



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 8 December 2016
Ref. No.:AGJ1015/16

JUDGMENT

in

Case No. KO73/16

Applicant

The Ombudsperson

**Constitutional review of Administrative Circular No. 01/2016 issued by
the Ministry of Public Administration of the Republic of Kosovo on 21
January 2016**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

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

Challenged act

2. The Applicant challenges the constitutionality of the Administrative Circular No. 01/2016, of 21 January 2016, issued by the Ministry of Public Administration of the Republic of Kosovo (hereinafter: the Administrative Circular).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Administrative Circular. It was issued to implement Regulation No. 05/2012 on the Classification of Jobs and Catalogue of Jobs in the Civil Service, adopted by the Government of the Republic of Kosovo (hereinafter: the Government) by Decision 05/12 of 5 February 2015.
4. The Ministry of Public Administration (hereinafter: the MPA) through the Administrative Circular requested from the Applicant and the other institutions enumerated in Chapter XII [Independent Institutions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), to submit their proposals for job classification to the MPA. The purpose was to determine their classification within the catalogue of Jobs in the Civil Service, and, following classification by the joint committee of the MPA and Ministry of Finance, and subsequent final approval of the classification by the Government, to apply the Classification of Jobs as per above Decision of the Government and place the civil servants within their respective institutions in the positions and grades as approved by the Government, with commensurate salaries.
5. The Applicant alleges that the MPA, with its Administrative Circular, has violated the constitutional guarantee of independence of the Ombudsperson as stipulated by Article 133 [Office of Ombudsperson] of the Constitution. Furthermore, the Applicant alleges that the constitutional independence was also violated with respect to the other institutions enumerated in Chapter XII [Independent Institutions] and Chapter VIII [Constitutional Court] of the Constitution.

Legal basis

6. The Referral is based on Articles 113.2(1) and 135.4 of the Constitution, Articles 22, 29 and 30 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 56, 62 and 65(1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 29 April 2016, the Applicant submitted the Referral to the Court.

8. On 5 May 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (presiding), Ivan Čukalović and Arta Rama-Hajrizi.
9. On 6 May 2016, the Court notified the Applicant of the registration of the Referral.
10. On the same date, the Court submitted a copy of the Referral to the President of the Republic of Kosovo, the President of the Assembly, the Prime Minister of the Government, the MPA, the Central Election Commission, the Auditor General of Kosovo, the Central Bank of Kosovo, the Independent Media Commission and the Ministry of Finance. The Court invited them to submit their comments by 30 May 2016.
11. On 30 May 2016, the MPA submitted its comments to the Court. The Court did not receive any comments from other institutions.
12. On 16 June 2016, the Court sent a copy of the comments of the MPA to the Applicant, the President of the Republic of Kosovo, the President of the Assembly, the Prime Minister of the Government, the Central Election Commission, the Auditor General of Kosovo, the Central Bank of Kosovo, the Independent Media Commission and the Ministry of Finance. The Court invited them to submit comments on the MPA response by 8 July 2016.
13. On 8 July 2016, the Applicant submitted additional comments.
14. On the same date, the Independent Media Commission also submitted comments to the Court.
15. On 15 July 2016, the Court sent a request for comparative analysis related to the present Referral to the members of the Venice Commission Forum.
16. Between 16 July 2016 and 5 September 2016, the following members of the Venice Commission Forum, responded: the Constitutional Court of Austria, Constitutional Court of South Africa, Constitutional Court of Lithuania, Federal Supreme Court of Switzerland, Constitutional Court of the Czech Republic, Constitutional Court of Bosnia and Herzegovina, the Council of State of the Netherlands, the Constitutional Court of Bulgaria and the Constitutional Court of Croatia.
17. On 28 September 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur to replace Robert Carolan who resigned from the position of the Judge of the Court on 9 September 2016. The composition of the Review Panel remained unchanged.
18. On 16 November 2016, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible and to find a violation.
19. On the same date, the Court voted unanimously for the admissibility of the referral and to find a violation.

Summary of facts

20. In 2010 the Assembly of Kosovo adopted Law No. 03/L-147 on Salaries of Civil Servants which was published in the Official Gazette of the Republic of Kosovo on 25 June 2010.
21. On 5 February 2015, by Decision 05/2015, the Government adopted Regulation No.05/12 on Classification of Jobs in the Civil Service. In addition, the Government also adopted a Catalogue of Jobs in the Civil Service. These legal acts were based upon the abovementioned Law on Salaries of Civil Servants, in order to implement the provisions of the Law.
22. On 21 January 2016, the MPA issued the contested Administrative Circular and requested from the Applicant to implement the classification and placement of the civil servants to positions and grades as approved by the Government.
23. In this respect, the Court recalls the requests entailed in the Administrative Circular:

“The process of job classification and the placement of civil servants in positions and grades

The Ministry of Public Administration, in order to support institutions in the preparation and completion of the process of job classification and promotion, issues the next administrative instruction, through which it determines and explains further actions and steps for the implementation of classification and placement of civil servants in positions and grades pursuant to the Regulation on Classification of Civil Servants and the Job Catalogue adopted by the Government, as follows:

1. Submission of proposals by institutions to the MPA

Institutions that, so far, have not submitted their proposals for job classification to the MPA pursuant to previous notices, especially after the adoption of the Catalogue by the Government and the Administrative Instruction / MPA, dated 24 February 2015, whereby you have been obliged to submit proposals for the process of classification to the MPA until 24 April 2015, are obliged to submit their proposals until 05.02.2016.

2. Review of proposals for job classification and harmonization with the Job Catalogue

The Ministry of Public Administration, namely the Department of Civil Service Administration – DCSA, in cooperation with institutions, shall review and harmonize proposals and classifications with the Job Catalogue. The DCSA shall submit proposals harmonized with the Job Catalogue to the Joint Committee MPA - MF for consideration and approval in principle.

3. Review and approval in principle of the classification by the Joint Committee MPA – MF

Pursuant to paragraphs 3, 4, 5, 6 and 7 of Article 29 of the Regulation on Classification, within 30 days from the day of receipt of proposals by the DCSA, the Committee MPA – MF shall review and approve in principle the proposals for job classification of institutions in accordance with the abovementioned regulation and the Job Catalogue. After approving in principle the proposals for job classification, the Committee MPA – MF shall submit them to the Minister of the Ministry of Public Administration and to the Minister of the Ministry of Finance for approval and then the classification shall be submitted to the Government for final approval.

4. Placement of civil servants in positions and grades approved by the Government and their submission to the MPA/DCSA

The institutions, in accordance with the job classification approved by the Government, shall place civil servants in relevant positions and grades. For this purpose, the institutions shall establish a committee which will be responsible for the placement of civil servants in the approved grades and shall submit their proposals to the senior leader of the institution for approval. The institutions are obliged, that within 20 days from the day of approval of the classification by the Government, to complete the placement of civil servants in positions and grades pursuant to the classification approved by the Government. The DCSA shall provide you with the classification approved by the government and support institutions during the process of placement of civil servants in positions and grades. After the placement of civil servants in grades pursuant to the classification approved by the Government, the institutions should submit the request together with the data table of classified and systemized civil servants to the MPA/DCSA. The DCSA shall put the data received from institutions in the HRMIS in order to proceed the salary.

5. Registration of position and grade in the DCSA

The Ministry of Public Administration, namely the Department of Civil Service Administration, shall register the classification approved by the Government in the Register of Job Classification. Institutions that have already started and completed any of the actions mentioned above in this instruction, in cooperation with the DCSA, shall continue with the following actions and steps foreseen in this instruction. The process of job classification and the placement of civil servants in positions and grades approved by the Government shall be concluded by 20 May 2016. Institutions that will not complete the process of classification within the foreseen time limit will not be able to include their employees in the Human Resource Management Information System (HRMIS) and consequently they cannot realize salaries through the system, make new recruitments, manage the civil service through the HRMIS and cannot realize other rights of civil servants which they are entitled to pursuant to the legislation of the civil service”.

24. On 24 February 2016, the Applicant responded to the MPA and emphasized that the Administrative Circular was in contradiction with the constitutional guarantees for institutional independence of the Ombudsperson Institution under Chapter XII of the Constitution and the provisions of the Law on Ombudsperson on the administrative, organizational and financial independence.
25. On 10 March 2016, the four institutions set forth in Chapter XII [Independent Institutions] of the Constitution, namely the Office of the Ombudsperson, the Office of the Auditor General of Kosovo, the Central Election Commission, and the Independent Media Commission sent a joint letter to the Prime Minister of the Government, the President of the Assembly, and to the Minister of the MPA. In their letter they raised their concerns that the Administrative Circular was not in compliance with the constitutional guarantee of independence that the Constitution confers upon these institutions and as such it was unconstitutional.
26. On 15 March 2016, the Applicant received a written response from the MPA which stated, inter alia, the following:

"Your Institution and other institutions are obliged to implement Decision of the Government No. 05/12, of 05.02.2015, the Administrative Circular 01/2015 of 24.02.2015, in connection with the use of the Catalogue of jobs for civil servants in Kosovo and the other Administrative Circular of 21.01.2016 on the process of the job classification and placement of civil servants in the positions and grades".
27. On 23 March 2016, the Applicant adopted its own Regulation No. 1/2016 on Internal Organization and Systematization of Jobs in the Ombudsperson Institution which was published in the Official Gazette of the Republic of Kosovo on 31 March 2016. The Applicant issued this Regulation based on the Law, No. 05/L-019, on the Ombudsperson which entered into force in July 2015.

Applicant's allegations

28. The Applicant requests *"by this submission... from the Constitutional Court the constitutional review of the procedures/requirements of the administrative act: Administrative Circular No. 01/2016 of 21 January 2016, the Government of the Republic of Kosovo on implementation of Regulation No. 05/2012 on the Classification of Jobs in the Civil Service and the Catalogue of jobs in the civil service, adopted by the Government of Kosovo, by Decision 05/12, of 5 February 2015"*.
29. The Applicant alleges that: *"Administrative Circular No. 01/2016 violates the independence of the independent constitutional institutions guaranteed by the Constitution of the Republic of Kosovo as enumerated in Chapter XII in particular the independence of the Ombudsperson Institution as guaranteed by Article 133 [Office of Ombudsperson] of the Constitution of the Republic of Kosovo"*.

30. The Applicant notes that: *"The Ombudsperson, the Office of the Auditor General, the Central Election Commission, the Independent Media Commission and the Central Bank of Kosovo are included as the constitutional categories in Chapter XII of the Constitution, and the Constitutional Court in Chapter VIII"*.
31. On the question of organizational, functional and financial independence, the Applicant alleges that: *"By Articles 132, 133, 134 and 135 of the Constitution of the Republic of Kosovo the competences, office/budget, election and reporting of work are guaranteed to Ombudsperson"*.
32. The Applicant reiterates that: *"the Constitution of the Republic of Kosovo, as a foundation, is a guarantor of independent functioning of state powers and independent constitutional institutions: Ombudsperson, the Office of the Auditor General, the Central Election Commission, the Independent Media Commission, the Central Bank of Kosovo and the Constitutional Court"*.
33. The Applicant argues that: *"The independent institutions under the Constitution of the Republic of Kosovo are a constitutional category under Chapter XII and the mandate, financing, reporting and election are provided by constitutional provisions. The independent institutions of the Republic of Kosovo are the institutions established by the Constitution relevant laws and their operation and competence is regulated in detail. The independent constitutional institutions have their own budget, which is administered independently in accordance with the law. Interpreting these constitutional articles, it is noted that the constitutional independence of an independent institution, is defined as a decision-making, organizational and financial independence"*.
34. Regarding the legal deadline to submit this referral, the Applicant states: *"A referral made pursuant to Article 30 of this Law shall be submitted within six (6) months from the day upon which the alleged conflict started. While the dispute over the issue arose after the Administrative Circular no. 01/2016 of 22 January 2016, of the Government of the Republic of Kosovo, which the Ombudsperson received by e-mail on 25 January 2016"*.

Comments submitted

35. The MPA submitted the following comments to the Court:
 - a) *The Catalogue of Jobs and the Methodology on Standardization of Jobs provide instructions and assistance to all institutions of civil service for them to carry out the standardization of the titles of job positions and descriptions, as well as the classification of jobs in grades, in compliance with the applicable legislation on civil service. The main purpose of the process of the classification of jobs in the civil service is the standardization and unification of titles and job descriptions in the civil service and the application of the principle "Equal pay for equal work", which is a legal provision foreseen by Article 3, paragraph 2 of Law no. 03/L-147 on Salaries of Civil Servants and the Universal Declaration of Human Rights, Article 23,*

paragraph 2, "Everyone, without any discrimination, has the right to equal pay for equal work."

- b) *The fact that this circular has a notifying and instructing character and that it is neither a normative nor an administrative act is confirmed by its mere content, because it contains clarifications and instructions which are indeed a remainder of the legal provisions determined by the Law on Salaries of Civil Servants and the Regulation on Classification of Jobs. In his referral, even the Ombudsperson has mistaken the concept and qualification of this circular; in some cases, he qualifies it as an administrative act, in others as a normative act, while it is neither!"*
- c) *"In fact, the referral aims and indirectly refers to the constitutionality of the Law on Salaries of Civil Servants and Regulation on Classification of Jobs. If the review of these normative acts has been requested, then Referral KO73/16 of the Ombudsperson, based on Article 30 of Law no. 03/L-121 of the Constitutional Court of the Republic of Kosovo is out of time (Article 30 [Deadlines] A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.)."*
- d) *"Based on the legal grounds and explanations provided hereunder, it is obvious that the main purpose of the Ministry of Public Administration was to realize its responsibilities, through its Administrative Circular no. 01/2016 of 21 January 2016, in relation to the classification of jobs and to explain and provide concrete guidelines concerning the facilitation of the implementation of the process of job classification for the institutions of public administration, which is a legal obligation stemming from Article 7 of the Law on Salaries of Civil Servants and the Regulation on Classification of Jobs; it, by no means stems from the violation of the constitutional independence of institutions, under Chapter XII of the Constitution of Kosovo."*

36. The Applicant in response submitted the following comments:

- a) *"The MPA error is reflected not only in the characterization of its reasoning, but also in its substance: a large part of the substance of the referral is focused on the protection of the Circular based on various laws for the regulation of civil service (see pg. 4-7 and 12-16). Based on these exclusively legal reasons, the MPA remains with no justification to draw its constitutional conclusion that the Circular is not "in any case, a violation of the constitutional independence of institutions, based on chapter XII of the Constitution of Kosovo" (id. pg. 3). In fact, the entire MPA submission, in the letter addressed to the Constitutional Court, contains quotations from dozens of legal provisions and administrative acts to the defense of the Circular, but not a single specific article of the Constitution is mentioned.*

- b) Notwithstanding this, having noted that the legal framework regulating the civil service is, in general, very respectful to the constitutional independence of the Ombudsperson Institution, despite the allegations of the MPA. Such constitutional independence is materialized upon rendering of basic laws in the field of the organization of public administration, civil service, salaries, and the Law on Ombudsperson Institution. The laws at hand explicitly confirm that, during their implementation, the independence of independent institutions must always be respected, which is what the impugned Circular does not do.
- c) The Constitution of the Republic of Kosovo clearly states that the Ombudsperson Institution is authorized to raise the "question of the compatibility with the Constitution of ... regulations of the Government" (Constitution, Article 113, paragraph 2, **bolds added**). The term "regulation", within its constitutional meaning, is a general term, which means that it includes not only acts that are titled "regulation", but also "any general legal act stemming from the authority of the Government", for example, "instructions, directives, etc."
- d) According to this standard, it is of no importance for the constitutional review of the Circular if we call it "normative act" or "administrative act". What is important is that (1) it is a general act that is implemented for the state institutions in general, not only for one natural or legal person; and (2), it is a legal act that stems from the authority of Minister Yagcilar, as part of the Government ("The Government consists of the Prime Minister, deputy prime minister(s) and ministers", Constitution, Article 92, paragraph 2). Therefore, the MPA allegations related to the labeling of the Circular are constitutionally irrelevant and an unnecessary deviation from the assessment of the substance of our referral."

37. The Independent Media Commission commented that:

"The IMC informs you that it supports the allegations of the Ombudsperson, Mr. Hilmi Jashari, raised in the letter of 29 April 2016, concerning the violation of the constitutional independence of the independent constitutional institutions, stipulated in Chapter XII of the Constitution of the Republic of Kosovo".

Relevant findings of the Venice Commission

38. The relevant findings of the Venice Commission Opinion CDL-AD(2007)020 are on the reform of the Ombudsperson in Kazakhstan and they read:

"Thus the law or statute regulating the Ombudsman could prescribe that the budgetary allocation of funds for the operations of the institution should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution, and take into account such matters of reference as the number of complaints lodged

with the institution in the previous year. The law or statute could also provide for a relative budgetary independence of the Ombudsman, by prescribing that the institution itself should submit a proposal for its budget to the governmental authority responsible for presentation of the national budget to the parliament, and that this proposal should be included within the national budget without changes, either as a proposal of the government or for purposes of comparison with the eventual proposal of the governmental authority, if the government should find it necessary to make reductions in the allocation requested. Finally, if the Human Rights Ombudsman is constituted as a parliamentary ombudsman in the ordinary sense (i.e. appointed by the legislature and reporting to the legislature), this may serve to strengthen the assumption that the parliament will in fact regularly provide the institution with financial means adequate to ensure its proper functioning”.

Assessment of the admissibility of the Referral

39. In order for the Court to be able to adjudicate on the Applicant's Referral, it has to examine whether the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure have been fulfilled.

40. Article 135.4 of the Constitution [Ombudsperson Reporting] provides that:

The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution.

41. The authority of the Ombudsperson under Article 135.4 of the Constitution to refer matters to the Court must be understood in conjunction with the provisions of the Constitution regarding the jurisdiction of the Court contained in Article 113 [Jurisdiction and Authorized Parties] of the Constitution.

42. In this respect, Article 113.2(1) of the Constitution provides that:

2. [...] the Ombudsperson [is] authorized to refer the following matters to the Constitutional Court:

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

43. In the present Referral, the Applicant requests the Court to assess whether the requests entailed in the Administrative Circular issued by the MPA are compatible with the Constitution.
44. The Applicant claims that the requests entailed in the Administrative Circular violate the constitutional guarantee of independence of the institutions enumerated in Chapter XII [Independent Institutions] of the Constitution and the independence of the Constitutional Court as provided in Chapter VIII [Constitutional Court].

45. The Court recalls that, in its comments submitted to the Court, the MPA stated that the contested Administrative Circular is not an administrative act and therefore the Applicant cannot contest it before the Court. The MPA further stated that the Administrative Circular is merely a notification, an instruction which provides guidance to the institutions to which it was directed.
46. The Court also recalls that in reply to such comments submitted by the MPA, the Applicant responded that despite such allegations, the Administrative Circular is an administrative act because it entails specific directions, orders and obligations that the institutions were requested to obey. Moreover, the Applicant alleges that there is violation of the provisions of Chapter XII and Chapter VIII of the Constitution.
47. The Applicant also asserted that, *"Moreover the referral is submitted within the deadline of six months from the date of entering into force the challenged Administrative Circular of the MPA."*
48. In this respect, the Court notes that the Administrative Circular was issued on 21 January 2016, whereas the Referral was filed on 29 April 2016, which is within the time-limit of six (6) months provided under Article 30 of the Law.
49. Having examined the Applicant's complaints and observations, the Court considers that the Referral raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded within the meaning of the Rule 36 (1) (d) of the Rules, and no other ground for declaring it inadmissible has been established (See, for example, the Case of *A and B v. Norway*, [GC], applications nos. 24130/11 and 29758/11, Judgment of 15 November 2016, paragraph 55 and also see *mutatis mutandis* Case No. KI132/15, *Visoki Dečani Monastery*, Judgment of the Constitutional Court of the Republic of Kosovo of 20 May 2016).
50. Consequently the Court declares the Referral admissible.

Assessment of the Merits of the Referral

51. In assessing the merits of this Referral the Court will not take a stand on the disputed legal nature of the challenged Administrative Circular. The gist of the Referral is whether the challenged Administrative Circular allegedly violated the respective provisions of the Constitution in this particular case under its particular circumstances.
52. In accordance with Chapter VIII [Constitutional Court], Article 112 [General Principles] of the Constitution, the mandate of the Court is to assess the constitutionality of the requests related to the Administrative Circular and not to assess its legality or whether it is supported by good public policy.
53. Accordingly the Court will consider the following provisions of the Constitution:

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. [...]*

Article 4 [Form of Government and Separation of Powers]

1. *Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided by this Constitution.*
2. *The Assembly of the Republic of Kosovo exercises the legislative power.*
3. *The President of the Republic of Kosovo represents the unity of the people. [...]*
4. *The Government of the Republic of Kosovo is responsible for implementation of laws and state policies [...].*
5. *The judicial power is unique and independent and is exercised by courts.*
6. *The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution. [...]*

Article 92 [General Principles]

1. *[...]*
2. *The Government of Kosovo exercises the executive power in compliance with the Constitution and the law.*
3. *The Government implements laws and other acts adopted by the Assembly of Kosovo and exercise other activities within the scope of responsibilities set forth by the Constitution and the law. [...]*

Article 93 [Competencies of the Government]

1. *The Government has the following competences:
[...]
(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws; [...]*
54. It is on this basis that the constitutionality of the requests related to the Administrative Circular will be analyzed.
55. The question to be answered is whether the MPA, when enacting the Administrative Circular, took into account the specific constitutional place and status of the independent institutions and the constitutional guarantees for their functional, organizational and financial independence and whether the legal principle "equal pay for equal work" is constitutionally applicable in view of their constitutional standing.
56. In this respect, the Court is to ascertain whether the contested Administrative Circular: (i) touches upon the constitutional status of the independent institutions and (ii) what is the substantive impact of that Administrative

Circular in relation to the organizational, functional and financial status of the independent institutions.

57. The Court recalls that the contested Administrative Circular, inter alia, reads: *"Institutions that will not complete the process of classification within the foreseen time limit will not be able to include their employees in the Human Resource Management Information System (HRMIS) and consequently they cannot realize salaries through the system, make new recruitments, manage the civil service through HRMIS and cannot realize other rights of civil servants which they are entitled to pursuant to the legislation of the civil service"*.
58. On this point, the Court notes that the contested Administrative Circular, regardless of its name, is of a mandatory nature and indeed touches upon the constitutional status of the independent institutions.
59. There is no evidence before the Court to suggest that the MPA has properly analyzed the implications of the requests entailed in the Administrative Circular in view of the specificities that these institutions have according to the provisions of the Constitution.
60. The Court also notes that the MPA was provided with the opportunity to comment on the merits of the Referral. In its submission before the Court, the MPA focused mainly on the procedural aspect of the admissibility of the Referral. They have not expressed an opinion on the allegations of the Applicant nor have they shown that they have taken into consideration the remarks of these institutions in the process of job classification and categorization.
61. As provided by Article 4 [Form of Government and Separation of Powers] of the Constitution, Kosovo is a democratic Republic based on the principle of separation of powers and checks and balances among them. Accordingly the Assembly exercises the legislative power, the Government - the executive power and the judiciary - the judicial power. Outside them are the other state institutions, inter alia the Office of the Ombudsperson and the Constitutional Court.
62. The Court notes that the Office of the Ombudsperson and the Constitutional Court are granted with detailed and extensive constitutional regulation, compared to the other independent institutions according to Chapter XII. This is why the Court will deal more extensively with these two institutions, but underlines that the constitutional independence is as well and as equally applicable to the other independent institutions. The Court also notes that the other independent institutions have different mandate and authority, as stipulated by the Constitution, and the specificity of their constitutional status must be respected accordingly. It is the duty of the Government in its entirety to take into account this reasoning.
63. This Court has already pointed out that the Constitution is based on the principle of separation of powers. In its Judgment in Referral, KO 98/11, dated 20 September 2011, *Concerning the immunities of 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, the Court said, at paragraph 44, "The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees the democratic functioning of a State. The essence of the independence and effective functioning of these branches is the immunity provided to the persons embodying these powers".

64. In addition to the three branches of government referred to above, the Constitution guarantees a special status to the Office of the Ombudsperson and to the other independent institutions enumerated in Chapter XII of the Constitution. The Constitution also safeguards a special status to the Constitutional Court as the final guarantor and interpreter of the Constitution. Furthermore, the Constitutional Court is the only authority established by the Constitution to solve questions of conflict of constitutional competencies between the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo (See Article 113.3(1) of the Constitution).
65. As noted by the Court, the Applicant and the Constitutional Court are not part of the legislative, executive and the regular judiciary. The same applies for the other independent institutions enumerated in Chapter XII of the Constitution.
66. Based on the above arguments, the Court will take into account mostly the special constitutional status that the Constitution confers upon the Applicant and the Constitutional Court and will explore their role in the overall constitutional system of the Republic of Kosovo as well the meaning of the notion of independence that applies to each of them with their specificity. The Court notes that this analysis will be done within the constitutional framework related to all independent institutions and the conclusions will be applicable to them as well.
67. In addition, the Court will elaborate, on a constitutional level, on the precise role of the Government in preserving, promoting and ensuring their independence.
68. For the purposes of such analysis, the Court takes into consideration the relevant provisions of the Constitution and of the laws of the Office of the Ombudsperson and of the Constitutional Court.

The Ombudsperson

1. The relevant provisions of the Constitution read as follows:

Article 132 [Role and Competencies of the Ombudsperson]

1. *The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.*

2. *The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo.*
3. *Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law.*

Article 133 [Office of Ombudsperson]

1. *The Office of the Ombudsperson shall be an independent office and shall propose and administer its budget in a manner provided by law. [...]*

The relevant provisions of Law No. 05/L-019 on Ombudsperson read as follows:

Article 3 [Basic Principles of Ombudsperson's activity]

1. *Ombudsperson is an independent institution that is governed by the principles of impartiality, independence, pre-eminence of human rights, confidentiality and professionalism. [...]*
3. *The institution of the Ombudsperson enjoys organizational, administrative and financial independence in the implementation of tasks set forth by the Constitution of the Republic of Kosovo and the Law.*

Article 16 [Powers]

1. *The Ombudsperson has the power to investigate complaints received from any natural or legal person to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.*

Article 32 [Personnel]

1. *The other employees of the Institution of Ombudsperson shall be subject to the legal provisions in force for civil servants.*
2. *[...] The provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to the extent that there is no infringement of constitutional independence of the Institution.*

Article 37 [Regulations of the Institution]

1. *The Ombudsperson issues the Rules of Procedure, Regulation for internal organization and systematization of job positions, decision making processes and other organizational issues in accordance with the Law. [...]*

69. The Court notes that the Office of Ombudsperson is an independent institution which was created to ensure accountability from the public authorities vis-à-vis the rights and freedoms of individuals. In fulfilling this role, the Institution independently exercises its mandate without accepting any instructions or intrusions from any other state authority.
70. Additionally, the Constitution places an obligation on the organs of state through legislative and other means to ensure the independence, impartiality, dignity and effectiveness of the Office of the Ombudsperson and the other independent institutions.
71. The Court notes that, on the other side, the Office of the Ombudsperson is accountable to the Assembly and must report on its activities and the performance of their functions to the Assembly at least once a year.
72. The Court notes that when assessing an alleged constitutional interference by the executive authorities, including the Government, with the constitutional guarantees of independence of the institutions in question, this must be assessed on a case-by-case basis.
73. The Government is constitutionally obliged to respect the independence of the Office of Ombudsperson. It is also bound to ensure it by issuing regulations, orders or other legal acts in such a manner that they do not curtail its functional, organizational and financial independence.
74. The Court notes that it is within the authority of the Government to deal with the public administration and, *inter alia*, to create a unified classification of job positions and grades. Furthermore, the implementation of laws and state policies is one of the constitutional duties of the Government. However, the Government is to take into account the special status of the Ombudsperson, the Court and the other independent institutions in accordance with the constitutional guarantee of their independence as outlined above. Accordingly the preparation, the content and the applicability of any norms related to their functioning and internal job descriptions and remuneration has to be adequately and appropriately developed and determined. The Government cannot suffice by applying identical criteria to those applied to the governmental agencies to be applied in the same manner to the independent institutions defined in the Constitution. It is also for the Government to consider to what extent the principle "equal pay for equal work" is constitutionally applicable in view of the constitutional standing of the independent institutions, *inter alia* to take into account also the specific job descriptions and duties of the staff recruited in those institutions.
75. The Court notes that the independence of the Ombudsperson and the other independent institutions cannot function in *a vacuum* or outside of all normative frameworks of the state. However these norms and principles have to guarantee their independent status and efficient functioning according the specific functions they perform under the Constitution. This is the starting point for the assessment of this referral and the alleged constitutional conflict and interference of the Government with these institutions' independence.

The Constitutional Court of the Republic of Kosovo

1. The relevant provisions: The Constitution:

Article 112 [General Principles]

1. *The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.*
2. *The Constitutional Court is fully independent in the performance of its responsibilities.*

Article 115 [Organization of the Constitutional Court]

1. *The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law.*
2. *The Constitutional Court shall publish an annual report.*

The Law on Constitutional Court

Article 2 [Organization of the Work of the Constitutional Court]

1. *The Constitutional Court shall enjoy organizational, administrative and financial independence in performing duties assigned by the Constitution of the Republic of Kosovo ('Constitution') and the Law.*
2. *The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law.*

Article 14 [Budget]

1. *The Constitutional Court shall be funded from the Kosovo Republic budget*
 2. *Notwithstanding provisions of other laws, the Constitutional Court shall prepare its annual budget proposal and forward the said budget proposal to the Assembly of the Republic of Kosovo for adoption. Neither the Government nor any other budget organization shall be entitled to amend or otherwise modify or influence the budget proposal prepared by the Constitutional Court. The budget proposed by the Constitutional Court shall be included in its entirety in the Republic of Kosovo Consolidated Budget submitted to the Kosovo Republic Assembly for adoption.*
 3. *The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of the Republic of Kosovo.*
76. As far as the Constitutional Court is concerned, the Court notes that the central issue of the referral is that the impugned Administrative Circular interferes with the functional, organizational and financial independence of the

Constitutional Court, as well as with the independence of the other independent institutions including the Applicant as analyzed above, and guaranteed according to the Constitution.

77. The Court recalls the constitutional requirement to respect the principle of separation of powers enunciated in Article 4 [Form of Government and Separation of Power] of the Constitution for the sake of its further analyses.
78. The Court will analyze the issues at stake in this referral under Article 113 [Jurisdiction and Authorized Parties] of the Constitution. The Court notes that it is for the Court to characterize the case facts vis-à-vis the constitutional norms and that it is not bound by the characterization given by the Applicant or by the MPA (see, among other authorities, *Guerra and Others vs. Italy*, ECtHR, Judgment of 19 February 1998, paragraph 44).
79. In particular the Court notes that Article 115.1 of the Constitution envisages that: "*The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law.*" Thus, according to the Constitution the mandate to adopt its own rules of procedure has been placed within the exclusive competence of the Court. Evidently the authors of the Constitution aimed at securing the independence and efficiency of the Constitutional Court by enabling the Court itself to create its own rules of procedure and thereby prevent any interference with the exercise of its assigned responsibilities. This also shows and confirms that the Court has a special position and authority according to the Constitution and within the system of the state institutions.
80. Accordingly the independence of the Court requires it to be governed by specific rules, moreover, of constitutional values, and obliges the Government and its branches to respect them.
81. The Court shall be able to decide by itself on its internal organization and to achieve efficient functioning. It is for the Assembly to establish and approve the budget of the institutions of the Republic of Kosovo, but in compliance with the Constitution. The Constitution obliges the legislator and the executive not to infringe upon the independence of the Court (see, for example, *Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina* in Case no. U 6/06, of 29 March 2008).
82. The Court underscores its position established in paragraph 6 of Article 4 [Form of Government and Separation of Powers] of the Constitution which stipulates: "*The Constitutional Court is an independent organ in protecting the constitutionality and is final interpreter of the Constitution*". Thus, the Court stresses that the Administrative Circular as a legal act, issued by the executive branch, apart from having an impact – if implemented – on the organizational, functional and financial independence of the Court, it in a way also interferes, on the checks and balances mechanism which guarantees the democratic functioning of the State.
83. Moreover on this point, the independence of the Court is of a particular nature because the Court performs a constitutional review of checks and balances

between the three branches of government whenever such conflict arises and whenever such constitutional question is referred to the Court by an authorized person in accordance with the Constitution.

84. As to the criteria that determine the position of Constitutional Courts as independent and separate branches of state power, the Constitutional Court of Lithuania in its Ruling in Case No. 12/06 of 6 June 2006 explained:

“The Constitutional Court has held in its acts more than once that the function of administration of justice determines the independence of the judge and courts, which is one of the essential principles of a democratic state under the rule of law: courts, while administering justice, must ensure the implementation of the rights established in the Constitution, the laws and other legal acts, to guarantee the supremacy of law, and to protect human rights and freedoms. The independence of judges and courts is not an end in itself: this is a necessary condition of protection of human rights and freedoms, not a privilege but one of the main duties of a judge and courts arising from the right (guaranteed in the Constitution (inter alia, Paragraph 2 of Article 109 in which it is prescribed that while administering justice the judge and courts shall be independent, as well as in Paragraph 1 of Article 30, in which it is prescribed that the person whose constitutional rights or freedoms are violated shall have the right to apply to court)) of every person who thinks that his rights or freedoms are violated to an independent and impartial arbiter of the dispute, which, under the Constitution and laws, would in essence solve the dispute at law. The autonomy and independence of the judicial power from other branches of state power are determined by the fact, that differently than other branches of state power, it is formed not on the political, but on the professional basis (the Constitutional Court’s rulings of 21 December 1999, 12 July 2001, its conclusion of 31 March 2004, and its rulings of 28 March 2006 and 9 May 2006).”

85. As to the binding nature of the rulings of Constitutional Courts and the constitutional obligation of other state institutions to respect them, the above-stated ruling of the Constitutional Court of Lithuania reads:

“Thus, also the exclusive powers of the Constitutional Court to construe the Constitution officially and to provide the official concept of the provisions of the Constitution – to form the official constitutional doctrine – arise from the Constitution itself. Under the Constitution, the concept of the constitutional provisions, the arguments set forth in the Constitutional Court’s rulings as well as in other acts of the Constitutional Court – conclusions and decisions, are also binding on law-making and law-applying institutions (officials), including courts of general jurisdiction and specialized courts established under Paragraph 2 of Article 111 of the Constitution (the Constitutional Court’s decision of 20 September 2005 and its ruling of 28 March 2006).”

86. As to the independence of the constitutional institutions, the Constitutional Court of Albania in Decision (V-19-07) in Case. No. 43/13 of 3 May 2007 reasoned:

“The notion of independence does not and cannot have the same substance or meaning in reference to all constitutional organs and institutions. That notion varies depending on the nature of the organ and its constitutional duties and function. However, generally speaking, it must be emphasized that their independence as guaranteed by the Constitution and the respective organic laws, has as its component or inherent element organizational, functional and financial independence. Beside questions of election, appointment or dismissal of managers and other high officials of constitutional organs and institutions, among others, the organizational independence is also valid with regard to their entitlement to draft and appoint, in compliance with certain criteria, their structure and organigram, including the right to appoint directors and advisors, the quantity and the set up of officials of supporting cabinets, appointment of officials of lower positions, recruitment of personnel of different levels, etc. The functional independence of the constitutional organs and institutions is closely knit with the substance of the work that they discharge, which is directly regulated for and has its foundations in the respective constitutional provisions ... no other organ or institution, whether it a part of one of the three branches of the government, cannot interfere in treatment and solving of questions, as the case may be, would make up the central object of the work of other constitutional organs and institutions ... while, on the other hand, the constitutional provisions and organic laws patently establish that management of the budget in accordance with the law should be left at the hand of these organs themselves. Surely, they know and assess their requests and problems, needs for investment, objectives that they want to reach, etc better than anyone else.”

87. The Court considers that the MPA approach that there must be put in place classification and categorization of jobs and salaries under the principle “equal pay for equal work” must be interpreted differently and applied in a differentiated manner with respect to the Applicant and the Court in particular. A technical and a unifying approach disregards their constitutionally defined role and authority and thus touches upon their independence accorded to them by the Constitution and further developed by their organic Laws and Rules of Procedure.
88. The personnel working in the Ombudsperson Institution and the Court have different work responsibilities compared to similar positions in other institutions and this explicit differentiation is reflected in their job descriptions and remuneration and is to be preserved.
89. Moreover, the functional and organizational independence of the Applicant and the Court is invariably linked with, and entails their financial and budgetary independence according to the Constitution and the respective organic laws. The challenged Administrative Circular does not respect adequately, or to the necessary degree, their three-fold independence – organizational, functional and financial and the specificity of the work of their staff.

90. On the other hand, the Court considers that the independence of the Applicant and the Court is also subject to some restrictions and control. They are contained in Article 14.3 of the Law on Constitutional Court which provides: "*The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo*". In a similar way, Article 35.4 of the Law on Ombudsperson Institution provides: "*The Ombudsperson Institution independently manages with its own budget and is subject to internal and external audit by the Auditor General of the Republic Kosovo*".
91. Moreover on this point, the Court notes that according to Article 137 of the Constitution [Competencies of the Auditor-General of Kosovo], the Auditor-General of the Republic of Kosovo is the only authority established by the Constitution that can audit the economic activity of the Applicant and the Court, as well as of all other public institutions in the Republic of Kosovo.
92. The Court, *mutatis mutandis*, recalls that the question of independence of the judiciary is one of the fundamental components of the general right to a fair and impartial trial. In this respect, the Court notes that the European Court of Human Rights in its well-established case law has stated that only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation "tribunal" within the meaning of Article 6, para. 1, of the European Convention of Human Rights. (See the Case of *Beaumartin v. France*, application no. 15287/89, ECtHR, Judgment of 24 November 1994, paragraph 38 and the references cited therein).
93. The Court notes that the importance of the Ombudsperson as an institution that protects fundamental human rights is also highlighted in the well-established case law of the European Court of Human Rights. In this respect, the European Court of Human Rights recognized that, in the circumstances of that case referenced below, a complaint by an applicant to the Ombudsman for alleged of ill-treatment by the police would have to be considered as an effective remedy for the purposes of Article 13 of the European Convention of Human Rights, due to the authority of the Ombudsman of that country to refer complaints to the public prosecutor. The fact that the referral of the complaint by the Ombudsman to the Prosecutor did not lead to an investigation by the latter was held to be in violation of Article 13 of the European Convention on Human Rights. (See, for example, the Case of *Egmez v. Cyprus*, ECtHR, application no. 30873/96, Judgment of 21 December 2000 para. 100).
94. In view of the above reasoning the Court concludes that the challenged Administrative Circular contains principles and an approach such that it in its entirety infringes the core of the independent institutions as separate state authorities from the legislative, executive and regular judiciary.
95. The Court notes that the challenged Administrative Circular does not provide for the necessary distinction between the independent institutions and the other organs of the state such that their specific functions and authority is reflected, *inter alia*, upon the job characteristics, responsibilities and

remuneration of their personnel, thus safeguarding their independence as stipulated by the Constitution.

96. Consequently, the Court holds that the challenged Administrative Circular issued by the MPA infringes, in its entirety, the provisions of Chapter VIII and Chapter XII of the Constitution of the Republic of Kosovo with respect to the Applicant, the Court, and the other independent institutions expressly enumerated therein.

CONCLUSION

97. The Court considers that the independent institutions envisaged in Chapter XII of the Constitution, and particularly the Applicant and the Court are situated outside of the three branches of the government, and as such, they are not and cannot be involved in the interplay of the division of power and checks and balances that characterizes the three branches of government. Accordingly they have a specific constitutional status that must be respected by the governing authorities.
98. The Court reiterates that the Applicant and the Court, in particular, assist the three branches of government in ensuring the rule of law, the protection of fundamental human rights and the supremacy of the Constitution, which makes them specialized and uniquely independent institutions.
99. In addition the Court notes that the contested Administrative Circular did not take into account the unique position of the Applicant and the Court as constitutionally independent institutions, given that the Circular was prepared without participation of the involved institutions or without taking the opinions expressed.
100. The Court agrees that the Government has a constitutional prerogative and duty to be the policymaker of the State, including the classification and categorization of job positions. But the Court opines that it could not be expected that the staff of the constitutionally independent institutions should conform in an identical manner to the system of recruitment, job classification, categorization and remuneration provided for by a legal act of general nature of the Government, or any act of the executive branch, without first taking into due account the specificities and uniqueness of the institutions in question. Therefore the Court finds that the Administrative Circular in its entirety violates the provisions of the Constitution as stipulated in Chapter VIII [Constitutional Court] and Chapter XII [Independent Institutions].

FOR THESE REASONS

The Constitutional Court pursuant to Articles 113.2(1) and 135.4 of the Constitution, Articles 22, 29 and 30 of the Law and Rules 56 (1), 62, and 65 (1) of the Rules of Procedure, unanimously, on 16 November 2016

DECIDED

- I. TO DECLARE, unanimously, the Referral admissible;
- II. TO HOLD, unanimously, that the Administrative Circular No. 01/2016 on Classification of Jobs and the Catalogue of Jobs in the Civil Service issued by the Ministry of Public Administration, in its entirety violates the independence of the independent institutions provided by the Constitution, and is unconstitutional with respect to those independent institutions. The abovementioned Administrative Circular is therefore null and void as it pertains to the Applicant and the other independent institutions explicitly enumerated in Chapter XII [Independent Institutions], namely in Articles 132-135 [Role and Competencies of the Ombudsperson], 136-138 [Auditor-General of Kosovo], 139 [Central Election Commission], 140 [Central Bank of Kosovo] and 141 [Independent Media Commission], as well as that of the Court as established in Chapter VIII [Constitutional Court] of the Constitution;
- III. TO NOTIFY this Judgment to the Parties;
- IV. TO PUBLISH this Judgment in the Official Gazette; in accordance with Article 20.4 of the Law;
- V. TO DECLARE this Judgment effective immediately.

Judge Rapporteur

Snezhana Botusharova



President of the Constitutional Court

Arta Rama-Hajrizi