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

Prishtina, 12 June 2017
Ref. No.:MM 1094/17

Case No. KI34/17

Constitutional Review of Decision KGJK No. 50/2017 of the Kosovo Judicial Council of 06 March 2017

DISSENTING OPINION
of Judge Gresa Caka-Nimani

I respectfully disagree with majority vote in Case No. KI34/17 (Constitutional review of the Decision KGJK No. 50/2017 of the Kosovo Judicial Council of 06 March 2017). The majority decided to declare this Referral admissible and to hold that the challenged Decision (KGJK No. 50/2017) of the Kosovo Judicial Council (hereinafter: the KJC) has been issued in breach of Articles 24 (1) [Equality Before the Law], 31 (1) [Right to Fair and Impartial Trial] and 108 (1) and (4) [Kosovo Judicial Council] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). Respectfully, the Referral should have been declared inadmissible based on Article 113 (7) [Jurisdiction and Authorized Parties] of the Constitution; Article 47 [Individual Requests] of the Law on Constitutional Court (hereinafter: the Law) and point (b) of Rule 36 [Admissibility Criteria] of the Court's Rule of Procedure.

As it will elaborated in the following sections, Article 113.7 of the Constitution, Article 47 of the Law and Rule 36 of the Rules of Procedure, among others, clearly determine the obligation for the "exhaustion of all legal remedies provided by law", as a precondition to declare a referral admissible and to assess its merits. The Referral in the present case does not meet this requirement. Accordingly, this Dissenting Opinion, will specifically contest the "Assessment of Admissibility" of the Judgment in case No. KI34/17, paragraphs, 68, 69, 70, 71, 72 and 73, respectively.

This Dissenting Opinion is based on the following rationale:

1. The Referral has been submitted based on Article 113.7 of Constitution. This Article clearly determines that an individual is authorized to refer alleged violations of public authorities of their individual rights and freedoms guaranteed by the Constitution, with the condition that all legal remedies provided by law

have been exhausted. Article 47 [Individual Requests] of the Law, contains the same requirements, namely that, individuals are entitled to request from the Constitutional Court legal protection when they consider that their individual rights and freedoms guaranteed by the Constitution are violated by a public authority, however, "only after he/she has exhausted all the legal remedies provided by the law".[1] Similarly, the Court's Rules of Procedure permit the Court to consider the merits of referral only if the four criteria established under the first paragraph of Rule 36 [Admissibility Criteria] are met.[2] Accordingly, the requirement for the "exhaustion of all legal remedies provided by law" is clearly established in the Constitution, Law and the Rules of the Constitutional Court.

2. The concept of exhaustion and/or the obligation to exhaust legal remedies stems and is based on the "generally recognized rules of international law".[3] Therefore, a long established international practice on the exhaustion of legal remedies exists.[4] The same applies to the European Court of Human Rights (hereinafter: the ECtHR) which according to Article 35 (Admissibility Criteria) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention), may only *"deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."*.[5] The ECtHR practice in assessing whether the obligation to exhaust all legal remedies provided by law has been fulfilled, is well established on its case law. The latter is binding for the Constitutional Court in terms of interpretation of human rights and fundamental freedoms.[6]

3. The rationale for the exhaustion of legal remedies rule is to afford the regular courts, the opportunity to prevent or put right the alleged violations of the Constitution.[7] In the context of the ECtHR, it is based on the assumption that the domestic legal order will provide an effective remedy for violations of Convention

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[1] Law on Constitutional Court, Chapter III on Special Procedures, Section 10 on the "Procedure for cases defined in Article 113, paragraph 7 of the Constitution", Article 47 [Individual Requests].

[2] According to the Rule 36 [Admissibility Criteria] of the Rules of Procedure, the Court may consider a Referral if: a) the referral is filed by an authorized party; b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted; c) the referral is filed within four months from the date on which decision on the last effective remedy was served on the applicant; and d) the referral is prima facie justified or not manifestly ill-founded. Additional grounds for inadmissibility are establishes in paragraph 3 of Rule 36.

[3] To which Article 35 of the Convention specifically refers to. See paragraph 1 of Article 35 of the Convention: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken."

[4] Among others, a landmark decision on the matter: the International Court of Justice, the Interhandel case (Switzerland v. the United States), Judgment of 21 March 1959.

[5] Paragraph 1 of Article 35 (Admissibility Criteria) of the Convention.

[6] Article 53 [Interpretation of Human Rights Provisions] of the Constitution, according to which: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

[7] In the context of the ECHR, this applies to the national authorities and the Convention, respectively.

rights. This is an important aspect of the subsidiary nature of the Convention.[8] The Constitutional Court has consistently adhered to this principle. It has consistently maintained that the principle of subsidiary requires all applicants to exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. The Constitutional Court has further maintained that applicants are liable to have their respective cases declared inadmissible by the Constitutional Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings.[9] Accordingly, the Constitutional Court has consistently and strictly applied the rule of the exhaustion of legal remedies and consistently adhered to the principle of subsidiary. This, with the exception of only four prior cases, aside from this Judgment, in which the Constitutional Court has considered fulfilled or waived the exhaustion of legal remedies requirement.[10]

4. The criteria under which this requirement can be considered fulfilled and/or waived however is well established under the ECtHR case law. The latter must be the guiding reference for the Constitutional Court when making an assessment on whether the requirement for the exhaustion of legal remedies has been met for the referrals submitted under article 113.7 of the Constitution.

5. In principle, according to the ECtHR case law, the obligation to exhaust legal remedies is limited to making use of those remedies the existence of which is sufficiently certain, not only in theory, but also in practice; which are available, accessible and effective; and which are capable of redressing directly the alleged violation of the Convention.[11] Further, an applicant cannot be regarded as having failed to exhaust domestic remedies if he/she can show, by providing relevant

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[8] Among others: Selmouni v. France, paragraph 74 and the references therein; Burden v. the United Kingdom, paragraph 42, and other references therein; Kudła v. Poland, paragraph 152; Demopoulos and Others v. Turkey, paragraphs 69 and 97.

[9] Among others: Resolution in case KI139/12, Besnik Asllani, Constitutional review of Judgment PKL. no. 111/2012 of the Supreme Court, of 30 November 2012, paragraph 45; Resolution, in Case No. Kl. 07/09, Demë KURBOGAJ and Besnik KURBOGAJ, Constitutional review of Judgment Pkl. no. 61/07, of the Supreme Court of 24 November 2008, paragraph 18; Decision in case no. KI89/15, Fatmir Koci, Constitutional review of Judgment PAKR. nr. 473/2014, of the Court of Appeal, of 21 November 2014, paragraph 35; and Resolution in Case No. KI24/16, Applicant Avdi Haziri, Constitutional review of Decision Rev. no. 191/2015 of the Supreme Court of Kosovo, of 1 September 2015.

[10] Judgment in Case No. KI56/09, Fadil Hoxha and 59 Others vs. the Municipal Assembly of Prizren; Judgment in Case No. KI06/10 VALON BISLIMI vs. Ministry of Internal Affairs, Kosovo Judicial Council And Ministry of Justice; Judgment in Case No. KI41/12 Applicants Gezim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council; and Judgment in Cases No. KI99/14 and KI100/14 Applicant Shyqyri Syla and Laura Pula, Constitutional Review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor.

[11] For more context pertaining to the ECtHR practice on exhaustion of legal remedies, among others refer to: Selmouni v. France, paragraphs 71 to 81; Akdivar and Others v. Turkey, Section B. Exhaustion of domestic remedies, paragraphs 55 to 77; Demopolous and others v Turkey, Sections: A. Submissions before the Court on exhaustion of domestic remedies and B. Exhaustion of domestic remedies, respectively, paragraphs 50 to 129; Ocalan v. Turkey, paragraphs 63 to 72; and Kleyn and Others v. the Netherlands, paragraphs 155 to 162.

case-law or any other suitable evidence, that an available remedy which he/she has not used, was bound to fail.[12]

6. More precisely however, the well established case law of the ECHtR provides for: a) the established exceptions to the exhaustion rule;[13] and b) the established principles, on the basis of which, in each case, an assessment on whether the exhaustion requirement has been met is made. As it pertains to the second category, the ECHtR case law has, in principle, maintained that the application of the exhaustion rule must be flexible and that the remedies must, in principle, be characterized by existence, availability, accessibility and effectiveness. Flexible application wise, the exhaustion rule must be applied with *"flexibility and without excessive formalism"*.[14] As it pertains to the other characteristics, in principle, a) the existence of the remedies in question must be sufficiently certain not only in theory but in practice; b) the legal remedy must have the necessary availability, accessibility and effectiveness; c) the remedy must also be capable of providing redress in respect of the respective complaints; and d) the remedy must offer reasonable prospects of success.[15] Further, the application of flexibility into the above referred to features that need to be attached to a remedy, must be made taking into account the circumstances of each individual case. In this respect, the ECHtR has also embarked into the concept of "*special circumstances*", through

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[12] Among others: Case of Kleyn and Others v. the Netherlands, paragraphs 156 and the references therein; and Selmouni v. France, paragraphs 74-77.

[13] The ECHtR case law has in principle, and among others, maintained, if the applicant proves, that the exhaustion requirement would be considered fulfilled: a) where an appellate court examines the merits of a claim even though it considers it inadmissible (example: the context of the case Voggenreiter v. Germany); b) in cases regarding applicants who have failed to observe the forms prescribed by domestic law, if the competent authority has nevertheless examined the substance of the claim (example: Vladimir Romanov v. Russia, paragraph 52 and the references therein); c) if more than one potentially effective remedy is available, the applicant is only required to have used one of them (examples: Karakó v. Hungary, paragraph 14 and the references therein; Kozacıoğlu v. Turkey, paragraphs 40 and the references therein; Micallef v. Malta, paragraph, 58; and Jasinskis v. Latvia, paragraphs 50, 53, 54); d) the complaint must have been raised "at least in substance" (examples: Castells v. Spain, paragraph 32; and Fressoz and Roire v. France, paragraph 37 and the references therein); e) Discretionary or extraordinary remedies need not be used (examples: the context of cases Çınar v. Turkey and Prystavka v. Ukraine); f) a remedy that is not directly accessible to the applicant, but is dependent on the exercise of discretion by an intermediary, does not need to be used (examples: Tănase v. Moldova, paragraph 122); g) a domestic remedy which is not subject to any precise time-limit and thus creates uncertainty cannot be regarded as effective (example: the context of the case Williams v. the United Kingdom); and h) in a cases using a remedy provided by the Constitutional Courts, the assessment of the exhaustion will be made depending on the jurisdiction of the respective Court (example: the context of Grišankova and Grišankovs v. Latvia; Liepājnieks v. Latvia; and Szott-Medyńska v. Poland).

[14] Selmouni v. France, paragraph 77 and the references therein; Cardot v. France, paragraph 34 and the references therein; Ringeisen v. Austria, paragraph 89 and the references therein; and Kozacıoğlu v. Turkey, paragraph 40 and the references therein.

[15] All these concepts and the circumstances in which they apply, are clearly defined in the ECHtR established case law. In this respect, see among others, Norbert Sikorski v. Poland, paragraph 117; on effectiveness, among others: the Vernillo v. France, paragraph 27; Akdivar and Others v. Turkey, paragraph 66 and the references therein; the Johnston and Others v. Ireland, paragraph 45 and the references therein; and Paksas v. Lithuania, paragraph 74, 75 and the references therein; on offering reasonable prospects of success: among others, Paksas v. Lithuania, paragraph 74, 75 and the references therein.

which it assesses, whether there are any special grounds dispensing an applicant from fulfilling the exhaustion of legal remedies requirement.[16]

7. The determination on whether each specific case meets the criteria[17], based on which the exhaustion of legal remedies requirement would be considered fulfilled and/or be waived, must be made based on the distribution of burden of proof, a process clearly established in the ECHtR case law. According to the latter, the distribution of proof is shared between the applicant and the government claiming non-exhaustion.[18] In the context of the present case, the distribution of burden of proof, is shared between the Applicant and the KJC. According to the ECHtR case law, it is incumbent on the government, in the context of the present case the KJC, claiming non-exhaustion, to satisfy the Court that the proposed remedy: a) exists in theory and practice; b) is accessible and effective; c) capable of providing redress in respect of the Applicant's complaints; and d) offers reasonable prospects of success. These arguments will carry more weight if examples from relevant case-law are supplied.[19] However, once this burden of proof has been satisfied, it falls again back to the applicant to prove that the remedy advanced by the government, in the context of the present case the KJC, was in fact exhausted, and if this is not the case, to counter argue the arguments of the KJC, respectively that: a) for some reason, the proposed remedy was inadequate and ineffective in the particular circumstances of the case; or b) that there are special circumstances absolving the Applicant from fulfilling the requirement for the exhaustion of the remedy.[20] Finally, as mentioned above, the ECHtR has also held that an applicant cannot be regarded as having failed to exhaust domestic remedies if he/she can show, by providing relevant case-law or any other suitable evidence, that an available remedy which he/she has not used, was bound to fail.[21]

8. Having said this, it should also be emphasized, that waiving the exhaustion requirement is done exceptionally. An applicant needs to show that *"he/she did everything that could reasonably be expected of her/him to exhaust legal*

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[16] On the concept of special circumstances, among others: the Van Oosterwijck v. Belgium, paragraphs 36 to 40, and the respective references; Selmouni v France, the context of paragraphs 71 to 81, and the corresponding references; Ocalan v. Turkey, paragraph 67; Akdivar and Others v. Turkey, paragraphs 67 and 68 and the references therein. Further, on considerations for the general legal and political context, among others, Akdivar and Others v. Turkey, paragraphs 68- 69 and the references therein; Selmouni v. France, paragraph 77.

[17] Both, in cases of already established exceptions to the exhaustion rule; and the established principles that need to be taken into account in each case where an assessment for the exhaustion rule must be made, as referred to in paragraph 6 of this Dissenting Opinion.

[18] For a more detailed discussion on the distribution of the burden of proof, among others, refer to Selmouni v. France, paragraph 76 and the references therein; and Akdivar and Others v. Turkey, paragraph 68 and the references therein.

[19] Among others, the context of Paulino Tomás v. Portugal and Mikolajová v. Slovakia, paragraph 34.

[20] Among others, the Akdivar and Others v. Turkey, paragraph 68 and the references therein; and Selmouni v. France, paragraph 76 and the references therein.

[21] Among others, Kleyn and Others v. the Netherlands, paragraph 156; and Augusto v. France, paragraphs 37 and 42.

remedies".[22] In fact, even further, the ECHtR case law refers to "*Mere Doubts*" as not a sufficient reason to absolve an applicant from the exhaustion of legal remedies requirement. "*Mere doubts*" on the part of an applicant regarding the lack of necessary characteristics of a particular remedy, will not absolve him/her from the obligation to try it.[23] On the contrary, it is in the applicant's interests to apply to the appropriate court to give it the opportunity to develop existing rights through its power of interpretation.[24]

9. Now, as noted above, the Constitutional Court must interpret the human rights and fundamental freedoms guaranteed by this Constitution consistent with the case law of the ECtHR.[25] The principles established by the latter, including, the use of concepts such as *flexible, available, accessible, and effective*, cannot be taken out of the context of the ECtHR case law.

10. Furthermore, the Constitutional Court must make the assessment on whether the exhaustion of legal remedies requirement has been fulfilled or whether it can be waived, in each specific case separately and only based on the respective submission of the parties, in this particular case, the KJC and the Applicant respectively, as the distribution of burden of proof, established by the ECtHR case law requires.

11. In the particular case, referring to *Selmouni v. France* and two previous Judgments of the Constitution Court,[26] the Applicant maintains that no legal remedies to address the alleged violations caused by the challenged Decision (KGJK no. 50/2017) exist. This claim is not substantiated in the Referral. To this position maintained by the Applicant, the KJC has responded by claiming non-exhaustion, referring to the available remedies foreseen by the Law No. 03/L-202 on Administrative Conflict and the respective jurisdiction of the Department for Administrative Matters of the Basic Court of Pristina. KJC's arguments would have certainly carried more weight if examples from relevant case-law were supplied. However, the Applicant has failed to respond to the remedy advanced by the KJC and its non-exhaustion arguments, thus also failing to carry the necessary burden of proof. The Applicant has not argued, as required by the ECtHR case law, why is the referred to remedy inadequate or ineffective, and whether there are any special circumstances absolving the Applicant from the exhaustion of legal remedies requirement. In fact, based on the submissions of

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[22] See D.H. and Others v. the Czech Republic, paragraph 116 and the references therein.

[23] Among others, Epözdemir v. Turkey, first paragraph of pg. 6 and the references therein; Milošević v. the Netherlands, last paragraphs of pg.6; and MPP Golub v. Ukraine, last paragraph of Section C on Court's Assessment.

[24] Among others, Ciupercescu v. Romania, paragraph 169.

[25] Article 53 [Interpretation of Human Rights Provisions] of the Constitution, maintaining that: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

[26] Judgment in Case No. KI06/10 VALON BISLIMI vs. Ministry of Internal Affairs, Kosovo Judicial Council And Ministry of Justice; and Judgment in Cases No. KI99/14 and KI100/14 Applicant Shyqyri Syla and Laura Pula, Constitutional Review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor.

the parties, it results that there has been no attempt at all by the Applicant to exhaust any legal remedies. In such circumstances, the Applicant must have not only mentioned, but shown and substantiated that the legal remedy does either not exist or that the available remedy which has not been used is not adequate, not effective and/or was bound to fail. Pertaining to the latter, as in the case of the KJC, the Applicant's arguments would have carried more weight if relevant case law would have been supplement, as referred to by the respective ECtHR case law. This has not been done. Therefore, the Applicant has not shown that "*everything that could reasonably be expected of her to exhaust domestic remedies*" has been done. It is to be reiterated, as discussed in paragraph 8 of this Dissenting Opinion, that "*mere doubts*" on the part of the Applicant regarding the effectiveness of a particular remedy, will not absolve her from the obligation to try it.

12. In this respect, and respectfully, the assessment of admissibility in Judgment Case no. KI34/17, as it pertains to the exhaustion of legal remedies requirement, elaborated in paragraphs 68 to 73 respectively, does not reflect an assessment based on the distribution of burden of proof. Specifically, while paragraphs 68 and 72 of the Judgment are technically correct, they are taken out of the context and not based on arguments put forward by the Applicant nor the KJC. Similarly, the arguments reflected in paragraph 69 of the Judgment have not been put forward by the Applicant. Further, in paragraph 70 of the said Judgment, the Court puts the burden of proof solely on the KJC. It is correct that the KJC did not supplement its claims for non-exhaustion and/or its proposed remedy with any relevant case-law, in comparable cases, which in exchange, would have shown that the Applicant would have had any reasonable prospects of success. However, as discussed in more detail in paragraph 7 of this Dissenting Opinion, the burden of proof is not solely on the KJC, as this Judgment reflects. It equally depends on the Applicant. As elaborated above, the latter has not explained: a) why no attempts have been made to exhaust any remedies; b) has not substantiated the claims for non-existence of a remedy; and c) has not responded to the KJC's non-exhaustion claims.

13. Finally, it is clear that the flexible application of the exhaustion rule must be tailored to each specific case and be based on the distribution of the burden of proof. The *importance* or the *specificity* related to any challenged decision, in this particular case, Decision KGJK No. 50/2017, as elaborated in paragraphs 71 and 73 of the Judgment, cannot in itself justify the waiver of the exhaustion of legal remedies requirement. These are additional criteria, the application of which outside of the context of the ECtHR case law, could potentially lead to unequal treatment of applicants under Article 113.7 of the Constitution.

14. Accordingly, and as elaborated above, the Referral should have been declared inadmissible on the basis of non-exhaustion of legal remedies, based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution; Article 47 [Individual Requests] of the Law and point (b) of Rule 36

[Admissibility Criteria] of the Court's Rule of Procedure of the Constitutional Court.

15. Taking into account the position justified above, and summarized in paragraph 14 of this Dissenting Opinion, I will refrain from providing a detailed opinion on the Merits of the Referral as elaborated in the Judgment. Such a position would have also prevented the majority to assess the merits of the Referral. However, I would like to add that I join the Dissenting Opinion of Judges Altay Suroy and Bekim Sejdiu, respectively, which maintains that exhaustion of legal remedies question aside, there are also other grounds, based on which the Referral is not admissible, particularly as being manifestly ill-founded on constitutional basis, because the Applicant has not sufficiently substantiated her claims for violations of Articles 24 (1) [Equality Before the Law], 31 (1) [Right to Fair and Impartial Trial] and 108 (1) and (4) [Kosovo Judicial Council] of the Constitution, and accordingly, the assessment of the allegations as presented by the Applicant, do not amount to the level of constitutional violations.

Respectfully submitted,
Gresa Caka-Nimani
Judge