



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

Prishtina, on 12 April 2016
Ref. No.:RK918/16

RESOLUTION ON INADMISSIBILITY

in

Case KI09/16

Applicant

Behgjet Pacolli

**Request for constitutional review of non-implementation of Resolution
No. 04-R-02 of the Assembly of the Republic of Kosovo, of 7 April 2011**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by Mr. Behgjet Pacolli, an individual person from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant requests constitutional review of non-implementation of Resolution No. 04-R-02 (hereinafter: the Resolution) of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), of 7 April 2011.

Subject matter

3. The subject matter is the constitutional review of non-implementation of the Assembly Resolution of 7 April 2011 with respect to constitutional amendments and necessary legislation for the direct election by the citizens of Kosovo of the President of the Republic of Kosovo.
4. The Resolution in question was adopted by the Assembly in support of a Memorandum of Agreement (hereinafter: the Memorandum) made between Mr. Behgjet Pacolli, Mr. Isa Mustafa and Mr. Hashim Thaçi, on 6 April 2011.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 48 of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law).

Proceedings before the Court

6. On 14 January 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 26 January 2016, the Court notified Applicant of the registration of the Referral and sent a copy of the Referral to the Secretariat of the Assembly.
8. On 12 February 2016, the President of the Court appointed Judge Robert Carolan as a Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi (Judges).
9. On 17 March 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts based on the documents contained in the Referral

10. On 6 April 2011, the Applicant, Mr. Behgjet Pacolli, leader of the political party Aleanca Kosova e Re (AKR), Mr. Isa Mustafa, leader of the political party Lidhja Demokratike e Kosovës (LDK) and Mr. Hashim Thaçi, leader of the political party Partia Demokratike e Kosovës (PDK), signed a Memorandum agreement to exit the institutional crisis created in 2011. In that Memorandum, the three leaders of the political parties agreed to the establishment of an *ad hoc* Committee of the Assembly which would draft the constitutional amendments

and the necessary legislation for the direct election of the President of the Republic of Kosovo by the citizens of Kosovo.

11. On 7 April 2011, the Assembly adopted a Resolution endorsing the above described Memorandum.
12. On 22 April 2011, the Assembly adopted Decision No. 04-V-12 on the establishment of the Committee for amending the Constitution of the Republic of Kosovo. This Decision was based also on the Resolution of the Assembly which in that case was not entirely implemented.
13. On 23 March 2012, the President of the Assembly referred the proposed amendments to the Constitutional Court of the Republic of Kosovo, requesting constitutional review of the proposed amendments, namely whether they complied with Chapter II and Chapter III of the Constitution.
14. On 20 July 2012, the Court, in cases KO29/12 and KO48/12, reviewed whether the proposed amendments complied with Chapter II and Chapter III of the Constitution.
15. The proposed constitutional amendments related to the direct election of the President of the Republic were not put up for voting by the Assembly.

Applicant's allegations

16. The Applicant alleges that the Assembly's failure to adopt these proposed amendments is a violation of Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 54 [Judicial Protection of Rights] of the Constitution, Article 6 (Right to a fair trial) in conjunction with Article 13 (Right to an effective remedy) European Convention on Human Rights and Article 25 item a) of the International Covenant on Civil and Political Rights and its Protocols.
17. The Applicant alleges: "*the Assembly has not fully enforced Resolution No. 04-R-02, dated 07.04.2011, because it has never put on the agenda to vote the proposed constitutional amendments for direct election of the President, which have been assessed by the Court in Judgment no. K.O.29/12 and KO48/12, dated 20 July 2012. In this case, the Assembly, by failure to act (silence) and non-enforcement of Resolution No. 04-R-02, has violated the alleged constitutional rights of the Applicant*".
18. The Applicant alleges: "*the Assembly, by failing to enforce Resolution No. 04-R-02, did not give deputies the opportunity, especially those of the previous legislature who supported this resolution to vote the proposed constitutional draft amendments for the election of the President of the Republic of Kosovo directly by the people*".
19. The Applicant alleges: "*... the Assembly did not treat him equally to the other political entities and signatories of the agreement, by not enforcing Resolution No. 04-R-02 and the failure to vote the package of amendments for the direct election of the President. The Applicant also states that he has had reasonable*

expectations that these draft amendments would have been proceeded for voting during this legislature, but also during the previous legislature of the Assembly.”

20. The Applicant alleges: *“The incomplete enforcement of the Resolution and by failing to proceed the proposed amendments for the direct election of the President for voting, his equality before the law as a natural person and the AKR as a legal person has also been violated, in the spirit of Article 24 of the Constitution, because in this case the Applicant, as a party of the agreement supported by the Resolution, has been put in the position of bias and inequality, in relation to the other entities of the agreement supported by Resolution No. 04-R-02, namely Mr. Hashim Thaçi (PDK) and Mr. Isa Mustafa (LDK)”*.
21. The Applicant alleges: *“Resolution No. 04-R-02 obliges the Assembly to respect the time limits foreseen in the political agreement, which also includes the amendment to the Constitution concerning the direct election of the President.”*
22. The Applicant claims that there is no legal remedy which he could use to complain against the non-implementation of Resolution No. 04-R-02 within the meaning of Article 144.3 of the Constitution to proceed with the voting of the proposed amendments for the direct election of the President.
23. The Applicant alleges: *“... after the Judgment of the Constitutional Court, Case no. KO29/11, [he] has withdrawn from the post of the President of the Republic of Kosovo in order that the Resolution to be enforced and vote the proposed constitutional amendments for the direct election of the President.”*
24. The Applicant claims that in this case the time limits established by the Law cannot be counted as this concerns a “continuing situation” because the Assembly by failing to implement the Resolution has created a “continuing situation”. In order to substantiate his claim, the Applicant refers to Case no. KI47/10 *Naim Rrustemi and 31 other deputies*, Judgment of 29 September 2010 (hereinafter: the case of President Sejdiu).
25. The Applicant alleges: *“as a party of the agreement, [he] has had reasonable expectations that the presidential elections of 2016 shall be organized pursuant to the new constitutional rules of the direct election by the people.”*
26. Finally, the Applicant requests from the Court *“...to confirm violation of rights and freedoms of the Applicant and to oblige the Assembly to enforce Resolution No. 04-R-02, by enforcing the further procedure of voting the proposed amendments for the direct election of the President, without prejudicing the voting result and by respecting the free mandate of deputies and other constitutional principles.”*

Resolution No. 04-R-02 of the Assembly of the Republic of Kosovo provides:

“The Assembly of the Republic of Kosovo supports the commitments and time limits contained in the Memorandum concerning the need for

amending the Constitution of the Republic of Kosovo and the related legislation in order for the President of the Republic of Kosovo to be elected directly by the people. The Assembly supports the time limit contained in the Memorandum, according to which the first presidential elections in Kosovo will be held not later than six months from the date on which the necessary constitutional and legislative amendments enter into force. The Assembly supports the establishment of a committee, led by a deputy of the Assembly identified by the ruling coalition, for this purpose as it is provided in the Memorandum. In accordance with the Memorandum, the Committee shall aim to complete its work within 6-9 months from the date of the establishment.”

Assessment of the admissibility

27. The Court first examines whether the Applicant’s referral has fulfilled the admissibility requirements set forth in the Constitution and further specified in the Law and the Rules of Procedure.

28. The Court refers to Article 113.1 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

“The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.”

29. The Court also refers to Article 48 of the Law which provides:

“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge”.

30. The Court also takes into account Rule 36 (1) a) of the Rules of Procedure which specifies:

(1) *“The Court may consider a referral if:*

a) the referral is filed by an authorized party”.

31. The Court should first clarify the question of its jurisdiction, that is, to determine whether in the concrete case it is dealing with a procedure provided for by the Constitution and whether the Referral has been filed by an entity authorized by the Constitution to ask for Constitutional review of the question submitted.

32. The number of entities that may challenge actions of the Assembly is limited to those set forth in paragraphs 3 and 5 of Article 113 of the Constitution. Article 113.7 of the Constitution does not allow for an *actio popularis* procedure (For a more detailed elaboration of an *actio popularis* procedure, see Case No. KI117/11, *Ridvan Hoxha*, Resolution on Inadmissibility of 24 July 2012).

33. In this respect, the Court recalls that the European Court of Human Rights regarding the *actio popularis* procedure has held: *“The Court has also*

underlined that the Convention does not envisage the bringing of an actio popularis for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention.” (See, Aksu v. Turkey [Grand Chamber], Application no. 4149/04 and 41029/04, Judgment of 15 March 2012, paragraph 50 and Burden v. the United Kingdom [Grand Chamber], Application no. 13378/05, Judgment of 29 April 2008, paragraph 33).

34. In this regard, the Court reiterates the content of paragraphs 3 and 5 of Article 113 of the Constitution:

“3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:

(1)...

(2) compatibility with the Constitution of a proposed referendum;

(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;

5. 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.”

35. Even if the Applicant were an authorized party, the Court also considers that this omission by the Assembly to put up for voting or non-implementation of the resolution in question usually cannot be subject to constitutional review because it is not compatible *ratione materiae* with its jurisdiction especially seeing that there is no concrete act and procedure to be followed as is established by paragraphs 3 and 5 of the Constitution.
36. The Court also notes that the Applicant has merely enumerated and described constitutional provisions and provisions of other international instruments concerning the right to a fair trial, judicial protection of rights and equality before the law, but he has failed to give reasons as to how such provisions were violated (See Case No. KI109/14, *Ahmet Krasniqi and others*, Resolution of 20 February 2015, paragraphs 35 and 36).
37. Consequently, the Referral has been filed by an unauthorized party and must be declared inadmissible as established by Article 113.1 of the Constitution, provided for by Article 48 of the Law and further specified by Rule 36 (1) a) of Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 of the Constitution, Article 48 of the Law and Rule 36 (1) a) of the Rules of Procedure, on 17 March 2016, unanimously

DECIDES


- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law;
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur


Robert Carolan



President of the Constitutional Court


Arta Rama-Hajrizi