



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

Prishtina, on 30 November 2020
Ref. no.:RK 1652/20

This translation is unofficial and serves for informational purposes only.

DECISION TO STRIKE OUT THE REFERRAL

in

Case No. KO98/20

Applicant

Hajrulla Çeko and 29 other deputies

**Constitutional review of Decision No. 52/2020, of the President of the
Republic of Kosovo of 14 March 2020**

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 30 deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), namely: Hajrulla Çeko, Rexhep Selimi,

Yllza Hoti, Liburn Aliu, Fatmire Mulhaxha Kollçaku, Arbërie Nagavci, Hekuran Murati, Fitore Pacolli, Saranda Bogujevci, Jahja Koka, Mefail Bajçinovci, Valon Ramadani, Mimoza Kusari Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Arbër Rexhaj, Arbëresha Kryeziu Hyseni, Labinotë Demi Murtezi, Alban Hyseni, Gazmend Gjyshinca, Arta Bajraliu, Enver Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani, Fitim Haziri, Elbert Krasniqi, Eman Rrahmani and Salih Zyba (hereinafter: the Applicants or Applicant deputies).

2. The Applicants were represented in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), by deputy Hajrulla Çeko.

Challenged act

3. The Applicants challenge Decision No. 52/20 of the President of the Republic of Kosovo, of 14 March 2020 (hereinafter: the challenged Decision) for the postponement of the extraordinary elections for the President of the Municipality of Podujeva.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Decision, which according to Applicants' allegations is not in compliance with paragraph 4 of Article 84 [Competencies of the President], Article 7 [Values], Article 123 [General Principles], Article 45 [Freedom of Election and Participation], paragraph 1 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 21 of the Universal Declaration of Human Rights (hereinafter: the UDHR), Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

5. The Referral is based on sub-paragraph (1) of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 29 [Accuracy of the Referral] and 30 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] and 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 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 22 June 2020, the Applicants submitted the Referral to the Court challenging the Decision of the President to postpone the holding of extraordinary elections for the President of the Municipality of Podujeva.

7. On 22 June 2020, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
8. On 23 June 2020, the Applicants were notified about the registration of the Referral. On the same date, the Court notified about the registration of the Referral: the President of the Republic of Kosovo (hereinafter: the President); The President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all members of the Assembly; The Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister); The Ombudsperson and the Chairwoman of the Central Election Commission (hereinafter: the CEC).
9. The Court notified all interested parties mentioned above to submit their comments, if any, to the Court, within 15 days, namely until 8 July 2020, at the e-mail address of the Court or by personal delivery.
10. On 8 July 2020, the President submitted comments on case KO98/20 of the Constitutional Court.
11. On 10 July 2020, the Court notified the Applicants about the comments received on 8 July 2020. The Court also requested the Applicants to clarify by 17 July 2020 *that in addition to the "the fact that you challenge the Decision to postpone the holding of extraordinary elections for the President in the Municipality of Podujeva (Decision No. 52/20, of 14 March 2020), we ask you to clarify whether you also challenge the decision to postpone the holding of extraordinary elections for the President in the Municipality of North Mitrovica (No. 63/20, of 11 June 2020)"*.
12. On the same date, the Court notified the President of the Assembly who was requested to submit a copy of the Referral to all deputies of the Assembly; the Prime Minister; The Ombudsperson; and the Chairwoman of the CEC; regarding the President's comments received on 8 May 2020.
13. On 28 July 2020, the Court notified the Applicants that within the set deadline, namely 17 July 2020, no response was received from them. Consequently, the Court notified the Applicants that *"the proceedings for the review of case KO98/20 will continue based on the existing documentation"*.
14. On 29 July 2020, the Applicants' authorized representative, via email addressed the Secretary of the Court, stating that he had received the letter of 28 July 2020, but that he had not received the letter of 10 July 2020, for which emphasizes that *"If there has been a request before, I want to inform you that I have not received anything from the Court. For this reason, please inform me concretely what is the request about, providing me with a reasonable deadline for response"*.
15. On 5 August 2020, the Court addresses the representative of the Applicants - deputy Çeko, where it confirms that the letter of the Court [Ref. no.: 1230/20/rl] of 10 July 2020, was sent by the Court to the Assembly of Kosovo and the latter was accepted by the Administration of the Assembly (In this

regard, the Court attached the confirmation of receipt of the letter). The Court also addresses as follows: *“The Court confirms equal treatment of all parties to the proceedings before it. Consequently, in case you consider that you have not received the letter of the Court [No. ref.:1230/20/rl] of 10 July 2020, we request you to bring a confirmation from the Administration of the Assembly which clarifies that the document in question has not been accepted by you”*.

16. On the same date, the Court addressed the Secretary of the Assembly regarding the request for the following information: (i) confirmation of receipt of the Court letter [Ref.no.:1230/20/rl] by the Administration of the Assembly; and at the same time (ii) the confirmation whether the letter of the Court was served on the addressee, namely deputy Hajrulla Çeko.
17. On 6 August 2020, the Applicants’ representative, deputy Çeko, sent an email to the Secretary of the Court stating that: (i) he had not received the letter of the Court and that he had no idea what the letter was about, although the letter could be submitted to the Assembly and for which there is evidence; and (ii) he requests to be notified about the request in question and to be given a deadline to respond.
18. On 7 August 2020, the Secretary of the Assembly notified the Court that (i) the letter of the Court (Ref. no. 1230/20/rl) of 10 July 2020 was received by the Administration of the Assembly of Kosovo and (ii) the latter on 10 July 2020, from the Service for the Support of Deputies, was sent to the deputy, Mr. Hajrulla Çeko, in his mailbox dedicated to the deputies.
19. On 13 August 2020, the Court addressed the representative of the Applicants - deputy Çeko, informing him that the request for extension of the deadline was rejected regarding the letter of the Court (Ref. no. 1230/20/rl) of 10 July 2020.
20. On 3 September 2020, the Court addressed the CEC with a request for additional information, as follows:
 - (1) a. *Have there been previous cases of postponement of elections in Kosovo - whether general or local elections?*
b. *If yes, which elections have been postponed (regular or early/extraordinary)?*
 - (2) a. *What are the decision-making authorities in cases of postponement of elections?*
b. *What was the legal basis used for postponing the elections?*
 - (3) *Based on the mandate of the CEC for the preparation, monitoring, direction and verification of all actions related to the election process, as well as based on paragraph 4 of Article 4 of Law No. 03/L-072 on Local Elections, what actions can be taken by the CEC regarding early elections, in the context of changing the deadlines in case this is necessary due to the circumstances?*
 - (4) *What was the basis of your request of 14 March 2020, addressed to the President to postpone the elections?*
 - (5) *What are the actions taken by the CEC, from monitoring the electoral activities of other states?*

21. On 10 September 2020, the CEC responded to the Court regarding the abovementioned questions.
22. On 15 September 2020, the Court, on the issue of receiving additional information from the CEC, notified the President of the Assembly, who was requested to submit a copy of the Referral to all deputies of the Assembly; the President; the Prime Minister; and the Ombudsperson.
23. On 5 November 2020, the President of Kosovo resigned from the position of President of the Republic of Kosovo.
24. On 5 November 2020, the President of the Assembly, Mrs. Vjosa Osmani-Sadriu started to exercise the post of Acting President of the Republic of Kosovo.
25. On 18 November 2020, the Review Panel considered the report of the Judge Rapporteur, and by majority recommended to the Court the inadmissibility of the Referral.

Summary of facts

26. On 6 February 2020, the Ministry of Local Government Administration (hereinafter: MLGA) by letter [Prot. No. 158] presented to the President the announcement stating that Agim Veliu has resigned from the post of the President of the Municipality of Podujeva.
27. On 7 February 2020, the President, by Decision 15/2020 on setting and announcing the date of the Extraordinary Elections for the President in the Municipality of Podujeva, determined that (i) the extraordinary elections for the President in the Municipality of Podujeva will be held on 15 March 2020; (ii) The Central Election Commission of the Republic of Kosovo is instructed to take all necessary actions for the organization and holding of elections for the President of Podujeva, in accordance with this decision and applicable law [...].
28. In the time interval between 11 March and 18 March 2020, the Government of Kosovo issued several decisions related to the prevention of the COVID-19 pandemics (see decisions of the Government: No. 01/07 of 11 March 2020; No. 01/08 of 12 March 2020; No. 01/09 of 13 March 2020; No. 02/09 of 13 March 2020; No. 01/10 of 14 March 2020; No. 01/11 of 15 March 2020; No. 01/12 of 17 March 2020; No. 01/13 of 18 March 2020).
29. On 11 March 2020, the CEC addressed the Ministry of Health for advice on whether to take any urgent specific health protection measures on the election day.
30. On 12 March 2020, the Ministry of Health responded to the CEC by sending Recommendations for polling stations during the elections, regarding the hygienic preventive measures given by the National Institute of Public Health of Kosovo (hereinafter: NIPHK).

31. On 14 March 2020, the NIPHK addressed the Chairwoman of the Central Election Commission (hereinafter: the CEC) with a recommendation *for temporary suspension of the elections of 15 March 2020 in Podujeva to prevent the spread of COVID-19 in the Republic of Kosovo.*
32. The aforementioned letter from the NIPHK states that taking into account the epidemiological situation with COVID-19 in recent days, the WHO assessment (1 March 2020) which considers the epidemiological situation with very high risk worldwide and the ECDC (2 March 2020) which considers it a high risk, as well as the declaration of a pandemic by the WHO on 11 March 2020, the measures of the Government of the Republic of Kosovo, of 11 March 2020, NIPHK and the Committee for Monitoring of Infectious Diseases of the Ministry of Health, have sent you in advance the Election Guide on 12 March 2020. As the epidemiological situation worsened yesterday on 13 March 2020, with the detection of two positive cases of SARS CoV-2 and today on 14 March 2020 the third case resulted positive, NIPHK and the Committee for Monitoring of Infectious Diseases recommends to temporarily suspend the elections of 15 March 2020 in Podujeva, to prevent the spread of COVID-19 in the Republic of Kosovo.
33. On 14 March 2020, the Chairwoman of the CEC addressed a letter to the President of the Republic of Kosovo requesting the postponement of the date of the Extraordinary Elections for the President of the Municipality of Podujeva, until another appropriate time in accordance with the recommendation of the NIPHK. and the Infectious Diseases Monitoring Committee.
34. On 14 March 2020, the President issued Decision No. 52/2020, on the postponement of the extraordinary elections for the President of the Municipality of Podujeva, for an indefinite period due to prevention of the spread of Coronavirus-COVID-19 and preventing growth of the number of infected persons in the Republic of Kosovo and the preservation of public health.
35. On 14 August 2020, the Assembly of Kosovo adopted Law No. 07/L-006 on Prevention and Combating COVID-19 Pandemics in the Territory of the Republic of Kosovo. This law defines the responsibilities of state institutions, public, private and public-private health institutions in taking measures to prevent, control, treat, monitor, provision of funding and share of responsibilities during the COVID-19 pandemics.. The same entered into force on 25 August 2020.
36. On 20 October 2020, the President, by Decision 157/2020, on setting and announcing the date of the Extraordinary Elections for the President of the Municipality of Podujeva, determined that (i) the extraordinary elections for the President of the Municipality of Podujeva will be held on 29 November 2020; (ii) The Central Election Commission of the Republic of Kosovo is instructed to take all necessary actions for the organization and holding of elections for the President of the Municipality of Podujeva, in accordance with this decision and applicable law; (iii) Organization and holding of elections for the President of the Municipality of Podujeva to be done in coordination with relevant institutions in accordance with Law No. 07/L-006 on prevention and

combating the Covid-19 pandemics in the territory of the Republic of Kosovo (OG, No. 3, 25 August 2020), [...].

Applicant's allegations

37. The Court recalls that the Applicants challenge the constitutionality of the challenged Decision, namely Decision No. 52/2020 of the President, of 14 March 2020. According to the Applicants, the challenged Decision was taken in violation of paragraph 4 of Article 84 [Competencies of the President], Article 7 [Values], Article 123 [General Principles], Article 45 [Freedom of Election and Participation], paragraph 1 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) with Article 21 of the Universal Declaration of Human Rights (in hereinafter: UDHR), Article 3 of Protocol No. 1 to the ECHR, paragraph 2 of Article 3 of the European Charter of Local Self-Government, and paragraph 3 of Article 56 of the Law on Local Self-Government, Article 4 of Law on Local Elections.
38. Regarding the *admissibility* of the Referral and its *accuracy*, the Applicants state that as a Parliamentary Group composed of 30 deputies of the VETËVENDOSJE! Movement, they are an authorized party to submit a request for constitutional review of President's Decision No. 52/2020, in accordance with Article 113.2 (1) of the Constitution. Moreover, the issue raised by the deputies in question is a constitutional issue, because it challenges the constitutionality of a Decision of a public authority within a certain legal deadline, which allegedly violates the above-mentioned constitutional articles.
39. The Applicants also allege that despite the naming of the act of the President as a decision, the latter is identical in form and content with the naming *decree* defined by the abovementioned article in the Constitution. Furthermore, the Applicants emphasize the case law of the Court in cases KO54/20, KO12/18 and KO73/16, where the Court considered that “[...] *in its case law, in essence, it has already been decided that one should not focus only on the naming of the act but on its content and effects. The challenged decision consequently falls within the scope of the word decree [...]*” of the President. Therefore, the Applicants conclude that they have met all the legal criteria to be an authorized party before the Court.
40. Regarding the content/substance of the challenged Decision, the Applicants state that the challenged Decision is not in accordance with Articles 123, 124 in conjunction with Article 45 of the Constitution, as well as paragraph 2 of Article 3 of the European Charter of Local Self-Government .
41. According to the Applicants, paragraph 1 of Article 123 clearly states that local self-government is guaranteed by law. Whereas, in the second paragraph of this article it is emphasized that “*Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections*”. Also in paragraph 3 it is emphasized that “*The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the*

European Charter on Local Self Government to the same extent as that required of a signatory state". Paragraph 2 of Article 3 of the European Charter of Local Self-Government stipulates that "composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them [...]".

42. The Applicants state that the case law of the Court in Judgment KO80/10, clearly states that the concept of local self-government is related to paragraph 1 of Article 45 of the Constitution which stipulates that *"Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision"*. While paragraph 2 of this Article provides that *"The vote is personal, equal, free and secret"*, therefore, the President's Decision to postpone the holding of extraordinary elections indefinitely, deprives the citizens of the Municipality of Podujeva, contrary to the abovementioned articles, to vote for the new president after the resignation of the President of Podujeva in accordance with applicable legislation.
43. The Applicants further state that the President does not have the constitutional authority to render such decisions to postpone municipal elections indefinitely in order to prevent an increase in the number of persons infected with COVID-19. Also, the President has no constitutional competence to create policies and at the same time take adequate measures to protect public health. In this regard, the Applicants state that the Court in case KO54/20, has determined that *"With this Judgment, the Court will not assess whether the measures taken by the Government to prevent and fight pandemics COVID-19 are adequate and necessary or not. This is not the role of the Constitutional Court. Public health policies and decision-making do not enter, and are not part of the competencies and authorizations of this Court [...]"*. Therefore, a decision based on these measures without any constitutional and legal basis constitutes a violation of the Constitution and international conventions. Thus, decision-making regarding public health and preventing the spread of the coronavirus is not the responsibility of the President.
44. According to the Applicants, the President postpones the holding of elections for the President of Podujeva on an indefinite term, based only on the current situation not covered by a special law and the Constitution, such as the prevention of the spread of coronavirus and the preservation of public health. This decision deprives the citizens of the Municipality of Podujeva of their right to exercise their political right to elect one of the candidates for the president of the Assembly already certified by the CEC.
45. The Applicants further allege that the challenged decision has produced legal effects which are contrary to the principle of democracy, respect for human rights and the rule of law under Article 7 of the Constitution. Consequently, such a decision prohibits democracy from materializing its function through the participation of the citizens of a given municipality in terms of being elected through the voting of their representative as president of the respective municipality.

46. Therefore, according to the Applicants, the concept of democracy set out in Article 7 should be seen in conjunction with paragraph 1 of Article 45 of the Constitution of Kosovo, which represents the general constitutional norm that applies to local and central elections. Consequently, in this case the democracy defined in Article 7 is implemented through Article 45 of the Constitution which enables certain citizens of the respective municipality to elect the president of their municipality after the resignation of Mr. Agim Veliu as President of Municipality of Podujeva.
47. Also, the principle of the rule of law implies in the present case that the actions of the President materialized through the decision must be in accordance with the law and the Constitution of the country. On this basis, an essential component of the principle of the rule of law is legal certainty, according to which the decisions of public authorities must be based on the Constitution and law. Every act must have its own predictability which is enabled by constitutional and legal norms. While in this case, the decision of the president has violated legal certainty due to the fact that constitutional and legal norms are accurate, concise, clear and predictable in the event that a president of the municipality resigns. Thus, in this case, the President of the country must implement the constitutional and legal norm as defined in the Constitution and electoral legislation.
48. The Applicants state that the right to election and participation as defined in Article 45 paragraph 1 is a political right of a person who, by his will through constitutional and legal norms, has the constitutional right to vote (active right of vote) the president of Municipality of Podujeva as a citizen residing within that territory.
49. The Applicants further state that the decision to postpone the holding of extraordinary elections for the President of Municipality of Podujeva for an indefinite period is discriminatory in terms of the denial of a political right to citizens belonging to that municipality, in relation to other municipalities.
50. The Applicants state in the following that according to them the Prime Minister of Kosovo, Mr. Avdullah Hoti has allowed the holding of Serbian elections in Kosovo. Therefore, on the one hand, the citizens of the respective Municipality are prohibited from exercising the political right to elect their president of municipality without any constitutional or legal basis, while on the other hand, the Serb citizens are allowed to vote in Kosovo for the parliamentary elections in Serbia. While there is no scientific evidence so far that some citizens may be more immune to COVID-19 in the exercise of the political right to vote and some other citizens due to this pandemics are unconstitutionally deprived of the exercise of this fundamental political right. In this regard, according to the Applicants, the President on 11 June 2020, issued Decision No. 63/2020, to postpone the holding of extraordinary elections for President of the Municipality of North Mitrovica. This decision is of the same nature as decision no. 52/2020, and the latter is contrary to all constitutional, legal provisions and international conventions mentioned in this referral.
51. The Applicants further state that non-holding and postponing the elections for indefinite period without constitutional and legal support violates the rights

guaranteed under Article 3 of Protocol No. 1 of the ECHR. According to the Applicants, the focus of this article is the obligation that the contracting state has and not on the rights and freedoms of natural or legal persons, although they are not excluded, as it is shown by case law of the ECHR. The Applicants further state that they are aware that in the case of Court KI48/18 it has been stated that Article 3 of Protocol No. 1 of the ECHR does not cover all categories of elections and in principle, its guarantees do not apply to local elections. However, they refer to this article in the light of the definitions and guarantees that the state possesses and that are related to the electoral rights protected beyond the ECHR and Article 45 of the Constitution.

52. In addition to the above, the Applicants allege that the Universal Declaration of Human Rights (hereinafter: the UDHR) which is an integral part of the Constitution of Kosovo by Article 22 thereof, which in Article 21 of this Declaration determines that the expression of the will of the people is done through periodic and free elections. According to the Applicants, this provision of the UDHR in the form of principle or legal value covers all elections at the level of state power depending on the levels of state power regulated and determined by the relevant legislation of the respective states.
53. The Applicants further state that the Decision to postpone the holding of extraordinary elections for the President of the Municipality of Podujeva and North Mitrovica deprives the citizens of the political right to vote and to be elected as defined in Article 45 of the Constitution. Consequently, according to the Applicants, the Principles of European Electoral Heritage, drafted by the Venice Commission, define the following five basic principles of the European electoral heritage: universal, equal, free, secret and direct suffrage.
54. Therefore, the Applicants consider that the postponement of the extraordinary elections for the President of the Municipality of Podujeva, in indefinite period is a violation of international conventions and the Code of Good Practice in Electoral Matters. Therefore, the Applicants consider that although the legal basis in the preamble of this decision is incorrect and moreover it is a misuse of the legislation in force, this Decision has produced legal effects in full violation of all the abovementioned provisions of the Constitution, international conventions and the Code of Good Practice in Electoral Matters.
55. Finally, the Applicants request the Court to *“issue a Judgment by which it decides: I. To declare this Referral admissible; II. To declare Decision No. 52/2020 of the President, of 14 March 2020, in violation of the Constitution of Kosovo and International Conventions; III. To order the President to announce the date of the extraordinary elections for the President of the Municipality of Podujeva as soon as possible; IV. To order that this judgment be notified to the parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette; V. This judgment is effective immediately”*.

Comments of the President

56. With regard to the admissibility of the Referral, the President states that Referral Ko98/20 should be declared inadmissible by the Court, as it is unclear in both its accuracy and reasoning. Initially, the President emphasizes that his

powers are extended in a wide range of constitutional and legal articles, which represent the entirety of the role that the President has in the constitutional and legal system of Kosovo, based primarily on the Constitution, but also on the practice of the Constitutional Court.

57. The President further argues that his mandate has also political nature, as the President participates in the conduct of public affairs. In support of this, the President also uses references of the Constitutional Court (case of the Court KO29/12 and KO48/12) where it is emphasized *“to take part in the conduct of public affairs”, in Article 25 (a) of the ICCPR, is central to the exercise of a duly and legitimately elected President under the Constitution as part of his/her role as contemplated by Article 4 [...]”* of the Constitution. Whereas, Article 4 [Form of Government and Separation of Power] of the Constitution stipulates that *“The President of the Republic of Kosovo represents the unity of the people ... [and] ... is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.”* This statement as to the role of the President is central to one of the principles underpinning the Constitution of Kosovo which is the doctrine of the Separation of Powers”.
58. Thus, according to the President, some of his competencies very clearly affect the political life of the country, such as when announcing elections for the Assembly of Kosovo or announcing elections for local self-government bodies. In the course of this, the President is the main factor that has the duty to maintain the unity of the people and stability, as well as to guarantee the democratic functioning of the institutions of the Republic of Kosovo. Further, the President emphasizes that in this case the request of the CEC was taken into account, which is responsible for organizing the elections and as a result the recommendation of the NIPHK was taken into account. Thus, the duty of the President to guarantee the democratic functioning of institutions is a permanent and continuous task, which he always performs taking into account the representation of the people and the protection of the interests of the citizens. Consequently, in case of not postponing the extraordinary elections in the Municipality of Podujeva, the health of the citizens and employees of the institutions that would participate in the electoral process would be endangered.
59. Following the President’s response, it is stated that the President’s Decision No. 52/2020 is fully in accordance with the Constitution and the legislation in force. So, the decision is based on Law No. 03/L-094 on the President of the Republic of Kosovo and Law No. 03 L-072 on Local Elections in the Republic of Kosovo.
60. The President also emphasizes that the preliminary actions and events, before the issuance of Decision No. 52/2020 of 14 March 2020 are also important. Here should be taken into account the course of actions and events as a whole and not just the challenged decision, as all actions are taken in accordance with constitutional and legal powers and in light of the circumstances presented in the Republic of Kosovo, which preceded the issuance of Decision No. 52/2020.

61. Among these actions, the President mentions: (i) The resignation of the President of the Municipality of Podujeva on 6 February 2020; (ii) by Decision No. 15/2020 of 7 February 2020, the extraordinary elections for President of the Municipality of Podujeva were announced for 15 March 2020; (iii) In order to fight the COVID-19 pandemics, the Government on 12 March 2020, by Decision No. 01/08 of the Government, decides the establishment of the Special Commission for the prevention of Coronavirus infection COVID-19; and on 13 March 2020, the Government by Decision No. 01/09 of the Government imposes additional measures, which included, among others: closure of cafeteria, bars, pubs and restaurants, shopping malls except pharmacies and food markets; all cultural and sports activities are suspended; all public institutions are reduced to essential actions and essential staff except the staff of the health and security sector; private companies are ordered to organize the work in such a way that most of the activities are performed by the workers from home; it is recommended: calls on all citizens to avoid crowded places and to adhere to all measures taken by the Government and recommendations given by the NIPHK.
62. Therefore, according to the President, the issuance of the challenged Decision was made in order to preserve public health and prevent the spread of the COVID-19 pandemics. This Decision is a reflection of the request of the CEC, of 14 March 2020, regarding the temporary suspension of the Extraordinary Elections for President of Municipality of Podujeva, to prevent the spread of COVID-19 in the Republic of Kosovo. Also, the President emphasizes that the request of the CEC to postpone the elections was preceded by the preventive recommendation from the NIPHK and the Committee for Monitoring of Infectious Diseases, for the suspension of the Extraordinary Elections in Podujeva, of 14 March 2020, which followed the assessment of the epidemiological situation. of COVID-19, which has resulted in deterioration.
63. Therefore, when issuing the challenged decision, the President claims that he has always taken into account the circumstances that have pushed the change of the timing of the Extraordinary Elections for the President of the Municipality of Podujeva, the interests of citizens and the preservation of public health, acting in accordance with the preventive recommendation by the NIPHK and the Committee for Monitoring of Infectious Diseases, at the request of the CEC of 14 March 2020 and the relevant legislation in force.
64. Also according to the President, when taking the challenged Decision, the Decision No. 01/09, of the Government of 13 March 2020 was taken into account, where every public institution is required to reduce to essential actions and essential staff, except the staff of the health sector and the security sector.
65. The President also states that the Applicants' allegations are ungrounded, as Article 4.4 of Law No. 03/L-072 on Local Elections in the Republic of Kosovo, among others provides: "... *early elections shall be announced no later than ten (10) days after the dissolution. Early elections may not be held earlier than thirty (30) days and no later than forty-five (45) days after the dissolution. Early elections shall be governed by the same laws and CEC rules as other elections, except that CEC may change time frames as needed in*

accordance with the circumstances". Therefore, based on the preventive recommendation of the NIPHK, the CEC assessed that due to the circumstances caused by the high risk of the spread of COVID-19, the deadlines for holding Extraordinary Elections for President of the Municipality of Podujeva should be changed, namely should be suspended and such a request was addressed to the President, who took it into account and issued Decision No. 52/2020.

66. Finally, the President states that Referral KO98/20 should be declared inadmissible because it is incompatible *ratione materiae* with the Constitution.

CEC comments

67. Regarding the questions of the Court of 3 September 2020, the CEC answers as follows:

Referring to your request with five (5) questions submitted to the CEC on 03.09.2020, No. 767/2020, for information regarding the postponement of the extraordinary elections for the President of the Municipality of Podujeva, we are sending you the answers listed according to your questions as follows:

I. Since the independence of Kosovo until the extraordinary elections for the President of the Municipality of Podujeva, there has been no other cases of postponement of the elections.

II. The decision-making authority for announcing the elections in Kosovo, whether general or local elections in Kosovo, is the President of the Republic of Kosovo. The President, after consulting with political parties: a) based on Article 4 of the Law on General Elections, sets and announces the date of the elections for the Assembly of Kosovo; and b) based on Article 4 of the Law on Local Elections, sets and announces the date of local elections.

III. Actions taken by the CEC based on the mandate of the CEC, for the preparation, supervision, direction and verification of all actions related to the election process, according to Article 4 paragraph 4, the CEC may change the deadlines in case this is needed due to the circumstances. To regulate these actions, the CEC has issued CEC Regulation No. 15/2013 on Extraordinary Elections and Early Elections. Rule No. 15/20 according to Article 3 defines the possibility of shortening the 12 deadlines as follows:

1) deadlines for creating Voters List and the challenge and confirmation period; 2) deadlines for the certification procedure of political parties and candidates; 3) ballot lottery deadline, and the deadline for withdrawal from the ballot lottery; 4) deadline for substitution of candidates; 5) deadlines for the publication of lists of certified candidates and any amendments; 6) deadline set for the campaign spending limit; 7) the duration of the election campaign as well as the deadlines for the election campaign rallies; 8) deadlines for submission of the application for accreditation of election monitoring organizations and observers 9) deadlines for appointing the Municipal Election Commissions (MECs) and Polling Station Committees (PSC); 10) deadline for publication of Polling Centers; 11) application deadlines for registration as voters abroad of

Kosovo, as well as the confirmation process terms; 12) deadlines for application for registration as voters with special needs.

IV. The concrete basis of the CEC request to the President of the Republic of Kosovo to postpone the elections was the response and recommendation of the NIPHK, of 14 March 2020, who recommended to the CEC the temporary suspension of the elections of 15 March 2020, in order to prevent the spread of COVID 19 in the Republic of Kosovo, in order to protect the public health of citizens.

V. The CEC, although initially planning and carrying out all preparations for the observation of the parliamentary elections in the Republic of North Macedonia held this year, due to the emergence of cases of COVID-19 among the delegation that is scheduled to observe those elections, that activity has failed.

Important constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

Article 45 [Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:

[...]

(4) issues decrees in accordance with this Constitution;

Chapter X Local Government and Territorial Organization

Article 123 [General Principles]

1. The right to local self-government is guaranteed and is regulated by law.
2. Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.
3. The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the European Charter on Local Self Government to the same extent as that required of a signatory state.

4. Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services having due regard for the specific needs and interests of the Communities not in the majority and their members.

Article 124 [Local Self-Government Organization and Operation]

1. The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies.

Universal Declaration of Human Rights

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Protocol No. 1 of the European Convention on Human Rights

Article 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

LAW No. 03/L-040 ON LOCAL SELF GOVERNMENT

Article 56 Election of the Mayor of the Municipality

[...]

56.3 The term of office of the Mayor of the Municipality shall end upon;

- a) the completion of his mandate;
- b) his death;
- c) his resignation;
- d) his change of residence to another municipality;
- e) his failure to report on duty for more than 1 months without a valid reason;
- f) his removal from office in accordance with this law;
- g) a final court decision depriving the Mayor of legal capacity to act;
- or
- h) his conviction of a criminal offence with an order for imprisonment for six (6) months or more.

LAW No. 03/L-072 ON LOCAL ELECTIONS IN REPUBLIC OF KOSOVO

Article 4

Date and announcement of election

4.1 After consultation with political parties, the President of Kosovo sets and announces the date of local elections.

4.2 Elections for the institutions of local self-government shall take place on a Sunday every four (4) years. Elections cannot be held earlier than sixty (60) days before the expiry of the mandate or later than thirty (30) days after the expiry of the mandate.

4.3 According to the competencies of the President of Kosovo defined by the Constitution, the decision of the President to set the date of elections is made not later than four (4) months nor earlier than six (6) months before the date of the elections. 4.4 Following the dissolution of the Municipal Assembly or dismissal of the Mayor, if there is no complaint filed within five (5) days in the Constitutional Court, early local elections shall be announced by the President of Kosovo. Upon dissolution of the Municipal Assembly early elections shall be announced no later than ten (10) days after the dissolution. Early elections may not be held earlier than thirty (30) days and no later than forty-five (45) days after the dissolution. Early elections shall be governed by the same laws and CEC rules as other elections, except that CEC may change time frames as needed in accordance with the circumstances

4.5 The Decision to announce elections shall be made public in the 'Official Gazette of Kosovo.

LIGJI No. 03/L-094 ON THE PRESIDENT OF THE REPUBLIC OF KOSOVO

Article 6 Competencies of the President

President of Republic of Kosovo shall exercise competencies provided for by the Constitution of Republic of Kosovo and other laws in force.

Admissibility of the Referral

68. In order to decide on the Applicants' Referral, the Court must first examine whether the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure have been met.
69. In this regard, the Court first refers to the relevant constitutional and legal provisions according to which the Assembly may appear as an Applicant before this Court:

Constitution of the Republic of Kosovo **Article 113 [Jurisdiction and Authorized Parties]**

[...] 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. [...]*

Law on the Constitutional Court
CHAPTER III
Special Procedures

Procedure for cases defined under Article 113, Paragraph 2, items 1 and 2 of the Constitution

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, the President of the Republic of Kosovo, the Government or the Ombudsperson.*
- 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.

Rules of Procedure of the Constitutional Court

VII. Special Provisions on the Procedures under Article 113 of the Constitution

Rule 67

[Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law]

- (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.*

70. With regard to the circumstances of the present case, the Court also takes into account paragraph (4) of Rule 35 of the Rules of Procedure, which establishes as follows:

Rule 35
(Withdrawal, Dismissal and Rejection of Referrals)

[...]

(4) The Court may dismiss a referral when the Court determines that a claim is no longer an active controversy, does not present a justiciable case, and there are no special human rights issues present in the case.

71. The Court first notes that an obligation similar to Rule 35 paragraph 4 of the Rules of Procedure also exists in Article 37 of the European Convention on Human Rights, which in accordance with item 2 of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, provides for direct implementation of the Convention in the Republic of Kosovo, the latter in the relevant part stipulates as follows:

*Article 37
Striking out applications*

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:

- a. the applicant does not intend to pursue his application; or*
- b. the matter has been resolved; or*
- c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.*

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

72. Therefore, in the context of the assessment of the admissibility of the Referral, the Court will first recall the substance of the case contained in this Referral and the respective allegations of the Applicants, in the assessment of which it will apply the standards of the ECtHR case law, in accordance with which, under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.
73. In this regard, the Court first recalls that the Applicants request the constitutional review of *Decision No. 52/2020 of 14 March 2020, of the President of the Republic of Kosovo*, which had to do with the postponement of the holding of extraordinary elections for the President of the Municipality of Podujeva for indefinite period, claiming that the latter is contrary to paragraph 4 of Article 84 [Competencies of the President], Article 7 [Values], Article 123 [General Principles], Article 45 [Freedom of Election and Participation], paragraph 1 of Article 124 [Local Self-Government Organization and Operation] of the Constitution, Article 21 of the UDHR, Article 3 of Protocol No. 1 to the ECHR,

74. In this regard, the Court notes that the case law of the ECtHR, when assessing whether subparagraph b of paragraph 1 of Article 37 of the Convention applies to the cases before it, must answer two questions in turn: (i) *first*, whether the circumstances complained of directly by the Applicants still obtain, and (ii) *second*, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *ECtHR El Majjaoui cases & Stichting Toubia Moskee v. the Netherlands*, Application No. 25525/03, Decision on striking out the application, paragraph 30; *Pisano v. Italy*, Application No. 36732/97; Decision on striking out the application, paragraph 42; *Sisojeva and others v. Latvia*, Application No. 60654/00, Decision on striking out the application, paragraph 97).
75. In the present case, in the context of the application of the first point of the abovementioned test, namely the assessment (i) *whether the circumstances complained of directly by the Applicants still obtain*, the Court notes that this includes first of all the determination of the situation whether the postponement of the extraordinary elections for the President of the Municipality of Podujeva still exists.
76. In connection with this point, the Court recalls that on 20 October 2020, the President by Decision No. 157/2020, has scheduled the date 29 November 2020, as the date of the extraordinary elections for the President of the Municipality of Podujeva. Therefore, regarding the first point of assessment, the fact of holding extraordinary elections for the President of the Municipality of Podujeva is no longer disputed. Consequently, the Court finds that with the fact of setting the date of the elections, the issue of non-holding the elections, namely the postponement of elections for indefinite period has ceased to exist.
77. On the other hand, in the context of the application of the second point of the above test, namely the assessment (ii) *whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed*, the Court notes that this point includes the constitutional assessment, if the eventual violation of the Constitution and the Convention by the challenged Decision, has been remedied by the decision of the President [No. 157/2020] of 20 October 2020, on setting and announcing the date of the extraordinary elections for the President of the Municipality of Podujeva.
78. The Court notes that the Decision of the President [No. 157/2020], in addition to setting the date of the elections for the President of the Municipality of Podujeva, specified that “in coordination with relevant institutions in accordance with Law No. 07/L-006 on prevention and combating the Covid-19 pandemics in the territory of the Republic of Kosovo (OG, No. 3, 25 August 2020). The same decision in its legal basis also refers to the challenged decision, namely the Decision of the President No. 52/2020 [on the postponement of the extraordinary elections for the President of the Municipality of Podujeva, for an indefinite period] for which he states that it was issued due to the COVID-19 pandemics.
79. The Court based on the analysis of the current situation, which is influenced by the decision of the President [No. 157/2020], including the aspect of

organizing elections in accordance with Law No. 07/L-006 on prevention and combating the Covid-19 pandemics, considers that the latter has replaced the challenged Decision and that the legal effect of eventual violation of the Constitution and the Convention by the challenged Decision, has already been remedied with setting 29 November 2020 as the date of the elections.

80. However, the Court will also assess whether it is still necessary to continue the examination of the present case, in the context of respect for human rights guaranteed by the Constitution and the Convention.
81. The Court first notes that the ECtHR standard, in cases where it is necessary to continue the examination of the case [in the context of respect for human rights guaranteed by the Convention], consists in those circumstances in which the Applicant's position is unclear as to the epilogue of his case and when the latter would unavoidably remain in an uncertain situation as regards the matters raised in the submission relied on under certain articles of the Convention (see the case of the ECtHR. *F.G v. Sweden*, Application No. 43611/11, Judgment of 23 March 2016, paragraphs 79-84;
82. Therefore, in the following the Court concludes that in the present case, (i) as long as the reason for which the President's Decision was challenged, namely *Postponement of elections for indefinite period* no longer stands; and (ii) while the effect of the eventual violation of Article 45 of the Constitution and Article 3 of Protocol 1 to the ECHR due to those circumstances has been addressed by setting a new election date (29 November 2020), the Court considers that the case does not include any specific circumstances regarding the observance of human rights set out in the Constitution and the Convention.
83. Accordingly, the Court finds that by the Decision of the President [No. 157/2020], the subject of the Applicants' Referral has changed significantly. The current position, namely *the setting of the election date* is such a circumstance which consists in the fact that the referral in question, already has no rationale and that the aim that was sought to be achieved, has already been fully achieved. In light of this, the Court considers that there is no longer any merit to further consider this case and such a reasoning, the Court has already clearly stated in its case law (see the cases of the Court: KO63/12, Applicant *Alma Lama and 10 other deputies of the Assembly of the Republic of Kosovo Request for constitutional review of of Articles 37, 38 and 39 of the Criminal Code of the Republic of Kosovo*, No. 04/L-82, Decision to strike out the Referral of 10 December 2012, paragraph 19; Case KO107/10, Applicant *Gani Geci and other deputies*, Constitutional Review of the Assembly Decision of 14 October 2010 regarding the Draft Strategy and the Decision of the Government on the Privatization of Kosovo Post & Telecommunication, Decision to strike out the Referral of 17 August 2011, paragraphs 24-26; Cases KI58, KI66 and KI94/12, with Applicants *Selatin Gashi, Halit Azemi and group of Municipal Assembly Members of Viti*, Referral for constitutional review of the Decision of the Municipality of Mitrovica, Gjilan and Viti for conditioning the access of citizens to public services with payment of obligations towards publicly owned enterprises, Decision to strike out the Referral of 5 July 2013, paragraph 45).

84. Thus, as a general procedural principle, the Court does not render decisions in cases where the case no longer exists and the issue becomes without subject of review. This is a universally accepted principle for the conduct of courts and is analogous to the principle of judicial restraint (see case KO63/12, cited above, paragraph 23; KI11/09, *Tomë Krasniqi, Constitutional review of Article 2.1 of the Administrative Direction No. 2003/12 of the United Nations Mission (UNMIK), and Article 20.1 of the Law No. 02/L-47 on Radio Television of Kosovo*, Decision to strike out the Referral of 30 May 2011, paragraph 46).
85. Therefore, considering the abovementioned assessments, the Court has already found that the 2 requirements of application of Article 37 paragraph 1 subparagraph b of the Convention are met. Also the allegation is no longer actively disputed and that the Court considers that there are no specific reasons regarding the respect for human rights established in the Constitution and the Convention for which it is necessary to proceed with the further review of this Referral, as long as there is no unresolved case or dispute regarding the constitutionality of the challenged decision and that the issue has in fact remained without subject of review.
86. Finally, taking into account Decision No. 157/2020 of the President on setting and announcing the date of the extraordinary elections for the President of the Municipality of Podujeva, the Court concludes that the Applicants no longer have an unresolved case or dispute regarding the constitutionality of the challenged decision and the issue is in fact without subject of review, therefore

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.2 (1) of the Constitution, Article 20 of the Law and Rules 35 (4) and 59 (3) of the Rules of Procedure, on 18 November 2020,

DECIDES

- I. TO STRIKE OUT, the Referral in accordance with Rule 35 (4) of the Rules of Procedure;
- 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; and
- IV. TO DECLARE that this Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi

Kopje e vërtetuar
Overena kopija
Certified Copy

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