



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO  
**GJYKATA KUSHTETUESE**  
**УСТАВНИ СУД**  
**CONSTITUTIONAL COURT**

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Prishtina, 16 March 2015  
Ref.no.: AGJ 782/15

## **JUDGMENT**

in

**Case No. KO13/15**

**Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by fifty five Deputies of the Assembly of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 6 February 2015 by letter No. 05-259/DO-179**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

Enver Hasani, President  
Ivan Čukalović, Deputy-President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge and  
Arta Rama-Hajrizi, Judge

#### **The Applicant**

1. On 6 February 2015 the President of the Assembly of the Republic of Kosovo (hereinafter: the "Applicant"), in accordance with Articles 113.9 and 144.3 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), referred an Amendment to the Constitution to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court"), proposed by fifty five (55) Deputies of the Assembly of the Republic of Kosovo (hereinafter: the "Deputies").

## **Subject matter**

2. The subject matter of the Referral is the prior assessment by the Court that the proposed Amendment to the Constitution does not diminish any of the rights and freedoms guaranteed by Chapter II of the Constitution according to Article 113.9 of the Constitution.
3. The proposed Amendment is for a new paragraph 8 to Article 96 [Ministers and Representation of Communities]. It states: *“8. None of the genders can be represented less than 40% in the positions of ministers and deputy ministers of the Government of the Republic of Kosovo.”*

## **Legal basis**

4. The Referral is based on Articles 113.9 and 144.3 of the Constitution and Articles 20 and 54 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the “Law”).

## **Proceedings before the Court**

5. On 6 February 2015 the Applicant referred the Amendment to the Court.
6. On 6 February 2015 the President of the Court, by Decision No. GJR. KO13/15, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, by Decision No. KSH. KO13/15, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.
7. On 10 February 2015 the Court notified the Applicant of the registration of the Referral and requested him to provide a comprehensive list of all the names of the Deputies and their signatures. The Court also asked the Applicant to provide a copy of the notification to each of the Deputies who had signed the Referral and to submit, if they wished, further comments.
8. On 10 February 2015 a copy of the Referral was communicated to the President of the Republic of Kosovo, the Prime Minister and the Ombudsperson.
9. On 13 February 2015 the Applicant submitted the requested list signed by the following Deputies: Alma Lama, Shpejtim Bulliqi, Emilija Redžepi, Veton Berisha, Teuta Sahatqija, Doruntinë Maloku, Vjosa Osmani, Lirije Kajtazi, Synavere Rysha, Besa Gaxheri, Njomza Emini, Shaip Muja, Armend Zemaj, Antoni Quni, Agim Kikaj, Fatmir Limaj, Valdete Bajrami, Shukrije Bytyqi, Haxhi Shala, Zafir Berisha, Sala Berisha Shala, Luljeta Veselaj Gotaj, Nait Hasani, Melihate Tërmkolli, Fadil Beka, Teuta Haxhiu, Fikrim Damka, Müfera Şinik, Time Kadrijaj, Puhie Demaku, Aida Dërguti, Shqipe Pantina, Besa Baftija, Mexhide Mjaku Topalli, Xhevahire Izmak, Nuredin Ibishi, Ganimete Musliu, Pal Lekaj, Rexhep Selimi, Bekim Haxhiu, Kujtim Pacaku, Qerim Bajrami, Danush Ademi, Enver Hoti, Mytaher Haskuka, Fisnik Ismaili, Glauk Konjufca, Berta Deliu Kodra, Blerim Grainca, Blerim Shala, Labinote Demi Murtezi, Naser Osmani, Hatim Baxhaku, Ilir Deda, Teuta Rugova.

10. No comments by the Deputies were submitted in response to the notification of the Court of 10 February 2015.
11. On 10 March 2015 the Judge Rapporteur presented the Report to the Review Panel. The Review Panel endorsed it and unanimously recommended to the full Court the Referral to be declared admissible for consideration and to declare that the proposed Amendment diminishes the rights and freedoms guaranteed by Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case law.
12. On the same date, the Court deliberated and voted on the case.
13. Judge Kadri Kryeziu did not participate in the Court's proceedings and ruling on the current Case KO13/15 based on the decision KK124/14 of 19 August 2014.

### **Summary of facts**

14. On 29 December 2014 the Deputies, pursuant to Article 144 [Amendments], paragraph 1, of the Constitution, proposed to the President of the Assembly one Amendment to the Constitution.
15. On 6 February 2015 the President of the Assembly referred to the Court the Amendment to the Constitution, requesting the Court to make a prior assessment whether the proposed Amendment diminishes any of the rights and freedoms set forth in Chapter II of the Constitution.

### **Admissibility of the Referral**

16. In order for the Court to adjudicate the Applicant's Referral it is necessary to examine whether the Applicant has fulfilled the admissibility requirements as laid down in the Constitution and as further specified in the Law.
17. Firstly, the Court needs to determine whether the Referral has been submitted by an authorized party and, secondly, whether it has jurisdiction to assess the Amendment to the Constitution proposed by the Deputies according to Article 113.9 of the Constitution.
18. The Court recalls that, pursuant to Article 113.9 of the Constitution, *"The President of the Assembly of Kosovo refers proposed Constitutional Amendments [...]"*,
19. The Court notes that the President of the Assembly, Mr. Kadri Veseli, referred the proposed Amendment and, accordingly, it was submitted by the authorized party, pursuant to Article 113.9 of the Constitution.
20. Further, the Court recalls that, pursuant to the same Article 113.9, it has *"[...] to confirm that the proposed Amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution"*.

21. Consequently, the Court has jurisdiction to assess whether the proposed Amendment diminishes the rights and freedom guaranteed by Chapter II of the Constitution.
22. Therefore, since it is referred by the authorized party and the Court has jurisdiction to adjudicate the case, the Referral is admissible.

### **Scope of the assessment**

23. The scope of the assessment of the proposed Amendment is based on Chapter II [Fundamental Rights and Freedoms], Chapter III [Rights of Communities and their Members] and the letter and spirit of the Constitution (See, Cases Nos. KO29/12 and KO48/12, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 20 July 2012; see, also Case No. KO61/12, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 31 October 2012).
24. The Court, in addition, considers that Article 21 [General Principles] of the Constitution should be read in conjunction with Article 7 [Values], paragraph 1, of the Constitution. The latter Article defines the values of the constitutional order of the Republic of Kosovo which is based *"on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of the law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers and a market economy."*

### **Proposed Amendment: new paragraph 8 to Article 96 of the Constitution**

25. The Amendment is proposed to be a new paragraph after paragraph 7 of Article 96 [Ministries and Representation of Communities] of the Constitution, reading as follows:

*"8. None of the genders can be represented less than 40% in the positions of ministers and deputy ministers of the Government of the Republic of Kosovo."*

### **Reasons for the proposed Amendment**

26. The Deputies allege that, so far, women in the postwar governments were not represented more than 10-15 % in ministerial positions, although the women/men ratio of the population is 50 % to 50 %. Based on that, they consider that *"[...] there is a necessity to introduce gender quota in the executive branch as an affirmative mechanism to change the serious situation of discrimination."* According to them, Article 24 [Equality Before the Law], paragraph 3, of the Constitution justifies the affirmative measures that should be taken towards *"the less represented groups"*.
27. The Deputies consider that the imposition of gender quota in the Constitution constitutes an obligation, which the Government cannot ignore, and which is similar to the guarantees that the Constitution provides to minorities.



28. According to the Deputies, the negative experience of the non-implementation of Law No. 2004/2 on Gender Equality of 19 February 2004, which includes all institutions and leading bodies, is another reason for this norm to be a constitutional norm and for the Constitution to be a guarantor thereof.
29. The Deputies further hold that the proposed Amendment is in compliance with the objectives of Resolution No. 04-R-09 of the Assembly of Kosovo, adopted on 20 December 2012. The Resolution is entitled: *"Prishtina Principles emerging from the International Women's Summit: 'Partnership for Change: Empowering Women'"*, held in Prishtina on 4-6 October 2012. They quote paragraph 4 of the Resolution, which states:

*"4. Encourages the institutions of the Republic of Kosovo to undertake concrete measures and establish local and international partnerships with relevant institutions to fulfill the objective of women's participation in civil service by fifty percent until 2050."*

### **Assessment of the proposed Amendment**

30. The proposed Amendment will be reviewed by the Court in accordance with the above defined scope of assessment.
31. The Court notes that the proposed Amendment to Article 96 of the Constitution contains two elements. The first one is to introduce a gender quota of forty percent (40 %), which according to the Deputies is equivalent to proportional representation of the population. The second one is about the forty percent (40 %) quota applicable only to the Ministerial and Deputy Ministerial positions in the Government.
32. The Court further notes that the proposed Amendment, as reasoned by the Deputies, may be considered as a qualified form of positive discrimination or affirmative action, whereby the preference is automatically and unconditionally given to women, notwithstanding the requirement of professional qualifications.
33. Moreover, the nature of the positive discrimination or affirmative action, in general is temporary, until a certain goal has been achieved as per Article 24.3 of the Constitution. On the other hand, any constitutional norm is perceived to be of a permanent nature, in order to ensure a stable constitutional and legal order. This is in compliance with the principle of legal certainty.
34. The Court also notes that the scope of the present Article 96 of the Constitution extends to the non-majority communities, such as the *"Serb, Roma, Ashkali, Egyptian, Bosnian, Turkish, Goran Communities and their members"*, which evidently include male and female members.
35. Therefore, the proposed Amendment needs to be considered in the context of the rights to these communities guaranteed by the Constitution.

36. As noted previously, the scope of the application of the proposed Amendment applies only to Ministerial and Deputy Ministerial positions within the Government.
37. The Court notes that, while Chapter I [Basic Provisions] of the Constitution defines the structure of the state of the Republic of Kosovo and its values, Article 3 [Equality Before the Law], paragraph 2, of the Constitution provides that: *“The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members”* Therefore, it is for the state bodies to establish appropriate mechanisms for the implementation of the guaranteed rights of the citizens.
38. The Court also recalls that, in particular, Article 7 [Values] of the Constitution stipulates that:
- “1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.*
- 2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.”*
39. From the above provisions, it stems that equality, non-discrimination and gender equality, *inter alia*, are part of the constitutional order and constitutes the democratic foundation of the Kosovo society. Their practical implementation is of vital importance for the enhancement of the democracy in Kosovo.
40. In order to make a full assessment of the proposed Amendment, the Court takes also into account the international instruments envisaged in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, related to the safeguards of human rights and fundamental freedoms.
41. Namely, Article 22 of the Constitution provides:
- “Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:*
- (1) *Universal Declaration of Human Rights;*

(2) *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;*

(3) *International Covenant on Civil and Political Rights and its Protocols;*

[...]

(6) *Convention on the Elimination of All Forms of Discrimination Against Women;*

[...]"

42. The abovementioned international agreements and instruments that guarantee human rights and fundamental freedoms, including the principle of equality, are part of the legal order of the Republic of Kosovo.
43. The Court reiterates that the principle of equality is one of the fundamental principles of the constitutional system of the Republic of Kosovo and guarantees gender equality of all citizens in its constitutional and legal order.
44. There are further references to the gender equality in the Constitution. Namely,
- a. Article 71 [Qualification and Gender Equality], paragraph 2, of the Constitution: *"The composition of the Assembly of Kosovo shall respect internationally recognized principles of gender equality."*
  - b. Article 101 [Civil Service], paragraph 1, of the Constitution: *"The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality."*
  - c. Article 104 [Appointment and Removal of Judges], paragraph 4, of the Constitution: *"The composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality."*
  - d. Article 108 [Kosovo Judicial Council], paragraph 2, of the Constitution: *"[...] The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law."*
  - e. Article 108 [Kosovo Judicial Council], paragraph 4, of the Constitution: *"Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law."*

- f. Article 109 [State Prosecutor], paragraph 4, of the Constitution: *“The State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality.”*
  - g. Article 110 [Kosovo Prosecutorial Council], paragraph 1, of the Constitution: *“[...] The Kosovo Prosecutorial Council shall ensure that the State Prosecutor is independent, professional and impartial and reflects the multiethnic nature of Kosovo and the principles of gender equality.”*
  - h. Article 110 [Kosovo Prosecutorial Council], paragraph 3, of the Constitution: *“Proposals for appointments of prosecutors must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the relevant territorial jurisdiction.”*
  - i. Article 114 [Composition and Mandate of the Constitutional Court], paragraph 1, of the Constitution: *“[...] Principles of gender equality shall be respected.”*
45. The abovementioned constitutional safeguards of the gender equality are in line with many constitutions of democratic countries and international instruments and recommendations.
  46. In this respect, the Constitution of the Republic of Bulgaria in its Article 6 (2) provides: *“[...] There shall be no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status.”*
  47. The Constitution of the Republic of Cyprus in its Article 28 (2) stipulates that: *“Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution.”*
  48. The Constitution of the Czech Republic includes the concept of equality and the principle of non-discrimination in its Article 3 [Charter of Fundamental Rights and Freedoms], reading: *“Everyone is guaranteed the enjoyment of fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.”*
  49. The Constitution of the Republic of Latvia in its Article 91 provides in part: *“Human rights shall be realised without discrimination of any kind.”*



50. The Constitution of the Slovak Republic in its Section 12, paragraph 2, reads as follows: *“Fundamental rights and freedoms are guaranteed to everyone in the territory of the Slovak republic regardless of sex, race, colour of skin, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or other status. No one may be harmed, preferred or discriminated against on these grounds.”*
51. The Constitution of the Republic of Slovenia in its Article 14 provides that everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance.
52. In addition, the Court refers to Recommendation Rec. (2003)3 of the Committee of Ministers of the Council of Europe on *“Balanced participation of women and men in political and public decision making”* (Adopted by the Committee of Ministers on 12 March 2003 at the 831st meeting of the Ministers' Deputies). It provides in its Chapter on Legislative and Administrative Measures, amongst others, that:

*“Member states should:*

- a. consider possible constitutional and/or legislative changes, including positive action measures, which would facilitate a more balanced participation of women and men in political and public decision making;*
- b. consider adopting legislative reforms to introduce parity thresholds for candidates in elections at local, regional, national and supra-national levels. Where proportional lists exist, consider the introduction of zipper systems;*
- c. consider action through the public funding of political parties in order to encourage them to promote gender equality;*
- d. where electoral systems are shown to have a negative impact on the political representation of women in elected bodies, adjust or reform those systems to promote gender-balanced representation;*
- e. consider adopting appropriate legislative and/or administrative measures to ensure that there is gender-balanced representation in all appointments made by a minister or government to public committees;*
- f. ensure that there is a gender-balanced representation in posts or functions whose holders are nominated by government and other public authorities;*

- g. *ensure that the selection, recruitment and appointment processes for leading positions in public decision making are gender sensitive and transparent;*
  - h. *consider taking legislative and/or administrative measures aiming at encouraging and supporting employers to allow those participating in political and public decision making to have the right to take time off from their employment without being penalised;*
  - i. *encourage parliaments at all levels to set up parliamentary committees or delegations for women's rights and equal opportunities and to implement gender mainstreaming in all their work."*
53. As seen from the above references, the Constitution of the Republic of Kosovo equally contains the internationally recognized safeguards for gender equality.
54. Based on that, the Court considers that, by introducing a gender-related quota for Ministerial and Deputy Ministerial positions, the proposed Amendment narrows the applicability of the constitutional safeguards for the gender equality. Thus, it diminishes the rights to a gender-balanced participation in public bodies.
55. Moreover, Article 96, paragraph 6, of the Constitution has to be taken into account as well. This provision clearly states that the Ministers in the first place, may be elected amongst deputies of the Assembly. Therefore, the deputies of the Assembly may apply the principle of gender equality and proportional representation while voting for Ministerial positions. The Assembly itself constitutes an entity with different gender presence. Secondly, Article 96 provides for the possibility for Ministers to be elected from qualified people who are not deputies of the Assembly, i.e. merits based nominations.
56. In this respect, the Court notes that the composition of the government reflects the political will of the Assembly, notwithstanding whether the Ministers and Deputy Ministers are public figures or qualified professionals.
57. A constitutional regulation of a gender quota for Ministerial and Deputy Ministerial positions may further, in practice, turn into a formal replacement of a person of the same gender that could diminish the rights of the other people being Deputies or qualified persons to become part of the government.
58. The European Court of Justice (See Case C-409/95, *Kalanke c Freie Hanstadt Bremen* (1995), Decision of 17 October 1995) reviewed a provision of the State of Bremen on the basis of which women had to be given priority over male candidates with equal qualifications in the event of promotion in a sector where women were under-represented. The European Court of Justice held that a provision granting women absolute priority over men for employment or promotion is not covered by the purpose of equal opportunities embraced by Directive 76/207 EEC. The problem was that the law of the State of Bremen, unlike similar German laws, did not leave the way open for exceptions in the face of a candidate's specific characteristics that could be relevant for the post.

59. Also, the Constitutional Council of France, in a decision of 1982, rejected as unconstitutional a proposal to limit the maximum percentage of either sex on the lists of candidates in municipal elections to 75 per cent. The Council considered that quotas were contrary to the constitutional principles of equality and universality which prohibited any division into categories of the electors and of the people to be elected.
60. Based on the abovementioned examples, the Court notes, *inter alia*, that it is not a common practice to have constitutional provisions regulating the participation in public bodies through gender quotas. Rather, the principle of equal opportunities for both women and men should be applied. The constitutional practice does not establish a qualified form of positive discrimination whereby preference is automatically and unconditionally based on a gender, notwithstanding the requirement of professional merit.
61. In that respect, the Court notes that the Deputies have not submitted any supporting evidence showing that the current constitutional safeguards of the principle of gender equality are insufficient to guarantee the gender equality constitutes “*a serious situation of discrimination*”. In fact, the burden of proof lies with the Deputies who have not presented a reasoned argument and pertinent relevant proof.
62. The Deputies consider that the negative experience of the non-implementation of Law No. 2004/2 on Gender Equality of 19 February 2004, which includes all institutions and leading bodies, is another reason for this norm to be a constitutional provision and for the Constitution to be a guarantor thereof.
63. In this relation, the Court wishes to refer to Article 4 [Form of Government and Separation of Power], paragraph 4, of the Constitution, which provides:

*“The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentary control.”*
64. Based on the above, the Court notes that the responsibility for implementing Law No. 2004/2 on Gender Equality lies with the Government, which is subject to the control of the Assembly, but it reiterates that it is the Assembly itself that votes and elects the government.
65. Furthermore, the Court notes that the Deputies refer to Article 24, paragraph 3, of the Constitution. However, the Court considers that the reference to this constitutional provision is unsubstantiated, as the Deputies have not justified that the proposed Amendment would be necessary to protect and advance gender equality in the Government.
66. Based on its conclusion that the Constitution provides sufficient safeguards for genders to be represented and participate in public life equally, the Court further considers that women of equal qualifications as men in Kosovo society have to be broader involved in public life and in the formation and functioning of the public bodies. This is to be achieved through the implementation of the constitutional principles, values and mechanisms.

67. For the above reasons, the Court concludes that the proposed Amendment diminishes the constitutional rights guaranteed by Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case law. Therefore, the proposed amendment is not in compliance with the Constitution.

### **FOR THESE REASONS**

The Court, pursuant to Article 113.9 and Article 144.3 of the Constitution, Article 20 of the Law and Rule 56 (a) of the Rules of Procedure, in its session held on 10 March 2015, unanimously

### **DECIDES**

- I. TO DECLARE admissible the Referral by the President of the Assembly submitted on 6 February 2015 with referred proposed Amendment to the Constitution of the Republic of Kosovo;
- II. TO DECLARE that the proposed Amendment diminishes human rights and freedoms set forth in Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court's case law;
- III. TO NOTIFY this Judgment to the Parties and to publish it in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- IV. TO DECLARE this Judgment effective immediately.

**Judge Rapporteur**

Snezhana Botusharova



**President of the Constitutional Court**

Prof. Dr. Enver Hasani