



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

Prishtina, on 10 November 2015
Ref. No.: VMP862//15

DECISION ON INTERIM MEASURE

in

Case No. KO130/15

Applicant

The President of the Republic of Kosovo

**Concerning the assessment of the compatibility of
the “Association/Community of Serb majority municipalities in Kosovo –
general principles/main elements” with the spirit of the Constitution,
Article 3 [Equality Before the Law], paragraph 1, Chapter II
[Fundamental Rights and Freedoms] and Chapter III [Rights of
Communities and Their Members] of the Constitution of the Republic of
Kosovo**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The referral was submitted by the President of the Republic of Kosovo, Her Excellency Atifete Jahjaga (hereinafter: the “Applicant”).

Subject matter

2. The Referral contains a request for the assessment of the compatibility of the “Association/Community of Serb municipalities in Kosovo – general principles/main elements” (hereinafter: the “Principles of Association”) with the spirit and Article 3 [Equality Before the Law], Paragraph 1, , Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their members] of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”).
3. Specifically, the Applicant requests that the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”) responds to the following question:

“Taking into consideration that the Principles of Association regulate the creation and functioning of the Association of the municipalities with Serb majority in Kosovo, are these principles and elements compatible with the spirit of the Constitution, Article 3, paragraph 1 (multi-ethnic nature), Chapter II (basic rights and freedoms) and Chapter III (rights of communities and their members) of the Constitution of the Republic of Kosovo?”

4. In addition, the Applicant requests from the Court to impose an interim measure, namely that, *“each activity and effect produced by the Principles of Association is suspended, [the Applicant] requests that the Court places a temporary measure on the issue raised until the final decision [of the Court]”*.

Legal basis

5. The Referral is based on Articles 84.9, 113.2 and 116.2 of the Constitution, Articles 27 and 29 of the Law no. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the “Law”) and Rules 54, 55 and 56 (c) of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 31 October 2015 the Applicant submitted the Referral to the Court.
7. On 02 November 2015 the President of the Court, by Decision GJR.KO130/15, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, by Decision KSH.KO130/15, the President of the Court appointed the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.
8. On 03 November 2015 the Court notified the Applicant of the registration of the Referral and requested the Applicant to submit a copy of the text of the “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” in the official languages of the Republic of Kosovo.
9. On 04 November 2015 the Applicant submitted the text of the “Association/Community of Serb majority municipalities in Kosovo – general

principles/main elements” in the official languages of the Republic of Kosovo, and including an initialed copy in the English language.

10. On 05 November 2015 the Court submitted a copy of the Referral to the President of the Assembly of Kosovo with the explicit request for it to be submitted to all Deputies of the Assembly, to the Prime Minister of the Government of the Republic of Kosovo, and to the Ombudsperson, and invited them to submit their comments on the Referral within a set deadline.
11. On 10 November 2015, after having heard the Judge Rapporteur and having discussed the request for an interim measure submitted by the Applicant, the Court decided to grant the Request for Interim Measures until 12 January 2016.

Brief summary of facts

12. On 19 April 2013 the Prime Ministers of the Republic of Kosovo and the Republic of Serbia signed the “First International Agreement on the Principles that Regulate the Normalization of the Relations between the Republic of Kosovo and the Republic of Serbia” (hereinafter: the “First International Agreement”).
13. On 22 April 2013, during an extra-ordinary session requested by the Prime Minister, the Assembly approved Resolution no. 04-R-10, on Giving Consent to the Signing of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia (Published on the Webpage of the Assembly). According to this Resolution:
 - a. *“the Assembly of Kosovo grants consent and supports signing of the first agreement for normalization of relations between the Republic of Kosovo and the Republic of Serbia [...]”;*
 - b. *“[...] the Assembly of Kosovo supports the promises contained in this agreement [...]”*
14. On 28 May 2013, the Government adopted Decision No. 01/132, “*Approving the Draft Law on Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this agreement.*” Furthermore, in accordance with this Decision, the Government proceeded with the Draft Law for review and adoption by the Assembly.
15. On 27 June 2013, the Assembly held a plenary session where Law, No. 04/L-199, on Ratification was voted upon and adopted. Of the Deputies present, 84 voted in favour, 3 were against and one Deputy abstained. On the same day the Law on Ratification was sent for promulgation to the President of the Republic of Kosovo.
16. On 12 September 2013, by Decree No. DL-050-2013, the President of the Republic of Kosovo promulgated the Law on Ratification.

17. The First International Agreement contained, *inter alia*, the following provisions:
1. *"There will be an Association/Community of Serb majority municipalities in Kosovo. Membership will be open to any other municipality provided the members are in agreement.*
 2. *The Association/Community will be created by Statute. Its dissolution shall only take place by a decision of the participating municipalities. Legal guarantees will be provided by applicable law and constitutional law (including the 2/3 majority rule).*
 3. *The structures of the Association/Community will be established on the same basis as the existing statute of the Association of Kosovo Municipalities, e.g. President, Vice-President, Assembly, Council.*
 4. *In accordance with the competences given by the European Charter of Local Self Government and Kosovo law the participating municipalities shall be entitled to cooperate in exercising their powers through the Association/Community collectively. The Association/Community will have full overview of the areas of economic development, education, health, urban and rural planning.*
 5. *The Association/Community will exercise other additional competences as may be delegated by the central authorities.*
 6. *The Association/Community shall have a representative role to the central authorities and will have a seat in the communities consultative council for this purpose. In the pursuit of this role a monitoring function is envisaged."*
18. In the referral is stated that on 25 August 2015 the Prime Minister of the Republic of Kosovo agreed on the *"Association/Community of Serb majority municipalities in Kosovo – general principles/main elements.*

Applicant's request and the request for an interim measure

19. The Applicant requests the Court to respond to the following question:

"Taking into consideration that the Principles of Association regulate the creation and functioning of the Association of the municipalities with Serb majority in Kosovo, are these principles and elements compatible with the spirit of the Constitution, Article 3, paragraph 1 (multi-ethnic nature), Chapter II (basic rights and freedoms) and Chapter III (rights of communities and their members) of the Constitution of the Republic of Kosovo?"

20. The Applicant argues that,

"The Principles of Association, in the format of a legal act approved by the Prime Minister of the Republic of Kosovo, handles issues which fall under the scope of issues which touch upon the spirit of the Constitution and issues specified in Article 3.1, Chapters II and III, as in the understanding of the notion of the multi-ethnic nature, of basic rights and freedoms, rights of communities and their members, as well as the nature of institutions stemming from the Constitution. Therefore, implementation of the

*obligations of the Principles of Association produces a legal effect in the constitutional system of the Republic of Kosovo. As per the commitment of the Principles of Association, it is clear that this issue constitutes the *ratione materiae*, as the issue raised falls under the scope of constitutional issues, also as reflected in [Judgments] taken by the Constitutional Court in cases No. KO80/10 and No. KO103/14. Characteristic of the criteria of “constitutional issues”, already determined in the above-mentioned cases, is that the issue falls under the scope of activity of the Constitution of the Republic of Kosovo, both in letter and in spirit.*

The Principles of Association is a document signed by the Prime Minister and represents the dedication of the Government to create a new legal entity which produces legal effects in the constitutional order of the Republic of Kosovo. The Principles of Association stem from the “First International Agreement on Principles which Regulate the Normalization of Relations [...]”, ratified by the [Assembly] of the Republic of Kosovo by Law No. 04/L-199, on Ratification of the First International Agreement which Regulates the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia [...].

[...]

*From the constitutional authority of the [Applicant] as head of state derives the right to refer constitutional issues in accordance with Article 113, paragraphs 2 and 3 (jurisdiction and authorized parties) of the Constitution. The reason for this lies in the fact that there are legal acts and conditions which are considered “constitutional issues” but cannot be formally submitted to the Constitutional Court, as they are not in the format of a law, decree, regulation or a municipal statute (as per Article 113, paragraph 2 of the Constitution). Such is also the case with the “Principles of Association”, which is not an international agreement but an applicable legislation deriving from an international agreement. The “First International Agreement” is not executable *per se* and requires additional legislation for [its] implementation.*

[...]

The Principles of Association is an intermediary legal act, which stems from the “First International Agreement”, adds additional elements in the process of creating the legal entity itself (the Association/Community), and precedes the founding act (Decree of the Government of Kosovo on Establishment, as per Article 2 of the Principles of Association), hence having a conditioning effect on the founding act. Taking into consideration these facts, the need arises for a constitutional assessment of the Principles of Association itself and its compliance with the Constitution.”

21. In addition to providing a response to this question, the Applicant, requests the Court to impose an interim measure. The Applicant considers that it would be in the public interest that, “each activity and effect produced by the Principles of Association is suspended, [and therefore the Applicant] requests that the

Court places a temporary measure on the issue raised until the final decision [of the Court]”.

22. The Applicant argues in support of this request that,

*“One of the reasons for physical barriers to hold the plenary sessions of the Assembly of Kosovo are the allegations of the opposition parties on constitutional non-conformity of the content of the Principles of Association. Due to the situation created in the Assembly of the Republic of Kosovo, and the inability of the [Assembly] to carry on its duties in a normal manner, the [Applicant] considers that the effect of the Principles of Association as it is in the **public interest** to avoid further escalation of abnormality, the [Applicant], in exercising her competencies stemming from Articles 83 and 84, has a duty to enable the functioning of the state by adding institutional credibility to the requests which have caused the blockade, by raising this issue at the Constitutional Court”.*

Assessment of the request for an interim measure

23. In order for the Court to grant an interim measure in accordance with Article 27 of the Law and Rule 55 (4), (5) and (6) of the Rules of Procedure, it must be determined that:

Article 27 of the Law

“ 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”.

Rule 55 (4) of the Rules of Procedure:

[...]

“(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 55 (5) of the Rules of Procedure

“If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application”.

Rule 55 (6) of the Rules of Procedure (excerpt)

"[...] No decision granting interim measures may be entered unless the expiration date is specified; however, expiration dates may be extended by further decision of the Court. If the admissibility of the referral has not yet been determined, the resolution shall state that interim measures will expire immediately if the Court determines the referral inadmissible."

24. In this respect, the Court notes that the Applicant has presented detailed argument relating to the need for a review of the compliance of the "Principles of Association" with the Constitution, and to be considered under the heading of "constitutional issues" within the meaning of Article 84.9 of the Constitution. Therefore, it comes within the scope of the jurisdiction of the Court, *ratione materiae*, under Article 113.2 of the Constitution.
25. As such, the Court considers that the Applicant has presented a *prima facie* case on the merits of the Referral, within the meaning of Rule 55, paragraph 4, under (a), of the Rules.
26. Furthermore, the Court notes that the Applicant argues that the imposition of an interim measure is necessary on the grounds of public interest. The Applicant argues that the functioning of state institutions, notably of the plenary meetings of the Assembly of the Republic of Kosovo, has become blocked as a consequence of a dispute between the governing political parties and the political parties of the opposition in regard to these Principles of Association.
27. The Applicant claims that this dispute relates, *inter alia* to the compatibility of these "Principles of Association" with the Constitution.
28. Moreover, the Court notes that the Applicant is in the constitutional position of the Head of State of the Republic of Kosovo, and represents the unity of the people of Kosovo and guarantor of the constitutional functioning of the institutions of the Republic of Kosovo, as prescribed by Articles 83 and 84 of the Constitution.
29. The Court has notified the Government of Kosovo, the Deputies of the Assembly of Kosovo and the Ombudsperson of the registration of this Referral and has offered them an opportunity to comment.
30. Given these circumstances, the Court considers that there are substantial reasons of a public interest nature within the meaning of Rule 55, paragraph 4, under c, of the Rules that warrant a suspension in the implementation of any further legal actions on the basis of these Principles of Association pending the Court's review of the compliance with the Constitution of these Principles.
31. Therefore, the Court, without prejudice to any further decision which will be rendered by the Court, on the admissibility or merits of the referral in the future, concludes that the request for interim measures must be granted in order to protect the public interest.
32. In addition, the Court notes that the Law does not provide for any deadline within which the Court must reach a decision on Referrals under Articles 84.9

in conjunction with Article 113.2 of the Constitution. Therefore, taking this into consideration, the Court decides to grant the Interim Measure until 12th of January 2016.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 27 of the Law and Rule 55 (4), (5) and (6) of the Rules of Procedure, on 10 November 2015, unanimously

DECIDES

- I. TO GRANT an interim measure;
- II. That this interim measure shall apply until 12 January 2016;
- 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



Snezhana Botusharova



President of the Constitutional Court



Arta Rama-Hajrizi