



# FAQs on Association/Community

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*This document presents some of the central questions regarding the Association/Community of Serb-majority municipalities (ASM), which in fact reflect the frequently expressed concerns in Kosovo regarding this matter. The text below also provides answers referring to the key open-source documents, including most notably the 2015 Judgment of the Republic of Kosovo Constitutional Court. The aim is to provide concise and accurate clarifications to the prevailing concerns and enable a fact-based discussion on the ASM, particularly regarding its interconnectivity with Kosovo's membership in the Council of Europe.*

*The document has been drafted on behalf of the Kosovo Civic Alternative (KCA), an informal platform of civil society to support peacebuilding and the process of normalization of relations between Kosovo and Serbia.*

## How can Kosovo proceed with the ASM statute when the Constitutional Court has declared the ASM to be unconstitutional?

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The Constitutional Court of the Republic of Kosovo **did not declare the Association/Community of Serb-majority municipalities (ASM) to be unconstitutional.** On the contrary, in its Judgment in Case No. K0130/15<sup>1</sup> the Court found the ASM to be part of the constitutional order of the Republic of Kosovo. In line with this, the Constitutional Court is clear in its expectation that the ASM “is to be established as provided by the First Agreement, ratified by the Assembly of the Republic of Kosovo and promulgated by the President of the Republic of Kosovo.”<sup>2</sup> Throughout the Judgment, the Court is clear on its expectation that the ASM statute will be drafted and that the Government will issue a legal act in support of the statute and the ASM’s establishment. Therefore, the notion that the Constitutional Court found the ASM to be “unconstitutional” is both factually and logically inaccurate. How can it be that a constitutional court of a democratic country declares an entity to be unconstitutional and at the same time asserts that it is part of the constitutional order and that it is to be established? Surely, if the Constitutional Court had declared the ASM to be unconstitutional its Judgment would have urged against any further steps towards its establishment.

## How can Kosovo proceed with the ASM statute when its Constitutional Court found 24 points of the ASM principles not to be in line with the Constitution?

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The Constitutional Court of the Republic of Kosovo **did not find 24 points of unconstitutionality** in the 2015 ASM Principles. In its Judgment in Case No. K0130/15,<sup>3</sup> the Court deliberated on the ASM principles and not the full statute. This is a crucial point. Because it did not review its full statute, the Court could not make full authoritative decisions. Thus, reviewing certain aspects of the 2015 ASM Principles, the Court noted that they relate to different articles of the RKS Constitution and provided guidance to the drafters of the ASM statute on how to avoid any unconstitutionality as they develop these Principles into a full-blown statute. Basically, because the Court did not see a full statute, it concluded that certain aspects of the Principles *may possibly/theoretically* be developed into the ASM statute in an unconstitutional way. In those instances, the Court listed the relevant provisions of the RKS Constitution and legal system and provided

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<sup>1</sup> See at: [https://gjk-ks.org/wp-content/uploads/vendimet/gjk\\_ko\\_130\\_15\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf).

<sup>2</sup> See at: [https://gjk-ks.org/wp-content/uploads/vendimet/gjk\\_ko\\_130\\_15\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf).

<sup>3</sup> See at: [https://gjk-ks.org/wp-content/uploads/vendimet/gjk\\_ko\\_130\\_15\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf).

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thorough guidance to the ASM statute drafters as to how to avoid unconstitutional elements in the statute.

For example, the Court explained that *the* constitutional entity of local government in the Republic of Kosovo is the municipality. In this regard, the Judgment noted that “when the objectives of the Association/Community are elaborated into a legal act and the Statute... [they] shall not replace or undermine the status of the participating municipalities.”<sup>4</sup> The essential logic of the Judgment is that **if** the ASM statute **were to** undermine the status of participating municipalities that **would be** unconstitutional. ***It did not conclude*** that the 2015 ASM Principles actually do that.

The absolute majority of the 24 points of the Constitutional Court Judgment are in this category. There are only three aspects of the 2015 ASM Principles that are straightforwardly declared as unconstitutional. This is to do with 1) the ability of the ASM to refer matters to the Constitutional Court, other than those that directly invoke its own fundamental rights and freedoms;<sup>5</sup> 2) the ability of the ASM to initiate legislative procedures; 3) the ability of the ASM to represent the Kosovo Serb community with the central Kosovo institutions. Notably, the Court did not conclude that these three points make the *entirety* of the ASM unconstitutional. It simply commanded that these features are not included in the ASM statute once it is developed. These three points are easily avoidable, as in fact was the case with the proposed draft statutes discussed in the recent period.<sup>6</sup>

Based on all the above, the Constitutional Court asserted that the 2015 ASM Principles “are not entirely in compliance with the spirit of the Constitution.”<sup>7</sup> This phrase refers to the three elements found to be unconstitutional – if three points are questionable than the Principles cannot be *entirely* in line with the spirit of the constitution. It also refers to the fact that the Court found that some other aspects of the 2015 ASM Principles *may* be developed into its statute in an unconstitutional manner. The Court did not find the ASM Principles to be *entirely unconstitutional* and it provided clear guidance on how to produce a constitutional ASM statute on the basis of its existing framework documents.

## How can Kosovo make a mono-ethnic association?

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The Constitutional Court ***did not declare any unconstitutionality related to the name of the ASM nor its presumed composition*** of 10 Serb-majority municipalities. As noted above, the Court only stated that the ASM cannot represent the Kosovo Serb community solely

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<sup>4</sup> See at: [https://gjk-ks.org/wp-content/uploads/vendimet/gjk\\_ko\\_130\\_15\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf).

<sup>5</sup> This means that ASM cannot act on behalf of, for example, a group of citizens from the 10 municipalities and refer *their* claim to the Constitutional Court; but it can refer matters pertaining to *its own* scope to the Constitutional Court.

<sup>6</sup> The FES/EIP draft proposal, the draft proposal commissioned by Albanian PM Edi Rama, and the official EU proposal, as circulated by media.

<sup>7</sup> See at: [https://gjk-ks.org/wp-content/uploads/vendimet/gjk\\_ko\\_130\\_15\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf).

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in dealings with the central institutions. The actual ASM statute thus needs to clearly stipulate that the ASM represents the municipal authorities and their citizens, regardless of ethnicity.

The ASM is to be an inter-municipal association. Its members are municipalities. **Municipalities are not ethnic entities.** They are constitutionally defined entities of local governance in the Republic of Kosovo. The fact that these ten municipalities would form an association does not make it mono-ethnic, as can clearly be deduced from the Constitutional Court Judgment. There is only the imperative that in the composition of its bodies, in its functioning, and in its representative role towards any other entity, the ASM reflects the multi-ethnic character that is constitutionally required from Kosovo's institutional spectrum. This can be easily done in the ASM statute.

## How can we proceed to create an executive, third layer of government in Kosovo?

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The ASM is **not envisioned as an executive, third layer of government.** The texts of the 2013 and 2015 agreements were carefully prepared to ensure that. For example, the ASM's scope of functions are called 'objectives' (as opposed to 'competences'). They are listed under the long-negotiated notion of 'full overview' (as opposed to 'full oversight'). That the ASM is to be in line with the Kosovo constitutional-legal system is stipulated in the ASM framework texts and has been unambiguously confirmed by US and European officials. This has been done repeatedly in recent months, but also immediately after the agreement on the ASM Principles: the Dialogue EUSR of the time, Frederica Mogherini, sent a letter to the then Kosovo Prime Minister, Isa Mustafa, confirming that the ASM is to be in line with the existing Kosovo law and that it is not envisaged as a third layer of government. If we know that the ASM is to be in line with the (not-to-be-changed) Constitution and legal system of the Republic of Kosovo, we also know that this system does not recognize a third level of governance. Importantly, it has always been anticipated that **the ASM statute would be reviewed by the Constitutional Court of the Republic of Kosovo.** This is *the* central and final instance of assessing constitutionality in this country and it will not pass an unconstitutional draft. All the guarantees of constitutionality are present in the ASM context.

### How can we call it non-executive when the ASM is to have a president and executive bodies?

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In its Judgment in Case No. K0130/15,<sup>8</sup> the **RKS Constitutional Court found no objections to the ASM's anticipated decision-making structure**, including the president. The ASM is modelled after the existing Association of Kosovo Municipalities. This Association has a leadership structure very similar to the one anticipated for the ASM. The fact that the ASM has a president does not make it an executive, third layer of government in Kosovo. Many other entities that are not holders of the state's executive power have a president. The executives of the ASM are the decision-makers on behalf of their organization, not the state. Their decisions are bound by the framework of their organization, which does not yield state executive powers. The issue is not the word president, but the president of what. Kosovo has clear definitions of what 'the President of the Republic of Kosovo' means versus what it means to be the president of an inter-municipal association.

### How can we make another *Republika Srpska* in Kosovo?

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The ASM and *Republika Srpska* (RS) **are extremely different in all aspects**. RS is a constitutive entity of Bosnia and Herzegovina. It has the full scope of executive, republic-level powers. It has the power to make laws to govern its territory, it has an executive/republic-level government, its own police service, its own constitution, and so forth. Importantly, RS has executive powers at the state level of Bosnia and Herzegovina (BiH). It has half of the state's government, half of the state's parliament, and a member of the state's presidency. It has 50% influence on Bosnia and Herzegovina's foreign policy decisions, from appointing ambassadors to signing bilateral agreements and recognizing states, as we have seen in the case of Kosovo. Because of RS, Bosnia and Herzegovina has not recognized Kosovo's statehood, or even recognized its passports, IDs, or car plates. In addition, RS is a homogeneous territorial entity comprising 49% of BiH. All this is a night-and-day difference with the ASM in every possible aspect. There is no single voice in the Euro-Atlantic community that wants RS in Kosovo. The expectation from Kosovo is for an ASM that is shaped and functional in accordance with the RKS Constitution and legal system. This Constitution/legal system does not anticipate anything akin to RS and it will be **RKS's own Constitutional Court that decides on the ASM's scope**. Any executive or legislative powers, or anything else unconstitutional, would be ruled out by the Constitutional Court in its review of the ASM statute.

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<sup>8</sup> See at: [https://gjk-ks.org/wp-content/uploads/vendimet/gjk\\_ko\\_130\\_15\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ko_130_15_ang.pdf).

### Basic Facts:

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- The ASM is included in the *First Agreement of Principles governing normalization of relations*, agreed under the EU-facilitated Dialogue in Brussels on 19 April 2013.
- The First Agreement of Principles was ratified as an international agreement by the Assembly of the Republic of Kosovo on 27 June 2013. It was promulgated by the Decree of the President of the Republic of Kosovo on 12 September 2013.
- The ASM provisions from the First Agreement were further elaborated into an agreement on the *ASM General Principles/Main Elements*, concluded under the EU-facilitated Dialogue in Brussels on 25 August 2015.
- On 31 October 2015, the President of Kosovo submitted a referral to the Constitutional Court concerning the assessment of constitutionality of the ASM General Principles/Main Elements.
- On 23 December 2015, the Constitutional Court issued a judgment in this case.