



Legal Gaps in the Constitution of the Republic of Kosovo in Chapter on the President of the Republic

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Abstract: Legal uncertainties and gaps in the legislation of Kosovo are expressed in constitutions, laws and other legal acts. Usually, these shortcomings are few in constitutions as the highest political legal act of a state. However, these defects are noted in the Constitution of the Republic of Kosovo. They can be explicitly distinguished in the chapter on the President of the Republic of Kosovo. These gaps are particularly evident in the case of resignation or death of the President. The article in the Constitution does not foresee who should exercise the function of the president when the president resigns or dies. Even more unclear situations we have when the president dies or resigns, at the time when the Kosovo Assembly is dissolved. These two situations occurred in Kosovo in 2006 and 2010.

Keywords: Legal uncertainties; legal gaps; President of Kosovo; resignation of the president; dismissal of the president

JEL Classification: K10; K40; K33

1. Introduction

In the constitution of the Republic of Kosovo, in some chapters there are many legal uncertainties and gaps. These gaps and legal uncertainties are more explicit in the chapter on the President of the Republic, article 88 which claims to regulate the president's status for not exercising other functions. In this case it is not clear whether the president has or does not have the right to exercise other public functions. Also, uncertainty is expressed in article 90 - the temporary absence of the president, where it is not precisely and clearly defined who should temporarily serve as Acting President in the cases of the his/her temporary absence. The gap in the Constitution is even more apparent in these segments:

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The Constitution does not foresee the death of the president, his resignation, and his replacement when the parliament is dissolved.

These legal declines were expressed in the case of the death of the president in 2006, and president's resignation in 2010 and its replacement by the Speaker of the Parliament at dissolution.

2. Head of the State

The head of state is a political institution that exercises the function of state representation. It is an electoral institution that is elected in two ways: directly by the electoral body, and by the parliament (Bajrami, 2010, p. 171). Depending on the organization of the governing system, the president institution is found to be organized as the head of state with exclusive executive powers, partly executive powers and ceremonial powers (Bajrami, 2011, p. 275).

The president is a formal head of the state when has limited executive powers and ceremonial duties. Such is the case in the governmental parliamentary systems where factual executive functions are executed by the government, as is the case in Albania, Italy and in particular in Germany (Heywood, 2007, p. 320).

Differently from these countries in the Presidential Governance System, the President is the main bearer of executive power. Regardless of the governance system, the President during the exercise of the function, may have difficulty in exercising his/her function, resign, die, or be dismissed.

These hypothetical situations are usually defined by constitution in each state, but not rarely, in constitutions are present uncertainties and legal disputes that do not clarify the way the president is replaced when the president resigns, dies or is dismissed from the post.

These legal uncertainties are present in the constitution of the Republic of Kosovo, in the chapter on the President of the Republic.

2.1. State Power and Sovereignty

State is always identified with practicing its authority, and through this it produces and modifies the right. State executes its relevant state functions by dint of power, which is a mechanism to fulfill these functions. The concept of power is a social concept that can be understood only as a relationship between two subjects, between two wills (Gurakuqi & Trashani, 2009, p. 19). Power is the ability to

enforce an order, a rule, other's behavior, in case they don't follow willingly the relevant norm, respectively the right. Practicing the state power is nothing else but the relation between creating and application, respectively obeying the right. To get to know state power better, we should first know its overall character. We can see that in practice we encounter different kinds of power: the family one, the school, the health, religion, etc.

The notion of powers can be seen as a report between two subjects, two wills. The power is an order for the other's behavior. Every power is some kind of liability. While having to do with state power we should think of it as some kind of state power that is available to use physical restraint, which is a special mechanism and with this restraint realizes the dedicated purpose (Constitution of Kosovo, 2008) Power's liability can be double: with moral means without using voluntary strength, voluntary behavior against legal norms and on the other hand the liability can be in compliance with the order, with and without using physical strength.

2.2. The State Power Sovereignty Concept

The President of the Republic is the highest representative institution of a country with the form of Republican government and corresponds to the head of state. The constitution gives him important functions, from the representation of national unity and the guarantee of constitutional principles to functions of political and executive nature (ShtetiWeb, 2016). From the explanations in the legal dictionaries we find that the President of the Republic is the highest title given to a person and has the highest political position who is in some countries may be the head of government. (<https://www.dictionary.com/browse/presently/>). On the other hand, the head of state is distanced from the head of government because it shows himself as the first ruler of the state who may be the king or the president (Macmillan, 2019). The mandate of the head of state is determined by constitutional and legal norms. The position of the head of state is first determined by the constitution. It is usually sanctioned with a special chapter for the head of state.

However, each state sets out in detail its status. Given the position the chief of state in the hierarchy of state power, his choice depends on the form of government. In the parliamentary system of government, the head of state is elected by parliament, unlike the presidential system of government where the chief of state is elected in direct elections by the electoral body. The way of election of the head of state also determines his power in state power. In the United States, the President of the Republic is elected by electors who elect the people in direct elections. Their

number is equal to the total number of congressmen and senators held by the US Congress. The president is elected candidate who has won half of the electors plus one vote. (US Constitution, Article II). In France, the President of the Republic is elected in direct voting by the electoral body for a five-year term. (Constitution of Republic of France).

In the states that apply the presidential system of government, the election of the president stems directly from the will of the electoral body, therefore its powers and powers are greater. In states with a parliamentary system of government, the head of state is elected by parliament, therefore their powers and authorizations are more limited. In Albania, the President of the Republic is elected by parliament with a qualified majority of votes. Like this is the election of the president in Italy and Germany. So the deputies from the two chambers of parliament and the deputies who are specially elected for the election of the president elect the president in Italy, respectively in Germany. In this very way of electing the president determines their control by parliament.

From the same body, from the parliament is also elected the President of the Republic of Kosovo. Every citizen of the Republic of Kosovo may be nominated as a candidate for President of the Republic of Kosovo if he / she ensures the signatures of at least thirty (30) deputies of the Kosovo Assembly. Members of the Assembly can only sign for one candidate for President of the Republic of Kosovo. The election of the President is done by two-thirds (2/3) of the votes of all members of the Assembly. If no candidate receives a two-thirds majority (2/3) in the first two ballots, the third ballot is held between the two candidates who have received the highest number of votes in the second ballot and the candidate receiving the majority the votes of all deputies shall be elected President of the Republic of Kosovo. If, in the third ballot, no candidate is elected President of the Republic of Kosovo, the Assembly is dissolved and new elections are announced, which should be held within forty-five (45) days. (Constitution of Kosovo, 2008

2.3. Responsibility of the Head of State Practicing

In practicing his function, the President of the Republic is responsible for actions that are in contravention of constitutional provisions. A distinction should be made between the legal responsibility and the political responsibility of the President of the Republic. Political responsibility exists when the president, while exercising his function, can not exercise his duty in accordance with state policies by losing political support. Most Republican constitutions for the acts of the president

provide only legal responsibility, primarily criminal responsibility (ShtetiWeb, 2016).

Even according to the Constitution of the Republic of Albania, the President of the Republic has no responsibility for the acts performed in the exercise of his duty, and this is precisely the lack of political responsibility. The Albanian Constitution provides only legal responsibility. The President of the Republic may be dismissed for a serious violation of the Constitution for committing a serious crime, according to the foreseen procedure (Constitution of Albania, Article 90). Even in Kosovo, the status of political and legal responsibility is not specified. Like the Constitution of the Republic of Kosovo and the Law on President, no political responsibility for the president has been foreseen. According to these acts, the President is responsible if he has been convicted of committing a serious crime; if the Constitutional Court has determined that he / she has committed a serious violation of the Constitution. (Law of the President of Kosovo, Article 10).

This shortcoming in the constitution of the Republic of Kosovo should be avoided by amending the constitution and by defining the constitutional norm the status of political and legal responsibility.

3. Uncertainty about the President of the Republic of Kosovo, Status of not

Exercising other Functions

In the Constitution of the Republic of Kosovo, the status of the president is not clearly clarified whether he has the right to exercise other functions as well. According to Article 88, paragraph 1 states: The President shall not exercise any other public function. (Constitution of Kosovo, article 88.1). This paragraph clarifies the status of the president and the restriction of his right not to exercise any other public function. However, the following paragraph makes the status unclear because it states: after election, the President cannot exercise any political party functions. (Constitution of Kosovo, article 88.2). This paragraph is unclear because, if it is said that after the election he has no right to exercise any political parties function, there is a dilemma, if the president before is elected is president?! Mr. Fatmir Sejdiu in 2006 was elected President of Kosovo, but he continued to exercise the function of the Chairman of the Political Party. Despite the public remarks by the Kosovo media that the President of the Republic respect the Constitution of the Republic of Kosovo and resigns from one function, he still

exercised the two functions in parallel, violating the Constitution as the highest political legal act within the state, as well as the statute as the highest legal act of his party. Finally, the Constitutional Court made the constitutional interpretation of the dismissal of the President of the Republic of Kosovo, Fatmir Sejdiu.

Once he understood the decision, he resigned. These violations were committed in 2010 by the Acting President of the Republic, Jakup Krasniqi, who has continuously participated in the electoral campaign for the election of the Kosovo Assembly composition. Because of this confusion and interpretation of the Constitutional Court, in 2010 the President of the Republic of Kosovo Mr. Fatmir Sejdiu had to resign.

Constitutional practices around the world regulate these issues precisely in the constitution, specifying if the President can exercise other public functions. Croatia's constitution regulates this status clearly: The President of the Republic shall not perform any other public or professional duty. Once elected, the President of the Republic shall resign from membership in any political party and shall notify the Croatian Parliament thereof (Constitution of the Republic of Croatia, Article 96). The German Constitution sanctions the following: The Federal President may not hold any other salaried office, or engage in any trade or profession, or belong to the management or supervisory board of any enterprise conducted for profit (Basic law of the Federal Republic Germany, Article 56). In Macedonia, the duty of the President of the Republic is incompatible with the performance of any other public office, profession or appointment in a political party. (Macedonian Constitution, Article 83).

In Albanian: The President of the Republic cannot exercise other powers besides those recognized expressly in the Constitution and granted by laws issued in compliance with it (Constitution of Albania, Article 94). Thus, from the explanations of the constitutions of the aforementioned countries, proves that they decisively determine the status of the President of the Republic at the time he assumes the post of President, the manner of exercising the function and the termination of the function.

4. Exercising President Function when the post Remains Vacant

Exercising the president's function when he/she resigns and when the parliament is dissolved, in different states it is arranged in different ways.

In the Constitution of the Republic of Kosovo if the President of the Republic of Kosovo is temporarily unable to fulfil his / her responsibilities, he / she may voluntarily pass the duties of his or her post to the Speaker of the Assembly who will be the Acting President of the Republic of Kosovo. (Constitution of Kosovo, article 94). The question is who should exercise the function of the President of the Republic of Kosovo with the Parliament at dissolution. So, the legal gap is presented when the president cannot temporarily exercise the post, when he/she resigns, dies, and if the parliament is dissolved. In the Republic of Kosovo in 2010, due to the resignation of the President of the Republic and the dissolution of the parliament, vacant remained the post of the President of the Republic. This function until the election of the new president was temporarily exercised by the Speaker of the Parliament at dissolution. The Kosovo Constitution does not foresee who should exercise the post of president when the parliament is dissolved. However, institutional representatives in Kosovo, tacitly approved the post of the Acting President to be exercised by the President of the Assembly, even though the parliament had been dissolved. This status has raised many professional legal dilemmas. Moreover, there have been opinions by experts of the constitutional law that this function should be temporarily exercised by the President of the Constitutional Court of Kosovo. This issue has never been discussed institutionally in Kosovo. If it is concluded that the function has been unconstitutionally, it can be questioned the legitimacy of the acts issued by the Acting President of the Republic of Kosovo.

Unlike the constitution of the Republic of Kosovo which does not sanction this factual constitutional state, in positive constitutions this matter is regulated in a concrete way. In other words, in France, if the post of the President of the Republic is vacant, for any reason, or because of any detention stated by the Constitutional Council, the functions of the President of the Republic is temporarily exercised by the President of the Senate and, if the latter is prohibited from exercising these functions, the function of the President is exercised by the Government. (Constitution of Republic of France, article 7). Thus, according to this definition, the vacancy of the President of the Republic is implied when the President cannot temporarily serve: in the case of death, resignation, or when dismissed by the respective body designated by the constitution.

Under the constitution of Italy in cases of permanent impediment or death or resignation of the President of the Republic, the functions of the President of the Republic, in all cases in which he cannot fulfil them, shall be exercised by the President of the Senate (Constitution of the Italian Republic, Article 86,). According the Croatian Constitution, in case the President of the Republic is prevented from discharging his/her duties for a shorter period as a result of his/her absence, illness or use of annual leave, he/she may entrust the Speaker of the Croatian Parliament to discharge his/her duties on his/her behalf. The President of the Republic shall decide on the resumption of his/her duties (Constitution of Republic Croatia, Art. 97-1).

In Albania, when the President of the Republic is temporarily unable to exercise his functions or when his seat remains vacant, the Speaker of the Assembly shall assume office and exercise his / her powers. If the President cannot serve for more than 60 days, the Assembly, by two-thirds of all members, decides to send the case to the Constitutional Court, which definitively confirms the fact of impossibility. In the case of a determination of incapacity, the place of the President remains vacant and the election of a new President begins within 10 days from the date of determination of incapacity. (Constitution of Albania, Article 91).

In the aforementioned constitutions, apart from Albania, which does not expressly foresee the resignation of the President of the Republic, in all other constitutions resignation and dismissal, either they are precisely specified such as the case of France or are expressly defined as is the case of Italy and Croatia. The death of the president is sanctioned in most constitutions, whether expressly or indirectly. The Chapter on the President of the Republic must definitely determine the death of the incumbent president. This should be done for many reasons, and in the first place to determine the status of who may be acting until the next president is elected. The Constitution of the Republic of Kosovo, by no provision, stipulates the death of the President of the Republic of Kosovo during the exercise of the presidential mandate. This represents special legal gap in the constitution of the Republic of Kosovo.

Under the constitution of Macedonia in case of death, resignation, permanent inability to perform his/her duties, or in case of termination of the mandate in accordance with the provisions of the Constitution, the office of the President of the Republic is carried out by the President of the Assembly until the election of the new President (Constitution of the Republic of Macedonia, article 82).

In Croatia, in the event of the death of the President of the Republic, the Speaker of the Croatian Parliament shall assume office and exercise his / her powers. (Constitution of the Republic of Croatia, article 97-3).

According to the oldest constitution in the world, the US Constitution, which is a model for many constitutions, this status is regulated by the following: in cases of dismissal of the President from office, death, resignation or his inability to exercise competencies and duties deriving from the post, this function passes to the Vice President. The Congress takes legal measures for the dismissal, death, resignation or disability of both the President and the Vice President to announce who will perform the function of the president until he/she is considered fit or until the new president is elected. (US Constitution, article 1.1). From the analysis of the aforementioned constitutions regulating the status of the President of the Republic, it is seen that most of them regulate this status, mainly when this function remains vacant, when the president resigns, is dismissed, dies or in any other situation.

5. Conclusion and Recommendations

The uncertainties and gaps in the constitution of the Republic of Kosovo in the chapter on the President of the Republic have been clearly expressed and have caused legal consequences. This has been proved in practice and the pressure made to the President of the Republic in 2010 to resign. Legal gaps have been proven in practice after the resignation of the President of the Republic, where the resignation was not foreseen in the provision of the Kosovo Constitution. These gaps were also confirmed at the same time when the President resigned, the Parliament was dissolved, while the function of the President was exercised by the President of the Parliament at dissolution.

Concluding these uncertainties and legal gaps in the Constitution of the Republic of Kosovo in the chapter on the President of the Republic we give these recommendations:

- The status of the function of the President of the Republic, article 83, paragraph 1, should be clarified for the lack of consistency on the function of the President of the Republic.
- To determine in constitutional paragraphs the manner of exercising the function of the President of the Republic of Kosovo with the parliament at dissolution,

because in 2010 we had a legal uncertainties and gaps, mainly who should exercise the function of the President of the Republic of Kosovo.

- To determine in constitutional paragraphs the resignation from the post of president, because in 2010 the president resigned from the post of the President of the Republic of Kosovo.

- To determine in constitutional paragraphs the death of the president because in 2006, the President of the Republic of Kosovo died.

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