



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

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Pristina, 30 March 2011  
Ref. No.: AGJ 107/11

## **JUDGMENT**

in

**Case No. KO 29/11**

Applicants

**Sabri Hamiti and other Deputies**

**Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011.**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

Enver Hasani, President  
Kadri Kryeziu, Deputy-President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Ivan Čukalović, Judge  
Gjyljeta Mushkolaj, Judge and  
Iliriana Islami, Judge

#### **Applicants**

1. The Applicants are 25 (twenty-five) Deputies from the Democratic League of Kosovo ("LDK") and 9 (nine) Deputies from the Alliance for Future of Kosovo ("AAK") (see Appendix A), represented by Mr. Sc. Vjosa Osmani.

### **Challenged decision**

2. The decision challenged by the Applicants is the Decision of the Assembly of the Republic of Kosovo (hereinafter: the "Assembly"), No. 04-V-04, concerning the election of the President of the Republic of Kosovo, Mr. Behgjet Pacolli, held at the extraordinary session of the Assembly of 22 February 2011.

### **Subject matter**

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the Constitutionality of the decision of the Assembly, by which, Mr. Behgjet Pacolli, was elected the President of the Republic of Kosovo.
4. The Applicants contest the constitutionality of the procedure for the election of the President of the Republic of Kosovo as applied in the extraordinary session of the Assembly held on 22 February 2011, alleging a violation of Article 86 [Election of the President] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").
5. The Applicants, in particular, claim that Article 86, paragraphs (4), (5), and (6) of the Constitution has been violated in view of the lack of the necessary quorum during the vote, lack of any opposing candidate and the interruption of voting during the election procedure.

### **Legal basis**

6. Article 113.5 of the Constitution, Article 42 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56 (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 1 March 2011, the Applicants submitted the Referral to the Court.
8. On 2 March 2011, pursuant to Rules 8 and 33 of the Rules of Procedure, the President, by Order No.GJR. 29/11 of 2 March 2011, appointed Judge Iliriana Islami as Judge Rapporteur. On the same date, pursuant to Rule 9 the Rules of Procedure, the Deputy-President of the Court, by Order No.KSH. 29/11, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Ivan Čukalović and Enver Hasani.
9. On 3 March 2011, the Referral was communicated to the President of the Assembly, requesting his response. On the same date, pursuant to the Rules of Procedure, the Referral was communicated also to the President of the Republic of Kosovo and the International Civilian Office, as interested parties to the case.
10. On 8 March 2011, the Court requested the Applicants to submit additional documents, pursuant to Rule 35 (2) of the Rules of Procedure.
11. On 10 March 2011, the President of the Republic of Kosovo, Mr. Behgjet Pacolli, submitted his reply to the Applicants Referral.
12. On 11 March 2011, the President of the Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, submitted only the Decision on the election of the President, the Minutes and

the Transcript from the election of the President and the Government held on the extra ordinary session on 22 February 2011.

13. On 17 March 2011, the Review Panel deliberated on the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.
14. On 28 March 2011, the Court deliberated and voted on the case.

### **Summary of the facts**

15. On 21 February 2011, the President of the Assembly summoned the Deputies for an extraordinary session to be held on 22 February 2011. On the agenda for the extraordinary session appeared, amongst other issues, the election of the President of the Republic of Kosovo.
16. The only proposed candidate running for the office of President of the Republic of Kosovo was Mr. Behgjet Pacolli.
17. During the voting, the following Opposition Parties did not participate: LDK, AAK, and Vetëvendosja. As a result, only 67 (sixty seven) Deputies were present.
18. After the first voting round, the President of the Assembly declared that 67 (sixty seven) Deputies were present and that, out of those 67 (sixty seven), 54 (fifty-four) deputies had voted in favour.
19. The Assembly then held a second round, whereafter the President of the Assembly declared that out of the 67 (sixty-seven) Deputies present, 58 (fifty-eight) voted in favour.
20. Thereafter, the President of the Assembly announced a third round of voting. However, the Democratic Party of Kosovo (PDK) requested a break, which was initially refused by the President of the Assembly.
21. After the break, the third round of voting was held, whereafter the President of the Assembly declared that, out of the 65 (sixty-five) Deputies, 62 (sixty-two) voted in favour. However, the Commission, which chaired the election procedure, declared that out of 67 voting ballots in the ballot box, 62 were in favor, 4 against, and one invalid.
22. After the third round of voting, the President of the Assembly, Mr. Jakup Krasniqi, conclude that Mr. Behgjet Pacolli was elected President of the Republic of Kosovo.

### **Applicants' arguments**

#### **i. Lack of quorum in order to enable the election of the President**

23. The Applicants claim that, according to Article 86(4) of the Constitution providing: "The President of the Republic of Kosovo shall be elected by a two thirds (2/3) majority [of the votes] of all deputies of the Assembly", the two thirds (2/3) majority of 120 (one hundred and twenty) deputies is 80 deputies, which is the required quorum needed to hold an election of the President. However, during the Extraordinary Session of the Assembly, in the first voting round, only 67 deputies were present, meaning that the necessary quorum was never reached in order to initiate the voting procedure for the President. Despite this, the voting took place without a quorum.
24. According to the Applicants, the lack of quorum was evident even in the second voting round, where only 67 (sixty seven) deputies were declared present.

25. In the third voting round, only 65 (sixty-five) deputies were declared present and the President of the Assembly, concluded that Mr. Pacolli, receiving 62 votes, was elected as the President of the Republic of Kosovo.
26. In the Applicants' opinion, in all, throughout the voting procedure for the election of the President, the necessary quorum of two thirds was not achieved or complied with, which is in breach of Article 86.4 of the Constitution.
27. Furthermore, the Applicants claim that the procedure is contrary to how the President of the Republic of Kosovo has previously been elected.
28. They, further, argue that Article 51 of the Rules of Procedure of the Assembly clearly specifies that: "The Assembly has a quorum, when there are more than half of the Deputies present in the Assembly" and that "Decisions of the Assembly sessions are valid only if when these were taken, when more than half of the Deputies in the Assembly were present." Furthermore, the Rules of Procedure of the Assembly provide that "Laws, decisions and other acts of the Assembly are considered to be adopted, if the majority of the Deputies are present and voting." However, the Rules also provide that "An exception is made in cases, when the Constitution of the Republic of Kosovo provides otherwise." In the view of the Applicants, it is clear that, regarding the necessary quorum in the case of the election of the President of Kosovo, the Constitution foresees otherwise, by requiring 2/3 of all the deputies of the Assembly.
29. The Applicants further hold that the Rules of Procedure of the Assembly, where the decision-taking with 2/3 is provided, are the ratification of international agreements, the dismissal of the Ombudsperson, the extension of a state of emergency for more than 150 days, the adoption of the Rules of Procedure of the Assembly, etc. The Applicants claim that, when the Assembly had to decide on any of the above mentioned issues, the vote should not have taken place, until a confirmed quorum of 2/3 of all deputies was present. As an example, the Applicants stated that, in the session of the Assembly of 6 September 2010, after the President of the Assembly confirmed that 72 deputies were present, he continued with the agenda of the day, which, in item 4, included the ratification of the Agreement between the Government of Kosovo and the World Bank. According to Article 18.1 (3) of the Constitution, ratification of international agreements must be made with 2/3 of all the deputies of the Assembly. By respecting this procedure, in the session of 6 September 2010, the President of the Assembly, after stating that there was no quorum, postponed it for the next available plenary session. Similarly, in a session in 2009, the Assembly proceeded with the ratification of an Agreement on the acquisition of a loan between the Republic of Kosovo and the International Bank for Reconstruction and Development (IBRD), as well as the Memorandum of the Treasury Mission of the World Bank, only after 81 deputies were declared present in the Assembly, i.e. more than 2/3 needed for the ratification of such an agreement. Also, in the plenary session of 13 and 17 May 2010, item 7 of the Agenda of the day, was the review of a proposal of the Government of Kosovo to amend the Agreement with the International Monetary Fund (IMF). Before reviewing this issue, the President of the Assembly declared that the voting for such a procedure cannot start without the quorum of 2/3 of all the deputies of the Assembly.
30. The Applicants further argue that the election of the President of the Republic of Kosovo in 2008 was based on the Constitutional Framework for Provisional Self-Government in Kosovo, which foresaw an identical procedure (with regard to the number of votes required) for the election of the President. Article 9.2.8 of this Framework stipulates that "The Assembly elects the President of Kosovo with a majority of 2/3 of the votes of all the deputies of the Assembly. If after 2 rounds of voting, a majority of two thirds cannot be achieved, in the subsequent round, a majority of votes of all deputies is required". Even

in that case, the voting was held after the confirmation that a quorum of two thirds of all the deputies was present. In fact, there were 119 deputies present, and after this number was confirmed, the President/Chairperson stated that “all the conditions/criteria have been met in order to proceed with the order of the day”, which included the election of the President. The Applicants, by using the principle of analogy, claim that the requirement of a quorum of 2/3 would have to be valid for the election of the President, according to the Constitution.

31. The Applicants hold that it is evident, that the previous practices of the Assembly confirm that, even if it is not mentioned expressly, before voting begins, a quorum of 2/3 is needed, by virtue of the Rules of Procedure of the Assembly and the Constitution. This is supported by the parliamentary practice of the Assembly. Therefore, by not respecting this procedure, Article 86 of the Constitution has been violated and any decision taken in such a procedure is unconstitutional.

**ii. Lack of any opposing candidate during the voting procedure for the President**

32. In this respect, the Applicants claim that the election of the President of the Republic of Kosovo must take place after the nomination of more than one candidate, pursuant to Article 86.5 providing: “if none of the candidates receives the majority of 2/3 in the first 2 ballots, a third ballot takes place between the 2 candidates who received the highest number of votes in the second ballot and the candidate who receives the majority of [the votes of] all deputies of the Assembly shall be elected as President of the Republic of Kosovo”. Furthermore, Article 86.6 of the Constitution provides: “If none of the candidates is elected as President of the Republic of Kosovo, the Assembly shall dissolve...”.
33. The Applicants further claim that Article 86 of the Constitution provides that the candidacy of, at least, two (2) candidates is required, because in both quotations, the number of the candidates is mentioned in plural. However, during the voting procedure on 22 February 2011, there was only one candidate running for the office of the President, which is unconstitutional, pursuant to Article 86.5 and Article 86.6 of the Constitution.
34. Finally, the Applicants allege that, at the previous two elections of the President of Kosovo there were always two candidates running for President. In fact, the Constitutional Framework did not provide for an opposing candidate, and it is clear, that the aim of the drafters of the Constitution was, when including the requirement in the Constitution of the Republic of Kosovo, not to have only one candidate in the case of the election of the President, but to have an opposing candidate as well. Thus, according to the Applicants, the aim of the drafters of the Constitution was to change this procedural part of electing the President, by aiming at a more democratic stance by adding competition.

**iii. Interruption of voting contrary to the Rules of Procedure of the Assembly of the Republic of Kosovo**

35. As to the interruption of the voting, when a break was asked, the Applicants claim that it was in violation of the Rules of Procedure of the Assembly of Kosovo and of the Constitution, based on the conclusion of the President of the Assembly, as the final interpreter of the Rules of Procedure of the Assembly. Since the Rules of Procedure do not specify, if in the beginning of the voting phase for the election of the President, interruptions or breaks can be allowed in the middle of the voting procedure, it is clear that the President of the Assembly, pursuant to Article 17(1) of the Rules of Procedure,

gives the final interpretation of the Rules of Procedure during the plenary sessions. This is exactly, what Mr. Jakup Krasniqi did in the session of 22 February 2011, when he stated that the interruption of the voting was in violation of the Rules of Procedure.

36. The Applicants further hold that, in the middle of the second and third ballot regarding the election of the President, PDK requested a break, which was initially refused by President Jakup Krasniqi, but even after allowing a break, it was pointed out by him, that it was a violation of the Rules of Procedure of the Assembly and a violation of the Constitution.
37. In their submission, after a pause of almost one hour, during the third ballot, Mr. Behgjet Pacolli was elected President of the Republic of Kosovo, despite the earlier warning by the President of the Assembly Mr. Jakup Krasniqi that such a break was unconstitutional and contrary to the Rules of Procedure of the Assembly. After the break was over, the President of the Assembly stated once more that the interruption in the middle of the voting procedure is contrary to the Rules of Procedure and will have as a consequence that pressure is put on the deputies.
38. The Applicants conclude that, based on the conclusion of the President of the Assembly as the final interpreter of the Rules of Procedure of the Assembly, the interruption of the election procedure violated those Rules.

#### **Response from the President of the Assembly of the Republic of Kosovo**

39. The President of Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, did not submit any comments as to the Referral of the Applicants but submitted to the Court the Decision on the election of the President of the Republic of Kosovo, Mr. Behgjet Pacolli, the Minutes and the Transcript on the election of the President and the Government of Kosovo held on 22 February 2011.
40. The President of the Assembly opened the extra ordinary session on 22 February 2011 with 81 deputies present, according to the Minutes and the Transcript, where two issues were on the agenda: 1) the election of the President of the Republic of Kosovo, and 2) the election of the Government of the Republic of Kosovo.
41. Thereafter, the temporary Commission for verification of the quorum and mandates submitted a Report for verification of the conditions of the candidate nominated for President, Mr. Behgjet Pacolli, where it concluded that he fulfilled the conditions provided by the Constitution and the Law No. 03/L-094 on the President of the Republic of Kosovo.
42. After this report was presented by the Commission, the President of the Assembly noted that 93 deputies were present.
43. Before the first round of voting began LDK, AAK, and Vetëvendosja left the session and did not participate. As a result, only 67 (sixty seven) Deputies were present.
44. After the first voting round, the President of the Assembly declared that 67 (sixty seven) Deputies were present and that, out of those 67 (sixty seven), 54 (fifty-four) deputies had voted in favour, 11 (eleven) voted against and 2 (two) votes were invalid.
45. The Assembly then held a second round, whereafter the President of the Assembly declared that out of the 67 (sixty-seven) Deputies present, 58 (fifty-eight) voted in favour, 7 (seven) voted against and two votes were invalid.

46. Thereafter, the President of the Assembly announced a third round of voting, which was held after the break with 65 (sixty-five) deputies present. The President of the Assembly declared that, out of the 65 (sixty-five) Deputies, 62 (sixty-two) voted in favour, 4 (four) voted against and 1 (one) vote was invalid. However, the Commission, which chaired the election procedure, declared that out of 67 voting ballots in the ballot box, 62 were in favor, 4 against, and one invalid.
47. After the third round of voting, the President of the Assembly, Mr. Jakup Krasniqi, concluded that Mr. Behgjet Pacolli was elected President of the Republic of Kosovo.

### **Response from the President of the Republic of Kosovo**

48. The President of the Republic of Kosovo, Mr. Behgjet Pacolli (hereinafter: the “Interested Party”), claims that he was nominated as candidate for the post of the President of the Republic of Kosovo in compliance with Article 86.3 of the Constitution. The Interested Party claims that, in compliance with Article 86.1 and Article 86.5 of the Constitution, in the third ballot, 62 deputies voted in favour for the election of Mr. Behgjet Pacolli as President of the Republic of Kosovo.
49. As to the lack of quorum, the Interested Party argues that, according to Article 69 [Schedule of Sessions and Quorum] of the Constitution and, more specifically Article 69.3 of the Constitution, provides that the Assembly has its quorum when more than one (1/2) half of the Deputies is present. At the beginning of the extraordinary session, there were 117 deputies present, according to the Interested Party. The fact that LDK, AAK and Vetëvendosja left the session should be considered as a vote against the candidate Mr. Behgjet Pacolli for the post of the President of the Republic of Kosovo and the deputies present and voting in favour of Mr. Behgjet Pacolli have to be considered as fulfilling the procedural requirements of Article 86 of the Constitution and that the will of the Assembly was expressed in the two first ballots.
50. Further, the Interested Party argues that there were 67 deputies present in the session when the first ballot started, i.e. the Assembly had a quorum in compliance with Article 69.3 of the Constitution and Article 51.1 and Article 51.3 of the Rules of Procedure of the Assembly. The presence of 67 deputies was also confirmed by the President of the Assembly. Furthermore, neither Article 86 of the Constitution nor the Rules of Procedure of the Assembly provide that two thirds (2/3) of the deputies is needed to begin the voting.
51. Moreover, the Interested Party argues that the Constitution does not literally provide an obligation for the deputies to be present. However, in the spirit of the Constitution and dignified representation of their electorate they have an obligation (at least an ethical obligation) to be present in the session. Therefore, in order to avoid blockage for the election of the President in the Assembly, the drafters of the Constitution and especially Article 86 of the Constitution has foreseen three rounds and in the third round Mr. Behgjet Pacolli was elected President.
52. As to the number of candidates, the Interested Party argues that Article 86.3 of the Constitution does not expressly require and does not obligate the deputies to nominate more than one candidate for the President.
53. Furthermore, the Interested Party claims that Article 86 of the Constitution has to be read and interpreted in its entirety and Article 86.5 and Article 86.6 of the Constitution only refer to “the special situation” when there is more than one candidate for the post of President.

54. As to the break, the Interested Party argues that neither the Constitution nor the Rules of Procedure of the Assembly prohibits the right of a group of parliamentarians to request for a break.
55. Furthermore, the Interested Party claims that pursuant to Article 17.1 of the Rules of Procedure of the Assembly, the final interpreter of the Rules of Procedure of the Assembly is the President of the Assembly. Therefore, the President of the Assembly as the final interpreter of the Rules of Procedure of the Assembly approved the request for a break. Therefore, the break was in compliance with the Rules of Procedure of the Assembly and the Constitution.
56. The Interested Party also remarked, *inter alia*, that “an additional amendment to the Constitution in compliance with universal principles of law is required”.

#### **Assessment of the admissibility of the Referral**

57. As to the Applicants’ allegation that Article 86 [Election of the President] of the Constitution has been violated, the Court observes that, in order to be able to adjudicate the Applicants’ complaint, it is necessary to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
58. The Court needs first to determine whether the Applicants can be considered as an authorized party, pursuant to Article 113.5 of the Constitution, stating that: “Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed”. In the present Referral, thirty four (34) deputies from the LDK and the AAK contested the constitutionality of the decision, adopted by the Assembly, to elect Mr. Behgjet Pacolli as President of the Republic of Kosovo. Therefore, the Applicants are an authorized party, entitled to refer this case to the Court, by virtue of Article 113.5 of the Constitution.
59. Furthermore, as to the further requirement of Article 113.5 of the Constitution that the Applicants must have submitted the Referral “within eight (8) days from the date of adoption” of any decisions by the Assembly, the Court determines that the Assembly adopted its decision on 22 February 2011, whereas the Applicants submitted the Referral to the Court on 1 March 2011. The Applicants, therefore, have met the necessary deadline for filing a referral to the Court, provided by Article 113.5 of the Constitution.
60. The Court also finds that the Applicants have fulfilled Article 42 of the Law, stipulating that:

*“In a referral made, pursuant to Article 113, Paragraph 5 of the Constitution, the following information shall, inter alia, be submitted:*

  - 1.1 names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*
  - 1.2. provisions of the Constitution or other act or legislation relevant to this referral;*
  - and*
  - 1.3. presentation of evidence that supports the contest.”*
61. Since the Applicants are an authorized party, have met the necessary deadline to file a referral with the Court and accurately described the alleged violation of the Constitution, including the challenged decision of the Assembly, the Court concludes that the Applicants have complied with all admissibility requirements.

## Legal assessment of the Referral

62. Since the Applicants have fulfilled the procedural requirements for admissibility, the Court now needs to examine the merits of the Applicants' complaints.

### As to the Procedure for the election of the President of the Republic of Kosovo

#### 1. As to the number of candidates

63. The Applicants complain that the procedure for the election of the President of the Republic of Kosovo with only one candidate is in violation of Article 86.5 and Article 86.6 of the Constitution.

64. In this respect, the Court refers to Article 86.3 of the Constitution which provides: *"Every eligible citizen of the Republic of Kosovo may be nominated as a candidate for President of the Republic of Kosovo, provided he/she presents the signatures of at least thirty (30) deputies of the Assembly of Kosovo. Deputies of the Assembly can only sign for one candidate for the President of the Republic."*

65. As to the present case, the Court notes that Mr. Behgjet Pacolli as a candidate for President of the Republic of Kosovo presented the signatures of 64 deputies. It is evident that the group of Parliamentarian that left and did not participate at the extraordinary session held on 22 February 2011 did not avail of the Constitutional opportunity to nominate another candidate for the President of the Republic of Kosovo.

66. Article 86.5 of the Constitution provides: *"If a two thirds (2/3) majority is not reached by any candidate in the first two ballots, a third ballot takes place between the two candidates who received the highest number of votes in the second ballot, and the candidate who receives the majority of the votes of all deputies of the Assembly shall be elected as President of the Republic of Kosovo"*.

67. Article 86.6 of the Constitution provides: *"If none of the candidates is elected as President of the Republic of Kosovo in the third ballot, the Assembly shall dissolve and new elections shall take place within forty five (45) days"*.

68. The Court is of the opinion that the wording of Article 86 [Election of the President] of the Constitution must be examined in its entirety. The interpretation of the Article can only be that there must be more than one candidate for the election of the President of the Republic of Kosovo in order for the election procedure to be put in motion. In particular, its paragraph 5, is explicit in stipulating that, if a two thirds (2/3) majority is not reached by any candidate in the first ballot, a third ballot takes place between the *"two candidates who received the highest number of votes in the second ballot"*. Furthermore, Article 86.6 of the Constitution also speaks of more than one candidate: *"If none of the **candidates** is elected"*. Article 27(4) and (5) of the Rules of Procedure of the Assembly contain similar provisions.

69. In this connection, the Court refers to the Constitutional Framework for Provisional Self-Government in Kosovo, providing in its Chapter 9.2.8: *"The President of Kosovo shall be elected by the Assembly by secret ballot. A nomination for the post of President of Kosovo shall require the support of the party having the largest number of seats in the Assembly or of at least 25 members. The Assembly shall elect the President of Kosovo by a two-thirds majority of the members of the Assembly. If after two ballots a two-thirds majority is not obtained, in the following ballots a majority of the votes of all members of the Assembly shall be required for election."*

70. The Court notes that, under the Constitutional Framework, the first election of the President of Kosovo was held in 2002, where only one candidate ran for the office of the President of Kosovo, i.e. Ibrahim Rugova from LDK. In the 2004 presidential election, there were two candidates running for President, Ibrahim Rugova from LDK and Ramë Buja from PDK. Further, in the 2006 election there was only one candidate running for President, Fatmir Sejdiu from LDK. However, in the 2008 election, still held under the Constitutional Framework, two candidates ran for President, Fatmir Sejdiu from LDK, and Naim Maloku from AAK. In the last presidential election of 22 February 2011, held under Article 86 of the Constitution of the Republic of Kosovo, there was only one candidate running for the office of President of the Republic of Kosovo.

71. The Court further notes that the Constitutional Framework was silent as to the number of candidates for the election of the President of Kosovo. However, unlike the Constitutional Framework, Article 86 of the Constitution of the Republic of Kosovo mentions, in an unambiguous way, that there must be more than one candidate in the first and second ballot as well as in the third ballot. It is evident that the drafters of the Constitution have chosen the wording of Article 86 of the Constitution in order to divert from the system provided by the Constitutional Framework by embracing a more democratic system where more than one candidate is needed before the procedure for the election of the President of the Republic of Kosovo can be set in motion. The election procedure has been crafted to ensure that, out of more than one candidate nominated for the election as President, the one, who obtained most of the votes, would be chosen as the representative of the people of Kosovo. If it had been the intention of the drafters of the Constitution to provide for an alternative election procedure, with only one candidate nominated, the Constitution would have expressly provided for such a procedure.

72. In this respect, the Court refers, as an example, to the Constitution of Albania, which, in its Article 87.5, expressly allows for a single candidate to run for the office of President:

*“When there is more than one candidate and none of them has received the required majority, within 7 days, a fourth voting takes place between the two candidates who have received the greatest number of votes.”*

73. The Constitution of Hungary, on the contrary, provides for a similar system laid down in the Constitution of the Republic of Kosovo, its Article 29 B providing:

“.....

*(2) The Parliament shall elect the President of the Republic by secret ballot. Voting may be repeated should this prove necessary. The candidate who receives a majority of two-thirds of the votes of the Members of Parliament in the first round of voting is elected President of the Republic.*

*(3) Should no candidate receive such a majority in the first round of voting, the voting process must be repeated, in accordance with Par. (1). A majority of two-thirds of the votes of the Members of Parliament shall also be required to be elected in the second round of voting.*

*(4) Should no candidate win the required majority in the second round of voting, a third round of voting shall be held. In the third round of voting only those two candidates who received the largest numbers of votes in the second round may stand for election. The candidate receiving a majority of the votes - regardless of the number of votes cast - in the third round of voting is elected President of the Republic.*

.....”

74. In fact, this presidential election procedure stems from the transition period after the Cold War, when the former Communist countries chose to have their presidents elected by their assemblies through a similar procedure as still provided in the Constitutions of Hungary and Kosovo. In the meantime, most of the former Communist countries amended the presidential election procedure and opted for direct elections by popular vote. This solution was motivated by the necessity to express and reflect the will of the people and through direct vote to elect a President who is the Head of the State and represents the unity of the people.
75. As to the presidential election procedure laid down in Article 86 of the Kosovo Constitution, the Court, therefore, emphasizes, that if deputies present only one candidate for the election as President of Kosovo, the formal requirements for putting in motion that election procedure are not met. In such a situation, any procedure which was followed to have the single candidate elected as President of the Republic of Kosovo, was, thus, in breach of Article 86 of the Constitution.
76. The Court notes that, at the extraordinary session of the Assembly of 22 February 2011, deputies presented Mr. Behgjet Pacolli as the only candidate for the election as President of the Republic of Kosovo. At the same session, the election procedure conducted by the President of the Assembly lead to the single candidate being elected as President of Kosovo, although, in the Court's opinion, it was inconsistent with the formal requirements of Article 86 of the Constitution.
77. In these circumstances, the Court concludes that the procedure for the election of Mr. Behgjet Pacolli as President of the Republic of Kosovo, carried out at the extraordinary session of the Assembly on 22 February 2011, was in breach of Article 86 of the Constitution and, therefore, unconstitutional.

## **2. As to the Vote by the Assembly**

78. The Court first emphasizes that, since it just concluded that the election procedure with one candidate running for the office of President of Kosovo was unconstitutional, it would not be necessary to go into allegations of additional breaches of the Constitution regarding the election procedure as carried out on 22 February 2011. However, even assuming that the Constitution would allow for one candidate to run for the office of President of Kosovo, the participation of less than the number of Deputies required by Article 86 of the Constitution, rendered the voting procedure also invalid.
79. In this respect, the Court refers to Article 70 [Mandate of Deputies] of the Constitution, stipulating that the "Deputies of the Assembly are representatives of the people [...]". Furthermore, as to their obligation as deputies, Article 74 [Exercise of Function] of the Constitution provides that "the deputies of the Assembly of Kosovo shall exercise their function in the best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly."
80. Moreover, Law No. 03/L-111 on Rights and Responsibilities of the Deputy (hereinafter: the "Law on Deputies") and Articles 3 and 21 of the Rules of Procedure of the Assembly, adopted on 29 April 2010 further emphasize that the Deputies of the Assembly are representatives of the people and shall have an equal right and obligation to participate fully in the proceedings of the Assembly and carry out their task as representatives of the people of Kosovo in accordance with the Constitution, the Law and the Rules of Procedure of the Assembly. That is to say, by receiving the vote of the citizens, deputies have an obligation towards them, inter alia, as stipulated by Article 40 [Obligations] of the Law on Deputies, by being obliged to participate in the Plenary Sessions and in meetings of the assisting bodies of the Assembly in which they are a member. If the

deputy cannot participate in the Assembly Sessions or in the meetings of the assisting authorities of the Assembly in which he/she is a member, he/she must inform in time the President of the Assembly respectively the President, Vice President of that assisting body, by submitting the reasons for his/her absence, as required by Article 40.3 of the Law on Deputies.

81. Their obligation as deputies is further reflected in the oath that the Assembly Members must take before the Assembly after the verification of their mandates, pursuant to Article 10 of the Rules of Procedure of the Assembly, providing:

*"I, Member of the Assembly of the Republic of Kosovo, swear that honestly and with devotion, shall carry out my duty and represent the people with dignity, shall work in the interest of Kosovo and all its citizens, shall be committed to protection and respect of the constitutionality and lawfulness, for protection of the territorial and institutional integrity of Kosovo, for guaranteeing human rights and freedoms, in accordance with the domestic laws and European standards. I swear".*

82. Furthermore, the Court emphasizes that, pursuant to Article 27 of the Rules of Procedure of the Assembly, the members of the Assembly shall comply with the Code of Conduct that is annexed to those Rules. The Code of Conduct clearly provides that the Members of the Assembly have a duty to uphold the law and to act on all occasions in accordance with the public trust placed in them.

83. In these circumstances, all 120 deputies of the Assembly should feel obliged, by virtue of the Constitution, the Law on Deputies, the Rules of Procedure of the Assembly and the Code of Conduct, to participate in the plenary sessions of the Assembly and to adhere to the procedures laid down therein, but most of all an obligation vis-à-vis the people of Kosovo that elected them.

84. The election of the President of Kosovo who, pursuant to Article 83 [Status of the President], is the Head of State and represents the unity of the people of the Republic of Kosovo, is of such importance, that all deputies, as the representatives of the people of Kosovo, should consider it their constitutional duty, unless excused by the President of the Assembly, to participate in the procedure for the election of the President as laid down in Article 86 [Election of the President] of the Constitution.

85. In this respect, the Court notes that, as to the number of votes required for the election of the President of the Republic of Kosovo, Article 86.4 of the Constitution provides that the President of the Republic of Kosovo shall be elected by a two thirds (2/3) of the **"votes of all deputies"** (in the original Albanian version "me dy të tretat (2/3) e votave të të gjithë deputetëve") of the Assembly, meaning that all 120 deputies should vote, minus those properly excused by the President of the Assembly, and that the candidate obtaining 80 or more votes of the votes of all deputies (in the first or second round) will be elected. Only if a 2/3 majority is not reached, a third round takes place. Article 27 of the Law on Deputies and Article 27(4) of the Rules of Procedure of the Assembly, contains identical wording: "two thirds (2/3) of the **votes of all deputies** of the Assembly".

86. It appears from the Minutes of the extraordinary session of the Assembly of 22 February 2011, that, before the voting started, initially 81 Deputies were present. However, when the voting started, only 67 deputies were still present and participated in the voting, while the other deputies had left the Assembly Hall. The requirement of Article 86, that all deputies had to vote, was, therefore, not met. All the more, a second round of voting took place in similar circumstances, while in the third round, Mr. Behgjet Pacolli, the

only candidate nominated, was elected as President of Kosovo with 62 votes out of 67 votes.

87. The Court concludes that, since only 67 deputies participated in the procedure for the election of the President of Kosovo held at the extraordinary session of the Assembly on 22 February 2011, Article 86 of the Constitution was violated.

### **3. As to the break held during the election procedure of the President of the Republic of Kosovo**

88. As to the Applicants' claim that the break allowed by the President of the Assembly before the third round was in violation of Article 27 of the Rules of Procedure of Assembly, the Court notes that Article 86 of the Constitution as well as Article 27 of the Rules of Procedure are silent on this issue.

89. Furthermore, the Court emphasizes its duty is only to review alleged breaches of the Constitution. The Applicants' complaint that a break was held before the third round of voting does not, in the Court's view, constitute a constitutional issue which could be raised under Article 86 [Election of the President] of the Constitution. However, if the Assembly had decided beforehand that no break was allowed, or if the President of the Assembly, as the ultimate interpreter of the Rules of Procedure of the Assembly, had informed the deputies that during the voting no break would be allowed in order to avoid that pressure on deputies might be exercised, then the break before the third round would have been in violation of that decision.

90. Therefore, as to the Applicants' complaint that there is a violation of Article 86 [Election of the President] of the Constitution when a break was allowed before the third round, the Court concludes that the Applicants have not submitted evidence, why a violation of that Article should have occurred.

### **FOR THESE REASONS,**

THE COURT, in its session held on 28 March 2011,

- I. DECLARES, unanimously, that the Referral is ADMISSIBLE.
- II. DECLARES, by seven votes in favour and two votes against, that the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011, is unconstitutional – and shall no longer be in force from the date of its publication pursuant to Article 116.3 of the Constitution - since it is contrary to the requirements of Article 86 of the Constitution of the Republic of Kosovo and the democratic principles enshrined therein.
- III. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law.
- IV. This Judgment shall have immediate effect.

**Judge Rapporteur**

Dr. Iliriana Islami

**President of the Constitutional Court**

Prof. Dr. Enver Hasani

## Appendix A

### LDK

1. Sabri Hamiti
2. Ismet Beqiri
3. Teuta Sahatqija
4. Arben Gashi
5. Lutfi Haziri
6. Skender Hyseni
7. Salih Morina
8. Eqrem Kryeziu
9. Anton Quni
10. Imri Ahmeti
11. Vjosa Osmani
12. Hashim Deshishku
13. Ali Sadriu
14. Sadri Ferati
15. Sali Asllanaj
16. Naser Osmani
17. Armend Zemaj
18. Bahri Thaçi
19. Afërdita Berisha-Shaqiri
20. Hykmete Bajrami
21. Vjollca Krasniqi
22. Lirije Kajtazi
23. Haki Demolli
24. Nazane Breca
25. Lutfi Zharku

### AAK

1. Ardian Gjini
2. Daut Haradinaj
3. Ahmet Isufi
4. Time Kadriaj
5. Burim Ramadani
6. Bali Muharremaj
7. Kymete Bajraktari
8. Teuta Haxhiu
9. Xhevdet Neziraj