



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 30 March 2011
Ref. No.: OM 108/11

Case No. KO 29/11

**Applicants
Sabri Hamiti and other Deputies of the Assembly of Kosovo**

**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**

30 March 2011

**Dissenting Opinion of Judges
Robert Carolan and Almiro Rodrigues**

We respectfully dissent from both the Judgment and the Conclusions of the Majority of the Court in this Referral.

THE FACTS

The Applicants and the Respondent agree as to the facts that follow.

1. On 22 February 2011, the Assembly of Kosovo commenced voting for the election of the President of the Republic of Kosovo.
2. The only candidate nominated was Mr. Behgjet Pacolli.
3. When the first ballot was cast, there were 67 Deputies present in the Assembly. Mr. Pacolli received 54 votes.
4. When the second ballot was cast, there were 67 Deputies present. Mr. Pacolli received 58 votes.
5. Before the third ballot was cast there was a break of less than one hour.
6. When the third ballot was cast, there were at least 65 Deputies present. Mr. Pacolli then received 62 votes.

We will consider three main issues: (1) the quorum, (2) number of candidates and (3) consequences of the Court's Judgment.

(1) QUORUM

The Majority, at least implicitly, erroneously concludes that the definition of a "quorum" for purposes of electing a President is the same as the minimal number of votes that a successful candidate for President must receive to be elected and that this minimal number of voters must be present when opening the session.

A quorum is different than voting. A quorum is "the minimum number of members of a deliberative assembly necessary to conduct business".¹ Voting² by the members of legislative body is part of the business of that legislative body. The rules applicable to each can be, and often are, different.

Pursuant to **Paragraph 3 of Article 69 of the Constitution**, "The Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present". That provision is the only one mentioning a quorum. The Rules of Procedure of the Assembly also establish the same quorum for the Assembly, which is more than one-half of all deputies (61 deputies). That quorum is kept unchanged during the session³, regardless of the business of the Assembly even though the minimum number of votes to take a decision may change.⁴

Therefore, pursuant to both the Constitution and the Rules of Procedure of the Assembly, a successful candidate for President, on either the first or the second ballot cast by members of the Assembly, must receive the votes of two-thirds (80 deputies) of the votes of all deputies.

On the third ballot to be elected as President, the successful candidate must receive the vote of more than one-half (61 deputies) of all the deputies.

In this case, on 22 February 2011 there was a quorum of the Assembly because between 67 and 65 deputies were present.

The only candidate nominated did not receive the required two-thirds votes (80 deputies' vote) that he needed to be elected President on either the first or second ballot. However, on the third ballot, the only candidate nominated received 62 votes, more than the minimum number of votes (61) required by both the Constitution and the Rules of Procedure.

1 Robert's Rules of Order Newly Revised, Tenth Edition (2000), p. 20

2 A voting system contains rules for valid voting, and how votes are counted and aggregated to yield a final result ("Voting system" From Wikipedia)

3 . "A Session of an assembly is a meeting which, though it may last for days, is virtually one meeting (...). The intermediate adjournments from day to day, or the recesses taken during the day, do not destroy the continuity of the meetings, which in reality constitute one session". (Robert's Rules of Order, Art. XI. Miscellaneous, 63. Session)

4 See Articles 20, 68, 69, 76, 90, 91 and 131 of the Constitution

The drafters of the Constitution clearly understood the difference between a quorum and voting by allowing the Assembly on the third ballot to elect a President with a different number of minimum votes but never changing the number of members that had to be present to have a quorum.

A rule that would require a quorum of 2/3s would allow a small minority of the members (41 deputies) to prevent the majority of parliamentarians from doing the business and will of the majority by simply refusing to meet and do the work they took an oath of office to do. It would prevent the majority from discharging the duties they were duly elected to do. It effectively would allow the minority to thwart the democratic will of the majority. It would also prevent the Assembly from acting pursuant to **Paragraph 4 of Article 86 of the Constitution** and elect a President on a simple majority vote of the deputies of the Assembly. Such an interpretation would make **Paragraph 4 of Article 86** meaningless. The drafters of the Constitution specifically designed the Constitution in such a way so as to prevent the minority from thwarting the will of the majority. .

(2) NUMBER OF CANDIDATES

The Majority erroneously concludes that the Assembly cannot elect a President of the Republic unless there is more than one candidate.

A successful candidate must be nominated by at least 30 deputies of the Assembly. Therefore, a maximum of four and a minimum of one candidate might exist. However, the Majority erroneously concludes that the Assembly of Kosovo cannot elect a President of Kosovo unless at least 60 deputies nominate two different candidates for President even in a situation where they may all support just one candidate.

As the Majority implicitly concedes, under its interpretation of the Constitution the first President of Kosovo, his Excellency, the late Ibrahim Rugova, could not have been elected President of the Republic by acclamation in 2002 even if that was the will of the entire Assembly. Certainly the drafters of the Constitution never intended such a result.

In fact, the Majority clearly misreads **paragraph 5 of Article 86 of the Constitution** by inferring that it requires that there be at least two candidates. If two candidates were required, the drafters of **paragraph 5 of Article 86** could have and would have stated that there shall be more than one candidate. Indeed, in the following paragraph of the **Constitution, paragraph 6**, the very same drafters of the Constitution specifically used the word "shall" when they stated what would happen if none of the candidates was elected in the third ballot. Furthermore, the expression "any" under paragraph 5 of Article 86 of the Constitution, in accordance with all dictionaries, means "one or more".

Thus, “any candidate” means “one or more candidate”. In addition, the combination of a two thirds (2/3) majority for the two first ballots and the majority for the third ballot also mean that one or more candidates may exist, as the two thirds (2/3) majority is more appropriate for a running off when more than one candidate and majority for only one candidate.

The fact that the drafters of the Constitution chose not to use the same language anywhere in the Constitution with respect to how many candidates must be nominated in order for the Assembly to elect a President but specifically used the term “shall” with respect to the consequences of the Assembly not electing a President by the third ballot clearly means that the drafters never intended that there had to be more than one candidate for President before the Assembly could elect a President.

There is no requirement that there must be more than one candidate for President before the Assembly can elect a President. The only requirement in the Constitution in this regard is that if there are two candidates when the third ballot is cast, the winning candidate must receive a majority of the votes of the deputies (61).

If the Constitution were to be interpreted as requiring at least two or more candidates, it could prevent the election of a candidate that the majority of the elected deputies of the Assembly supported. If such a requirement existed it could easily be met by simply having 30 other deputies sign a document supporting the other candidate but then voting for the popular candidate.

This interpretation would create a sham and mockery of the election system for the highest elected office in Kosovo. The drafters of the Constitution could not have intended such an illogical result. The Constitutional Court does not have the authority to order the Assembly to nominate more than one candidate.

In sum, the foregoing is in accordance with a systematic and teleological interpretation which allows the conclusion that the main purpose of the Constitution is guaranteeing the regular functioning of the political institutions and ensuring the political stability.

Furthermore, we cannot say that, being the President the head of the State and guarantor of the unity of the people⁵, the President must necessarily be elected by two thirds (2/3) of the votes of all deputies, as, even when there is more than one candidate, the President can be elected only by majority of the votes.

(3) CONSEQUENCES OF THE COURT’S JUDGMENT

⁵ Article 83 [Status of the President] of the Constitution states that “The President is the head of state and represents the unity of the people of the Republic of Kosovo”.

The Majority concludes, and it is undisputed, that, on 22 February 2011, the Assembly had three rounds of balloting for the Office of President of the Republic. At the conclusion of the third round of balloting the President of the Assembly declared that Mr. Behgjet Pacolli had been elected President. This Court cannot change the facts or re-write what happened on February 22. Three ballots were cast for the Office of President of the Republic. The President of the Assembly then declared Mr. Behgjet Pacolli the elected President of the Republic of Kosovo.

If that election process violated the Constitution, paragraph 6 of the Constitution is very clear with respect to what the Constitutional remedy is:

“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”. (emphasis added.)

The Constitutional Court does not have the authority to order the Assembly to nominate at least two candidates for the office of President or to order the Assembly to re-vote for a fourth time.

However, at the outset, when the Court determines that there was a violation of the Constitution in the election procedure of the Assembly, the Constitution then mandates that the Assembly shall dissolve and new national elections of the Assembly shall take place within forty five days.

By declaring that the election process on 22 February 2011 violated the Constitution, this Court declared that the Assembly had not elected a President after the third round of balloting. The Constitution then mandates the dissolution of the Assembly and new national elections within 45 days.

The Court’s erroneous decision of today, which cannot be without consequences, forces that result. The Court by simply declaring the election process on 22 February 2011 violated the Constitution implicitly acknowledges that it does not have the authority to order the Assembly to re-vote. Since the Court also does not have the power to declare the election unconstitutional without a remedy, the decision of the Majority forces the dissolution of the Assembly and new national elections.

Respectfully submitted,


Robert Carolan


Almiro Rodrigues

Judges of the Constitutional Court of the Republic of Kosovo

