



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

Prishtina, on 06 janar 2021  
Ref.No:AGJ1692/21

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

## JUDGMENT

in

**Case No. KO95/20**

Applicant

**Liburn Aliu and 16 other deputies of the Assembly of the Republic of Kosovo**

**Constitutional review of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, of 3 June 2020, on the Election of the Government of the Republic of Kosovo**

### THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

#### **Applicant**

1. The Referral was submitted by Liburn Aliu, Hekuran Murati, Hajrullah Çeku, Saranda Bogujevci, Jahja Koka, Valon Ramadani, Mimoza Kusari Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Alban Hyseni, Gazmend Gjyshinca, Enver

Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani and Elbert Krasniqi (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants authorized the deputy of the Assembly, Artan Abrashi, to represent them in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

### **Challenged act**

3. The Applicants challenge the constitutionality of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo of 3 June 2020, on the election of the Government of the Republic of Kosovo (hereinafter: the challenged decision).

### **Subject matter**

4. The subject matter is the constitutional review of the challenged decision, which allegedly is not in compliance with paragraph 3 of Article 95 [Election of the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

### **Legal basis**

5. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 42 [Accuracy of the Referral] and 43 [Deadline] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 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 11 June 2018, the Applicants submitted their Referral to the Court. On the same date, the Applicants submitted to the Court additional documents related to the case, namely, they submitted the challenged decision.
7. On the same date, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Remzije Istrefi-Peci (members).
8. On 15 June 2020, the Applicants were notified about the registration of the Referral.
9. On the same date, the Referral was communicated to the President of the Republic of Kosovo (hereinafter: the President), the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister), the Ombudsperson, and the Chairperson of the Central Election Commission (hereinafter: the CEC),

with the instruction to submit the comments to the Court, if any, by 29 June 2020.

10. On the same date, namely on 15 June 2020, the Referral was also communicated to the President of the Assembly, who was requested to notify the deputies that they may submit their comments on the Applicants' Referral, if any, by 29 June 2020.
11. On 17 June 2020, the Court requested the Secretariat of the Assembly that, by 29 June 2020, submit to the Court all relevant documents relating to the challenged decision, and to notify the Court whether there is any prior practice in the Assembly concerning the end or invalidity of the mandate of the deputies accused or convicted of criminal offenses.
12. On 24 June 2020, the Secretariat of the Assembly submitted to the Court the relevant documents related to the challenged decision, and notified the Court about the procedure followed by the Assembly, in 2016, in the case of deputy Rr. M., who lost the mandate of deputy of the Vth Legislature of the Assembly and was replaced, because he was convicted of a criminal offense.
13. On 9 July 2020, the Court requested the Secretariat of the Assembly to submit to the Court, by 16 July 2020, the following documents: a) Report of the Temporary Committee for the Verification of Quorum and Mandates, established by Decision No. 07-V-001, for the verification of the quorum in the constitutive session and the validity of the mandate of the deputies of the VII-th Legislature of the Assembly, presented on 26 December 2019; and b) Minutes of the constitutive meeting of the Assembly of the Republic of Kosovo, held on 26 December 2019.
14. On 9 July 2020, the Court requested the CEC to submit, by 16 July 2020, information to the Court regarding: a) the procedure followed at the CEC for the certification of candidates/list of candidates for participation in the general elections, especially in relation to the requirements set out in Article 29.1. (q) of Law No. 03/L-073 on General Elections in the Republic of Kosovo, amended and supplemented by Law No. 03/L-256; and b) if there is any special procedure or action taken by the CEC to prevent persons convicted of criminal offenses by a final court decision in the last three years from not being allowed to run for and be elected as deputies of the Assembly of the Republic of Kosovo, and requested the CEC to inform the Court if there have been such cases in the past.
15. On 13 July 2020, the Secretariat of the Assembly submitted to the Court the following documents: a) Report of the Temporary Committee for Verification of Quorum and Mandates, dated 26.12.2019; b) Minutes of the Constitutive Session of the Assembly of the Republic of Kosovo, held on 26 December 2020; and c) Transcript of the Constitutive Session of the Assembly of the Republic of Kosovo, held on 26 December 2019.
16. On 16 July 2020, the CEC submitted a response to the request for information by the Court.

17. On 20 July 2020, the Court notified the Applicants, the President, the Prime Minister and the President of the Assembly, about the responses received from the Secretariat of the Assembly and the CEC. The President of the Assembly was requested to inform all the deputies about the answers received regarding the Referral.
18. On 7 August 2020, the Court requested the Secretariat of the Assembly to submit to the Court, by 10 August 2020, the Legal Opinion that the Directorate for Legal Services and Approximation of Legislation of the Assembly has submitted to the President of the Assembly regarding the issue of Etem Arifi (as this document was missing from the file submitted by the Secretariat of the Assembly).
19. On 7 August, the Court received the notification from the Secretariat of the Assembly clarifying that: "*The Legal Opinion, regarding the mandate of the Deputy Etem Arifi, of 18 May 2020, of the Directorate for Legal Services and Approximation of Legislation, is an internal document addressed to the Presidency of the Assembly*". Therefore, the document in question was not submitted to the Court.
20. On 2 September 2020, at its regular session, the Court considered the report of the Judge Rapporteur and decided to adjourn the decision-making so that additional information on the case could be requested from the Assembly and the KJC.
21. On 7 September 2020, the Court requested the KJC to notify the Court by 14 September 2020 "*regarding the date when Judgment PAKR. No. 328/19 of the Court of Appeals of 20 August 2019, has become final according to the legislation in force*".
22. On 8 September 2020, the Court requested the President of the Assembly to submit to the Court, by 15 September 2020, the Legal Opinion that the Directorate for Legal Services and Approximation of Legislation of the Assembly has submitted to the President of the Assembly, regarding the case of Etem Arifi.
23. On 10 September 2020, the KJC submitted the response to the request for information requested by the Court.
24. On 15 September 2020, the Assembly submitted to the Court the Legal Opinion of the Directorate for Legal Services and Approximation of Legislation of the Assembly, of 18 May 2020, regarding the case of Etem Arifi.
25. On 28 October 2020, the Court considered the report of the Judge Rapporteur and decided to postpone the case to one of the following sessions, with the request that the latter be completed. At the same session it was decided to hold a public hearing and send questions related to the case to the Forum of the Venice Commission.

26. On 17 November 2020, the Court sent the invitation to participate in the public hearing to the Applicants, the President of the Assembly, the Prime Minister, the Chairman of the Committee on Legislation, Mandates, Immunities, the Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency (hereinafter: the Committee on Legislation, Mandates and Immunities); Chairperson of the CEC; and the Chairperson of the KJC.
27. On 23 November 2020, the Court submitted the following questions to the Venice Commission Forum:
- “a) Does the legal framework in your country allows persons that have been convicted for criminal offence to be candidates for elections as deputies of Parliament?*
- b) Which is the momentum when the mandate of a deputy of the Parliament convicted by a final court decision is considered to have been lost/terminated?*
- c) Does the Parliament continue to work and make decisions in the period between the point in which the mandate of the deputy has been terminated/lost and the point in which his/her mandate has been replaced/filled in?*
- d) In case the Parliament continues to work while the deputy, who has lost the mandate has not been replaced yet, what is considered the total number of the Parliament deputies for the purpose of the “majority vote of all members of the Parliament”? Are the required votes calculated based on the total number of mandates/seats of the Parliament, or only based on the total number of valid mandates/seats at a specific point?*
- e) What are the legal consequences for a decision adopted by the Assembly, in case one of its members who is considered to have had an invalid mandate participated in the decision making procedure of the Parliament and his/her vote is decisive for the adopted decision?”*
28. Between 29 November 2020 and 15 December 2020, the Court received answers to questions raised through the Venice Commission Forum from the constitutional/supreme courts of the following countries: Sweden, Slovakia, Croatia, Czech Republic, Mexico, Brazil, Kyrgyzstan, the Netherlands, Bulgaria and Poland.
29. On 2 December 2020, a public hearing was held, via the electronic platform. The following persons participated in this session and were heard: the representative of the Applicants, the representative of the President of the Assembly, the representative of the Prime Minister, the Chairperson of the Committee on Legislation, Mandates and Immunities; Chairperson of the CEC; and the representative of the President of the KJC.
30. On 7 December 2020, the Court received comments regarding the hearing from the Applicants’ representative and the Prime Minister’s representative. On the

same date, comments and clarifications regarding the case were submitted by the representative of Etem Arifi.

31. On 21 December 2020, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.
32. On the same date, the Court voted and unanimously decided that Decision No. 07/V-014 of the Assembly of the Republic of Kosovo on the Election of the Government of the Republic of Kosovo, of 3 June 2020, is not in compliance with paragraph 3 of Article 95 [Election of the Government] of the Constitution, because it did not receive a majority of votes of all deputies of the Assembly of the Republic of Kosovo.

## **Summary of facts**

### ***Summary of facts regarding the criminal conviction against Etem Arifi***

33. On 20 April 2018, the Basic Court in Prishtina, by Judgment PKR. 740/16, found Etem Arifi guilty because in co-perpetration (with the person B.G.) he committed the criminal offense “*Subsidy fraud*”, under Article 336, paragraph 3 in conjunction with Article 31 of the Criminal Code of Kosovo (hereinafter: the CCK). At that time, Etem Arifi was a member of the previous legislature of the Assembly (namely the VI-th legislature) and he was re-elected deputy of the Assembly, in the elections of 6 October 2019. By the Judgment of the Basic Court, Etem Arifi was sentenced to imprisonment in duration of two (2) years, which decision would not be executed provided that he within the time limit of three (3) years would not commit any other criminal offense. The Basic Court also obliged Etem Arifi and the other convict (B.G.) to compensate the Ministry of Labor and Social Welfare for the damage caused, in solidarity within 6 months, the amount of 22,900 euro, as well as the Office of the Prime Minister the amount of 2,749 euro.
34. Etem Arifi and the Special Prosecution of the Republic of Kosovo filed an appeal against the abovementioned Judgment of the Basic Court.
35. On 28 March 2019, the Court of Appeals of Kosovo, by Judgment PAKR. No. 328/2018, decided that: “*I. [...] the Judgment of the Basic Court is modified [...] in the sentencing part regarding the decision on the sentence and the obligation regarding the legal qualification of the criminal offense so that this Court finds that in the actions of the accused Etem Arifi and of [B.G.], described in the enacting clause under item I are formed elements of the criminal offense of subsidy fraud under Article 336 par 3, in conjunction with paragraph 2 and 1 of Article 31 of the CCRK and for this criminal offense sentences the accused to (1) year and (3) months imprisonment [...] are obliged to compensate the Ministry of Labor and Social Welfare on behalf of the damage caused the amount of € 22,900, and the Office of the Prime Minister of the Republic of Kosovo - Office for Communities the amount of 2,749 € within six months after this judgment becomes final*”.

36. Etem Arifi filed a request for protection of legality with the Supreme Court, against Judgment PAKR. No. 328/2018, of the Court of Appeals. The Supreme Court, by Judgment Pml. No. 168/2018, of 20 June 2019, remanded the case of Etem Arifi (and of person B.G.), for reconsideration to the Court of Appeals, because “*the composition of the court was not in accordance with the law*”.
37. On 20 August 2019, the Court of Appeals, by Judgment PAKR. No. 328/19, acting on retrial, decided as follows:
- I. With the approval of the appeal of the Special Prosecution of the Republic of Kosovo, the Judgment of the Basic Court – Serious Crimes Department in Prishtina PKR. No. 740116 of 20.04.2018 is modified in the sentencing part regarding the punishment [...], and for this criminal offence the accused Etem Arifi is sentenced to 1 year and 3 months imprisonment [...].*
- II. The accused Etem Arifi and of [B.G], are obliged to compensate the Ministry of Labor and Social Welfare on behalf of the damage caused in the amount of 22,900 euro, while the Office of the Prime Minister of the Republic of Kosovo-Office for Communities in the amount of 2,749 euro, all in time of 3 months.*
- III. With the approval of the appeal of the SPRK, and ex officio, the judgment in the acquittal part regarding the accused Etem Arifi is annulled and the case is remanded to the Basic Court SCD in Prishtina for retrial.*
- IV. The appeals of the defense counsels and the accused are rejected as ungrounded.*
38. According to the case file, it results that Judgment PAKR. No. 328/19, of the Court of Appeals, was served on Etem Arifi on 9 November 2019.
39. On 18 November 2019, Etem Arifi filed a request for protection of legality against Judgment PKR. No. 740/16 of the Basic Court of 20 April 2018, as well as Judgment PAKR 328/19 of the Court of Appeals of 20 August 2019, alleging violation of the provisions of criminal procedure and violation of the criminal law.
40. On 30 January 2020, the Supreme Court, by Judgment PML. No. 380/2019, rejected as ungrounded the request for protection of legality submitted by Etem Arifi.
41. On 27 April 2020, Etem Arifi submitted to the Constitutional Court Referral (KI71/20) for the constitutional review of the abovementioned Judgment of the Supreme Court.
42. On an unspecified date, the Basic Court issued an order for the arrest, detention and sentencing of Etem Arifi.
43. On 23 September 2020, the Constitutional Court declared Referral of Etem Arifi KI71/20 inadmissible and manifestly ill-founded.
44. Currently, Etem Arifi is serving his sentence.

## ***Summary of facts regarding the challenged decision of the Assembly of the Republic of Kosovo***

45. On 26 August 2019, the President of the Republic of Kosovo issued Decision No. 236/2019, on the appointment and announcement of early elections for the Assembly of the Republic of Kosovo, which were scheduled for 6 October 2019.
46. On 27 August 2019, the CEC issued Decision no. 824-2019, on Setting the Deadlines for election activities for the Early Elections for the Assembly of the Republic of Kosovo. Point II of this Decision provided, *inter alia*, that:
- “[...]”
- e) *[Deadline] for application for certification of political entities and candidates starts on 27 August and ends on 6 September 2019.*
- [...]”
- g) *Certification of political entities and candidates begins on 5 September and ends on 10 September 2019.*
- [...]”
- i) *Deadline for withdrawal of candidates from the ballot lottery and deadline for replacement of candidates 08 September to 17 September 2019.*”
47. On 6 October 2019, early elections were held for the Assembly of the Republic of Kosovo.
48. On 27 November 2019, the CEC certified the results of the elections for the Assembly, by Decision No. 1845/2019, based on the following list of the election results:
- a. VETËVENDOSJE Movement! (hereinafter: the LVV), 29 deputies;
  - b. The Democratic League of Kosovo, 28 deputies;
  - c. Democratic Party of Kosovo, 24 deputies;
  - d. AAK-PSD Coalition 100% Kosovo, 13 deputies;
  - e. Srpska Lista, 10 deputies;
  - f. Social Democratic Initiative - New Kosovo Alliance, Justice Party, 6 deputies;
  - g. Coalition “Vakat”, 2 deputies;
  - h. Kosova Demokratik Tyrk Partisi, 2 deputies;
  - i. Egyptian Liberal Party, 1 deputy;
  - j. Nova Demokratska Stranka, 1 deputy;
  - k. Ashkali Party for Integration, 1 deputy;
  - l. New Democratic Initiative of Kosovo, 1 deputy;
  - m. United Gorani Party, 1 deputy;
  - n. United Roma Party of Kosovo, 1 deputy.
49. The list of deputies certified by the CEC also included Etem Arifi from the Ashkali Party for Integration.



50. On 26 December 2019, the constitutive meeting of the Assembly was held, with three items on the agenda:
  1. Establishment of the Temporary Committee for Verification of the Quorum and the Mandates of the Deputies;
  2. Taking the oath by the deputies;
  3. Election of the President and Vice-Presidents of the Assembly.
51. At the same meeting, by Decision No. 07-V-001, the Assembly formed the Temporary Committee for Verification of Quorum and Mandates, consisting of 14 members (members of the Assembly). According to item II of this Decision, *“The Committee reviews the relevant documentation of the early elections for the Assembly of the Republic of Kosovo, held on 6 October 2019, for the certification of the election results by the Central Election Commission and presents the report to the Assembly on the valid mandates of the deputies of the Assembly, and verifies the quorum in the constitutive session of the VII Legislature of the Assembly”*.
52. On the same date, on 26 December 2019, the Temporary Committee for the Verification of Quorum and Mandates, based on CEC Decision No. 1845/2019, of 27 November 2019, together with the final list of candidates, submitted the Report stating that *“in the VII Legislature for the Assembly of the Republic of Kosovo are certified 120 deputies from political parties, coalitions, civic initiatives that have participated in the elections held on 6 October 2019”*. Etem Arifi was one of the persons whose mandate as a deputy was confirmed. After that, the deputies took the oath (including Etem Arifi), and with the election of the President and Vice-President, the Assembly was constituted.
53. On 3 February 2020, the Assembly elected the Government with the Prime Minister Mr. Albin Kurti.
54. On 20 March 2020, a number of deputies of the Assembly submitted to the Presidency of the Assembly the Motion of No-confidence against the Government.
55. On 25 March 2020, the Assembly, by Decision No. 07-V-013, approved the Motion of No confidence in the Government.
56. On 30 April 2020, after several correspondences and at the request of the President (letter No. Prot. 382/1), in which he addressed the President of the Democratic League of Kosovo to nominate a candidate for the formation of the Government, the Democratic League of Kosovo proposed Mr. Avdullah Hoti as a candidate for Prime Minister of the Republic of Kosovo.
57. On 30 April 2020, the President issued Decree No. 24/2020, whereby *“Mr. Avdullah Hoti is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo”*.

58. On the same date, 30 deputies of the Assembly of Kosovo requested from the Constitutional Court the constitutional review of the Decree of the President of the Republic of Kosovo No. 24/2020, of 30 April 2020, on the proposal of Avdullah Hoti as a candidate for Prime Minister of the Republic of Kosovo.
59. On the same date, namely 30 April 2020, the President of the Assembly requested the KJC to send to the Assembly all information and documents related to the case of Etem Arifi.
60. It follows from the case file that, on 30 April 2020, the President of the Assembly had received a letter (explanatory Memorandum) from Etem Arifi's legal counsel, regarding the latter's mandate. In this letter, among others, it is noted that: *"Mandate of Mr. Etem Arifi [...] is legal and in accordance with the Constitution of the Republic of Kosovo as he was not convicted by a final decision of the court during this term (Legislature VII) while the sentence imposed by Judgment of 20.08.2020 did not present obstacle in the certification of Mr. Arifi as a candidate for deputy and also does not pose a legal obstacle in continuing to exercise the mandate as long as these legal conditions exist"*.
61. On 1 May 2020, at the request of the President of the Assembly, the KJC submitted to the Assembly copies of the judgments by which Etem Arifi was found guilty of a criminal offense, including Judgment PAKR 328/19 of the Court of Appeals, of 20 August 2019 and Judgment PML. No. 380/20, of the Supreme Court, of 30 January 2020.
62. On 4 May 2020, the Court of Appeals submitted to the Assembly physical copies of the Judgment of the Basic Court and the Judgment of the Court of Appeals.
63. On 4 May 2020, the President of the Assembly addressed a letter to the Chairman of the Committee on Legislation, Mandates and Immunities, requesting *"to address the issue of the mandate of deputy Etem Arifi"*.
64. On 12 May 2020, the Committee on Legislation, Mandates and Immunities submitted a response to the request of the President of the Assembly, explaining the following:

*"The Committee found that no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses the mandate ipso jure, except in the case as defined by Article 70, paragraph 3, subparagraph 5 of the Constitution of the Republic of Kosovo and Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly [...]. Therefore, based on the Rules of Procedure of the Assembly, the relevant Committee on Legislation, examines the issue of the mandate of the deputy only in cases as defined by Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly".* The Committee on Legislation also stated that: *"It is recommended that in the future the Temporary Committee for the Verification of Quorums and Mandates be more proactive in verifying the mandate of the deputies. [...] Therefore, based on the findings above, it is recommended to follow the previous practice of the Assembly"*.

65. On 28 May 2020, the Constitutional Court decided that the Presidential Decree of 30 April 2020 on the nomination of Avdullah Hoti as a candidate for Prime Minister of the Republic of Kosovo was in accordance with the Constitution.
66. On 3 June 2020, the Assembly, by the challenged Decision No. 07/V-014, elected the Government of the Republic of Kosovo, with 61 votes “for”, 24 “against” and 1 abstention. According to the material submitted to the Court, Etem Arifi voted “for” the election of the Government.

### **Applicant’s allegations**

67. The Applicants allege that the challenged decision is not in compliance with paragraph 3 of Article 95 [Election of the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of Deputies], of the Constitution.
68. The Applicants in their Referral challenge the constitutionality of the challenged decision because, according to them, “[...] (i) the result of the voting in the extraordinary plenary session of the Assembly of 03.06.2020, is not in accordance with Article 95 paragraph 3; and (ii) during the voting procedure in the above session of 03.06.2020, which resulted in the issuance of the Decision on the establishment of the Government, the Assembly acted contrary to the procedures provided in the Constitution within the meaning of Article 70 paragraph 3, subparagraph (6), contrary to the law and sub-legal acts in force, regarding the mandate of the deputy”.
69. The Applicants argue the alleged violations above stating that “in the above-mentioned extraordinary plenary session of the Assembly on 03.06.2020, was present and voted Mr. Etem Arifi, a deputy of the Assembly of the Republic of Kosovo from the Ashkali Party for Integration (API), who is convicted by a final court decision in the Republic of Kosovo for the criminal offense with a sentence of 1 year and 3 months. Consequently, the composition of the Government did not receive the necessary majority of votes for its election as defined by the Constitution”.
70. The Applicants, referring to Article 45 [Freedom of Election and Participation] of the Constitution, argue that “The Constitution, as well as the legislation in force, are clear and define precisely and unambiguously the issue of the right and restrictions regarding the right to vote and to be elected. In this definition of guaranteeing the right to vote, the issue of the mandate of the deputy is also a part”. They further add that “The Constitution of Kosovo, in order not to leave any room for arbitrariness for abuse of any state power regarding one of the basic human rights, the right to vote and for deputies of the Assembly of the Republic of Kosovo, has defined the segments, the size as well as the manner of restriction, which can be done only by a “court decision”.
71. The Applicants, referring to Article 70 [Mandate of the Deputies], paragraph 3 of the Constitution, allege that “[...] Deputy of the Assembly Mr. Etem Arifi is convicted by a final court decision, consequently his vote should be declared invalid, his mandate as a deputy was ended”. According to the Applicants,

Article 70 [Mandate of the Deputies] clearly defines the constitutional criteria regarding the fact when the mandate of a deputy in the Assembly of the Republic of Kosovo ends.

72. The Applicants further clarify that *“for the decision of the Court of Appeals by which the deputy Mr. Etem Arifi was sentenced with 1 year and 3 months in prison, the Assembly was notified for the first time in April 2020. Thus, according to the principle of a general legal standard, the effects of the decision begin to produce legal consequences as soon as the party, in this case the Assembly, is notified about the consequences of this decision. Therefore, the Applicants allege that the vote of the Deputy in question should be declared invalid in accordance with Article 70 paragraph 3 sub-paragraph (6) of the Constitution. Consequently, from the procedural point of view, the decision of the Assembly No. 07-V-014 of 03.06.2020, should be considered unconstitutional due to the fact that the composition of the Government has not received the majority of votes of all deputies of the Assembly, as defined in Article 95 paragraph 3 of the Constitution”*.
73. The Applicants also refer to Article 112 [Replacement of Assembly Members], paragraph 1, of Law No. 03/L-073 on General Elections in the Republic of Kosovo amended and supplemented by Law no. 03/L-256 (hereinafter: the Law on General Elections), as well as Article 8 [End of Mandate], point 1.6, of the Law No. 03/L-111 on the Rights and Responsibilities of the Deputy (hereinafter: the Law on the Rights and Responsibilities of the Deputy), which provide that the mandate of the Deputy ends when he/she is convicted of a criminal offense as provided in Article 70, paragraph 3, of the Constitution.
74. The Applicants further allege that *“Article 25, point d) of the Rules of Procedure of the Assembly of the Republic of Kosovo, has the same spirit of the Constitution, which Law No. 03/L-111 as in the previous paragraph of this request. Exclude linguistic differences to express the same purpose of the norm, the essence of the constitutional and legal spirit is the reason for losing the mandate [...]”*.
75. The Applicants further state that *“the mandate of the deputy Mr. Etem Arifi is unconstitutional and unlawful with constitutional consequences, non-fulfillment of the constitutional criteria for the election of the Government according to Article 95 paragraph 3 of the Constitution. In other words, the vote of the deputy in question in the extraordinary plenary session of the Assembly, which according to the Applicants was decisive in the formation of the Government, is invalid and, as such, makes Decision No. 07-V-014 of the Assembly of 03.06.2020 unconstitutional in procedural terms”*.
76. Finally, the Applicants request the following from the Court:
  - I. To declare this Referral **ADMISSIBLE**;
  - II. To declare Decision No. 07-V-014 of 03.06.2020 of the Assembly of the Republic of Kosovo for the election of the Government of the Republic of Kosovo **CONTRARY** to the Constitution of the Republic of Kosovo, in procedural terms;

- III. *To order this Judgment to be communicated to the parties and in accordance with Article 20.4 of the Law, to be published in the Official Gazette*
- IV. *This judgment is effective immediately*”.

### **The response of the Secretariat of the Assembly about previous practices in the Assembly in similar cases**

77. The Court recalls that it requested the Secretariat of the Assembly to notify the Court about previous practices in the Assembly regarding the termination or invalidity of the mandate of deputies convicted of criminal offenses.
78. With regard to the question raised by the Court, the Secretariat of the Assembly notified the Court that the Assembly had only one case during the V-th Legislature of the Assembly, with deputy Rr.M. In that case, the procedure followed was as follows:

*“The Kosovo Judicial Council, on 28 January 2016, notified the President of the Assembly about the Judgment of the Court of Appeals of Kosovo in Prishtina on the sentence of the deputies, [L.G.] and [Rr.M.] (deputy [LG], on 1 December 2015, resigned from the mandate of deputy).*

*The President of the Assembly, on 29 January 2016, based on Article 112.3 of Law no. 03/L-073 on General Elections in the Republic of Kosovo, requested the President of the Republic of Kosovo to replace the deputy, [Rr.M], from the Political Entity “Coalition PDK-PD-LB-PSHDK and PKK”, whose mandate has ended in accordance with Article 70, paragraph 3, point (6) of the Constitution of the Republic of Kosovo, with another member from the list of candidates of the Political Entity "Coalition PDK-PD-LB-PSHDK and PKK" - in the elections held on 8 June 2014.*

*The President of the Republic of Kosovo, on 12 February 2016, notifies the President of the Assembly about the Decision, of 11 February 2016, on the replacement of the deputy [Rr.M].*

*In this case, the Committee on Legislation, Mandates, Immunities, Rules of Procedure and Oversight of the Anti-Corruption Agency did not play a role. [...].”*

### **The CEC response to the questions posed by the Court**

79. The Court recalls that it requested the CEC to notify the Court about:
- a) the procedure followed at the CEC for the certification of candidates/list of candidates for participation in the general elections, especially in relation to the requirements set out in Article 29.1 (q) of Law No. 03/1-073 on the General Elections in the Republic of Kosovo; and
  - b) if there is any special procedure or action taken by the CEC to prevent persons convicted of criminal offenses by a final court decision, in the

last three years, from being enabled to run and be elected deputies of the Assembly of the Republic of Kosovo, and requested the CEC to inform the Court if there have been such cases in the past.

80. Regarding the abovementioned questions, the CEC initially stated that it implements the election legislation that regulates issues related to: the submitting the requests for certification of political entities and their candidates, the procedures for certification of political entities and their candidates, the reasons for the rejection of the application for certification, applicants' complaints for certification, review of applications, withdrawal or replacement of candidates of political entities, storage and verification of their data, payment of certification and ranking on ballots.
81. In this regard, the CEC clarified that the Office for Registration of Political Parties and Certifications (hereinafter: ORPPC), which operates within the CEC, assists the CEC in accepting, technical review and recommendation for certification of political entities. In this regard, the CEC stated that within fifteen days of the announcement of the election date by the President, the registered political party which does not wish to be certified for elections must notify the ORPPC/CEC that it is not running in the elections, or that the political party will seek certification through electoral coalition. The political entity that intends to run in the elections must apply for certification at the CEC within the set deadline. Each application for certification of a political entity must be accompanied by all required documentation related to the political entity. The CEC added that the ORPPC, after reviewing all applications for certification and if it determines that the political entity has met all the requirements, makes a written recommendation to the CEC to approve the application.
82. Regarding the application of candidates for certification, according to the CEC, the political entities that have applied for certification to participate in the elections must submit to the ORPPC the list of candidates according to the specified form. Each candidate must complete the candidate certification form and with his/her signature confirm that he/she does not hold any position that would make it impossible for him/her to run as a candidate, based on Article 29 of the Law on Elections, as well as to give consent to appear as a candidate for the political entity in whose list he/she appears and pledges to act in accordance with the election laws, the CEC election rules and the Code of Conduct.
83. According to the CEC, the ORPPC during the review of applications considers the documentation of each candidate whether it is complete, and, *inter alia*, whether all the criteria set out in Article 29 of the Law on General Elections are met. According to them, *"In relation to point (q) of Article 29 of the Law [...] on General Elections [...], it is compared to the lists accepted by the KJC or the judiciary or whenever possible, the List of Candidates was sent to Judiciary through the KJC, to obtain confirmation that any candidate has been convicted of a criminal offense in the last three years. In extraordinary and early elections, due to tight deadlines, it has rarely been possible to carry out this verification properly"*. The CEC states that, for the regular elections, the verification was done until the 2013 elections, while from 2017, the certification

of political entities and their candidates was made in accordance with Judgment AA.-Uzh. No. 16/2017 of the Supreme Court of 19 September 2017.

84. Furthermore, with regard to point (q) of paragraph 1 of Article 29 of the Law on General Elections, which stipulates that persons appearing on the voter list must not have been found guilty of a criminal offense by a final decision in the last three years, the CEC clarifies that according to Judgment AA. - Uzh. No. 16/2017 of the Supreme Court, this provision has been interpreted by the Supreme Court so that, *“no one can be denied the right to run in the elections, if such a right has not been removed by a court decision, which means that the candidate must be found guilty by a final decision, and the court, has imposed the accessory punishment “deprivation of the right to be elected”*. Therefore, the CEC states that *“if the ORPPC/CEC had encountered a court decision entitled “deprivation of the right to be elected” it would not recommend it, namely it would not certify any candidate of any political entity”*.
85. Explaining the procedure that preceded Judgment Uzh. No. 16/2017 of the Supreme Court the CEC clarified that: *“on 11 September 2017, has decided to not to certify 87 candidates for mayor and municipal assembly for the elections of 22 October 2017, a part of this decision is also Z.B. candidate for mayor of Prizren [...]. The decision of the CEC came as a result of data from the Judiciary, final decisions that these persons have been convicted of criminal offenses. But after the appeal of the decision of the CEC and the ECAP comes Judgment Uzh. No. 16/2017 of the Supreme Court [...] which orders the CEC to return the certification of the candidates removed from the list of certified”*.
86. Regarding Etem Arifi, the CEC in its response stated that *“was not and is not informed that by final decision, it was prohibited to Mr. Arifi, before 10 September 2019 when he was certified, to be a candidate for deputy”*.
87. The CEC attached to its response the request for certification of the political entity PAI; the certification form of the candidate Etem Arifi; the decision for certification of the political entity PAI; and Judgment of the Supreme Court A.A.-U.zh. No. 16/2017, of 19 September 2017.

### **Arguments given by the parties participating in the public hearing**

88. At the public hearing of 2 December 2020, the Applicant’s representative, the representative of the President of the Assembly, the representative of the Government, the Chairman of the Committee on Legislation, Mandates and Immunities, the representative of the KJC and the Chairperson of the CEC presented their arguments and counter-arguments in relation to the case, as well as answering the questions of the judges of the Court, which the Court will summarize below.

### **Arguments of the Applicant’s representative**

89. The Applicant’s representative, during the presentation of the Applicants’ positions at the public hearing, mainly repeated the views and arguments which

were presented in the initial Referral. He reiterated the allegations and arguments that the decision of the Assembly to elect the Government is contrary to Article 95, paragraph 3, of the Constitution, in conjunction with Article 70, paragraph 3, item 6, of the Constitution. This is because Etem Arifi, who voted for the election of the Government, did not have a valid mandate, as a result of Judgment PAKR. No. 328/19 of the Court of Appeals of 20 August 2019, through which he was sentenced to a year and three months imprisonment. Therefore, Etem Arifi had lost his mandate, based on Article 70 paragraph 3 item 6 of the Constitution.

90. Consequently, according to the Applicants' representatives, the election of the Government did not have a majority of the votes of all the deputies, taking into account the fact that the vote of Etem Arifi which was the decisive vote in the formation of the Government, as the 61st vote, out of a total of 120 deputies, was invalid.
91. According to the Applicants' representative, there are two forms of restriction of the right to be elected. Thus, the ineligibility to be elected a deputy limits the passive right to vote guaranteed by Article 45 of the Constitution, which stipulates that this right "*can be limited only by a court decision*". This right is also limited by Article 55 of the Constitution, which stipulates that "*rights and freedoms may be limited only by law*".
92. The Applicants' representative further stated that according to the case law of the ECtHR, this restriction should be made only by law "*to ensure the proper functioning of the democratic regime*". According to his allegations, Etem Arifi was not denied the right to run for a deputy in the parliamentary elections of 6 October 2019, in accordance with Article 45, paragraph 1, of the Constitution, due to the fact that the imposition of the main sentence related to the criminal offence was not accompanied by an accessory punishments [...]. The Court has not rendered any additional court decision within the meaning of Article 45, paragraph 1 of the Constitution, in conjunction with Article 63 of the Criminal Code and Article 29 paragraph 1, item p of the Law on General Elections, by which restricts the candidacy of the person in question.
93. However, according to the Applicants' representative, Etem Arifi should not have been certified as a candidate for deputy, based on Article 55 of the Constitution, which provides that rights and freedoms may be limited only by law and, consequently, Article 29 of the Law on General Elections, which stipulates that a person is capable of running as a candidate for deputy, unless found guilty of a criminal offense by a final court decision in the last three (3) years. The Applicants' representative stated that the non-application of Article 29 of the Law on General Elections is "*total legal irresponsibility of the CEC*".
94. The Applicants' representative stated that the exercise of political power by people who seriously violate the law could jeopardize the democratic nature of the state, adding that a person who does not know the standards of conduct in a democratic society may not be willing to respect the constitutional or international standards for democracy and the rule of law. In addition, the



Applicants' representative raised the question of how it is possible for someone from prison to represent the interests of those who elected him.

95. In this regard, the Applicants' representative claimed that the certification of the candidate Etem Arifi by the CEC occurred also because the deputy lied when submitting the form, when he stated that his candidacy is in accordance with Article 29, paragraph 1 item (q). This, according to him, is confirmed by the CEC response to the Court, which states that the candidate did not notify the CEC that he was convicted by a final court decision, with imprisonment of over one year. According to his allegations, neither the KJC has notified the CEC, nor any other institution about the fact that Etem Arifi had a final decision, through which he was sentenced to one year and three months imprisonment.
96. The Applicants' representative also referred to Judgment AA.-Uzh. No. 16/2017 of the Supreme Court, according to which the right to be elected can be limited only by a supplementary court decision. According to him, the Supreme Court without any legal basis returned to Article 45 of the Constitution, declaring, in a way, Article 29, paragraph 1 point q, of the Law on General Elections – unconstitutional, which is not within the competence of this court.
97. The Applicants' representative further stated that the Assembly had not been notified until 4 May 2020 that the deputy in question had been convicted by a final decision. Thus, according to the principle of the general legal standard, the effects of the decision begin to produce legal consequences once the party, in this case the Assembly, became aware of the consequences of this decision. In this case, this means on 4 May 2020, namely during the current legislature.
98. The Applicants' representative argued that the Presidential Decree appointing Mr. Avdullah Hoti as a candidate for Prime Minister has no legal effect, given that the procedure for the election of the Government, in the session of the Assembly of 3 June 2020, has been exhausted. According to the representatives of the Applicants, since the Presidential Decree for the appointment of Mr. Avdullah Hoti as a candidate for Prime Minister has no legal effect, the Constitutional Court must declare the challenged decision unconstitutional and must decide to go to elections, "*or that the situation is returned to zero*", regarding the election of the Government, in accordance with paragraph 2 of Article 95 of the Constitution.

### ***Arguments of the representative of the President of the Assembly***

99. The representative of the President of the Assembly held that the President of the Assembly was initially notified about the conviction of Etem Arifi from the media and immediately requested the KJC and the Court of Appeals to submit to the Assembly the court decisions regarding the case in question.
100. He stressed that following the receipt of court decisions from the KJC, addressed to the President of the Assembly, on 4 May 2020, the President addressed the Committee on Mandates and Immunities of the Assembly to seek clarification regarding the status of Etem Arif in the current legislature. This Committee has not provided a specific answer on this issue. In the meantime,

the Assembly elected the new Government by the challenged decision, in which case the Applicants addressed the Court requesting that the Constitutional Court assesses the constitutionality of the challenged decision, where the subject of review was the validity of Etem Arifi's mandate.

101. In further clarification, the representative of the President of the Assembly stated that the President of the Assembly, being aware that the Applicants had submitted a request for constitutional review of the challenged decision to the Constitutional Court, had not taken any further action, including the replacement of the deputy in question according to the legislation in force. The representative of the President of the Assembly also confirmed that Etem Arifi is still on the list of deputies of the Assembly of the current legislature.

***Arguments of the representative of the Committee on Legislation, Mandates and Immunities***

102. The Chairperson of the Committee on Legislation, Mandates and Immunities, during his presentation, notified the Court that the positions of this Committee are that no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses the mandate *ipso jure*, except as defined by Article 70, paragraph 3, subparagraph 5 of the Constitution, and Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly. According to him, the relevant Committee on Legislation examines the issue of the mandate of the deputy only in cases defined by Article 25 paragraph 1, item e) of the Rules of Procedure of the Assembly, when a deputy is absent for six (6) consecutive months in the sessions of the Assembly. Therefore, this Committee has no legal obligations to take an action in cases where a deputy loses his mandate as a result of committing a criminal offense.

***Arguments of the Government's representative***

103. The Government's representative held that the Applicants' Referral should be declared inadmissible by the Court, "*in the spirit of its formal inadequacy, which allows the Constitutional Court to declare the Referral inadmissible*".
104. The Government's representative, referring to the Opinion of the Venice Commission, of 23 November 2018, "*regarding the exclusion of offenders from parliament*", stated that regarding the restriction of voting rights "*a legitimate constraint must be pursued, which is necessary in a democratic society, while the restrictive means and the constraint itself must be proportionate to the aim pursued*". According to the Government's representative, the invalidity of the mandate from Article 70. 3 (6), as well as the impossibility of running from Article 73.2 of the Constitution, which the Applicants refers to, are two completely different things and are not related to the restriction of the election rights, under Article 45 of the Constitution.
105. While arguing the Government's position, he added that the essence of the constitutional problem in this case is not whether Etem Arifi lost or did not lose his mandate as a deputy in the sixth legislature, but whether he had judicial

restrictions on the exercise of his constitutional rights, under Article 45 of the Constitution, for candidacy in the seventh legislature.

106. The representative of the Government, regarding the fact whether Etem Arifi had restrictions of his constitutional rights in accordance with Article 45 of the Constitution, stated that *“Article 73.2 of the Constitution deals with the case of impossibility of candidacy and not with the restriction of any constitutional right according to Article 45 of the Constitution. In Article 73.3 of the Constitution this impossibility has to do with the cases when a person has problems with the ability to act”*.
107. With regard to the Applicants’ allegation that the loss of the mandate of a deputy produces constitutional moments, when a deputy is sentenced by a final court decision to imprisonment of one year or more, the Government’s representative argued that if such an approach is not respected *“then there a total legal uncertainty would be created, in which no constitutional guarantee would apply, and following such a logic would mean that the legal institute of rehabilitation in a democratic society would be deprived of any content”*.
108. The representative of the Government held that Etem Arifi lost his mandate as a deputy when he was convicted by Judgment PAKR. No. 328/2018, of the Court of Appeals, of 28 March 2019, and, according to him, a deputy loses his mandate only once. In the present case, Etem Arifi had lost his mandate when he was first convicted by the above Judgment and which had to do with the previous legislature and not the current legislature.
109. Also, according to the Government’s representative, if the Court finds that Etem Arifi did not have a valid mandate, then he maintains that the Government was elected with a sufficient number of votes, given the fact that since Etem Arifi’s mandate was invalid, and then the Assembly had a total of 119 deputies with valid mandates. Consequently, according to him, the challenged decision received the majority of votes of all members of the Assembly who had a valid mandate, namely 60 votes.

### ***Arguments of the KJC representative***

110. The KJC representative clarified that the KJC has no specific legal obligation to notify the institutions of the Republic of Kosovo in the event that a deputy of the Assembly is convicted by a final decision.
111. He further clarified that, although there is no legal obligation, the KJC is set in motion only at the request of the parties, as it did in the present case following the request of 30 April 2020 of the President of the Assembly, where the KJC submitted to the Assembly the copies of the judgments by which Etem Arifi was found guilty of a criminal offense, including Judgment PAKR 328/19, of the Court of Appeals, of 20 August 2019 and Judgment PML. No. 380/20, of the Supreme Court, of 30 January 2020. He further added that the KJC has consistently provided such information when requested by the CEC, or by other institutions.

### ***Arguments of the CEC Chairperson***

112. The CEC Chairperson emphasized that the CEC implements the electoral legislation that regulates issues related to the application for certification of political entities and candidates, procedures for certification of political entities and their candidates, the reasons for rejecting the request for certification, applicants' complaints about certification, review of applications, as well as withdrawal or replacement of candidates of political entities.
113. With regard to point (q) of paragraph 1 of Article 29 of the Law on General Elections, which stipulates that persons appearing on the voter list must not have been found guilty of a criminal offense by a final court decision within the past three years, the CEC Chairperson clarified that according to Judgment AA.-Uzh. No. 16/2017 of the Supreme Court, this provision was interpreted by the Supreme Court so that no one can be denied the right to run in elections if such a right has not been revoked by a court decision, which means that the candidate must be found guilty by a final decision and the court has imposed the accessory punishment "*deprivation of the right to be elected*". Therefore, the CEC Chairperson clarified that only if the CEC had encountered a court decision on "*deprivation of the right to be elected*" it would have considered not recommending, namely not certifying any candidate of any political entity.
114. Regarding the abovementioned Decision of the Supreme Court, the CEC Chairperson stated that the latter is controversial and with which she personally disagrees.
115. The CEC Chairperson further clarified before the Court that, following Judgment AA..Uzh. No. 16/2017 of the Supreme Court, the CEC allowed the certification of 87 candidates who had previously been decertified by the CEC (as the latter received information from the KJC, the candidates were convicted of criminal offenses during the past three years).
116. Regarding Etem Arifi, the CEC Chairperson informed that in the application submitted and signed by Mr. Etem Arifi, he vowed that he met all the requirements to run for deputy and that he had nowhere stated that he was convicted of a criminal offense.

### **Important provisions of the Constitution, laws and sub-legal acts**

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

##### *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 64 [Structure of Assembly]*

1. *The Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists. The seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.*

#### *Article 70 [Mandate of the Deputies]*

1. *Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate.*
2. *The mandate of each deputy of the Assembly of Kosovo begins on the day of the certification of the election results.*
3. *The mandate of a deputy of the Assembly comes to an end or becomes invalid when:*
  - (1) *the deputy does not take the oath;*
  - (2) *the deputy resigns;*
  - (3) *the deputy becomes a member of the Government of Kosovo;*
  - (4) *the mandate of the Assembly comes to an end;*
  - (5) *the deputy is absent from the Assembly for more than six (6) consecutive months. In special cases, the Assembly of Kosovo can decide otherwise;*
  - (6) *the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime;*
  - (7) *the deputy dies.*
4. *Vacancies in the Assembly will be filled immediately in a manner consistent with this Constitution and as provided by law.*  
[...]

#### *Article 71 [Qualification and Gender Equality]*

1. *Every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the Assembly.*
2. *The composition of the Assembly of Kosovo shall respect internationally recognized principles of gender equality.*

#### *Article 72 [Incompatibility]*

*A member of the Assembly of Kosovo shall neither keep any executive post in the public administration or in any publicly owned enterprise nor exercise any other executive function as provided by law.*

#### *Article 73 [Ineligibility]*

1. *The following cannot be candidates or be elected as deputies of the Assembly without prior resignation from their duty:*
  - (1) *judges and prosecutors;*
  - (2) *members of the Kosovo Security Force;*

- (3) members of the Kosovo Police;*
- (4) members of the Customs Service of Kosovo;*
- (5) members of the Kosovo Intelligence Agency;*
- (6) heads of independent agencies;*
- (7) diplomatic representatives;*
- (8) chairpersons and members of the Central Election Commission.*

*2. Persons deprived of legal capacity by a final court decision are not eligible to become candidates for deputies of the Assembly.*

*3. Mayors and other officials holding executive responsibilities at the municipal level of municipalities cannot be elected as deputies of the Assembly without prior resignation from their duty.*

#### *Article 74 [Exercise of Function]*

*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.*

*[...]*

#### *Article 75 [Immunity]*

*1. Deputies of the Assembly shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly.*

*2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly.*

#### *Article 95 [Election of the Government]*

*1. After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.*

*2. The candidate for Prime Minister, not later than fifteen (15) days from appointment, presents the composition of the Government to the Assembly and asks for Assembly approval.*

*3. The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo.*

*4. If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the Government is not elected for the second time, the President of the*

*Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement..*

*5. If the Prime Minister resigns or for any other reason the post becomes vacant, the Government ceases and the President of the Republic of Kosovo appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government.*

*6. After being elected, members of the Government shall take an Oath before the Assembly. The text of the Oath will be provided by law.*

**Law No. 03/L-073 on General Elections in the Republic of Kosovo  
(amended and supplemented by Law No. 03/L-256)**

*Article 29  
Candidate Eligibility*

*29.1 Any person whose name appears on the Voters List is eligible to be certified as a candidate, except if he or she is:*

- a) judge or prosecutor in Kosovo or elsewhere;*
  - b) member of the Kosovo Security Force;*
  - c) member of the Kosovo Police;*
  - d) member of the Customs Service of Kosovo;*
  - e) member of the Kosovo Intelligence Agency;*
  - f) head of an independent agency;*
  - g) diplomatic representative;*
  - h) chairperson or a member of the CEC;*
  - i) member of the ECAC;*
  - j) member of a Municipal Election Commission;*
  - k) member of the armed forces of any state;*
  - l) member of any police force or similar body;*
  - m) serving a sentence imposed by the International Tribunal for the Former Yugoslavia;*
  - n) under indictment by the Tribunal and has failed to comply with an order to appear before the Tribunal;*
  - o) deprived of legal capacity by a final court decision;*
  - p) deprived by a final court decision, including an ECAC decision, of the right to stand as a candidate;*
  - q) found guilty of a criminal offence by a final court decision in the past three (3) years;*
  - r) has failed to pay a fine imposed by the ECAC or the CEC; or has failed to obey an order of the ECAC.*
- [...]*

*29.4 If a candidate who has been certified by the CEC has or acquires a status that would render him or her ineligible to be a candidate by reference to the provisions of paragraph 1 of this Article, that person shall be decertified by the CEC and removed from the candidates list of the relevant Political Entity.*

*Article 112  
Replacement of Assembly Members*

*112.1 Seats allocated in accordance with the present Law are held personally by the elected candidate and not by the Political Entity. A member's mandate may not be altered or terminated before the expiry of the mandate except by reason of:*

- a) the conviction of the member of a criminal offence for which he or she is sentenced to prison term as provided by the article 69.3 (6) of the Constitution;*
  - b) the failure of the member to attend for six (6) consecutive months a session of the Assembly or the Committee(s) of which he or she is a member, unless convincing cause is shown as per Assembly Rules;*
  - c) the member's forfeiture of his or her mandate under article 29 of this Law;*
- [...]*

*112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:*

- a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election;*
- b) if there is no other eligible candidate of the same gender on the candidate list, by the next eligible candidate who won the highest number of votes from the candidate list;*
- c) if there are no other eligible candidates on the candidate list, by the next eligible candidate on the candidate list of the Political Entity which had the next largest quotient of votes under the formula set out in article 111.4 of this Law in the most recent election of the same type; and*
- d) if the member is an independent candidate, by the next eligible candidate on the candidate list of the Political Entity that had the next largest quotient of votes under the formula set out in article 111.4 of this Law.*

*112.3 Upon a seat becoming vacant, the Speaker of the Assembly shall make a request in writing to the President for the vacancy to be filled. Such request shall include an explanation as to how the vacancy.*

*112.4 Upon receipt of a request under paragraph 3 of this Article, President shall, if the explanation provided is satisfactory, request the CEC to recommend the name of a person to fill the vacancy. The CEC shall, within five (5) working days of being requested to do so, provide the President with the name of the next eligible candidate under paragraph 2 of this Article.*



## **Law No. 03/L-111 on Rights and Responsibilities of the Deputy**

### *Article 5 Deputy's mandate*

[...]

*2. The mandate of the deputy shall commence from the moment when his/her mandate is certified by the competent authority in accordance with the Law. The mandate of the deputies of the previous composition of the Assembly ends on the same day.*

[...]

### *Article 8 End of mandate*

*1. The deputy's mandate ends prematurely:*

[...]

*1.6. if he is by a valid decision convicted of a crime, with imprisonment for a period of at least six (6) months;*

## **Rules of Procedure of the Assembly of the Republic of Kosovo**

### *Article 9 Chairing of the inaugural session of the Assembly*

[...]

*3. After the agenda has been presented, the Chairperson of the inaugural session shall request from political parties represented in the Assembly, to appoint one member each in the ad hoc Committee for verification of quorum and mandates.*

*4. . The ad hoc Committee shall review the relevant documentation of elections and shall present a report on the validity of mandates of Members of the Assembly and shall verify the quorum of the inaugural session of the Assembly.*

### *Article 22 Immunity of Members of the Assembly*

*1. A Member of the Assembly shall enjoy immunity in accordance with the Constitution.*

[...]

*4. The immunity of a Member of Assembly shall commence on the day of verification of his/her mandate and shall cease at the end of the mandate.*

*5. As an exception of paragraph 4 of this Article the Assembly of Kosovo may waive the immunity of the Member of Assembly before the end of the mandate.*

*6. The request to waive the immunity of a Member shall be made by the competent body in charge of criminal prosecution. The decision to waive*

*the immunity of a Member shall be taken by the Assembly following the recommendations of the Committee for Mandates and Immunities.*

*7. The measure of detention or arrest may be taken against the Member of the Assembly even without waiving the immunity in advance by the Assembly in cases when the Member of the Assembly commits a serious criminal offence which is punishable by five (5) years or more of imprisonment.*

### *Article 23 Procedure of Waiving the Immunity*

*1. The competent body of criminal prosecution shall file the request for waiving the immunity of the Member of the Assembly together with other complementary documents to the President of the Assembly. The President of the Assembly shall submit the request of the prosecution body along with the complementary documentation to the Committee on Mandate, Immunity and Regulation within 48 hours.*

*2. The Committee on Mandate, Immunities and Regulations shall, upon receiving the request under paragraph 1 of the present Article, review the Request and submit the report and recommendations to the Assembly within 30 days.*

*3. The Committee shall inform the Member of the Assembly, whose immunity is to be waived, of the request and the time of its review in the Committee.*

*4. The Member of the Assembly shall be invited to participate in the meeting of the Committee and the plenary session to provide explanations and remarks on the matter.*

*5. The non-attendance of the invited Member of the Assembly shall not hinder the Committee and the Assembly to take a decision in his absence.*

*6. The Assembly shall review the report with recommendations in the second coming session at the latest. At the beginning of reviewing the matter, the floor shall be given to the Member of the Assembly to provide explanations and answer to questions of the Members of Assembly.*

*7. The Assembly shall decide on waiving the immunity of the Member of the Assembly by a secret ballot of majority of the members of Assembly.  
[...]*

### *Article 25 Loss of the status as a Member of the Assembly*

*1. A Member of the Assembly shall lose the mandate in the following cases:*

- a) he/she fails to take the oath,*
- b) he/she tenders the resignation,*
- c) his/her mandate ceases,*
- d) he/she is convicted for a criminal offence with imprisonment of one (1) year or more,*
- e) in a period of six (6) months attends none of the sessions of the Assembly. If the Member of Assembly does not show good cause to the satisfaction of the President of the Assembly, the President shall seek*

*the recommendation of the Committee on Mandate, Immunity and Regulation. After the recommendation of the Committee the President shall propose to the Assembly that the Member concerned cease to be a Member of Assembly. The Assembly shall decide on the matter in the next session;*

*f) a final decision of the court confirming the absence of his legal capacity to act,  
g) death.*

*2. In regards to cases under item 1. e) of this article, Member of Assembly may submit written argument to the Assembly to explain good cause for non-attendance in meetings and he/she shall be allowed to address to the Assembly, if he/she wishes so.*

*3. Vacated seats of Member of Assembly in whatever case that is defined by these Rules shall be filled in accordance with Article 70.4 of the Constitution of Republic of Kosovo and Article 112 of the Law on General Elections.*

*[...]*

#### *ANNEX No. 2 of the Rules of Procedure of the Assembly*

*Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency (According to the Decision of the Assembly 07-V-008 of 13.2.2020)*

*The scope of this Committee includes:*

*“[...]*

*- Interprets the Rules of Procedure of the Assembly, when requested by the Assembly;*

*- Considers the requests for the abolition of the Immunity and Mandate of Members of Parliament and submits recommendations to the Assembly;*

*[...]”*

#### ***Criminal Code No. 04/L-082 of the Republic of Kosovo***

##### ***“ACCESSORY PUNISHMENTS***

###### *Article 62*

###### *Accessory punishments*

*1. An accessory punishment may be imposed together with a principal or alternative punishment.*

*2. The accessory punishments are:*

*2.1 deprivation of the right to be elected;*

*[...]*

###### *Article 63*

###### *Deprivation of right to be elected*

*The court shall deprive a perpetrator of the right to be elected for one (1) to four (4) years, if such person, with the intent of becoming elected, commits a criminal offence against voting rights or any other criminal offence for which a punishment of at least two (2) years imprisonment is provided.”*

*Article 336  
Subsidy fraud*

- 1. Whoever, in connection with the application for a grant, continuation, or modification of the terms of a subsidy, provides a competent authority with incorrect or incomplete information which is a condition for the granting, continuation or modification of a subsidy, or conceals such information in violation of an obligation to disclose such information to a competent authority, shall be punished by a fine or by imprisonment of up to five (5) years.*
  - 2. Whoever uses such subsidy in violation of the law or for purposes other than those for which it was originally granted by the subsidy provider shall be punished by a fine or by imprisonment of up to five (5) years.*
  - 3. If the offense provided for in paragraphs 1 or 2 of this Article results in material gain or material damage exceeding twenty-five thousand (25,000) EUR, the perpetrator shall be punished by imprisonment of one (1) to eight (8) years.*
- [...]*

**Criminal Procedure Code No. 04/L-123**

*Article 407*

*Appeal against Judgment from Court of Appeals to Supreme Court*

- 1. An appeal against a judgment of a Court of Appeals may be filed with the Supreme Court of Kosovo if the Court of Appeals has modified a judgment of acquittal by the Basic Court and rendered instead a judgment of conviction or when the judgment by the Basic Court or Court of Appeals has imposed a sentence of life-long imprisonment.*

*Article 485*

*Finality and enforceability of Decisions*

- 1. A judgment shall become final when it may no longer be contested by an appeal or when no appeal is permitted.*
  - 2. A final judgment shall be executed if its service has been effected and if there are no legal obstacles to its execution. If an appeal has not been filed, or if the parties have waived the right to appeal or abandoned the appeal filed, the judgment shall be considered executable upon the expiry of the period of time prescribed for appeal or upon the day of the waiver or abandonment of the appeal.*
- [...]*

## Admissibility of the Referral

117. The Court first examines whether the Referral meets the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

118. In this respect, the Court refers to paragraph 1 of Article 113 of the Constitution, which establishes that:

*“The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties”.*

119. In addition, the Court also refers to Article 113.5 of the Constitution, which provides:

*“Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed”.*

120. The Court finds that the Referral is filed by 17 (seventeen) deputies the Assembly, in accordance with Article 113.5 of the Constitution. Therefore, the Applicants are authorized parties to submit this Referral.

121. In addition, the Court takes into account Article 42 [Accuracy of the Referral] of the Law, which establishes that the Referral submitted in accordance with Article 113.5 of the Constitution must contain:

*1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*

*1.2. provisions of the Constitution or other act or legislation relevant to this referral; and*

*1.3. presentation of evidence that supports the contest”.*

122. The Court also refers to Rule 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure, which establishes:

*“[...]”*

*(2) In a referral made pursuant to this Rule, the following information shall, inter alia, be submitted:*

*(a) names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*

*(b) provisions of the Constitution or other act or legislation relevant to this referral; and*

*(c) evidence that supports the contest*

*(3) The applicants shall attach to the referral a copy of the contested law or decision adopted by the Assembly, the register and personal signatures of*

*the Deputies submitting the referral and the authorization of the person representing them before the Court”.*

123. The Court notes that the Applicants entered the names of the deputies and their signatures; submitted the power of attorney for the person representing them before the Court; specified the challenged decision and submitted a copy; referred to specific constitutional provisions, which they claim that the challenged decision is not in compliance with; as well as presented evidence and proof to support their allegations. Therefore, the Court considers that the criteria set out in Article 42 of the Law and further specified in Rule 74 of the Rules of Procedure have been met.
124. Regarding the deadline set for submitting the Referral, which is 8 (eight) days from the date of approval of the challenged act, the Court notes that the challenged decision was adopted on 3 June 2020, while the Referral was submitted to the Court on 11 June 2020.
125. In this regard, the Court recalls that, in accordance with Rule 30 (1) of the Rules of Procedure, the final deadline for submitting the referral is calculated as follows: *“when a period is expressed in days, [...] is to be calculated starting from the following day after an event takes place”.*
126. In the case of the present Referral, this is the day following the adoption of the challenged decision. Consequently, the Court finds that the Referral was filed within the time limit set by Article 113. 5 of the Constitution.
127. In view of the above, the Court finds that the Applicants have met the admissibility requirements, established in the Constitution and further specified in the Law and the Rules of Procedure.
128. Therefore, the Court declares the Referral admissible and will consider its merits in the following.

### **Merits of the Referral**

129. The Court first recalls that the Applicants request the constitutional review of the challenged decision, claiming that the latter is contrary to paragraph 3 of Article 95 [Election of the Government], in conjunction with subparagraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies], of the Constitution.
130. The Court notes that the constitutional issue raised by the Applicants in their Referral relates to the compliance with the Constitution of the challenged decision, by which the Assembly, on 3 June 2020, had elected the Government. The Applicants allege that the procedure followed by the Assembly for the election of the Government was contrary to paragraph 3 of Article 95 [Election of the Government], of the Constitution, which states that *“the Government [...] is considered elected if it receives a majority of votes of all deputies of the Assembly”* which, based on Article 64 [Structure of the Assembly] which provides that the Assembly of Kosovo has 120 deputies, means that to elect the Government it is necessary that 61 deputies of the Assembly vote “for” the

election of the Government. According to the Applicants, this violation occurred because during the procedure for issuing the challenged decision, the Assembly acted in violation of Article 70 [Mandate of the Deputies], paragraph 3, subparagraph 6.

131. Accordingly, the Applicants build their argument by stating that, despite the fact that according to paragraph 3 of Article 95, to elect the Government, 61 valid votes of the deputies are required, in the voting held in the Assembly for the election of the Government on 3 June 2020, only 60 votes of the deputies were valid. This is because, according to them, Etem Arifi's vote was counted as the 61st vote for the election of the Government, despite the fact that his mandate as a deputy was not valid because he was convicted by a final decision for the criminal offence with a sentence of more than one year imprisonment. According to the Applicants, this means that Etem Arifi has automatically lost his mandate as a deputy, in accordance with subparagraph 6 of paragraph 3 of Article 70 of the Constitution, which stipulates that the mandate of a deputy expires or becomes invalid if he/she is "*sentenced to one or more years imprisonment by a final court decision of committing a crime*". In this regard, the Applicants allege that the mandate of Etem Arifi became invalid on the day when the Assembly was notified that the deputy in question was convicted of a criminal offense with imprisonment of more than one year.
132. Consequently, the Applicants allege that the election of the Government by the challenged decision, which was approved by the vote of Etem Arifi, whose vote was decisive, is contrary to the Constitution.
133. In light of this, the Court considers that the Applicants' Referral raises two essential issues: *firstly*, whether Etem Arifi had a valid mandate at the time of the issuance of the challenged decision in the Assembly (in the voting of which the deputy in question participated); *secondly*, is the challenged decision of the Assembly in accordance with the Constitution if a deputy who did not have a valid mandate participated in its adoption.
134. In dealing with the two issues in question, the Court will first refer to: (i) the views of the Venice Commission on the impossibility (ineligibility) of running in parliamentary elections and the loss of the mandate of deputies of Parliament as a result of a conviction for criminal offenses; (ii) answers of the member states of the Venice Commission Forum to questions sent by the Court in connection with the present case; (iii) the current practices of the Assembly of the Republic of Kosovo regarding the termination or invalidity of the mandate of deputies as a result of convictions for criminal offenses.

***(i) The views of the Venice Commission regarding the impossibility (ineligibility) for running in parliamentary elections and the loss of the mandate of deputies as a result of a criminal conviction***

135. The standards on the issue of running in parliamentary elections and the loss/invalidity of the mandate of deputies are comprehensively elaborated in the *Report of the Venice Commission on the Exclusion of Offenders from Parliament*, adopted by the Venice Commission at its 104th Plenary Meeting of

23-24 October 2015, CDL-AD (2015) 036 and promulgated through Opinion No. 807/2015, of 23 November 2018 (hereinafter: Report of the Venice Commission on the Exclusion of Offenders from Parliament).

136. In addition, in order to fully reflect the position of the Venice Commission on issues related to the parliamentary elections and the loss/invalidity of the mandate of the deputies, the Court will also note the main elements of the following two documents:
- *Code of Good Practice in Electoral Matters of the Venice Commission* No. CDL-AD (2002) 023rev2-cor, adopted in the Plenary Session of 18-19 October 2002 and promulgated through Opinion No. 190/2002, of 25 October 2018 (hereinafter: the Code of Good Practice in Electoral Matters of the Venice Commission); and
  - *Report of the Venice Commission on Electoral Law and Electoral Administration in Europe* No. CDL-AD (2006) 018, of 12 June 2006, adopted at the Plenary Session of 9-10 June 2006, of the Venice Commission and promulgated through Study No. 352/2005, of 12 June 2006 (hereinafter: Report of the Venice Commission on Electoral Law and Electoral Administration in Europe).

*Report of the Venice Commission on the Exclusion of Offenders from Parliament*

137. The report of the Venice Commission on the Exclusion of Offenders from Parliament made a comparative analysis, in the light of the restriction of the passive right to vote, namely the right to be elected, guaranteed by Article 3 of Protocol 1 [Right to free elections], of the European Convention on Human Rights (hereinafter: the ECHR). In this regard, the above-mentioned Report of the Venice Commission refers to the rich case law of the ECtHR, regarding the impossibility of running for a member of parliament. Thus, in its practice regarding the restriction of the passive right to vote, the ECtHR has pointed out that, in order to comply with the ECHR, such a restriction must be provided by law, pursue a legitimate aim and be proportional (see, inter alia: *Hirst v. the United Kingdom*, ECtHR judgment of 6 October 2005).
138. However, in the present case, the Court notes that the Referral does not raise allegations of individual election rights, but of adopting decision by the Assembly. Thus, in this case we are not dealing with a referral submitted by an individual claiming to violate his constitutional rights, but with a request for so-called “abstract review” of constitutionality submitted by seventeen deputies, against a decision of Assembly. Therefore, the Court will emphasize the analysis and findings of the Venice Commission Report on the Exclusion of Offenders from Parliament, which reflects the practice of some Council of Europe member states regarding: 1) Inability to run in parliamentary elections; 2) Loss or invalidity of the mandate of a member of parliament.
139. *With regard to the inability (ineligibility) to run in parliamentary elections*, the above-mentioned Report of the Venice Commission notes that in most



Council of Europe member states, the issue of inability (or ineligibility) to run in parliamentary elections is not determined by special constitutional provisions, but is regulated by relevant laws (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, pages 6-7).

140. In addition, as regards the legal basis for the inability (ineligibility) to run for a member of parliament, the above report distinguishes the states where the impossibility of running depends on the nature of the criminal offense, as well as the states where the impossibility of running depends on the nature of the sentence.
141. Thus, in the countries such as the United Kingdom, France, and Cyprus, parliamentary elections are prohibited for persons convicted of criminal election-related offense. In some countries (Iceland, Turkey, Denmark, etc.), the persons convicted of criminal offenses that violate moral values (honor, reputation, etc.) may not be candidates for parliamentary elections. In Canada (a non-Council of Europe country), for example, persons convicted of corrupt actions over the past five years, or serving prison sentences, cannot run for parliament. In Latvia, a person convicted of an intentional criminal offense may not run in the parliamentary elections. On the other hand, in some countries the impossibility of running in parliamentary elections depends on the nature (length) of the sentence for criminal offenses. This group includes countries such as: Austria, Germany, Montenegro, Luxembourg, etc. In Germany, for example, the Criminal Code imposes an automatic ban (for a period of five years) on running in elections for persons sentenced to not less than one year in prison. A limited number of countries (Finland, Slovenia, USA) do not have specific constitutional or legal obstacles for persons convicted of criminal offenses to run in parliamentary elections (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, pages 11-13).
142. In addition, the above-mentioned Report of the Venice Commission points out that in countries where the right to run in parliamentary elections is restricted, this is done: 1) by law, in general, specifying the type of punishment or a criminal offense which prevents the exercise of the right to be elected; or 2) the restriction is imposed by court decisions, as a case-by-case sentence (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, page 13).
143. Regarding the loss/invalidity of the mandate of a member of parliament, the above-mentioned report of the Venice Commission states that more than 40% of the member states of the Council of Europe have constitutional provisions regarding the loss/invalidity of the mandate of members of parliament, while the rest of the states regulate this issue by legal provisions (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, page 15).
144. According to the comparative analysis contained in the above-mentioned Report of the Venice Commission, the loss/invalidity of the parliamentary mandate is regulated in different ways, in the countries included in the analysis (including some non-member states of the Council of Europe). However, there are generally three normative bases that determine the loss/invalidity of the

mandate of a member of parliament: first, the nature of the criminal offense; second, the nature of the sentence; third, the circumstances that make it impossible to run in parliamentary elections (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, page 15).

145. The first group of countries - where the loss/invalidity of the parliamentary mandate is related to the nature of the criminal offense - include Finland, France, Italy, Malta, Cyprus, Canada, Portugal, etc. The category of criminal offenses that lead to the loss/invalidity of the parliamentary mandate includes: criminal offenses related to the electoral process, criminal offenses that are considered particularly immoral, serious criminal offenses, intentional criminal offenses or other specific offenses.
146. The second group includes states where the loss/invalidity of the mandate of the deputy is related to the nature (length) of the sentence. In this context, in some countries, any conviction for a criminal offense by a court decision is the basis for the loss/invalidity of the mandate of the deputy (Albania, Azerbaijan, Estonia, Finland, etc.). In some other countries, the loss/invalidity of a deputy's mandate depends on the length of the sentence and other aspects related to the sentence. Thus, in Croatia and Ireland the deputy loses the mandate if he is sentenced to effective imprisonment of 6 months or more. In Greece, the deputy loses his/her mandate in the Parliament if he/she loses the general right to vote (the loss of the general right to vote is determined by the Constitution and a special law). In Canada, the deputies lose their mandate if they are sentenced to two or more years imprisonment. Whereas in some countries, such as Bulgaria, the loss/invalidity of the parliamentary mandate occurs if a prison sentence is imposed, the execution of which has not been suspended.
147. The third group belongs to the countries where the loss/invalidity of the mandate of the deputy is related to the fulfillment of the conditions for the inability (ineligibility) to run in the parliamentary elections. Thus, the deputy loses the parliamentary mandate if during the exercise of the mandate of the member of parliament the conditions and circumstances are met which would make it impossible for him/her to run in the parliamentary elections. This is done automatically or by a special decision of the parliament.
148. Always referring to the Report of the Venice Commission for the Exclusion of Offenders from Parliament, the Court notes that the above practices are not comprehensive and uniform. Thus, in countries such as the USA, Israel, etc., the loss/invalidity of the mandate of the deputy (or senator) occurs only in very rare cases. In the US, for example, there are no express constitutional provisions for losing a seat in Congress, except for acts of treason (see Venice Commission Report on Exclusion of Offenders from Parliament, p. 23).
149. With regard to the procedure for the loss/invalidity of the mandate of a deputy, the abovementioned Report of the Venice Commission points out that this procedure has been regulated in different ways. In some countries, a member of parliament automatically loses his or her mandate (is disqualified) as soon as he or she is deprived of his or her civil political rights by a court decision (eg, Belgium). In Estonia, the Constitution stipulates that the mandate of a deputy is

terminated as soon as he or she enters a court decision in force on his sentence, which would prevent him from running for a deputy.

150. In other countries, it is provided that the loss/invalidity of the mandate (disqualification) is realized through a certain action in the parliament. Thus, in Denmark the parliament can take the mandate of a member who has been convicted of a criminal offense which renders him unworthy to hold a seat in the legislature. A similar practice is followed in countries like Germany and Hungary. While in France, the loss of civil rights leads to the loss of the parliamentary mandate of the deputy, but this is confirmed by a decision of the Constitutional Council.

#### Code of Good Practice in Electoral Matters of the Venice Commission

151. Through its Code of Good Practice in Electoral Matters, the Venice Commission clarifies the possibilities for restricting political rights, including the right to vote and to stand for election, through the provisions of electoral legislation. In the relevant part, this Code states that:

*“[...] provision may be made for clauses suspending political rights. Such clauses must, however, comply with the usual conditions under which fundamental rights may be restricted; in other words, they must:*

- 1. be provided for by law;*
- 2. observe the principle of proportionality;*
- 3. be based on mental incapacity or a criminal conviction for a serious offence.*

152. Furthermore, according to the abovementioned Code, in the case of the acquisition of rights on the basis of mental incapacity, such a decision may relate to the incapacity but also imply *ipso jure* the acquisition of civil rights. While the conditions for denial of the right of individuals to be elected may be less strict than the deprivation of the right to elect (to vote), as in this case it is a question of holding a public position [...] (see: Venice Commission Code of Good Practice in Electoral Matters, p. 14).

#### Report of the Venice Commission on Electoral Law and Electoral Administration in Europe

153. The report of the Venice Commission on Electoral Law and Electoral Administration in Europe addresses key issues concerning electoral legislation and the administration of elections in Europe. In the relevant part of this Report, regarding the loss of the mandate of the elected, the Venice Commission determines the following:

*“[...]*  
*78. It is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying*

*offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms. With regard to the Law on Elections of People's Deputies of the Ukraine, for instance, the Venice Commission recommended that the law should provide greater protection for candidate rights, including removing the blanket and indiscriminate prohibition on candidacy for persons who have a criminal conviction (see CDL-AD(2006)002, paras 16 and 100). The OSCE/ODIHR recommendation that the right to be a candidate should be restored to those persons who were convicted and subsequently pardoned after the 2003 post-election disturbances in Azerbaijan goes in the same direction.*

*79. On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all. For instance the delegation of the Congress of Local and Regional Affairs of the Council of Europe was most concerned at the issue of the validity of the candidatures that were put forward in the 2005 local elections in "the Former Yugoslav Republic of Macedonia". An elected mayor was able to run for Mayor there despite having being sentenced to four years imprisonment for large scale theft by the court" (see Report of the Venice Commission on Electoral Legislation and Electoral Administration in Europe, paragraphs 78 and 79)".*

154. As a conclusion regarding the positions of the Venice Commission, in all three documents of the Venice Commission analyzed above, emphasis is placed on the general conclusion that the impossibility, namely the ineligibility to run in the parliamentary elections, as well as the loss of the parliamentary mandate, is a restriction of electoral rights, guaranteed by Article 3 of Protocol 1 to the ECHR. Therefore, they must be based on clear norms of law, pursue a legitimate aim and respect the principle of proportionality. But also, as the Venice Commission strongly emphasizes, it is in the general public interest to avoid the active role in political decision-making of serious violators of the law.

***Answers received from the Venice Commission Forum to questions sent by the Constitutional Court***

155. The Court will present in the following chronologically the answers of the states of the Venice Commission Forum. As explained in the part of the proceedings before the Court, the latter addressed questions to the members of the Forum of the Venice Commission. Answers were received from the constitutional/supreme courts of the following countries: Sweden, Slovakia, Croatia, Czech Republic, Mexico, Kyrgyzstan, the Netherlands, Bulgaria and Poland.
156. The answers of the Supreme Court of **Sweden** and the Supreme Administrative Court of Sweden, state that: (a) in Sweden, it is not forbidden by law to run for members of the Assembly (Riksdag) if you have been convicted of a criminal offense. However, political parties are presumed to have internal rules that prevent persons from running for office if they have committed a criminal offense; (b) the deputy loses the mandate due to commission of a criminal

offense, while the decision to remove the mandate of a deputy of Parliament (Riksdag) is taken by the court that decides on the criminal offense, if we are dealing with a imprisonment sentence of two (2) years or more; (c) in the event that a member of Parliament (Riksdag) is absent (or loses office), he/she shall be replaced by a deputy. If the deputy member is also absent, then, until his/her replacement is appointed, the Parliament (Riksdag) is incomplete but continues to work and take decisions; (d) there are no rules as to how many members must be present in Parliament to have a quorum, although there are certain cases where a certain number of deputies are required to take a decision. To make a decision, the majority of members present must vote “for” the proposal; and (e) a member of Parliament (Riksdag) has the right to vote until he/she is removed from office. The fact that the deputy has been dismissed does not mean that the previous decisions where he voted (before he was dismissed) are invalid. This is because in Sweden the law that has been passed can only be repealed or amended by the Parliament (Riksdag), which can issue a new law, while the decisions of the Parliament cannot be appealed or reviewed.

157. The answer from the Constitutional Court of **Slovakia** states that: (a) a person may not be a candidate for elections in Slovakia if he has been convicted of an intentional criminal offense and if the decision is final until the sentence has been removed from his criminal file; (b) the term of office of a deputy of Parliament ends when the decision on his or her imprisonment for a criminal offense becomes final and that sentence of imprisonment has not been suspended; (c) there are no rules prohibiting the work of the Assembly due to the absence of a deputy as a result of the loss of his mandate; (d) the total number of deputies to be considered “*the majority of all deputies of the Assembly*” is the majority of the number of deputies as defined in the Constitution, namely of the total number of 150 deputies of the Slovak Assembly under Article 71 (3) of the Constitution of Slovakia; and (e) decisions of the Assembly taken when a certain deputy has not had a valid mandate, and his or her vote has been decisive for decision-making - although there are no written rules - may be challenged in the Slovak Constitutional Court, which has stated that serious procedural errors made by Parliament can cause a decision to be declared unconstitutional..
158. The response from the Constitutional Court of **Croatia** clarifies that in Croatia: (a) persons who have been sentenced by a final court decision to effective imprisonment of 6 months or more, and if at the time of the issuance of the decision on the announcement of the elections, sentence is being executed, or is expected to be executed. Also, persons who have been convicted and have not been rehabilitated according to the law in force, on the day the decision to announce the elections is made, may not be candidates for deputy. Fulfillment of these conditions must be proven by a relevant certificate from the candidate; (b) the deputy loses his mandate if he is sentenced by an unconditional and final decision to imprisonment of 6 months or more. However, the term of office of a deputy of Parliament shall expire on the day on which Parliament decides to terminate the term of office of a deputy, in the accordance with procedure established in Article 10 of the Rules of Procedure of the Croatian Parliament, and that decision of the Parliament is published in the Official Gazette; (c) the Parliament shall continue to function even when a deputy loses his or her

mandate; (d) the votes required for decision-making in Parliament are calculated according to the total number of mandates/seats in Parliament, and not according to the total number of seats valid at the specific moment; and (e) there is no case law of the Constitutional Court that is relevant in the present case. However, the Constitutional Court decided on a case when the Parliament rendered a law with one vote less (76 instead of 77 votes), but the deputies who decided had a valid mandate to decide.

159. The response from the **Czech Republic** specifies that the legislation of this country: (a) does not restrict the right to be a candidate for election as a result of the commission of criminal offenses; (b) no loss of mandate as a result of the commission of criminal offenses is envisaged; (c) in case of loss of the mandate of a deputy he is replaced by another deputy and the mandate of the new deputy begins the day of the end of the mandate of the deputy who is replaced. If there is no replacement, then the seat of the deputy will remain vacant even though such a situation has not yet occurred in practice; (d) with regard to the votes required for decision-making, the vote of “*all deputies of Parliament*” means the majority of the total number of seats of Parliament provided by the Constitution (in the case of the Parliament of the Czech Republic, this means a majority of 200 deputies of the Parliament, as provided in the Constitution); and, (e) the Constitution of the Czech Republic gives jurisdiction to the Constitutional Court to resolve doubts as to the loss of eligibility to hold office, but the decision of the Constitutional Court is of a declaratory nature only and the Czech Constitution or other legal acts do not regulate situations where a former deputy holds an invalid mandate at the time of voting.
160. The response from the Supreme Court of **Mexico** specifies that: (a) In Mexico the legal system does not allow persons who have been convicted of criminal offenses and are currently serving sentences to be candidates for election, but such a prohibition does not apply, in principle, in cases where a person has completed serving the sentence; (b) for deputies who are exercising their mandate in order for criminal proceedings to take place it is necessary to obtain a “Declaration of Indictment” from (other) deputies. If the deputies agree, then the deputy in question loses the mandate; (c) there is no legal provision stipulating that Parliament (Congress) does not function if a deputy resigns. If a deputy loses the mandate, the same is replaced; (d) the votes required for decision-making in Parliament (Congress) are, in principle, the majority of the votes of the deputies present at the voting session. Therefore, the number of votes required for the adoption of decisions is not calculated on the basis of the number of members of any of the chambers of Parliament, as long as a majority of the deputies are present to make a quorum, depending on the issue under discussion; and, (e) although there is no practice similar to the circumstances of the case where a deputy without a valid mandate took part in the vote and when his vote was decisive in the decision in question, the Supreme Court of Mexico may annul laws when it finds irregularities during the procedure for their approval.
161. The response of the Supreme Court of **Brazil** emphasizes that: (a) in Brazil a person who has committed a criminal offense may not be a candidate in election for Congress without passing eight (8) years from the time he/she served the

sentence for the criminal offense. As for a deputy who is exercising his duty, the term of eight (8) years starts from the day he/she completes the duty and not from the date when the conditions are created for an ineligibility of candidacy; (b) a deputy (congressman, senator) loses his or her mandate if his/her political rights are suspended, or convicted of a criminal offense by a final decision. In cases of loss of political rights, he/she loses the mandate if decided by the House of Representatives or the Federal Senate, by an absolute majority of votes. While there is also a special procedure to be followed when a deputy (congressman or senator) loses his mandate, when he is convicted of a criminal offense; (d) the deputy (congressman, senator) who loses the mandate of deputy according to the above-mentioned procedures, immediately leaves the position of deputy and he is replaced by the replacing deputy; and, (e) in Brazil, based on the principle of the presumption of innocence, the Federal Supreme Court decides whether the deputy has committed a criminal offense and then the Federal Senate, or the House of Representatives, decides definitively to remove him from office. Therefore, until he leaves the position according to the prescribed procedures, the deputy (congressman, senator) exercises his/her function. The effects of the removal are not retroactive and his vote so far remains valid.

162. The response from the Constitutional Chamber of the Supreme Court of **Kyrgyzstan** specifies that in the legislation of this country: (a) persons serving a sentence by a court decision may not be elected deputies. The registration/certification of a candidate for election should be withdrawn by the Central Election Commission, if it is confirmed that the candidate has concealed information about the lack of passive suffrage, including information about the existence of a criminal file which has not been deleted from the file as such, as provided by law; (b) the mandate of the deputy ends prematurely if there is a court decision on the sentence. The premature removal of the deputies is done by a decision of the Central Election Commission, which decision is taken no later than 30 days from the day when the legal basis for such a thing is presented; (c) in the event of the loss of a deputy's seat, Parliament shall function normally; (d) in the absence of the composition of the Assembly under the Constitution, decisions shall be taken by the composition of the deputies who have taken the oath; and, (e) the legislation in force does not have norms governing the issue if a deputy who does not have a valid mandate participates in a vote of the Parliament.
163. The response from the Supreme Court of **the Netherlands** clarifies that: (a) a person whose voting rights have been restricted, or a person who has been convicted of a criminal offense with imprisonment of at least one (1) year, may not run for elections; (b) the deputy loses his/her mandate if he/she has been convicted by an irrevocable decision; (c) (d) and (e) the exercise of the post-disqualification function is unlawful, but the disqualification does not result in a pre-disqualification vote being invalid.
164. The response from the Constitutional Court of **Bulgaria** specifies that: (a) a person may not be a candidate for election in Bulgaria if he is serving a sentence; (b) the term of office of a deputy ends when a sentence of imprisonment due to intentional commission of a criminal offense is imposed

and the serving of sentence has not been postponed. The abolition of the mandate of the deputy, however, requires the issuance of a decision by Parliament; (c) Parliament continues to function despite the fact that a deputy lost his seat; (d) the total number of deputies to be considered “*the majority of all deputies in the Assembly*” is the majority of the number of deputies in the Assembly (but the Assembly continues its work if more than half of the deputies are present); (e) the Constitution of Bulgaria or other legislation does not provide for what happens when a deputy who has lost a mandate has taken part in a decision of the Assembly and whose vote has been decisive for the decision.

165. The reply from the Constitutional Court of **Poland**, specifies that: (a) according to the Constitution of Poland, no person sentenced to imprisonment by a final judgment for an intentional criminal offence may be elected to the Sejm (Representative Chamber) and Senate. While according to the electoral legislation that regulates this issue more specifically, a person has no right to stand for election if she/he was sentenced to imprisonment by a final judgment for an intentional criminal offence prosecuted *ex officio* and/or an intentional criminal offence of fiscal nature; (b) the loss of the mandate of the deputy of the House of Representatives, (Sejm) occurs when he/she loses the right to be a candidate for deputy, as a result of the criminal offenses mentioned in point (a). The end of the mandate is done by decision of the Marshal of the House of Representatives. The deputy who loses the mandate has the right to appeal this decision within 3 days to the Supreme Court of Poland, which evaluates the above-mentioned decision within 7 days. After a deputy has lost his mandate, according to the abovementioned procedure, the Marshal of the House of Representatives takes steps to fill the vacancy of the deputy whose mandate has ended.; (c) in case of loss of the mandate of a deputy he/she is replaced by another deputy, however neither the Constitution nor the electoral legislation provide for the suspension of the legislative function of the House of Representatives of the Polish Parliament until the filling of the vacant position of deputy; (d) with regard to the votes required for decision-making in the House of Representatives of the Polish Parliament, “*majority of deputies*” means half of the total number of mandates of Sejm, provided by the Constitution, which in case of Poland, is half of the total number of 460 deputies, As a result of losing the mandate of a deputy, until the vacant seat is filled, it is not foreseen to modify the constitutional requirement for a quorum that is necessary to pass a law, in this case, with “half the number of deputies; and, (e) it may not occur in practice for a deputy who has lost his or her mandate to participate in decision-making due to the fact that, *inter alia*, there are brief procedures within which the President of the Marshal of the House of Representatives decides on replacement, and the Supreme Court of Poland decides regarding the appeal.

***(iii) Practice of the Assembly of the Republic of Kosovo so far regarding the termination or invalidity of the mandate***

166. The Court notes that, based on the comments submitted to the Court by the Secretary General of the Assembly, it is noted that so far there has been only one case where the mandate of a deputy has been terminated and this has happened



during the V-th Legislature of the Assembly of the Republic of Kosovo, with the deputy Rr. M.

167. In that case, on 28 January 2016, the KJC notified the President of the Assembly regarding the Judgment of the Court of Appeals, of 1 December 2015, on the imprisonment of the deputies Rr.M (sentenced to four years imprisonment) and L.G. (sentenced to six years imprisonment). On 1 December 2015, deputy L.G., had resigned from the mandate of the deputy and, consequently, the issue of loss or invalidity of his mandate had not been raised.
168. On 29 January 2016, the President of the Assembly, in accordance with paragraph 3 of Article 112 [Replacement of Assembly Members], of the Law on General Elections, requested the President of the Republic of Kosovo to replace the deputy Rr. M.
169. Acting upon the request of the President of the Assembly and in support of the relevant legal provisions, on 11 February 2016, the President of the Republic of Kosovo issued a decision to replace deputy Rr.M, with another candidate from the same political party.
170. On the same date, the President of the Republic of Kosovo notified the President of the Assembly about the decision to replace the deputy Rr.M.
171. Based on the documents and responses submitted by the Assembly, the Court notes that in the present case in the Assembly no special procedure had been conducted to abolish or establish the invalidity of the mandate of the deputy Rr.M. But, as soon as the KJC informed the President of the Assembly about the conviction of the deputy Rr.M., by the Judgment of the Court of Appeals, the President of the Assembly addressed a letter to the President of the Republic to replace the deputy Rr.M.
172. In the light of the analysis above, the Court will continue to address the issue of the effect of a conviction for a criminal offense on the right to run in parliamentary elections, as well as the validity of the mandate of a deputy, according to constitutional and legal provisions in the Republic of Kosovo. In this regard, the Court notes that the Applicants base their constitutional referral mainly on Article 70.3.6 of the Constitution - citing the fact that Etem Arifi has been certified and elected a deputy and has continued to exercise his mandate as a deputy, despite the fact that he had been convicted of a criminal offense. However, the Court considers that the issue raised in this Referral is related to the constitutional and legal norms that have to do with the effect that the sentence for a criminal offense has and the right to run as a deputy of the Assembly of the Republic of Kosovo, in accordance with Article 71.1 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections.

***Regarding the effect that the sentence for a criminal offense has on the candidacy, election and exercise of the mandate of the Deputy of the Assembly of the Republic of Kosovo***

173. The Court recalls once again that the fundamental constitutional issues raised by the Referral are: whether Etem Arifi had a valid mandate at the time of the issuance of the challenged decision by the Assembly (in which vote the deputy in question participated); and, if not, is the challenged decision of the Assembly in accordance with the Constitution, if in its adoption a deputy who did not have a valid mandate participated (moreover, as a decisive vote).
174. The Court notes that, in this case, the consideration of these two issues is related to the effect that the sentence for a criminal offense has on the candidacy, election and exercise of the mandate of a deputy.
175. Regarding the effect of the conviction for committing a criminal offense on the election and exercise of the mandate of a deputy, the Court notes that the legislation applicable in the Republic of Kosovo provides for two situations, namely the situation of inability (ineligibility) to be a candidate for deputy of the Assembly of the Republic of Kosovo, as a result of a conviction for committing criminal offenses; as well as the situation of termination or invalidity of the mandate of the deputy, as a result of the sentence for committing criminal offenses. The Court notes that the views of the Venice Commission and the responses received from the member states of the Venice Commission Forum, set out above, also emphasize these two situations.
176. Therefore, the Court will further reflect, in a concise manner, the normative framework in the Republic of Kosovo regarding: *a*) inability (ineligibility) to be a candidate for deputy of the Assembly of the Republic of Kosovo, as a result of conviction for criminal offenses; *b*) the invalidity of the mandate of the deputy as a result of the conviction for criminal offenses. Further, the Court will shed light on the question whether *c*) there is, according to the legislation in force in the Republic of Kosovo, any special procedure that should be followed for the abolition of the mandate of the deputy, after he/she has been sentenced to imprisonment of one year or more, by final court decision. Finally, the Court will analyze the issue of the mandate of Etem Arifi, in light of the conclusions reached after the consideration of the three issues mentioned above.

***a. Inability (ineligibility) to be a candidate for a deputy of the Assembly of the Republic of Kosovo as a result of conviction for criminal offences***

177. Regarding the inability (ineligibility) of persons to be a candidate for deputy, the Court first refers to Article 45 [Freedom of Election and Participation] of the Constitution which stipulates that “*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. [...]*”.
178. The Court further refers to Article 71 [Qualifications and Gender Equality] of the Constitution, which provides that “*Every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the Assembly*”.

179. The Court also refers to Article 73 [Ineligibility], of the Constitution, which expressly defines the specific cases when a person cannot run for or be elected a deputy of the Assembly. Thus, paragraph 1 of Article 73 stipulates that *“The following cannot be candidates or be elected as deputies of the Assembly without prior resignation from their duty: (1) judges and prosecutors; (2) members of the Kosovo Security Force; (3) members of the Kosovo Police; (4) members of the Customs Service of Kosovo; (5) members of the Kosovo Intelligence Agency; (6) heads of independent agencies; (7) diplomatic representatives; (8) chairpersons and members of the Central Election Commission”*.
180. The Court also refers to paragraph 2 of Article 73, which stipulates that *“[p]ersons deprived of legal capacity by a final court decision are not eligible to become candidates for deputies of the Assembly.”* Whereas paragraph 3 of Article 73, provides that *“Mayors and other officials holding executive responsibilities at the municipal level of municipalities cannot be elected as deputies of the Assembly without prior resignation from their duty”*.
181. In this regard, the Court notes that Article 73 [Ineligibility], of the Constitution, does not explicitly stipulate that persons convicted of criminal offenses may not run for a deputy of the Assembly of Kosovo.
182. However, the Court emphasizes Article 71 [Qualifications and Gender Equality] of the Constitution, which stipulates that *“Every citizen of the Republic of Kosovo who is eighteen (18) years or older and **meets the legal criteria** is eligible to become a candidate for the Assembly”*. In this respect, it is a constitutional requirement provided in the above-mentioned article of the Constitution which explicitly stipulates that in order to run for a deputy, each person must meet, in addition to the criteria of age and citizenship, also the *“legal criteria”*. From this constitutional provision it follows that the Assembly of Kosovo may establish additional criteria, in addition to law, in order for a person to run for a deputy.
183. In this regard, the Law on General Elections, in Article 29 [Candidate Eligibility], paragraph 1, stipulates, *inter alia*, that:
- 29.1. *“Any person whose name appears on the Voters List is eligible to be certified as a candidate, except if he or she is:*  
*[...]*  
*o) deprived by a final court decision, including an ECAC decision, of the right to stand as a candidate;*  
*p) deprived of legal capacity by a final court decision;*  
*q) found guilty of a criminal offence by a final court decision in the past three (3) years;*  
*[...]”*
184. According to this legal provision, a person, in addition to having to meet other criteria provided by the Constitution and the law, cannot be a candidate for deputy in parliamentary elections if *“by a court decision, including the ECAP decision, he has been deprived of the right to be a candidate”, or if he has been*

*found guilty of a criminal offense by a final court decision in the past three (3) years”.*

185. The Court considers it important to note that the Law on General Elections distinguishes between situations when persons are deprived of the right to be candidates in parliamentary elections by a final court decision (or of the ECAP), and situations where such a thing is impossible for them because they have been found guilty of a criminal offense by a final court decision in the past three years.
186. Furthermore, as regards the criterion that a person has not been found guilty of a criminal offense by a final court decision in the last three years, the Court notes that the Law on General Elections specifies the nature of the criminal offense and the criminal sanction imposed, so that a person is deprived of the possibility of being a candidate for deputy, provided that the person is: *“found guilty of a criminal offence”* by *“a final court decision”* and provided that this happened in *“the past three (3) years”*.
187. In this regard, the Court notes that Article 29 of the Law on General Elections attributes to the CEC the exclusive competence to assess the formal conditions of candidates when applying and certifying them to participate in elections. Paragraph 4 of this Article stipulates that *“If a candidate who has been certified by the CEC has or acquires a status that would render him or her ineligible to be a candidate by reference to the provisions of paragraph 1 of this Article, that person shall be decertified by the CEC and removed from the candidates list of the relevant Political Entity”*.
188. However, the Court brings to attention the response received by the CEC and repeated by the CEC Chairperson during the public hearing, where she clarified the actions taken by the CEC in application of Article 29, paragraph 1, item (q), of Law on General Elections. This article stipulates that persons appearing on the voter list must not have been found guilty of a criminal offense by a final court decision in the last three years. In this regard, the CEC clarified that in Judgment AA.-Uzh. No. 16/2017, of 19 September 2017, the Supreme Court found that *“no one can be denied the right to run in an election, if such a right has not been taken away by a court decision, which means that the candidate must be found guilty by a final decision, and the court, has imposed the additional sentence “deprivation of the right to be elected”*. The CEC further clarified that since 2017, namely from the issuance of this Judgment of the Supreme Court *“[...] only if the ORPPC/CEC had encountered a court decision entitled “deprivation of the right to be elected”, it would not have recommended, namely it would not certify any candidate of any political entity”*.
189. While regarding Etem Arifi, the CEC states that *“it was no and is not informed that by final decision it was prohibited to Mr. Arifi, before 10 September 2019 when he was certified, to be a candidate for deputy”*. In this regard, the Court notes that during the public hearing, the Applicants’ representative and the CEC Chairperson stated that Etem Arifi, in the form he filled in at the CEC on the occasion of running for deputy, did not provide the information that he had

convicted (and consequently, has not met the conditions required by Article 29.1 of the Law on General Elections), to run for deputy.

190. The Court notes that Article 45 of the Constitution, which the Supreme Court referred to, when rendering its Judgment of 19 September 2017, in paragraph 1, provides 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”*.
191. The Court notes that Article 45 of the Constitution speaks generally about electoral rights, stipulating in general terms that they may be limited by court decisions - without specifying the nature of those decisions and without expressly requiring those decisions to be on the abolition of the election rights. Whereas Article 71 of the Constitution defines the conditions that must be met specifically to run for deputy of the Assembly of the Republic of Kosovo.
192. In light of this, the Court considers that, first, Article 45 of the Constitution deals with the *“restrictions”* of election rights, in general language; second, the term *“court decision”*, within the meaning of this article, cannot be interpreted in such a way as to mean exclusively and only complementary court decisions of *“deprivation of the right to be elected”*. Thus, a textual and logical interpretation of the language of this article, in systematic connection with Article 71 of the Constitution and Article 29.1 (q) of the Law on General Elections, leads to the conclusion that even court decisions by which citizens are convicted of criminal offenses may *“restrict”* the elections rights. The Court notes that such an interpretation is also consistent with the practice of the vast majority of member states of the Venice Commission, as reflected in the documents and responses presented above.
193. In addition, the Court notes that, with regard to the issue of restriction of the constitutional rights, reference to Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution is inevitable. This article stipulates that the human rights set forth in the Constitution may be limited in certain cases and, according to the Court, this includes the voting rights provided for in Article 45 of the Constitution. In this regard, the Court refers to Article 55 of the Constitution, which stipulates:
  1. *“Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.*
  2. *Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.*
  3. *Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.*
  4. *In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay*

*special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.*

*5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right”.*

194. In the light of these constitutional provisions, the Court notes that human rights, including the voting rights, may be restricted if the following criteria are cumulatively met:
- a. if the restriction of rights is provided by law;
  - b. if there was a legitimate aim intended to be achieved by restriction; *and*
  - c. whether the interference is “necessary in a democratic society” or if there was a relationship of proportionality between the restriction of rights and the legitimate aim pursued (see, *mutatis mutandis*, the case of the Constitutional Court, KO157/18, Applicant: *the Supreme Court of Kosovo*, Judgment i March 13, 2019, paragraph 91).
195. Such an interpretation is in line with the case law of the ECtHR in the interpretation of Article 3 of Protocol no. 1 of the ECHR, as well as the relevant reports of the Venice Commission.
196. In view of the above, the Court considers that, in accordance with Article 71 of the Constitution, any citizen of the Republic of Kosovo who is eighteen years or older and meets the legal criteria may be a candidate for deputy. Whereas according to Article 29.1 (q) of the Law on General Elections, no person can be a candidate for deputy for the elections to the Assembly if he has been convicted of a criminal offense by a final decision of the court in the last three years. As stated above and as reflected in the Venice Commission Report and the responses of the member states of the Venice Commission Forum, such a practice of the impossibility of running in parliamentary elections for persons convicted of criminal offenses, with some small differences, is also followed by many democratic countries. Such a restriction serves the primary purpose of preserving constitutional integrity and civic credibility in the legislature - as a fundamental pillar of the democratic order.
197. In this connection, the Court considers it important to point out the existence of uncertainties regarding the application of Article 29 of the Law on General Elections. This was also evidenced by the answers and arguments presented during the hearing. The Court, however, emphasizes that Article 29 of the Law on General Elections does not allow for the candidacy for deputy (among others) of persons found guilty of a criminal offense by a final court decision in the last three years. Furthermore, the Law on General Elections stipulates that if a candidate who has been certified by the CEC, is or has achieved the status by which he or she loses the ability to be a candidate under the provisions of paragraph 1 of Article 29 of the Law for the General Elections, that person is decertified by the CEC and as such cannot be a candidate for deputy.

198. The Court notes that the Law on General Elections does not require persons convicted of criminal offenses to be sentenced to an accessory punishment of “*deprivation of the right to be elected*”, so that they are not allowed to run in parliamentary elections. This is because, according to Article 29.1 of the Law on General Elections, the deprivation of the right to be a candidate in elections by decision of the ECAP and the court, as well as the inability to be a candidate due to conviction for a criminal offense by a final court decision in the last three years, present different/separate grounds that cause the inability/ineligibility to be a candidate. The Court is of the opinion that this interpretation is also consistent with the systematic reading of Articles 45, 55 and 71 of the Constitution.
199. The Court considers that if the above interpretation of the Supreme Court is followed, then the regular courts should, whenever imposing convictions for criminal offenses, consider, in a completely hypothetical manner, the possibility of imposing accessory punishments on convicted persons by deprivation of the right to be elected (in accordance with the criteria provided by the Criminal Code). The regular courts cannot be expected to make assumptions about which of the perpetrators could potentially run in future elections whenever they decide to impose criminal sentences.
200. Furthermore, the Court wishes to underline that the Supreme Court, in Judgment AA.-Uzh. No. 16/2017, of 19 September 2017, did not even interpret the legal provision, namely Article 29.1 (q) of the Law on General Elections, in relation to the restrictions provided in Article 45 in conjunction with Articles 55 and 71 of the Constitution, nor it did address the Constitutional Court to request an assessment of its constitutionality. The Court notes that the Supreme Court could refer to the Constitutional Court the issue of the constitutionality of Article 29.1 (q) of the Law on General Elections, pursuant to paragraph 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, in relation to the case before it.
201. In this regard, the Court clarifies that the Law on General Elections continues to remain in force - with all its articles and provisions - until it is amended by the Assembly, or its unconstitutionality is challenged before the Constitutional Court.
202. The Court notes its Judgment in case KI207/19, where the Constitutional Court has clarified that “*despite the fact that the Constitution recognizes the competence of regular courts to interpret a norm of legal rank in line with a norm of constitutional rank and/or the direct application of a norm of constitutional rank, this does not mean that the regular courts can ascertain or declare a legal norm as a norm contrary to the Constitution [...] Such a right, the Constitution has assigned exclusively to the Constitutional Court*” (see case no. KI207/19, Applicant NISMA Social Democratic, New Kosovo Alliance and the Justice Party, Judgment of 10 December 2020, paragraph 259).
203. Accordingly, the Court wishes to clarify that in this case the issue of the constitutionality of Article 29 of the Law on General Elections is not subject to review before the Court, just as the constitutionality of the Judgment of the

Supreme Court, Uzh. No. 16/2017, of 19 September 2017 was not challenged. Therefore, the Court is limited to analyzing the provisions of the aforementioned Law only insofar as they relate to the circumstances of the present case.

204. In the light of this, the Court notes that the essential question contained in the Applicants' Referral in this case is whether Etem Arifi had a valid mandate when the challenged decision was voted in the Assembly. In this regard, in addition to the issue of inability (ineligibility) to be a candidate in parliamentary elections, the referral raises claims related to constitutional and legal provisions regarding the cases when the mandate of a deputy of the Assembly of the Republic of Kosovo ends or becomes invalid, as a result of conviction for criminal offenses.

***b. Invalidity of the mandate of the deputy of the Assembly of the Republic of Kosovo as a result of conviction for criminal offenses***

205. The Court first notes that Article 70 [Mandate of the Deputies] regulates the issue of the mandate of deputies, stipulating in paragraph 2 that *"the mandate of each deputy of the Assembly of Kosovo begins on the day of the certification of the election results"*.
206. Whereas paragraph 3 of Article 70 of the Constitution, provides for the cases when the mandate of a deputy ends or becomes invalid, defining 7 cases when such a thing can happen.
207. In this respect, the Court notes that Article 70 of the Constitution mentions the "end" and "invalidity" of the mandate of a deputy. However, this article does not explicitly distinguish between the cases when the mandate ends, namely becomes invalid. The mandate of a deputy, according to Article 70 paragraph 3 of the Constitution, ends or becomes invalid if he/she:

*"(1) the deputy does not take the oath;  
(2) the deputy resigns;  
(3) the deputy becomes a member of the Government of Kosovo;  
(4) the mandate of the Assembly comes to an end;  
(5) the deputy is absent from the Assembly for more than six (6) consecutive months. In special cases, the Assembly of Kosovo can decide otherwise;  
(6) the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime;  
(7) the deputy dies."*

208. The Court emphasizes Article 70, paragraph 3, subparagraph 6, which stipulates that the mandate of a deputy ends or becomes invalid if he or she is sentenced by a final court decision for a criminal offense, to one or more years of imprisonment.
209. Provisions similar to sub-paragraph 6 of paragraph 3 of Article 70 are also provided in the Law on General Elections, specifically in Article 112 [Replacement of Assembly Members], paragraph 112.1. a, where it is determined



that: *“A member’s mandate may not be altered or terminated before the expiry of the mandate except by reason of: a) the conviction of the member of a criminal offence for which he or she is sentenced to prison term as provided by the article 69.3 (6) of the Constitution [70.3 (6)].”*

210. Furthermore, the Court notes that the Law on General Elections, in Article 112 [Replacement of Assembly Members], paragraph 1, item c), stipulates that *“A member’s mandate may not be altered or terminated before the expiry of the mandate except by reason of: [...] c) the member’s forfeiture of his or her mandate under article 29 of this Law”*. Thus, Article 112.1.c of the Law on General Elections refers to the loss of the mandate of the deputy and if any of the conditions/circumstances provided in Article 29 of this Law are met. Such an approach, embodied in the Law on General Elections, is also in line with the practice of many member states of the Venice Commission, as elaborated in the Report of the Venice Commission on the Exclusion of Offenders from Parliament.
211. Article 29 of the Law in question stipulates, among other things, the impossibility to run in the parliamentary elections for persons who have been found guilty of a criminal offense in the last three years before the elections (Article 29.1.q). Consequently, the interconnected interpretation of Article 112.1.c and 29.1.q of the Law on General Elections, practically leads to the conclusion that the mandate of the deputy is lost if any of the requirements which, would prevent him from running in the parliamentary elections for deputies of the Assembly is met.
212. The Court also recalls the Law on the Rights and Responsibilities of the Deputy, namely Article 8 [End of mandate] paragraph 1, item 1.6 which provides that *“The deputy’s mandate ends prematurely: [...] if he is by a valid decision convicted of a crime, with imprisonment for a period of one or more years of imprisonment”*. The same provision is provided in the Rules of Procedure of the Assembly, namely Article 25 [Loss of the status as a Member of the Assembly] which in paragraph 1, point d, provides that *“A Member of the Assembly shall lose the mandate in the following cases: [...] he/she is convicted for a criminal offence with imprisonment of one (1) year or more [...]”*.
213. In view of the above, the Court finds that the relevant constitutional and legal framework clearly stipulates that the mandate of a deputy expires or becomes invalid if he/she, *“is sentenced by the court decision”; “the sentence is for the criminal offence”; “the imprisonment sentence is for the time period of one (1) and more years”; “the court decision is final”*. So, at the moment when the above four circumstances are cumulatively met against a deputy of the Assembly of the Republic of Kosovo, he/she loses the mandate.
214. The Court notes that its Judgment in case KO 98/11 is also in this line, where it had stated that: *“[...] the Constitution provides for when the mandate can end prematurely. In relation to the situation when there is a final court decision for the sentencing of a deputy for a term of one or more year of imprisonment, the deputy is stripped of his/her mandate and therefore the mandate ends and*

*he/she no longer can enjoy the privilege and immunity attaching to the mandate [...]*".

215. With regard to the fact that when a person is sentenced to imprisonment by a "final" decision, the Court refers to the Criminal Procedure Code, which in Article 485 [Finality and enforceability of Decisions], provides that:

*1. A judgment shall become final when it may no longer be contested by an appeal or when no appeal is permitted.*

216. In this regard, the Court also refers to Article 407 [Appeal against Judgment from Court of Appeals to Supreme Court], which provides that:

*1. An appeal against a judgment of a Court of Appeals may be filed with the Supreme Court of Kosovo if the Court of Appeals has modified a judgment of acquittal by the Basic Court and rendered instead a judgment of conviction or when the judgment by the Basic Court or Court of Appeals has imposed a sentence of life-long imprisonment.*

217. In light of this, the Court notes that, according to the abovementioned provisions of the Criminal Procedure Code, a court decision is considered to be final, if against that decision is not further allowed the filing of regular legal remedies, namely the appeal.

218. Against this constitutional and legal background, the Court concludes that the mandate of a deputy of the Assembly of the Republic of Kosovo ends or becomes invalid when he is imposed an imprisonment sentence to one year or more, by a court decision which cannot be challenged by an appeal, as a regular legal remedy in the criminal proceedings.

219. In the present case, the Court finds that Etem Arifi was sentenced by the Court of Appeals, initially on 28 March 2019 and, after remanding the case for retrial, he was sentenced to one year and three months imprisonment by Judgment PAKR. No. 328/19 of the Court of Appeals, of 20 August 2019. In this regard, the Court recalls the response of the KJC that, "*[a]ccording to the legislation in force the judgment becomes final on the date when it is decided by the Court of Appeals upon the appeal, which in this case is 20.08.2019*".

***c. Whether there is a special procedure to be followed for the abolition of the mandate of the deputy, after the sentence of imprisonment of one year or more by a final court decision?***

220. The Court first considers it important to recall that, prior to the constitution of the Assembly, according to the Rules of Procedure of the Assembly, a Temporary Committee for the Verification of Quorums and Mandates is established. This Committee, according to paragraph 4 of Article 9 of the Rules of Procedure of the Assembly, "*shall review the relevant documentation of elections and shall present a report on the validity of mandates of Members of the Assembly and shall verify the quorum of the inaugural session of the Assembly*".

221. In this regard, the Court notes that in the present case the above-mentioned Committee presented its Report on the verification of mandates before the Assembly, based exclusively on the CEC Decision No. 1845/2019, of 27 November 2019, for the certification of the final results of the early elections for the Assembly of the Republic of Kosovo, held on 6 October 2019, together with the final list of candidates including the name of Etem Arifi.
222. The Court further notes that neither Article 70 of the Constitution nor any other constitutional or legal provision sets out any special procedure to be followed to remove the mandate of a deputy, or to establish the termination or invalidity of the mandate of a deputy - after the circumstances provided in Article 70. 3 (6) of the Constitution have been created. The Court noted that this finding was reinforced by the arguments and interpretations of the parties presented at the hearing.
223. As regards the replacement of a deputy who has lost his mandate, the Court refers to Article 70.4 of the Constitution, as well as paragraph 3 of Article 112 [Replacement of Assembly Members], of the Law on General Elections. Thus, Article 70.4 of the Constitution stipulates that *“Vacancies in the Assembly will be filled immediately in a manner consistent with this Constitution and as provided by law”*. This general constitutional provision is broken down through Article 112.3 of the Law on General Elections, which stipulates that *“Upon a seat becoming vacant, the Speaker of the Assembly shall make a request in writing to the President for the vacancy to be filled. Such request shall include an explanation as to how the vacancy”*. Whereas paragraph 4 of this Article stipulates that *“[u]pon receipt of a request under paragraph 3 of this Article, President shall, if the explanation provided is satisfactory, request the CEC to recommend the name of a person to fill the vacancy. The CEC shall, within five (5) working days of being requested to do so, provide the President with the name of the next eligible candidate under paragraph 2 of this Article”*.
224. The Court notes, as explained above, that neither the Law on General Elections nor any other normative act provides for a precise procedure for determining when *“the deputy’s seat remains vacant”*, but the relevant normative acts determine only the procedure how *“a seat that has been remained vacant”* is filled.
225. In relation to this case, the Court also refers to the response received from the Secretariat of the Assembly regarding the current practices of loss/invalidity of the mandate of the deputy in case of committing a criminal offense. Thus, the Court recalls that the Assembly of the Republic of Kosovo had only one case when a deputy was deprived of his mandate, as a result of a conviction for a criminal offense by a final court decision (the case of former deputy Rr.M). The Court recalls that in that case, the deputy was convicted on 1 December 2015, while the KJC notified the President of the Assembly, on 28 January 2016, regarding the sentencing Judgment of the Court of Appeals. Whereas on 29 January 2016, the President of the Assembly requested the President the

replacement of the deputy in question, in accordance with Article 112.3 of the Law on General Elections.

226. The Court also notes the reply that the Committee on Legislation, Mandates and Immunities sent to the President of the Assembly (on 12 May 2020), arguing that “[...] *no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses his/her mandate ipso jure, except in the case as defined by Article 70, paragraph 3, sub-paragraph 5 of the Constitution of the Republic of Kosovo and Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly [...]. Thus, based on the Rules of Procedure of the Assembly, the relevant Committee on Legislation, examines the issue of the mandate of the deputy only in cases as defined by Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly* ”[in six-months period does not participate in any session of the Assembly].
227. In the light of this, the Court notes that from the responses received from the member states of the Venice Commission Forum, as well as from the Venice Commission Report, cited above, it appears that there is no uniform practice in this regard as to how the issue of losing the mandate of a deputy is processed. Thus, in some European countries there are constitutional or legal provisions that define a special procedure to be followed (in the respective parliaments) after the imposition of a criminal offense against a deputy. Respect for this procedure is a precondition for the mandate of the deputy to formally end. While in some other countries this issue is not regulated and the ascertainment or formalization of the loss of the mandate of the deputy does not require any special procedure or voting in the parliament (respective bodies), but the loss of the mandate is automatic and related to the final court decision.
228. The Court reiterates that neither in the Constitution of Kosovo, nor in the relevant laws and regulations, there is no specifically defined procedure that must be followed for determining the loss of the mandate, after the requirements for the termination or invalidity of the mandate of the deputy have been met, due to imprisonment of one year or more (as provided by Article 70.3.6. of the Constitution and the relevant articles of the Law on General Elections and the Law on the Rights and Responsibilities of the Deputy).
229. The Court reiterates that in the previous practice of the Assembly there is only one case when a mandate of the deputy was terminated as a result of committing a criminal offense. In that case, according to the case file, there is no information that any specific procedure has been followed in the Assembly for the removal of the mandate, except for the procedure for the replacement of the deputy whose mandate has ended. Consequently, after losing the mandate of the deputy in question, the President of the Assembly requested from the President the replacement of the deputy whose mandate had ended, according to the procedure defined in the Law on General Elections.
230. The Court recalls, once again, that the issue of the impossibility of being a candidate for a deputy of the Assembly is clearly and comprehensively defined in the constitutional and legal provisions, including Articles 71 and 73 of the Constitution, as well as Article 29 of the Law on General Elections. Also, the

issue of loss, or invalidity, of the mandate of the deputy is regulated by Article 70 of the Constitution, Article 112 of the Law on General Elections, Article 8 of the Law on the Rights and Responsibilities of the Deputy and Article 25 of the Rules of Procedure of the Assembly.

231. The Court notes that the Constitution has expressly provided for the case in which the loss of the mandate is not automatic, but is subject to a special procedure in the Assembly, namely in cases when a deputy is absent for six (6) months in the sessions of the Assembly, unless the Assembly decides otherwise, as expressly provided in item 5 of paragraph 3 of Article 70 of the Constitution.
232. In this regard, the Court notes that even if the intention of the legislator would be to remove the mandate of a deputy, after the issuance of a final decision for a sentence of one year or more imprisonment, it is to be subject to a certain procedure, whether through a formal vote by the Assembly or any other procedure in the Assembly, this procedure would have been defined either by constitutional provisions or by any of the relevant laws or by the Rules of Procedure of the Assembly.
233. Such a procedure cannot be determined by the Constitutional Court, unless it is provided for in any normative act and, moreover, in the absence of an established practice in the Assembly on this issue (as noted, from the responses of the Secretariat of the Assembly, it turns out that so far there has been only one such case).
234. However, the Court notes that on the fact of the absence of such a special procedure, such constitutional interpretations could not be constructed which would deprive Article 70.3.6 of the Constitution, Article 112.1.a and c of Law on General Elections, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy, as well as Article 25 of the Rules of Procedure of the Assembly of practical effect. The Court considers that the purpose of Article 70.3.6 of the Constitution and the legal articles in question, which derive from it, is not to enable the exercise of the mandate of a deputy who is sentenced to one year or more imprisonment.
235. Therefore, the Court concludes that, in the absence of a special procedure for determining the loss, namely the invalidity of the mandate of the deputy, the mandate of the deputy is lost or becomes invalid from the moment of issuing the final court decision sentencing him/her to one year or more imprisonment. Thus, in the absence of such a procedure, the loss of the mandate is automatic and starts from the moment of issuing the final court decision on sentencing the deputy for a criminal offense with one year or more imprisonment.
236. On the other hand, the legal framework clearly defines the procedure to be followed for the replacement of a deputy who has lost his/her mandate, namely when “*the seat of a deputy remains vacant*” (Article 112.3 of the Law on General Elections). This represents another constitutional and legal moment, which follows the expiration or invalidity of the mandate of the deputy. Regarding the replacement of the deputies whose mandate has expired or has become invalid, the Assembly (namely its President), in accordance with Article 112.3 of the Law

on General Elections, must take the legal actions provided for the replacement of the deputy, as soon as it is officially notified that there is a final court decision by which a deputy is sentenced to one year or more imprisonment. The Constitution, in paragraph 4 of its Article 70, clearly stipulates that the “vacancies” must be filled replaced “immediately”.

237. Having regard to the abovementioned findings concerning the effect of the conviction for criminal offenses, on the impossibility of running for parliamentary elections and the loss of the mandate of a deputy, the Court will further assess whether, in the present case, Etem Arifi had a valid mandate during the conduct of the procedure for issuing the challenged decision.

**I. Whether Etem Arifi had a valid mandate when the challenged decision was rendered**

238. Initially, the Court recalls that on 20 April 2018, the Basic Court found Etem Arifi guilty of the criminal offense of “Subsidy fraud” and sentenced him to imprisonment for a term of 2 years, which sentence would not be executed on condition that within the time limit of 3 years he would not commit any other criminal offense. Whereas on 28 March 2019 and 20 August 2019, the Court of Appeals modified the Judgment of the Basic Court and sentenced the accused Etem Arifi to 1 year and 3 months imprisonment. These judgments of the Court of Appeals, in accordance with the provisions of the Criminal Procedure Code elaborated above, were final decisions. The last judgment of the Court of Appeals was served on Etem Arifi on 9 November 2019. On 30 January 2020, the Supreme Court rejected as ungrounded the request for protection of legality, filed by Etem Arifi.

239. On 26 August 2019, the President announced the elections for the Assembly, which were scheduled for 6 October 2019. On 27 August 2019, the CEC rendered a decision on setting deadlines for electoral activities, which provided that the deadline for applying for certification of political entities and candidates starts on 27 August 2019 and ends on 6 September 2019, while the deadline for withdrawal of candidates by draw from the ballots and the deadline for the replacement of candidates was 8-17 September 2019.

240. The Court notes that at the time of the certification of the candidates and the lists of political entities for elections, Etem Arifi was convicted of a criminal offense by a final decision of the Court of Appeals.

241. On 27 November 2019, the CEC certified the results of the elections for the Assembly. The list of deputies certified by the CEC also included Etem Arifi, who had already received the final Judgment of the Court of Appeals.

242. On 26 December 2019, the Assembly formed the Temporary Committee for the Verification of Quorum and Mandates. This Committee presented its Report for the verification of mandates before the Assembly, based exclusively on the CEC Decision No. 1845/2019, of 27 November 2019, for the certification of the final results of the early elections for the Assembly of the Republic of Kosovo, held on 6 October 2019, together with the final list of deputies, which included Etem

Arifi. The Report of the Temporary Committee for Verification of Quorum and Mandates did not mention the fact that Etem Arifi was convicted of a criminal offense with imprisonment of one year and three months.

243. On 30 April 2020, the President of the Assembly received a letter (Explanatory Memorandum) from the legal counsel of Etem Arifi, regarding the mandate of the latter, stating, *inter alia*, that “*the mandate of Mr. Etem Arifi [...] is legal and in accordance with the Constitution of the Republic of Kosovo as he was not convicted by a final decision of the court during this term (Legislature VII) [...]*”.
244. On 30 April 2020, the President of the Assembly requested the KJC to send to the Assembly all information and documents related to the case in question. On 1 May 2020, the KJC submitted to the Assembly copies of the judgments by which Etem Arifi was found guilty of a criminal offense.
245. With regard to the KJC response, the Court wishes to emphasize the fact that, as can be seen from the case file as well as from the information presented at the hearing, the KJC notified the Assembly that Etem Arifi was convicted by a final court decision only after the President of the Assembly addressed the KJC requesting information regarding the case in question. In fact, if we take into account the time when Etem Arifi was convicted for the first time by a final judgment of the Court of Appeals (28 March 2019), it turns out that the Assembly was officially notified by the KJC about the conviction of Etem Arifi after more than a year.
246. On 4 May 2020, the President of the Assembly addressed a letter to the Chairperson of the Committee on Legislation, Mandates and Immunities, requesting that the issue of Etem Arifi’s mandate be reviewed.
247. On 12 May 2020, the Committee on Legislation, Mandates and Immunities submitted a response to the request of the President of the Assembly, clarifying that “[...] *no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses the mandate ipso jure, except in the case as defined by Article 70, paragraph 3, subparagraph 5 of the Constitution of the Republic of Kosovo and Article 25 paragraph 1 point e) of the Rules of Procedure of the Assembly [...]*”. In the end, this Committee recommended “*to follow the previous practices of the Assembly*”.
248. In connection with the response of the Committee on Legislation, Mandates and Immunities, the Court notes that, according to the Rules of Procedure of the Assembly of the Republic of Kosovo (Annex no. 2), the Committee in question “*reviews all issues that are related to the implementation of the Rules of Procedure of the Assembly and for mandates and immunities*”. Further, this Rules of Procedure instructs this Committee, *inter alia*, to “*interpret the Rules of Procedure of the Assembly, when requested by the Assembly*”, as well as “*to consider the requests for the abolition of the Immunity and Mandate of Members of Parliament and submits recommendations to the Assembly*”.

249. The Court notes that although the Rules of Procedure of the Assembly assigns to the Committee on Legislation, Mandates and Immunities the task of reviewing requests for the abolition of the immunity and mandate of deputies, it does not clearly define the role of this Committee in the event of loss of the mandate, or the invalidity of a mandate of the deputy, due to the imprisonment sentence by a final court decision (in accordance with Article 70.3.6 of the Constitution, Article 112.1.a of the Law on General Elections and Article 25.1.d. of the Rules of Procedure of the Assembly).
250. In the present case, the Court considers that the Committee in question was satisfied by following a narrow approach to the interpretation of its role, avoiding providing a comprehensive interpretation of the normative framework regarding the mandate of deputy in situations where a deputy of the Assembly of the Republic of Kosovo continues to exercise the mandate of a deputy, despite the fact that there is a final court sentence, by which he was sentenced to imprisonment of more than one year. This sentence was imposed before the deputy in question won the seat of the deputy, but which continues to remain active, as a criminal sanction pending its execution. Thus, this Committee was not able to express its clear position on whether Etem Arifi had a valid mandate as a deputy and, consequently, whether he should have been replaced.
251. The Court notes that following the response of the Committee on Legislation, Mandates and Immunities, neither the President of the Assembly, nor any other instance has taken any further action to clarify the issue of the validity of mandate of Etem Arifi, as well as to make his eventual replacement.
252. In the course of events, on 3 June 2020, the Assembly, by the challenged decision, with 61 votes “for”, 24 “against” and 1 abstention, elected the Government of the Republic of Kosovo. According to the material submitted to the Court, Etem Arifi was one of the deputies who participated in the voting procedure by voting “for” the election of the Government.
253. On the basis of these chronological facts, it results that on the day of voting of the challenged decision in the Assembly, Etem Arifi:
- was convicted of a criminal offense by a final decision of the Court of Appeals with effective imprisonment of one year and three months, a sentence that has not yet been executed;
  - the decision of the Supreme Court was rendered upholding his sentence;
  - received the final decision of the Court of Appeals and the final decision of the Supreme Court; *and*
  - The Assembly was also notified by the KJC regarding the final decision of the Court of Appeals and that of the Supreme Court.
254. In the light of these factual circumstances, the Court notes the different and contradictory interpretations by different bodies of the Assembly, as well as by the parties involved in this case, as to “*when the mandate of Etem Arifi became invalid*”. Thus, the Court brought to attention the argument given by the Directorate for Legal Services and Approximation of Legislation of the Assembly, in the Opinion on the issue of the mandate of deputy Etem Arifi, of 18



May 2020, which stated that: *“the court decision has become final before Mr. Etem Arifi was certified as a deputy of the VII legislature. In this case, the constitutional and legal provisions related to the role of the Assembly of Kosovo for removal of the mandate of a deputy do not apply. Based on Law no. 03/L-073 on General Elections in the Republic of Kosovo, [CEC] is a competent body regarding the verification of formal criteria that must be met by candidates for deputies before their certification”*.

255. In this line of argument, the Court also draws attention to the argument given by the representative of Etem Arifi, in the “Explanatory Memorandum” that he submitted to the President of the Assembly on 20 April 2020. The same submission was submitted by the representative of Etem Arifi to the Court on 7 December 2020, where he also informed the Court that before the regular courts they have made a request for the reopening of the criminal case against Etem Arifi. In the above-mentioned “Explanatory Memorandum”, the representative of Etem Arifi stated that: *“the mandate of Mr. Etem Arifi [...] is legal and in accordance with the Constitution of the Republic of Kosovo as he was not convicted by a final decision of the court during this term (Legislature VII) while the sentence imposed by Judgment of 20.08.202 has not presented an obstacle in the certification of Mr. Arifi as a candidate for deputy and also does not pose a legal obstacle in continuing to exercise the mandate as long as these legal conditions exist”*.
256. In this regard, the Court considers it important to note that even during the hearing, the parties expressed opposing views on the question of whether Etem Arifi lost his mandate and if so, when. Thus, the Applicants’ representative alleged that Etem Arifi won the mandate in violation of the Constitution and the law and that the loss of his mandate began to take effect for the Assembly from the moment the Assembly was notified by the KJC about the conviction of the deputy in question. The representative of the President of the Assembly said that Etem Arifi continues to have a mandate, while the representative of the Government argued that Etem Arifi lost his mandate in the previous legislature (when he was convicted by a final decision) and, according to him, the mandate of Etem Arifi in this legislature is valid.
257. In this regard, the Court initially notes that at the time of imposing the sentence by the Court of Appeals, on 19 March and 20 August 2019, Etem Arifi was a deputy of the previous legislature of the Assembly (namely the VI-th legislature), which legislature was dissolved after the vote of the Assembly on 22 August 2020. Based on the response received from the Secretariat of the Assembly, it does not appear that Etem Arifi was replaced in the previous legislature (VI legislature), as the Assembly had not taken any action regarding the mandate of Etem Arifi.
258. However, the Court notes that - beyond the question arising as to the possibility of losing a mandate of a deputy as a result of a conviction for a criminal offense during a particular legislature - the Constitution and relevant laws do not even allow a person convicted of a criminal offense to run in the elections (if he was convicted of a criminal offense during the last three years) nor to exercise the

duty of deputy (if he was sentenced to one or more years of imprisonment by a final court decision).

259. Thus, the Court considers that in the present case it is not essential whether Etem Arifi should have been deprived of his mandate as a deputy in the previous legislature, pursuant to Article 70.3.6 of the Constitution, but first of all whether he should have been allowed to run for deputy, in the elections of 6 October 2019, according to Article 71.1 of the Constitution and Article 29.1 (q) of the Law on General Elections.
260. In the Court's assessment, Article 70.3.6 of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of a Deputy and Article 112.1 (a) and (c) of the Law on General Elections should be read intertwined with Article 71.1 of the Constitution and Article 29.1.q of the Law on General Elections. The common purpose of these constitutional and legal articles is that:
- a) persons convicted of criminal offenses by final court decisions, valid in the Republic of Kosovo, cannot run or be elected as deputies, if they have been convicted during the last three years before the elections; and
  - b) they cannot exercise the mandate of deputy if they are sentenced to one or more years of imprisonment, by a final court decision, valid in the Republic of Kosovo.
261. As such, the abovementioned constitutional and legal provisions are coherent and complementary. In a general view, those provisions reveal the legislator's clear intention that persons criminally convicted of a violation of the law may not be elected as deputies for a term of certain time, as well as not be able to exercise the duty of representative of citizens in the legislative body of the country - the Assembly of the Republic of Kosovo.
262. The Court considers that such an approach, in terms of the effect of the sentence on the mandate of the deputy, is outlined in the Judgment of the Constitutional Court in case KO98 /11, where the Court has emphasized that the mandate of the deputy ends when a final court decision "**exists**" by which a deputy is sentenced to one or more years of imprisonment. This is a reasonable interpretation, since the sentence of effective imprisonment, for a certain period of time, prevents the deputy from exercising his representative function. Accordingly, this disables the representation of voters who voted for the deputy in question and, moreover, undermines the integrity of the legislative body.
263. This is also in line with the practice of the vast majority of the member states of the Venice Commission Forum, as well as with the views expressed in the Venice Commission Reports.
264. In this light, the Venice Commission refers to the case law of the ECtHR which notes that, under Article 3 of Protocol 1 to the ECHR, "*restrictions on the right to be elected should be limited to what is necessary to ensure the proper functioning and preservation of the democratic regime. This functioning would be more seriously endangered by an elected officer than by a simple voter exercising his active electoral rights. The restrictions under*

*consideration should not be considered as limiting democracy, but as a means of preserving it”* (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, p. 28).

265. On the other hand, the Court wishes to clarify that it considers the Applicants’ argument that the constitutional effect of Etem Arifi’s sentence begins to run from the moment the Assembly was notified by the KJC about the existence of this sentence as ungrounded. This is because neither the Constitution nor any legal provision sets out a procedure to be followed to deprive a deputy of his mandate - after he has lost his mandate as a result of a sentence for criminal offence. As well as due to the lack of a clear normative basis that determines how and when the KJC (or courts) have an obligation to notify the Assembly that a deputy is convicted of a criminal offense.
266. Therefore, as can be seen from the case file and as noted by the KJC representative during the hearing, there is no normative provision (legal act or sub-legal act) that sets out a clear obligation for the KJC to notify the Assembly about sentencing of deputies. As a result, in this case the Assembly was informed by the KJC about the sentencing of Etem Arifi only after the President of the Assembly formally requested the KJC to inform him about this case and almost a year after his sentence (in the first time), by final decision.
267. Based on the above, and in accordance with the principles and findings elaborated above, the Court finds that Etem Arifi has not won the mandate of the deputy in accordance with Article 71.1 of the Constitution and Article 29.1 (q) of the Law on General Elections, nor he may exercise it, in accordance with Article 70.3.6 of the Constitution, in conjunction with Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Article 112.1 (a) and (c) of the Law on General Elections.
268. In such circumstances, the Court cannot assign the constitutional legitimacy to the mandate of a deputy, for whom it has been confirmed that the conditions provided by the Constitution and relevant laws were not met, to be a candidate for deputy (when he run and was elected), nor to exercise the mandate of deputy.
269. Therefore, the Court finds that when issuing the challenged decision, Etem Arifi did not have a valid mandate as a deputy, in accordance with Articles 71.1 and 70.3.6 of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Articles 29.1 (q) and 112.1.a of the Law on General Elections.

**II. Whether the challenged decision of the Assembly is in accordance with the Constitution if a deputy who did not have a valid mandate participated in its voting procedure?**

270. After the Court found that in the case of issuing the challenged decision, Etem Arifi did not have a valid mandate of deputy, in accordance with the relevant constitutional and legal provisions elaborated above, it will further assess

whether the procedure for issuing the challenged decision was in accordance with the Constitution.

271. The Court first refers to paragraph 3 of Article 95 [Election of the Government] of the Constitution which stipulates that:

*“3. The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo”.*

272. The Court notes that according to the abovementioned provisions of the Constitution, in order to elect the Government, it is required that a majority of all deputies of the Assembly vote “for” the proposed Government. Given that the Assembly of Kosovo, in accordance with Article 164, paragraph 1 of the Constitution, has 120 deputies, the Court notes that at least 61 deputies must vote “for” the Government in order for it to be considered elected.

273. The Court notes that this interpretation of the meaning of “majority of the deputies of the Assembly” was also interpreted by the Constitutional Court in Judgment KO72/20. In that case, the Court had clearly found that *“Article 95 of the Constitution is organized in 6 paragraphs, which establish the manner of electing the Government within an election cycle, [...] Its second and third paragraphs [Article 95 of the Constitution], stipulate [...] the Government is considered elected if it receives a majority of the votes of all deputies of the Assembly of Kosovo, namely the vote of sixty one (61) deputies”,* (see Judgment of the Constitutional Court KO72/20, Applicant: *Rexhep Selimi and 29 other Members of the Assembly of the Republic of Kosovo*, Judgment of 28 May 2020, published on 1 June 2020, paragraph 428).

274. Further, in the same Judgment, the Constitutional Court stated that *“For the approval of no confidence in a Government, sixty one (61) votes of people’s representative is required, as much as it is enough to give the confidence of the Assembly to a Government to be considered elected”* (see Judgment of the Constitutional Court KO72/20, paragraph 388).

275. Such an interpretation is also confirmed by the responses received from the states of the Venice Commission Forum, where from all the states which envisage the voting of the *“majority of all the deputies of the Parliament”* it has been clarified that the majority of all the deputies of the Parliament means the majority of the number of deputies provided by their constitutions.

276. The Court notes that, in the case of Kosovo, this majority, namely *“the majority of the votes of all deputies of the Assembly of Kosovo”*, differ from the majority of votes of the deputies required to take other decisions in the Assembly. In this regard, the Constitution of Kosovo distinguishes between decision-making procedures where the decision-making requires a majority of votes of all members of the Assembly (for some very important decisions), and the decision-making procedures when a majority of present deputies and voting is required.

277. Therefore, the Court reiterates once again that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) deputies of the Assembly must vote “for” the Government.
278. In the present case, according to the official documents of the Assembly, the Court notes that on 3 June 2020, sixty-one (61) deputies had voted “for” the Government, namely for the challenged decision. Etem Arifi also voted for the approval of the challenged decision.
279. The Court found above that the mandate of Etem Arifi was invalid before the challenged decision was voted. Therefore, since the challenged decision received only 61 votes of the deputies of the Assembly, including the vote of Etem Arifi, the Court notes that without counting his vote, the challenged decision received only 60 votes of the deputies of the Assembly.
280. The Court further considers it important to place emphasis on Article 70 [Mandates of the Deputies] of the Constitution, which states that “*Deputies of the Assembly are representatives of the people*”. Whereas Article 74 [Exercise of Function] of the Constitution stipulates that: “*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*”.
281. The Court finds that Decision No. 07/V-014, of 3 June 2020, for the Election of the Government of the Republic of Kosovo, is not in compliance with the Constitution, because that decision did not receive the majority of votes of all deputies of the Assembly, namely 61 valid votes, as defined in paragraph 3 of Article 95 of the Constitution.
282. The Court reiterates that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) deputies of the Assembly must vote “for” the Government. In this case, according to official documents of the Assembly, the Court notes that on 3 June 2020, sixty-one (61) deputies had voted “for” the Government, namely for the challenged Decision. Etem Arifi also voted for the approval of the challenged decision. After the Court found that Etem Arifi’s mandate had been invalid prior to the vote on the challenged Decision, that Decision had received only sixty (60) valid votes.
283. Further, with regard to the effects of this Judgment, the Court considers it necessary to clarify that Article 95 of the Constitution, as interpreted through its case law, provides for two attempts to elect the Government by the Assembly. In both cases, the Government to be considered elected must have the majority of votes of all deputies of the Assembly, namely sixty one (61) votes. If the Government is not elected even after the second attempt, Article 95.4 of the Constitution expressly stipulates the announcement of elections by the President of the Republic of Kosovo, which based on this article, must be held no later than forty (40) days from the day of their announcement by the President.

284. The Court recalls that the Government voted by Decision No. 07/V-014 of the Assembly, of 3 June 2020, is based on Presidential Decree No. 24/2020, issued based on paragraph 4 of Article 95 of the Constitution, namely the second attempt to elect the Government. In this regard, the Court recalls the interpretation given in Judgment KO72/20 where it stated that *“the elections will be inevitable in case of failure of the election of the Government in the second attempt, [...] in which case, based on paragraph 4 of Article 95 of the Constitution, the President announces the elections, which must be held no later than forty (40) days from the day of their announcement”*.
285. Therefore, the Court reiterates that when a proposed Government, based on paragraph 4 of Article 95 of the Constitution, does not receive the necessary votes to be elected, the Constitution expressly stipulates that the President of the Republic of Kosovo announces elections, which must be held no later than forty (40) days from the day of their promulgation.
286. Finally, the Court also clarifies that the finding that the challenged Decision of the Assembly on the election of the Government is not in compliance with paragraph 3 of Article 95 of the Constitution, does not result in the automatic dissolution of the Assembly.

## **Conclusions**

287. On 28 March and 20 August 2019, Etem Arifi was sentenced by a final Judgment of the Court of Appeals to one year and three months of imprisonment. On 6 October 2019, the early elections were held for the Assembly of the Republic of Kosovo. Etem Arifi ran and was elected a deputy of the Assembly of the Republic of Kosovo. On 27 November 2019, the CEC certified the election results and Etem Arifi was also on the list of certified deputies. On 26 December 2019, the constitutive meeting of the Assembly was held where the mandate of Etem Arifi was confirmed. Since then, Etem Arifi continued to exercise the function of a deputy, even though he was sentenced by a final court sentence, for a criminal offense, to one year and three months of imprisonment.
288. In this constitutional referral, 17 deputies of the Assembly of the Republic of Kosovo challenged the constitutionality of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, on the election of the Government, issued on 3 June 2020. The Applicants allege that the Decision in question is contrary to the Constitution, namely paragraph 3 of Article 95 [Election of the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies] of the Constitution. This is because, according to the Applicants, Etem Arifi also participated in the voting procedure of the challenged Decision, whose vote was invalid due to his sentence of one year and three months imprisonment, by a final court decision.
289. The Court noted that the basic question contained in this Referral is whether Etem Arifi had a valid mandate at the time the challenged Decision was adopted in the Assembly on the election of the Government (in the voting of which he had participated).

290. In this respect, the Court took into account: the responses submitted by the member states of the Venice Commission Forum, the views of the Venice Commission; as well as the previous practice of the Assembly of the Republic of Kosovo, for similar situations.
291. With regard to the constitutional and legal provisions in the Republic of Kosovo, which provide answers to the issues raised by this Referral, the Court found that:
- Article 71.1 of the Constitution, in conjunction with Article 29.1 (q) of the Law on General Elections, stipulates that no person can be a candidate for deputy for elections to the Assembly, if he was convicted of a criminal offense by a final court decision in the past three years;
  - Article 70.3 (6) of the Constitution stipulates that the mandate of a deputy ends or becomes invalid if he/she is sentenced by a final court decision to one or more years of imprisonment. This constitutional definition is reinforced by Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy, Article 112.1.a of the Law on General Elections, as well as Article 25.1.d of the Rules of Procedure of the Assembly;
292. The Court considers that, as regards the right to run in the parliamentary elections, Articles 45, 55 and 71.1 of the Constitution should be read in conjunction. Thus, Article 45 of the Constitution generally deals with electoral rights, stipulating in a general way that they can be limited by court decisions, while Article 55 establishes the cumulative conditions under which the human rights guaranteed by the Constitution may be limited. While Article 71 of the Constitution – which deals exclusively with the “qualifications” to run for a deputy of the Assembly – stipulates that every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the deputy. These “legal criteria”, referred to in Article 71 of the Constitution, are defined by the Law on General Elections, which in Article 29.1 (q) clearly and explicitly states that no person can be a candidate for deputy for elections to the Assembly, if he/she has been convicted for a criminal offense by a final court decision in the past three years. This constitutional and legal definition is in line with the practice followed by many democratic countries, as noted by the relevant documents of the Venice Commission, as well as the responses of the member states of the Venice Commission Forum.
293. The Court emphasizes that the abovementioned constitutional and legal norms, which have to do with the impossibility (ineligibility) to run for deputy in the general elections, as well as with the termination or invalidity of the mandate of the deputy, as a consequence of the sentence with imprisonment for the commission of criminal offenses, should not be seen as an end in itself. In essence, these norms do not have the primary purpose of punishing certain individuals by preventing them from exercising the function of deputy, but have as their basic purpose the protection of constitutional integrity and civic credibility in the legislature, as a pillar of parliamentary democracy.

294. The Court considered that the civic credibility in the Assembly of the Republic of Kosovo is violated if – despite the prohibitions imposed by Article 71 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections – it is allowed that the mandate of a deputy is won and exercised by a person convicted of a criminal offense by a final court decision valid in the Republic of Kosovo.
295. In this respect, the Court draws attention to the Report of the Venice Commission, which states that “*legality is the first element of the Rule of Law and implies that the law must be followed, by individuals and by the authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle [rule of law], which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state*”. (See Report of the Venice Commission on the Exclusion of Offenders from Parliament, CDL-AD(2015)036, of 23 November 2018, paragraph 168).
296. In this spirit, the Court noted that it is a clear constitutional requirement embodied in Article 71.1 in conjunction with Article 70.3 (6) of the Constitution, that it is incompatible with the Constitution for a person to win and hold the mandate of deputy if convicted for a criminal offense, by a final court decision, as defined by these provisions. This requirement is reinforced by Articles 29 and 112 of the Law on General Elections, as well as Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy.
297. The Court further emphasized that the fact that Article 70.3 (6) of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Article 112.1 (a) of the Law on General Elections refer to the conviction of a deputy (i.e. the conviction after he has won the mandate), is a reflection of the presumption that Article 29.1 (q) of the Law on General Elections, which is based on Article 71.1 of the Constitution, does not allow a person sentenced to imprisonment during the last three years before elections to run for deputy and win the mandate of deputy.
298. Therefore, based on the clear language of Article 71.1 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections, as well as subparagraph 6 of paragraph 3 of Article 70 of the Constitution, the Court considers that no person can win and hold a valid mandate of a deputy if he/she is convicted of a criminal offense as provided by these provisions, by a final court decision, if against him/her there is a sentencing decision that is in force in the Republic of Kosovo.
299. The Court notes the explanation of the CEC that according to Judgment AA.-Uzh. No. 16/2017, of 19 September 2017 of the Supreme Court, “*no one can be denied the right to run in the elections, if such a right has not been taken away by a court decision, which means that the candidate must be found guilty by a final decision, and the court, has imposed the accessory punishment “deprivation of the right to be elected”*”.



300. However, the Court considers that the Law on General Elections does not require that persons convicted of criminal offenses necessarily be sentenced to an accessory punishment “*deprivation of the right to be elected*”, so that they are not allowed to run in parliamentary elections. This is because, according to Article 29.1 of the Law on General Elections, among others, the following two grounds are provided: (i) deprivation of the right to be a candidate in elections by decision of the ECAP and the court; and (ii) the impossibility of being a candidate due to being found guilty of a criminal offense by a final court decision in the past three years. These are different/separate grounds that cause inability/ineligibility to be a candidate. The Court is of the opinion that this interpretation is also consistent with the related reading of Articles 45, 55 and 71 of the Constitution.
301. The Court considers it important to note that the candidacy of Etem Arifi in the parliamentary elections, his election as a deputy and the exercise of his mandate as a deputy – all this after he was sentenced to one year and three months imprisonment by a final court decision – reveals the existence of normative ambiguity and serious shortcomings in the institutional mechanisms of the Republic of Kosovo, which are competent to guarantee the legality and constitutional integrity of electoral processes and parliamentary activity. This ambiguity is also evident in the answers given by the relevant bodies of the Assembly and the CEC.
302. In this regard, the Court emphasizes the need for the Assembly of the Republic of Kosovo with its committees, in cooperation with relevant institutions, including the KJC and the CEC, to clarify and consolidate inter-institutional cooperation and normative aspects that relate to the candidacy in parliamentary elections and the exercise of the mandate of deputy, by persons convicted of criminal offenses.
303. This is necessary to avoid paradoxical situations, from the constitutional point of view, where a person, after being convicted by a final court decision as provided by the relevant articles of the Constitution and laws, is allowed to run in parliamentary elections, to be elected a deputy, to have his mandate verified, as well as to continue to exercise the function of deputy in the Assembly of the Republic of Kosovo, even while serving an imprisonment sentence. Meanwhile, the Constitution and the relevant laws set clear normative barriers to prevent persons sentenced to imprisonment for committing criminal offenses, to be elected deputies and to exercise the mandate of deputies.
304. With regard to the election of the Government, the Court notes that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) deputies of the Assembly must vote “for” the Government. In this case, according to official documents of the Assembly, the Court notes that on 3 June 2020, sixty one (61) deputies voted “for” the Government, namely for the challenged Decision. Etem Arifi also voted for the adoption of the challenged Decision. As the Court found that the mandate of Etem Arifi was invalid prior to the vote of the challenged Decision, that Decision had received only sixty (60) valid votes. Consequently, the procedure for electing the Government was not conducted in accordance with paragraph 3 of

Article 95 [Election of the Government] of the Constitution, because the Government did not receive a majority of votes of all deputies of the Assembly of the Republic of Kosovo.

305. The Court notes that Article 95 of the Constitution, as interpreted through its case law, provides for two attempts to elect the Government by the Assembly. In both cases, the Government to be considered elected must have a majority of votes of all deputies of the Assembly, namely sixty-one (61) votes. If the Government is not elected even after the second attempt, Article 95.4 of the Constitution provides for the announcement of elections by the President of the Republic of Kosovo.
306. The Court recalls that the Government voted by Decision No. 07/V-014 of the Assembly of 3 June 2020 is based on the Decree No. 24/2020 of the President, of 30 April 2020, issued based on paragraph 4 of Article 95 of the Constitution, namely the second attempt to elect the Government. In this regard, the Court recalls the interpretation given in Judgment KO72/20 where it stated that *“the elections will be inevitable in case of failure of the election of the Government in the second attempt, [...] in which case, based on paragraph 4 of Article 95 of the Constitution, the President announces the elections, which must be held no later than forty (40) days from the day of their announcement”*.
307. In light of this, the Court notes that in the present case paragraph 4 of Article 95 of the Constitution is set in motion, according to which the President of the Republic of Kosovo announces the elections, which must be held no later than forty (40) days from the day of their announcement.
308. The Court considers it important to emphasize that it is aware that Etem Arifi has participated in other voting procedures in the Assembly, even though he did not have a valid mandate. However, based on the principle *non ultra petita* (“not beyond the request”), the Court is limited to the constitutional review of the challenged act by the referral submitted before it, namely Decision No. 07/V-014, of the Assembly of the Republic of Kosovo, regarding the Election of the Government of the Republic of Kosovo.
309. The Court considers it necessary to clarify also that, based on the principle of legal certainty, as well as the fact that this Judgment cannot have retroactive effect, the decisions of the current Government remain in force, and the Government remains in office until the election of the new Government.

## **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113, paragraph 5 of the Constitution, Articles 42 and 43 of the Law on the Constitutional Court and pursuant to Rules 59 (1) and 72 of the Rules of Procedure, on 21 December 2020, unanimously

### **DECIDES**

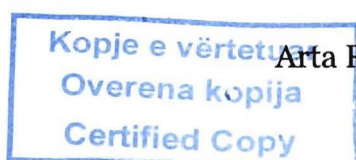
- I. TO DECLARE the Referral admissible;
- II. TO HOLD that, based on Article 71.1 of the Constitution of the Republic of Kosovo, in conjunction with Article 29.1 (q) of the Law on General Elections, a person convicted of a criminal offense by a final court decision in the last three (3) years, cannot be a candidate for deputy, nor win a valid mandate in the Assembly of the Republic of Kosovo;
- III. TO HOLD that Decision No. 07/V-014 of the Assembly of the Republic of Kosovo on the Election of the Government of the Republic of Kosovo, of 3 June 2020, is not in compliance with paragraph 3 of Article 95 [Election of the Government] of the Constitution, because the Government did not receive the majority of votes of all deputies of the Assembly of the Republic of Kosovo;
- IV. TO HOLD that considering that the Government was not elected according to paragraph 3 of Article 95 [Election of the Government] of the Constitution, based on paragraph 4 of Article 95 [Election of the Government] of the Constitution, the President of the Republic of Kosovo announces the elections, which must be held no later than forty (40) days from the day of their announcement;
- V. TO HOLD that, this Judgment has no retroactive effect and based on the principle of legal certainty, the decisions of the Government remain in force, and the Government remains in office until the election of the new Government;

- VI. TO DECLARE that this Judgment is effective on the date of its publication and its submission to the parties;
- VII. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law.

**Judge Rapporteur**

**President of the Constitutional Court**

Bekim Sejdiu



Arta Rama-Hajrizi

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