



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

Prishtina, 25 November 2019
Ref. no.:VPM 1472/19

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DECISION ON INTERIM MEASURE

in

Case No. KO203/19

Applicant

The Ombudsperson

Constitutional review of specific Articles of Law No. 06/L-114 on Public Officials

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral is submitted by the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant).

Challenged law

2. The Applicant challenges the constitutionality of specific provisions of Law No. 06/L-114 on Public Officials (hereinafter: the challenged law), published in the Official Gazette of the Republic of Kosovo (hereinafter: the Official Gazette), on 11 March 2019, and which entered into force six (6) months after its publication in the Official Gazette, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1.2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the challenged Law.

Subject matter

3. The subject matter of the Referral is the constitutional review of the aforementioned provisions of the challenged Law, which according to the Applicant's allegations are not in compliance with paragraph 2 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and other constitutional provisions regulating the status of independent constitutional institutions.
4. The Applicant regarding the status of the officials of Kosovo Forensic Agency, personnel of Kosovo Prosecutorial Council and Police of Kosovo, although not specifying the specific articles of the Constitution, raises the issue of compatibility of the provisions of the challenged Law with the constitutional principle of equality before the law and the principle of separation of the state powers.
5. In this respect, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure for "*immediate suspension of the challenged provisions, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1.2, paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6); 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68, (paragraph 8); 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and Article 85 of the [challenged law], or at least suspension of the application of these provisions in relation to the Ombudsperson*".

Legal basis

6. The Referral is based on paragraph 2, sub-paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of Law No.

03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and Rules 32, 56, and 57 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 8 November 2019, the Applicant submitted the Referral to the Court.
8. On 12 November 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
9. On 15 November 2019, the Applicant was notified about the registration of the Referral.
10. On the same date, the Referral was communicated to the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Acting Prime Minister of the Republic of Kosovo, the Acting Minister of Public Administration, the President of the Kosovo Prosecutorial Council, the Chief Executive of the Kosovo Forensic Agency and Director the Police of Kosovo, with instructions to submit comments to the Court, if any, by 29 November 2019. The Referral was also communicated to the Secretary of the Assembly of the Republic of Kosovo, who was requested to submit to the Court all relevant documents regarding the challenged Law.
11. On 19 November 2019, the Judge Rapporteur recommended to the Court the approval of interim measure. On the same date, the Court unanimously decided to approve the interim measure until 28 February 2020.

Summary of facts

12. On 2 February 2019, the Assembly of Kosovo [Decision No.06-V-312] adopted the challenged law.
13. On 11 March 2019, the challenged law was published in the Official Gazette of the Republic of Kosovo.
14. Article 86 [Entry into Force] of the challenged Law stipulates that "*This Law shall enter into force six (6) months after publication in the Official Gazette*".

Applicant's allegations

15. The Applicant challenges specific provisions of the challenged Law (Law No. 06/L-114 on Public Officials), namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68

(paragraph 8), 70 (paragraph 8)), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85.

16. The Applicant alleges that pursuant to Article 1 [Purpose], the purpose of the challenged Law is to establish the legal basis for the employment of public officials in the institutions of the Republic of Kosovo. In this regard, he alleges that the challenged Law “vests” the Government of the Republic of Kosovo (hereinafter: the Government) and the ministry responsible for public administration with powers to administer the employment issue to all state institutions including the independent institutions. This, according to him, violates the constitutional independence of the Ombudsperson Institution guaranteed by Article 132 of the Constitution which stipulates that: *“The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo”*. The Applicant builds this allegation by elaborating the alleged violations, and the role of the Government in administering the Applicant’s officials, referring to the specific provisions of the challenged Law.
17. In this regard, the Applicant first refers to paragraph 3 of Article 2 [Scope of application] of the challenged law defining “civil servants” as public officials within the civil service which also expressly includes public officials employed in the independent institutions. According to the Applicant, the violation of the Applicant’s independence, guaranteed by Article 132 of the Constitution consists in the fact that the challenged Law does not contain any specific provision regarding its personnel, to ensure the independence of the Applicant, unlike Law No. 03/L-149 on the Kosovo Civil Service, repealed by the challenged Law, and which in Article 3, paragraph 7, which expressly provided that *“During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected”* and Law No. 05/L-019 on the Ombudsperson, namely paragraph 2 of Article 32 [Personnel], which foresees that: [...] *The provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to that extend that there is no infringement of constitutional independence of the Institution”*.
18. The Applicant also refers to paragraph 1, subparagraph 1.2 and paragraph 2 of Article 5 [Definitions] of the challenged law, which defines the meaning of “other state institution” including, in this definition, independent institutions. According to him, the challenged Law and Law No. 06/L-113 on the Organization and Functioning of the State Administration *“aim at marginalizing independent institutions and bringing them under the supervision of the Government, which represents a direct interference with constitutional independence, thereby suffering a setback in terms of the separation of powers and independent institutions and the democratic functioning of the state”*.
19. The Applicant refers to Article 10 [Government] of the challenged Law stating that this Article authorizes the Government to adopt general state policies for the employment of public officials and to adopt sublegal acts based on the challenged Law but does not specify to what extent the Government can

exercise power in relation to independent institutions. He emphasizes that, given that the challenged Law makes no exception for public officials in the independent institutions, it is understood that the Government has the right to issue sublegal acts including the issues relating to the employment of public officials in the independent institutions. In this context, the Applicant states that “*the challenged law, in specific articles, concretizes the powers of the Government and the relevant ministry to issue sublegal acts on a long number of employment-related matters*”. He also links this allegation with the Judgment of the Constitutional Court KO73/16 which held, *inter alia*, that “*it could not be expected that the staff of the constitutionally independent institutions should conform in an identical manner to the system of recruitment, job classification, categorization and remuneration provided for by a legal act of general nature of the Government, or any act of the executive branch, without first taking into due account the specificities and uniqueness of the institutions in question*”.

20. The Applicant also refers to Article 11 [Department for the Management of Public Officials] of the challenged Law which defines the responsibilities of the Department for the Management of Public Officials (hereinafter: the DMPO), which provides that the DMPO has competence to request and receive from the institutions of Kosovo any information necessary for the fulfillment of its responsibilities. The Applicant also states that “*this article stipulates that every institution that employs public officials, as well as any public functionary and public official who has managerial and decision-making competences, or who has information in this field, is required to cooperate with the DMPO. According to him, this is in contradiction with Article 32, paragraph 2 of Law no. 05/L-019 on the Ombudsperson, which stipulates that the provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to that extent that there is no infringement of constitutional independence of the Institution*”.
21. The Applicant also refers to paragraph 5 of Article 14 [Human Resource Management Unit (HRMU)] of the challenged Law which stipulates that Human Resources Management Units are required to maintain an annual report on human resources management and send a copy of it to the DMPO. The Applicant considers that this provision may affect his independence by the fact that “*is required to report to the DMPO, without specifying how independent institutions should report. The absence of a provision in the law that determines the application of this law or this provision to independent institutions, calls into question the constitutionality of this provision. [...]*”.
22. With regard to other Articles of the challenged Law which the Applicant claims to be in violation of the Constitution, such as Articles 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85, the Applicant states that these Articles relate to staff plan and the human resource management system; civil service employment relationship and job

classification; admission to the civil service; transfers within the category and promotion; appointment to senior management positions; evaluation of results at work; discipline in the civil service; transfer to the civil service and related employment and public affairs matters. Bearing in mind the role of the Ombudsperson as an independent institution and the fact that the aforementioned articles of the challenged Law authorize the Government to adopt sublegal acts and Article 85 of the challenged Law on the other hand repeals any norm contrary to the challenged Law, by including the provisions of the Law on the Ombudsperson and its internal acts concerning the internal organization and systematization of jobs issued under the Law on the Ombudsperson, thereby violating the independence of the Applicant.

23. In the light of the foregoing, he refers to and cites parts of the Judgments of the Constitutional Court, such as Judgment KO73/16 of 8 December 2016 and Judgment KO171/18 of 25 April 2019 which decided on the issue of the independence of independent constitutional institutions, noting that despite the fact that the Ombudsperson has requested the Government and the Assembly to consider the abovementioned Judgments of the Constitutional Court when reviewing and adopting of the challenged Law and other related laws, with the adoption of the challenged Law, the independence of the independent institutions, namely the independence of the Ombudsperson Institution, is again questioned, thus completely disregarding the Constitution and Judgment KO 73/16 of 8 December 2016 of the Constitutional Court. The Applicant also refers to the status and legal regulation of the Ombudsperson Institution in Croatia, the principles of the Venice Commission concerning the protection and promotion of the Ombudsperson Institution, and the so-called “Paris Principles”.
24. The Applicant also complains about interference by the challenged law with the status of employees of other state institutions such as Kosovo Forensic Agency, staff of Kosovo Prosecutorial Council and the Police of Kosovo, referring to their complaints before the Ombudsperson. It states that the challenged law interferes with the employment relations of the personnel of these institutions in contravention of the specific laws governing the staffing issue of these institutions. In this regard, he invokes the principle of equality before the law and the principle of separation of powers. He claims, *inter alia*, that for some of these institutions had to be provided provisions that exclude the personnel of these institutions from the scope of the challenged Law, as is the case with the Kosovo Intelligence Agency, Kosovo Customs, Kosovo Security Force, and, judges and prosecutors.
25. Finally, the Applicant with respect to the independent constitutional institutions and other state institutions mentioned above states that “[T]he challenged law clearly shows the tendency to centralize the authority for employment, but also for the dismissal of most public officials. Exceptions to law enforcement are not entirely adequate and logical, even in some cases they constitute unequal treatment. For example, the challenged law excludes civil servants of the administration of the Assembly of the Republic of Kosovo from its scope (see Article 4, paragraph 3), while it does not exclude civil servants in the administration of system of justice institutions and independent institutions (see Article 2, paragraph 3). Such definitions of the

challenged law violate the principle of separation of powers, since it is clearly known that both the Assembly and the judiciary are separate powers from the Government, as the independent institutions”.

Regarding the request for interim measure

26. As regards the interim measure, the Applicant requests that on the basis of the abovementioned arguments, the Constitutional Court imposes an interim measure for the immediate suspension of the challenged provisions, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2, paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5) , 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85, “*or at least suspends the application of these provisions in relation to the Ombudsperson*”. The Applicant refers to Rule 55 of the Rules of Procedure of the Court laying down the conditions to be met for the imposition of an interim measure, stating that all three conditions set out are fulfilled in this case.
27. First, the Applicant considers that the arguments presented above provide a *prima facie* basis for the repeal of the challenged provisions in relation to the Ombudsperson Institution.
28. Second, if the interim measure is not approved, the functioning of the Ombudsperson Institution will be severely hampered by the constant interference of other institutions (Government of the Republic of Kosovo, Assembly of the Republic of Kosovo) in this institution. The Ombudsperson considers, with due respect, that it is necessary that this Court immediately suspends the challenged provisions, based on which other institutions may impede the effective work of the Ombudsperson Institution and its employees.
29. Third, the Ombudsperson Institution often serves as the last hope for victims of human rights violations to address these violations and to provide solutions. The inability to function properly and exercise the mandate of the Ombudsperson, as the only national human rights institution, would inevitably impede the protection of the rights and fundamental freedoms of the citizens of the Republic of Kosovo. For these reasons, the Ombudsperson considers that the adoption of an interim measure is necessary in order to ensure the proper and unimpeded function of the Ombudsperson Institution, while respecting its organizational, functional and financial independence with respect to other institutions of the Republic of Kosovo.

Assessment of the request for interim measure

30. In order to assess the request for interim measure, the Court first examines whether the Referral has fulfilled the relevant requirements, established in the Constitution and further specified in the Law and the Rules of Procedure.

31. Initially, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides that “*The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties*”.

32. In addition, the Court refers to paragraph 2, subparagraph 1 of Article 113 of the Constitution, which states that:

“2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;”

33. The Court also refers to paragraph 4 of Article 135 [Ombudsperson Reporting] of the Constitution, which provides that: “*The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution*”.

34. The Court also refers to paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which provides:

“[...]

2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages”.

[...]”

35. The Court also refers to Article 27 [Interim Measures] of the Law, which provides:

“1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.

2. The duration of the interim measures shall be reasonable and proportionate”.

36. Finally, the Court recalls Rule 57, paragraphs (4) and (6) of the Rules of Procedure, which specify:

Rule 57 (4) of the Rules of Procedure

[...] Before the Review Panel may recommend that the request for interim measures be granted, it must find that:

- (a) the party requesting interim measures has shown a *prima facie* case on the merits of the referral and, if admissibility has not yet been determined, a *prima facie* case on the admissibility of the referral;*
- (b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
- (c) the interim measures are in the public interest*
[...]

Rule 57 (6) of the Rules of Procedure

[...] If the request for interim measures has made this necessary showing either in whole or in part, the Court shall grant the request, stating the facts and the legal reasons supporting the decision and the time during which the interim measures will be effective. No decision granting interim measures may be taken unless the expiration date is specified; however, expiration dates may be extended by further decision of the Court [...].

37. The Court considers that the facts and allegations presented by the Applicant in his Referral raise a number of issues at the constitutional level that may have potential consequences on the independence and functioning of the Ombudsperson Institution, as a permanent and independent institution, established by the Constitution and mandated to protect human rights. The same applies to other independent institutions provided for by Chapter VIII [Constitutional Court] and Chapter XII [Independent Institutions] of the Constitution. Consequently, the Court considers that the Applicant has submitted a *prima facie* case on the merits of the Referral within the meaning of Rule 57, paragraph 4, item (a) of the Rules of Procedure.
38. In addition, taking into account the significance of Article 132 of the Constitution, Chapter VIII [Constitutional Court] and Chapter XII [Independent Institutions] of the Constitution, the Court considers that the application of the challenged Law, more specifically the application of the specifically challenged Articles, can potentially cause irreparable damage, and may have a direct impact on the independence of the aforementioned institutions. Accordingly, the Court considers that the Applicant has proven a risk of irreparable damage within the meaning of Rule 57, paragraph 4, item (b) of the Rules of Procedure.
39. The Court considers that the issues raised in the Referral are of such significance as to the respect and proper application of the constitutional provisions regarding the functioning of independent institutions established by the Constitution, so that the suspension of the application of the challenged provisions of the challenged Law is in the public interest. Accordingly, the Court considers that there are substantial reasons of the nature of the public

interest within the meaning of Rule 57, paragraph 4 item (c) of the Rules of Procedure, which justify the approval of an interim measure with respect to the challenged articles of the challenged Law.

40. Therefore, the Court, without prejudice to the admissibility or the merits of the Referral, concludes that the Applicant's request for interim measure with regard to the challenged Articles must be approved in order to prevent irreparable damage to the Ombudsperson Institution and other independent institutions, provided for in Chapter VIII [Constitutional Court] and Chapter XII [Independent Institutions] of the Constitution, and to protect the public interest.
41. In addition, the Court notes that the Applicant has challenged a number of Articles of the challenged Law, which are also related to other provisions of the challenged Law. The Court also notes that the Applicant raises issues related not only to the independence of the independent constitutional institutions, but also in relation to some other state institutions. Therefore, the Court considers that the suspension of the challenged provisions would have a direct impact on the application of the Law as a whole. In this case, if the challenged law is partially applied, it could potentially cause irreparable damage to a number of public institutions. Therefore, the Court finds it necessary to suspend the application of all the provisions of the challenged Law.

FOR THESE REASONS

The Court, in accordance with Article 116.2 of the Constitution, Article 27 of the Law and Rule 57 of the Rules of Procedure, on 19 November 2019, unanimously

DECIDES

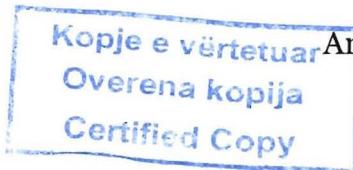
- I. TO APPROVE the interim measure until 28 February 2020, from the date of adoption of this Decision;
- II. TO IMMEDIATELY SUSPEND the implementation, in its entirety, of Law No. 06/L-114 on Public Officials, for the duration specified in item I;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in accordance with Article 20.4 of the Law; and
- V. This decision is effective immediately.

Judge Rapporteur

Safet Hoxha

President of the Constitutional Court

Arta Rama-Hajrizi



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