

# STELLUNGNAHMEN UND BERICHTE

## Communities and Minorities in UNMIK's Virtual World of a Multicultural Kosovo

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### I. Introduction

Thinking of virtual worlds may call in mind colourful pictures, which of course do not exist in reality. UNMIK's<sup>1</sup> Kosovo undoubtedly exists, but it exists like Alice's Wonderland, where things are not what they seem to be and where rules have strange and dream-like effects. One need not speak of Kosovo as a land where one single man, the Special Representative of the Secretary-General (SRSG) governs - combining in his person the ultimate executive, legislative and judicial authority<sup>2</sup>. The receptive reader of a legal journal may also not be interested in the normal behaviour of a people who constantly park their cars on the thereby unusable pavements and with instinctive certainty walk on the streets, where red and green traffic lights struggle to enrich the grey daily life by some colour. I want to report of an experiment of multiculturalism and the efforts to create a multiethnic society in which the enemies of yesterday are doomed to be friends of today or at least of tomorrow. This implies that the different ethnicities should live peacefully together, Albanians and Serbs with Romas, Ashkalis, Egyptians, Bosniaks, Turks and Goranis, in a society where a diversity of cultural, social and religious traditions are not only tolerated but also encouraged<sup>3</sup>. The terminology usually used in the

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<sup>1</sup> United Nations-Interim Administration Mission in Kosovo – Basic structure at: <<http://www.un.org/peace/kosovo/pages/kosovo9.htm>>. An excellent analysis has been produced by Stahn, Carsten, International Territorial Administration in the former Yugoslavia: Origins, Development and Challenges ahead, *ZaöRV*, 2001, 107; see also Manuel Eising/Philipp Reszat, Die internationale Notstandsverwaltung im Kosovo, *ZOR*, Zeitschrift für Osteuroparecht, 2003, 63.

<sup>2</sup> Section 1.1 UNMIK/REG/2000/54; similar UNTAET (East Timor), Security Council resolution 1272 (1999) of 25 October 1999.

<sup>3</sup> Section 23.5 UNMIK/REG/2000/45.

UNMIK legal texts is that of “communities” which are defined as “communities of inhabitants belonging to the same ethnic or religious or linguistic group”<sup>4</sup> entitled to their own rights of community<sup>5</sup> e.g. to preserve, protect and express their ethnic, cultural, religious, and linguistic identities<sup>6</sup>. The wording “rights of a community” might be questioned by political and legal scholars as only the single members can be entitled to possess and exercise rights that correspond to moral or legal obligations<sup>7</sup> by the municipality, UNMIK itself or the society (to avoid the term state) of Kosovo. The legal inaccuracy can be tolerated in this context and should not prevent us diving into the multi-complex object of communities and minorities in UNMIK’s virtual world. This paper intends to

- illustrate different, but of course not all<sup>8</sup>, legal mechanisms used in Kosovo to improve the situation of minority members, and to
- question whether or not such mechanisms are able to achieve this aim considering the overall interaction among the members of a multicultural society.

## II. The Minorities in Kosovo

The concepts of minority and majority in Kosovo are relative ones. From a Kosovo-wide point of view it may be clearly stated that the Albanians form the majority, against which the minorities of Serbs, Romas, Ashkalis, Egyptians, Bosniaks, Turks and Goranis must be protected. But considering the United Nations Security Council resolution 1244 (1999) of 10 June 1999 that Kosovo is still part of the Federal Republic of Yugoslavia leads to the fact, that the Albanians form the minority that has to be protected from the majority of Serbs in FRY. Narrowing the view to smaller units shows that a lot of enclaves live in fear of the surrounding majorities, like the Albanian enclaves in Northern Kosovo and the Serbian and other enclaves in the rest of Kosovo, all of them well secured by KFOR soldiers. In certain parts of Kosovo it is not even clear, at least in the awareness of the local population, which of the ethnicities should be considered as minority and majority. The legal framework in Kosovo tries to protect all, so that the Albanians are in the same moment majority and minority, a population, which has to be protected, and against which protection is necessary. Perhaps this may be the reason that the term minority in Kosovo does not appear, but is circumscribed as

<sup>4</sup> Section 2.3 UNMIK/REG/2000/45; Paragraph 3.2 UNMIK/REG/2001/9.

<sup>5</sup> Section 23.7 UNMIK/REG/2000/45.

<sup>6</sup> In the same manner Paragraph 4.1 UNMIK/REG/2001/9 states that the Communities have rights in order to preserve, protect and express their ethnic, cultural, religious, and linguistic identities.

<sup>7</sup> Birch, Anthony H. *Concepts and Theories of Modern Democracies*, 2<sup>nd</sup> ed. 2001, London: Routledge, page 149.

<sup>8</sup> For a complete overview see the Tenth Assessment of the Situation of Ethnic Minorities in Kosovo, provided by OSCE (Mission in Kosovo) and UNHCR, March 2003, <<http://www.osce.org/kosovo/documents/reports/minorities/>>.

- “community that are not in the majority”<sup>9</sup>,
- “non-Albanian Kosovo Communities”<sup>10</sup>,
- “a community that is not in the majority” but “forms a substantial part of the population”<sup>11</sup>,
- “Communities other than the Community having a majority representation in the Assembly”, “Kosovo Serb Community” and “another Community”, “non-majority Community”<sup>12</sup> or as
- “Communities, other than the one having the majority among the members of the Assembly”<sup>13</sup>.

The magic formula to solve this complex task is the multiculturalism, which is transferred in the legislative system through a set of provisions. A selection of these provisions may illustrate the intended function<sup>14</sup>.

## 1. Civil Service<sup>15</sup> and Labour Law<sup>16</sup>

In private employment and occupation relationships (including access to vocational training, to employment and to particular occupations, and terms and conditions of employment) any discrimination is prohibited<sup>17</sup>. No private employer (not bound by the rules on civil service) may make any distinction with regard to race, colour, religion, political opinion, national extraction, social origin or language which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation<sup>18</sup>, though a similar right for communities and their members is not guaranteed as a constitutional right<sup>19</sup>. This principle may be considered as noble. But as special legal consequences are not foreseen in the essential labour law for its violation, it cannot be expected in practice that the prohibition will have much effect. It is up to each potentially disadvantaged citizen to force his right of non-discrimination. Of course any distinction, exclusion or preference in

<sup>9</sup> E.g. Section 25.3 UNMIK/REG/2000/45.

<sup>10</sup> As in Paragraph 9.1.3 (b) UNMIK/REG/2001/9 and Sections 8.1 and 29.9 UNMIK/REG/2001/36.

<sup>11</sup> Within UNMIK's discretion, Sections 23.11 UNMIK/REG/2000/45 and 23.15 UNMIK/REG/2000/45.

<sup>12</sup> Paragraph 9.3.5 UNMIK/REG/2001/9.

<sup>13</sup> Paragraph 9.3.6 UNMIK/REG/2001/9.

<sup>14</sup> Complaints and Judicial Protection (e.g. Chapter 6 25.3 UNMIK/REG/2000/45) open to everybody regardless of her or his membership to a community (minority or majority) shall not be taken into consideration.

<sup>15</sup> For detailed information see Schwarz, Axel, *Das Recht des öffentlichen Dienstes im Kosovo*, WGO-MfOR (Monatshefte für Osteuropäisches Recht), 2002, 13 – 22.

<sup>16</sup> For detailed information see Schwarz, Axel, *Das Arbeitsrecht des Kosovo*, ZIAS (Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht), 2002, 155 – 165.

<sup>17</sup> Section 2.1 UNMIK/REG/2001/27.

<sup>18</sup> Section 2.2 UNMIK/REG/2001/27.

<sup>19</sup> Paragraph 4.4 (d) UNMIK/REG/2001/9 guarantees only the equal opportunity with respect to employment in public bodies at all levels and with respect to access to public services at all levels.

respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination<sup>20</sup>. This latter principle is not mentioned in UNMIK/REG/2001/36 on Civil Service in Kosovo, but must be valid also in the public employment sector.

The Kosovo civil service is governed among others by the principles of non-discrimination as well as of inclusiveness. The former forbids any direct or indirect discrimination<sup>21</sup>, based on mostly the same criteria appearing in the private labour law, thus with an obvious inconsistency

- using instead of the term of “national extraction” that of “national and ethnic origin”,
- adding the criteria of “association with a national community” and
- avoiding the limiting condition of the disadvantaging effects (of nullifying or impairing equality of opportunity or treatment in employment or occupation).

The different wording will presumably not justify a different treatment of the public and private sector. The latter principle of inclusiveness requests that recruitment at all levels in the civil service shall reflect the multi-ethnic character of Kosovo and the need for equitable representation of all the communities in Kosovo<sup>22</sup>. Without a special rule to determine which of these principles should prevail in case of collusion then the practical difficulties are evident. The question here may be whether the ethnic qualification shall supersede the professional one. Also this principle of inclusiveness is riddled with inconsistency:

- Whereas the Civil Service Regulation requests an “equitable representation of all the communities in Kosovo”,
- the Local Self-Government Regulation claims for a “fair proportion of qualified representatives of communities at all levels”<sup>23</sup>, and
- the Constitution contents itself with the right to “enjoy equal opportunity with respect to employment in public bodies at all levels and with respect to access to public services at all levels”<sup>24</sup>.

To meet the goals of the non-discrimination and inclusiveness three different types of panels deal with the participation of minorities.

### a) Employing authorities panels

A first control takes place in the employing authorities themselves. A special panel of three or more persons with equitable representation of communities in Kosovo has to review applications for positions, and short-list, interview and select candidates<sup>25</sup>. It is difficult to say whether the concept of “equitable representation” allows a wide discretionary power to the employer or not.

<sup>20</sup> Section 2.3 UNMIK/REG/2001/27.

<sup>21</sup> Section 2.1 (g) UNMIK/REG/2001/36.

<sup>22</sup> Section 2.1 (h) UNMIK/REG/2001/36.

<sup>23</sup> Section 23.4 (c) UNMIK/REG/2000/45.

<sup>24</sup> Paragraph 4.4 (d) UNMIK/REG/2001/9.

### b) Independent Oversight Board for Kosovo (Board)

An "Independent Oversight Board for Kosovo (Board)"<sup>26</sup> has to secure also the rights of the minorities to participate in the Kosovo civil service. To enable the Board to fulfil this task its members are not only selected on the basis of competence and integrity but also on their commitment to establishing a civil service that reflects the multi-ethnic character of Kosovo<sup>27</sup>. The composition of the Board itself shall reflect as far as possible the multi-ethnic character and to this end, at least two of its members shall be appointed from among the non-Albanian Kosovo communities<sup>28</sup>.

### c) Senior Public Appointments Committee (SPAC)

A similar provision is foreseen for the appointment of higher positions i.e. the Permanent Secretaries of the Ministries, the chief executive officers of the Executives Agencies and such other posts as may be decided by the SRSG. Two members of the "Senior Public Appointments Committee (SPAC)" that is responsible for these appointments<sup>29</sup> must be Ministers from non-Albanian Kosovo communities<sup>30</sup>. The quorum for meetings of the SPAC is seven members (out of eleven) and includes at least one member representing the non-Albanian Kosovo communities<sup>31</sup>. Furthermore the Minister under whom the candidate for appointment would serve<sup>32</sup> as well as six persons (three eminent inhabitants of Kosovo<sup>33</sup> and three international members<sup>34</sup>) appointed by the SRSG are members of the SPAC. It can be expected that the interests of minorities to be represented in higher positions are guaranteed.

## 2. Local Self-Government<sup>35</sup>

The Local Self-Government regulation<sup>36</sup> obliges all organs and bodies of a municipality to ensure that the inhabitants enjoy all rights and freedoms without distinction of race, ethnicity, colour, language, religion, political or other opinion, na-

<sup>25</sup> Section 3.1 (b) UNMIK/REG/2001/36.

<sup>26</sup> Chapter 4 UNMIK/REG/2001/36.

<sup>27</sup> Section 8.1 UNMIK/REG/2001/36.

<sup>28</sup> Section 8.2 UNMIK/REG/2001/36.

<sup>29</sup> Annex 1, paragraph E (iv) of UNMIK/REG/2001/19.

<sup>30</sup> Annex 1, paragraph E (ii) (c) of UNMIK/REG/2001/19.

<sup>31</sup> Section 19.2 UNMIK/REG/2001/36.

<sup>32</sup> Annex 1, paragraph E (ii) (b) of UNMIK/REG/2001/19.

<sup>33</sup> Annex 1, paragraph E (ii) (d) of UNMIK/REG/2001/19.

<sup>34</sup> Annex 1, paragraph E (ii) (e) of UNMIK/REG/2001/19.

<sup>35</sup> For detailed information see Schwarz, Axel, *Der Aufbau einer kommunalen Selbstverwaltung im Kosovo*, ZOR (Zeitschrift für Osteuroparecht), 2002, 123 – 134.

<sup>36</sup> Section 2.3 UNMIK/REG/2000/45.

tional or social origin, property, birth or other status. All communities should find appropriate conditions enabling them to express, preserve and develop their ethnic, cultural, religious and linguistic identities. This principle clearly does not refer to a concept of majority or minority. Its wording provides for each ethnic or religious or linguistic group the same right to express its own identity regardless of size. This may provoke contradictions between different groups which cannot be solved even by applying the principle of coexistence<sup>37</sup>. As democratic structures by themselves are not able to protect minorities, the Local Self-Government regulation establishes some special institutions. A Communities Committee and a Mediation Committee<sup>38</sup> as well as additional instruments that will survey, control and protect the rights of the minorities.

### a) The Communities Committee

Every inhabitant of Kosovo (all of them can be considered as member of a community, even if not as a member of a minority in a given municipality) has an additional right to appeal to the Communities Committee<sup>39</sup>. The Communities Committee consists of members of the Assembly and representatives of communities. Each community residing in the municipality is represented by at least one member. The community that is in the majority in the municipality has less than one half of the membership. The remaining membership of the Communities Committee shall fairly reflect the number of other communities. The functions<sup>40</sup> of this Committee are to ensure

- the legal bans on negative discrimination controlling any discrimination by a person undertaking public duties or holding public office,
- affirmative action for civil, political, economic, social and cultural rights and interests on an equal basis to enjoy full and equal opportunities, and
- a positive discrimination in the municipal civil service by a fair proportion of qualified representatives of communities at all levels.

In order to fulfil these functions, the Communities Committee refers the appropriate matters immediately to the Mediation Committee<sup>41</sup>.

### b) The Mediation Committee

While the Communities Committee is dominated by members of minorities the Mediation Committee<sup>42</sup> consists of equal numbers of members

<sup>37</sup> Which is stated in Section 2.3 sentence 2 UNMIK/REG/2000/45.

<sup>38</sup> Both are standing committees, Section 23.1 UNMIK/REG/2000/45.

<sup>39</sup> This right is granted in addition to the rights to refer a matter to the Ombudsperson or to a court of law, Section 23.1 UNMIK/REG/2000/45.

<sup>40</sup> Within the territory of the municipality, Section 23.1 UNMIK/REG/2000/45.

<sup>41</sup> Section 23.6 UNMIK/REG/2000/45.

<sup>42</sup> Section 23.3 (d) UNMIK/REG/2000/45.

- of the Municipal Assembly who are not members of the Communities Committee and

- of representatives in a fair proportion to communities in the municipality who do not belong to the community that is in the majority in the municipality.

The Mediation Committee examines the matters referred to it and carries out investigations regarding (also potentially in the future) the violated “rights of a community or a member of a community”<sup>43</sup>. Though the wording of the regulation mentions the concept of the rights of a community<sup>44</sup>, this may be questioned as already described earlier. This is also valid for e.g. the special municipal duties of taking particular account regarding villages, settlements and urban quarters populated by minorities<sup>45</sup>. The Mediation Committee submits within 28 days a report with relevant recommendations to the Municipal Assembly which decides about potential action in relation to the matter<sup>46</sup>. In case of dissatisfaction with the decision taken by the Municipal Assembly the Communities Committee may refer the matter to the Central Authority<sup>47</sup> for review<sup>48</sup>.

### c) Additional instruments

Five additional instruments protect the rights of minorities, two of them purely political without any power, two of them extremely powerful and equipped with executive functions, whilst the fifth one provides military security.

#### (1) The Community Office

As a temporary measure the Community Office and eventually its Sub-offices are to be established<sup>49</sup> in those municipalities where “a community that is not in the majority forms a substantial part of the population”<sup>50</sup>. This Community Office

<sup>43</sup> Section 23.7 UNMIK/REG/2000/45.

<sup>44</sup> In the same manner Paragraph 4.1 UNMIK/REG/2001/9 states that the Communities have rights in order to preserve, protect and express their ethnic, cultural, religious, and linguistic identities.

<sup>45</sup> Section 23.10 UNMIK/REG/2000/45.

<sup>46</sup> Section 23.8 UNMIK/REG/2000/45: strange enough, but expressively the municipality is admonished to stick to the law and its principles, so as if the law did not bind the municipality or as if the legislator had some fear that the municipality could deviate it. The principle of legality has also found its own place in Section 33 UNMIK/REG/2000/45 binding the municipality once more to law and justice, to the human rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto and finally to the applicable law (see also UNMIK/REG/2000/59, 27 October 2000, Amending UNMIK Regulation No. 1999/24 on the law applicable in Kosovo).

<sup>47</sup> “Central Authority” means UNMIK acting under the authority of the Special Representative of the Secretary-General, Section 1.2 UNMIK/REG/2000/45.

<sup>48</sup> Section 23.9 UNMIK/REG/2000/45.

<sup>49</sup> Section 23.12 UNMIK/REG/2000/45; unclear is the meaning of the additional provision that the Community Office shall be an integral part of the municipality and of the municipal administrative structure!

shall enhance the protection of “community rights” and the ban on negative discrimination by ensuring equal access for communities<sup>51</sup> to public services at the municipal level<sup>52</sup>. This happens through reports submitted by its head, an ex-officio member of the Board of Directors<sup>53</sup> of the municipality, to each meeting of the Communities Committee “detailing the work carried out to meet the responsibilities of the Community Office”<sup>54</sup>.

### (2) The Minority Deputy President

In municipalities with minorities (“communities not in the majority”) the Municipal Assembly appoints an additional Deputy President from these minorities<sup>55</sup>. This Minority Deputy President has no special task besides his representative function. He is not even entitled to assume the President’s responsibilities and authority in his absence as this task is reserved to the regular Deputy President<sup>56</sup>.

### (3) The Municipal Administrator

The legal control of the municipality is the most important task of the Municipal Administrator<sup>57</sup>, even after the transfer of responsibilities by the adoption of its Statute and Rules of Procedure<sup>58</sup>. One of his noblest duties is to intervene<sup>59</sup> so as

- to prevent any negative discrimination and in the same time
- to protect the “rights and interests of communities”.

Also here the wording is misleading in so far as the communities themselves are not owner of rights. But of course the Municipal Administrator has to take care that the rights of the members of communities and especially of minorities are not violated by (majorities of) the municipality. In special cases this may create a very sensitive task, especially when a positive discrimination in favour of a member of a minority contains a negative discrimination in disadvantage of a member of the majority. Whenever he considers that a municipal decision could be in conflict with United Nations Security Council resolution 1244 or the applicable law the Muni-

<sup>50</sup> Within UNMIK’s discretion, Sections 23.11 and 23.15 UNMIK/REG/2000/45.

<sup>51</sup> Obviously also here the single members are meant to be entitled, not the community as a group!

<sup>52</sup> Section 23.12 UNMIK/REG/2000/45.

<sup>53</sup> The Board of Directors comprises the heads of the municipal departments and the Head of the Community Office, Section 31.1 UNMIK/REG/2000/45.

<sup>54</sup> Section 23.14 UNMIK/REG/2000/45; the details what could be the sense of “the work carried out to meet the responsibilities” are not explained.

<sup>55</sup> Section 25.3 UNMIK/REG/2000/45.

<sup>56</sup> Section 25.4 UNMIK/REG/2000/45: the Deputy President appointed under section 25.1!

<sup>57</sup> Section 48.1 UNMIK/REG/2000/45.

<sup>58</sup> Section 46.1 UNMIK/REG/2000/45.

<sup>59</sup> Section 48.2 UNMIK/REG/2000/45; in addition he has to assist the municipality in creating local conditions for the return of internally displaced persons and refugees to their municipalities of origin (Section 48.4 UNMIK/REG/2000/45) as well as in initiating peace-building activities and reconciliation programs and activities (Section 48.5 UNMIK/REG/2000/45).

pal Administrator has the right to suspend this decision and to refer it to the SRSG<sup>60</sup>. He may also appoint members of the Communities Committee and of the Mediation Committee who are not members of the Municipal Assembly<sup>61</sup> as well as the Head of the Community Office and the staff of the Community Office and furthermore he may establish sub-offices of the Community Office<sup>62</sup>.

#### (4) The Special Representative of the Secretary-General (SRSG)

As the ultimate authority<sup>63</sup> the SRSG is entitled to set aside any decision of a municipality which does not take sufficiently into account the rights and interests of minorities<sup>64</sup>. He is even able

- to co-opt additional members to the Municipal Assembly in order to ensure a representation of all communities pursuant to United Nations Security Council resolution 1244<sup>65</sup>,
- to remove (exceptionally) in cases of serious misconduct a member of a Municipal Assembly from office<sup>66</sup>,
- to dissolve the Assembly and order new elections, if it persistently fails to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo<sup>67</sup>, and also
- dismiss any member of the municipal civil service who has failed to carry out his or her tasks impartially and justly, respecting and acting in accordance with the applicable law<sup>68</sup>.

#### (5) KFOR

The highest and untouchable authority<sup>69</sup> in Kosovo, even in the area of local self-government, remains the Commander of the Kosovo Force (KFOR)<sup>70</sup>. One of his main tasks is to protect the physical existence of minorities.

<sup>60</sup> Section 48.3 UNMIK/REG/2000/45.

<sup>61</sup> Section 49.1 UNMIK/REG/2000/45.

<sup>62</sup> Section 49.2 UNMIK/REG/2000/45.

<sup>63</sup> Prevailing other provisions, Section 53 UNMIK/REG/2000/45; also Chapter 12 UNMIK/REG/2001/9; in the context of the rule of law see Schluetter, Birgit, *Rechtsstaatlichkeit der UN-Verwaltungsherrschaft in Kosovo, Südosteuropa*, 2001, 303-323, also Wagner, Markus, *Das erste Jahr der UNMIK – Die Organisation der Zivilverwaltung im Kosovo*, Vereinte Nationen, 2000, 132, 137.

<sup>64</sup> Section 47.2 UNMIK/REG/2000/45.

<sup>65</sup> Section 47.3 UNMIK/REG/2000/45.

<sup>66</sup> The limiting element "exceptionally" in Section 47.4 UNMIK/REG/2000/45 (may be unnecessarily) recalls the principle of proportionality.

<sup>67</sup> Section 47.5 UNMIK/REG/2000/45.

<sup>68</sup> Section 47.10 UNMIK/REG/2000/45.

<sup>69</sup> See also Chapter 13 UNMIK/REG/2001/9!

<sup>70</sup> Chapter 10 UNMIK/REG/2000/45.

### 3. Constitution<sup>71</sup>

The consideration of the preamble of the new constitution<sup>72</sup> towards a life in freedom and peace embraces minorities, referring to the Universal Declaration on Human Rights and a string of Human Rights Charters, Covenants and Conventions<sup>73</sup>. At the same time the preamble is upholding “the rights of all Communities of Kosovo and their members” and aiming at “the participation of all persons including all members of Communities in the process of establishing democratic institutions of self-government”. The constitution finally guarantees “all persons in Kosovo” human rights and fundamental freedoms without discrimination on any ground and in full equality<sup>74</sup>. It furthermore ensures all communities the rights to preserve, protect and express their ethnic, cultural, religious, and linguistic identities<sup>75</sup>. As explained already earlier this provision builds up rights not for the communities but for the members of communities and therefore – as finally everybody is belonging to some ethnic or religious or linguistic group – for all persons in Kosovo!

This finding is strengthened by the constitutional statements that

- “no person shall be obliged to declare to which Community he belongs, or to declare himself a member of any Community” without any fear of disadvantage resulting “from an individual’s exercise of the right to declare or not declare himself a member of a Community”<sup>76</sup> while

- the organs of the constitution (the Provisional Institutions of Self-Government) are mandated to promote coexistence and support reconciliation between Communities, to enable Communities to preserve, protect and develop their identities and to promote the preservation of Kosovo’s cultural heritage of all Communities without discrimination<sup>77</sup> and

- communities and their members shall have the same rights<sup>78</sup>.

#### a) Constitutional rights<sup>79</sup>

These constitutional rights of communities and their members are to

<sup>71</sup> For detailed information see Schwarz, Axel, Die Verfassung des Kosovo, Europa-Blätter 2002, 84 –93.

<sup>72</sup> UNMIK/REG/2001/9, 15 May 2001, On a Constitutional Framework for Provisional Self-Government in Kosovo.

<sup>73</sup> As well as Paragraph 3.2 UNMIK/REG/2001/9. Additionally states Paragraph 3.3 UNMIK/REG/2001/9 that the provisions on rights and freedoms are directly applicable.

<sup>74</sup> Paragraph 3.1 UNMIK/REG/2001/9.

<sup>75</sup> Paragraph 4.1 UNMIK/REG/2001/9.

<sup>76</sup> Paragraph 4.2 UNMIK/REG/2001/9.

<sup>77</sup> Paragraph 4.3 UNMIK/REG/2001/9.

<sup>78</sup> Paragraph 4.4 UNMIK/REG/2001/9.

<sup>79</sup> See also TEXT OF THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES / Council of Europe, <[http://www.coe.int/T/E/human\\_rights/minorities/](http://www.coe.int/T/E/human_rights/minorities/)>; Lord Russel-Johnston, The Rights of Minorities and the Activities of the Council of Europe

- (a) use their language and alphabets, also before courts and public bodies;
- (b) receive education in their own language;
- (c) enjoy access to information in their own language;
- (d) enjoy equal opportunity with respect to employment in public bodies at all levels and with respect to access to public services at all levels;
- (e) enjoy unhindered contacts among themselves and with members of their respective Communities within and outside of Kosovo;
- (f) use and display Community symbols, subject to the law;
- (g) establish associations to promote the interests of their Community;
- (h) enjoy unhindered contacts with, and participate in, local, regional and international non-governmental organizations;
- (i) provide information in the language and alphabet of their Community, including by establishing and maintaining their own media;
- (j) provide for education and establish educational institutions, e.g. schooling in their own language and alphabet and in Community culture and history (with financial assistance also from the public) respecting the applicable law, the human rights and the cultural traditions of all Communities and reflecting a spirit of tolerance among Communities;
- (k) promote respect for Community traditions;
- (l) preserve sites of religious, historical, or cultural importance to the Community, in cooperation with relevant public authorities;
- (m) receive and provide public health and social services, on a non-discriminatory basis, in accordance with applicable standards;
- (n) operate religious institutions;
- (o) be guaranteed access to, and representation in, public broadcast media, as well as programming in relevant languages; and
- (p) finance their activities by collecting voluntary contributions from their members or from organizations outside Kosovo, or by receiving such funding as may be provided by the Provisional Institutions of Self-Government or by local public authorities, so long as such financing is conducted in a fully transparent manner.

## b) Institutional protection

In principle each member of the Assembly has equal rights to participate on an equal basis in the Assembly<sup>80</sup> while their immunity does not cover acts that are clearly conducive to inter-Community violence<sup>81</sup>. All constitutional organs<sup>82</sup>, i.e. the Assembly, the President of Kosovo, the Government, the Courts and the other

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for their Protection, *Humanitäres Völkerrecht – Informationsschriften*, 2000, 220; Gaetano Pentassuglia, *The EU and the Protection of Minorities: The Case of Eastern Europe*, *EiJL*, 2001, 3.

<sup>80</sup> Paragraph 9.1.23 UNMIK/REG/2001/9.

<sup>81</sup> Paragraph 9.1.24 UNMIK/REG/2001/9.

<sup>82</sup> Provisional Institutions of Self-Government Paragraph, 1.5 UNMIK/REG/2001/9.

constitutional bodies and institutions, are obliged to ensure the exercise of the rights of all Communities and their members as well as the fair representation of Communities in employment in public bodies at all levels<sup>83</sup>. They are controlled by the SRSG who also in this field retains the highest authority (Reserved Power<sup>84</sup>). He can intervene at any time whenever he thinks it to be necessary in order to protect the rights of Communities and their members<sup>85</sup>. Further provisions aim at a special protection.

### (1) Mass media

All constitutional organs have to prevent defamation or hate speech<sup>86</sup>. The independent media commission must reflect the ethnic and regional diversity of Kosovo society<sup>87</sup>. In order to guarantee the independence of the public broadcaster the same is determined for its Board<sup>88</sup>.

### (2) Assembly

The composition of the Assembly protects the minorities in a double way. One hundred of its 120 seats are distributed amongst all parties, coalitions, citizens' initiatives, and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly<sup>89</sup>. But the minorities are not only represented in this way concerning the outcome of the election. They dispose of further twenty of the 120 seats reserved for their additional representation<sup>90</sup>. Ten out of these twenty seats are allocated to self-declared representatives of Serb Communities<sup>91</sup>. The remaining ten seats are distributed among Roma, Ashkali and Egyptian Communities (four seats), the Bosniak Community (three seats), the Turkish Community (two seats) and the Gorani Community (one seat)<sup>92</sup>.

### (3) Presidency of the Assembly

Five of the seven members of the Presidency of the Assembly are appointed corresponding to the number of votes obtained in the Assembly elections<sup>93</sup>. Regardless of the number of votes obtained in the Assembly elections one additional

<sup>83</sup> Paragraph 4.5 UNMIK/REG/2001/9.

<sup>84</sup> "Full authority to ensure that the rights and interests of Communities are fully protected", Paragraph 8.1 (a) UNMIK/REG/2001/9.

<sup>85</sup> Paragraph 4.6 UNMIK/REG/2001/9.

<sup>86</sup> Paragraph 5.4 (a) UNMIK/REG/2001/9.

<sup>87</sup> Paragraph 5.4 (b) UNMIK/REG/2001/9.

<sup>88</sup> Paragraph 5.4 (c) UNMIK/REG/2001/9.

<sup>89</sup> Paragraph 9.1.3 (a) UNMIK/REG/2001/9.

<sup>90</sup> Paragraph 9.1.3 (b) UNMIK/REG/2001/9.

<sup>91</sup> Paragraph 9.1.3 (b) i. UNMIK/REG/2001/9.

<sup>92</sup> Paragraph 9.1.3 (b) ii. UNMIK/REG/2001/9.

<sup>93</sup> Paragraph 9.1.7 (a) – (c) UNMIK/REG/2001/9.

member (out of the Assembly members) has to be appointed from the self-declared representatives of Serb Communities<sup>94</sup> and one further member from the self-declared representatives of a non-Kosovo Albanian and non-Kosovo Serb Community<sup>95</sup>.

#### (4) Committees

A special "Committee on Rights and Interests of Communities" is equipped with its own right to address recommendations or proposals to the Assembly or other committees<sup>96</sup>. Furthermore it has its own right to initiate laws and such other measures, as it deems appropriate to address the concerns of Communities<sup>97</sup>. Each of its members has the right to attach a written opinion to any proposed law referred to or taken up by the committee<sup>98</sup>. This committee is composed of two members from each Community represented in the Assembly or at least one member in case that a community is represented by only one member in the Assembly<sup>99</sup> which means that the non-Kosovo Albanian Communities can rely on a comfortable majority. The positive discrimination in favour of the minorities in Kosovo can also be found in the composition of

- the Functional Committees whose membership shall reflect the diversity of the membership of the Assembly<sup>100</sup> at least through an observer capacity<sup>101</sup>,
- the proportionally distributed chairmanships of all Committees with two Vice-Chairmen from different parties or coalitions than that of the Chairman while at least one Vice-Chairman must be of a different Community than the Chairman<sup>102</sup>.

#### (5) Assembly procedure for adopting laws

In the procedure for adopting laws any member of the Assembly, supported by five additional members, may submit a motion to the Presidency claiming that the law or certain of its provisions violate vital interests of the Community to which he belongs<sup>103</sup>. Possible reasoning<sup>104</sup> can be that the law or provisions

- discriminate against a Community,
- adversely affect or violate rights of the Community and their members,

<sup>94</sup> Paragraph 9.1.7 (d) UNMIK/REG/2001/9.

<sup>95</sup> Paragraph 9.1.7 (e) UNMIK/REG/2001/9.

<sup>96</sup> Paragraphs 9.1.13 – 9.1.14 UNMIK/REG/2001/9.

<sup>97</sup> Paragraph 9.1.15 UNMIK/REG/2001/9.

<sup>98</sup> Paragraph 9.1.16 UNMIK/REG/2001/9.

<sup>99</sup> Paragraph 9.1.12 UNMIK/REG/2001/9.

<sup>100</sup> Paragraph 9.1.19 UNMIK/REG/2001/9.

<sup>101</sup> Paragraph 9.1.20 UNMIK/REG/2001/9.

<sup>102</sup> Paragraphs 9.1.21 and 9.1.22 UNMIK/REG/2001/9.

<sup>103</sup> Within 48 hours from the approval of a law by the Assembly, Paragraph 9.1.39 UNMIK/REG/2001/9.

<sup>104</sup> Within three days on request by the Presidency, Paragraph 9.1.40 UNMIK/REG/2001/9.

- violate Human Rights or
- otherwise seriously interfere with the ability of the Community to preserve, protect or express its ethnic, cultural, religious or linguistic identity.

If the Presidency does not succeed to get a consensus proposal within the five-day period, a special three-member Panel<sup>105</sup> will automatically be seized of the matter. The Panel issues a recommendation within five days<sup>106</sup> to the assembly which finally decides on the matter<sup>107</sup>. The last control is effected by the SRSG before he will promulgate the law<sup>108</sup>.

#### (6) Government

At all times, at least two Ministers from minorities must belong to the Government<sup>109</sup>, at least one of these from the Kosovo Serb Community and one from another Community and in the case of more than twelve Ministers, also a third Minister from a non-majority Community<sup>110</sup>.

In the selection process parties, coalitions or groups representing non-majority Communities exercise their influence through consultations concerning the ministers and their responsibilities. Minorities' ministers from outside the Assembly require the formal endorsement of the members of the Assembly from the concerned minority<sup>111</sup>. Also the immunity of members of the government does not cover acts that are clearly conducive to inter-Community violence<sup>112</sup>.

#### (7) Judiciary

The membership of the judiciary shall reflect the diversity of the people of Kosovo<sup>113</sup>. Also minority members of the Assembly, either as a group of no fewer than five or as members of the Presidency of the Assembly, any Assembly Committee or the Government may have recourse to the Special Chamber of the Supreme Court on the enumerated constitutional matters<sup>114</sup>.

<sup>105</sup> Consisting of representatives of the two sides and one member, who shall preside, designated by the SRSG, Paragraph 9.1.41 UNMIK/REG/2001/9.

<sup>106</sup> Recommending that the Assembly reject the motion, the law or provisions at issue, or adopt the law with amendments that the Panel proposes.

<sup>107</sup> Paragraphs 9.1.42 and 9.1.43 UNMIK/REG/2001/9.

<sup>108</sup> Paragraphs 9.1.44 and 9.1.45 UNMIK/REG/2001/9.

<sup>109</sup> Consisting of the Prime Minister and Ministers, Paragraph 9.3.4 UNMIK/REG/2001/9.

<sup>110</sup> Paragraph 9.3.5 UNMIK/REG/2001/9. The selection of these Ministers and their responsibilities shall be determined after consultation with parties, coalitions or groups representing non-majority Communities.

<sup>111</sup> Paragraph 9.3.6 UNMIK/REG/2001/9.

<sup>112</sup> Paragraph 9.3.19 UNMIK/REG/2001/9.

<sup>113</sup> Paragraph 9.4.7 UNMIK/REG/2001/9. Special rules are valid for international judges and prosecutors.

<sup>114</sup> Paragraph 9.4.11 UNMIK/REG/2001/9.

## (8) Ombudsperson

The Ombudsperson deals with complaints concerning human rights violations or actions constituting abuse of authority by any public authority in Kosovo<sup>115</sup>. He has jurisdiction to receive and investigate complaints, monitor, take preventive steps, make recommendations and advise on any such matters<sup>116</sup> especially in cases of severe or systematic violations, allegations founded on discrimination, including discrimination against Communities and their members, and allegations of violations of rights of Communities and their members<sup>117</sup>.

### 4. Languages

Kosovo may be called a Babel of languages. The "Babelisation" of Kosovo is also reflected in the quality of colourful translations that often do not match the original text. The Albanian translation e.g. of the below mentioned rule concerning the official signs of cities, towns, villages, roads and so on contains an additional 10% clause as a condition that minorities can request a name in their own language<sup>118</sup>. Besides the European Charter for Regional or Minority Languages<sup>119</sup> many other rules are to be applied.

### a) In the civil service

Public Authorities must advertise available positions in Albanian and Serbian<sup>120</sup>. The Independent Oversight Board for Kosovo (Board) publishes its report on the civil service in Kosovo in Albanian, Serbian and English<sup>121</sup>.

### b) In the local self-government

Members of communities shall have the right to communicate in their own language with all municipal bodies and all municipal civil servants<sup>122</sup>. In theory then, practically all municipalities in Kosovo are challenged to deal with the languages of Albanians, Serbs, Romas, Ashkalis, Egyptians, Bosniaks, Turks and Goranis. Meetings of the Municipal Assembly, its committees and public meetings must be conducted in Albanian and Serbian and in case of the existence of other communities also in the language of that community<sup>123</sup>. Correspondingly the same is valid for

- the printing of all official documents of a municipality<sup>124</sup> and

<sup>115</sup> Paragraph 10.1 UNMIK/REG/2001/9.

<sup>116</sup> Paragraph 10.2 UNMIK/REG/2001/9.

<sup>117</sup> Paragraph 10.3 UNMIK/REG/2001/9.

<sup>118</sup> This clause is not to be found in the original English text of Section 9.4 UNMIK/REG/2000/45

<sup>119</sup> Preamble and Paragraph 3.2 (g) UNMIK/REG/2001/9.

<sup>120</sup> Section 3.1 UNMIK/REG/2001/36.

<sup>121</sup> Section 14.2 UNMIK/REG/2001/36.

<sup>122</sup> Section 9.1 UNMIK/REG/2000/45.

<sup>123</sup> When necessary, Section 9.2 UNMIK/REG/2000/45.

– official signs indicating or including the names of cities, towns, villages, roads, streets and other public places<sup>125</sup>.

Finally the Statute of a municipality shall make detailed provisions for the use of languages of communities taking into consideration the composition of communities in the municipality<sup>126</sup>.

### c) In the Constitution

The meetings of the Assembly and its Committees<sup>127</sup> as well as of the Government and its bodies<sup>128</sup> must be conducted in Albanian and Serbian and all official documents of the Assembly as well as of the Government shall be printed in both of these languages. Official documents on a specific Community shall be made available also in the language of that Community<sup>129</sup>. Minority members of the Assembly are permitted to address the Assembly or its Committees and to submit documents for consideration by the Assembly in their own language<sup>130</sup>. All laws<sup>131</sup> promulgated by the Assembly shall be published in five languages (Albanian, Bosniak, English, Serbian and Turkish) whereas for the still possible UNMIK-Regulations by the SRSG the publication in three languages (Albanian, English, Serbian) is sufficient, except the Constitutional Framework which has to be published also in Bosniak and Turkish. But also in this, like in any other case, the English language version prevails<sup>132</sup>. Members of the Government from Communities other than the Kosovo Albanian and Kosovo Serb Communities are permitted to use their own language<sup>133</sup>.

## III. Conclusions

### 1. Minority Languages

Clairvoyant capacities are evidently not necessary to recognise that the intended consequences of the language-related provisions will not meet their goal of an equal treatment of all eight or (including English) nine possible languages. In the future nobody will be ready or even able to provide the cost for all the necessary translations. In the first three years of UNMIK's world not even the prescribed re-

<sup>124</sup> Section 9.3 UNMIK/REG/2000/45.

<sup>125</sup> Section 9.4 UNMIK/REG/2000/45.

<sup>126</sup> Section 9.5 UNMIK/REG/2000/45.

<sup>127</sup> Paragraph 9.1.49 UNMIK/REG/2001/9.

<sup>128</sup> Paragraph 9.3.17 UNMIK/REG/2001/9.

<sup>129</sup> Paragraph 9.1.49 UNMIK/REG/2001/9.

<sup>130</sup> Paragraph 9.1.50 UNMIK/REG/2001/9.

<sup>131</sup> Paragraph 9.1.51 UNMIK/REG/2001/9.

<sup>132</sup> Paragraph 14.4 UNMIK/REG/2001/9.

<sup>133</sup> Paragraph 9.3.18 UNMIK/REG/2001/9.

quirement to translate the regulations into the three languages Albanian, Serbian and English have been fulfilled in a sufficient way. The system will continue as before: the laws will enter into force as soon as the original version has finished, but the first translation will only follow some months later, the further translations even later and hardly anybody will know that the translations are available at all. In this way the effect of the language rules will be negative, by

- discriminating again the members of the minority languages, and
- raising questions of validity and responsibility.

This negative impact of rules that were intended to produce some good effects for the social identity of the different ethnicities might be considered a minor point. Unfortunately this is not the only case which contributes to the assessment of a virtual world consisting of rules without reflection in the facts.

## 2. Ethnic Minorities in Kosovo

The executive summary of the Tenth Assessment of the Situation of Ethnic Minorities in Kosovo, provided by OSCE (Mission in Kosovo) and UNHCR,<sup>134</sup> reaches the conclusion that the existing conditions do not (yet) allow a large-scale return of ethnic minorities in the near future. It furthermore underscores the continuing need for international protection for members of ethnic communities, in particular Kosovo Serbs, Roma, Ashkaelia and Egyptians. The main reasons for this are found among others in

- limitations on freedom of movement for minority communities,
- parallel structures in the justice of northern municipalities,
- limited security for minority students,
- no Community Proportional Representation in the Civil Service,
- limited co-operation and flow of information between Centres for Social Work employees working in majority and minority areas,
- parallel healthcare systems,
- no significant development on some of the areas regarding housing and property rights as they relate to minority communities and
- illegal construction and illegal use of agricultural and residential land of minority property right holders.

To overcome this situation a series of measures are suggested. Among these one can also find

- the acknowledgement that activities related to inter-ethnic dialogue and tolerance-building are key factors as well as
- the strong recommendation to intensify active involvement in such activities throughout Kosovo.

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<sup>134</sup> March 2003, <<http://www.osce.org/kosovo/documents/reports/minorities>>.

Unfortunately this point remains rather abstract and is not supported by concrete proposals how to realize the lacking feeling of being a member of the same society.

### 3. Encouraging Separation

UNMIK announces an official commitment to multiculturalism. Canada and Australia tried the same<sup>135</sup>. Canada gave up its efforts to maintain and promote cultural and ethnic distinction.<sup>136</sup> Australia has never followed the Canadian way but preferred a multiculturalism which is determined to facilitate integration rather than to encourage diversity. The described UNMIK-Regulations will have exactly this effect of ethnic separation. The important and heroic goal to build a system that allows a number of different communities to live together and in peace cannot be reached by such norms. The main problem is not that all members of the different communities should have the same rights to express themselves and to preserve their own history and tradition. These rights find their borderlines when rights of members of other communities are touched. Most judges today know how to find a good balance between the different interests and rights in conflict situations. But the point is, that people must be ready to live together in a kind of co-operation agreement<sup>137</sup> and to accept that the borders of their own rights are limited by the rights of others. This leads to a consensus on the substance of Kosovar identity or culture. UNMIK's multiculturalism supports the contrary, namely a definition of each ethnic community as a distinct collective entity. By doing so it encourages separation, strengthens barriers to upward social mobility and maintains the present state, where Kosovo looks like a big zoo with KFOR gamekeepers and UNMIK administrators. The prompts and incentives for common ground are too weak. Only the preamble and paragraph 5.7 UNMIK/REG/2001/9 talk of "the people of Kosovo" and Paragraph 9.2.1 UNMIK/REG/2001/9 calls the President of Kosovo the representative of its unity. In spite of all EU-efforts the potential for disappointments remains considerable<sup>138</sup>. The present system will be suspicious of any efforts by the new government to develop a unique Kosovo. UNMIK's virtual world will be uphold, where rules are something other than what they seem to be.

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<sup>135</sup> Birch, note 7, 25–28.

<sup>136</sup> For activities in multiculturalism see: <[http://www.pch.gc.ca/pc-ch/sujets-subjects/divers-multi/multi/index\\_e.cfm](http://www.pch.gc.ca/pc-ch/sujets-subjects/divers-multi/multi/index_e.cfm)>.

<sup>137</sup> See Göllner, Ralf Thomas, *Pluralistische Demokratie und Minderheitenschutz, Südosteuropa*, 2001, 386, 400.

<sup>138</sup> Wittkowsky, Andreas, *Südosteuropa und die Europäische Union – Stabilität durch Integration, Südosteuropa*, 2000, 157, 173.