

A Constitutional Coup!

The Take-Down of the First President of the Republic of Kosovo

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Abstract

A coup d'etat is defined as "a sudden and decisive action in politics, especially one resulting in a change of government illegally or by force." As one looks through all the coup d'etats that have occurred throughout the history in various parts of the world, one can observe that often the protagonists of such events are political enemies, military leaders, or distressed insiders. Indeed, one is hard pressed to find where a coup d'etat has been executed by way of a poor legal reasoning of a Constitutional Court. Well, that is until now!

In the newest country in Europe, the Republic of Kosovo, major international and domestic investments are being made on institution building. One of the beneficiaries of such investments has been the newly formed Constitutional Court of the Republic of Kosovo. Soon after its establishment, this young court faced its first tough decision, namely a challenge to the President of the country regarding his alleged serious violation of the Constitution by holding posts as President of the country and Chairman of his party. In a highly controversial case, marred with procedural irregularities, judicial misconduct, lack of due process, human rights violations, regular media leaks, and behind-the-scenes international and domestic political influences on the Court, a split Court decided that the President had seriously violated the Constitution. This decision led to the President's resignation, which caused a political imbalance that still lingers, further harming Kosovo's long term interests and prospects. But more importantly, some argue that this marks the first case where a coup d'etat that took down a President was executed by a Constitutional Court.

This paper argues that the Court should have dismissed the claim of the MPs as inadmissible on procedural grounds, specifically that it was filed by the MPs after the time permitted by law and that the MPs never maintained the number of 30 members that were needed for the group to be an authorized party. Additionally, even on the merits, the Court failed to distinguish between the constitutional requirement to not exercise a party function, which the President in this case did not do, but rather simply held the position in a suspended mode. Moreover, even had the President's holding of the position amounted to a violation of the Constitution, in no way did that equate to a serious constitutional violation. Still, the Court held contrary to the Constitution,

applicable laws, and the available evidence before it and found that the President had seriously violated the Constitution.

Keywords: Kosovo; Constitution; President; serious; violation; position; party

Introduction

A *coup d'état* is defined as “a sudden and decisive action in politics, especially one resulting in a change of government illegally or by force.”¹ As one looks through all the *coup d'états* that have occurred throughout the history in various parts of the world, one can observe that often the protagonists of such events are political enemies, military leaders, or distressed insiders. Indeed, one is hard pressed to find where a coup d'état has been executed by way of a poor legal reasoning of a Constitutional Court. Well, that is until now!

In the newest country in Europe, the Republic of Kosovo, major international and domestic investments are being made on institution building. One of the beneficiaries of such investments has been the newly formed Constitutional Court of the Republic of Kosovo.² Soon after its establishment, this young court faced its first tough decision, namely a challenge to the President of the country regarding his alleged serious violation of the Constitution by holding posts as President of the country and Chairman of his party.³ In a highly controversial case, marred with procedural irregularities, judicial misconduct, lack of due process, human rights violations, regular media leaks, and behind-the-scenes international and domestic political influences on the Court, a split Court decided that the President had seriously violated the Constitution. This decision led to the President's resignation, which caused a political imbalance that still lingers, further harming Kosovo's long term interests and prospects. But more importantly, some argue that this marks the first case where a coup d'état that took down a President was executed by a Constitutional Court.

In this comment, the author analyzes the case *Naim Rrustemi, et.al. v. Dr. Fatmir Sejdiu, President of the Republic of Kosovo*, KI.47/10 Const. Court (28 Sept. 2010),⁴ from an insider's point of view. Here, the author scrutinizes the case from its origin, and all the way to the issuance of the majority decision and the dissent. In this piece, the author tells about a young court's failure to rise to the occasion, when all eyes

¹ See www.dictionary.com, last visited on 21 January 2011.

² The Constitutional Court of the Republic of Kosovo was formed in January 2009. See <http://www.gjk-ks.org/?cid=2,1>, last visited on 21 January 2011. In accordance with Article 152 of the Constitution, the Court has 6 Kosovo judges and 3 international judges.

³ Naim Rrustemi, et. al. v. Dr. Fatmir Sejdiu, President of the Republic of Kosovo, KI.47/10, Const. Court. Kosovo (28 Sept. 2010), available at http://gjk-ks.org/repository/docs/ki_47_10_eng_2.pdf, last visited on 2 March 2013 (hereinafter "Majority Judgment"). Dissenting opinion drafted by two disagreeing judges is available at http://gjk-ks.org/repository/docs/ki_47_10_dissenting_opinion_judge_snezhana_botusharova_and_judge_almiro_rodrigues.pdf, last visited on 2 March 2013.

⁴ See http://www.gjk-ks.org/repository/docs/ki_47_10_eng_2.pdf for a copy of the Court's judgment.

looked for some order in a chaotic newborn-country environment. He narrates and analyzes for the reader the case in which the Constitutional Court of the Republic of Kosovo unjustly and unconstitutionally took down the first President of the Republic of Kosovo.

Factual Background

The story begins on 10 February 2006, when members of the Assembly of Kosovo elected Dr. Fatmir Sejdiu President of Kosovo, in accordance with the then Constitutional Framework for Self-Government of Kosovo. Thereafter, he was elected Chairman of LDK. After his election as Chairman of LDK, President Sejdiu made public his decision to suspend the exercising of his function as Chairman of LDK through a letter sent to the LDK leadership on 28 December 2006.⁵ On 9 January 2008, the MPs of the Assembly of Kosovo elected again Dr. Fatmir Sejdiu President of Kosovo. After the entry into force of the Constitution, on 15 June 2008, President Sejdiu once again made public, by way of a letter sent to the LDK leadership on 16 June 2008, his decision that he is suspending the exercising of this party function up to the end of his mandate as President.⁶

Two years after the entry into force of the Constitution and of the making public of the President Sejdiu's decision to suspend the exercising of the party function, Claimants in this case submitted a claim in the Constitutional Court that challenged the constitutionality of the act of the President to maintain the post of the Chairman of LDK, but to suspend the exercising of that function.⁷ The constitutional Article which the Claimants alleged to have been violated by the President states:

Article 88 [Incompatibility]

1. The President shall not exercise any other public function.
2. After election, the President cannot exercise any political party functions.

This was the first time that someone challenged the constitutionality of that act and circumstance, despite its existence since 2006.

While the President was outside of the country in an official visit to the United States to attend the United Nations General Assembly meeting deciding on an important resolution about Kosovo, on Friday, 24 September 2010, the Court without any prior notice to the President's legal representatives and after the close of work schedule issued a press release stating:

⁵ See President Dr. Fatmir Sejdiu's 28 December 2006 letter to the leadership of the Democratic League of Kosovo announcing that he suspends his position as Chairman of the Democratic League of Kosovo during his service as President of the country.

⁶ See President Dr. Fatmir Sejdiu's 16 June 2008 letter to the leadership of the Democratic League of Kosovo announcing that he suspends his position as Chairman of the Democratic League of Kosovo during his service as President of the country.

⁷ See Claim KI.47/10 by Naim Rrustemi, et.al. against the President in the Constitutional Court of the Republic of Kosovo; and the MPs' demands therein.

In the case KI47/10, “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, the Court found, by majority vote, that the Referral, submitted on 25 June 2010, is admissible. The Court also found that there has been a serious violation of the Constitution of Kosovo, namely, Article 88.2, by His Excellency, Fatmir Sejdiu, holding the office of the President of the Republic as well as the position of Chairman/President of the political party “Democratic League of Kosovo” (LDK) at the same time.

The full text[]s of the Judgment[] in the above mentioned case[] will be delivered shortly.⁸

This statement was leaked days in advance to the local media who had been reporting on the Court’s upcoming decision.⁹ Indeed, many of those media outlets cited judges who had anonymously given information to the media about the decision before the press release was issued by the Court, and without any communication to the interested parties.

Much attention was given to this high profile case and public pressure grew on President Sejdiu to see how he would respond to the Court’s decision, which he had not yet received because the court had made only the ruling public.

In an attempt to gather all the relevant information, President Sejdiu’s legal representatives requested from the Court a copy of the Court’s written decision, or at the very least, the Court’s ruling. On 27 September 2010, the Court finally sent them a notice dated 24 September 2010, stating *inter alia* that:

the Court found, by majority vote, that the Referral, submitted on 25 June 2010, is admissible. The Court also found that there has been a serious violation of the Constitution of Kosovo, namely, Article 88.2, by His Excellency, Fatmir Sejdiu, holding the office of the President of the Republic as well as the position of Chairman/President of the political party “Democratic League of Kosovo” (LDK) at the same time.

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The President’s legal team immediately, on 27 September 2011, sent a letter to the Court asking for the written decision. The Court responded that same day by way of a letter, in which it stated that the decision shall be delivered to the parties on 28 September 2010, at 12:00 p.m.¹¹

⁸ See Constitutional Court Press Release of 24 September 2010, available at <http://www.gjk-ks.org/?cid=2,28,193>, last visited on 4 March 2011.

⁹ All local media reported this.

¹⁰ See Court’s correspondence dated 24 September 2010 and faxed to President Sejdiu’s legal representatives on 27 September 2011.

¹¹ See Court’s correspondence dated 27 September 2010 sent to President Sejdiu’s legal representatives.

Without having received yet the written decision by the Court, President Sejdiu resigned from his office on 27 September 2011. His stepping down marked the beginning of a turmoil in the political scene in Kosovo, which is yet to settle.

The written decision was finally delivered to the President's legal representatives in the late afternoon of 28 September 2011, which discovered among other things that two of the international judges, namely Judge Almiro Rodrigues (Portugal) and Judge Snezhana Botusharova-Doicheva (Bulgaria), had dissented and that they were preparing a dissenting opinion. In this opinion, it was also discovered for the first time that the Judge Rapporteur in this case was the American Judge, Robert Carolan and that the members of the Review Panel were Judge Snezhana Botusharova-Doicheva (Bulgaria), Judge Kadri Kryeziu and Judge Gjyljeta Mushkolaj.

On 12 October 2010, the Court published the dissenting opinion of Judge Almiro Rodrigues (Portugal) and Judge Snezhana Botusharova-Doicheva (Bulgaria).

While this dissenting opinion closed this case procedurally, its effects are far from over. The takedown of President Sejdiu has embarked Kosovo on a difficult path of trying to reach political stability.

The Court's Decisions

The Majority's Judgment

In its Judgment, the Court found, by a majority vote, that the Referral, submitted on 25 June 2010, was admissible.¹² The Court also found that there had been a serious violation of the Constitution of Kosovo, namely, Article 88.2, by His Excellency, Fatmir Sejdiu, holding the office of the President of the Republic as well as the position of Chairman/President of the political party "Democratic League of Kosovo" (LDK) at the same time.¹³ The Court reasoned as follows.

First, the Court held that it was not barred from considering this case by Article 45 of the Law on the Constitutional Court, a statute of limitations clause, because the action of the President was ongoing rather than a "one off" event. The Court made this finding without citing any legal source or precedent.¹⁴

Second, the Court held that the Claimants were an authorized party despite the withdrawal of several MPs, basing its holding on Article 23 of the Law on the Constitutional Court and Section 32 of the Court's Rules of Procedure, which permits

¹² See Majority Judgment, at 12.

¹³ Ibid.

¹⁴ Id. at 5-6.

the court to “decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings.”¹⁵

Third, with regard to the substantive issues, the Court held in less than two pages of analysis that the President had seriously violated Article 88.2 because the President had failed to stop the Democratic League of Kosovo from making use of the President’s name. Moreover, the Court held that his violation had been serious because by holding the position in the party, the President was not “representing the unity of the people” and that he was not showing “impartiality, integrity and independence.” Again, without citing to any relevant legal source or precedent for such a proposition.¹⁶

The Dissenting Opinion

Two of the court’s judges, specifically Judge Almiro Rodrigues and Judge Snezhana Botusharova, disagreed with the majority and drafted a dissenting opinion.¹⁷ In this opinion, the two dissenting judges had two primary concerns, namely the court’s competence to address the claim and second, that the claimants had not substantiated their claim that the President had committed a serious violation of the Constitution.¹⁸

With regard to the competence issue, the dissenting judges noted that the number of MPs supporting the claim had fallen below the necessary number of thirty, immediately following the submission of the claim to the Court, thereby, failing to uphold the group’s status as an authorized party.¹⁹ They based this holding on the German Basic Law (constitution) and precedent from Germany and the United States.²⁰ Moreover, Judges Rodrigues and Botusharova opined that the claimants had missed the time limit to bring such a claim because they had submitted their claims much later than the 30 days allotted for bringing such claims to the Constitutional Court, substantiating their opinion by basing it on European Court of Human Rights precedent.²¹ Moreover, they disagree strongly with the majority that this was a case of the “continuing situation” with regard to the violation of the Constitution due to their reliance on European standards for this principle.²²

The dissenting judges were also not convinced that the claimants had substantiated their claim that the President had seriously violated the Constitution, as was their

¹⁵ Id. at 6-8. See also Article 23 of the Law on the Constitutional Court of the Republic of Kosovo.

¹⁶ Majority Judgment, at 11-12.

¹⁷ See Joint Dissenting Opinion of Judge Almiro Rodrigues and Judge Snezhana Botusharova (Case No. KI 47/10), available at http://www.gjk-ks.org/repository/docs/ki_47_10_dissenting_opinion_judge_snezhana_botusharova_and_judge_almiro_rodrigues.pdf, last visited on 2 March 2013.

¹⁸ Id. at 1, 3, 5 and 6.

¹⁹ Id. at 3.

²⁰ Id. at 3-4.

²¹ Id. at 3-5.

²² Id. at 4-5.

burden to do when filing the claim. Moreover, the two judges indicated that this was a serious enough case to warrant a public hearing, because this is an integral part of any impeachment proceedings before a court. The two argue that a hearing would have provided both parties to provide evidentiary evidence, which was necessary for the court to decide the matter.²³

As a final note, the dissenting judges note that many of the questions which needed answering in this case could have been clarified through the use of *travaux préparatoires*, however, such documents were not provided to the judges despite their several requests.²⁴

With the foregoing addressed, the two judges disagreed with the holding of the majority.²⁵

Analysis

In this case, the Constitutional Court erred in its decision in several respects. The author identifies and outlines the key issues which should have directed the Court to dismiss the case on procedural grounds. Moreover, he elaborates the chief arguments why the MP's claim should have not survived even on substantive grounds. They are all outlined below.

The Court Had No Jurisdiction

In its decision, the Court improperly found that it had jurisdiction to hear and decide this claim. Pursuant to the Kosovo Constitution, "The Constitutional Court is the final authority for the interpretation of the Constitution..."²⁶ In accordance with this responsibility, "[t]he Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties."²⁷ With respect to the constitutional challenge of the President's actions, the Constitution recognizes as an authorized party "[t]hirty or more deputies of the Assembly [who] are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution."²⁸

Taking the aforementioned into consideration, it flows that the Constitutional Court has jurisdiction to determine the constitutionality of the President's actions, in accordance with these constitutional provisions. However, the Court in this case ignored the standing issues argued in the following section of this Comment, in

²³ Id. at 5-6.

²⁴ Id. at 6.

²⁵ Id. at 7.

²⁶ See Article 112(1) of the Constitution.

²⁷ See Article 113(1) of the Constitution.

²⁸ See Article 113(6) of the Constitution.

which it is argued that the Claimants were not an authorized party, as required by Article 113(6) of the Constitution. Taking into account that the Claimants were not an authorized party and further, taking into account that the Constitutional Court can only decide on claims that are brought by authorized parties, consequently it can only be understood that the Constitutional Court had no jurisdiction to decide whether the President has seriously violated the constitution, regardless of which act of the President was being challenged. The decision to the contrary violated Article 113(1) that gives the Constitutional Court jurisdiction to “decide[] only on matters referred to the court... by authorized parties.”

Besides not having jurisdiction to hear this case, the Court also erred on hearing and deciding this matter, because the Claimants had no standing to submit their claim in the Constitutional Court. This argument is further explained in the section to follow.

Claimants Had No Standing

The Court found that the Claimants had standing to submit this claim, which finding was faulty at several levels. Claimants had no standing to submit the claim in question to determine the constitutionality of the acts of the President because: (i) they had not submitted the claim within the time limits permitted by the Law on the Constitutional Court; and (ii) Claimants did not fulfill the criteria of Article 113(6) of the Constitution to be considered an authorized party for purposes of bringing claims before the Constitutional Court.

- Claimants had submitted their claim past the time limit permitted by law

Article 113(6) states that “[t]hirty (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.”²⁹ The Law on the Constitutional Court regulates *inter alia* “procedures for submitting and reviewing referrals to the Constitutional Court.”³⁰ According to this scope, Article 45 of the same law determines the time limit within which a claim based on Article 113(6) of the Constitution must be submitted. Specifically, Article 45 of the Law on the Constitutional Court says, with regard to the claims based on Article 113(6) of the Constitution: “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*.”³¹ Consequently, the 30-day time limit begins counting from the moment when the challenged act has been made public, irrespective of the fact whether such act occurs once or is a continued act.

²⁹ See Article 113(6) of the Constitution of the Republic of Kosovo.

³⁰ See Article 1 of Law Nr. 03/L-121 on the Constitutional Court of the Republic of Kosovo.

³¹ See Article 45 of Law Nr. 03/L-121 on the Constitutional Court of the Republic of Kosovo (emphasis added).

The Claim of the MPs stated that they were submitting their claim “based on Article 113 point 6 of the Constitution...”³² In accordance with this declaration, the procedural rules set by the Law on the Constitutional Court for claims based on Article 113(6) of the Constitution, were applicable to the claim raised by the MPs in this instance.

Taking into account these constitutional and legal requirements, the claim of the MPs in question had no basis on the Constitution and law. The evidence of the case showed that the claim of the MPs was accepted by the Constitutional Court on 25 June 2010.³³ For this claim by the MPs based on Article 113(6) of the Constitution to be timely, the act of the President which they challenge as unconstitutional should have been made public no earlier than 26 May 2010.³⁴

The Constitution of the Republic of Kosovo, the violation of which the MPs alleged, entered into force on 15 June 2008.³⁵ On 16 June 2008, Dr. Fatmir Sejdiu, President of the Republic of Kosovo, made public his decision to freeze “the exercising of the function of the Chairman of the Democratic League of Kosovo” by way of a letter sent to the Council of the Democratic League of Kosovo.³⁶ Thus, the act that the MPs allege to be unconstitutional was made public ever since 16 June 2008. According to this, the time limit to challenge this act pursuant to Article 113(6) of the Constitution had begun running from the date 16 June 2008 and has expired on 16 July 2008. Any constitutional challenge thereafter of the President’s act in question pursuant to Article 113(6) of the Constitution was legally prohibited by Article 45 of the Law on the Constitutional Court, which requires that these types of constitutional challenges occur within a thirty day time limit. Having in mind that the Claim of the Claimants was submitted on 25 June 2010, more than two years after the President’s act in question was made public, their Claim had therefore been made outside the time limit determined by law.³⁷

³² See Annex nr. 3, pg. 1.

³³ In the cover letter of 29 June 2010, sent by the President of the Constitutional Court to Dr. Fatmir Sejdiu, President of the Republic of Kosovo, inter alia it is stated that “on 17 June 2010, claim Nr. 47/10 of 32 MPs of the Assembly of the Republic of Kosovo was registered in the Constitutional Court...” See Annex nr. 1. This is in accordance with the date listed in the MPs claim, specifically with 17 June 2010. See Annex nr. 3. However, the claim form that was attached to the claim of the MPs and which was sent by the President of the Court to the President of the Republic of Kosovo contains a receiving stamp with the date of submission as 25 June 2010. See Annex nr. 2. Therefore, it can be concluded that even though the claim of the MPs is dated 17 June 2010, it was not submitted in the Constitutional Court until 25 June 2010, which stands as the official date of submission of the claim.

³⁴ The act that is challenged by the MPs in question was made public in almost all Kosovar media a long time before the legal time limit of 26 May 2010. See Annex nr. 8. Therefore, there is no possibility to allege that the challenged act of the President was not public information until the time when the MPs have filed the claim.

³⁵ See Article 162 of the Constitution of the Republic of Kosovo.

³⁶ See Annex nr. 4.

³⁷ As a supporting point for this argument, it must be stated that the President has frozen the exercising of the function of Chairman of LDK even after his election as President on 10 February 2006, in accordance with the Constitutional Framework for Provisional Selfgovernment in Kosovo (See Annex nr. 5) and this act of the President was not challenged by any person or body of that time.

The Claim of the MPs in question was not legally permitted even if it is assumed that the President's act in question was made public on the occasion of the submission of the President's name as Chairman of LDK by LDK in the Central Election Commission (hereinafter "CEC"), with regard to the local elections of 17 November 2009.³⁸ The Claim of the MPs was based on the registration of LDK in the CEC, where it was alleged that the LDK had submitted Dr. Fatmir Sejdiu in the position of the Chairman of LDK.³⁹ Even if one assumes that all the allegations in the Claim are true, the last possible date when the President's decision to hold the post of the Chairman of LDK, but to freeze the exercising of the function, could have been made public is 17 November 2009. Even if this date was the date in which the President's decision was made public, the legal time limit for the Claimants to submit their claim has expired on 17 December 2009. Based on these facts, any constitutional challenge thereafter of the President's act in question based on Article 113(6) is legally prohibited by Article 45 of the Law on the Constitutional Court, which requires this types of constitutional challenges to occur within a thirty-day time limit. With that said, the claim was submitted on 25 June 2010, over six months late and the respondents claim that the Constitutional Court should dismiss this claim as untimely.

The Court's holding that this was a continuous violation⁴⁰ is nonsensical because the intent of the President to hold, but not exercise, was clearly expressed by way of a letter sent to the LDK leadership on 16 June 2008, his decision that so long as he is Chairman of LDK, he is suspending the exercising of this party function up to the end of his mandate as President.⁴¹ The only alleged violation that he committed was based on the election list submitted by LDK to the CEC, in which the President was listed as Chairman of the Party. Moreover, the Law on the Constitutional Court is very clear when it states that "[t]he 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*,"⁴² and certainly not at any time during which the alleged violation has taken place.

The fact that the President had decided to hold, but not exercise his party function could therefore only have been made public once, and there exists no such principle

³⁸ Initially, before even entering into the legal arguments, it is difficult to understand the logic behind the allegation of the Claimants that the President could be held responsible for an act committed by LDK. In their claim, MPs allege that LDK has reported President Sejdiu as the Chairman of LDK. See Annex nr. 3, pg. 1. The reasoning behind this allegation is lessened even further when taking into account the fact that the President has frozen the exercising of the function of Chairman of LDK, which even further removes the President from any responsibility for the actions of the LDK. It is impossible to understand how the President could be responsible for the actions of another, in this case the LDK, when the constitutional test for the event of dismissal from duty have to do with actions of the President (see Article 91(3) where it says that the President can be dismissed when "*he/she has seriously violated the Constitution...*" (emphasis added).

³⁹ See Annex nr. 3, pg. 1.

⁴⁰ Majority Judgment, at 6.

⁴¹ See President Dr. Fatmir Sejdiu's 16 June 2008 letter to the leadership of the Democratic League of Kosovo announcing that he suspends his position as Chairman of the Democratic League of Kosovo during his service as President of the country.

⁴² See Article 45 of Law Nr. 03/L-121 on the Constitutional Court of the Republic of Kosovo (emphasis added).

of a continuous making public of the same decision. This proposition was put forth by the dissenters in the Court who substantiated their position by relying on German Federal Constitutional Court Act, ECtHR precedent *Ulke v. Turkey*,⁴³ De Becker (1958), Loizidou v. Turkey (1996), Cyprus v. Turkey (2001) and Ilascu and Others v. Modova and Russia (2004), and finally, Grand Chamber in Varnava v. Turkey (2009).

Based on these arguments, one can consequently conclude that the decision of the President to freeze the exercising of the function in the LDK, but to hold the same, was made public years ago and in many occasions. Ever since, no group of MPs had challenged this act by the President based on Article 113(6) of the Constitution within the time limit of thirty (30) days (as required by Article 45 of the Law on the Constitutional Court). Resultantly, the legal standing to challenge this act by the President based on Article 113(6) was extinguished for all authorized parties of Article 113(6) of the Constitutions because of the expiration of the thirty day time limit determined by Article 45 of the Law on the Constitutional Court. A legal interpretation of the asserted issue dictates that the Constitutional Court should have denied such a constitutional challenge in this case and all the way up to the end of the President's mandate as inadmissible on procedural grounds.

- Claimants had not fulfilled the required criteria of Article 113(6) of the Constitution of the Republic of Kosovo to be an authorized party for bringing this claim before the Constitutional Court

Article 113(6) of the Constitution states that “[t]hirty (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.”⁴⁴ Thus, there is a requirement that there be at least 30 MPs for them to be considered an authorized party based on Article 113(6) of the Constitution for the purpose of submitting this Claim.

On 25 June 2010, Mr. Naim Rrustemi and Mr. Driton Tali, MPs of the Assembly of the Republic of Kosovo, submitted the Claim at hand KI.47/10 in the Constitutional Court, as representatives of a group of MPs.⁴⁵ They attached to their Claim a list of thirty-two (32) names and signatures of MPs, including their own signatures. On 29 June 2010, for reasons which they made public, three (3) of the aforementioned MPs wrote to the Constitutional Court and withdrew from this group of MPs that submitted the claim.⁴⁶

⁴³ N 39437/98, (24 Jan. 2006).

⁴⁴ See Article 113(6) of the Constitution of the Republic of Kosovo.

⁴⁵ See Annex nr. 2, pg. 2 dhe Annex nr. 3, pg. 2.

⁴⁶ See Annex nr. 6. MPs of the Assembly of the Republic of Kosovo that withdrew from the claim are Mr. Dragiša Mirić, Mr. Mihailo Šćepanović, and Mr. Vladimir Todorović. In the mean time, Mr. Berat Luzha dhe Mrs. Myzejene Selmani, MPs of the Assembly of the Republic of Kosovo have publicly declared for Kosovo media that they have withdrawn from the claim at hand. See Annex nr. 8.

This withdrawal of the three MPs, reduced the number of MPs that submitted the claim to twenty-nine (29), which is not sufficient for this group of MPs to be considered an authorized party as required by Article 113(6) of the Constitution.⁴⁷

The majority in this case, without any constitutional or legal basis, created a new principle that when the authorized party is indeed a group of 30 members, in order to withdraw from the group, “they should not now be allowed to withdraw their signatures without articulated, serious and substantial reasons.”⁴⁸ The court shows judicial activism and takes upon itself the role of a legislator, which is unknown and impermissible in the civil law system.

On the other hand, the dissenters aptly describe in their opinion that when the authorized party is a group, they must maintain their level (here 30 members) throughout the proceedings for them to remain an authorized party.⁴⁹ They base their holding on German Basic Law (Constitution), the Judgment of the German Federal Constitutional Court in the case of *Organstreit* of 30 June 2009, para 169 and following, as well as the case of *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990).

With that said, in conclusion for this section, it must be stated that the claim should have been dismissed by the Court as procedurally inadmissible because the Claimants did not have legal standing to submit the claim in question for two reasons: (i) they had not submitted the claim within the time limit determined by the Law on the Constitutional Court of the Republic of Kosovo; and (ii) the MPs in question did not fulfill the criteria of Article 113(6) of the Constitution to be an authorized party for purposes of bringing a claim before the Constitutional Court.

Claimants Had Not Proven That The President Had Committed a Heavy/Serious Violation of the Constitution

The claim of the MPs at hand did not have constitutional or legal standing also in the substantive aspect. Therefore, the Constitutional Court should have dismissed their claim for the following reasons: i) the suspending of the exercising of the party function, but the holding of the same by the President, is not a violation of Article 88(2) of the Constitution; and ii) the President’s act cannot be qualified as a serious violation of the same article of the Constitution.

⁴⁷ It is noteworthy that this withdrawal of MPs differs from a withdrawal of a claim from an authorized party. In this case, the claim is not being withdrawn, however, with the withdrawal of three MPs, the group of MPs has lost the status of an authorized party pursuant to Article 113(6). Thus, even though Article 32 of the Rules of Procedure of the Constitutional Court permits the Court to decide a case irrespective of a withdrawal of the case by the authorized party, the same article cannot be interpreted as permission to decide cases that are submitted by parties that are not authorized, which is the case here. The idea that the party must remain an authorized party even after the submission of the claim has some support in the American jurisprudence, in an analogical case where the court considered the issue of an interested party. See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990) (parties have to continue remaining interested parties until the final resolution of the case).

⁴⁸ Majority Decision, at 8 (paragraph 44).

⁴⁹ Dissenting Opinion, at 1-3.

- The President had not violated the Constitution of the Republic of Kosovo because he had not exercised any function in the political party

The claim of the MPs was unfounded even in the substantive aspect because there is a substantial difference between “holding” a party function and the “exercising” of a party function. As it is shown below, while exercising a party function would be a violation of Article 88(2), the holding of a party function, while suspending the exercising of same function, cannot be considered a constitutional violation.

The Claim of the MPs alleged that the President had seriously violated Article 88(2) of the Constitution.⁵⁰ Article 88(2) says that “[a]fter the election, the President cannot exercise any political party functions.”⁵¹ Thus, Article 88(2) requires that the President *not exercise* any political party function, however, does not require that the President after the election *not hold* any party function. This assertion is legally reasonable in several levels.

Initially, there is a significant difference between “holding” and “exercising” a function. This substantive difference finds support even in the Constitution of the Republic of Kosovo and in international jurisprudence. By way of comparison, in the context of the responsibilities of the President of the Assembly of the Republic of Kosovo, Article 67(8) of the Constitution says that “[w]hen the President of the Assembly is absent or is unable to exercise the function, one of the Deputy Presidents will serve as President of the Assembly.”⁵² Thus, as a further explanation, in the event that the President of the Assembly holds the position of President, but does not exercise it, one of the Deputy Presidents of the Assembly serve as President of the Assembly. This constitutional article shows clearly the constitutional difference between the terms “hold” and “exercise.” Had it been interested, the Constitutional Court could have found this substantive difference between the two terms “hold” and “exercise” also in a long line of cases from the European jurisprudence.⁵³

To explain further this constitutional and legal difference between holding and exercising a function, it is worth mentioning that there are several other cases where the exercising of the responsibility is delegated, but the position is kept. As an

⁵⁰ See Annex nr. 3, pg. 1.

⁵¹ See Article 88(2) of the Constitution (emphasis added).

⁵² See Article 67(8) of the Constitution.

⁵³ See e.x. *Cases from the EU*: Case C-39/98, Celex No. 698C0038, European Court of Justice, Opinion of Advocate General Alber (22 June 1999) (explaining case 53/87 that had to do with competition and the Court distinguished between the holding and the exercising of a dominant position in the IP industrial market); Case C-421/98, Celex No. 698C0421 in the European Court of Justice, Opinion of Mr. Advocate General Alber (11 May 2000), ECJ Reports 2000 pg. I-10375 (recognizes a difference between the exercise of control and the holding of a post in the architectural context, where the court stated that there is a difference between those that draw the development projects and those that control the work). See also *Prosecutor v. Zejnil Delalic, Zdravko Mucic (AKA "Pavo"), Hazim Delic and Esad Landzo (AKA "Zenga") ("Celebici Case")* (tribunal distinguishes between the holding of a position and acts that could be a result of the position, in the case of a prison guard, therefore, the tribunal distinguished between the holding of an office and the exercise of the responsibilities).

example, Article 90.1 of the Constitution says that “[i]f the President of the Republic of Kosovo is temporarily unable to fulfill her/his responsibilities, he/she may voluntarily transfer the duties of the position to the President of the Assembly who shall then serve as *Acting* (*NOTE: in Albanian: exerciser of the responsibility of the*) President of the Republic of Kosovo” (emphasis added). As another example, Article 11.2 of the Law on the Constitutional Court says that “The Deputy President of the Constitutional Court shall *perform* (*NOTE: in Albanian: exercise*) the duties of the President of Constitutional Court when the latter is absent or for any other reason is unable to perform his/her duties. The President of the Constitutional Court may delegate to the Deputy President certain duties to support the President in *performing* (*NOTE: in Albanian: exercise*) his/her duties.” (emphasis added).

The Court should have noted this difference between the two terms and should have applied it to its analysis in this case as well, which it did not do. Applying these legal principles to the facts of this case, would lead one to understand that the President had held the post of the Chairman of LDK, which would not amount to a violation of Article 88(2), because said article requires not exercising a function but does not require not holding the same. Moreover, the claimants in this case had not offered any proof that the President had exercised his party function, which would have amounted to a violations of Article 88(2).

With regard to the exercising of the party function, as prohibited by Article 88(2), there is no shred of evidence that the President had undertaken any unconstitutional act. The word “exercise,” in the legal sense, is defined as “making use of” or “put into action.”⁵⁴ Thus, to exercise a function one needs something more than simply holding it, thus there needs to be some sort of an action.⁵⁵ Hence, to exercise a function, one needs something more than holding, meaning action is needed. This principle finds support in American jurisprudence. In *Reagan v. Wald*, the Court referred to the actual exercise of responsibilities, which were not exercised simply because there was an article in existence that indicated that the President had the authority to act; thus, the exercise of the President’s responsibilities depended on the affirmative actions of the President, by regulating through licensing, prohibiting, advising or forcing.⁵⁶

The MPs’ claims and allegations that the President has violated Article 88(2) of the Constitution by holding the post of the Chairman of LDK and the suspending of the exercising of the same, were based on a sole fact – that LDK submitted a document to

⁵⁴ See Black’s Law Dictionary (online 8th ed. 2004) (defines the word “exercise” as “[t]o make use of; to put into action”).

⁵⁵ For support, see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1459 (1990) (in the context of the “Free Exercise Clause” of the US Constitution, many academics have addressed the meaning of “exercise” and have defined it to require an affirmative action that surpasses possession; while interpreting the same clause, an academic has stated that the “key phrase ‘exercise’, that is found in six constitutions, has been defined in the dictionaries of this time to mean ‘action’”).

⁵⁶ 468 U.S. 222, 235 (1984).

the CEC reflecting the President as Chairman of LDK.⁵⁷ This allegation fails for several reasons.

First, even the MPs admit that the submission of the document by LDK where the President reflects as Chairman of LDK was made by LDK and not by President Sejdiu. Thus, this submission of documents in CEC is an act by LDK and cannot be attributed to the President, since he had suspended the exercising of the chairmanship and did not participate in LDK decision-making and/or review of official documentation submitted by LDK. This allegation by the MPs makes even less sense taking into account the suspending of the exercising of the function of the Chairman of LDK by the President, which further removes the President from any type of responsibility for the actions of LDK. It is inconceivable to understand how the President could be responsible for the actions of another, in this case the LDK, when the test for constitutionality for the event of dismissal from position has to do with the acts of the President (see Article 91(3) where it says that the President could be dismissed when "*he/she* has seriously violated the Constitution... " (emphasis added)). Here, it was not the President that had acted, but rather, a completely different person, namely LDK.

Second, the submission of these documents by LDK in the CEC represented only a factual circumstance in the LDK structures; thus, it reflected the holding of positions by different people, among which the President was reflected as holding the function of the Chairman of the LDK. Claimants make the proper assertion that if LDK had replaced its Chairman, then they would be responsible to report this change to the CEC. Nothing in this documentation proves that the President had undertaken any action that would amount to the exercising of the function of the Chairman of LDK; thus, no proof existed that the Chairman of LDK had performed any of his statutory responsibilities as Chairman.

Third, the MPs in question had not offered any evidence where the President has violated the suspending of his party function by undertaking any action in violation of such a suspension. Their entire claim was based on the submission of election documents by LDK to the CEC, where the President was noted as the Chairman of LDK. Considering the fact that there is substantive difference between the holding and exercising of a party function, which also determines whether there was a violation of Article 88(2) of the Constitution, then it can be seen that the MPs' claim misses factual evidence that the President has exercised his party function in violation of his suspending of that function and in violation of Article 88(2) of the Constitution. What is more, the President lacked the ability to exercise such a function because said function was delegated to another organ of LDK immediately upon the President's suspending of the exercising of the function as Chairman of LDK. In the letter of 16 June 2008, the President stated: "The function of the Chairman of the Democratic

⁵⁷ See Annex nr. 3, pg. 1.

League of Kosovo will be exercised in agreement with the articles of the Statute of LDK..." Article 3 of this Statute states that "[i]n the absence of the Chairman, LDK will be represented by the vice-chairmen, the general secretary, specifically the authorized persons of the Council."⁵⁸ Therefore, the LDK statute and general legal principles prevent the exercising of the same function by two entities at the same time. Consequently, immediately after the President has delegated the exercising of the function of the Chairman of LDK to another body and has suspended the exercising of same by himself, it was impossible for the President to exercise that function.

And finally, a comparative analysis shows that the constitutional requirements of Article 88(2) of the Constitution for the President of the Republic of Kosovo differ greatly from regional constitutional practice. In regional countries, whenever it was required that the President not exercise and not hold any other position, the drafters of those constitutions declared that responsibility in an explicit way. By way of analysis, it can be seen that while the Kosovo Constitution does not permit the exercising of a party function by the President of the country, other constitutions are explicit when it comes to the halting of all party functions by the presidents of respective countries. Article 89 of the Constitution of the Republic of Albania requires a more rigorous non-association and states that "the President of the Republic cannot hold any other public post, cannot be a member of a party and cannot undertake any other private function."⁵⁹ Similarly, Article 95 of the Constitution of the Republic of Croatia states that: "The President of the Republic cannot perform any other public or professional duty. After election, the President of the Republic resigns from membership in political party, about which it informs the Croatian Assembly."⁶⁰ From this it can be seen clearly that in Croatia, the Constitution requires not only for the President to not perform or exercise a function, but also the withdrawal from party posts. Comparatively, this does not exist in the Constitution of the Republic of Kosovo because it requires only the not-exercising, but not also the resignation from the political party.

The Constitution of Macedonia also has a more rigorous approach toward the holder of the post of the President than the Constitution of Kosovo. Article 83 of the Constitution of the Republic of Macedonia says: "The function of the President of the Republic is incompatible with the exercising of a function, other public profession or function in a political party." It is clear that even in this constitution a distinction is made between the exercising of a function and the holding of a function in a political party, and it requires the resignation of the President from both. Similarly, the Constitution of the Republic of Slovenia states in Article 105 that "the function of the President of the

⁵⁸ See Statute of LDK available at <http://ldkkosova.wordpress.com/2009/05/01/statuti/>, last visited on 8 July 2010.

⁵⁹ See Article 89 of the Constitution of the Republic of Albania.

⁶⁰ See Article 95 of the Constitution of the Republic of Croatia (in the original: "Predsjednik Republike ne može obavljati nijednu drugu javnu ili profesionalnu dužnost. Nakon izbora Predsjednik Republike podnosi ostavku na članstvo u političkoj stranci, o čemu obavešтava Hrvatski sabor.")

Republic is incompatible with any other public function or other profession.⁶¹ Thus, the Slovenians have made it clear that the President must be only President and this is evident from the language that they use in Article 105 of their Constitution. To the contrary, in the Constitution of Kosovo, it is without a doubt that it prevents only the exercising of a party function, but not the holding of a post and the suspending of the exercising of same.⁶²

Irrespective of all the aforementioned legal reasoning, the Court completely fails to substantiate its holding that indeed there was a violation of Article 88(2) and in fact does not even make the distinction between the two principles of holding versus exercising of a function. In less than two pages of legal reasoning and analysis, the Court asserted that because the President had allowed LDK to “make use of” his name and position as President of the Republic, the President had seriously violated the Constitution.⁶³ Once again, according to the Court, the President is at fault for the actions of another, namely his party. Still, no direct evidence was ever produced by the MPs, nor considered by the court, which substantiates the assertion that the President had permitted LDK to “make use of” his name. The evidence produced was a document generated by the LDK, but the MPs produced no evidence, as was their burden,⁶⁴ that this was permitted by the President.

The dissent clearly denotes 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.”⁶⁵ This clearly shows the possibility of two events happening. First, the President officially resigning his post, but continuing with his informal leading of the party. And second, the President resigning and completely removing himself from the party, but the party continuing to make use of the President’s name without his permission to do so.

As a last note, the Court should have held a public hearing on this case due to its grave importance. As the dissent notes on pages 5-6,

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

⁶¹ See Article 105 of the Constitution of the Republic of Slovenia (in the original: “Funkcija predsednika republike je nezdružljiva z opravljanjem druge javne funkcije ali poklica”).

⁶² As it can be seen, in the Constitution of the Republic of Kosovo, the clear intent of the drafters of the Constitution was to make a distinction between the holding and the exercising of a function in a political party. And therefore they have drafted the constitutional articles by referring in an explicit way to the word “exercise.”

⁶³ Majority Judgment, at 11-12.

⁶⁴ See *Ocic v. Croatia*, No. 46306/99 (1999); and *Halford v. UK*, No. 20605/92 (1997).

⁶⁵ Dissenting Opinion, at 6 (paragraph 35).

stand on the response of the President and the Court could not evaluate the arguments of both Parties.

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 Court⁶⁶, 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.

From this, one can observe that the parties to such an important issue of whether the President had seriously violated the Constitution must be given their chance to respond to one another's allegations and responses. Moreover, this provide the Court with the opportunity to further explore its constitutional and legal avenues before issuing a judgment.

In sum and as argued above, it must be mentioned that the President had not exercised a party function, therefore, had acted in full accordance with his constitutional responsibilities. Based on that, the Constitutional Court erred when it held that there was a serious violation of Article 88(2) and failed to dismiss the submitted claim as without merit.

- The President had not seriously violated the Constitution

Article 113(6) of the Constitution says that “[t]hirty (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.”⁶⁷ Thus, this case presents to the Constitutional Court not only a task of analyzing the issue of whether the non-exercising of a party function but the holding of same by the President is a violation of the Constitution, but the application of a much higher standard, specifically the analysis of whether this act of the President seriously violates the Constitution.

The Constitution of the Republic of Kosovo in Article 91.1 (Dismissal of the President) states that “The President of the Republic of Kosovo may be dismissed by the Assembly if he/she has been convicted of a serious crime or if she/he is unable to exercise the responsibilities of office due to serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution.”

⁶⁶ 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.

⁶⁷ See Article 113(6) of the Constitution of the Republic of Kosovo.

The Constitution has not listed or defined which actions or omissions by the President would be considered a serious violation of the Constitution. From a logical and legal interpretation of this norm of the Constitution, one can conclude that not necessarily every possible violation of the Constitution by the President would amount to a "serious violation" that is required by Article 91.1 of the Constitution.

Since the Constitution has not listed and has not defined which actions or omissions by the President would be considered a serious violation, according to the legal interpretation of the respondents, a "serious violation" of the Constitution by the President could be considered actions in contradiction or omissions related to the competences of the President as enumerated in Article 84 of the Constitution.

Because in the prior section it was shown that the President's act in question was in full compliance with the Constitution, then it is impossible for such an act to amount to a heavy or serious violation of the Constitution. Thus, if the allegations of the MPs in question and the evidence offered by them were not sufficient to prove a violation of Article 88(2), then, those certainly cannot fulfill the more rigorous constitutional standard of a heavy or serious violation of the Constitution.

The Court majority in this case completely fails to distinguish between the two principles of a "constitutional violation" and a "serious constitutional violation." In a couple of sentences, the Court simply states that because the office that is held by the President is of high importance, the failure to completely resign from a political post is a serious constitutional violation. Again, the dissent points out to an important fact that "no grounds have been presented by [the MPs] to conclude that 'the President of the Republic of Kosovo has committed a serious violation of the Constitution.'"⁶⁸

From the arguments provided in the two preceding sections above, there is only one logical conclusion -- that the holding of the post of Chairman of LDK by the President is not equivalent to the exercising of that party function. The holding of this post, but the suspending of the exercising of the same by the President, is not a violation of constitutional articles, therefore, it is even further removed from being a heavy or serious violation of the Constitution. Resultantly, the claimants' claim in question could not stand and should have been dismissed as without merit.

⁶⁸ Dissenting Opinion, at 5 (paragraph 29).

Conclusion

This case was the first major challenge that the newly formed Constitutional Court of the Republic of Kosovo faced. In dealing with this case, they operated under circumstances in which they still were not aware of their complete role, competences and their dealings with the parties. As a result, this case was marred by procedural irregularities and a poorly reasoned final judgment.

In this case, the Court failed to lead the procedure as required by law, namely to keep the President and his legal representatives fully informed about all that was alleged against them. Moreover, the Court failed to inform the President of the Court's judgment in a way that the position of the President deserves. Rather, it leaked it to the media weeks in advance and issued a notice before it even notified the President about the outcome.

The judgment of the majority lacked the needed legal reasoning deserving of such a landmark case. While the dissenters make apt use of ECtHR precedent, which is directly applicable in Kosovo, the majority's judgment is completely stripped of any relevant constitutional or legal sources that would substantiate their holdings.

Simply put, the Court should have dismissed the claim of the MPs as inadmissible on procedural grounds, specifically that it was filed by the MPs after the time permitted by law and that the MPs never maintained the number of 30 members that were needed from the group to be an authorized party. Additionally, even on the merits, the Court failed to distinguish between the constitutional requirement to not exercise a party function, which the President in this case did not do, but rather simply held the position in a suspended mode. Moreover, even had the President's holding of the position amounted to a violation of the Constitution, in no way did that equate to a serious constitutional violation.

Still, the Court held contrary to the Constitution, applicable laws, and the available evidence before it. Which leads to the following conclusion. There are two potential reasons why this case was decided this way, either as a result of political influence on the Court or as a result of lack of legal competence by those comprising this Court. While all hope for the former not to be true, the latter is even more worrisome due to the fact that this Court continues to make important decisions for the Kosovar constitutional jurisprudence.

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