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Gjykata Kushtetuese / Ustavni sud / Constitutional Court

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Case KI 11/09, Tomë Krasniqi vs RTK and KEK

**Dissenting opinion on interim measures**

**Judge Gjyljeta Mushkolaj**

I respectfully disagree with the Majority's decision on interim measures and therefore join Judge Almiro Rodrigues dissenting opinion. Furthermore, in my view, the Majority's decision to suspend further application of Art. 20.1 of the Law on RTK considering it an infringement of public interest, ignores entirely the constitutional guarantee of the freedom of expression<sup>1</sup> and the freedom and pluralism of the media.<sup>2</sup>

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The guarantee of freedom of expression applies with particular force to the media, including public service broadcasters. In order to be able to serve as disseminators of news and as scrutinizers of public affairs, public service broadcasters need to have the greatest possible degree of freedom, within the framework of the constitutional right of freedom of expression.

One of the key rationales behind public service broadcasters is that they make an important contribution to pluralism. A number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

The independence of a Public Service Broadcasters is, of course, inextricably linked to the sufficiency of its funding. This fact has also been given explicit recognition in many of the published international standards.

For example, the Resolution of the Parliamentary Assembly of the Council of Europe on the Future of Public Service Broadcasting, strongly stresses the pivotal importance of the financial independence of Public Service Broadcasters, as do a number of other documents issued by that body in recent years<sup>3</sup>. Funding of Public Service Broadcasters should, not only be commensurate with their

<sup>1</sup> Article 40 of the Constitution of Republic of Kosovo

<sup>2</sup> Article 42 of the Constitution of Republic of Kosovo

<sup>3</sup> Res. 428 of 1970 and Rec. 748 of 1975 of the Parliamentary Assembly, CoE. See, also, Res. 2 (Fifth conf., 1997) of the Ministerial Conference, CoE.

obligations, but also insulate them from arbitrary increases or decreases of funding at the whim of whoever controls the purse strings.

Articles 17-19 of Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe on the Guarantee of the Independence of Public Service Broadcasting, note that funding for public service broadcasting organizations should be appropriate to their tasks, secure and transparent. Funding arrangements should not render the broadcasters susceptible to interference, for example with their editorial independence or institutional autonomy.<sup>4</sup>

The need for stability and security of funding was underlined in a paper published by the European Broadcasting Union in 2000:

“To be stable and secure, such funding needs a clear legal basis (apart from a law approving the state budget), which projects the level of funding for an appropriate period of time. Dependence on annual decisions (on the state budget) or on ad hoc measures would create a climate of insecurity and would undermine a public broadcaster’s ability to plan ahead and invest”<sup>5</sup>.

Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe on the funding of public service broadcasting states that “the funding of public service media may be ensured, through a flat broadcasting license fee, a tax, state subsidies, subscription fees, advertising and sponsoring revenue, specialized pay-per-view or on demand services, the sale of related products such as books, videos or films, and the exploitation of their audiovisual archives. In this regard, public service media may have a mixed funding similar to other public cultural institutions such as orchestras, theatres or museums.”

“Article 19”, an international civil society organization with expertise in international public service broadcasting standards, notes that public service broadcasting organizations play a unique and vital role in satisfying the *public interest* and ensuring a free flow of information and ideas, and governments and other public actors must be urged to make a solid commitment to funding this essential public resource.<sup>6</sup>

Therefore, Art. 20.1 of the Law on RTK is fully in compliance with the Constitution of the Republic of Kosovo and the best international and European standards. The right of the legislator to setting the subscription fee for the public broadcaster by providing a mechanism which effectively allows for exclusion of social cases from payment of the subscription fee, as the Law on RTK provides, is fully in accordance with the *public interest*.

The suspension of Article 20.1 of the Law on RTK will deprive RTK of the necessary funds, having a direct effect on the scope and quality of its programs and its continuity as an independent public service broadcaster. It is, therefore, not in the public interest to suspend Article 20.1.

## II

The Majority's Decision recommending the Assembly to reconsider the nature of Art. 20.1. of the Law on RTK, and practices based on those provisions by December 1, 2009, misunderstands the nature of RTK as an independent institution. As the Law on RTK recognizes this important feature of

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<sup>4</sup> Rec. R (96)10, Council of Europe, *supra* note 26, Arts. 17-19

<sup>5</sup> The funding of public service broadcasting. (2000, 9 November). Retrieved 1 June 2005, from [http://www.ebu.ch/CMSimages/en/leg\\_p\\_funding\\_psb\\_tcm6-4443.pdf](http://www.ebu.ch/CMSimages/en/leg_p_funding_psb_tcm6-4443.pdf)

<sup>6</sup> Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, at [www.article19.org](http://www.article19.org)

RTK, it does not empower solely the Assembly to make a decision on the amount of the public broadcasting fee. Instead, the law provides for a special procedure to enable the Assembly to change the amount of the subscription fee. The law provides that the Assembly can make such a decision only upon the proposal made by RTK Board, after consultations with the Independent Media Commission.<sup>7</sup> Having this in mind, the deadline proscribed by the Majority's Decision is unrealistic.

Amending the law is a democratic process that requires public consultation, and engagement of expertise. Changing the subscription fee is an issue of public concern, and in my view the court does not have the right to interfere by excluding the public from the decision making process.

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The Majority's Decision is very controversial, and does not provide any justification that Art. 20.1 of the Law on RTK infringes the public interest.

With all due respect, for the reasons given in Judge Almiro Rodrigues's dissent and for the reasons I have given, I dissent. I find nothing in the language or the spirit of the Constitution to support the Majority's Decision.

  
Judge Gjyljeta Mushkolaj