



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

Prishtina, on 13 August 2019  
Ref. no.:AGJ 1411/19

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

## JUDGMENT

in

**Case No. KO58/19**

Applicant

**Bilall Sherifi and 29 other deputies of the Assembly of the Republic of Kosovo**

**Constitutional review of decisions No. 57/2019, No. 58/2019, No. 59/2019, No. 60/2019, No.61/2019, No.62/2019, No. 63/2019 and No. 65/2019 of the President of the Republic of Kosovo of 28 March 2019**

### 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

### Applicants

1. The Referral was submitted by: Bilall Sherifi, Aida Dërguti, Besa Baftiu, Dardan Sejdiu, Dardan Molliqaj, Driton Çausi, Dukagjin Gorani, Faton Topalli, Fisnik Ismaili, Frashër Krasniqi, Salih Salihu, Shqipe Pantina, Visar

Ymeri, Muharrem Nitaj, Rasim Selmanaj, Bekë Berisha, Teuta Haxhiu, Shkumbin Demaliaj, Daut Haradinaj, Donika Kadaj-Bujupi, Gani Dreshaj, Ahmet Isufi, Labinot Tahiri, Time Kadrijaj, Blerim Kuçi, Haxhi Shala, Albulena Balaj-Halimaj, Enver Hoti, Zafir Berisha and Ilir Deda (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants authorized Mr. Bilall Sherifi to represent them before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

### **Challenged decision**

3. The Applicants challenge the decisions of the President of the Republic of Kosovo (hereinafter: the President) on the appointment of members of the Central Election Commission of the Republic of Kosovo (hereinafter: the CEC), namely:
  1. Decision No. 57/2019 of 28 March 2019 on the appointment of Mr. Qemajl Kurtishi as a CEC member from the Bosnian community;
  2. Decision No. 58/2019 of 28 March 2019 on the appointment of Mr. Stevan Veselinović for a CEC member from the Serb community;
  3. Decision No. 59/2019 of 28 March 2019 on the appointment of Mr. Ercan Şpat for a CEC member from the Turkish community;
  4. Decision No. 60/2019 of 28 March 2019 on the appointment of Mr. Alfred Kinolli as a CEC member as representative of the Roma, Ashkali and Egyptian communities;
  5. Decision No. 61/2019 of 28 March 2019 on the appointment of Ms Nazlie Bala as a member of the CEC;
  6. Decision No. 62/2019 of 28 March 2019 on the appointment of Mr. Adnan Rustemi as a CEC member;
  7. Decision No. 63/2019 of 28 March 2019 on the appointment of Mr. Florian Dushi as a CEC member;
  8. Decision No. 65/2019 of 28 March 2019 on the appointment of Mr. Sami Hamiti as a CEC member.

### **Subject matter**

4. The subject matter of the Referral is the constitutional review of the challenged decisions, which according to the Applicants' allegation are not in compliance with paragraph 4 of Article 139 [Central Election Commission] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

### **Legal basis**

5. The Referral is based on Article 113, paragraph 2, subparagraph 1 [Jurisdiction and Authorized Parties] of the Constitution, Articles 29 [Accuracy of the Referral] and 30 [Deadlines] Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 7 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure] Constitutional

Court of the Republic of Kosovo no. 01/2018 (hereinafter: the Rules of Procedure).

### **Proceedings before the Court**

6. On 8 April 2019 the Applicants submitted the Referral to the Court, challenging the President's Decree regarding the appointment of the CEC members.
7. On 8 April 2019, the President of the Court appointed Judge Remzie Istrefi-Peci as Judge Rapporteur and the Review Panel, composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.
8. On 12 April 2019, the Court notified the Applicants about the registration of the Referral.
9. On 12 April 2019, the Referral was submitted to the President and he was notified that he could submit his comments regarding the Referral by 26 April 2019. The Court also requested the Office of the President to provide copies of the President's Decree on the appointment of the CEC members.
10. On 12 April 2019, the Court notified the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister), the Ombudsperson and the CEC President about the registration of the Referral.
11. The President of the Assembly was asked to provide one copy of the Referral to all deputies of the Assembly, and all deputies were invited to submit their comments regarding the Referral, if any, by 26 April 2019.
12. On 16 April 2019, the Applicants supplemented the Referral by submitting the challenged decisions to the Court.
13. On 26 April 2019, the Parliamentary Group of the Self-Determination Movement! (hereinafter: the SDM) submitted its comments to the Court regarding the allegations filed in the Referral.
14. On 26 April 2019, the Office of the President of Kosovo submitted to the Court comments regarding the allegations filed in the Referral.
15. On 8 May 2019, the Court notified the Applicants about the comments received regarding the Referral and invited them to submit their comments, if any, by 21 May 2019.
16. On the same date, the Court also notified the President, the President of the Assembly, the Prime Minister, the Ombudsperson and the President of the CEC about the comments received regarding the Referral. The President was notified that he may submit his comments, if any, by 21 May 2019. The President of the Assembly was asked to provide copies of all comments to all deputies of the Assembly and to inform them they could submit their

comments, if any, by 21 May 2019. The Court did not receive any comments from the interested parties.

17. On 26 July 2019, Judge Bajram Ljatifi requested the President of the Court to be excluded from the review of Referral No. KO58/19 because he was previously part of the CEC.
18. On 26 July 2019, the President, in accordance with Article 18.1 (1.3) of the Law and Rule 9 (4) of the Rules of Procedure, approved a decision on the request for recusal from the process of review and decision making in case KO58/19.
19. On 29 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.
20. On 29 July 2019, the Court voted on the admissibility of the Referral and unanimously decided that the challenged acts are not in contradiction with the Constitution.

### **Summary of facts**

21. On 11 June 2017, the early elections for the Assembly were held.
22. On 8 July 2017, the CEC confirmed the election results for the Assembly, based on the following list of election results:
  - a. Kosovo Democratic Party, Alliance for the Future of Kosovo, Kosovo Initiative, Justice Party, Unity Movement, Albanian Democratic Christian Party of Kosovo, Kosovo Conservative Party, Democratic Alternative of Kosovo, Republicans of Kosovo, Front Party, Social Democratic Party, Kosovo National Front (hereinafter: DPK, ABK and Initiative), 39 deputies;
  - b. SDM, 32 deputies;
  - c. Kosovo Democratic Alliance and the New Kosovo Alliance (hereinafter: the KDA and the NKA), 29 deputies;
  - d. Citizens' Initiative Srpska Lista, 9 deputies;
  - e. Kosovo Democratic Party of Turks (Kosovo Democrat Tyrk Partisi), 2 deputies;
  - f. Coalition "Vakat", 2 deputies;
  - g. New Democratic Party, 1 deputy;
  - h. Independent Liberal Party, 1 deputy;
  - i. Kosovo Democratic Party of Ashkali, 1 deputy;
  - j. Liberal Party of Egyptians, 1 deputy;
  - k. United Gorani Party, 1 deputy;
  - l. Ashkali Party for Integration, 1 deputy, and
  - m. United Roma Party of Kosovo, 1 deputy.
23. On 3 August 2017, the Assembly held a constituent session and, *inter alia*, established an *Ad hoc* committee for the verification of quorum and mandates (hereinafter: *Ad hoc* committee).



24. On the same date, the *Ad hoc* committee submitted a report based on the list of confirmed election results and established mandates based on the confirmed results.
25. On 7 September 2017, the Assembly was constituted by the election of the President and the Vice-President.
26. In September 2017, a number of deputies informed the President of the Assembly about the establishment of a new parliamentary group - the Social Democratic Initiative.
27. In September 2017, a number of deputies informed the President of the Assembly about the establishment of a new parliamentary group - the Alliance for the Future of Kosovo (hereinafter: the AFK).
28. On 14 March 2018, 12 (twelve) deputies notified the President of the Assembly about the establishment of a new parliamentary group - the Group of Independent Deputies, which was subsequently registered as a parliamentary group, the Social Democratic Party (hereinafter: the SDP).
29. On 27 March 2018, the President addressed the President of the Assembly requesting that the parliamentary groups with the right to appoint a member (members) to the CEC and representatives of other non-majority communities in Kosovo with guaranteed seats be informed to propose/appoint a name (names) of the members for the CEC.
30. On 7 June 2018, the President, pursuant to paragraph 9 of Article 84 of the Constitution, submitted to the Court Referral KO79/18, requesting the Court to interpret paragraph 4 of Article 139 [Central Election Commission] of the Constitution.
31. On 3 December 2018, the Court published the Resolution on Inadmissibility in case KO79/18. In that case, the Court declared the Referral inadmissible and held that Article 84.9 of the Constitution was not independent of Article 113 of the Constitution and that the constitutional issues must be referred to the Court only based on Article 113 of the Constitution.
32. On 14 December 2018, the Office of the President addressed the parliamentary groups represented in the Assembly of Kosovo to nominate candidates/nominees of the parliamentary groups for CEC members, to be appointed by the President. The request of the Office of the President was based on Article 139.4 of the Constitution of the Republic of Kosovo and Articles 61 and 62 of Law No. 03/L-073 on General Elections in the Republic of Kosovo (hereinafter: the Law on Elections).
33. In the period between 15 and 26 December 2018, the parliamentary groups of deputies submitting this Referral, the SDP, the ABK and the Initiative, submitted their nominations for the CEC members.

34. Between 18 and 26 December 2018, the Office of the President addressed the contact persons of the parliamentary groups with information that the nominations for CEC members were received for review. Also, it was requested to submit additional documents for persons who were nominated for CEC members.
35. Between 20 December 2018 and 9 January 2019, the parliamentary groups of deputies submitting this Referral submitted additional documentation to the Office of the President.
36. On 28 March 2019, the President by decisions No. 57/2019, No. 58/2019, No. 59/2019, No. 60/2019, No. 61/2019, No. 62/2019, No. 63/2019 and No. 65/2019 of 28 March 2019, nominated CEC members from political parties, pre-election coalitions and citizen initiatives that won the majority seats according to the results of the Assembly elections of 11 June 2017. The President did not nominate the persons who proposed SDP, ABK and the Initiative as CEC members.

### **Applicant's allegations**

37. The Applicants allege that the challenged decisions are contrary to the provisions of paragraph 4 of Article 139 [Central Election Commission] of the Constitution.
38. The Applicants challenge the President's decisions in its entirety. They challenge the President's interpretation that the parliamentary groups, based on paragraph 139 of the Constitution, are those political parties, coalitions or citizens' initiatives that have won the majority of seats in the Assembly according to the election results.
39. The Applicants base their allegation on the recognition of the "*current and factual situation, including here the legal situation*" in the Assembly, because, according to their allegations, "*in this present case we are dealing with the current status of representation in the Assembly of Kosovo*".
40. The Applicants' first objection concerns the form of appointment of the CEC members from the parliamentary groups that emerged from the political entities that won the elections for the Assembly of Kosovo. The Applicants emphasize the need to put emphasis on the terminology used by the Constitution of Kosovo in the relevant provision of Article 139 paragraph 4 of the Constitution, which reads: "*Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly*". The term "represented" has the of a *post-festum* character, which in itself implies that "*it is not necessary that a political entity that has won certain seats in the Assembly be represented at the level of a parliamentary group with that number of deputies with a mandate*".
41. The Applicants state that the nomination of members for representation in the CEC "*is closely related to the constitutional powers with regard to the morphology of the constitutional mandate of deputy, as members of the*

highest constitutional body of a legislative character". They also allege that the "provision of Article 70 paragraph 1 provides [...] the freedom to exercise the function of deputy within the scope of his/her mandate, without being subject to any other binding mandate".

42. The Applicants also allege that "the strengthening of the freedom of political choice within the political structure of deputies as members of the Assembly is linked [...] to the very nature of representation. Representation is a dynamic concept. Thus, it is changeable. Its changeability is also reflected in the limitation of a mandate in terms of time. These are even one of the basic advantages of representative democracy, as it promotes the dynamism of representation beyond the time limit of the mandate". On this ground, according to the Applicants, "the appointment of CEC members, taking into account the structure of parliamentary groups according to the result of the election of political entities, [...] [...] would preserve political freedom of representation in the Assembly of Kosovo and [...] deny political initiatives in the form of parliamentary groups of deputies".
43. In addition, the Applicants emphasize that "the important issues such as the mandate and requirements for the appointment of CEC members are not at all specified in the constitutional provisions. On the other hand, since the entry into force of these provisions, the provisions of the Law on General Elections have revived the implementation of the constitutional norms of Article 139 of the Constitution of Kosovo". According to their allegations, Article 61, paragraph 3 of the aforementioned Law regulates the deadline for the appointment of CEC members. Accordingly, according to their allegations, this provision contains a standard of recognition of the *post festum* factual and legal status.
44. The Applicants further state that, although Article 18 of the Law on General Elections recognizes only pre-election coalitions, paragraph 3 of Article 18 emphasizes that after the dissolution of the coalition, each of the registered political parties that were a member of the coalition was jointly and severally liable with debts and imposed possible fines.
45. According to the Applicants' allegations, the President did not comply with the provisions of the Rules of Procedure of the Assembly "which obliges him, beforehand, after a certain cycle of general elections for the Assembly of Kosovo, to issue an official letter and EX OFFICIO requesting the correct and official answer, how many parliamentary groups has the Assembly of Kosovo, at that moment: in order, at a later date, on the basis of a factual, realistic and accurate situation, to request that these parliamentary groups - of certain political entities - within 21 days, in full compliance with the provisions of paragraph 4 of Article 139 of the Constitution of Kosovo, and in accordance with the principle of representation - democratic representation and proportionality, nominate their potential candidates for the members of the Central Election Commission of Kosovo. In the previous practice, the President has always addressed the Assembly, through the President of the Assembly, with the question of what are the six existing parliamentary groups in the Assembly regarding the process of appointing CEC members. In

*this regard, a request was sent to the Assembly, but the reply was never sent to the President”.*

46. The Applicants also allege that the Office of the President erroneously applies the principles of Judgment KO119/14 which “[...] *had to do with a completely different matter, not with the implementation of the provisions of Article 139, paragraph 4 of the Constitution of Kosovo [...]. According to this judgment, it is clear that the answer to the question asked was given. Therefore, parliamentary groups resulting from the elections cannot create new groups until institutions are constituted and it clarifies what institutions, therefore, it is not said all institutions, but in the case of the Assembly (the Presidency with the President and the Government). The norm applied to parliamentary groups, which is Article 139 of the Constitution, is not related to the judgment of the Court on the establishment of institutions...* ”. Therefore, according to the Applicants, “[...] *Article 139 is an original/source norm that states that each parliamentary group has the right to send a member to the CEC. Judgment KO119/14 only has to do with a special legal situation, a special situation that was initiated at that time [...]*”.
47. The Applicants are also refer to the process of election of the Constitutional Court judges with members of the CEC, stating that “[...] *the process of election, interviewing and overall parliamentary procedure for Constitutional Court judges does not fall within the parliamentary groups that have stemmed since the last election, but from the heads of an existing parliamentary group in the Assembly (Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, Article 6, paragraph 2, subparagraph 2.2)* ”.
48. Finally, the Applicants state that the method of appointment of the CEC members, based on the identification of parliamentary groups resulting from the election result, is absurd, because it does not provide a solution in cases of dissolution of a parliamentary group or political entity that has nominally won seats in the Assembly of Kosovo, and which, although in the meantime the deputies won seats under the candidate list of the relevant political entity, ceased to exist.
49. In conclusion, the Applicants request the Court to declare the Referral admissible and to quash the decisions of the President on the appointment of CEC members on the grounds of erroneous application of paragraph 4 of Article 139 of the Constitution.

### **Comments submitted by the SDM Parliamentary Group**

50. With respect to the allegations made in the Referral, the SDM Parliamentary Group initially describes the composition, forms of organization and functions of the Central Election Commissions. They emphasize three forms of organization of central election commissions: a) those composed of judges or experts recruited through competition; b) those composed of exclusively registered political parties participating in the elections; and c) mixed

commissions with partly political-party composition and partly composed of experts or judges.

51. The SDM further states that Kosovo has opted for a purely political-party model, with the exception of the CEC chairman coming from the judicial system, and his appointment is the sole responsibility of the President of the Republic of Kosovo. According to their allegations, the role of the President in appointment of other CEC members is solely of the nature of confirming nominations of political entities after the Office of the President is satisfied that the criteria and conditions for eligibility of candidates are met.
52. They further state that paragraph 4 of Article 61 of the Law on General Elections sets a deadline for the beginning of the term of office of the CEC members, which is related to the date of confirmation of the election results and not to the date of constitution of the Assembly. Therefore, according to them, the functioning of the CEC has nothing to do with the constitution of the Assembly, which may be longer than a period of 60 (sixty) days from the date of confirmation of the election results.
53. The SDM also states that paragraph 118 of the judgment of the Court No. KO119/14, produced legal consequences regarding the interpretation of the concept of a parliamentary group by entitling parliamentary groups, as set out in that paragraph, to nominate candidates in accordance with the Law on Elections in a capacity of the CEC member.
54. With regard to the Rules of Procedure of the Assembly of Kosovo, which allows for the permanent establishment of parliamentary groups, the SDM considers that the composition of the CEC cannot monitor the internal dynamics of the Assembly of Kosovo. According to their allegations, “... *such parliamentary groups have no constitutional or legal right to delegate certain individuals to constitutional institutions, including members of the CEC*”.
55. Finally, the SDM emphasizes that when it comes to the composition of the CEC, the spirit of Article 139 (4) of the Constitution implies parliamentary groups in terms of political entities that have passed the electoral threshold, which applies only to political entities that participated in the elections and which name is on the ballot.

### **Comments submitted by the President of Kosovo**

56. With regard to the Applicants’ allegations, the President describes the logic and legal basis for rendering the challenged decisions.
57. At the outset, the President provides a historical background of the appointment of CEC members in past convocations. As for the appointment of CEC members in the current, the following actions preceded: a) a letter addressed to the President of the Assembly of 27 March 2018 requesting to notify parliamentary groups with the right to nominate members to the CEC; b) following the nomination of candidates by parliamentary groups, the president encountered legal dilemmas as to which parliamentary groups from



which candidates should be nominated the CEC members. On this basis, the President emphasizes that he requested the Constitutional Court to interpret Article 139 paragraph 4 of the Constitution by clarifying issues concerning the appointment of CEC members, and (c) On 21 November 2018, the Court declared inadmissible the request for interpretation of Article 139 paragraph 4 of the Constitution (Resolution on Inadmissibility in case KO79/18) emphasizing that the Court is restricted from taking the consultative and advisory role. Consequently, the question raised by the President remained unanswered.

58. The President further mentions applicable legislation concerning the election of CEC members, citing Article 139 paragraph 4 of the Constitution, Articles 61 and 62 of Law No. 03/L-073 on General Elections in the Republic of Kosovo, as well as problems with applicable legislation regarding the appointment of CEC members.
59. The Office of the President also refers to the judgment of the Court in case KO119/14, and refers to the conclusions drawn from that judgment. According to paragraph 118 of Judgment KO119/14 of the Constitutional Court, parliamentary groups represented in the Assembly shall mean those parliamentary groups elected by the people on the basis of voters' lists and ballots, as they participated in general elections.
60. Finally, the President emphasizes that the appointment of CEC members was conducted in accordance with Article 139 paragraph 4 of the Constitution, taking into account the parliamentary groups that were represented at the first session of the Assembly, because the parliamentary groups subsequently formed, and in addition to being formed on the basis of the Rules of Procedure of the Assembly, do not represent the will of the people expressed in the free elections held in 2017.

### **Admissibility of the Referral**

61. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure.
62. In this respect, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes: "*The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties*".
63. In addition, the Court also refers to paragraph 2 (1) of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes as follows:

*"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*

*(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government; [...]*”.

64. In this regard, the Court also refers to Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law, which provide:

Article 29  
Accuracy of the Referral

*“1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (1/4) of the deputies of the Assembly of the Republic of Kosovo [...].*

*2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;.*

*3. A referral shall specify the objections put forward against the constitutionality of the contested act. ”.*

Article 30  
Deadlines

*“A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force”.*

65. The Court also refers to Rule 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure, which stipulates:

*“(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.*

*(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.*

*(3) The referral shall specify the objections put forward against the constitutionality of the contested act.*

*(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act”.*

66. In the light of the abovementioned normative framework, it follows that any request made by the Assembly pursuant to paragraph 2 (1) of Article 113 [Jurisdiction and Authorized Parties] of the Constitution must fulfill the following requirements in order to be admissible:
- a. that it is submitted by at least one quarter (1/4) of the deputies of the Assembly;
  - b. that it was submitted in connection with the question of compatibility of laws, decrees of the President and the Prime Minister and regulation of the Government with the Constitution;
  - c. to specify whether the entire challenged act or specific parts of that act are considered incompatible with the Constitution;
  - d. to specify all issues concerning the unconstitutionality of the challenged act;
  - e. that it was submitted within 6 (six) months from the effective date of the challenged act.
67. With regard to the requirement set out in subparagraph *a*), the Court notes that the referral was signed by 30 (thirty) deputies of the Assembly and submitted by the Applicants' representatives on the basis of the authorizations given by them. Accordingly, the Court finds that the Referral was submitted by one-fourth (1/4) of the Assembly deputies in accordance with Article 113, paragraph 2, subparagraph 1 of the Constitution, in conjunction with Article 29, paragraph 1 of the Law. Consequently, the Applicants are the authorized party.
68. The Court also notes that the Applicants, with respect to the requirement set out in subparagraph (b), have specified acts which constitutionality they challenge before the Court, namely the following decisions of the President: Decision No. 57/2019, Decision No. 58/2019, Decision No. 59/2019, Decision No. 60/2019, Decision No. 61/2019, Decision No. 62/2019, Decision No. 63/2019 and Decision No. 65/2019 of 28 March 2019.
69. In this regard, Article 113, paragraph 2, subparagraph 1 constitutes the main point of reference in order to assess what acts of the President may be challenged by the Assembly before the Constitutional Court, stating expressly: the decrees of the President.
70. The decisions of the President are not specifically mentioned in Article 113 (2), subparagraph 1 of the Constitution. However, the Court recalls that in its case law it considered the constitutionality of other acts of the Government and the Prime Minister, although they are not explicitly mentioned in Article 113 (2), subparagraph 1 of the Constitution.
71. Thus, in Decision KO73/16, the Court held that "*Administrative Circular [No. 01/2016] issued by the Ministry of Public Administration of the Republic of Kosovo, regardless of its name, is of a mandatory nature and indeed touches upon the constitutional status of the independent institutions*", therefore, it found that it constituted a legal act which constitutionality could be assessed by the Court (see, the Constitutional Court of the Republic of Kosovo: Case No.

KO73/16, submitted by the Ombudsperson, Judgment of 8 December 2016, paragraph 58).

72. Likewise, in Case KO12/18, the Court decided that: *“the decisions of the Government may be admitted for constitutional review by the Constitutional Court, only when it is substantiated that they raise important constitutional matters. [...] The Court notes that the essential issue, over which the Applicants and the Government submit opposing allegations, concerns the relationship between the decision of the Government to raise the salaries and the Law on Budget for 2018. [...] In this regard, the Court considers that the decision concerned raises important constitutional matters that deal with the exercise of the constitutional competences by the Assembly and the Government”* and can be assessed by the Court even though „decisions“ as legal acts are not specifically mentioned in Article 113 paragraph 2 (1) of the Constitution (see, Constitutional Court of the Republic of Kosovo: Case No. KO12/18, Applicant *Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo*, judgment of 29 May 2019, paragraphs 88, 89 and 90).
73. In this respect, the Court considers that, based on its earlier abovementioned practice in relation to the acts of the Government, and other legal acts of the President, whether or not they are addressed as “decrees”, they may be assessed by the Court if they fulfill the requirements set out above and if they raise constitutional issues.
74. Therefore, in the present case, the Court notes that the President's decisions are individual legal acts of a binding nature governing an individual situation and are rendered on the basis of the powers vested in the President directly by the Constitution or by law.
75. In this respect, the Court finds that the challenged decisions meet the requirements to be considered by the Court under Article 113, paragraph 2, subparagraph 1 of the Constitution. This is because the Court considers regardless of their name, the challenged decisions are binding in nature and concern the appointment of members of the CEC, which is an independent constitutional institution mandated to organize and monitor elections in Kosovo on the basis of the powers conferred on it based on the Constitution and the Law on General Elections in Kosovo.
76. In addition, the issues raised by the Applicants are of constitutional importance related to the right of parliamentary groups represented in the Assembly to nominate CEC members in accordance with Article 139 paragraph 4 of the Constitution.
77. With respect to the requirement foreseen under item c) and d), the Applicants specified that they challenge the challenged acts in their entirety and raised questions concerning the unconstitutionality of the challenged acts in accordance with Article 113, paragraph 2, subparagraph 1 of the Constitution, Article 29, paragraph 2 and 3 of the Law and Rule 67 paragraph 2 and 3 of the Rules of Procedure. The Court also finds that the Referral was submitted

within the time limit laid down in Article 30 of the Law and Rule 67 paragraph 4 of the Rules of Procedure.

78. Therefore, the Applicants' Referral is admissible for review on merits.

### **Merits of the Referral**

79. The Court recalls that the essence of the Applicants' Referral relates to the allegation that by the challenged acts on the appointment of CEC members, the President violated Article 139 paragraph 4 of the Constitution, which provides:

*"Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats [...]."*

80. The Applicants allege that the President, by interpreting the "largest parliamentary groups" as a party, coalition, civic initiative that emerged from political entities that won the elections for the Assembly of Kosovo and appointment of CEC members by challenged acts, according to that interpretation, violated the constitutional provisions. This is because "the largest parliamentary groups", according to Article 139, paragraph 4 of the Constitution, are those groups that are formed after the constitution of the Assembly of the Republic of Kosovo, and exist as such at the moment when the President appoints the CEC members.
81. They relate their arguments regarding the referral to the fact that, when the Law on General Elections came into force, it was envisaged that CEC members would be appointed 10 (ten) days after the Law comes into force, even though the elections were held 7 (seven) months earlier. They argue that the intention was to propose the CEC members by existing parliamentary groups at the time of the appointment, not political entities that arose as a result of the elections.
82. In addition, according to them, the way the term "parliamentary group" is interpreted by the President of the Republic, in addition to contravening Article 139 (4) of the Constitution, also denies free political initiatives to form parliamentary groups of deputies.
83. The Applicants also mention the procedure for considering candidates for appointment to the Constitutional Court, noting that the process is managed by existing parliamentary groups in the Assembly.
84. The Court recalls, first of all, that the Constitution, apart from specifying the manner of appointment of CEC members and from what parliamentary groups are appointed, does not contain any specific definition as to whether the parliamentary groups for the purpose of appointing CEC members are those parliamentary groups: *i)* that emerged from political entities that won the elections for the Assembly of Kosovo, or, *ii)* those that were established after the constitution of the Assembly of the Republic of Kosovo.



85. Within its jurisdiction, pursuant to Article 112 of the Constitution, the Court, taking into account the specific issues raised by the Applicants, will give the necessary interpretation of Article 139 paragraph 4 of the Constitution, respecting the letter and spirit of the Constitution and the principles of democracy, in conjunction with other relevant legal provisions.
86. In this respect, the Court will assess the constitutionality of the appointment of 6 (six) CEC members from parliamentary groups represented in the Assembly who are not entitled to participate in the distribution of reserved seats. Election of CEC members proposed from the ranks of parties or coalitions holding reserved seats, namely the constitutionality of decision no. 57/2019, decisions no. 58/2019, decisions no. 59/2019 and decisions no. 60/2019, are not the subject of consideration of this referral.
87. The Court recalls that the term “largest parliamentary group” used in Article 139 (4) of the Constitution is also used in Article 67 paragraphs 2 and 3 in connection with the election of the President and Vice-President of the Assembly, that is, “political party or coalition” in Article 84, paragraph 14, and Article 95, paragraph 1 of the Constitution, in conjunction with the appointment of the mandator to form the Government.
88. In this regard, the Court recalls its judgment in Case KO119/14, in which it found that: *“in relation to the election of President and Deputy Presidents of the Assembly and the formation of the Government, the Constitution uses different expressions for one and the same reality. The different expressions are, namely: the seats (...) are distributed (...) in proportion to the number of valid votes received (...) [Article 64 (1) of the Constitution]; the largest parliamentary group [Article 67 (2) of the Constitution]; the political party or coalition holding the majority in the Assembly [Article 84 (14) of the Constitution]; the political party or coalition that has won the majority in the Assembly [Article 95 (1) of the Constitution”* (see judgment in case KO119/14, *Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo*, Constitutional review of Decision No. 05-V-001, voted by 83 deputies of the Assembly of the Republic of Kosovo on the election of the President of the Assembly of the Republic of Kosovo, of 17 July 2014, judgment of 26 August 2014, paragraph 104).
89. In accordance with that judgment, *“as the largest parliamentary group according to Article 67 (2) of the Constitution is to be considered the party, coalition, citizens' initiatives and independent candidates that have more seats in the Assembly, in the sense of Article 64 (1) of the Constitution, than any other party, coalition, citizens' initiatives and independent candidates that participated as such in the elections. [...]”* (see judgment in Case KO119/14, *Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 116).
90. As regards the use of terms “political party or coalition” referred to in Articles 84 (14) and 95 (1) of the Constitution, the Court recalls its judgment in case KO103/14, in which it decided that *“[...] the political party or coalition can only be the one that has won the highest number of votes in the elections,*

*respectively most of the seats in the Assembly*” (see case KO103/14, Applicant President of the Republic of Kosovo, Judgment of 1 July 2014, paragraph 86).

91. Accordingly, it follows from the above judgments that, pending the constitution of the Assembly and for the purpose of its constitution, pursuant to Article 67 of the Constitution, the parliamentary groups reflect the composition of political parties, coalitions or citizens' initiatives arising from elections. The same definition applies to a party or coalition that won the election and has the right to nominate a mandator to form the Government under Article 84, paragraph 14, and Article 95, paragraph 1 of the Constitution. The Court emphasizes that this interpretation applies only to the constitution of the Assembly, that is, to determine the mandate for forming the Government.
92. The Court also recalls its case law in which it held that *“a parliamentary group, in the strictest sense of the word (in stricto sensu) and according to the Rules of Procedure of the Assembly and its Annexes, can only be registered after the constitution of the Assembly, i.e. after the election of the President and Deputy Presidents of the Assembly. At the moment of conveying the Constitutive Session of the Assembly, a parliamentary group is composed of the candidates that were elected as member of the Assembly on the ballot of the party, coalition, citizens' initiatives and independent candidates that were registered in the election, participated in them, passed the legal threshold and acquired seats in proportion to the number of valid votes received by them in the election to the Assembly ”* (see judgment in Case KO119/14, Xhavit Haliti and 29 other Members of the Assembly, cited above, paras. 117 and 118).
93. In this connection, the Court refers to paragraph 1 of Article 70 [Mandate of the Deputies] of the Constitution which provides: *“Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate”*, as well as Article 74 [Exercise of Function] of the Constitution according to which: *„Deputies of the Assembly of Kosovo shall exercise their function in best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly ”*.
94. The Court also recalls Article 20 paragraphs 1 and 2 of the Rules of Procedure of the Assembly, which provides:

*“1. Members of Assembly may establish a parliamentary group on account of their political affiliation or programme determination.*

*2. The Member of Assembly shall have the right to take part equally in a parliamentary group, leave the group, form a new parliamentary group, join another group or act as an independent Member of Assembly. In each case, the Member of Assembly shall be obliged to notify the President of the Assembly on his decision in writing.*

*[...]”*
95. Based on the foregoing, upon constitution of the Assembly, the deputies are free to form parliamentary groups, to leave a particular parliamentary group,

or to join another parliamentary group and to exercise their rights as a parliamentary group, in accordance with the Constitution and the Rules of Procedure.

96. This interpretation is also consistent with the practice established by the Assembly, which allows changes in the number of members of a parliamentary group to be reflected in the membership of the standing committees and *ad hoc* committees of the Assembly. In this connection, the Court refers to the decision of the Assembly 06-V-006 on the formation of fourteen (14) parliamentary committees, of 3 October 2017; Decision of the Assembly 06-V-011 on amending and supplementing Decision No. 06-V-006, of 26 October 2017; and Assembly Decision 06-V-032 amending and supplementing Decision no. 06-V-006, dated 26 October 2017.
97. However, with regard to the issues raised by the Applicants, the Court will assess whether the parliamentary groups for the purpose of appointing CEC members, pursuant to paragraph 4 of Article 139 of the Constitution, are those emerging from the elections from the Assembly, or parliamentary groups that are formed after the constitution of the Assembly.
98. In this regard, the Court will assess the constitutional and other provisions pertaining to the parliamentary groups of the Assembly, having regard to (i) the constitutional role of the CEC as an independent institution for the management of elections and referendums, (ii) the manner of appointing CEC members; (iii) the duration of a mandate and (iv) the time of their appointment.
99. The Court refers to Article 139 paragraph 1 of the Constitution, which provides:

*“The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results“.*
100. Therefore, the CEC is a permanent body mandated to govern elections and referendums in Kosovo, which carries out its functions in a professional and impartial manner, regardless of any political interest. Accordingly, the Constitution attributes to the CEC the nature of a permanent state body and recognizes it as the sole and independent authority to control and confirm the mandate of representative institutions.
101. The Court also recalls its case law in which it assessed the role of the independent constitutional institutions referred to in Chapter XII of the Constitution, and found that independent institutions, including the CEC, are not part of the legislation power, the executive and the regular judiciary, and that the Constitution hereby guarantees the institutions a special status as regards their independence (see, *mutatis mutandis*, Case KO73/16, Applicant the Ombudsperson, Constitutional review of Administrative Circular No. 01/2016, published on 21 January 2016 by the Ministry of Public Administration of the Republic of Kosovo, Judgment of November 16, 2016, Attitudes 61-65).

102. The Court recalls once again Article 139 paragraph 4 of the Constitution, which provides:

*“Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats [...]”.*

103. The Court also recalls Article 61 paragraphs 3 and 4 of the Law on General Elections in Kosovo, which stipulates:

*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;  
[...]*

*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.*

104. The Court recalls that under the abovementioned constitutional provisions, CEC members are not mandated for a fixed term. Their mandate is related to the mandate of the election cycle and, in principle, begins no later than 60 (sixty) days after the election results are confirmed, with the exception of the exceptions provided for in Article 61, paragraph 3, subparagraph (e) of the Law on Elections.
105. Based on the foregoing, the intention of the legislator was to appoint the CEC members as soon as possible, after the election for the Assembly is completed, by setting a deadline of 60 (sixty) days, which shall begin to run, not from the date of constitution of the Assembly, but from the confirmation of the election results, and to serve as members of the CEC until the confirmation of the results of the next elections for the Assembly, with the exceptions provided for in Article 61, paragraph 3, subparagraph (e) of the Law on Elections.
106. Therefore, pursuant to the abovementioned provisions, the election of CEC members is not related to the issue of constitution of the Assembly, which may or may not take place within 60 (sixty) days from the date of confirmation of

the election results, or with parliamentary groups in the narrow sense, which are formed after the constitution of the Assembly, when parliamentary life begins in the full sense of the word, which enables the organization of deputies into the parliamentary groups that can be distinguished from parties or coalitions that have emerged from the elections.

107. Members of the CEC, although proposed by parliamentary groups, the time of their appointment is associated with the date of confirmation of the elections, and not with the constitution of the Assembly or the organization of parliamentary groups in a narrow sense for the purposes of the work of the Assembly.
108. As regards the procedure for considering candidates for appointment to the Constitutional Court, the Court notes that this process is linked with parliamentary groups after the Assembly is constituted, and thus does not present a situation similar to the process of appointment of CEC members.
109. It can also be seen from the practice of other countries that members of election commissions, when proposed by the Assembly, are mainly proposed by the political parties or coalitions that have emerged from the elections, and that such proposals are submitted by political parties or coalitions representing position and opposition (see practice of Croatia, Slovakia and Bulgaria).
110. It follows from the foregoing that the composition of the CEC is intended to reflect the composition of the Assembly according to the election results, which means that political entities that have participated in the elections and which won the largest number of seats for the Assembly have the right to nominate CEC members who are appointed by the President, and as part of the CEC as a permanent independent body to which the Constitution has given a mandate to govern the electoral process and referendums and have a mandate until the next general elections, subject to the exceptions referred to in Article 61, paragraph 3, subparagraph (e) of the Law on General Elections, when a new CEC composition is appointed.
111. Therefore, CEC members cannot change every time the composition or membership of parliamentary groups within the same legislature changes, as is the case with the composition of parliamentary committees that reflect changes that have occurred in parliamentary groups during a single legislature.
112. The definition or role of parliamentary groups in the narrow sense of the word and for the purposes of the functioning of the Assembly, referred to in other constitutional provisions or as provided for in the Rules of Procedure of the Assembly, cannot apply automatically and be valid in the case of a specific constitutional provision relating to CEC. Such a practice of changing the CEC composition every time the parliamentary groups in the Assembly are changed, in addition to lacking a basis in the Constitution and law, would also impair the institutional stability of the CEC functioning as provided by the Constitution.
113. Moreover, such a dynamic practice of continuous change within a single mandate is not supported either by the previous institutional practices of the



CEC of Kosovo, but also by the relevant practice of the election commissions of other countries. See the practice of Slovakia, Bulgaria, Albania, Montenegro and Croatia.

114. Such a practice is not favored by either the Venice Commission or the OSCE/ODIHR, which emphasize that the Central Election Commission must have a permanent character and that the bodies appointing the members of these commissions should not be free to dismiss them because it would jeopardize their independence (see the *Code of Good Practice in Electoral Matters*, adopted by the Venice Commission at its 52nd Plenary Session, held on 18-19 October 2002, p. 10 and 26, and the *Election Law*, Venice Commission, CDL-EL(2013)006, of 3 July 2013, p. 17 and 18. See also *Guidelines for Reviewing Legal Framework for Elections*, Second Edition, OSCE/ODIHR 2013, p. 29).
115. The appointment of CEC members based on the results of general elections ensures that there is no institutional vacuum in the CEC, regardless of the time of the establishment of the Assembly. This means that the President, based on Article 61.4 of the Law on Elections, may exercise his/her duty of appointing CEC members within 60 (sixty) days from the date of confirmation of the elections by parliamentary groups political entities based on the results of the elections for the Assembly.
116. Accordingly, based on the above, the Court considers that, based on Article 139 paragraph 4 of the Constitution, as well as other legal provisions related to Article 139 of the Constitution, the CEC members are appointed from parliamentary groups, directly deriving from political parties, coalitions or citizens' initiatives as a result of general elections and consequently won the largest number of seats in the Assembly. Considering the role of the CEC as defined by the Constitution as a permanent election management institution, the fact that the mandate of the CEC members is related to the cycle of elections for the Assembly, the specific manner of their appointment, and especially the time of appointment CEC members, which is not connected with time of the constitution of the Assembly, nor with the manner in which the Assembly functions, but with the date of confirmation of the election results.
117. Therefore, the Court finds that the largest parliamentary groups represented in the Assembly, for the purposes of Article 139 paragraph 4 of the Constitution, are those 6 (six) parties, coalitions, citizens' initiatives, which have more seats in the Assembly than any other party, the coalition, citizens' initiatives that participated in the elections for the Assembly as such.
118. Therefore, the Court considers that the challenged acts do not violate the provisions of the Constitution, namely paragraph 4 of Article 139 [Central Election Commission] of the Constitution.
119. The Court finds that the interpretation of parliamentary groups for the purposes of Article 139 paragraph 4 of the Constitution does not violate the free initiative and internal organization of political parties, individuals or other initiatives in the Assembly, as it applies only for the purposes of this provision.

According to the Constitution and the Rules of Procedure of the Assembly, the deputies are free and have the right to organize themselves in parliamentary groups, and that organization, including the formation or change of parliamentary groups, reflects, in accordance with the Constitution and law, on the daily work of the Assembly and its bodies throughout the entire legislature.

### **FOR THESE REASONS**

The Constitutional Court, pursuant to Article 113, paragraph 2, subparagraph 1 of the Constitution, Articles 29 and 30 of the Law and pursuant to Rules 59 (1) and 67 of the Rules of Procedure, on 29 July 2019:

### **DECIDES**

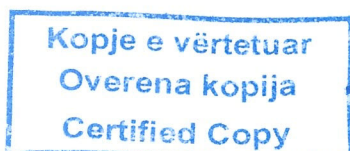
- I. TO DECLARE the Referral admissible for review on merits;
- II. TO HOLD that Decision No. 57/2019, Decision No. 58/2019, Decision No. 59/2019, Decision No. 60/2019, Decision No. 61/2019, Decision No. 62/2019, Decision No. 63/2019, Decision No. 65/2019, of 28 March 2019, of the President of the Republic of Kosovo, are not in contradiction with paragraph 4 of Article 139 [Central Election Commission] of the Constitution;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20 paragraph 4 of the Law; and
- V. This Judgment is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Remzije Istrefi-Peci

Arta Rama-Hajrizi



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