



REPUBLIKA E KOSOVËS
Republika Kosova - Republic of Kosovo
Gjykata Kushtetuese / Ustavni sud / Constitutional Court

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Ref. No. DRLSA 344/10

Concurring Opinion
Of
Judge Almiro Rodrigues
Judgment in the Case No KO 01/09

I accept the operative part of the Judgment. However, I respectfully disagree with paragraph 54 for the reasons that follow.

1. The Constitution of Kosovo is largely built on the '*Comprehensive Proposal for the Kosovo Status Settlement*' (*Ahtisaari Framework*) and stands at the foundation of a broad legislative framework aimed at protecting non-majority communities' rights.
2. Article 57.1 of the Constitution defines communities as being "inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of Kosovo".
3. However, the Law on Protection and Promotion of the Rights of Communities and their Members stipulates a narrower definition for communities: for the purposes of this law, communities are defined as national, ethnic, cultural, linguistic or religious groups traditionally present in the Republic of Kosovo that are not in the majority. This narrower definition, applies only to groups that are in numerical minority. Non-majority communities are commonly referred to as 'Communities'.
4. On the other side, Chapter one of the Constitution sets out the basic provisions of the Kosovo State. Some of these provisions are relevant to communities. For example, the Constitution states that Kosovo is a multiethnic and secular State, and that Albanian and Serbian are Kosovo's official languages, while the Bosnian, Roma and Turkish languages are official languages at the municipal level¹.

¹ Article 2.4 of the Law on Official Languages states:

"In municipalities inhabited by a community whose mother tongue is not one of the official languages of Kosovo and which represents above 3 (three) percent of the total population of the municipality, the language of the community shall have the status of a language in official use in the municipality in accordance with the provisions specified in Article 8. In addition, community whose language has been traditionally spoken in a municipality shall also have the status a language in official use within that municipality.

5. In effect, Article 62.1 of the Constitution establish that "in municipalities where at least ten per cent (10%) of the residents belong to Communities not in the majority in those municipalities, a post of Vice President of the Municipal Assembly for Communities shall be reserved for a representative of these communities". Thus, in these municipalities, communities shall be represented by a Vice President of the Municipal Assembly for Communities, who shall be the focal point for addressing non-majority communities' concerns and interests.
6. In this case, the applicant acting in the capacity of Vice President of the Municipal Assembly for Communities, and in accordance with Article 62.4 of the Constitution, referred the matter directly to the Court, without the need of having exhausted all remedies provided by law. However, the Vice President of the Municipal Assembly for Communities does not act personally; he should act on behalf of the Communities and be a guarantor of the communities' participation process, trough the legally established mechanisms.
7. Besides guaranteeing community representation in public institutions, the Constitution also protects minority rights in the legislative process. Moreover, in accordance with Article 81 of the Constitution, certain areas of legislation, such as the *Law on the Use of Languages*, the *Law on Local Elections and Laws on the use of symbols, including Community symbols and on public holidays*, are considered legislation of vital interest.
8. Another way through which the constitution protects the rights and interests of communities is via a system of decentralization, through which communities are granted substantial autonomy at local level, particularly in areas where communities form a majority population. Here, the *Law on Local Self Government* establishes the legal basis for sustainable local self-government at municipal level². Article 55 of that Law regulates the duties and the competencies of the Vice President of the Municipal Assembly. According to this article, the Vice President of the Municipal Assembly "serves as formal focal point for addressing non-majority communities' concerns and interests".
9. This means that the personal opinion of the Vice President of the Municipal Assembly for Communities is not authoritative regarding the fulfillment of the constitutionally guaranteed rights of the communities. Instead, the Vice President of the Municipal Assembly for Communities is responsible for "reviewing claims by communities or their members that the acts or decisions of the municipal assembly violate their constitutionally guaranteed rights"³.
10. In the case, the Vice President of the Municipal Assembly for Communities was expressing his own opinion when in the public hearing, not in his referral, stated that the wording "Komuna", "Opstina" and "Belediye" should be written in the emblem of the Municipality without the year "1878". Thus, he was not representing the Communities, meaning expressing an opinion obtained trough a communities' participation process.

Pursuant to Article 35, municipalities shall adopt detailed regulations on this issue within six months of the promulgation of this law".

Article 35 is of particular importance, as it obliges the municipalities to "adopt in their bylaws detailed regulation for the use of languages", in accordance with the provisions of the law on official languages.

In addition, Article 9.2 asserts:

"Official signs indicating or including the names of municipalities, villages, roads, streets and other public places shall be displayed in the official languages and in the languages that have the status of official language in the municipality in accordance with Article 2.3".

² Law Nr. 03/L-040 ON LOCAL SELF GOVERNMENT requires the municipalities to create appropriate conditions enabling all communities to express, preserve, and develop their national, ethnic, cultural, religious, and linguistic identities (Article 4.3 of the Law).

³ See Article 62.3 of the Constitution and Article 55.2 of the Law on Local Self Government.

Also Article 62.4 of the Constitution and 55.3 of the Law requires the Vice President of the Municipal Assembly to refer such matters to the Municipal Assembly for its reconsideration of the act or decision.

11. In fact, the proposal made by the Vice President of the Municipal Assembly for Communities cannot be subject to the consideration of the Court, as it has neither been discussed, nor approved by the Communities Committee of the Municipal Assembly as a specific contribution for the case. Thus, the Court should refrain of expressing a view on the reasonability of the proposal. Furthermore, the Vice President of the Municipal Assembly for Communities does not bring any evidence that he has an approval made by the Communities Committee of the Municipal Assembly.
12. Before the foregoing, paragraph 54 introduce a clear contradiction in the judgment. In fact, on one side, "the Court is of view that this [the proposal of the Vice President of the Municipal Assembly for Communities] was a reasonable proposal that would have met the legitimate concerns of the communities"; but the Court does not withdraw the logical consequence in determining which emblem is in conformity with the Constitution. On the other side, the Court, "orders the Municipality of Prizren to amend its Statute and its emblem (...) in order to bring them into conformity with the Constitution and to not exclude the non-majority Communities", so apparently giving free room for the Municipality to bring that conformity and guaranteeing the communities' participation process; but the Court clearly shows its preference, for not saying clear indication, in relation to the emblem to be chosen.
13. Allowing total freedom to the Municipality in amending the emblem would also mean total freedom in the determination process, but without leading or influencing the result of the making decision process. Otherwise, the communities' participation process will be completely disturbed by the suggestive view of the Court.
14. In my opinion, the Court cannot ignore Article 53.2 of the Law on Local Self Government, which establish the authority of the Communities Committee to "recommend to the Municipal Assembly measures it considers appropriate to ensure the implementation of provisions related to the need of communities to promote, express, preserve and develop their ethnic, cultural, religious and linguistic identities, as well as to ensure adequate protection of the rights of communities within the municipality." Thus, the Court cannot ignore, or at least disturb, the constitutional right of non-majority communities to take part in the decision making process regarding the emblem of the municipality through the Communities Committee, one of two permanent committees of the municipal assembly
15. Therefore, I conclude that the reference to the above mentioned proposal made in paragraph 12 would be pertinent and relevant as a mere fact reported as having happened. However, the clause "the Court is of view that this was a reasonable proposal that would have met the legitimate concerns of the communities" should be deleted.
16. In sum, paragraph 54 contradicts the reasoning and the decision of the judgment and thus shouldn't be included in the Judgment.

Prishtina, March 2010


Almiro Rodrigues
Judge

