



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO  
GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT

Prishtina, 12 June 2017  
Ref. No.:MM 1095/17

**DISSENTING OPINION OF JUDGE ALTAY SUROY AND BEKIM SEJDIU  
ON THE JUDGMENT IN CASE NO. KI34/17**

- I. With the greatest respect we express our disagreement with the decision of the majority of judges of the Constitutional Court in case number KI34/17. We consider that the Referral should have been declared inadmissible, because there are several grounds for this. In addition, even if the Referral would pass the admissibility test, we find the conclusion of the majority of judges that the KJC Decision No. 50/2017 contains violation of the Applicant's rights guaranteed by Articles 24 (1), 31 (1) and 108 (1 and 4) of the Constitution, to be wrong.
- II. We join the Dissenting Opinion of Judge Gresa Caka-Nimani, as to the way of reasoning of the exhaustion requirement of legal remedies. Without prejudice to whether the Applicant had available effective legal remedies, or not, we consider that the Court's reasoning regarding the exhaustion of legal remedies is insufficient. As such, a majority decision in this case exempts the Applicant from the obligation to prove that: there are no legal remedies that she could have exhausted; for some reason they are inadequate or ineffective in this case; or there is a certain circumstance that in the present case exempts the Applicant from the obligation to exhaust legal remedies before filing the Referral with the Constitutional Court.

We also agree with the assessment of Judge Gresa Caka-Nimani that this flaw of the majority's decision regarding the (non) exhaustion of legal remedies becomes more apparent due to the fact that the Kosovo Judicial Council (KJC) has alleged that the Applicant had at her disposal accessible and effective legal remedies that had to be exhausted before filing the Referral with the Constitutional Court. This essential allegation of the KJC remained unanswered by the Applicant.

- III. Beyond disagreement with the majority regarding the manner of handling the requirement of (non) exhaustion of legal remedies, we consider that

the Judgment of the Constitutional Court in the present case contains the following essential flaws:

- a. The Judgment voted by a majority of judges does not clearly and accurately identify and address the substance of the Applicant's Referral. As a general rule, the individuals submit constitutional referrals to the Constitutional Court, in the form of a request for concrete and so-called "repressive" control - in accordance with Article 113.7 of the Constitution and Article 47 of the Law on the Constitutional Court. Beyond this, Article 113.8 of the Constitution enables individuals to refer allegations during judicial hearings before the regular courts regarding the unconstitutionality of specific legal norms, while the regular courts may submit referrals to the Constitutional Court on this basis (the so-called "incidental" constitutional control).

Within this backdrop of the constitutional judiciary, the individuals may file claims with the Constitutional Court, arguing that they are victims of a constitutional violation (*locus standi*), due to arbitrary or unjust acts of public authorities. But in no case, the individuals can directly raise to the Constitutional Court the allegations that the respective legal norms are not in compliance with the Constitution.

In the present case, the Applicant's Referral contains elements of an individual Referral, in the spirit of Article 113.7 of the Constitution, as well as a request for the constitutional review of the relevant norms governing the functioning of the KJC.

We are of the opinion that the decision of the majority of the judges of the Constitutional Court does not make the distinction between these two elements of the Applicant's Referral, and, consequently, they were not properly addressed.

**Firstly**, the Applicant alleges that in the procedure of selecting the President of the Supreme Court, her rights guaranteed by the Constitution of the Republic of Kosovo were violated, namely Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 45 [Freedom of Election and Participation], and Article 108 [Kosovo Judicial Council]. The Applicant presents two main arguments in support of her claims: The first argument concerns the manner of voting and the calculation of votes during the selection process of the candidate to be nominated as President of the Supreme Court. Whereas, the second argument concerns the assessment of the "merits of candidates" proposed for the President of the Supreme Court by KJC (the Applicant refers to Article 108.4 of the Constitution, which stipulates that the KJC should, upon the proposals for appointments of judges, take into consideration, among others, the merits of candidates and the principle of gender equality).

It should be noted at the outset that the Constitutional Court has consistently held that it is not the task of the Constitutional Court to deal with the way in which other public authorities establish facts and

interpret the relevant legal provisions, because that is primarily a question of legality (not of constitutionality). The Constitutional Court is involved in the matters of legal interpretations by other public authorities only if such a matter is related to a violation of the constitutional rights and standards.

We consider that the Judgment voted by majority failed to argue that the KJC, by arbitrary or unjust actions, violated the Applicant's respective constitutional rights. The Judgment in question does not clearly address the Applicant's argument regarding the manner of voting and the calculation of the vote (i.e. the interpretation of the effect of the abstaining vote). Whereas, regarding the other basic allegation of the Applicant that she was discriminated against because the outcome of the KJC voting did not reflect the outcome of the interview of the candidates who were in a competition to be appointed as a President of the Supreme Court, the Judgment in question does not contain convincing reasoning as to why the outcome of the interviewing of candidates had to be decisive for the way of voting in the KJC.

Related to this, we bring to attention that the KJC in its response provided extensive argument that the assessment of the candidates' merits is done taking into account certain criteria established in the Law on the Judicial Council (including consultations with judges of the relevant court, management training; management experience).

**Secondly**, the Applicant raises allegations, although casually, regarding the non-compliance of Regulation 14/16 of the KJC with the Constitution. She alleges that, we cite: “[...] *Regulation 14/2016 of the KJC on Procedures of Selection, Appointing, Evaluation, Suspension and Dismissal of Presidents of the Courts does not apply the requests as stipulated by the Constitution*” (see paragraphs 40 and 55 of the Judgment).

The Judgment of the Constitutional Court goes beyond the Applicant's allegation regarding the violation of her individual rights by making a general assessment of the voting process at the KJC. Thus, paragraph 98 of this Judgment reads that, we cite: “[...] *The failure to foresee the abstaining vote and the failure to foresee its effect on the voting process creates legal uncertainty because it impairs principles of openness and foreseeability*”. Whereas paragraph 99 reads, we cite: “[...] *the current form of regulating the voting process does not provide “equal opportunities” to candidates, because the process does not provide for procedural safeguards pertinent to the guarantee of equality of treatment*”.

These findings by the majority of judges of the Constitutional Court allude, clearly and directly, to structural defects in the KJC voting process. This process is largely regulated by the Law and the Regulation of the KJC. In our view, the task of the Constitutional Court in the concrete case was the assessment whether the Applicant's respective constitutional rights have been violated as a result of arbitrary or unjust

actions of the KJC, and not as a consequence of the effect of the relevant Articles of the Law and of the Rules of Procedure of KJC, which govern the voting process for the election of the President of the Supreme Court.

We are of the opinion that in the present case it was not the task of the Constitutional Court to make a general constitutional assessment of how the KJC, as a constitutional institution, applies the procedures regarding the proposals for appointment of the President of the Supreme Court of the Republic of Kosovo. Furthermore, such an action may have a negative effect on the decision-making independence of the KJC.

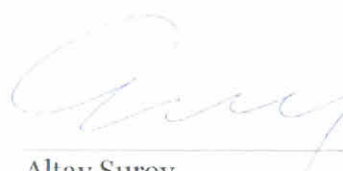
- b. Majority of judges found that the KJC violated Article 31 (1) of the Constitution, which guarantees the right to fair and impartial trial (paragraph II of the enacting clause of the Judgment).

In our assessment, the precondition for implementation in non-criminal cases of relevant guarantees that includes the right to fair and impartial trial - the right guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights, is the existence of a dispute over the specific constitutional rights. The European Court of Human Rights clarifies that the term “dispute”, within the meaning of Article 6 of the Convention, must be given a substantive and not technical or formal meaning (see decisions in *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, *Gorou v. Greece*, 20 March 2009). Furthermore, the dispute must be genuine and of a serious nature. This requirement for the application of Article 31 of the Constitution and Article 6 of the Convention is clearly confirmed by the case law of the European Court of Human Rights. Article 6 of the Convention does not apply to non-contested cases and unilateral proceedings, which do not involve opposing parties and which apply when there is no dispute over rights (see case *Alaverdyan v. Armenia*, 24 August 2010).

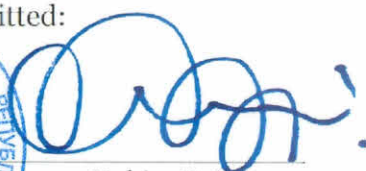
In the present case, the decision reached by the majority does not make the necessary connection between the existence of a dispute (before the referral was addressed to the Constitutional Court) and the application of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights.

IV. In conclusion and in connection with the above-mentioned flaws, we consider that the majority decision embodied in the Judgment of the Constitutional Court in Case KI34/17 may produce two negative effects. First, the KJC is put in a situation of legal uncertainty. This is due to the fact that in the repetition of the voting process for the proposal of the candidate for the position of the President of the Supreme Court, the KJC may be put into a situation when it has to decide between the independent application of the relevant norms of the Law and Regulation of the KJC, and the findings made by the Constitutional Court in the Judgment in question. Secondly, this Judgment can create a complicated precedent with regard to the procedures that are followed in similar situations for the appointments to senior public positions in the Republic of Kosovo.

Respectfully submitted:



Altay Suroy  
Judge



Bekim Sejdiu  
Judge