



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

Prishtina, on 8 January 2021
Ref. no.:VE 1690/21

This translation is unofficial and serves for informational purposes only.

**DECISION ON STAY OF
REFERRAL REVIEW**

in

Case no. KO56/20

Applicant

**Rexhep Selimi and 29 other deputies of the Assembly
of the Republic of Kosovo**

**Constitutional review “of the action of the President of the Republic of
Kosovo, of 23 March 2020, expressed through a press conference for
non-compliance and non-implementation of the decision of the
Government of the Republic of Kosovo”**

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the deputies of the Assembly of the Republic of Kosovo: Rexhep Selimi, Yllza Hoti, Liburn Aliu, Fatmire Mulhaxha-Kollçaku, Arbërie Nagavci, Hekuran Murati, Fitore Pacolli, Hajrullah Çeku, Saranda

Bogujevci, Jahja Koka, Mefail Bajçinovci, Valon Ramadani, Mimoza Kusari-Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Arbër Rexhaj, Arbëreshë Kryeziu-Hyseni, Labinotë Demi-Murtezi, Alban Hyseni, Gazmend Gjyshinca, Arta Bajraliu, Enver Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani, Fitim Haziri, Elbert Krasniqi, Eman Rrahmani and Salih Zyba (hereinafter: the Applicants).

2. The Applicants in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) were represented by deputy Arbërie Nagavci.

Subject Matter

3. Applicants request review of *“the constitutionality of the action of the President of the Republic of Kosovo, of 23 March 2020, expressed through a press conference for non-compliance and non-implementation of the decision of the Government of the Republic of Kosovo”*.
4. The Applicants allege that the “action” of the President of the Republic of Kosovo (hereinafter: the President) expressed through his statement at the press conference (hereinafter: the Statement of the President) constitutes a serious violation of the Constitution, respectively paragraph 2 of Article 84 [Competencies of the President], paragraphs 3 and 4 of Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraphs 1 and 2 and paragraph 4 of Article 16 [Supremacy of the Constitution], paragraph 4 of Article 93 [Competencies of the Government], Article 97 [Responsibilities] and paragraph 9 of Article 65 [Competencies of the Assembly of Kosovo] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
5. The President in his statement of 23 March 2020 had stated as follows: *“The today’s Government decision is completely unconstitutional. Citizens are not obliged to respect unconstitutional decisions and no one can punish them for doing this. I repeat: citizens are not obliged to respect unconstitutional decisions and no one can punish them for doing so. I underline: Neither the Kosovo Police nor the security authorities should enforce this unconstitutional decision of the Government as they themselves will commit a criminal offense by doing so. I reiterate, he says: Neither the Kosovo Police nor the security authorities should enforce this unconstitutional decision of the Government as they themselves will commit a criminal offense by doing so. The decision of the Government does not have a legal effect and it is not enforceable in the whole territory of the Republic of Kosovo”*.
6. The Applicants also request the Court to hold a public hearing.

Legal basis

7. The Referral is based on paragraph 6 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 44 [Accuracy of the Referral] and 45 [Deadlines] of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 32 [Filing of Referrals and Replies] and Rule 75 [Referral in accordance with Article 113.6 of

the Constitution and Articles 44 and 45 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

8. On 31 March 2020, the Applicants submitted their Referral to the Court. In addition to the written Referral, the Applicants also submitted the audio recording of the President's statement at the press conference of 23 March 2020.
9. On 31 March 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Radomir Laban (members).
10. On 2 April 2020, the Applicants were notified of the registration of the Referral and at the same time were requested to appoint their representative in the proceedings before the Court.
11. On the same date, the Court notified the President of the Referral, instructing him to submit his response to the Referral to the Court by 17 April 2020. The Referral was also communicated to the Speaker of the Assembly of the Republic of Kosovo, Mrs. Vjosa Osmani-Sadriu, with the instruction for submitting the Referral to all deputies of the Assembly, and the acting Prime Minister of the Republic of Kosovo, Mr. Albin Kurti, inviting them to submit their comments to the Court, if any, by 17 April 2020. The Referral was also communicated to the Secretary of the Assembly of the Republic of Kosovo.
12. On 2 April 2020, the Court was informed by e-mail that in order to conduct communication regarding the Referral, the Applicants will be represented by Deputy Arbërie Nagavci.
13. On 17 April 2020, the President submitted his response to the allegations raised in the Applicants' Referral.
14. On 22 April 2020, the Court notified the Applicants' representative of the acceptance of the response submitted by the President and invited them to submit their comments on the response, if any, in writing no later than 5 May 2020. On the same day, the President's response to the allegations raised in the Applicants' Referral was communicated to the Speaker of the Assembly of the Republic of Kosovo, with the instruction to submit a copy of the response to all deputies of the Assembly, and the acting Prime Minister of the Republic of Kosovo.
15. On 5 May 2020, the Applicants submitted to the Court their comments on the President's response.
16. On 8 May 2020, the submitted comments of the Applicants to the President's response were communicated to the President, the Speaker of the Assembly of the Republic of Kosovo, with instructions to submit a copy of the comments to all deputies of the Assembly, and the acting Prime Minister of the Republic of Kosovo.

17. On 14 October 2020, the Court reviewed the case and decided to postpone the decision on this case to another hearing.
18. On 5 November 2020, the President of the Republic of Kosovo, Mr. Hashim Thaçi resigned from the position of President of the Republic of Kosovo.
19. On 5 November 2020, the Speaker of the Assembly, Mrs. Vjosa Osmani-Sadriu started exercising the post of Acting President of the Republic of Kosovo.
20. On 17 December 2020, after having reviewed the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court to order the stay of the Referral review proceedings. Consequently, the Court, pursuant to Article 113.6 of the Constitution, Articles 44 and 45 of the Law and paragraph (5) of Rule 75 of the Rules of Procedure, decided to order the stay of the review of the Applicants' Referral.

Summary of facts

21. Starting from 11 March 2020, the Government issued several decisions related to the COVID-19 pandemic. (Decisions no. 01/07 of 11 March 2020; no. 01/08 of 12 March 2020; no. 01/09 of 13 March 2020; no. 02/09 of 13 March 2020; no. 01/10 of 14 March 2020; no. 01/11 of 15 March 2020; no. 01/12 of 17 March 2020; no. 01/13 of 18 March 2020).
22. On 15 March 2020, at the request of the Ministry of Health of the Republic of Kosovo (hereinafter: the Ministry of Health) the Government of the Republic of Kosovo (hereinafter: the Government) issued Decision [no. 01/11] on declaring a "public health emergency".
23. On 23 March 2020, the Government at the request of the Ministry of Health issued Decision [no. 01/15] by which it approved the undertaking of measures to prevent and control the spread of the COVID-19 pandemic, as follows:

"1. The movement of citizens and private vehicles is prohibited starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration;

2. Free movement is allowed for economic operators classified as the most important under the NACE codes and that the Ministry of Economy, Employment, Trade, Industry, Entrepreneurship and Strategic Investments allows to operate during period of emergency related to the COVID-19 pandemic, as well as for transport of goods/services to ensure the functioning of the supply chain.

3. Movements on the road shall be carried out by no more than two persons together and always keeping a distance of two meters from the others.

4. Gatherings shall be prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and

fighting work, and where two meters' distance is permitted between people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral.

5. Institutions of the Government of the Republic of Kosovo shall be obliged to take the necessary actions for the implementation of this Decision. [...]."

24. On the very same day, the President at a press conference stated that *"The today's Government decision is completely unconstitutional. Citizens are not obliged to respect unconstitutional decisions and no one can punish them for doing this. I repeat: citizens are not obliged to respect unconstitutional decisions and no one can punish them for doing so. I underline: Neither the Kosovo Police nor the security authorities should enforce this unconstitutional decision of the Government as they themselves will commit a criminal offense by doing so. I reiterate, he says: Neither the Kosovo Police nor the security authorities should enforce this unconstitutional decision of the Government as they themselves will commit a criminal offense by doing so. The decision of the Government does not have a legal effect and it is not enforceable in the whole territory of the Republic of Kosovo".* (The Applicants also submitted to the Court the audio recording of the President's statement to the media.)
25. On 5 November 2020, the President of the Republic of Kosovo, Mr. Hashim Thaçi resigned from the position of President of the Republic of Kosovo.
26. On 5 November 2020, the Speaker of the Assembly, Mrs. Vjosa Osmani - Sadriu started exercising the post of Acting President of the Republic of Kosovo.

Applicant's allegations

27. The Court recalls that the Applicants allege that the President's statement, given at the press conference constitutes a serious violation of the Constitution, respectively Article 84 [Competencies of the President] paragraph 2, Article 4 [Form of Government and Separation of Power] paragraphs 3 and 4, Article 7 [Values] paragraph 1, Article 16 [Supremacy of the Constitution], paragraphs 1, 2 and 4, Article 93 [Competencies of the Government], paragraph 4, Article 97 [Responsibilities], and Article 65 [Competencies of the Assembly of Kosovo] paragraph 9, of the Constitution.
28. In their Referral, the Applicants state that *"The unconstitutional action of the President of the Republic of Kosovo should be emphasized in four elements: (i) "The today's Government decision is completely unconstitutional": (ii) "Citizens are not obliged to respect unconstitutional decisions and no one can punish them for doing this": (iii) "Neither the Kosovo Police nor the security authorities should enforce this unconstitutional decision of the Government as they themselves will commit a criminal offense by doing so"; (iv) "The decision of the Government does not have a legal effect and it is not enforceable in the whole territory of the Republic of Kosovo".*
29. In the context of their allegations, the Applicants initially underline that in the constitutional system of the Republic of Kosovo *"[...] The President of the Republic of Kosovo as a neutral power or as a representative of neutral power, i.e., who stands above the parties, does not enter into the separation of powers*

and does not perform any executive function in the political leading of the country. It is in this regard that the status of the President of the Republic of Kosovo is defined in the sense that “the President is the head of state and represents the unity of the people of the Republic of Kosovo”. In the following, the Applicants reason that “The President of Kosovo is not allowed to represent group or partisan political interests but represents them all together, which gives substantial meaning to the representation of the unity of the people of a state. On the basis of this status, the President of Kosovo has been assigned with constitutional competencies to materialize his role as a balancing power or “mediator of institutions”, or “neutral power”. In this context, the Applicants underline that one of the most important competencies of the President is to be “guarantor of the constitutional functioning of the designated institutions” with the Constitution”.

30. According to the Applicants, “Guaranteeing the constitutional and democratic functioning of constitutional institutions defined by this Constitution by the President of the Republic of Kosovo, is realized by exercising his constitutional competencies”. The Applicants, referring to the principle of separation of powers, state that “State power is not only subject to the restrictions provided by the Constitution and laws, but also to those restrictions which are also provided by the principle of separation of powers and which do not allow different functions of power to be placed in the hands of one authority”. In the following, the Applicants reason that “On the basis of Articles 4 and 7 of the Constitution and on the basis of a constitutional mechanism (competence), which equips the President of the Republic for the guarantee and constitutional functioning of constitutional institutions, state power is separated between the executive, legislative and judicial bodies, including control and balancing between them, as well as defining constitutional competencies in a taxing manner. So, only in this way is state power separated and exercised independently. Thus, the branches of state power and their competencies, including the President of Kosovo who does not enter into the separation of state power, are extended through certain constitutional provisions”. In the context of this allegation, the Applicants state that the decisions and legal acts of the Government, issued pursuant to Article 93, paragraph 4 of the Constitution may be “challenged only by the Constitutional Court” in accordance with its jurisdiction, as defined by Article 113 of the Constitution.
31. The Applicants specify that “[...] the issue of whether the President has committed a serious constitutional violation, calling for the non-implementation of the Government Decision, is completely independent of the issue, whether the President was correct in his opinion that the measures of the Decision are really unconstitutional.” According to the Applicants, the President at the press conference “[...] has not simply focused on the expression of thought. On the contrary, he has exceeded all limits of his competencies as president, placing himself in the role of the court”. In this regard, the Applicants, referring to Article 102, paragraph 3 and Article 112, paragraph 1 of the Constitution, emphasize that it is the competence of the courts to declare the decisions of the Government unconstitutional, in which citizens, law enforcement and other institutions are instructed to non-implementation of these decisions. In light of this reasoning, the Applicants conclude that “Any other official who calls for non-implementation of Government decisions,

based on his opinion that they are unconstitutional, usurps the exclusive competence of the courts, seriously violates the constitutional and legal order of the country, and flagrantly violates the democratic separation of powers, between courts and other institutions. In this way, calling on citizens and law enforcement to disrespect the Government's decision, the President has committed serious violations of the Constitution.

32. The Applicants state that *"The Constitutional Court is a constitutional body which has been given the competence of constitutional control - procedural and material - of acts of public authorities with the right to declare them invalid on the basis of their incompatibility with the Constitution"*. According to them, such a competence as that of the Constitutional Court has not been given to other bodies, nor to the President.
33. In the following, the Applicants, referring to Article 97 [Responsibilities] and paragraph 9 of Article 65 [Competencies of the Assembly] of the Constitution, reason that *"The relationship between the executive and the legislative power is realized through the exercise, functioning, balancing and limitation between them, with the participation of the President as a guarantor of the constitutional and democratic functioning of the institutions defined by this Constitution"*.
34. The Applicants allege that *"with his unconstitutional action in the form of a public statement"* The President has made serious violations of the Constitution, by *"violating the independence of the separation of state power defined by Articles 4 and 7 of the Constitution, through the realization of the elements of unconstitutional action expressed in point III of this Referral. Respect for the principle of separation of powers by the President of Kosovo means the activation of Article 84 par. 2 and Article 4 par. 3 of the Constitution of Kosovo"*.
35. Furthermore, the Applicants, referring to Article 16 [Supremacy of the Constitution] of the Constitution reason that from this provision *"two constitutional characteristics can be derived regarding the exercise of state power. First, the state authorities exercise their activity through legal acts based on the Constitution and law, and, second, the state authorities must respect the constitutional provisions"*. In this context, the Applicants state that *"[...] the actions of [the President] do not derive from the Constitution, nor do they exclude the violation of the constitutional provisions regarding the exercise of constitutional competence defined in Article 84, par. 2 in conjunction with Article 4, par. 3 of the Constitution of Kosovo"*.
36. In the following, the Applicants underline that *"The constitutional relationship of separation, exercise, control and balance of power between the legislative and executive body can be understood by the concrete provisions set out in Article 65 par. 9, Article 93 par. 4 and Article 97 of the Constitution"*. Consequently, according to the Applicants, the President *"[...] with the unconstitutional action with which he called on the citizens, police and security authorities of Kosovo not to implement the decisions of the Government, has intervened and violated Article 93 par. 4 in conjunction with Article 97, as well as Article 65 par. 9 of the Constitution"*.

37. According to the Applicants *“[...] although the Assembly is the body that has been recognized the controlling function of the Government, neither the Speaker of the Assembly of Kosovo has the right to call on the non-implementation of the decisions approved by the executive. In case the Speaker of the Assembly or any deputy considers that an act of the Government is contrary to the Constitution, they may request the support of the necessary number of deputies to refer the matter to the Constitutional Court”*.
38. The Applicants, arguing that the responsibility of the Government of Kosovo, as defined in Article 97, is related to Article 65, paragraph 9 of the Constitution, reiterate that *“[...] with the unconstitutional action of the President of Kosovo, an unconstitutional interference in the competence of the Assembly of Kosovo has been created [...]”*.
39. In light of the elaboration of their allegations, the Applicants referring to the Court case KO47/10, Applicant Naim Rrustemi and 31 other deputies of the Assembly of the Republic of Kosovo suggest that *“[...] to conclude that the President of the Republic of Kosovo has committed serious violations of the Constitution, one must assess the impact of the President’s unconstitutional action on the credibility of the public, regarding the large number of constitutional competencies given to him, and thus on the basis of these competencies it is right to assume that the President represents the unity of the people, and not of the interests of certain groups or political parties. On this basis, the constitutional competencies given to the President of the Republic of Kosovo by the constitution, aim to materialize the representation of the unity of the people through the exercise of his constitutional competencies. The constitutional competencies defined in Article 84 of the Constitution, reflect the adequate level of public trust in the role of the President in the exercise of his constitutional competencies. According to the Applicants “[...] intentional and premeditated violation of Article 84, par. 2 in conjunction with Article 4, par. 3 and 7, Article 16, par. 1, 3 and 4, Article 93 par. 4 in conjunction with Article 4 par. 4, Article 97 in conjunction with Article 65 par. 9 of the Constitution, with his unconstitutional action according to point III [Reasoning of the Referral and the alleged violations of the Constitution] of this Referral, has caused the level of public credibility of the President to be extremely violated”*.
40. Consequently, the Applicants conclude that *“[...] according to the evidence and arguments presented in this Referral, it can be proven that the President of the Republic of Kosovo has committed serious “intentional and premeditated” violations of the provisions of the Constitution elaborated within this Referral”*.
41. In conclusion, the Applicants, referring to the public health emergency, consider that *“[...] non-implementation of the measures set by the Government Decision, especially in this critical phase of the spread of the virus, could lead to exponential growth of the virus, which, so far, the Republic of Kosovo, thanks to the work and dedication of doctors, nurses and medical authorities, has managed to prevent. Given this very sensitive situation in which the Republic of Kosovo finds itself, the call of the President not to implement the measures of the Government, has directly endangered the health and lives of citizens. In this*

respect, the constitutional violation committed by the President reaches the highest possible level of seriousness”.

42. Consequently, the Applicants request the Court that: *“the unconstitutional action of the President of the Republic of Kosovo be reviewed as a serious violation of the Constitution, according to certain constitutional provisions defined and argued in the content of this Referral”.*
43. Finally, the Applicants request that the Court declare their Referral admissible and find *“serious violations of the Constitution, respectively of Articles 84, par. 2 in conjunction with Article 4 par. 3 and 7 par. 1, Article 16, par. 1, 2 and 4, Article 97 in conjunction with Article 65, par. 9 of the Constitution, by the President of the Republic of Kosovo, Mr. Hashim Thaçi”.*

Applicants’ request for holding a public hearing

44. The Applicants, in their Referral, requested the holding of a public hearing. In relation to this Referral, the Applicants state that *“[...] it is in the public interest to hold this public hearing, because the case in question affects not only state bodies and their constitutional competencies but also society as a whole. As argued above, the unconstitutional action of the President violates important principles of the functioning of our Republic”.*

President’s response

45. Initially, the President in his response clarifies that *“before commenting on the allegations of the Applicants in case KO56/20, as well as the public statement of the President, at the press conference of 23.03.2020, where the Applicants allege that this statement constitutes a serious violation of the Constitution, commenting on the previous actions of the President, before holding of this conference (23.03.2020), but also the purpose of the conference and the statements given by the President. Here should be considered the course of the President’s actions as a whole and not just as a statement detached from the press conference to which the Applicants refer”.*
46. The President, in the sense of a general statement to the Applicants’ allegations, stated that: *“The Conference of the President held on 23.03.2020 and the statements of the President during the conference were in full compliance with the constitutional scope and competencies of the President, especially given consideration to Article 4, paragraph 3, Article 83 and Article 84, paragraph 2 of the Constitution [...]”. According to the President, based on these competencies defined by the Constitution: “All three of these competencies constitute the main axis of the President in the constitutional system of Kosovo. The President through the exercise of these competencies materializes all other competencies which are guaranteed by the Constitution and takes care of the balance of competencies, as well as the democratic functioning of the constitutional institutions in the Republic of Kosovo”.*
47. Based on the above reasoning, the President specifies that *“Given that [the President] is a representative of the unity of the people, the same must first of all take into account the interests of the citizens of the Republic of Kosovo,*

including non-majority communities, as defined in the Constitution.” In this regard, the President specifies that: “Having in mind the civic interest, exactly when the whole world is facing the COVID-19 pandemic, the President has taken important actions in order to protect the rights of citizens from the pandemic, but also beyond it”.

Reasoning regarding the actions for declaring a state of emergency

48. In this regard, the President referred to his actions taken in connection with the declaration of a state of emergency, explaining that: *“On 17.03.2020, the President held consultations with the Prime Minister and other stakeholders for the declaration of the State of Emergency, according to Article 131 of the Constitution. Based on his competencies and above all in the function of representing the unity of the people [...] the President requested from the Prime Minister that in accordance with Article 127 paragraph 3 of the Constitution and Article 5.4 of Law no. 03/L-050 on the establishment of the Kosovo Security Council [...] convene a meeting of the Kosovo Security Council [...] on 18.03.2020, the President requested the Prime Minister to convene a meeting of the Kosovo Security Council with the purpose of the announcement of the declaration of the State of Emergency due to the natural disaster, a meeting which was not convened by Prime Minister Kurti, despite the constitutional and legal obligation to do so. It should be noted that throughout the whole consultation process with the President on the Declaration of State of Emergency, the Prime Minister has vehemently and without any argument refused the declaration of a State of Emergency. In the context of this claim, the President in his response has attached the letters sent to the Prime Minister for this purpose.*
49. Furthermore, regarding the issue of declaring a state of emergency, the President argues that the declaration of a state of emergency would avoid and prevent the violation of human rights, guaranteed by Chapters II and III of the Constitution. In this regard, the President also refers to the Judgment of the Court in case no. KO29/12 and KO48/12 [Review of the proposed constitutional amendments, submitted by the Speaker of the Assembly of the Republic of Kosovo, on 23 March 2012 and 4 May 2012, Judgment of 20 July 2012, paragraph 161].
50. In this regard, the President adds: *“Given the risk of violating, diminishing and endangering human rights and freedoms, based on the duty to represent the unity of the people and guarantee democratic institutions, the statement of the President at the conference of 23.03.2020 was in the interest of better representing the unity of the people of Kosovo and the protection of their constitutional rights, which are guaranteed in Chapter II of the Constitution, a statement which the Applicants attempt to present as an alleged violation of the Constitution”.*
51. The President also adds that the Court in cases KO29/12 and KO48/12 in paragraph 254 had determined: *“From the date of the election of the President of the Republic by the Assembly, the President became the legitimate representative of the country, internally and externally, as well the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as*

provided in the Constitution". The President further adds: "Therefore, the duty of the President to guarantee the democratic functioning of institutions is a permanent and continuous task, which he always performs taking into account the representation of the people and the protection of the interests of citizens".

52. In the following, the President justifies his intention to hold a press conference on 23 March 2020 as follows: *"The President's Conference of 23.03.2020 was held in continuation of the actions of the President to declare a State of Emergency, in order to prevent the consequences of the COVID-19 pandemic to the lives of citizens and to protect against the reduction and violation of human rights that are defined in Chapter II of the Constitution. The President is the representative of the people of the Republic of Kosovo and guarantees the democratic and constitutional functioning of the institutions of the Republic of Kosovo. Therefore, in the conference of 23.03.2020, the President aimed and had a goal only to represent the interests and unity of the people of Kosovo, guarantee the democratic functioning of constitutional institutions and respect the values set by the Constitution in Article 7".* Consequently, the President states that his statement at the press conference was intended to give "a clear message that [the President] will take care of their protection and take constitutional action to protect their rights guaranteed in Chapter II. of the Constitution, challenging the constitutionality of the Government Decision in the Constitutional Court.
53. The President further adds that exactly according to this commitment given in the statement, on 24 March 2020, he submitted to the Constitutional Court his Referral for the review of the constitutionality of the Government Decision. In this regard, the President also clarifies that *"On the same day (24.03.2020) he asked the Prime Minister to repeal the decision or at least suspend its implementation until the decision of the Constitutional Court. On the same day, on 24.03.2020, the President again requested from the Prime Minister to convene a meeting of the Kosovo Security Council in order to discuss the latest developments in the security situation in the Republic of Kosovo. This meeting has not been convened again by Prime Minister Kurti, despite the constitutional and legal obligation to do so".* In this regard, the President in his response attached the letters of 24 March 2020 sent to the Prime Minister.
54. With regard to his Referral submitted to the Court, the President notes that through Judgment of the Court in case KO54/20, the Government Decision was declared non-compliant with Articles 55, 43, 35, 36 of the Constitution and Articles 8 and 11 of the ECHR in conjunction with Article 2 of Protocol no. 4 of the ECHR.
55. Addressing the statement on non-implementation of the Government decision, the President stressed that: *"[...] the statement on the non-implementation of the decision by the citizens and by the competent bodies has always been addressed by the President with his deep conviction that the decision violates and diminishes the human rights defined in Chapter II of the Constitution, and the implementation of the same would cause unconstitutional consequences with the authorities in regard to human rights. In fact, this effect has been achieved because based on this decision, human rights have been limited and arrests of citizens who have not respected the Government Decision no. 01/15,*

of 23.03.2020 have been made. *“There have been constant reports in the media that these actions could produce legal consequences in the event of a complaint from arrested citizens or other citizens who may claim that their rights apart from that of the movement have been violated.”*

56. The President also adds: *“The President could not allow the citizens, whose unity he represents, nor other institutions to take action, based on a Government Decision, which was found to be contrary to the Constitution, according to the Judgment of the Constitutional Court in case KO54/20. Above all, the President as the custodian of the democratic and constitutional functioning of the institutions could not allow the Government to interfere in the constitutional power that belongs to the Assembly, or in other words to violate the competencies of the Assembly and thus the principle of separation of powers in the Republic of Kosovo. The Constitutional Court in case KO54/20 (enacting clause of the Judgment) finds that the restriction of freedoms and human rights can be done only by law. The Constitution of the Republic of Kosovo in Article 65 paragraph 1 stipulates: The Assembly of the Republic of Kosovo: (1) adopts laws, resolutions and other general acts. Therefore, on the occasion of issuing decision no. 01/15, of 23.03.2020, the Government of the Republic of Kosovo intervened in the competencies of the Assembly, regulating by decision a matter that should be regulated by law, according to Article 55 paragraph 1”. In this regard, the President underlines that “interference in the competencies of other constitutional bodies produces a ‘conflict of competencies’ and this situation impedes the democratic and constitutional functioning of institutions”.*
57. The President states: *“Therefore, the Government with its Decision has interfered in the competencies of the Assembly and thus has violated the principle of separation of powers, the guarantor of whose balance is the President of the Republic of Kosovo. Based on this practice of the Constitutional Court and the provisions of the Constitution, the President has the duty to protect democratic principles and constitutional values, based on competencies, in this case based on addressing the case to the Constitutional Court, but also informing citizens about this. Above all, in line with this, the President has a duty to assure the citizens and people of Kosovo by conveying messages to them that the Government and other constitutional bodies are acting in accordance with the Constitution, laws and democratic values embodied in the Constitution”.*

Regarding the Applicants’ allegation of violation of Article 4, paragraphs 3 and 4 in conjunction with Article 84 of the Constitution, paragraph 2

58. In relation to this allegation, the President clarifies that he has not violated the principle of separation of powers, set out in Article 4 of the Constitution. According to him, *“through his actions, he has contributed to protect the principle of separation of powers, which had been violated by the Government through the issuance of Decision no. 01/15, of 23.03.2020”.* Addressing this allegation, the President in his response adds that *“The President is obliged under Article 84, paragraph 2 and Article 4, paragraph 3 to take action to guarantee the constitutional and democratic functioning of institutions.”*

59. The President in his response stressed: *“The President has in no way violated Article 4, paragraph 3 and Article 84, paragraph 2 of the Constitution. On the contrary, the President in the respective conference of 23.03.2020 has implemented those articles, guaranteeing the democratic and constitutional functioning of the institutions, after taking concrete measures to prevent the unconstitutional consequences of Decision no. 01/15, of 23.03.2020, in order to protect the freedoms and human rights deriving from Chapter II of the Constitution”*.

Regarding the allegation of the Applicants for violation of Article 16 of the Constitution

60. Regarding the Applicants’ allegation of violation of paragraphs 1 and 2 and paragraph 4 of Article 16 of the Constitution, the President replied: *“[...] The President in no way acted in violation of Article 16 paragraphs 1, 2 and 4, through statements at the press conference on 23.03.2020. Moreover, the President with his actions has defended the principles of constitutionality, taking care that the decision of the Government is in accordance with the Constitution and for this reason he has submitted a Referral to the Constitutional Court, on 24.03.2020. The Constitution has given the President the competence, based on Article 113, to take care of the constitutionality of the acts of the Government or the laws of the Assembly, in order to preserve and protect the principle of constitutionality, based on Article 16, paragraph 1 of the Constitution”*.

Regarding the allegations of the Applicants for violation of Article 93, paragraph 4 of the Constitution

61. In his response to the Applicants’ allegation of violation of paragraph 4 of Article 93 of the Constitution, the President stated that: *“The President also did not violate Article 93, paragraph 4 of the Constitution, as alleged by the Applicants. The President, through his statements on non-implementation, has not interfered in the competence of the Government to issue decisions. Furthermore, the President has taken care of the constitutionality of Government Decision no. 01/15, of 23.03.2020, in order to protect human rights and freedoms, as well as in order to guarantee the constitutional functioning of institutions by protecting the principle of separation of powers, since the Government through Decision no. 01/15, of 23.03.2020, has interfered in the competencies of the Assembly, violating the principle of separation of powers, freedoms and human rights, constitutional values and the principle of equality before the law”*.

Regarding the allegation of violation of Article 65, paragraph 9 of the Constitution

62. Further, to the allegation of the Applicants for violation of paragraph 9 of Article 65 of the Constitution, the President responded: *“The President through his statements at the press conference, of 23.03.2020, in no way violated Article 65, paragraph 9 of the Constitution, as alleged by the Applicants. Through his statements, the President in no way intended to exercise oversight of the work of the Government. The President through his actions, exercising his powers has only warned the citizens about the unconstitutional consequences of the*

decision of the Government no. 01/15, of 23.03.2020, and has taken care of the democratic function of the institutions of the Republic of Kosovo, especially for the protection of the principle of separation of powers which the Government has exceeded by exercising the competencies that belong to the Assembly. This, as mentioned several times above, has been ascertained by the Constitutional Court in case KO54/20”.

63. Whereas, regarding the case KO47/10, to which the Applicants refer in their Referral, the President specified that: *“The Applicants in order to argue the alleged violation of the President through his statements, have cited completely out of context the Judgment of the Constitutional Court in case KO47/10, according to which the Constitutional Court found a serious violation of the Constitution by the former President of the Republic of Kosovo Mr. Fatmir Sejdiu. As it is publicly known, the circumstances of this case have been completely different from the current circumstances, due to the fact that former President Sejdiu, even during his time as President, had allowed himself to appear registered in the lists of his party, LDK. With this, he had violated Article 88.2 of the Constitution, as he had held the post of President of the LDK, while this is expressly prohibited by the Constitution of the Republic of Kosovo, in Article 88.2 [...] However, even in this case, the President addressed the citizens to inform them about a situation of unconstitutionality of the decision and his actions that he will take, in order to preserve and protect the rights of citizens and the protection of democratic values that the Constitution cultivates. The citizens of the Republic of Kosovo expect the President, as a representative of their unity, to be impartial and to take action in the protection of their rights guaranteed by the Constitution”.*

Regarding the functional immunity

64. In the following, the President in his response also refers to functional immunity. In this context, the President refers to the Judgment of the Court in case KO98/11, Applicant Government of the Republic of Kosovo, Regarding the immunity of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, and members of the Government of the Republic of Kosovo, Judgment of 20 September 2011. The President, referring to the content of the above Judgment of the Court underlines that: *“From the connection between the functional immunity of the deputies and the President according to points 58, 59 and 118 of the Judgment in case KO98/11, it is implied that the deputies have functional immunity in performing their duties, within the competencies of the Assembly, as defined by Article 65 of the Constitution. This means that the functional immunity of deputies is what is exercised within the competencies of the Assembly, as defined taxatively in Article 65 of the Constitution. By analogy, since the Constitutional Court follows a standard for the functional immunity of deputies and the President, it is implied that the functional immunity of the President is all that the President exercises through his competencies set out in Articles 83 and 84 of the Constitution, as well as other Articles of the Constitution such as: 4, 18, 60, 66, 69, 79, 80, 82, 93, 94, 95, 104, 109, 113, 114, 118, 126, 127, 129, 131, 136, 139 and 144”.*

65. In his response, the President reiterates that at the press conference held on 23 March 2020 “[...] he has not acted unilaterally politically, but always in the public interest and the interest of the citizens and the protection of human rights and freedoms and the constitutional values of the Republic of Kosovo. In the course of this conference, the President on 24.03.2020 took two actions: the first, he submitted a Referral to the Constitutional Court to review the constitutionality of the Decision of the Government of the Republic of Kosovo, no. 01/15, of 23.03.2020, as well as the second, he requested the Prime Minister to repeal the decision in question or at least to suspend its implementation until the decision of the Constitutional Court”.
66. At the end of his response, the President drew the following conclusions:
- (i) *The President has not violated any of the constitutional articles alleged by the Applicants and this was later confirmed and verified by the Constitutional Court with Judgment KO54/20;*
 - (ii) *The President at the press conference of 23 March 2020 did not take a decision or decide, but only gave a statement based on his competencies as a representative of the unity of the people and a guarantor of the democratic and constitutional functioning of institutions;*
 - (iii) *The President, based on his constitutional competencies, in his declarations of 23 March 2020, aimed at protecting the civic interest and the protection of human rights and freedoms set forth in Chapters II and III of the Constitution;*
 - (iv) *The President at the press conference and with the subsequent actions stated that he intended to protect the principle of separation of powers and not to allow the Government to interfere in the competencies of the Assembly;*
 - (v) *The President, acting within his competencies, acted within the functional immunity, defined in Article 89 of the Constitution and the Judgment of the Constitutional Court in case KO98/11.*
67. The President alleged that based on the above arguments, Referral no. KO56/20 should be declared inadmissible because it is non-compliant *ratione materiae* with the Constitution.
68. The President, in addition to his response to the Applicants’ allegations, also submitted to the court the letters sent to the Prime Minister:
- (i) Letter with prot. No. 325, of 17 March 2020 on convening a meeting of the Kosovo Security Council to prevent the spread of COVID-19 coronavirus;
 - (ii) Letter with prot. no. 328, of 18 March 2020;
 - (iii) Letter with prot. no. 331, of 24 March 2020, by which he informed that he sent to the Court Government Decision, no. 01/15, of 23 March 2020, for the review of its constitutionality and “*Wanting to preserve the constitutional and legal order in Kosovo, I invite you to repeal last night’s decision, or at least suspend its implementation until the decision of the Constitutional Court*”, and
 - (iv) Letter with prot. no. 333, of 24 March 2020 for convening a meeting of the Security Council in order to discuss the latest developments in the security situation in the Republic of Kosovo.

Applicants' comments on the President's response

69. Initially, the Applicants state that *"that no constitutional provision provides that the President of the Republic of Kosovo protects human rights and freedoms. Freedoms and human rights are protected through other legal and constitutional mechanisms, depending on the nature of the violation of these freedoms and rights by the institutions of the Republic of Kosovo. Therefore, we consider that the legal system of Kosovo provides sufficient legal and constitutional mechanisms to protect human rights and freedoms. [...]"*.
70. Applicants justify that: *"[...] Government decisions were related to protecting the lives of citizens from the Covid-19 pandemic, while the President's behaviour to publicly announce government decisions without legal effect was related to the brutal intervention of violating the independence of the executive power and endangering human rights and freedoms by calling on those who support these decisions to be committing a criminal offense. In this case the President has committed triple constitutional violations. First, he has usurped the constitutional competence of the Constitutional Court regarding the public declaration of government decisions as unconstitutional and without legal effect throughout the territory of the Republic of Kosovo. Second, he has unconstitutionally and arbitrarily created criminal sanction for government decisions in the sense that neither the security authorities nor the citizens should implement these decisions, because otherwise they commit a criminal offense. And third, he has seriously violated the separation of powers, namely the independence of the executive, legislative and competencies of the Constitutional Court, without any constitutional basis. Thus, the President of the Republic has incited the citizens to illegal actions"*.
71. In the following, the Applicants regarding the reasoning of the President that his statement was given in accordance with Article 4.3 in conjunction with Article 84.2 of the Constitution of Kosovo, argue that *"Such a statement by the President is completely erroneous and inconsistent because the President has no right to go beyond his constitutional competencies. Because from the principle of separation of powers it derives that the executive branch must execute every decision without exception and that is why the President is not authorized to decide which decisions should be implemented and which should not"*.
72. The Applicants in their comments also state that *"Article 84.2 of the Constitution aims to materialize the specific constitutional competencies provided in Article 84 of the Constitution. No such competence provides for interference with the independence of the executive branch. [...] Each such action which interferes with the constitutional competencies of the government in the name of the democratic functioning of constitutional institutions without a constitutional basis, converts to the constitutional guardian of Kosovo in an unconstitutional manner. In our constitutional system, the President as the guardian of the Constitution has a neutral position and in this sense he is recognized only the right to challenge decisions before the Constitutional Court invoking his competencies, but not to judge or conclude that the decision of the Government has no legal effects and call for non-implementation and non-compliance"*.

73. The Applicants state that *“The President strangely in these comments and after the unconstitutional behaviour emphasizes that he had a deep conviction that the decision of the Government reduces freedoms and human rights, for this reason he said that the decision of the government should not be implemented. In this respect we can confirm that in the statement made, he did not say this claim related to the conviction. The Constitutional Court does not deal with convictions which have not been expressed or brought in a certain public form”*.
74. In their comments to the response of the President regarding the separation of powers, the Applicants underline that *“[...] Although these powers are separated in terms of functional autonomy and in the independence of the exercise of the duties assigned by the Constitution, they balance each other through the interaction between them for the exercise of duties, respecting, promoting, supporting and controlling each other. The principle of separation of powers will not mean that every power is closed and uncontrolled by anyone. The separation of powers between the three branches of government is guaranteed only through a system of controls and balances. In this way, according to the Constitution, as much as there is talk of separation, it is also a matter of balance of powers. The purpose of such a constitutional concept is to prevent any branch of government from exercising unlimited power. The controls and balances recognized by the Constitution give each branch powers that offset or mitigate those of other branches. There are tools or mechanisms that balance the powers, because in the final analysis, no power in itself is able to fulfil the mission, if its activity is not harmonized with the activity of other powers and if a balance, coordination and mutual control is not ensured, which of course does not interfere to the extent that they undermine their constitutional missions. In this regard, the mandate of the President of the Republic is inviolable to ensure respect for the principle of separation of powers and to maintain security in the legal and constitutional order (see cases K029/12 and K048/12, Proposed constitutional amendments submitted by the Speaker of the Assembly of the Republic of Kosovo on 23 March 2012 and on 4 May 2012, Judgment of 20 July 2012). Thus, such constitutional arguments lead to the fact that the President cannot interfere in the independence of the separation of powers without constitutional mechanisms as he has done in the given case. Thus, the President materializes his competencies through Article 84 of the Constitution of Kosovo. This is the only way through which he ensures respect for the separation of powers. Also, the President of the Republic of Kosovo has other constitutional mechanisms according to which and by which he has the right to challenge any decision of the Government according to Article 113 of the Constitution. The President has interfered in the constitutional competencies and in the independence of the executive power at the moment he has made such an unconstitutional act with intent [...] In this regard, we consider that the President clearly acknowledges that, on the one hand, he interferes in the competencies of the Government, declaring himself a decision unconstitutional and without legal effect in the whole territory of Kosovo, when it is known that such a thing is the exclusive competence of Constitutional Court. Second, through that behaviour he interferes with the competencies of the Assembly that through Article 65 par. 9 he oversees the work of the Government of Kosovo. Thus, the President unconstitutionally and deliberately wants to maintain the separation of powers and their balance through public announcement of government decisions without legal effect, when it is known*

that the separation of powers and their balance is done through the constitutional competencies which they exercise, and for any conflict between them, the sole authority to resolve constitutional disputes lies on the Constitutional Court, and not the President. Because this competence is under no circumstances provided in Article 84 of the Constitution of Kosovo. Furthermore, the President has made this statement calling for non-compliance with and non-implementation of the decision of the Government, before submitting the Referral to the Constitutional Court, as well as without the decision of the Constitutional Court being received or published”.

75. *In their comments on the President’s response that he has the exclusive competence to take care of the constitutionality of legal acts with the Constitution, the Applicants assess that “[...] The President again deliberately deviates from the explanation of Article 16 of the Constitution. All this for the fact that the President under Article 84, par. 6, has the right of return for reconsideration of adopted draft laws if he considers that they are detrimental to the legitimate interests of the Republic of Kosovo or one or more of its communities. This is the only address through which the President can in some form challenge a draft law passed by the assembly if he claims it is unconstitutional. Therefore, the President of the Republic acted in violation of Article 16 of the Constitution itself because his action was outside the constitutional competencies defined by the Constitution of Kosovo. [...] Thus, the only body that has not acted in accordance with the constitution of Kosovo, interfering in the competencies of the Government, the Assembly and the Constitutional Court, is the President of Kosovo. The argument is therefore highly unprofessional, contradictory and irrelevant. Thus, in fact, his actions, and non-compliance with the Constitution, with his competencies and with other powers are reconfirmed. These unconstitutional actions committed intentionally violate the constitutional order and cause the level of trust and credibility of the Office of the President to fall to the lowest possible level, which violates the representation of the unity of the people.”*
76. *The Applicants in their comments conclude that “The President’s recent comments reveal the contradiction between his claims to intervene ostensibly on a “constitutional” basis in the functioning of constitutional institutions and his attempt to hide behind the functional immunity of the President’s position. In other words, the President by trying to hide behind functional immunity confirms the unconstitutional action committed intentionally. Thus, in the entirety of the “arguments” defined in these comments, there is an impetus to interfere in the constitutional independence of the Government, the Assembly and the Constitutional Court, without any constitutional support, by playing the role of an individual who stands without a constitutional basis over the constitutional functioning of constitutional institutions, as well as his desperate attempt to hide behind a functional immunity, which in no circumstances covers his unconstitutional action”. In this case, the Applicants referring to the case of Court KO98/11 underline that this case “clearly explains that functional immunity is functional immunity to ensure that the President be not hindered in the performance of state duties entrusted to that institution by the Constitution. [...]”.*

77. Finally, the Applicants consider that “[...] the President’s comments confirm the violation of all articles of the Constitution set out in the request of the PG of the VETËVENDOSJE Movement submitted to the Constitutional Court on 31 March 2020”.

Relevant provisions of the Constitution and Law no. 03/L-094 for the President of the Republic of Kosovo

Article 4
[Form of Government and Separation of Power]

“[...]”

3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.

4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentary control.

Article 7
[Values]

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.

Article 16
[Supremacy of the Constitution]

1 The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.

2. The power to govern stems from the Constitution.

“[...]”

4. Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution”.

Article 65
[Competencies of the Assembly]

The Assembly of the Republic of Kosovo,

[...]

(9) oversees the work of the Government and other public institutions that report to the Assembly in accordance with the Constitution and the law”.

Chapter V President of the Republic of Kosovo

Article 83 [Status of the President]

The President is the head of state and represents the unity of the people of the Republic of Kosovo.

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:

[...]

(2) guarantees the constitutional functioning of the institutions set forth by this Constitution.

[...]

(20) appoints the Commander of the Kosovo Security Force upon recommendation of the Prime Minister;

(21) with the Prime Minister, jointly appoints the Director, Deputy Director and Inspector General of the Kosovo Intelligence Agency;

(22) decides to declare a State of Emergency in consultation with the Prime Minister;

(23) may request meetings of the Kosovo Security Council and chairs them during a State of Emergency;

(24) decides on the establishment of diplomatic and consular missions of the Republic of Kosovo in consultation with the Prime Minister;

(25) appoints and dismisses heads of diplomatic missions of the Republic of Kosovo upon the proposal of the Government;

[...]

Article 93 [Competencies of the Government]

“The Government has the following competencies:

(1) proposes and implements the internal and foreign policies of the country;

(2) promotes the economic development of the country;

[...]

(4) makes decisions and issues legal acts or regulations necessary implementation of laws”.

[...]

(8) proposes to the President of the Republic of Kosovo the appointment and dismissal of the heads of diplomatic missions of the Republic of Kosovo;

Article 94 **[Competencies of the Prime Minister]**

The Prime Minister has the following competencies:

[...]

(7) consults with the President of the Republic of Kosovo on matters of intelligence;

(8) in cooperation with the President, jointly appoints the Director, Deputy Director and Inspector General of the Kosovo Intelligence Agency;

(9) consults with the President on the implementation of the foreign policy of the country;

Article 97 **[Responsibilities]**

1 The Government is accountable to the Assembly of Kosovo regarding its work.

2. The Prime Minister, deputy prime minister(s) and ministers are jointly accountable for the decisions made by the Government and individually accountable for decisions made in their fields of responsibility”.

Regarding the Referral review procedure

78. In order to decide on the Applicants' Referral, the Court must assess whether the admissibility criteria set out in the Constitution and further specified in the Law and the Rules of Procedure have been met.
79. In this context, the Court first recalls that the Applicants, on 31 March 2020, submitted their Referral to the Court, claiming that the "action" of the President of the Republic of Kosovo expressed through his statement at the press conference constitutes a serious violation of the Constitution, respectively paragraph 2 of Article 84 [Competencies of the President], paragraphs 3 and 4 of Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraphs 1 and 2 and paragraph 4 of Article 16 [Supremacy of the Constitution], paragraph 4 of Article 93 [Competencies of the Government], Article 97 [Responsibilities] and paragraph 9 of Article 65 [Competencies of the Assembly of Kosovo] of the Constitution of the Republic of Kosovo.
80. Following the Applicants' Referral, the Court, in accordance with the legal provisions in force, took all necessary actions to notify the interested parties of the registration of their Referral with the Court, which are reflected in paragraphs 8 to 16 of this Decision.
81. With regard to the review of the admissibility of the Referral, the Court refers to the relevant constitutional and legal provisions according to which, the deputies can appear as an authorized party before this Court and request the review of their allegation if the President of the Republic of Kosovo has committed serious violations of the Constitution.

Constitution of the Republic of Kosovo

Article 113

[Jurisdiction and Authorized Parties]

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

6. Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution".

[...]

Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo

CHAPTER III SPECIAL PROCEDURES

9. Procedure in the case defined under Article 113, Paragraph 6 of the Constitution

Article 44 Accuracy of the Referral

1. In a referral made pursuant to Article 113, paragraph 6 of the Constitution, the following information shall, inter alia, be submitted:

- 1.1. description of facts of the alleged violation;*
- 1.2. concrete provisions of the Constitution allegedly violated by the President; and*
- 1.3 presentation of evidence that supports the allegation for serious violation of the Constitution by the President of the Republic.*

Article 45 Deadlines

The referral should be filed within a period of thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.

Rules of Procedure of the Constitutional Court

VII. Special Provisions on the Procedures under Article 113 of the Constitution

Rule 75

Referral pursuant to Article 113.6 of the Constitution and Articles 44 and 45 of the Law

(1) A referral filed under this Rule must fulfil the criteria established under Article 113.6 of the Constitution and Articles 44 and 45 of the Law.

(2) In a referral pursuant to this Rule the following information shall, inter alia, be submitted:

- (a) description of facts of the alleged violation;*
- (b) concrete provisions of the Constitution allegedly violated by the President of the Republic of Kosovo; and*
- (c) presentation of evidence that supports the allegation for serious violation of the Constitution by the President of the Republic of Kosovo.*

(3) Following the filing of a referral pursuant to this Rule, the Court shall immediately notify the President of the Republic and send a copy of the referral no later than three (3) days from its filing with the Court.

(4) The Court shall request the President of the Republic to reply to the referral within fifteen (15) days from date the referral is served on the President of the Republic, unless good cause is shown for a later reply and the respective permission is granted.

(5) The Court shall order stay of proceedings initiated pursuant to this Rule in the event that before issuing its decision, the President of the Republic has resigned or has otherwise terminated his/her mandate.

(6) In the event that the authorized party withdraws the referral, the President of the Republic may request the Court to continue with the proceedings and issue a decision. Such request shall be determined by the Court upon by a majority of Judges.

(7) The referral under this Rule must be filed within thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.

[...]

82. Subsequently, the Court, based on all the criteria set out in the above provisions of the Constitution, the Law and the Rules of Procedure, finds that: (i) the Referral is filed by an authorized party as defined in paragraph 6 of Article 113 of the Constitution; (ii) the Referral is filed within 30 (thirty) days from the day when the alleged constitutional violation by the President is made public, as defined in Article 45 of the Law and paragraph (1) of Rule 75 of the Rules of Procedure; and (iii) the Applicants have specified their Referral as set forth in Article 44 of the Law and paragraph (2) of Rule 75 of the Rules of Procedure.

83. However, before the Court could finally decide on the Applicants' Referral, alleging a serious violation of the Constitution by the President, on 5 November 2020, the President of the Republic of Kosovo resigned from the position of President.

84. In the context of the specific circumstance, which was created as a result of the resignation of the President from his position as President of the Republic of Kosovo, the Court in this case refers to paragraph (5) of Rule 75 of the Rules of Procedure, which stipulates that:

(5) The Court shall order stay of proceedings initiated pursuant to this Rule in the event that before issuing its decision, the President of the Republic has resigned or has otherwise terminated his/her mandate.

85. Based on the above, the Court notes that paragraph (5) of Rule 75 of the Rules of Procedure sets out the obligation of the Court to act in accordance with the circumstances created, namely the circumstance of the resignation of the President from the position of President after the initiated procedure, respectively the submission of the Referral by the Applicants in accordance with paragraph 6 of Article 113 of the Constitution and before the rendering of its final decision on the Referral. This provision of the Rules of Procedure expressly stipulates that in case of resignation or termination of the mandate of the President before rendering its decision regarding the assessment of the allegation whether the President has committed a serious violation of the Constitution, the Court orders the stay of the proceedings initiated pursuant to paragraph 6 of Article 113 of the Constitution.

86. The Court recalls that the President's Statement at the press conference of 23 March 2020 was given in connection with a decision of the executive branch for a series of restrictive measures for the citizens of the Republic of Kosovo.
87. Having said that, the Court recalls that the Applicants allege that the President through his Statement has committed a serious violation of the Constitution, specifically claiming that (i) the President through his statement calling for non-implementation of the Government Decision has "usurped the exclusive competence of the courts and flagrantly violated the democratic separation between the courts and other institutions"; (ii) that the violation of paragraph 2 of Article 84 [Competencies of the President], paragraphs 3 and 4 of Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraphs 1 and 2, and paragraph 4 of Article 16 [Supremacy of the Constitution], paragraph 4 of Article 93 [Competencies of the Government], Article 97 [Responsibilities] and paragraph 9 of Article 65 [Competencies of the Assembly of Kosovo] of the Constitution, the President of the Republic of Kosovo has made the level of public confidence of the President be extremely compromised"; and (iii) referring to the state of emergency of public health, the President with his call for non-implementation of the Government Decision through his public statement has "*directly endangered the health and lives of citizens*".
88. Therefore, based on the above, the Court considers that the allegations of a serious violation by the President specifically relate to the actions of the President in the exercise of his function as President, and consequently the responsibility of the President or the allegation of a serious violation of the Constitution relates exclusively to the exercise of his function as President.
89. In this context, and referring to paragraph 6 of Article 113 of the Constitution, it is determined that the subject matter of the Court's review is the "President of the Republic", respectively the review of whether a specific action of the President of the Republic constitutes a serious violation of the Constitution. Consequently, and pursuant to Rule 75, paragraph (5), of the Rules of Procedure, the Court considers that the proceedings for reviewing or assessing whether the President has committed a serious violation of the Constitution cannot be continued also in the case when the person against whom allegation has been raised on committing a serious violation of the Constitution is not exercising that function. Having said that, as soon as the position of the President or the exercise of his function as President ceases to exist, in this case as a result of his resignation, the previous person exercising this function, who is subject to the assessment of the Court whether he has committed serious violations, cannot continue to be a party in the procedure of review of the Referral submitted in accordance with Article 113, paragraph 6 of the Constitution, not only for the simple fact that the person whose decision or action is subject to review is not in office, but also that the measure set forth in paragraph 3 of Article 91 of the Constitution becomes unenforceable.
90. In this case, the Court refers to paragraph 3 of Article 91 [Dismissal of the President] of the Constitution, which stipulates that:

3. If the President of the Republic of Kosovo has been convicted of a serious crime or if the Assembly in compliance with this article determines that the President is unable to exercise her/his responsibilities due to serious illness, or if the Constitutional Court has determined that he/she has seriously violated the Constitution, the Assembly may dismiss the President by two thirds (2/3) vote of all its deputies.

91. Due to the fact that the President has already resigned and is no longer in office, this fact makes the provision of paragraph 3 of Article 91 of the Constitution unenforceable, in the sense that the Assembly has no way of dismissing him even if the Court finds that he has committed serious violation of the Constitution.
92. Based on the above, the Court notes that if the exercise of the office of President is terminated as a result of his resignation, then paragraph 3 of Article 91 of the Constitution cannot be set in motion.
93. In this case, the Court also distinguishes between a Referral filed pursuant to paragraph 2 of Article 113 of the Constitution and a Referral filed pursuant to paragraph 6 of Article 113 of the Constitution.
94. While based on paragraph 2 of Article 113 of the Constitution, subject matter of review is, inter alia, the issue of the compliance of the President's decrees with the Constitution, which is independent of the person exercising the function of the President and whether the same continues to be in office or not, in the case of paragraph 6 of Article 113, the issue is related to the person exercising the function and the review whether the same has committed a violation or not, a determination that has direct effects on the holder of the function. In other words, in the case of an issue that arises validly on the basis of paragraph 2 of Article 113, the Court may decide on the constitutionality of a decree of the President, regardless of whether the President who issued the contested decree is in office or exercising the function or not. In this case, the Court would be obliged to review the merits of the contested law or decree due to the continuing legal consequences that such an act would produce despite the resignation of the President.
95. In the circumstances of the present case, the Referral was filed under paragraph 6 of Article 113 of the Constitution in which case the Applicants dispute the constitutionality of the President's statement given on 23 March 2020. Having said that, the challenged statement constitutes neither a law nor a decree from Article 113.2 of the Constitution, but constitutes an action, which is exclusively related to the exercise of his function as President, now already resigned.
96. Consequently, based on the fact that the Referral was submitted pursuant to Article 113, paragraph 6 of the Constitution in which case the Applicants dispute the constitutionality of the President's action through his Statement given on 23 March 2020, which action is consequently related to the Referral for finding of a serious violation that could result in the dismissal of the President while the President is no longer in office, the Court in accordance with Article 113.6 of the Constitution, Articles 44 and 45 of the Law, and Rule 75 (5) of the Rules of Procedure finds that there is no longer a case before it and consequently must decide to stay the proceedings for further review of the Referral.

Request for holding a public hearing

97. The Court also recalls that the Applicants requested that a public hearing be held. In the context of their Referral, the Applicants state that: *"[...] it is in the public interest to hold this public hearing, because the case in question affects not only state bodies and their constitutional competencies but also society as a whole. As argued above, the unconstitutional action of the President violates important principles of the functioning of our Republic"*.

98. In this case, the Court recalls paragraph 2 of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure which stipulates:

"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law".

99. Taking into account the order of the Court to stay the proceedings of the Referral review as a result of the resignation of the President from the position of President, this order of the Court also refers to the stay of the review of the Applicants' Referral for a hearing.

Conclusion

100. The Court, based on the circumstances created after the submission of the Referral by the Applicants, as a result of the resignation of the President, and based on the fact that the Referral was submitted pursuant to Article 113, paragraph 6 of the Constitution, in which case the Applicants contest the constitutionality of the President's action through his Statement given on 23 March 2020, an action which is consequently related to the Referral for ascertainment of a serious violation that could result in the dismissal of the President, while the President no longer exercises this duty, the Court in accordance with Article 113.6 of the Constitution, Articles 44 and 45 of the Law, and Rules 59 and 75 (5) of the Rules of Procedure, finds that there is no longer a case before it and consequently must decide to stay the further review of the Referral.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113, paragraph 6 of the Constitution, Articles 44 and 45 of the Law, Rule 59 and paragraph (5) of Rule 75 of the Rules of Procedure, on 17 December 2020, unanimously:

DECIDES:

- I. TO STAY the proceedings for review of the Applicants' Referral;
- II. TO NOTIFY this Decision to the parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and
- IV. This DECISION is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bajram Ljatifi

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.