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ELECTIONS, LEGAL REMEDIES AND JUDICIAL FLIP-FLOPPING

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2020 has been a hectic year for the political parties and the government. Apart from the unpredicted consequences caused by the pandemic, within a year period two governments fell. The Kurti Government, established in February 2020 was dismissed after the coalition with LDK was terminated, resulting with a no-confidence motion initiated by the latter, and voted in June 2020. Six months after, Hoti Government collapsed due to a Constitutional Court ruling triggered by a claim addressed by Vetëvendosje questioning the constitutionality of the vote casted by the then MP Etem Arifi. Mr. Arifi, who had been found guilty on a fraud charge prior to the elections, was deemed ineligible to exercise the MP mandate, and therefore his actions as an MP (therefore the continuation of his mandate), according to Vetëvendosje, are unconstitutional.

In late December 2020, the Constitutional Court ruled that the decision of the Assembly on the election of the Hoti Government was not in compliance with the Constitution, because the Government did not receive the majority of votes of all deputies of the Assembly of the Republic of Kosovo. But, surprisingly the Court went beyond Vetëvendosje's particular request and elaborated on the eligibility of candidates running to become an MP. As per the Constitutional Court ruling, a person convicted of a criminal offense by a final court judgment in the last three (3) years, cannot be registered as a candidate for an MP, nor exercise the mandate of an MP in the Assembly of the Republic of Kosovo. What's more, the Court decided that the President should announce the elections no later than forty (40) days from the day of their ruling is published. Hence, 2021 found Kosovo with a caretaker government preparing for snap elections to be held on mid-February.

The arbitrary interpretation of the article 71 of the Constitution by the Constitutional Court, except inducing the collapse of the Hoti Government, affected several prominent members of Vetëvendosje!, including their leader Albin Kurti and longtime MP and former Minister of Justice Albulena Haxhiu, as well as members of other political parties. Both, Albin Kurti and Albulena Haxhiu have been convicted with conditional sentences by the Basic Court of Prishtina in January 2018. Their conviction came as a consequence of setting off tear gas in the Assembly against ratifying a controversial deal to demarcate the border with Montenegro. Their decision became final in September 2018.

In January 2021, the Central Election Commission (CEC) voted against certifying Vetëvendosje's list of proposed candidates, due to including Albin Kurti, Albulena Haxhiu and others that are not eligible according to the latest Constitutional Courts' ruling. Similarly, CEC refused to confirm some lists of other political parties as well, including AAK and NISMA. According to CEC, individuals convicted, (regardless of the type of violation and judgment), cannot be registered as candidates nor receive a valid mandate in the Assembly of the Republic of Kosovo due to the Constitutional Court decision. Nevertheless, Vetëvendosje decided to appeal the CEC decision to the Election Panel for Appeals and Complaints (ECAP) claiming their proposed list includes candidates that are fully eligible.

As if all of this mess was not enough, the ECAP when deciding on the complaint of Vetëvendosje against the CEC decision ruled that Vetëvendosje cannot those candidates that were not certified in the first place. Such a decision is considered to be arbitrary and in violation of the principle of legal certainty, right to effective legal remedy and fundamental rights. *I intend to explain why?*

In general the procedure for certification of a political party and its list undergoes the following procedures. First and foremost, the political party's list to run for a seat in the Assembly consists of a maximum of 110 candidates. The Law requires political parties to submit their lists

to the CEC for certification. CEC, except certification of the political party and individual candidates include in the political party list, is responsible to verify the eligibility of candidates and decide whether to certify them or not. If the list is not certified and/or the party does not replace the candidates deemed ineligible, the political party has the right to appeal the decision to the ECAP. The ECAP either approves their complaint or reaffirms the decision of CEC. If the ECAP approves their complaint, then the CEC complies with such a decision and certifies all candidates proposed at first instance. If ECAP confirms the CEC decision, the applicant (the political party) can file another appeal to the Supreme Court. The Supreme Court either approves party's complaint or reaffirms the decision of the ECAP. In case the complaint gets approved, CEC should act upon and comply with the decision by certifying all proposed candidates. On the other hand, if the Supreme Court does not approve the complaint but reconfirms the ECAP decision, then the political party should replace ineligible candidates with new ones.

In other words, the CEC represents the first instance body to decide on the process of certifying political parties and their candidates proposed for MPs. The CEC decision is not final, and therefore any challenge to CEC decisions suspend its effects and cannot be implemented. On the other hand, the ECAP represents the appellate body (the second instance) to decide all complaints and appeals against the CEC decisions. However, as per the Electoral Code of Kosovo, the Supreme Court is the final instance in this procedure. Plainly said, the decision of the second instance body is final only if the party does not appeal it at the Supreme Court.

In the case in hand, the CEC refused to certify the lists of Vetëvendosje, NISMA, and AAK because some of the candidates proposed are convicted of criminal offences (the refusal was made regardless of the type of violation). CEC demanded that the political parties replace the 'ineligible' candidates with new ones. All three abovementioned political parties chose to appeal the CEC decision and file a complaint at the ECAP. Vetëvendosje did not replace the 'ineligible' candidates. The ECAP decided to confirm the CEC decision and furthermore it decided that political parties are not allowed to replace the candidates, without any explanation why. Following this, political parties filed a complaint at the Supreme Court, as the last instance in the process. Three days after, the Supreme Court decided to partially confirm the appeal of Vetëvendosje and AAK, and rejected the appeal of NISMA as unfounded. Regarding Vetëvendosje's claim, the court allowed two other contested members to be part of the list, leaving outside their leader Albin Kurti and Albulena Haxhiu. The court found that the ECAP had made an erroneous assessment of the 3 year deadline on the case Liburn Aliu and Labinota Demi Murtezi, both candidates of Vetëvendosje. The same assessment was made for Shemsedin Dreshaj, a candidate from AAK. On the other hand, the court found that NISMA's appeal was unfounded considering that none of the contested members fulfill the legal criteria required to be part of the list.

First, the ECAP and the Supreme Court have violated the right to an effective legal remedy when it decided that political parties are not allowed to replace the ineligible candidates. The effective legal remedy presumes that the legality of the legal act issued by CEC is decided in merit by the final instance body. In addition, the appeal offers a remedy to parties to replace the candidates if any candidate, as per the decision of the Supreme Court is deemed ineligible to be included in the political party electoral list.

Second, the appeal submitted by political parties against the decision of CEC has a suspensive effect. Because the merit of the decision of CEC has not been decided entirely by the Supreme Court as by the Electoral Code of Kosovo, political parties were under no obligation to replace the candidates in their lists. Only after the Supreme Court decided on the merits of the appeal, the political parties could have been invited by CEC to replace their candidates. If they would refuse to do so, the list could have been certified.

Why was this discussion necessary?

In a time where the rule of law and human rights remain essential for Kosovo's democracy, the Constitutional Court, has on the opposite, contributed to minimize the values and importance of human rights. The decision of the Constitutional Court imposed a very critical standard by prohibiting the right to run for office without any clear constitutional and legal standards. Such a standard led to legal uncertainty for candidates and political parties. These flip-flops in the interpretation of the rules of the game are dangerous in any democracy, especially in fragile democracies like Kosovo. It is against any European standard to restrict the right to run without clear constitutional and legal standards. Such an action would produce unprecedented crises in every other country, not only in Kosovo. The abovementioned decision fueled unnecessary and additional political tension, which will completely jeopardize the proper management of the election processes. Moreover, it provoked an ECAP and Supreme Court decision which contributed to minimize the values of the right to effective legal remedy, an exceptionally dangerous practice for a fragile democracy like Kosovo.

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