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Case KI 11/09, Tomë Krasniqi vs RTK and KEK

Dissenting opinion on interim measures[1]
Judge Almiro Rodrigues

Introduction

1. We must respectfully dissent from the Majority's decision on interim measures, as we do not agree with both the procedural and substantive point of view taken by the Majority. On the contrary, we conclude that the interim measures should not be decided without prior admission of the referral and the request for interim measures should be rejected as unfounded in its entirety.

2. We wish to emphasize at the outset that our dissent arises only from our disagreement with the good faith legal conclusions of the Majority. It is unquestionable that the Majority has reached its conclusion honestly, fairly and in full accordance with the ethical and professional obligations of judges in the Constitutional Court. Therefore, while we dissent, we do so respectfully, with full faith in the indisputable integrity of the Majority's decision.

3. We wish also to emphasize that our dissent solely concerns issues of law, not issues of fact. It is self-evident that, in deciding on the merits of the interim measures, the Majority does not make factual findings. Nothing in this dissent should be regarded as a factual conclusion. Rather, we have only reviewed the procedural step of holding a public and reasonableness on deciding the request of interim measures, without issuing any opinion as to the veracity of any allegation either in the referral or in the request for interim measures.

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[1] *Preliminary note*
The decision on interim measures in the case KI 11/09, Tomë Krasniqi vs RTK and KEK is the first one to be delivered by the Constitutional Court of the Republic of Kosovo. Thus, it is decisively important not only for the citizens of Kosovo but also for the case law to be built by the Court. Given these circumstances and being dissident, we felt deeply engaged on thoroughly explain why we couldn't join the majority in that great moment. We took the risk of being boring for the persons who by chance have the opportunity of contacting with our dissenting opinion. However, we did that additional effort in the name of upholding the Constitution, performing my function with full individual and independent responsibility and giving that modest contribution for an open, respectful and fertile debate. I hope it can be helpful.

4. Thus, taking into account the factual basis brought by the parties, we will analyze and discuss mainly the procedural step of holding a public hearing and admissibility of the referral (I) and the merits of the interim measures decision (II).

I. The procedural step of holding a public hearing and admissibility of the referral

5. The procedural framework followed by the Majority and the subject matter is expressed in the introduction of the Majority's decision. It reads that the Court, after having heard the judge rapporteur, (...) discussed the matter in its entirety in the deliberations; and the subject matter is "the request of 2 September 2009 on imposing the interim measures for the referral KI 11/09, filed by Mr. Tomë Krasniqi against RTK et Al".

6. When analyzing and discussing the procedural step of the Majority's decision on interim measures, we take together the procedural step of the public hearing and admissibility of the referral. However, for analysis commodity, we will take them separately.

1. The procedural step of public hearing

7. On 02 September 2009, Tome Krasniqi requested interim measures alleging that "the collection of 3.5 Euros severely violates civic rights and public interest". Therefore, he requested "to suspend implementation of this Agreement until taking of the decision based on merits".

8. On 02/03/2006, he started all this process with his claim against KEK due to the "difficult circumstances" under which he is living, and for that reason he concluded that "it is not fair (…) to pay for electricity consumption and continue to live with 40.00 Euros a month". Furthermore, he stated that "it is absurd, abnormal and highly immoral for a Kosovo pensioner to pay 3.5 Euros a month for Kosovo Radio Television".

9. A public hearing on the requested interim measures was scheduled for and took place on 06 October 2009, without any decision on admissibility of the referral having been made before. Let us remind that hearings are not a rule in the Constitutional Court proceedings, as in general only admitted referrals "**may become** the object of a hearing"[2]. However, when dealing with interim measures, "the President **shall set a date for a hearing** as soon as possible which will afford the parties an opportunity of expressing their views on the request"[3]. Thus, it looks like a hearing on interim measures is the rule.

10. The issue under consideration now is whether the Constitutional Court *ex-officio* or upon the referral of a party may temporarily decide upon interim measures without having admitted the referral to which they are connected.

2. Admissibility of the referral

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[2] Section 37 (2) of Rules of Procedure
[3] Section 52 (2) of Rules of Procedure

11. Admissibility is not for now the main subject. However, in accordance with the constitutional legal frame, it is difficult, for not saying almost impossible, to discuss interim measures without at least making a general reference to the admissibility, because, in our view, there is no autonomous interim measures procedure, meaning without a correspondent referral having been admitted.

12. We still think that a decision on admissibility of the referral must be taken before processing any interim measures. In fact, the constitutional legal frame establishes, in general, that "the Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties"[4]; more specifically, it states that "the initiation of proceedings before the Constitutional Court is made through a referral to the Court"[5]; "the Constitutional Court receives and processes a referral (...), if it determines that all legal requirements have been met"[6] and, finally, "only referrals, which have not been dismissed on the basis of inadmissibility, may become the object of a hearing"[7], which is the same as saying that only admitted referrals can become object of a hearing.

13. The reading of these legal provisions, in our opinion, is clear and without any doubt in relation to the concept they express. Also they are consistent with the main features of the proceedings where a judge rapporteur makes a proposal to the review panel[8] which submits to the Court (all judges)[9] a draft decision on admissibility[10]. Finally, the proposed interpretation is reasonable in order to avoid a possible absurd situation where a decision was taken on interim measures connected to a referral that later on was considered inadmissible or to take a decision on interim measures connected with a referral which has never been admitted.

14. Literal, systematic or teleological interpretations drive us to the compelling conclusion that admissibility is the first procedural step to be taken, even in an interim measure situation. As the legal provisions specifically do not make any distinction in relation to the subject of the hearing, we cannot make the distinction in relation to the interim measures hearing. The assumed fact that other courts, like the European Court of Human Rights, accept dealing with interim measures without considering first admissibility does not override the specifically foreseen solution by the Kosovo constitutional legal frame.

15. In the present case, no decision on admissibility was taken yet and, in our view, it should have been taken, as the merits of the interim measures are closely linked to the merits of the referral to be admitted.

3. Admissibility of the referral and the merits of the interim measures

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[4] Article 113 of Constitution
[5] Article 22 of Law on Court
[6] Article 46 of Law on Court
[7] Section 37 of Rules of Procedure
[8] Article 22 (5) of Law on Court
[9] Article 22 (8) and (9) of Law on Court
[10] Article 22 (6) and (7) of Law on Court

16. On the other side, it is fair to say that the requirements for interim measures of "unrecoverable damages"[11] or avoiding "any risk or irreparable damages, or if such an interim measure is in the public interest"[12] suggest urgency in processing the referral. However, the urgent nature of the interim measures was taken into account by the constitutional legal frame, when it established that "a request for interim measures shall be considered by the Court in an expedient manner and shall have priority over all other referrals"[13]. Thus, the need for an expedient decision does not mean necessarily and exclusively cutting procedural steps. A solution to the urgent situation is foreseen and it is nothing more but expediency and priority over other referrals.

17. Finally, as said, there is no autonomous interim measures procedure without a referral being admitted, because "a party applying to the Court for interim measures shall submit a written request for a decision on interim measures at any time **during the course of the proceedings on a referral** in connection with which the request is made"[14]. It is, let us say, crystal clear that a "request for a decision on interim measures" takes place at any time "**during the course of the proceedings** on a referral in connection with which the request is made" and it is already said that "**the initiation of proceedings** before the Constitutional Court is made through a referral".

18. In sum, taking into due account what was noted and considered above, a decision respecting all procedure rules related to admissibility, which is the same as saying on opening the course of the proceedings on a referral in connection with which the request on interim measures is made, should have been taken before the public hearing, discussion and adjudication on the merits of the interim measures. We cannot say either that the referral is so obviously admissible that it does not need a decision on admissibility. If it is the case, let us make the so obvious decision.

19. Therefore, taking into account all above mentioned, the procedure to apply to admissibility of the referral and interim measures should be as the one which follows. The **Judge Rapporteur** submitted the preliminary report to the Review Panel. Meanwhile, the **Review Panel**, after having assessed the admissibility of the referral, should have sent to all judges a draft decision rejecting the referral due to the lack of admissibility or a draft decision concluding that the referral is admissible. Then, if judges who are not members of Review Panel would not oppose the draft decision on inadmissibility, the **President** of the Constitutional Court would sign and issue the decision rejecting the claim on the basis of inadmissibility; if the draft decision has concluded that the referral would be admissible, or if one or more of the judges not on the Review Panel have not opposed the draft decision to reject the referral, the case should have been referred to **the Court**. That was, in our opinion, the correct procedural framework to be followed by the Majority. It was not done and accordingly we dissent.

4. The merits of interim measures and the merits of the referral

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[11] As the Constitution words
[12] The wording of Law on Court
[13] Section 52 of Rules
[14] Section 51 of Rules

20. Furthermore, the merits of interim measures, in our opinion, are closely related with the merits of the referral and cannot be separated either. In fact, some legal provisions govern the admissibility of the referral and establish general requirements for a referral filed by individuals to be admitted[15]. Some of these requirements impact on the request of interim measures. Among these requirements are: referring the matter to the court in a legal manner[16]; having exhausted all legal remedies provided by law[17]; filing the referral within a certain deadline[18], and so on.

21. In addition, the applicant should accurately clarify what rights and freedoms he claims to have been violated and what concrete act of public authority is subject to challenge[19]; referrals should be justified, attach the necessary supporting information and documents[20], and include other elements of information[21].

22. More precisely, it is established that "the request shall specify the reasons for requesting interim measure, the possible consequences if it is not granted, and the measure requested"[22]. On the other side, interim measures may be decided if they are "necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest"[23].

23. Let us assume that, in the case, Tome Krasniqi requested interim measures where he was not an authorized party[24], or did not exhaust all remedies provided by law, or the request did not respect the deadline to file the referral. Could we deal in those circumstances with interim measures, namely scheduling a public hearing and imposing interim measures, without deciding on admissibility? We think that the answer cannot be other but negative.

24. As mentioned above, Tome Krasniqi challenges "the legality and constitutionality of Article 2.1 and 2.2 of the Administrative Instruction No. 2003/12 which was promulgated by the Representative of the General Secretary of the UN on 03.06.03, mainly because he is obliged to pay the fee of 3.50 Euros under the "difficult circumstances" he is living under. That Administrative Instruction was replaced by the Law on RTK and is not in force anymore.

25. By the way, the Majority's decision noted that "legal and factual basis which is contested by the applicant, as stated by him, is superseded in the meantime by the promulgation of the Law No. 02/L-47 on the Radio and Television of Kosovo of January 20, 2006 (hereinafter referred to as: the Law on RTK), while the old practices still continue to be applied by the opposing parties of this case".

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[15] Article 113 (7) of Constitution
[16] Article 113 (1) of Constitution
[17] Article 113 (7) of Constitution
[18] Article 49 of Law on Court
[19] Article 48 of Law on Court
[20] Article 22 of Law on Court)
[21] Mentioned in Section 29 of Rules of Procedure
[22] Section 51 (2) of Rules of Procedure
[23] Article 27 of Law on Court
[24] In the sense of Article 113 (7) of Constitution

26. Thus, it is completely useless, or even impossible, to challenge the constitutionality of a legally nonexistent subject. In addition, if the main reason is the "difficult circumstances" he is living under, then he could apply for exemption of this payment, as provided by the Law[25]. He did not use this administrative remedy and thus did not exhaust all remedies. Having exhausted all legal remedies provided by law is an essential requirement to become an authorized party. Therefore, the request on interim measures should not be accepted, as the referral would not be either.

5. Rights and freedoms allegedly violated

27. In the request of interim measures, Tome Krasniqi alleged that "the collection of 3.5 Euros severely violates civic rights and public interest". That so unspecific allegation is clearly insufficient to meet the minimum threshold of accurately clarifying what rights and freedoms he claims to have been violated.

28. He also alleged that he "filed a civil suit with the Municipal Court in Pristine" which, despite three requests for urgent convocation of judicial session, continued silent, "what practically and realistically impeded the realization of applicant's right to an effective legal remedy". He considers that "the Court violated Article 32 of the Constitution of the Republic of Kosovo – the Right to Legal Remedies - as well as Articles 6, paragraph 1 and 13, of The European Convention on Human Rights and Fundamental Freedoms and its Protocols - Article 22 clause (2) of the Constitution of the Republic of Kosovo [Direct Applicability of International Agreements and Instruments]".

29. In that allegation, the applicant mixes and confuses the right to a fair trial[26] and the right to legal remedies[27]. They might coexist, but they are different in scope. In fact, Article 6 guarantees the right to a fair trial; Article 13 guarantees the effectiveness of Article 6 and also constitutes a remedy to be exhausted before referring the case to the Constitutional Court, which is a subsidiary and not an alternative remedy. Otherwise, the Constitutional Court would replace all the other courts.

30. On the other side, the invoked right to a fair trial, foreseen in Article 6 of the European Convention, is a general reference to a complex of other rights related also to a civil suit: namely, the right to trial by a competent, independent and impartial court; the right to compensation for miscarriages of justice; the right to equality before the law and courts; the right to call and examine witnesses; the right to an interpreter and translation; the right to a Lawyer; the right to a public hearing; the right to appeal; the right to be present at trial and appeal; the right to a fair hearing[28].

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[25] Article 20 of Law on RTK
[26] Article 6 of European Convention
[27] Article 13 of European Convention
[28] In addition, we could consider other rights more related with criminal cases, like: the right to the presumption of innocence, the prohibitions on retroactive application of criminal laws and on double jeopardy, the right not to be compelled to testify or confess guilty, the right to adequate time and facilities to prepare the defence, the right to be brought promptly before a judge, the right to be tried without undue delay, the right to challenge the lawfulness of detention, the right to

31. That list, not being exhaustive, is nevertheless enough and impressive to see how difficult is for the Court guessing which right in Article 6 of the European Convention was violated, how and why it was violated. It could be assumed that the applicant is referring to the right to trial within a reasonable time. However, it is not up to the Court to replace the party in complying with his duty of "referring the matter to the court in a legal manner", namely accurately clarifying "what rights and freedoms he/she claims to have been violated". Apparently, the applicant is zigzagging on an unknown road of violated rights.

32. Thus, it is not clear whether the applicant eventually exhausted all judicial remedies and mainly what precise right he claims to have been violated. Therefore, the request on interim measures is confusing and incomplete and then should not be accepted, as the connected referral should not be either.

6. The interim measures requested

33. More specifically, the applicant requested "to suspend implementation of the Agreement between KEK and RTK, implementing Administrative Instruction 2003/12, dated June 3, 2003, on collection of 3.5 Euros, because the Agreement "severely violates civic rights and public interest".

34. Let us bear in mind that the request for interim measures "shall specify the reasons for requesting interim measures, the possible consequences if it is not granted, and the measures requested"[29]. We can see immediately that the given reason "because the Agreement severely violates civic rights and public interest" does not "specify the reasons for requesting interim measures". In addition, no information has been submitted on "the possible consequences if it is not granted"[30].

35. Meanwhile, we note that Tome Krasniqi requested interim measures "pursuant to my request dated 16 March 2009, registered in this Court under reference number KI 11/09". The reference number KI 11/09 is the referral. We also note that the request for interim measures is a five lines text. With a five lines request for interim measures, without a reference to the referral, it is almost impossible to comply with the established legal requirements for the request to be accepted by the Court.

36. Looking at the merits of interim measures and the merits of the referral separately, in such a procedural context adopted by the Majority's decision, may put some dilemmas to the Court. In fact, the Majority must choose: or the request for interim measures does not fulfill the requirements and the request has to be rejected, completely disregarding the connection established by the applicant

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defend oneself in person or through counsel, the right to humane conditions of detention and freedom from torture, the rights of people in custody to information.

[29] Section 51 (2) of Rules of Procedure

[30] We note that Tome Krasniqi considers himself "not to be a legal debtor for payment for RTK" and hopes that he "will be released (exempted) from such payment". It is reasonable assuming that he is not paying the fee. Thus, in principle there are no "possible consequences" if the interim measures are not granted.

himself in between the referral and the request; or, when deciding on the merits of the request, the Majority's decision must consider the merits of the request together with the referral and consequently should have decided on admissibility of the referral, as the only procedural way of taking into account the referral. In our view, this should have been done, at least, for the sake of fairness and transparency.

37. The Majority took exactly the second choice. In fact, the Majority started its decision considering that, since the application does not concern only the personal interest, but also the public interest, "for this reason it deems opportune to grant the requested interim measure". Meanwhile, it is not clear whether the Majority's decision was based on the public interest alone, or on both the personal interest and the public interest, which means that we don't know either whether the decision is *ex officio* or upon request of the party.

II. The merits of the interim measure decision

38. The Majority's decision says, in its introduction, that the subject matter is "the request of 2 September 2009 on imposing the interim measures for the referral KI 11/09, filed by Mr. Tomë Krasniqi against RTK et Al".

39. "The Constitutional Court *ex-officio* or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest"[31]. We must understand as "a party" the "individuals (...) authorized to refer violations and request interim measures"[32]. In the case, that party is Tome Krasniqi.

40. The Majority's decision considered that "this individual application does not concern only the personal interest of the applicant, but also the public interest, (...) as the amount of the fee of 3.5 euro envisaged in the same provision of Art. 20.1 of the Law on RTK is as well part of the public concern". Furthermore, the Majority's decision considered that "in his application, Mr. Tome Krasniqi requests *in abstracto* control of the constitutionality of some provisions regulating the work of the RTK", as "the application (...) deals with the national laws and administrative practices based on them". In addition, the Majority's decision considered "that here we are not dealing with an *actio popularis*, although we have to do not only with an individual interest but as well as with a public one.

41. Some questions arise from these Majority's decision considerations:
    (1) Is there any relation between "*ex-officio*" and "public interest", on one side, and "upon the referral of a party" and "avoid any risk or irreparable damages", on the other?
    (2) Is an individual an authorized party to represent and defend other interests but their own?
    (3) Is an individual an authorized party to "request *in abstracto* control of the constitutionality of some provisions regulating the work of the RTK"?

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[31] Article 27 of Law on Court
[32] Article 113 (7) of Constitution

1. Whether there is any relation

42. Apparently there is no necessary correspondence between the mentioned elements of the relation. In a way, they are interchangeable within certain limits. In fact, interim measures may be decided *ex officio* upon the request of a party or without a request if such an interim measure is in the public interest, assuming that a referral exists. However, if such measures are necessary to avoid any risk or irreparable damages of private interest character, the court may decide upon interim measures only upon the request of the interested party. This interpretation is in conformity with the general principle of dispositive.

43. Thus, the request of a party may function as a reminder for the court to apply *ex officio* interim measures in the public interest, but it is necessary in the private interest. The only condition is that certain circumstances exist where such measures are necessary to "avoid any risk or irreparable damages" or to care about "the public interest". However, *ex officio* cannot mean that the Court takes the initiative on its own without a referral, as the Court acts upon the initiative of an authorized party and thus cannot go into the question on its own and investigate if and where interim measures are necessary. It means also that the Court needs a factual basis which allows the conclusion that interim measures are necessary in a given circumstance.

44. The notion of public interest is broader than the one of private interest and thus additionally demanding more balance and discretion. Even more, caring for the public interest is a competence and duty of all and different state organs. Thus, there is always a risk of interfering or conflicting with legitimate acts or decisions by other authorities when assessing whether such acts or decisions were taken "in the public interest". For instance, was the Law on RTK legitimately adopted by the Assembly of the Republic "in the public interest"? If the answer is yes, how can the Court now suspend it in total or in part, without violating the principle of separation of powers? If the answer is no, the Court must demonstrate and declare that it was adopted against "the public interest", meaning with an incorrect interpretation of the Constitution or with a violation of the Constitution.

45. "The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution"[33] and "the Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution"[34]. Thus, protecting the constitutionality and the compliance of laws with the Constitution is the only material jurisdiction of the Court.

46. Therefore, the Court is not entitled in the public interest to suspend an act of another authority, without demonstrating that such an act makes an incorrect interpretation of the Constitution or violates the Constitution and, let us say, for that reason is against "the public interest", assuming that the Constitution represents the public interest at the highest legal level. In our view, only after having done so, the court could invoke the public interest to suspend such an act. The Majority's decision, as quoted above, considered that "the amount of the fee

[33] Article 4 (6) of Constitution
[34] Article 112 of Constitution

of 3.5 euro envisaged in the same provision of Art. 20.1 of the Law on RTK is as well part of the public concern". However, in our view, public interest is not the same as public concern. It must be also reminded that the notion of public interest pertains to the domain of the judicial discretion; not to the arbitrary one. By judicial discretion we mean the power of the court to take some step or grant a remedy, or not, as it thinks fit in the circumstance; but always inside the legal limits, beyond these limits we risk entering in the arbitrary.

47. Before the foregoing, it is very difficult for us to understand the Majority's decision consideration "that the methodology used for financing public broadcasting in Kosovo should be alongside the best practices of Europe and its legal standards". Adopting the best methodology used for financing public broadcasting in Kosovo is up to the Assembly of the Republic, which exercises the legislative power, and up to the Government of the Republic, which is responsible for implementation of laws and state policies, subject to parliamentarian control. Finally, it is up to the courts to exercise the judicial power, adjudicating based on the Constitution and the law. The constitutional Court exercises a subsidiary judicial power, while protecting the constitutionality and the compliance of laws with the Constitution in accordance with the Constitution itself, the Law on Court, Rules of Procedure and other subsidiary applicable legal instruments

48. In our opinion and with all respect, the Majority's decision does not take into account the above mentioned constitutional principles when imposing interim measures on further implementation of the legal provisions of 20.1 of the Law on RTK until decision on merits, recommending to the Assembly to reconsider the nature, amount of the fee as foreseen in that legal provision and practices based on that". We do not agree with the decision on that point and thus we dissent, because of that.

2. Whether an individual is an authorized party under the Constitution to represent and defend other interests but their own.

49. The Majority's decision noted that "the request for an interim measure by Mr. Tome Krasniqi is not an *actio popularis*, as it might look at first instance". It further explains that it is not an *actio popularis* "due to the fact that there is an abundant case law of the European Court on Human Rights, which based on Art. 53 of the Constitution of the Republic of Kosovo should serve as our very basis while interpreting all our decisions".

50. Just for now, let us remind that *actio popularis* is a modality of individual complaint which allows any persons who seeks to defend the public interest and the constitutional order to refer violations to the constitutional justice without requiring proof of personal or individual interest and exhaustion of all legal remedies.

51. Having presented that notion, it seems that the Majority's decision makes an equivocation using the word *actio popularis* ambiguously. In fact, the Majority's decision confuses two different fields of application of the Court decisions of the European Court of Human Rights: one is the substantive; the other is the procedural one. As a matter of fact, it is true that Article 53 of the Constitution

establishes 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". However, "human rights and fundamental freedoms" is the substance of the Human Rights Law. On the contrary, *actio popularis* pertains to the procedural domain. The Majority's decision accepts that *actio popularis* is a procedural aspect, when mentioning that "the case law of the European Court on Human Rights says that the party may ask for such a measure and be granted as such if "... the party bring *prima facie* evidence of such a practice and of his being a victim of it". Is, at least, the notion of "the party may ask for such a measure" and of "*prima facie* evidence" anything more but procedural concepts? In our opinion, they are the best examples of procedural concepts. Bringing *prima facie* evidence means exactly the initiative of the party in a case that has been supported by sufficient evidence for it to be taken as proved in the absence of adequate evidence to the contrary. This is different of public and notorious fact evidence.

52. In the end, the Majority's decision is inconsistent: on one side, it says that under the national constitutional legal system, "the request for an interim measure by Mr. Tome Krasniqi is not an *actio popularis*; on the other side, "it is not that (we have already assumed *actio popularis),* due to the fact that there is an abundant case law of the European Court on Human Rights". But it is not aware that the abundant case law is of a substantive character. Finally, when following the reasoning of the Majority's decision, we would expect that through the subsidiary mechanism of Article 53 of the Constitution it was going to accept that the request for an interim measure by Mr. Tome Krasniqi is an *actio popularis.* However, we are surprised with the outcome, which is: "here we are not dealing with an *actio popularis*, although we have to do not only with an individual interest but as well as with a public one". Is it fair to say that the Majority's conclusion was that "we are not dealing with an *actio popularis",* although, as we are dealing "not only with an individual interest but as well as with a public one", we have to do as it was *actio popularis?* We do not believe that the Majority reasoned in that way, even though that way would lead to the requested *in abstracto* control of the constitutionality.

3. Whether an individual is an authorized party to "request *in abstracto* control of the constitutionality of some provisions regulating the work of the RTK"?

53. The Majority's decision further considered that "in his application, Mr. Tome Krasniqi requests *in abstracto* control of the constitutionality of some provisions regulating the work of the RTK". However, this consideration on requesting *in abstracto* the control of the constitutionality is only possible if the *actio popularis* has been admitted. In any way, Mr. Tome Krasniqi is not an authorized party to request *in abstracto* control of constitutionality of any legal act. In Kosovo constitutional justice, individual complaints do not mean *actio popularis.* On the other side, it is not possible to "import" the individual complaint from other legal systems, namely from the European countries, since the notion does not encompass a uniform concept. Individual complaint might mean very different realities.

54. In the most general sense, the individual complaint is an application to the constitutional justice concerning the constitutionality of legal acts (most often, normative acts) applicable to this person, or concerning the actions (or failure to act) of state institutions or their officials, which, in the opinion of the applicant, unreasonably limited or violated their constitutional rights and freedoms. That procedural measure aims to protect and defend human rights and freedoms, thus increasing the level of protection of constitutional human rights and freedoms. However, there is no unified model. In almost all European states[35] in which constitutional courts were established the individual complaint exists as well.

55. Notwithstanding the differences, the individual complaint has many similar features in various states and thus we can find common elements: individuals are authorized parties to refer to the court; the object of the referral is a violation of a constitutional right or freedom; the existence of a specialised court that considers such complaints; establishment of special legal conditions for lodging such complaints; special rules for admitting such complaints; special procedures for consideration of such complaints in court. However, the concrete content of each element, especially their details, may be different in various states.

56. In states where the individual complaint is provided for, certain legal measures prevent the constitutional courts from a possible avalanche of complaints. For instance, most often an individual complaint is permitted only after having exhausted all legal remedies. In addition, this complaint must be filed within a certain deadline from the adoption of a certain law, act or decision. There are also other additional conditions: the complaint must be drawn up by an advocate or a person having education in law or a stamp duty of an established size must be paid.

58. Individual complaints regarding violation of constitutional rights are further divided in European states according to the subjects who may apply to the constitutional justice, the disputed legal acts (normative and/or individual), as well as the extent of rights that are protected and defended by individual complaint. Taking into account the common aspects and some peculiarities of the individual complaint, it can be grouped into the categories that follow.

    i) The petitioners are legally allowed to defend not only their own rights, but also the rights of other persons, as well as the public interest. Such complaint is called *actio popularis* (the complaint of public action, or complaint regarding defence of the public interest), as already defined above.
    ii) The petitioner may challenge legal acts passed by all state institutions, as well as their failure to act. This complaint is of a *wide scope* (or classical complaint). It is designed to protect without exceptions all rights and freedoms of the person, which are entrenched in the Constitution, as well as in international treaties;
    iii) The petitioner may lodge a complaint only regarding the normative acts on the ground of which a decision of individual character is adopted (Latvia, Poland, and Russia). This complaint is of a *narrow scope*. It encompasses only

[35] For the comparative approach of other European countries, we closely followed Mr Kęstutis Lapinskas, "The Perspectives of Individual Constitutional Complaint in Lituania", in the Conference on "Constitutional Justice and the Rule of Law in South Caucasus", European Commission for Democracy Through Law, in Batumi, 19-20 June 2008.

decisions of an individual character (Czech Republic, Slovakia, and Slovenia). It does not encompass all rights that are enumerated in the Constitution (Belgium, Spain), or not all legal acts adopted by state institutions.

59. Having that comparative perspective and taking into account Article 113 7 of the Constitution and Articles 46 to 49 of Law on Court, we clearly see that the constitutional legal system didn't adopt the *actio popularis*. Therefore, it is legally not admissible that, as mentioned in the Majority's decision, "in his application, Mr. Tome Krasniqi requests *in abstracto* control of the constitutionality of some provisions regulating the work of the RTK". If the control of the constitutionality *in abstracto* was in effect requested, then the request should have been summarily rejected.

60. Again, we wish to emphasize that our dissent arises only from our disagreement with the good faith legal conclusions of the Majority. As we reach different legal conclusions regarding the interpretation and application of the constitutional legal system, and as we conclude that the interpretation and application we endorse requires a different decision, we cannot agree with the Majority's decision. Therefore, we actively and humbly submit that the Majority erred in imposing the above mentioned interim measures and accordingly, we respectfully dissent.

Pristine, 19 October 2009

Judge Almiro Rodrigues