights of its ethnic communities in Europe and, in fact, anywhere in the world.”*⁴

Immediately after the Declaration of Independence the first wave of recognition of Kosovo statehood began. During this wave, Kosovo gained recognition from the most powerful countries in the West, including the USA, France, Germany, Italy, Poland, the Czech Republic, the United Kingdom, and Turkey, among others.

¹ United Nations Security Council. Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168 [online]. 26. 3. 2007 [cit. 2024-12-21]. Available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20168.pdf>.

² Propozimi Gjithëpërfshirës për Marrëveshjen për Statusin e Kosovës [Comprehensive Proposal for the Agreement on the Status of Kosovo] [online]. 2. 2. 2007 [cit. 2024-11-21]. Available at: <https://old.kuvendikosoves.org/common/docs/Propozim%20per%20Statusin%20e%20Kosoves.pdf>; United Nations. Provisional Institutions of Self Government: Assembly of Kosovo [online]. [cit. 2024-11-21]. Available at: https://old.kuvendikosoves.org/common/docs/2007_04_05%20Procesverbal%20i%20seanc%20C3%20ABs%20plenare.pdf.

³ ĐUKANOVIĆ, D. – VUČIĆ, M. Between Geopolitics and Legal Obligations: The EU and the Continuation of the Normalization of Process Between Belgrade and Prishtina. In: DUIĆ, D. – PETRAŠEVIĆ, T. (eds.). *EU at the Crossroads – Ways to Preserve Democracy and Rule of Law* [online]. 2024, Vol. 8, pp. 640–665 [cit. 2024-11-21]. Available at: <https://ojs.srce.hr/eclic/issue/view/1327>.

⁴ WELLER, M. *What Went Wrong in the Brussels Dialogue?* [online]. Prishtina: Koha, 2023 [cit. 2024-11-03]. Available at: <https://www.koha.net/veshtrime/381797/what-went-wrong-in-the-brussels-dialogue/>.

As expected, Serbia opposed Kosovo's Independence, and based on Serbia's initiative, the issue of Kosovo's Declaration of Independence was brought to the International Court of Justice. The Court was asked rule on whether Kosovo's Declaration of Independence violated international law.

2. THE INTERNATIONAL COURT OF JUSTICE'S ADVISORY OPINION AND THE BEGINNING OF DIALOGUE

On 22 July 2010, the International Court of Justice issued an Advisory Opinion regarding Kosovo's Declaration of Independence. The Court Opinion stated: "*General international law contains no applicable prohibition of declarations of independence – Declaration of [I]ndependence of 17 February 2008 did not violate general international law.*"⁵ Following this significant ICJ judicial decision, the EU communicated to the UN that it is ready to facilitate a dialogue process between Kosovo and Serbia to normalise relations between the two states. The EU-mediated dialogue, also known as the Brussels dialogue between Prishtina and Belgrade, officially began in 2011. Representatives of Kosovo and Serbia held official meetings between March 2011 and July 2012, during which nominated negotiators discussed the main technical issues affecting citizens of Kosovo and Serbia.⁶ The dialogue, was originally intended to cover technicalities, but unexpectedly and quickly transformed into political discussions.

From the beginning to the present, the Kosovo-Serbia dialogue has been marked by numerous ups and downs. Its outcomes have always been difficult to predict. As explained below, the dialogue started differently from usual international practice, where "*parties first reach a legally binding agreement*".⁷

The goals of the dialogue between Kosovo and Serbia were never clearly communicated to the public by either party or the facilitator. They were not explicitly formulated or stated. Nonetheless, various issues were discussed during the dialogue, ranging from the integration of the Serb minority into Kosovo's institutions to the development of peace and democracy, and even the possibility of a legally binding agreement with state recognition at its core, or even land swapping. Kosovar representatives initially entered into the dialogue seeking mutual recognition (i.e., Serbia recognising Kosovo). Serbian representatives consistently declared that Serbia would never recognise Kosovo. However, dialogue started, and as a result, 39 agreements were achieved. Some were realised under difficult conditions, while others were obstructed, and some had numerous

⁵ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. In: *International Court of Justice* [online]. [cit. 2024-10-10]. Available at: <https://www.icj-cij.org/case/141>.

⁶ RRAHMANI, B. – BELEGU, M. Endless EU Facilitated-Mediated Dialogue Between Kosovo and Serbia. *Insight Turkey* [online]. 2023, Vol. 25, No. 1 [cit. 2024-11-01]. Available at: <https://www.insightturkey.com/file/1536/endless-eu-facilitated-mediated-dialogue-between-kosovo-and-serbia>.

⁷ Balkans Policy Research Groups. *Asociacioni i Komunave Serbe: Kuptimi i pikëpamjeve kundërthënëse të shqiptarëve dhe serbëve* [Association of Serbian Municipalities: Understanding the Conflicting View of Albanians and Serbs]. Policy Report. Prishtina, 2017, p. 14.

ambiguities. Indeed, the entire process may be treated as ambiguous. The ambiguity refers to the parties involved, the content, and the role the facilitator/mediator played in the dialogue process.⁸ Nonetheless, for the purposes of this paper, two agreements (the most difficult and controversial) will be explained and elaborated upon.

3. THE AGREEMENT OF PRINCIPLES GOVERNING THE NORMALISATION OF RELATIONS (2013) AND THE AGREEMENT ON THE PATH TO NORMALISATION (2023)

The Agreement on the Normalisation of Reports between Kosovo and Serbia, was completed in April 2013. The other Agreement on the Path to Normalisation was completed on 23 February 2023. The April 2013 Agreement comprises 15 articles, out of which six articles deal with the creation of the Association of Serb Municipalities.⁹ The February 2023 Agreement consists of 11 articles.¹⁰ The April 2013 Agreement was agreed and initialled by the former Prime Minister of Kosovo Hashim Thaçi, and former Prime Minister of Serbia Ivica Dačić. The February 2023 Agreement was neither signed nor initialled but was nevertheless declared to be an officially binding EU document.¹¹ In both cases, agreements were reached during a process of dialogue facilitated/mediated by the EU. Both agreements and the dialogue process itself were not followed with sufficient attention to detail resulting in these agreements being rendered impossible to properly implement them. They are inapplicable because of the process; inapplicable based on the will of the parties, and inapplicable based on the lack of enforcing mechanisms for parties.

3.1 THE TREATY (AGREEMENT) ON NORMALISATION OF REPORTS (2013)

The EU – and in particular the EU High Representative of the Union for Foreign Affairs and Security Policy, Catherine Ashton – sought to promote dialogue between the two parties to reduce tensions and produce a settlement of (at least some) key issues that constituted real obstacles for Kosovo.¹² When talks between Serbia and

⁸ RRAHMANI, B. – BELEGU, M. The EU Engagement in the Kosovo Serbia Dialogue. *On-line Journal Modeling New Europe* [online]. 2022, No. 39, pp. 127–149 [cit. 2024-12-02]. Available at: <https://neweurope.centre.ubbcluj.ro/wp-content/uploads/2022/09/OJMNE-September-Issue-no.39.pdf>.

⁹ First Agreement of Principles Governing Normalization of Relations. In: *United Nations* [online]. 19. 4. 2013 [cit. 2024-12-04]. Available at: <https://peacemaker.un.org/en/node/9756>.

¹⁰ Belgrade-Pristina Dialogue: Agreement on the Path to Normalisation Between Kosovo and Serbia. In: *EEAS* [online]. 27. 2. 2023 [cit. 2024-12-02]. Available at: https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-agreement-path-normalisation-between-kosovo-and-serbia_en.

¹¹ BORREL, J. Belgrade-Pristina Dialogue: Press Remarks by High Representative Josep Borrell After the Ohrid Meeting with President Vučić and Prime Minister Kurti: Press Remarks by European Union High Representative for Foreign Affairs. In: *EEAS* [online]. 19. 3. 2023 [cit. 2024-12-02]. Available at: https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-press-remarks-high-representative-josep-borrell-after-ohrid-meeting_en.

¹² BIEBER, F. The Serbia Kosovo Agreement an EU Success Story. *Review of Central and East European*

Kosovo began in Brussels in March 2011, there was no clear roadmap for the mediation timeline nor a defined goal for the process. As already noted, the dialogue began, with no clear strategy, far from the public eye, and with numerous ambiguities regarding the parties, content, and facilitator/mediator. Hence, the parties to the dispute were not summoned, as they are typically summoned based on the law of treaties. Parties were named as sides. It was not clear whether the role of facilitator was that of a facilitator or whether it was somewhat more than that. Finally, the content of the dialogue was not specified, and it was unclear when it began. Sides/parties entered into the dialogue with quite opposite goals. Kosovo entered the dialogue aiming for mutual recognition, whereas Serbia entered with a strategy that has undergone permanent changes. Serbian officials frequently stated Serbia would never recognise Kosovo.

Moreover, Serbian authorities have begun to gradually declare they do not recognise Kosovo's territorial integrity.

The main reasons and factors that led to the dialogue beginning without reaching an agreement have already been mentioned. On Kosovo's side, Canadian professor Austin mentions an additional factor which should not be neglected. Professor Austin states: "[...] loaded with a big number of agreements, many are asked about why Kosovo has signed a lot of bad agreements. First, the elite do not possess the necessary skills to negotiate. Second, governments hire and employ family members and party militants who are terribly unqualified. Third, and this is what is believed by the majority that presented indictments and accusations, means that they will be doing all that they are told to be doing by the international community, even then, when these requests [by the international community] are directly against the state interests of Kosovo."¹³

The Dialogue moved forward without any secure guarantees for satisfying both parties. The breakthrough came in April 2013, when the two sides signed a fifteen-point agreement that addressed some of the most contentious issues in their relations. The agreement was reached in Brussels, and from standpoint of the EU, it was considered a triumphant achievement. The EU Commission press release proudly stated: "Serbia and Kosovo*: Historic Agreement Paves the Way for Decisive Progress in Their EU Perspectives"¹⁴ The parties participating in the dialogue process also issued positive statements, "Serbian Prime Minister Ivica Dacic said: 'This is so far the most favourable text for the Serbian side.' He said he had initiated the text, for which both Serbia and Kosovo will decide in the upcoming days whether to agree to it or reject it. The agreement 'will help us heal the wounds of the past,' Kosovo Prime Minister Hashim Thaci told the media shortly after he signed the agreement today in Brussels. EU Enlargement Commissioner Stefan Fule dubbed the deal historic for Serbia-Kosovo relations, for the entire Western Balkans region, and the EU. He also said that it was crucial now that the political leadership and

Law [online]. 2015, Vol. 40, No. 3–4, pp. 285–319 [cit. 2024-11-12]. Available at: https://www.researchgate.net/publication/287405200_The_Serbia-Kosovo_Agreements_An_eu_Success_Story.

¹³ ROBERT, A. C. *Bërja dhe Ribërja e Ballkanit, Kombet dhe Shtetet nga viti 1878* [The Making and Remaking of the Balkans: Nations and States since 1878]. Prishtina: Koha, 2020, p. 295.

¹⁴ Serbia and Kosovo*: Historic Agreement Paves the Way for Decisive Progress in Their EU Perspectives. In: *European Commission* [online]. Brussels, 22. 4. 2013 [cit. 2024-11-14]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_13_347.

general public in both Serbia and Kosovo support the agreement and actively help to implement it. 'It is in the interests of all concerned; of the people living in Kosovo, those living in Serbia, and the region as a whole.' Fule said.¹⁵

In reality implementation of the fifteen-point April 2013 Agreement signed by both sides has differed from a historic success. In 2026, after more than 2 decades, this agreement is in its initial phase, despite being ratified by Kosovo's Parliament. Later on, the Constitutional Court, opinion included abstract provisions such as "*general principles/main elements: are not entirely in compliance with the spirit of the Constitution [...]*" leaves a lot to be desired. This judgement,¹⁶ instead of clarification, deepened the ambiguity of the agreement. What does this agreement cover?

As commentator Andreas Ernst noted, "*the agreement was an example of the 'creative ambiguity' of the entire negotiation process*", with the two sides promoting a very different understanding of the agreement. "*Serbian mediators, for example, viewed the Association/Community of Serb Municipalities (further in the text ASMM) as part of the formal governance structure of Kosovo, whereas Kosovan officials dismissed it as just an NGO.*"¹⁷

What does the 2013 agreement cover? Most of the articles addressed the status of the north. This includes six points on the Association/Community of Serb-majority Municipalities. Falling short of Serbian demands (and Kosovan fears) of an autonomous region the agreement allows municipalities to coordinate and pool some competencies. While it gives the central government the ability to grant undefined additional powers and its existence is to be protected by government decision, it does not have explicit legislative competencies. It does not constitute an extra layer of government. However, the vagaries of the agreement led to extensive wrangling over the details. This agreement consists of 15 articles, but ever since the agreement was signed, the primary and only focus has been on the first six articles, as presented below:

"1. There will be an Association/Community of Serb majority municipalities in Kosovo. Membership will be open to any other municipality, provided the members are in agreement.

2. 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).

3. The structures of the Association/Community will be established on the same basis as the existing statute of the Association of Kosovo municipalities, e.g., President, Vice President, Assembly, Council.

4. In accordance with the competences given by the European Charter of Local Self-Government and Kosovo law, the participating municipalities shall be entitled to cooperate in exercising their powers through the Community/Association collectively.

¹⁵ BARLOVAC, B. Kosovo and Serbia Reach Historic Deal in Brussels. In: *BalkanInsight* [online]. 19. 4. 2013 [cit. 2024-11-14]. Available at: <https://balkaninsight.com/2013/04/19/kosovo-and-serbia-may-seal-eu-deal/>.

¹⁶ Kosovo Constitutional Court Judgement, Case No. K0130/15 [online]. Pristina, 23 December 2015 Ref. No.: AGJ877/15 [cit. 2024-11-14]. Available at: https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf.

¹⁷ BIEBER, c. d.

The Association/Community will have a complete overview of the areas of economic development, education, health, and urban and rural planning.

5. The Association/Community will exercise other additional competences as may be delegated by the central authorities.

6. The Community/Association shall have a representative role to the central authorities and will have a seat in the communities' consultative council for this purpose. In the pursuit of this role, a monitoring function is envisaged."¹⁸

All six articles of the agreement pertain to the creation of the Association of Serb Municipalities, and the process by which it was drafted and agreed upon has consistently raised numerous questions and caused turbulence, both politically and legally. Questions and concerns regarding this agreement pertain to its practical, academic, and political aspects. Concretely, regarding the creation of the Association. On the other side, since the agreement was signed and ratified by Kosovo's Parliament, it became a burden for Kosovo as per the principle *pacta sunt servanda*, even though it went under the constitutional court test, from which the Kosovo Constitutional Court came up with a judgment concluding, in many aspects, the unconstitutionality of the agreement. However, this court underlined that "*the Kosovo Government must create the association*".¹⁹ The procedure before the Constitutional Court regarding this agreement was unusual, and the judgment was equally unusual. The judgement did not bring an appropriate solution, and in some aspects, it complicated the issue. It formulated an obligation for Kosovo's government, thus creating a track and a basis for international pressure upon Kosovo. The ambiguity in the agreement was not clarified, as it usually would be in cases like these. As it is, for the uncertainty and ambiguity, following the ECMI explanation is helpful. The ECMI is an international organisation with a primary focus on minority issues.

This ambiguity between the Association as a coordination body of participating municipalities and a representative body of the Kosovo Serb Community raises two concerns. Although the Association brings together Serb-majority municipalities, it cannot be reduced to a body representing the interests of the Kosovo Serb community only. This would not only duplicate the existing framework designed to promote and protect the rights of minority communities, particularly the Serb community (Guaranteed Seats system in parliament, 2/3 double majority for Laws of Vital Interest, guaranteed participation in the Government of Kosovo in ministerial positions, as well as a range of institutions protecting their interests such as the language Commissioner, the Office for Community Affairs within the Office of the Prime Minister, as well as the Consultative Council for Communities), but would ignore the non-Serb communities living in the respective municipalities and violate the multi-ethnic principle that underpins Kosovo's legal framework from the local to the central level.²⁰ Further, "*they (Serb Minority) elect twice as many MPs per capita compared to Albanian Community, and 1.2 times*

¹⁸ First Agreement of Principles Governing Normalization of Relations.

¹⁹ Kosovo Constitutional Court Judgement, Case No. K0130/15.

²⁰ European Centre for Minority Issues Kosovo. *Communities in Kosovo: A Guidebook for Professionals Working with Communities in Kosovo* [online]. 2nd ed. Prishtina, 2013 [cit. 2024-10-14]. Available at: <https://ecmikosova.org/>.

more than other minorities (ratios that increase 4.3 times and 2.4 times respectively, if Serbs of North are excluded)”.²¹

It is worth noting that pressure, essentially international pressure, is typically in the form of a request to Kosovo’s Government to establish the association. However, a quick look into the constitution suggests that Kosovo’s Government lacks the authority to create any association.²² Only municipalities can form associations, as permitted by law. Municipalities have the right to engage in inter-municipal cooperation and cross-border cooperation under the law.²³ The issue of inter-municipal cross-border collaboration and cooperation is regulated by the Law on Local Self-Government. Moreover, based on this law for the protection and promotion of their common interests, municipalities may form and belong to associations that operate in conformity with the law. For the protection and promotion of their common interests, municipalities may form and belong to associations that operate in conformity with the law.²⁴ This is seen, for example, in France, where to fulfil the increasing local service requirements, French municipalities have long resorted to various association-type solutions (*inter-communalité*), whose membership has increased significantly since the 1970s.²⁵ In this regard, the Association of Kosovo Municipalities has existed since 2001, comprising the local authorities of Kosovo as its members. Local authorities become members of the association upon the approval by the Association’s Assembly, following a decision on membership by the municipal assembly. The Association of Kosovo Municipalities is committed to ensuring that the principles of the European Charter on Local Self-Government are implemented in Kosovo.²⁶

The 2013 First Agreement, which is the only agreement between Kosovo and Serbia that Kosovo’s Assembly has formally ratified, confirmed that the creation of the ASMM would align with the process specified in the Constitution. It states that the ASMM will be “*established on the same basis as the existing statute of the Association of Kosovo Municipalities*”. The existing Association of Kosovo Municipalities, which has no ethnic basis, was established in accordance with the Constitution by the municipalities without any additional action by Kosovo’s central authorities. Thus, following the same constitutional process, the statute creating the ASMM would be laid out equivalently – by the municipalities themselves.²⁷

²¹ CAPUSELLA, L. A. *Shtetndërtimi në Kosovë: Demokracia, Korrupsioni dhe BE-ja në Ballkan* [State-Building in Kosovo: Democracy, Corruption, and the EU in the Balkans]. Prishtina: Koha, 2015, p. 150.

²² Kosovo Constitution [online]. Article 94 [cit. 2024-11-29]. Available at: https://mapl.rks-gov.net/wp-content/uploads/2017/10/1.CONSTITUTION_OF_THE_REPUBLIC_OF_KOSOVO.pdf.

²³ *Ibid.*, Article 124.

²⁴ *Ibid.*, Article 31.

²⁵ KUHLMANN, S. – HELLMUT WOLLMAN, H. *Introduction to Comparative Public Administration: Administrative Systems and Reforms in Europe*. Cheltenham: Edward Elgar, 2019, p. 76.

²⁶ *Asociacioni i Komunave të Kosovës* [Association of Kosovo Municipalities] [online]. [cit. 2024-11-29]. Available at: <https://komunat-ks.net/sqper-noonper-nesrabout-us?lang=sq>.

²⁷ STEINBAUM, J. – WILLIAMS, P. – BETA, S. Breaking the Stalemate: How Kosovo’s Constitution Holds the Key to the Association of Serb Majority Municipalities. In: *Prishtina Insight* [online]. 3. 10. 2024 [cit. 2024-11-29]. Available at: <https://prishtinainsight.com/breaking-the-stalemate-how-kosovos-constitution-holds-the-key-to-the-association-of-serb-majority-municipalities-mag/>.

On various occasions there is pressure to accept proposals for creating ASMM, which, in almost all cases, is not in accordance with the principle of the rule of law. And related to the rule of law, it has always been said, even since Aristotle's time, that we have to deal with respect for the saying "government by laws and not government by people". Whereas rule of law is defined from various points of view and it has been also a strong issue for the UN according to which, the principle requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.²⁸

The issue of the Association of Serb Municipalities, as part of the Agreement, as seen, remains unresolved and unfulfilled for eleven years. This is among the other results of the ambiguity in the process that led to that agreement. Lawyers, academicians, researchers, politicians, diplomats, etc., have interpreted this agreement from various viewpoints, and based on the approach from these viewpoints, the interpretation, and answer will be drawn; from those that Kosovo has no obligation to establish that type of association, to those that this is an international obligation which cannot be avoided. Nonetheless, between the two sides, around 39 agreements were achieved. Beyond this, between parties, half publicly or secretly, other issues were discussed, including land swaps, which were never declared to be publicly supported. However, these types of discussions were developed, whereas the facilitator, for example, Ms. Mogherini, remained silent when the land swap ideas appeared in various forms, including the media. However, the agreement was reached more than a decade ago, and the ASMM was never created. Governments led by four different political parties have come and gone in Kosovo while the ASMM remains unestablished. Democratic and Republican Administrations in the US, as well as officials from the European Union, have been unable to shepherd the project to fruition.²⁹

3.2 THE TREATY (AGREEMENT) ON THE PATH TO NORMALISATION (2023)

The other Agreement, The Treaty on the Path to Normalisation, announced with much fanfare by the EU facilitator/mediator, was concluded in Brussels on 27 February 2023. This, derived from the Franco-German proposal. The agreement needed to be followed by the Annex of Implementation in the Ohrid meeting. Although the Ohrid meeting was expected to be the culmination of a process, it did not turn out to be so. The sides (parties), yet again, emerged from the meeting, with differing interpretations. Josep Borrell, speaking on behalf of the EU, announced an agreement had been reached and "*the parties are obliged to implement it*".³⁰ Kosovo's Prime Minister offered his signature and expressed readiness to implement the agreement in its entirety, provided

²⁸ U.N. Secretary-General. The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 6, U.N. Doc. S/2004/616, 2004.

²⁹ STEINBAUM – WILLIAMS – BETA, *c. d.*

³⁰ BORREL, *c. d.*

Serbia signed it. The President of Serbia not only refused to sign it, but also ironically stated his hand was injured and would remain so, thereby preventing a signature. Professor Weller, Chair of International Law and Constitutional Studies Cambridge University, commented: “*Even before the High Representative of the European Commission for Foreign Affairs and Security Policy, Mr. Josep Borrell, could announce the result, the President of Serbia had already addressed the Press, announcing that he had not agreed to anything at all. Repeated several times since then, the President of Serbia has declared: ‘I did not accept the Franco-German agreement. You have no such statement from me. I stated that I accepted the concept and that we are ready to work on implementing the agreement within certain limits.’ This has remained Serbia’s position since then. President Vucic appears to argue that the Basic Agreement does not bind Serbia and that it may implement only those provisions it chooses freely.*”³¹

Similar to the 2013 agreement, the Agreement on the Path to Normalisation allowed parties to adopt different approaches. Even political analysts and journalists of the Brussels Agreement and the Ohrid Annex. The Franco-German proposal endorsed – but not signed – by Serbian President Vucic and Kosovo’s Prime Minister Kurti in Ohrid on 18 March 2023, “*offered a roadmap towards the Normalisation of relations while calling on both parties to engage in several confidence-building steps. Yet, while the aftermath of the Ohrid verbal agreement demanded a focus on rebuilding trust, both parties have instead engaged in actions that do the exact opposite*”.³²

Based on international law on treaties, categorising the Franco-German proposal is problematic. It does not fit the classic definition of an agreement between two states to be classified as a bilateral agreement nor can it be unequivocally categorised as a legal treaty. However, theory and international practice teach us that agreements, whether signed or not, have produced effects and even duties for states. It is evident that bilateral agreements produce legal effects; however, when they are not implemented, customary law will be applied.³³

The text of the agreement is available on the EU website and is considered a binding document by the EU. But it has not been treated as such by parties. Kosovo offered a signature and then complete implementation. Serbia wanted to treat the agreement as an “à la carte menu” from which to pick and choose what they prefer. Serbian Prime Minister Ms. Brnabic officially notified the EU that parts of the Agreement will not be respected by Serbia.³⁴ The Agreement on the Path to Normalisation comprises

³¹ WELLER, *c. d.*

³² MUCZNIK, M. Normalisation Between Serbia and Kosovo Must Come from Within. In: *The Dialogue* [online]. July 2023 [cit. 2024-11-23]. Available at: <https://dialogue-info.com/normalisation-between-serbia-and-kosovo-must-come-from-within/>.

³³ KOLB, R. *E Drejta e Traktateve* [The Law of Treaties]. Prishtina, 2020; PUTO, A. *E Drejta Ndërkombëtare Publike* [Public International Law]. Tirana: Dudaj, 2010; MERRILS, J. G. *International Dispute Settlement*. 6th ed. Cambridge: Cambridge University Press, 2017.

³⁴ Serbia “zyrtarizoi dështimin e dialogut” me letrën në Bruksel [Serbia “Officially Confirmed the Failure of the Dialogue” with the Letter to Brussels] [online]. In: *Radio Evropa e Lirë* [Radio Free Europe] [online]. 16. 12. 2023 [cit. 2024-11-10]. Available at: <https://www.evropaelire.org/a/letra-e-bernabiq-serbia-kosova-njohja-/32732507.html.2023>.

11 articles.³⁵ If Serbia has officially notified the EU, through Brnabic's letter expressing reservations on eight out of eleven articles of the agreement, then obviously, there is no agreement. Serbia has violated the agreement by concrete acts and activities. For example, the agreement requires parties to respect territorial integrity, meaning Serbia should not oppose Kosovo's membership in international organisations. Serbian authorities lobbied against Kosovo's membership in international organisations, and they declared they would not recognise Kosovo's territorial integrity. The EU has shown no strong reaction against Serbia's actions, except for phrases reminding them the agreement is binding and both parties must comply. The EU as facilitator/mediator should have taken these behavioural and attitudinal and breaches by Serbia more seriously into consideration. It selects specific articles to be implemented by Kosovo, whereas when we talk about its obligations, phrases in forms such as "we have always been for peaceful solutions", etc., are used. Thus, Serbia's practical activities are pretty much the opposite. And suppose one party expresses reservations for eight articles out of eleven, in that case, one may normally question whether this constitutes an agreement at all or what remains to be implemented from that agreement. The EU supervises and requests implementation, but no measures have been taken against parties that do not comply with the agreements. It did not undertake any measures when Serbia lobbied for the rejection of Kosovo's membership in the Council of Europe. Kosovo was rejected, whereas Serbia faced no consequences. This was a clear violation of Article 4 of the agreement. The EU states that Normalisation of relations with Kosovo is included in Chapter 35 of Serbia's path to EU membership. Is this condition truly sufficient to convince Serbia to comply with the agreed-upon duties? Or what will happen if an analysis is made about whether Serbia is truly heading towards the EU? What if, hypothetically, Serbia was to move towards BRICKS, rejecting EU membership? The supervisory mechanism overseeing the implementation of all agreements reached in the dialogue between Belgrade and Prishtina is deemed irrelevant, and the influence of the mediator, Slovak diplomat Miroslav Lajčák, appointed by the EU, lacks the desired credibility. Conversely, it is evident that this process only began to progress after the engagement of the United States. Consequently, the EU's credibility has been tarnished due to the slow and generally unsuccessful Normalisation process. Therefore, it is unreasonable to anticipate or expect that unfulfilled agreements from the first decade of the Normalisation process will be enacted in the following decade.³⁶

In the spirit of this paper, the following citation is proper and this is taken from the EU Commission report for Kosovo, published on 30 October 2024: *"The Agreement is valid and legally binding for the parties, and any formalities, including those related to its adoption or 'formalisation', should not stand in the way of making progress in its implementation. The Parties also must fully implement all past Dialogue Agreements. The constructiveness of the Parties will be assessed based solely on their implementation performance. Normalisation of relations remains an essential condition on the*

³⁵ Belgrade-Prishtina Dialogue: Agreement on the Path to Normalisation Between Kosovo and Serbia.

³⁶ ĐUKANOVIĆ – VUČIĆ, *c. d.*

European path of both Parties and both risk losing meaningful opportunities in the absence of progress."³⁷

These types of statements were frequently seen in past years and continue to appear. However, these types of statements did not lead to Normalisation, and they stand far from a final agreement that would be accepted by the parties. Final solutions are those that bring parties to an equal position, and when they are convinced that they are in a position of equality. Otherwise, an unbalanced approach offers everything but not success.

Both agreements were designed to ensure and advance the position of the Serb minority, whose rights are regulated by the Kosovo constitution, respecting international law and international standards. First of all, according to Kosovo's Constitution, the Republic of Kosovo is a state of its citizens.³⁸ Municipalities where the Serb community live enjoy additional competencies. These are called enhanced competencies, as presented below:

– *Provisions for secondary health care, including registration and licensing of health care institutions, recruitment, payment of salaries, etc. for Gračanica, Štrpce, and North Mitrovica municipalities.*

– *Provisions for higher education, including registration and licensing of educational institutions, recruitment, payment of salaries, and training of instructors, for the North Mitrovica municipality.*

– *Authority and responsibility in cultural affairs, including protection and promotion of Serbian and other religious and cultural heritage within the municipal territory for all Serb majority municipalities.*

– *In accordance with the police law, the municipal assemblies of Serb-majority municipalities have an enhanced participatory right in the selection of the local police station commander.*"³⁹

Constitutional rights of Kosovo minorities are concretised with special laws, such as the Law on the Protection and Promotion of the Rights of Communities and their Members, the Law on Protection against discrimination, the Law on the use of languages, and main international instruments that are an integral part of Kosovo's Constitution (Chapter II) and thus directly applicable. Based on the positive legal system of Kosovo, communities are defined as "[...] national, ethnic, cultural, linguistic, or Religious groups traditionally present in the Republic of Kosovo that are not in the majority. These groups include Serbs, Turks, Bosnians, Roma, Ashkalis, Egyptians, Gorani, and other ethnic and religious communities. Members of the community in the majority in the Republic of Kosovo as a whole, who are not in the majority in a given Municipality shall also be entitled to enjoy the rights listed in this law."⁴⁰

³⁷ Kosovo 2024 Report, SWD(2024) 692 final. In: *European Commission* [online]. Brussels, 30. 10. 2024 [cit. 2024-11-16]. Available at: https://enlargement.ec.europa.eu/kosovo-report-2024_en.

³⁸ Kosovo Constitution, Article 1, paragraph 2.

³⁹ Kosovo Law on Self Government [online]. Articles 19–23 [cit. 2024-11-11]. Available at: <https://map1.rks-gov.net/wp-content/uploads/2017/10/Law-On-Local-Self-Government.pdf>.

⁴⁰ Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and Their Members in Kosovo. In: *Official Gazette of the Republic of Kosova* [online]. Article 1, paragraph 4 [cit. 2024-11-10]. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2531&langid=2>.

Under the existing political circumstances, and for a more successful integration of Serbs into the Kosovo system, the Serb community has received significantly more attention compared to other Kosovar communities. For the Serb community, a special form of advancement and protection has been put in place. The Serb community is represented at all levels of power. Serbs are guaranteed 10 seats in the Kosovo Parliament, and they enjoy the right to veto in the process of promulgation of laws (laws of vital interest).⁴¹ Furthermore, minorities have to be represented in the composition of the Kosovo Government. Thus, there shall be at least one (1) Minister from the Kosovo Serb Community and one (1) Minister from another Kosovo non-majority Community. If there are more than twelve (12) Ministers, the Government shall have a third Minister representing a Kosovo non-majority Community. There shall be at least two (2) Deputy Ministers from the Kosovo Serb Community and two (2) Deputy Ministers from other Kosovar non-majority Communities. Suppose there are more than twelve (12) Ministers. In that case, the Government shall have a third Deputy Minister representing the Kosovo Serb Community and a third Deputy Minister representing another Kosovo non-majority Community.⁴²

Out of nine members of the Kosovo Constitutional Court, two members belong to minorities (one from the Serb minority and one from other communities). Similarly, communities are represented in the Kosovo Supreme Court, the Kosovo Judicial Council, the Kosovo Prosecutorial Council, and other relevant institutions.

The Council of Europe Framework Convention for the Protection of National Minorities, the Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights, along with their respective protocols, are integral parts of the Kosovo constitutional system. They are directly applicable, even though Kosovo is still not a member of the Council of Europe. Additionally, specific Kosovo laws promote and protect the rights of minorities in particular areas. For example, the Law on Local Self-Government, grants municipalities with a Serb majority specific special competences, and is formulated as enhanced competences. These enhanced competences encompass issues of Secondary Health Care, enhanced competences in university education, and enhanced competences in the area of culture, among others.⁴³ A fundamental law to be mentioned in this context is the Law on Specially Protected Areas, which regulates and protects very sensitive issues in Kosovo. This law ensures the protection of Serbian Orthodox Monasteries, Churches, other religious sites, as well as historical and cultural sites of special importance for the Serbian Community and other communities in the Republic of Kosovo, through the establishment of Specially Protected Areas.⁴⁴ Kosovo's institutions implemented the provisions of this law. There was a case that had undergone judicial procedures, which, according to various resources, was opposed and considered a controversial judicial process. On 13 March, Kosovo's Prime Minister Albin Kurti announced he had requested the Cadastral Agency

⁴¹ Kosovo Constitution, Article 64, paragraph 2.

⁴² *Ibid.*, Article 66, paragraph 2.

⁴³ See Articles 19–23 of the Law Nr. 03/L-040 on Local Self-Government.

⁴⁴ Law No. 03/L-039 on Specially Protected Areas, Article 1.

to transfer 24 hectares of land in the name of the Deçan Monastery. He stated that the implementation of the Constitutional Court's decision would be crucial for Kosovo's application for membership in the Council of Europe, which is scheduled to be discussed during the Council of Europe's Parliamentary Assembly in April. Nonetheless, Kosovo was not granted membership in the Council of Europe. The Diocese of Raška and Prizren of the Serbian Orthodox Church in Kosovo confirmed that the Deçan Monastery has registered 24 hectares of land in its name in the Central Cadastre of Kosovo, in Prishtina.⁴⁵ These acts by Kosovo were not opposed by the national and international community. Kosovo's institutions have repeatedly demonstrated a commitment to drafting a statute for the creation of an Association of Municipalities with a Serb majority, respecting Kosovo's constitutional system. These types of activities and commitments were applauded and supported. However, astonishingly, when the Central Bank of Kosovo (CBK) issued a decree stating that, as of 1 February (2024), the euro would be the sole currency for cash transactions and payments, it was not supported, despite being widely considered a legal decision.

We emphasise that both Agreements we have dealt with in this paper address the Serbian minority's position and their rights. The biggest obstacle to strengthening the Serb minority position in Kosovo is the official Belgrade politics. In many aspects, Serb citizens of Kosovo are the victims of Serbia's efforts to make them a part of the political uniformity of Belgrade. *"Serb citizens in four municipalities in the north of Kosovo are even more victimized. In this century, these citizens had no free elections through which they would pass the test of electoral democracy."*⁴⁶

4. CONCLUSIONS

Balanced mediation from the EU, as the facilitator is crucial for success. Measures for not complying with the defined standards on the direction of finalising the process should be equally put in place against the party that doesn't show willingness for a fair and equal process of dialogue.

The dialogue between Kosovo and Serbia remains ongoing and will continue to remain ongoing, unless the attitudes of the parties are changed. Especially if the EU, as the facilitator/mediator, doesn't change its approach towards the process and regarding the final defined outcome of the process.

⁴⁵ Manastiri i Deçanit regjistron pronësinë e 24 hektarëve tokë [The Deçan Monastery Registers Ownership of 24 Hectares of Land]. In: *Radio Evropa e Lirë* [Radio Free Europe] [online]. 20. 3. 2024 [cit. 2024-03-20]. Available at: <https://www.evropaelire.org/a/manastiri-decan-regjistrim-toke-/32869964.html>.

⁴⁶ SURROI, V. Katër sfidat kufitare Kosovë-Serbi: Etnocentrizmi, demokracia, NATO dhe BRICS – vijat e fërkimit mes Kosovës dhe Serbisë që pengojnë fundin e konfliktit në këtë çerek të shekullit XXI e që lehtë mund të kalojnë në çerekun e dytë të këtij shekulli [Four Border Challenges Between Kosovo and Serbia: Ethnocentrism, Democracy, NATO and BRICS – the Fault Lines Between Kosovo and Serbia That Are Preventing the End of the Conflict in This Quarter of the 21st Century and Could Easily Spill Over into Its Second Quarter]. In: *Koha* [online]. 13. 9. 2023 [cit. 2024-11-29]. Available at: https://www.koha.net/veshtrime/391709/kater-sfidat-kufitare-kosove-serbi/?fbclid=IwAR19-S_8cB9r7c1sG3X2AlbOudpYnoNTjd3Y2G0mfjMpLplqG6Qy3Pk9eI.

As long as parties do not express mutual respect for their status, it is evident that the party that considers itself stronger than the other will always drag out the process, waiting for “more convenient circumstances” to act. The EU’s neutral position regarding Kosovo’s status is itself a problem. The non-recognition of Kosovo by five EU Member States is also not a contribution to the dialogue. The agreements contain obligations for both parties. Hence, both parties should be requested to respect and fulfil their responsibilities. The pressure from the EU on the parties for non-implementation of agreements is not equal, so we cannot see the requested outcomes. If agreements are allowed to be treated as an “à la carte menu” from which parties will pick and choose to implement only what suits them better, then the agreement and the dialogue itself will become questionable. Principles of democracy, human rights, and the rule of law should prevail instead of support for autocrats and corrupt governments creating an environment fostering double standards in the application of the law.

The dialogue, if continued on its usual track, facilitated/mediated without a balanced approach, will not bring Normalisation. It is expected that changes in the EU following the last elections will gain momentum, and that Ms. Kallas, who replaced Mr. Borrell, will be more assertive and will have no excuse for obstructions from the parties. The replacement of Mr. Lajcak, whose mandate is set to expire in early 2025, will also be a strong impetus to the dialogue. Changes in the White House are also a potential new impetus related to the success of the dialogue. US involvement in these types of negotiations has been shown to be crucial. The creation of the ASMM is not impossible. There is a process to create the ASMM and to escape the dead end in which we have placed ourselves. It is time to stop trying to force reluctant parties in Belgrade and Prishtina to engineer the creation of the ASMM. Instead, stepping aside and allowing it to happen in accordance with the Constitution – drafted with the support of the US - might indeed be the best path forward.⁴⁷

The international community should make it that Kosovo cannot afford a new Republika Srpska and that territorial changes will not be allowed. This will make it easier to achieve future agreements and to implement them. Municipalities with a majority Serb population should enjoy care and assistance from the official government of Serbia. At the same time, these municipalities must be free from the influence of Belgrade’s official political interests. Dialogue between all communities is much more helpful than political influence and pressure coming from outside Kosovo.

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⁴⁷ STEINBAUM – WILLIAMS – BETA, *c. d.*