REPUBLIKA E KOSOVËS
Republika Kosova - Republic of Kosovo
Gjykata Kushtetuese / Ustavni sud / Constitutional Court

Pristina, 12 October 2010
Ref.no.: DO. 55/10

Joint Dissenting Opinion
of
Judge Almiro Rodrigues and Judge Snezhana Botusharova

Case No. KI 47/10

Naim Rrustemi and 31 other Deputies of the Assembly of the Republic of Kosovo

vs.

His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo

We welcome the judgment of the Majority of the Constitutional Court, but we cannot agree with it for the reasons that follow.

1. Admissibility of the Referral

1. We preliminarily note that questions of competence essentially concern the limits of the Court's jurisdiction. As such, they are examined by the Court on its own motion[1]. The basic question is who is competent to bring a case and against whom.

1.1 Authorized Party

2. It is not disputed that 32 Deputies of the Assembly signed the Referral filed with the Constitutional Court on 25 June 2010. Thus, the Referral contained more than the minimum number of 30 Deputies of the Assembly required by Article 113.6 of the Constitution. However, on 29 June 2010, three Deputies informed the President of the Constitutional Court that they withdrew their signatures from the list of Applicants. On that same date of 29 June 2010, the Court notified the President of the Republic of Kosovo of the filing of the Referral and invited him to submit a reply. On 2 July 2010, a further Deputy withdrew the signature, while a new Deputy joined the list of Applicants; on 5 July 2010 another Deputy withdrew his signature and, on 9 July 2010, two more followed. So, on that date the list of Applicants contained a number of 26 Deputies, meaning less than the number of 30 Deputies legally required.

[1] See, for example, the case law of the European Court of Human Rights (ECHR), *Blecic v Croatia,* No. 59532/00, 8 March 2006, para. 67.

3. The first and absolute requirement for the admissibility of a Referral is that it has to be submitted by an authorized party, i.e. by an applicant who has the necessary legal standing to file a constitutional complaint with the Constitutional Court. This requirement is laid down in Article 113.1 of the Constitution, which provides that "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".

4. Therefore, the question is whether the Applicants, Naim Rrustemi and 31 other Deputies, can be considered as the "authorized party" within the meaning of Article 113.1 of the Constitution. In fact, according to Article 113.6 of the Constitution, "Thirty (30) or more Deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution".

5. So, at first sight, the 32 Deputies could be considered as an authorized party when they submitted the Referral on 25 June 2010. However, such a party authorized to refer a matter to the Constitutional Court needs clarification and compliance with certain legal standards: is it a group of 30 Deputies represented by one of them or by a legal representative with the necessary authorization and is there such a requirement in the legal system of the Republic of Kosovo, or is each of them individually represented until their number reaches at least 30? Evidently they are not considered as a group being represented by one of them[2]. In fact, the German Basic Law (Constitution) clearly distinguishes between complainants acting as a group and represented by an authorized person, where the withdrawal of individual members of the group will have no impact on the legitimacy of the authorized party. However, this is not the case regarding the present Referral, because there is no collective body to withdraw its application, but there are a number of individuals who wanted together to refer the matter to the Constitutional Court.

6. A second question is whether the minimum number of 30 Deputies is not only necessary to file a Referral with the Court, but also to stay throughout the proceedings until the Court takes a final decision.

7. The above two questions are crucial and need a response, before deciding on the admissibility of the case. Leaving them without a response would mean that the conclusion that there was still an authorized party would be without any legal basis, even though the number of Deputies had dropped below the minimum number required by the Constitution.

8. In his reply, the President of Republic argues that the withdrawal of the signature of certain Deputies from the Referral, to the extent that the number of supporters fell below 30, means that the group can not be considered any longer as an authorized party as required by Article 113.6 of the Constitution.

9. However, the Majority concluded that, on the date, on which the Referral was filed, there was a valid Referral before the Court. The Court was seized of it on that date and remained seized of it until the judgment was given. The Majority, therefore, decided that the case was admissible.

10. We do not agree with that conclusion of the Majority, because it is against the procedural principle of legal stability and consistent presentation at proceedings. That principle establishes that the case must be "stable" in relation to the persons, petitum and reasons for the petitum from the notification of the case to the opposing party until the final decision of the case[3]. So, it requires the same applicants to stay until the end of the proceedings.

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[2] See Judgment of the German Federal Constitutional Court in the case of *Organstreit* of 30 June 2009, para. 169 and following.

[3] See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 /1990/, quoted by the President in his reply to the Referral of the Applicants.

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11. Therefore, we consider that there was no authorized party when the judgment was taken. As this first and absolute requirement to have a valid Referral before the Constitutional Court has not been met, the Referral is inadmissible.

1.2 Time Limit

12. It is also indisputable that, on the date, on which the Applicants filed the Referral, they alleged that, on the occasion of the local elections of 17 November 2009, the President of the Republic had committed a serious violation of the Constitution by continuing "to also hold concurrently and at the same time (sic) the function of the President of the Democratic League of Kosovo (LDK), thus acting in contradiction with the Constitution of the Republic of Kosovo". The Applicants complained to the Court that the alleged violation had become known to them during the registration procedure for these local elections which were held on 17 November 2009.

13. Pursuant to Article 45 of the Law on the Constitutional Court, the referral shall be filed within thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.

14. The Majority considered that "the time limit of 30 days (...) for referral of serious violations to the Constitutional Court, applies to serious violations that were "one off" events in time or were continuing violations that ceased. The time [limit] cannot apply to serious violations that continue".

15. We do not agree with such a consideration.

16. In fact, the second requirement for a Referral to be admissible is to meet the requirement to be filed within the legally defined time limits or deadlines. Similar requirement exists in the European Court of Human Rights (ECHR) proceedings.

17. The ECHR explains the *ratio legis* of the requirement that a complaint must be filed within six months from the date on which the final domestic judgment is rendered (the so called "six month rule"), by stating that the "six month rule" aims, namely, at ensuring that cases raising issues under the Convention are dealt with in a reasonable time and to prevent that past decisions are not continually open to challenge[4]. It marks out the temporal limits of supervision carried out by the ECHR and indicates to the parties the period beyond which such supervision is no longer possible[5]. The aim of the rule is also to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time[6]. Finally, the ECHR explains as well that the rule is designed to facilitate the establishment of the facts of the case; otherwise, with the passage of time, this would become more and more difficult, and a fair examination of the issue raised would thus become problematic.

18. Applying the ECHR case-law *mutatis mutandis* to the present case, "the Referral should be filed within a period of thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public", as required by Article 45 of the Law on the Constitutional Court. The Applicants claim that the fact that the President of the Republic holds two posts, one as President of the Republic and the other as Chairman of LDK, became known to them during the registration procedure for the local elections which were held on 17 November 2009. Assuming that, as the Applicants allege, the President has

[4] See *Finucane v. the United Kingdom*, (dec.) No. 29178/95, 2 July 2002; *X v France*, No. 9578/82, Commission decision of 13 December 1982, Decisions and Reports (DR) 29, p. 235

[5] See *K v Ireland*, ECHR No.10416/83, 17 May 1984

[6] *Alzery v Sweden*, No. 10786/04, 26 October 2004

violated the Constitution by that day, then their Referral is out of time and must be rejected as inadmissible. The Applicants should have submitted the Referral to the Constitutional Court prior to 17 December 2009. That day would be the last day of the period of 30 days which started to run on the date of holding the local elections, which is the date the alleged violation of the Constitution by the President has been made public.

19. In the same vein, the German Federal Constitutional Court Act[7] contains a similar provision, dealing with the impeachment of the Federal President. Article 50 stipulates that: "Impeachment may be effected only within three months of the circumstances, on which it is based, becoming known to the body entitled to impeach".

20. Therefore, such deadlines must be strictly interpreted and applied according to the legal standards.

21. In fact, it is difficult to understand why the "continuing situation concept" would be applicable in this case. This concept considers situations as continuing because of the absence of a domestic remedy, which could put an end to them or because the existing remedies are ineffective. So, the ECHR only applies the concept of continuing situation, when the alleged violation takes the form of a state of affairs as opposed to a specific act or decision and where there is no remedy in the domestic law against it[8]. Therefore, the time limit will not start running until the end of the situation.

22. The concept of continuing violation has a long legal history in the case law of the ECHR, from the initial case of De Becker (1958), passing, namely, trough Loizidou v. Turkey (1996), Cyprus v. Turkey (2001) and Ilascu and Others v. Moldova and Russia (2004) until the recent judgment of the Grand Chamber in Varnava v. Turkey (2009).

23. Evidently, the will of the legislature, when adopting the Law on the Constitutional Court of the Republic of Kosovo on 16 December 2008, has been to refer to the Constitutional Court an alleged serious violation of the Constitution by the President of the Republic within a period of 30 days. This clear and non-negotiable deadline is conditioned, namely, because it starts on the day the alleged violation of the Constitution by the President has been made public. This day is a clear and concrete point in the event's time.

24. We consider that the established period of 30 days aims at maintaining stability in the state institutions, establishing discipline in the exercise of such a right, enabling the well-functioning of the different constitutional institutions and ensuring the effective checks and balances within the constitutional system.

25. Therefore, if the authorized party does not make timely use of this available remedy, it may be assumed that either they do not consider that there is a serious violation or they do not want to proceed for whatever other reason. Anyway, the time to challenge a serious violation by the President is over, once the time limit has passed.

26. One cannot guess why the Deputies have not reacted within the statutory deadline, if they considered that there was a serious violation committed by the President. The fact that he was President of the Republic and, at the same time, was holding the "frozen" position of Chairman of a party was known to them, at least, as they allege, on 17 November 2009. Moreover, in their Referral, they do not explain why they consider that the 30-days time limit, set forth in Article 45 of the Law, adopted by the Deputies of the Assembly on 16 December

[7] Bundesverfassugsgerichts-Gesetz,BVerfGG, Federal Law Gazette I p. 243, last amended by the Act of 16 July 1998 /Federal Law Gazette I page 1823

[8] See, for example: *Ulke v Turkey, N 39437/98,* 24 January 2006

2008, did not need to be respected by them or why that time limit can be overcome because of the existence of a continuing situation.

27. In sum, we consider that, applying the European standards, there is no continuous situation in the present case as a remedy was clearly available and, hence, no continuing violation of the Constitution by the President of the Republic exists. So, based on the facts in this case and legal criteria for admissibility, we conclude that this Referral is inadmissible. All the more, these criteria are an absolute requirement and non- conformity affects substantially the life of the case.

1.3 Referral not substantiated

28. The Deputies of the Assembly of Kosovo, who signed the Referral, allege that the President of the Republic has committed, and continued to commit, a serious violation of Article 88.2 of the Constitution that prohibits the President from exercising any political party functions.

29. The referring Deputies maintain that, not only since 17 November 2009, but already since 9 October 2007, the LDK party has as its elected Head of the Party, Mr Fatmir Sejdiu, the President of the Republic of Kosovo. They assume that this situation constitutes a serious violation of the Constitution. However, no grounds have been presented by them to conclude that "*the President of the Republic of Kosovo has committed a serious violation of the Constitution*"[9].

30. "Referrals should be justified and necessary supporting information and documents should be attached"[10], while the referral shall include "a procedural and substantive justification of the referral" and "supporting information and documentation"[11].

31. Furthermore, according to the established case-law of the ECHR, an applicant does bear the initial burden of proof of producing reasonable and convincing evidence in support of the alleged violation[12]. If an applicant fails to substantiate his or her allegations, the ECHR will declare the case inadmissible as being manifestly ill-founded.

32. In the same vein, the Constitutional Court's recent jurisprudence also shows examples of referrals, where the Court itself has ruled that applicants need to substantiate their allegations of a violation of the Constitution for the referral being admissible[13]. In these cases, the referrals were declared inadmissible because of not being substantiated.

33. All the more, for the sake of justice and equality of arms, the arguments of the Responding party, the President of the Republic, should have been communicated to the Applicants for comments or, even more, should have been discussed in a public hearing. Since this has not happened, the Applicants have not been enabled to take a stand on the response of the President and the Court could not evaluate the arguments of both Parties.

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[9] Article 113.6 of the Constitution

[10] Article 22.1 of the Law on the Constitutional Court

[11] Section 29(1) (f) and (g) of the Rules of Procedure of the Constitutional Court

[12] See, for example, *mutatis mutandis, Ocic v Croatia,* No. 46306/99, 1999; *Halford v UK,* No. 20605/92, 25 June 1997.

[13] See, for instance:, *Misin Beqiri vs. Ministry of Health,* Case No. KI 17/09, Resolution on Inadmissibility of 22 June 2010; *Ahmet Arifaj vs. Municipality of Klina,* Case No. KI. 23/09, Resolution on Inadmissibility of 20 April 2010

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34. In this connection, we would like to refer to Article 55 (Impeachment of the Federal President) of the German Law on the Federal Constitutional Court[14], mentioned above, which clearly shows that the presentation of evidence, including oral proceedings, is an integral part of the impeachment proceedings before the German Federal Constitutional Court.

35. On the other side, the arguments of the Majority about the role of the political parties and of the President, and the influence of a politically active President on behalf of his party are in principal correct when taken in general and in principle. But in the same line of general discussion, one could also speculate that, even after a full president's resignation from a party position or even a party membership, he could and would continue to be associated with this same party and its policy, even he could be more party-active, while not holding formally any party position.

36. The Constitution is barring the President of the Republic from *exercising* any political party function. What were the concrete acts, behavior or damages to substantiate and confirm the alleged violation of the Respondent party? The Applicants should have been given the possibility to respond, if they wished. How the holding of a leadership position, "frozen" according to President, was an exercise of a political party function? These questions were not answered through evidence. Such evidence was not present, analyzed and interpreted in order to establish facts which constitute a serious violation.

37. Moreover, a constitutional interpretation of Article 88(2) of the Constitution is called for, in particular, in view of the wording used in Article 9.2.7 of the Constitutional Framework For Provisional Self-Government in Kosovo, which was applicable in Kosovo until the entry into force of the present Constitution. That provision states that : "The President of Kosovo shall not hold any other office or employment".

38. Evidently, the different wording used for the grounds of incompatibility raises a constitutional issue, meriting discussion and interpretation.

39. So, with regret we have difficulties to align with the thoughts developed in the reasoning part of the judgment.

40. We conclude that the Referral has not been substantiated and that it should have been declared inadmissible as being manifestly ill-founded.

2. The use of *travaux préparatoires* (preparatory works)

41. This case raises many questions that could have been clarified by consulting the *travaux préparatoires* on the drafting of the Constitution and the Law on the Constitutional Court. We have asked for these documents several times, however, at no avail. We consider, as is the practice of many countries, that the consultation of the *travaux préparatoires* could have been very useful in interpreting the Constitution and the organic law. Although this principle

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[14] *Article 55 : (1) The Federal Constitutional Court shall decide on the basis of oral proceedings.(2) The Federal President shall be summoned to the oral proceedings. In the summons he shall be informed that the proceedings will continue in his absence should he not attend without excuse or leave without sufficient reason.(3) During the proceedings, the representative of the body making the application shall first of all read out the impeachment.(4) After this the Federal President shall be given the opportunity to make a statement on the impeachment.(5) Then the evidence shall be presented.* (6) *At the end of proceedings the representative of the body effecting the impeachment shall present his plea and the Federal President shall present his defense. He shall have the final word.*

is regarded as declaratory, its use is permitted under customary international law[15]. The practice of using the *travaux préparatoires* is also reflected in the case-law of the ECHR, in which the Strasbourg Court stated[16] that the Arts. 31 to 33 of the Vienna Convention on the Law of Treaties, of 23 May 1969, should guide in the interpretation of the European Convention on Human Rights. The *travaux préparatoires* may be used to help to resolve an ambiguity in the text, to confirm a meaning attributed by the use of other rules or to avoid an absurdity.

42. Unfortunately, as to the present Referral, this very important tool has not been available.

3. Conclusion

43. For the above reasons, we disagree with the Majority's finding of a violation in this case and, accordingly, we respectfully dissent.

Pristina, 12 October 2010

Judge Almiro Rodrigues

Judge Snezhana Botusharova

[15] See *Bankovic and others v Belgium and 16 other Contracting States,* No. 52207/99, 12 December 2001, GC, /2007/, para 35

[16] In the case *Golber v UK* /N 4451/70, 21 February 1975, para 29