



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO  
GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT

Prishtina, 3 December 2018  
Ref. no.:RK 1294/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KO79/18**

Applicant

**The President of the Republic of Kosovo**

**Request for interpretation of Article 139, paragraph 4, of the  
Constitution of the Republic of Kosovo**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of:

Arta Rama-Hajrizi, President  
Bajram Ljatifi, Deputy President  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge  
Gresa Caka-Nimani, Judge  
Safet Hoxha, Judge  
Radomir Laban, Judge  
Remzije Istrefi-Peci, Judge, and  
Nexhmi Rexhepi, Judge

#### **Applicant**

1. The Referral was submitted by the President of the Republic of Kosovo, His Excellency, Hashim Thaçi (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant requests interpretation of Article 139 [Central Election Commission] paragraph 4 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
3. The Applicant submitted the following question to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court):

*“From which parliamentary groups CEC members should be appointed:*

- 1.1. from the parliamentary groups that have emerged from the political entities that won the elections for the Assembly of Kosovo? or*
- 1.2. from the parliamentary groups created after the constitution of the Assembly of the Republic of Kosovo?”*

## **Legal basis**

4. The Referral is based on Article 84 (9) in conjunction with Article 113 of the Constitution.
5. On 31 May 2018, in an administrative session the Constitutional Court of the Republic of Kosovo adopted amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

## **Proceedings before the Court**

6. On 7 June 2018, the Applicant submitted the Referral to the Court.
7. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci dhe Nexhmi Rexhepi.
8. On 17 August 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.
9. On 24 August 2018, the Court notified the Applicant, the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly) and the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister) about the registration of the Referral.
10. The President of the Assembly was requested that a copy of the Referral be submitted to all the deputies of the Assembly and invited the deputies to submit their comments regarding the Referral, if any, by 20 September 2018.

11. On 11 September 2018, the Court requested the Office of the President to submit copies of the decrees of the President of the Republic of Kosovo on the appointment of members of the last composition of the Central Election Commission.
12. On 13 September 2018, the Office of the President submitted to the Court the copies of the required decrees.
13. On 19 September and 20 September 2018, Ismet Beqiri, deputy of the Assembly, Albulena Haxhiu, on behalf of parliamentary group of Vetëvendosje Movement, Visar Ymeri, on behalf of parliamentary group of the Social Democratic Party and Bilall Sherifi, on behalf of the parliamentary group of Social Democratic Initiative submitted their comments regarding the Referral.
14. On 24 September 2018, the Court notified the Applicant about the comments and invited him to submit his comments, if any, until 28 September 2018. The Applicant did not file any response regarding the above-mentioned comments of the deputy and the parliamentary groups.
15. On the same date, the Court also notified the President of the Assembly and the Prime Minister about the comments. The President of the Assembly was requested to submit copies of all comments to all the deputies of the Assembly.
16. On 25 September 2018, the Court submitted questions to the Forum of the Venice Commission.
17. From 26 September to 29 October 2018, the Court received responses from the Constitutional/Supreme Courts of Austria, Netherlands, Slovakia, Croatia, Luxembourg, Ireland, Lithuania, Bulgaria, South Africa, Norway, Czech Republic, Germany and Latvia.
18. On 21 November 2018, the Review Panel considered the Report of the Judge Rapporteur and, by majority, recommended to the Court the inadmissibility of the Referral.
19. On the same date, the Court voted, by majority, on the inadmissibility of the Referral.

### **Summary of facts**

20. On 16 December 2014, the President of the Republic of Kosovo, based on the nomination by parliamentary groups and political parties of non-majority communities represented in the Assembly of the Republic of Kosovo (hereinafter: the Assembly) appointed members of the Central Election Commission (hereinafter: the CEC).
21. On 11 June 2017, the early elections for the Assembly were held.
22. On 21 June 2017, the President announced the elections for municipal assemblies and mayors of the municipalities in the Republic of Kosovo.

23. On 8 July 2017, the Central Election Commission (hereinafter: the CEC) certified the election results for the Assembly.
24. On 3 August 2017, the Assembly held its constitutive session and, among other things, established an *ad hoc* committee for verification of the quorum and mandates (hereinafter: the *ad hoc* Committee).
25. On the same date, the *ad hoc* Committee submitted the report, based on the list of the certified election results and ascertained the following mandates:
  - a) Democratic Party of Kosovo, Alliance for the Future of Kosovo, Initiative for Kosovo, Justice Party, Movement for Union, Albanian Democratic Christian Party of Kosovo, Conservative Party of Kosovo, Democratic Alternative of Kosovo, Republicans of Kosovo, Party of Balli, Social Democratic Party, Balli Kombëtar of Kosovo (hereinafter: PDK, AAK and Nisma), 39 deputies;
  - b) “Vetëvendosje” Movement (hereinafter: LVV), 32 deputies;
  - c) The Democratic League of Kosovo and Alliance Kosova e Re (hereinafter: the LDK and AKR), 29 deputies;
  - d) Građanska inicijativa Srpska lista, 9 deputies;
  - e) Kosova Demokratik Tyrk Partisi, 2 deputies;
  - f) Coalition “Vakat”, 2 deputies;
  - g) Nova Demokratska Stranka, 1 deputy;
  - h) Samostalna Liberalna Stranka, 1 deputy;
  - i) Ashkali Democratic Party of Kosovo, 1 deputy;
  - j) Egyptian Liberal Party, 1 deputy;
  - k) United Party of Gorani, 1 deputy;
  - l) Ashkali Party for Integration, 1 deputy; and
  - m) Roma United Party of Kosovo, 1 deputy.
26. On 7 September 2017, with the election of the President and Deputy Presidents the Assembly was constituted.
27. In September 2017, a number of deputies notified the President of the Assembly on the formation of the new parliamentary group, the Social Democratic Initiative.
28. In September 2017, a number of deputies notified the President of the Assembly about the formation of the new Parliamentary Group, the Alliance for the Future of Kosovo (hereinafter: the AAK).
29. On 22 October 2017, local elections were held in the Republic of Kosovo.
30. On 27 December 2017, the CEC certified the results of the local elections.
31. On 14 March 2018, twelve (12) deputies notified the President of the Assembly about the formation of the new Parliamentary Group, the Group of Independent Deputies.
32. On 27 April 2018, the President of the Republic appointed Ms. Valdete Daka Chair of the CEC.

## **Applicant's Referral**

33. The Court recalls that the Applicant requests interpretation of Article 139 [Central Election Commission] paragraph 4 of the Constitution.

34. In light of his Referral, the Applicant requests the Court to answer the following questions:

*"From which parliamentary groups the CEC members should be appointed:*

*1.3. from the parliamentary groups that have emerged from the political entities that won the elections for the Assembly of Kosovo?; or*

*1.4. from the parliamentary groups created after the constitution of the Assembly of the Republic of Kosovo?"*

35. With regard to the abovementioned question, the Applicant clarifies his Referral as follows:

*"In accordance with the Constitution and the Law No. 03/L-073 on General Elections in the Republic of Kosovo (OG, No. 31, 15 June 2008), the President is in the phase of appointing CEC members with a new mandate.*

*In order to avoid any dilemma in the appointment of CEC members, I request the Constitutional Court that in the spirit of the Constitution, to interpret Article 139, paragraph 4 of the Constitution [...]."*

36. As to the admissibility of the Referral, the Applicant argues:

*"The Referral is submitted in accordance with Article 84 (9) of the Constitution, as this provision gives the President the competence to refer the constitutional matters to the Constitutional Court when there are unclear constitutional issues, which he faces in exercising the powers guaranteed by the Constitution and with a purpose of the realization of the primary role of the President, as a representative of the constitutional legal unity of the people of Kosovo and as a guarantor of the democratic functioning of the institutions and the constitutional system of the Republic of Kosovo".*

37. According to the Applicant: *"The competence of the Constitutional Court for the interpretation of the Constitution is established in Article 112.1 of the Constitution:*

*"The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.*

*Article 84 (9) of the Constitution explicitly gives the President the competence to refer matters to the Constitutional Court. This competence under this constitutional provision is a broad competence and is not*

subject to any limitations, including but not limited to the specific cases listed in Article 113 of the Constitution.

*The President has the responsibility for implementing the Constitution and guaranteeing the democratic and constitutional functioning of the institutions of the Republic of Kosovo. In implementing such a constitutional responsibility, the President may refer matters to the Constitutional Court in cases where clarification is needed in relation to a situation where the constitutional provision is unclear and a decision that produces legal effects is required to be taken.*

*In this context, there is uncertainty as to what are the parliamentary groups that have the right to nominate/propose member/s to be appointed as member/s of the Central Election Commission (hereinafter: the CEC) by the President. In this regard, the President uses his constitutional competence to refer this constitutional question to clarify from which parliamentary groups the CEC members should be appointed”.*

38. The Applicant further argues that: “The Constitutional Court, pursuant to Article 112 of the Constitution, is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compliance of laws with the Constitution and in accordance with Article 113 of the Constitution has jurisdiction to decide only on cases referred to the Court in a legal manner by the authorized party. Undoubtedly, in these cases, these two requirements are met and accordingly the Constitutional Court must interpret the constitutional provisions whenever an issue is addressed to it by the mandated institutions for referral. In this case, the interpretation of Article 139, paragraph 4 of the Constitution is required in order to clarify this constitutional provision and enable the President to consolidate the CEC by appointing its members.”
39. The Applicant finally emphasizes that: “[i]n the course of what was emphasized above, the admissibility of this Referral by the Constitutional Court is self-evident.”

### **Questions submitted to the Venice Commission Forum and summary of responses**

#### **Questions**

1. Is there any constitutional definition for the parliamentary group (parliamentary groups)?
2. Is there a constitutional (legal) time limit from when a parliamentary group is formally established? At what stage the parliamentary groups are authorized (entitled) to propose or nominate the candidates for the appointment to various bodies (e.g., in parliamentary committees, ad hoc parliamentary committees, in independent institutions)?
3. If applicable in your country, what is the relevant case law for the appointment of CEC members, more specifically, are CEC members elected:



*(a) from the parliamentary groups that emerge from political entities that have directly emerged from the elections, and as such have won seats in the Assembly/Parliament; or*

*(b) from the parliamentary groups created after the constitution of the Assembly/Parliament (and which may or may not correspond to the parliamentary groups that have automatically emerged from the political (coalitions) entities that participated in the election process?*

*Is there any relevant case law regarding the subject matter covered by prior questions or any other situation that may be relevant to the purposes of this subject matter?*

*Responses of the Constitutional/Supreme Courts, submitted through the Venice Commission Forum*

40. Based on the responses of the Constitutional/Supreme Courts submitted through the Forum of the Venice Commission, it is noted that the provisions of the constitutions of these states do not foresee a definition for the parliamentary groups.
41. Likewise, based on the responses of the Constitutional/Supreme Courts submitted through the Venice Commission Forum, it results that in most of these states, the Central Election Commissions are permanent and professional commissions, composed of the representatives of various institutions, governmental and judicial ones. Meanwhile, in some cases they are composed of members who are proposed, either directly by the political parties, or by parliamentary groups represented in the Parliament.

***Comments submitted by Deputy Ismet Beqiri and by the representatives of the parliamentary groups***

*Comments by Deputy Ismet Beqiri*

42. Deputy Ismet Beqiri in his comments submitted on 19 September 2018, among other things, argued that “[...] *this provision is also clear for the fact that its implementation in practice is not happening for the first time in our country. All the compositions of the Central Election Commission since the entry into force of this Constitution and the establishment of the CEC, have been built based on the number of parliamentary groups as they emerged from the election process, based on their results and in the process of verification of the groups and mandates of each deputy separately in the constitutive sessions of all previous legislatures. As such, this formula of the allocation of seats has always been acceptable to all actors and as a result we have never had any dispute and a slightest dilemma in the spirit of the question posed to your institution by the President of Kosovo.*”
43. Mr. Beqiri further argues that “[...] *in the provision for which the interpretation is required, it is only for the parliamentary groups that emerge*

*from the election process and not for the groups that can be created, ceased, created and ceased ... cases without limitation during a legislature [...]*”.

44. According to Mr. Beqiri “ [...] in accordance with Article 61, paragraph 4 of Law 03/L-073 on General Elections, the upper limit is sixty (60) days and that the process of appointment of CEC members may be conducted immediately after the certification of election results, even before the constitution of the Assembly (because pursuant to Article 66.1 of the Constitution, the constitutive session of the Assembly of Kosovo must be held within 30 days of the announcement of the election results)”.
45. Mr. Beqiri concludes: “Thus, the interpretation differently from what we find clear in the content of Article 139.4 of the Constitution and practiced consistently so far, that the seats in CEC are shared by the groups that have emerged as such from the elections, does not have any legal or institutional logic and it would greatly harm the CEC and the work of this very sensitive institution.”

#### *Comments of the Parliamentary Group Vetëvendosje Movement*

46. In the comments submitted by Ms. Albulena Haxhiu on behalf of the Vetëvendosje Parliamentary Group on 20 September 2018, among other things, it was stated: “Paragraph 4 of Article 61 of the Law on General Elections stipulates that “The mandate of the members of the CEC shall begin no later than sixty (60) days after the certifications of the Assembly elections results”. This paragraph, beyond the deadline for the mandate of CEC members to begin the latest, also clarifies the legal criterion on the legitimate entities to make nominations for the members of the CEC, as it guarantees the necessary mechanism for institutional continuity of a permanent constitutional institution. We emphasize that this deadline relates to the date of the certification of election results and not to the day or date of the constitution of the Assembly. From this it can be seen that the CEC functionality has no connection with the constitution of the Assembly. Even the constitution of the Assembly could go beyond this 60-day period from the certification of election results, as the failure of the Assembly after constitution to elect the Prime Minister would lead the country to early elections, for which the CEC would have already been functional”.
47. Mrs. Haxhiu further argues that “Based on the spirit of the Constitution of the Republic, in accordance with the Judgment of the Constitutional Court No. 119/94, based on the Law on General Elections and based on the CEC decision of certification of the final results of the general elections of 11 June 2017, the Central Election Commission should consist of members representing the parliamentary groups that have emerged as political entities from the election results for the Assembly of Kosovo and have passed the parliamentary threshold [...]”,

#### *Comments of the Parliamentary Group of Social Democratic Party*

48. In the comments submitted by Mr. Visar Imeri, on behalf of the SDP Parliamentary Group on 20 September 2018, it was stated as follows:



*“The constitutional text in this provision has used the term “represented”. Such a term used in this provision has a post-festum character. This implies that not necessarily the political entity that has won certain mandates in the Assembly will be represented at the parliamentary group level with the same mandated deputies. And since the basis for acquiring the right to nominate the representative for the appointment in the capacity of a CEC member is closely related to constitutional authorizations regarding the morphology of the constitutional mandate of deputies, as members of the highest constitutional body of a legislative character. It is the provision of Article 70, paragraph 1, which gives the freedom to exercise the function of a deputy within his mandate without being subject to any other mandatory mandate. Strengthening the freedom of political determination within the political structure of deputies as members of the Assembly, is related to the very nature of representation. Representation is a dynamic notion. So it is moveable. Its dynamism is also expressed by the definition of a mandate in terms of time. These are even among the fundamental prerogatives of representative democracy, as through the time limitations of mandates, the dynamism of representation is stimulated.”*

49. Finally, Mr. Imeri noted: *“All these questions are eliminated with the interpretation that “the President will appoint members of the CEC from among the parliamentary groups-those that have been created and function within the framework of the internal political structure of the Assembly [...]. Therefore, based on the above, we consider that in the alternative questions that are included in the referral KO79/18 by the President of Kosovo, the answer to interpretation of the provision of Article 139 paragraph 4 of the Constitution of Kosovo should be found in the modality of the second question, namely that: “The members of the CEC should be elected from the parliamentary groups with the right to nominate representatives in the CEC, created after the constitution of the Kosovo Assembly, namely according to the situation in which reflects the composition of the parliamentary groups when the nominations of the representatives for appointment to the CEC should be made”.*

*Comments of the Parliamentary Group of Social Democratic Initiative*

50. On 20 September 2018, Mr. Bilall Sherifi, on behalf of the Parliamentary Group of Social Democratic Initiative, in essence, stated the following:

*“The question of the President of the Republic of Kosovo for the Constitutional Court has no legal constitutional relevance for the appointment of the CEC members regarding the time of establishment of the Parliamentary Groups as it exists according to interpretation of the Court KO119/14 only one time and it is after the constitution of the Assembly.*

*1. There are no parliamentary groups emerging from the elections and after the constitution of the Assembly as the President has posed the question, but there are parliamentary groups only after the constitution of the Assembly.*

2. There is no legal dilemma that the Parliamentary Groups established after the constitution of the Assembly should be represented by a member according to the voting power of the CEC, see Article 139 of the Constitution of the Republic of Kosovo and Article 61 of Law No.03/L-073/2008.

The Parliamentary Group of the Social Democratic Initiative, based on the arguments put forward in these comments, is convinced that the Constitutional Court will maintain the continuity of its interpretation in Judgment KO119/14, regarding the time relevance of the establishment of parliamentary groups as described above so that the Parliamentary Group of the Initiative that now has 8 deputies, to have the right of representation with member in the Central Election Commission in accordance with Article 139 of the Constitution of the Republic of Kosovo and Article 61 of the Law on Central Elections in the Republic of Kosovo.”

### **Relevant constitutional and legal provisions**

#### *Constitution of the Republic of Kosovo*

##### *Article 84 [Competencies of the President]*

[...]

(26) appoints the Chair of the Central Election Commission;

[...]

##### *Article 112 [General principles]*

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.

[...]

##### *Article 139 [Central Election Commission]*

[...]

3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.

4. Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed

*for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo.*

*Law No. 03/L-073 on General Elections in the Republic of Kosovo (published in the Official Gazette on 15 June 2008)*

**Article 61**  
**Mandate and Appointment of CEC Members**

*61.1 The Chair of the CEC shall be appointed in accordance with article 139(3) of the Constitution of Kosovo.*

*61.2 The mandate of the Chair of the CEC shall be seven (7) years commencing on the day stipulated in the notification of appointment by the President of Kosovo.*

*61.3 Appointment of CEC members as provided in article 139 (4) of the Constitution of Kosovo shall be done by the following procedures:*

- a) within 10 days of the coming into force of this law parliamentary groups entitled to appoint a member(s) to the CEC shall notify the President of Kosovo of their appointment. Provided that the individual appointed by the parliamentary group conforms to the requirements of this law, the President of Kosovo shall, within five (5) days confirm the appointment in writing. The appointment shall be effective on the day stipulated in the official appointment by the President of Kosovo;*
- b) the Chairman of the CEC shall serve for not more than 2 consecutive mandates;*
- c) the Members of the CEC shall serve for not more than 3 consecutive mandates. d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;*
- d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;*
- e) notwithstanding point (d) of this paragraph mandate that expires 90 or fewer days before an election or up to 90 days following the certification of the results of an election shall be automatically extended to 90 days after the certification of the results of an election.*

*61.4 The mandate of the members of the CEC shall begin no later than sixty (60) days after the certifications of the Assembly elections results.*

**Admissibility of the Referral**

51. The Court first examines whether the submitted Referral meets the admissibility requirements, as established in the Constitution and further specified in the Law on the Constitutional Court (hereinafter: the Law) and in the Rules of Procedure.

52. Article 113, paragraph 1 of the Constitution stipulates that “[t]he Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties”.
53. The Court emphasizes that the President of the Republic of Kosovo is an authorized party pursuant to Article 113 [*Jurisdiction and Authorized Parties*], paragraphs 2 and 3 of the Constitution.
54. Pursuant to Article 113, paragraph 2, of the Constitution, “[...] the President of the Republic of Kosovo [...] [is] authorized to refer the following matters:
  - (1) the question of the compatibility with the Constitution of laws, of decrees of the [...] Prime Minister, and of regulations of the Government;
  - (2) the compatibility with the Constitution of municipal statutes.”
55. Furthermore, Article 113, paragraph 3, of the Constitution stipulates that [...],the President of the Republic of Kosovo [...] [is] authorized to refer the following matters:
  - (1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
  - (2) compatibility with the Constitution of a proposed referendum;
  - (3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;
  - (4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;
  - (5) questions whether violations of the Constitution occurred during the election of the Assembly.
56. In this respect, Article 113, paragraphs 2 and 3 of the Constitution explicitly provide for cases that the President of the Republic may refer to the Constitutional Court.
57. Therefore, the Court emphasizes that the right of the authorized parties by the Constitution to file referrals before the Court derives from Article 113 of the Constitution. An exception to this is the situation related to Article 62 [*Representation in the Institutions of Local Government*], paragraph 4 of the Constitution, as well as the cases that may arise from additional jurisdiction that may be regulated by law, as established in Article 113, paragraph 10 of the Constitution.
58. Article 62, paragraph 4 of the Constitution defines:

*“In the event the Municipal Assembly chooses not to reconsider its act or decision, or the Vice President deems the result, upon reconsideration, to still present a violation of a constitutionally guaranteed right, the Vice President may submit the matter directly to the Constitutional Court, which may decide whether or not to accept the matter for review.”*

59. However, even with respect to this exemption, when the case on this ground is directly brought before the Constitutional Court, it is at the discretion of the Court to decide whether to accept to consider the relevant case (See the Judgment of the Constitutional Court in case KO01/09, *Applicant: Qemajl Kurtishi*, Deputy President of the Municipality of Prizren, of 18 March 2010).
60. The Court recalls that the Applicant requests the interpretation of Article 139 [Central Election Commission] paragraph 4 of the Constitution, and his request for interpretation was based on Article 84 (9) and Article 112, paragraph 1, of the Constitution.
61. In this regard, the Court notes that the question raised by the Applicant before the Court does not fall within the scope of the jurisdiction of the Constitutional Court as provided by paragraphs 3 and 4 of Article 113 of the Constitution. Furthermore, such a thing was neither requested, nor specified by the Applicant in his Referral.
62. The Court further recalls that the Applicant states: *“Article 84 (9) of the Constitution explicitly gives the President the competence to refer matters to the Constitutional Court. This competence under this constitutional provision is a broad competence and is not subject to any limitations, including but not limited to the specific cases listed in Article 113 of the Constitution.”*
63. The Applicant further states that, under Article 84 (9) of the Constitution, the President has the competence to refer constitutional matters to the Constitutional Court *“[...] as this provision gives the President the competence to refer constitutional matters to the Constitutional Court, when there are unclear constitutional issues that he faces when exercising the competencies guaranteed by the Constitution and in order to realize the primary role of the President as a representative of constitutional legal unity of the people of Kosovo and as a guarantor of the democratic functioning of the institutions and of the constitutional system of the Republic of Kosovo ... The President may refer issues to the Constitutional Court in cases where clarification is needed regarding a situation where the constitutional provision is unclear, and is required that a decision that produces legal effects is rendered”*.
64. In addition, the Applicant states that *“[t]he Constitutional Court, pursuant to Article 112 of the Constitution, is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compliance of laws with the Constitution and in accordance with Article 113 of the Constitution has jurisdiction to decide only on cases brought before a court in a legal manner by the authorized party ...”* adding that *“[...] the admissibility of this referral by the Constitutional Court is self-evident”*.
65. In this respect, the Court reiterates that Article 112 of the Constitution establishes that the Constitutional Court is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compliance of the laws with the Constitution.



66. Therefore, as rightly specified in the content of the Applicant's Referral, the Constitutional Court, pursuant to Article 113, paragraph 1 of the Constitution, has jurisdiction only on cases brought before it in a legal manner by an authorized party.
67. In that regard, the Court is the final authority for the interpretation of the Constitution under Article 112, paragraph 1 of the Constitution, in relation to the cases referred before it as provided for by Article 113. The Court does not deal with interpretations of matters relating to legal actions or inactions of the constitutional institutions for which it is not authorized under Article 113 of the Constitution. Therefore, Article 112, paragraph 1, of the Constitution cannot be interpreted outside the context of Article 113 of the Constitution.
68. As to the meaning and limits of Article 84 (9) of the Constitution, the Court notes that the referrals filed on this basis can only be admissible within the regular jurisdiction of the Court, clearly and explicitly established in Article 113, paragraphs 2 and 3.
69. The Court, in its previous case law, applying the broader understanding of the notion of "constitutional questions", had considered referrals that are not explicitly included within the limits of its jurisdiction under Article 113, paragraphs 2 and 3 of the Constitution. The Court was requested by the President of the Republic to interpret the meaning of specific provisions of the Constitution (see, for example, Case No. KO80/10, *President of the Republic of Kosovo*, Judgment of 7 October 2010, Case No. KO97/10, *Acting President of the Republic of Kosovo*, Judgment of 28 December 2010, Case No. KO57/12, *President of the Republic of Kosovo*, Judgment of 22 October 2012, Case No. KO103/14, *President of the Republic of Kosovo*, Judgment of 1 July 2014).
70. Furthermore, in its case law, the Court had noted that it was in its discretion to decide whether the raised issue was a "constitutional question" and it would decide on a case-by-case basis. The Court, in fact, assessed that "Not every issue that [the Applicant] claims to raise a constitutional question may be such a matter per se" (See Judgment in case KO130/15, *President of the Republic of Kosovo, concerning the assessment of the compatibility of the principles contained in the document entitled "Association/Community of Serb majority municipalities in Kosovo general principles/main elements" with the spirit of the Constitution, Article 3 [Equality Before the Law], paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo mentioned above*, Judgment of 23 December 2015, paragraph 101).
71. The Court's earlier case law regarding the consideration of referrals submitted under a broad meaning of the notion "constitutional question" should be understood in the spirit of the process of establishing the foundations of the constitutional judiciary and of the social need for the Court in its beginnings to be included in interpretations of specific articles of the Constitution, in particular when the questions raised were related to the exercise of the competencies of the President, as established by the Constitution; when the issues raised affected the separation of powers; in preserving the constitutional



order; as well as when the issues raised had fundamental implications for the functioning of the constitutional system of the country (See Judgment in case KO130/15, *the President of the Republic of Kosovo*, cited above, paras 104, 107 and 109. See also case No. KO103/14, *the President of the Republic of Kosovo*, mentioned above, Judgment of 1 July 2014, paragraphs 27, 57 and 61).

72. However, the Court in its present composition considers that, in full compliance with the explicit, exhaustive and restrictive language of Article 113 [Jurisdiction and the Authorized Parties] of the Constitution, all other references in the Constitution related to the referring of constitutional questions to the Constitutional Court stem from Article 113.
73. Based on this, the Court finds that the submitted Referral does not fall within the limits of Article 113, because pursuant to Article 113, paragraph 2, the President may raise questions related to the compatibility with the Constitution of laws, acts of the Government and of the Prime Minister, as defined in 113.2 (1) and the Statute of the Municipality, as defined in Article 113.2 (2) of the Constitution.
74. Whereas, pursuant to Article 113, paragraph 3, the President is authorized to refer matters related to situations of conflict among constitutional competencies of the Assembly, the President and the Government; compatibility of the referendum with the Constitution; the compatibility of the declaration of the state of emergency and the actions taken during this state with the Constitution; the compatibility of the proposed constitutional amendments with international agreements and the review of the constitutionality of the procedure followed; as well as the constitutionality of the process of election of the Assembly.
75. Therefore, the Applicant's competence under Article 84 (9) of the Constitution, must also relate to the jurisdiction of the Court set forth in Article 113, paragraphs 2 and 3 of the Constitution, which explicitly and exhaustively define the questions that the President of the Republic may refer to the Constitutional Court.
76. Based on the fact that the Constitution has explicitly defined the jurisdiction of the Constitutional Court, including the authorized parties to activate its jurisdiction, the possibility for the Court to take a consultative or advisory role is limited, as such role would run counter to its fundamental role to decide on the cases brought before it. The practice of other countries recognizes cases when constitutional courts have exercised advisory jurisdiction, but later such practice of consultative nature has been removed because of its incompatibility with the decision-making nature of constitutional courts. Specifically, in the case of the Constitutional Court of Germany, the Law on the Federal Constitutional Court, at the outset of its existence, provided for the possibility of giving advisory opinions from this court (Law on the Federal Constitutional Court of Germany, *BVerfGG* of 12 March 1951). However, only a few years later, due to the mandatory nature of the "advisory opinions", the provision of the abovementioned law, which allowed such a jurisdiction, was repealed (on 21 July 1956).

77. The Court reiterates that the content of the provision of Article 113 of the Constitution, taken in its entirety, is clear and concrete with regard to the competencies of the President deriving from the context of an authorized party before the Constitutional Court.
78. Therefore, it follows that Article 113 represents the basic and sole jurisdictional foundation of the Court with respect to the authorizations of the President as an authorized party before the Constitutional Court.
79. In addition, the Court recalls that the Applicant in his Referral requests the interpretation of Article 139, paragraph 4 of the Constitution, which stipulates that:

*“Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo”.*

80. Therefore, the Referral does not concern issues that are expressly related to the exercise of the constitutional responsibilities of the President, because neither Article 84 [Competencies of the President], nor Article 139 [Central Election Commission] of the Constitution, provide for the competence of the President to appoint the members of the Central Election Commission, namely:

*Article 84*  
*[Competencies of the President]*

*[...]*  
*(26) appoints the Chair of the Central Election Commission;*  
*[...]*

*Article 139*  
*[...]*

*[Central Election Commission]*  
*[...]*

*3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.*  
*[...]*

81. Unlike Articles 84 (26) and 139 (3) of the Constitution, which clearly provide the competence of the President to appoint the Chair of the Central Election Commission, the competence of the President for the appointment of CEC members is specifically defined only in the provisions of the Law on General Elections in the Republic of Kosovo, namely Article 61, paragraph 3 (a).

82. Finally, the Court finds that in order for the Court to assess the Applicant's Referral, the Referral should be based on Article 113 of the Constitution.
83. Therefore, based on the above, the Court finds that the questions raised by the Applicant before the Court do not fall within the scope of the jurisdiction of the Constitutional Court, as established in Article 113. Therefore, in accordance with Article 113, paragraph 1, of the Constitution, the Court concludes that the Referral is inadmissible.

### **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113, paragraph 1, of the Constitution, Rule 59 (2) of the Rules of Procedure, on 21 November 2018, by majority

### **DECIDES**

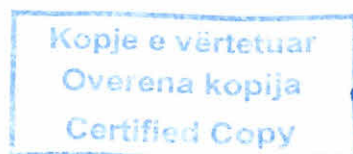
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately

**Judge Rapporteur**

**President of the Constitutional Court**

Nexhmi Rexhepi

Arta Rama-Hajrizi



*This translation is unofficial and serves for informational purposes only.*