



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

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Prishtina, on 19 July 2021  
Ref. no.: RK 1819/21

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

## RESOLUTION ON INADMISSIBILITY

in

**Case No. KO88/21**

Applicant

**The President of the Republic of Kosovo**

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

### THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President  
Bajram Ljatifi, Deputy President  
Selvete Gërzhaliu-Krasniqi, Judge  
Safet Hoxha, Judge  
Radomir Laban, Judge  
Remzije Istrefi-Peci, Judge, and  
Nexhmi Rexhepi, Judge

#### **Applicant**

1. The Referral was submitted by the President of the Republic of Kosovo, Her Excellency, Vjosa Osmani-Sadriu (hereinafter: the Applicant).

## **Subject matter**

2. The Applicant requests: (i) the interpretation of the notion “the largest parliamentary group” in the context of allocation of seats in the Central Election Commission (hereinafter: the CEC) for the parliamentary groups represented in the Assembly of the Republic of Kosovo (hereinafter: the Assembly), within the meaning of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); and (ii) resolving conflict of authorizations of parliamentary groups to nominate CEC members.
3. In the context of paragraph 9 of Article 84 of the Constitution, the Applicant’s Referral is presented in the form of four (4) questions which can be summarized as follows: (i) what is the meaning of the notion of a parliamentary group or groups related to the word “may” of paragraph 4 of Article 139 of the Constitution; (ii) what is the prevailing criterion for deciding whether two (2) additional CEC members should be appointed by the largest parliamentary group or by several parliamentary groups, especially when a parliamentary group has won over 50% of the votes in the elections; (iii) whether the principle of proportionality (the number of deputies of one parliamentary group in relation to the others) should be reflected in deciding whether the two (2) additional CEC members belong to only one group or several parliamentary groups; and, (iv) in cases where non-majority communities have the same number of deputies, how is their order determined in the context of paragraph 4 of Article 139 of the Constitution?
4. The Applicant also requests the imposition of an interim measure reasoning: *"[d]ue to the specific circumstances explained in this referral, and in order to maintain legal certainty and public interest, it is required to impose an interim measure in the application of legal deadlines (60 days from the day of certification of the election result), as provided in Article 61, paragraph 4, of Law No. 03/L-073 on General Elections in the Republic of Kosovo, regarding the beginning of the mandate of two CEC members, who were not appointed in this round due to lack of constitutional clarity. The need for an interim measure for the running of the deadlines becomes especially relevant for the fact that local elections will be organized within this year, and it is necessary that the actions taken by the President regarding the appointment of CEC members be in full compliance with the Constitution of the Republic of Kosovo"*.

## **Legal basis**

5. The Referral is based on paragraph 9 of Article 84 [Competencies of the President] of the Constitution and sub-paragraph (1) of paragraph 3 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 31 [Accuracy of referral] and Article 27 [Interim Measures] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rule 68 [Referral pursuant to Article 113.3 (1) of the Constitution and Article 31 and 32 of the Law] and Rule 56 [Request for Interim Measures] 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 12 May 2021, the Applicant submitted the Referral to the Court.
7. On 14 May 2021, the Applicant, the Prime Minister, the President of the Assembly of the Republic of Kosovo and the CEC Chair were notified about the registration of the Referral. The President of the Assembly of the Republic of Kosovo was requested to submit a copy of the referral to all deputies and parliamentary groups of the Assembly of the Republic of Kosovo, in order to submit their written comments, if any, by 31 May 2021.
8. On 17 May 2021, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
9. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP.71-2/21 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.
10. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.
11. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision no. KO88/21, appointed Judge Bajram Ljatifi as Judge Rapporteur replacing Judge Bekim Sejdiu following his resignation.
12. The parliamentary groups, the deputies of the Assembly of the Republic of Kosovo and any other notified Parties, did not submit comments on this referral, within the deadline set by the Court.
13. On 24 June 2021, the President of the Assembly addressed the Court with a request to extend the deadline for submission of comments by the Deputies of the Assembly of Kosovo, explaining that the letter of 14 May 2021 had not been sent to the Deputies of the Assembly for objective reasons.
14. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.
15. On 28 June 2021, the Court notified the President of the Assembly of Kosovo that the request for extension of the deadline for submission of comments by the

Deputies of the Assembly was submitted three weeks after the deadline for submission of comments and that it was rejected based on paragraph 3 of Rule 33 of the Rules of Procedure. The Court in its case law has rejected the requests for extension of the deadline for submission of comments (see the cases of the Constitutional Court: KO61/20 Applicant: *Uran Ismaili and 29 other Deputies of the Assembly of the Republic of Kosovo*, Judgment of 1 May 2020, paragraph 23 and KO98/20 Applicants: *Hajrulla Çeku and 29 deputies*, Decision to strike out the referral, of 18 November 2020, paragraph 19).

16. On 2 July 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral. On the same date, the Court decided by a majority that the Referral is inadmissible.

### **Summary of facts**

17. On 14 February 2021, the early elections were held for the Assembly of the Republic of Kosovo.
18. On 12 March 2021, the CEC certified the final result of the elections: Vetëvendosje Movement 50.280% (58 seats), PDK 17.009% (19 seats), LDK 12.731% (15 seats), SL 5.094% (10 seats), AAK 7.124% (8 seats), KDTP 0.745% (2 seats), Vakati 0.616% (1 seat), IRDK 0.379% (1 seat), RI 0.364% (1 seat), NDS 0.331% (1 seat), SDU 0.292% (1 seat), JGP 0.248% (1 seat), PAI 0.245% (1 seat) and LPRK 0.139% (1 seat).
19. On 22 April 2021, the Office of the President of the Republic of Kosovo sent a request to the parliamentary groups for the nomination of candidates for CEC members, who would then be decreed by the President.
20. On 29 April 2021, the political entity AAK, as a parliamentary group represented in the Assembly, which has no right to participate in the allocation of reserved seats, nominated one (1) member from this political entity to the CEC.
21. On 5 May 2021, the political entity SDU, representing the Bosnian community with one (1) deputy in the Assembly of the Republic of Kosovo, submitted to OPRK the proposal for a CEC member.
22. On 5 May 2021, the political entity LS, representing the Serb community with ten (10) deputies in the Assembly of the Republic of Kosovo, sent to OPRK the proposal for a member of the CEC.
23. On 6 May 2021, the political entity IRDK, which represents the Egyptian community with one (1) deputy in the Assembly of the Republic of Kosovo, sent to the OPRK the proposal for a member of the CEC.
24. On 6 May 2021, the “Coalition VAKAT”, representing the Bosnian community with one (1) deputy in the Assembly of the Republic of Kosovo, submitted the proposal for a member to the CEC.

25. On 6 May 2021, the political entity LDK, as a parliamentary group represented in the Assembly of the Republic of Kosovo, which has no right to participate in the allocation of reserved seats, nominated one (1) member from this political entity as a representative in the CEC.
26. On 7 May 2021, the political entity NDS, which represents the Bosnian community with one (1) deputy in the Assembly of the Republic of Kosovo, sent to OPRK the proposal for a member of the CEC.
27. On 7 May 2021, the political entity PDK, as a parliamentary group represented in the Assembly, which has no right to participate in the allocation of reserved seats, nominated two (2) members from this political entity as representatives in the CEC.
28. On 11 May 2021, the political entity KDTP, which represents the Turkish community with two (2) deputies in the Assembly of the Republic of Kosovo, sent to OPRK the proposal for one (1) member in the CEC.
29. On 12 May 2021, Movement Vetëvendosje, as a parliamentary group represented in the Assembly of the Republic of Kosovo, which has no right to participate in the allocation of reserved seats, nominated three (3) members from this political entity as representatives at the CEC.
30. On 12 May 2021, the President of the Republic of Kosovo appointed eight (8) members of the CEC. The President of the Republic of Kosovo did not appoint two (2) other members of the CEC due to “lack of clarity” in the context of paragraph 4 of Article 139 of the Constitution, addressing the Constitutional Court.

### **Applicant’s Referral**

31. The Court recalls that the Applicant requests the interpretation of Article 139 [Central Election Commission] paragraph 4, of the Constitution. The Court reiterates that the Applicant’s request for interpretation has been submitted in the form of four (4) questions which can be summarized as follows: (i) what is the meaning of the notion of a parliamentary group or groups related to the word “may” of paragraph 4 of Article 139 of the Constitution; (ii) what is the prevailing criterion for deciding whether two (2) additional CEC members should be appointed by the largest parliamentary group or by several parliamentary groups, especially when a parliamentary group has won over 50% of the votes in the elections; (iii) whether the principle of proportionality (the number of deputies of one parliamentary group in relation to the others) should be reflected in deciding whether the two (2) additional CEC members belong only to one group or several parliamentary groups; and, (iv) in cases where non-majority communities have the same number of deputies, how is their order determined in the context of paragraph 4 of Article 139 of the Constitution?

### **Regarding admissibility of the Referral**

- (i) *With regard to item (1) of paragraph 3 of Article 113 of the Constitution*

32. Regarding the admissibility of the Referral based on item (1) of paragraph 3 of Article 113 of the Constitution, the Applicant initially states that she is authorized to refer issues related to the conflict of inter-institutional competencies. In this regard she states that *“The Assembly of the Republic of Kosovo consists of 120 deputies. These deputies, in order to functionalize the work of the Assembly of the Republic of Kosovo, form parliamentary groups which exercise their function within the umbrella of the Assembly. Consequently, the parliamentary groups are constituent bodies of the Assembly of the Republic of Kosovo. The right to nominate CEC members is the competence of the parliamentary groups represented in the Assembly, as stipulated by Article 139, paragraph 4, of the Constitution of the Republic of Kosovo”*. According to the Applicant, *“the parliamentary groups of VV and PDK have nominated their candidates for members of the CEC, but the number of nominees does not correspond to the number of vacant seats for the members of these two parliamentary groups”*.
33. Therefore, she claims that in the present case, *“we are dealing with the conflict of authorizations of the parliamentary groups (as bodies of the Assembly) to nominate candidates for CEC members, as an initial step before the appointment by the President, as a constitutional competence of the President. In this case, the competence of parliamentary groups to propose, as well as the competence of the President to appoint, is established in Article 139 of the Constitution of Kosovo. Therefore, both are constitutional competencies”*.
34. The Applicant further states that in case KO131/18, the Court had set three criteria that must be met in order for the case to be considered admissible in accordance with Article 113, paragraph 3, sub-paragraph 1 [Jurisdiction and Authorized Parties] of the Constitution, and that the conflict of competencies: (i) is referred by one of the three authorized parties; (ii) that the conflict be raised over a constitutional competence provided by the Constitution for one of the three authorized parties; and, (iii) to have a conflict.
35. Consequently, the Applicant states that in the present case the three requirements set out in Article 113 paragraph 3, sub-paragraph 1 of the Constitution, broken down by the Court in case no. KO131/18 because: (i) the conflict is raised by one of the three authorized parties which is the President of the Republic of Kosovo; (ii) the conflict arises for a certain constitutional competence, in this case for the nomination and appointment of CEC members as provided in Article 139, paragraph 4 of the Constitution; (iii) the conflict exists as the nomination of CEC members, which is the competence of the parliamentary groups as bodies of the Assembly, precedes the appointment of the CEC members, as the competence of the President of the Republic of Kosovo; and, consequently, (iv) the case in question meets the three criteria established by the Court.
- (ii) *Regarding the admissibility of the Referral under paragraph 9 of Article 84 of the Constitution*
36. With regard to the admissibility of the Referral pursuant to Article 84 of the Constitution, the Applicant alleges that: (i) *“According to Article 84, paragraph 2, of the Constitution, one of the competencies of the President is to guarantee the “constitutional functioning of institutions [...]”*; (ii) The Constitution entitles

the President to seek interpretation of constitutional issues when it comes to lack of clarity about the spirit of the Constitution, and this is supported by the fact that the right to refer constitutional matters is placed under the “umbrella” of the President’s competencies based on Article 84 of the Constitution; (iii) the requirement based on paragraph 9 of Article 84 of the Constitution is not limited to other requirements and suggests a broad interpretation of the meaning of constitutional issues.

37. In this context, the Applicant alleges that: (i) the allocation of the number of proposals for the appointment of CEC members is not regulated by any act other than the Constitution, which proves that the referral is a “purely constitutional issue”; (ii) the Court’s case-law shows that the notion of “constitutional issue” can be applied in an extended meaning (iii) the broader meaning of the term “constitutional issue” is adequate to apply to this referral because the issues raised have not been previously assessed by this Court or any other court; (iv) the constitutional issues may be accepted by the Court even when they are not related to the jurisdiction set out in Article 113 paragraphs 1 and 2 but also in Article 112 paragraph 1 and for this, among other things, cites the cases of the Court no. KO80/10; KO97/10; KO57/12; KO103/14; and KO130/15; and, that (v) this referral derives from Article 84 paragraph 9 of the Constitution which provides for the referral of constitutional issues to the Court as one of the functions of the President.
38. Therefore, the Applicant alleges that *“this referral meets the criteria required for its admissibility also under Article 84 [of the Constitution]. First, it refers to the competent and final authority in the Republic of Kosovo for the interpretation of the Constitution. Secondly, the referral derives from Article 84, paragraph 9 of the Constitution which provides for the referral of constitutional issues to the Constitutional Court as one of the functions of the President”*.

### **Regarding the merits of the Referral**

39. Regarding the merits of the Referral the Applicant alleges that: *“Article 139 paragraph 4 of the Constitution stipulates from which parliamentary groups members must be nominated in the event that there are six parliamentary groups which are not entitled to participate in the allocation of reserved seats. This article continues even in the situation when we have less than six parliamentary groups but does not explicitly specify which group the additional members belong to. Having said that, the second sentence of Article 139, paragraph 4, of the Constitution shows that the largest “group” or “groups” “may” appoint additional members”*.
40. The Applicant alleges that the interpretation of the constitutional issues would also serve as a reference for future processes of appointment of CEC members, for at least two reasons: (i) it would specify the formula for the appointment of CEC members; specifying the prevailing criteria for the appointment of members from the largest “group” or “groups” in the event that at least 6 parliamentary groups are represented in the Assembly, and (ii) specify the formula according to which non-majority members will be appointed, in case a

certain community is represented in the Assembly with an equal number of deputies from different political entities.

41. The Applicant alleges that the interpretation of the Constitutional Court would provide legal certainty in taking actions by the President for the appointment of CEC members, and at the same time would be in the public interest by enabling the full functioning without delay of an important institution such as the CEC, especially given the fact that very soon the CEC is expected to begin work on the administration of local elections.

### **Regarding the imposition of an interim measure**

42. With regard to the request for imposition of an interim measure, the Applicant states: (i) the imposition of an interim measure is required in application of the legal deadlines (60 days from the day of certification of the election result), as provided in Article 61, paragraph 4 of Law no. 03/L-073 on General Elections in the Republic of Kosovo, regarding the beginning of the mandate of two CEC members, who were not appointed in this round due to constitutional ambiguities; and, that (ii) the need for an interim measure for the running of the deadlines becomes especially relevant for the fact that local elections will be organized within this year, and it is necessary that the actions taken by the President regarding the appointment of CEC members be in full compliance with the Constitution of the Republic of Kosovo.

## **Relevant constitutional and legal provisions**

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

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

[...]

*(9) may refer constitutional questions to the Constitutional Court;*

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

[...]

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

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

[...]

#### *Article 113 [Jurisdiction and Authorized Parties]*



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

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

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

*(2) the compatibility with the Constitution of municipal statutes.*

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

*(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;*

*(2) compatibility with the Constitution of a proposed referendum;*

*(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;*

*(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;*

*(5) questions whether violations of the Constitution occurred during the election of the Assembly.*

*Article 139  
[Central Election Commission]*

*[...]*

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

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

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

*Article 61*

*Mandate and Appointment of CEC Members*

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

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

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

*a) within 10 days of the coming into force of this law parliamentary groups entitled to appoint a member(s) to the CEC shall notify the President of Kosovo of their appointment. Provided that the individual appointed by the parliamentary group conforms to the requirements of this law, the President of Kosovo shall, within five (5) days confirm the appointment in writing. The appointment shall be effective on the day stipulated in the official appointment by the President of Kosovo;*

*b) the Chairman of the CEC shall serve for not more than 2 consecutive mandates;*

*c) the Members of the CEC shall serve for not more than 3 consecutive mandates. d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;*

*d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;*

*e) notwithstanding point (d) of this paragraph mandate that expires 90 or fewer days before an election or up to 90 days following the certification of the results of an election shall be automatically extended to 90 days after the certification of the results of an election.*

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

**Admissibility of the Referral**

43. In order to decide on the Applicant's Referral, the Court must first examine whether the submitted Referral meets the admissibility requirements, as established in the Constitution and further specified in the Law and in the Rules of Procedure.
44. In this regard, the Court first refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which also defines the jurisdiction of the Constitutional Court to decide on cases referred to by the Applicant, namely the President.

45. Pursuant to Article 113, paragraph 2, of the Constitution, “[...] *the President of the Republic of Kosovo [...] [is] authorized to refer the following matters:*
- (1) *the question of the compatibility with the Constitution of laws, of decrees of the [...] Prime Minister, and of regulations of the Government;*
  - (2) *the compatibility with the Constitution of municipal statutes.*
46. Furthermore, Article 113, paragraph 3 of the Constitution stipulates that [...], *the President of the Republic of Kosovo [...] [is] authorized to refer the following matters:*
- (1) *conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;*
  - (2) *compatibility with the Constitution of a proposed referendum;*
  - (3) *compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;*
  - (4) *compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;*
  - (5) *questions whether violations of the Constitution occurred during the election of the Assembly.*
47. The Court also refers to paragraph (9) of Article 84 [Competencies of the President], related to the above provisions, which stipulates:
- “The President of the Republic of Kosovo::*  
 [...]
- (9) *may refer constitutional questions to the Constitutional Court;*  
 [...]
48. In this regard, the Court first notes that based on the facts of this case, it follows that (i) on 22 April 2021, the President of the Republic sent a request to the parliamentary groups for the nomination of candidates for CEC members; and (ii) between 29 April 2021 and 12 May 2021, the parliamentary groups represented in the Assembly, which are not entitled to participate in the allocation of guaranteed seats, namely LVV, PDK, LDK and AAK, proposed the respective members, while political entities holding guaranteed seats for non-majority communities in Kosovo also submitted their nominations.
49. The President of the Republic of Kosovo, on 12 May 2021, appointed eight (8) members of the CEC. The other two (2) members were not appointed by the President of the Republic of Kosovo, because (i) LVV proposed three (3) candidates for CEC members, while PDK proposed two (2) candidates for CEC members. and claiming “*lack of clarity*” in the context of paragraph 4 of Article 139 of the Constitution which stipulates that “*if fewer groups are represented in the Assembly, the largest group or groups may appoint additional members*”, the President of the Republic of Kosovo addressed the Court with a request for interpretation of the “*largest parliamentary group*” in the context of the above provision, namely whether the vacant seats in the CEC belong only

to the largest parliamentary group or groups; and (ii) the Bosnian community, in the current structure of the Assembly, is represented by three (3) different political entities with an equal number of seats in the Assembly, while three (3) proposals have been submitted to the Presidency by this community, although only one (1) seat in the CEC belongs to them. Consequently, the President of the Republic also claims “*lack of clarity*” in the context of paragraph 4 of Article 139 of the Constitution, regarding the appointment of CEC members from non-majority communities, in cases where a community is represented by more than one political entity, but with an equal number of seats in the Assembly.

50. The Court reiterates that the President's request for interpretation was presented in the form of four (4) questions which could be summarized as follows: (i) what is the meaning of the notion of a parliamentary group or groups related to the word “may” of paragraph 4 of Article 139 of the Constitution; (ii) what is the prevailing criterion for deciding whether two (2) additional CEC members should be appointed by the largest parliamentary group or by several parliamentary groups, especially when a parliamentary group has won over 50% of the votes in the elections; (iii) whether the principle of proportionality (the number of deputies of one parliamentary group in relation to the others) should be reflected in deciding whether the two (2) additional CEC members belong only to one group or several parliamentary groups; and, (iv) in cases where non-majority communities have the same number of deputies, how is their order determined in the context of paragraph 4 of Article 139 of the Constitution?
51. In relation to the above, the Court notes that the Applicant requests the Court:
  - (i) *“the interpretation of the notion “the largest parliamentary group” in the context of the allocation of seats in the CEC for parliamentary groups represented in the Assembly of the Republic of Kosovo, within the meaning of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo” based on paragraph 9 of Article 84 of the Constitution; and (ii) “resolution of the conflict of authorizations of parliamentary groups to nominate CEC members”, based on item 1 of paragraph 3 of Article 113 of the Constitution.*
52. The Court will further assess the admissibility of the President’s Referral based on (i) paragraph 9 of Article 84 of the Constitution; and (ii) item 1 of paragraph 3 of Article 113 of the Constitution.
  - (i) *Regarding the assessment of admissibility in the context of paragraph 9 of Article 84 of the Constitution*
53. In this regard, the Applicant alleges that the Constitution entitles the President to seek interpretation of constitutional issues when it comes to lack of clarity about the spirit of the Constitution. According to her, this is based on the fact that the right to refer constitutional issues is placed under the “umbrella” of the competencies of the President based on Article 84 of the Constitution, thus not being limited to other requirements and suggesting a broad interpretation of the understanding of constitutional issues.
54. The Applicant alleges that in the present case the criteria required for admissibility have been met pursuant to Article 84 (9) of the Constitution. This

is because: (i) the allocation of the number of proposals for the appointment of CEC members is not regulated by any act other than the Constitution, which confirms that the referral is a “purely constitutional issue”; (ii) the Constitution refers to the Constitutional Court as the competent and final authority in the Republic of Kosovo for the interpretation of the Constitution; and (iii) the referral derives from Article 84, paragraph 9 of the Constitution which provides for the referral of constitutional issues to the Constitutional Court as one of the functions of the President.

55. In this regard, the Applicant maintains that “*the lack of clarity of competencies is making impossible for the President to appoint all members of the CEC, as a body which administers and manages the free, equal and direct elections in Kosovo*”.
56. With regard to the Applicant’s competence to file a Referral before the Court based solely on Article 84 (9) of the Constitution, the Court refers to the principles set out in its case law in similar cases.
57. The Court notes that in the context of filing referral before it based on paragraph 9 of Article 84 of the Constitution, it already has a consolidated case law and which, *inter alia*, emphasizes the President’s possibility to refer constitutional issues in the context of paragraph 9 of Article 84 of the Constitution must be understood in relation to the provisions of the Constitution relating to the jurisdiction of the Court set forth in Article 113 of the Constitution. More precisely, paragraph 9 of Article 84 of the Constitution, cannot serve as a separate and independent basis from Article 113 of the Constitution and that the competence of the President to “refer constitutional issues” as defined in paragraph 4 of Article 84 of the Constitution must be related to Article 113 of the Constitution. (See, cases of the Constitutional Court: KO79/18, Applicant: *The President of the Republic of Kosovo*, Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo, Resolution on Inadmissibility, of 3 December 2018, paragraphs 72, 74 , 77, 78 and 82; KO131/18 Applicant: *The President of the Republic of Kosovo*, Resolution on Inadmissibility of 6 March 2019, paragraph 90; and KO181/18, Applicant: *The President of the Republic of Kosovo*, Resolution on Inadmissibility of 13 June 2019, paragraph 46).
58. In addition, the Court notes that setting from the fact that the Constitution has explicitly defined the jurisdiction of the Constitutional Court, including the authorized parties to activate its jurisdiction, the possibility of taking a consultative or advisory role was limited to the Court, as this role would conflict with its fundamental role to decide on the cases brought before it (see, case KO79/18, cited above, paragraph 76).
59. Therefore, the Court emphasizes that Article 84 (9) of the Constitution, must also relate to the jurisdiction of the Court set forth in Article 113, paragraphs 2 and 3 of the Constitution, which explicitly and exhaustively defines the issues that the President of the Republic may refer to the Constitutional Court.
60. Therefore, the Court reiterates that Article 84 (9) of the Constitution cannot serve as the sole legal basis for the Applicant to file a request for interpretation

before the Constitutional Court and consequently, the Court finds that the Applicant's request for interpretation of paragraph 4 of the Article 139 of the Constitution, is inadmissible for consideration.

*(ii) Regarding the assessment of admissibility in the context of item (1) of paragraph 3 of Article 113 of the Constitution*

61. In this regard, the Court notes that the President, in her capacity as Applicant, has also raised a case of conflict of constitutional competence between parliamentary groups, as bodies of the Assembly.
62. The Applicant alleges in this connection that: “[...] *in the present case, the three requirements set out in Article 113 paragraph 3, sub-paragraph 1 of the Constitution are met, broken down by the Court in case no. KO131/18 because: (i) the conflict is raised by one of the three authorized parties which is the President of the Republic of Kosovo; (ii) the conflict arises for a certain constitutional competence, in this case for the nomination and appointment of CEC members as provided in Article 139, paragraph 4 of the Constitution; (iii) the conflict exists as the nomination of CEC members, which is the competence of the parliamentary groups as bodies of the Assembly, precedes the appointment of the CEC members, as the competence of the President of the Republic of Kosovo.[...].*”
63. The Court once again refers to Article 113.3. (1) of the Constitution which stipulates that the President of the Republic of Kosovo is one of the three parties authorized to raise issues of “*conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo*”.
64. The Court further refers to the legal requirements established in Article 31 [Accuracy of referral] and 32 [Deadlines] of the Law as well as Rule 68 [Referral pursuant to Article 113.3 (1) of the Constitution and Article 31 and 32 of the Law] of the Rules of Procedure as provisions further specifying the aforementioned constitutional provision for a “*conflict among constitutional competencies*”:

Article 31  
[Accuracy of referral]

*A referral made pursuant to Article 113, Paragraph 3 item 1 of the Constitution shall be filed by any authorized party in conflict or from any authorized party directly affected from the said conflict. The referral shall include any relevant information in relation to the alleged conflict as further determined by the Rules of Procedures of the Constitutional Court.*

Article 32  
[Deadlines]

*A referral made pursuant to Article 31 of this Law shall be submitted within six (6) months from the day upon which the alleged conflict started.*

Rule 68

[Referral pursuant to Article 113.3 (1) of the Constitution and Article 31 and 32 of the Law]

*(1) A referral filed under this Rule must fulfill the criteria established under Article 113.3 of the Constitution and Articles 31 and 32 of the Law.*

*(2) When filing a referral pursuant to this Rule, an authorized party shall state precisely what conflict exists between the constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo or the Government of Kosovo.*

*(3) The authorized party shall identify the act which violates its competence and the relevant provision of the Constitution which has been violated by such act.*

*(4) The referral under this Rule must be filed within a period of six (6) months from the day the alleged conflict started.*

*(5) The Secretariat shall provide notice to the authority whose act is challenged. They may respond within fifteen (15) days from the date of notification, unless good cause is shown for a longer time and the respective extension is granted.*

65. In this context, the Court recalls its interpretation through its case law that Article 113.3 (1) of the Constitution encompasses three requirements of the constitutional level, which must be met cumulatively, namely the necessity that:
- (i) the conflict be brought by one of the three authorized parties;
  - (ii) the issue be raised over a constitutional competence set forth in the Constitution for one of the three authorized parties; and,
  - (iii) to have a conflict (see cases of the Constitutional Court: KO131/18, cited above, paragraph 92; and KO181/18, cited above, paragraph 58).
66. Regarding the requirement (i), the Court notes that Article 113.3 (1) of the Constitution authorizes the Assembly, the President and the Government to raise cases of conflict among their constitutional competences. This authorization is mutual and each of these authorized parties may raise issues of conflict of competence for one or the other party, not excluding the possibility of raising the conflict against two parties at the same time. In the present case, this constitutional requirement is supplemented by the fact that the Referral is submitted by the President, as one of the three potential parties authorized to raise the issue of conflict among competences of the Government and the Assembly.
67. With respect to requirement (ii), the Court notes that Article 113.3 (1) of the Constitution provides that a conflict may arise only for a certain constitutional competence set forth in the Constitution for one of the three authorized parties. Although the Constitution leaves open the subject of conflict among the constitutional competencies, it makes a significant limitation on the fact that the alleged conflict of constitutional competence must necessarily stem from the constitutional competencies laid down in the Constitution for the President, the Assembly and the Government (See, cases of the Constitutional Court: KO131/18, cited above, paragraph 94 KO181/18, cited above, paragraph 60).

68. Therefore, the Court must further assess whether, in the present case, (ii) the constitutional criterion has been met, namely whether in the present case the alleged conflict arises for “*constitutional competence*” between the President of the Republic, the Assembly of Kosovo and the Government of Kosovo.
69. In this respect, the Court recalls that the Applicant in his Referral requests the interpretation of Article 139, paragraph 4 of the Constitution, which stipulates that:

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

70. The Court also recalls the relevant provisions of the Constitution, which establish:

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

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

*Article 139*

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

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

[...]

71. In this regard, the Court brings to attention the provision of Article 61.3.a of Law No. 03/L-073 on General Elections in the Republic of Kosovo, which provides: “[...] a. Within 10 days of the coming into force of this law parliamentary groups entitled to appoint a member(s) to the CEC shall notify the President of Kosovo of their appointment. Provided that the individual appointed by the parliamentary group conforms to the requirements of this law, the President of Kosovo shall, within five (5) days confirm the appointment in writing. The appointment shall be effective on the day stipulated in the official appointment by the President of Kosovo.”
72. The Court notes that Article 84 [Competencies of the President] and paragraphs 3 and 4 of Article 139 [Central Election Commission] of the Constitution, prescribe the constitutional competence of the President for the appointment of



the CEC Chair and the manner of appointing members of the latter but the competence of the President for the appointment of CEC members is not defined by the Constitution, but only by the Law on General Elections in the Republic of Kosovo, namely by item (a) of paragraph 3 of Article 61 thereof (See the case of the Constitutional Court: KO79/18, cited above, paragraph 81). Considering that the conflict of competencies, in the circumstances of the present case, has been raised in relation to a competence of the President and which is not defined by the Constitution, the Court, based on item 1 of paragraph 3 of Article 113 of the Constitution and its case law through which it has interpreted this provision, states that the conflict of competencies has not been raised in relation to the “constitutional competencies” of the President and consequently, the second constitutional criterion has not been met in the context of “conflict of competencies” for the President, the Assembly and/or the Government. (See case of the Constitutional Court: KO131/18, cited above, paragraphs 102-106). Considering that the second constitutional criterion in the context of Article 113.3.1 of the Constitution, is not met in the circumstances of the present case, the Court, based on its case law considers that it is not necessary to assess the requirement (iii) of the admissibility of the Referral, namely, if there is a “conflict” between the competencies of the President, the Government and the Assembly. (See the case of the Constitutional Court: KO181/18, cited above, paragraph 72).

73. Therefore, in the Court’s assessment in the circumstances of the present case, the President of the Republic, although a party authorized to raise issues of conflict of constitutional competencies between her and the Assembly, did not raise before the Court a conflict of “*constitutional competencies*”, according to provisions of Article 113.3. (1) of the Constitution, and consequently, the Court declares the Referral of the President of the Republic of Kosovo inadmissible based on Article 113 of the Constitution.

### **Request for interim measure**

74. The Court also notes that the Applicant has requested the imposition of an interim measure “[...] *The need for an interim measure for the running of the deadlines becomes especially relevant for the fact that local elections will be organized within this year, and it is necessary that the actions taken by the President regarding the appointment of CEC members be in full compliance with the Constitution of the Republic of Kosovo*”.
75. The Court refers to Article 27 [Interim Measures] of the Law, which provides:
- “1. *The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*
2. *The duration of the interim measures shall be reasonable and proportionate*”.

76. The Court has already held that the Referral is inadmissible pursuant to Article 113, paragraph 1, of the Constitution and consequently the request for an interim measure is to be rejected.
77. The Court rejects the request for imposition of an interim measure.

## **Conclusion**

78. In the review session held on 2 July 2021, the Court reviewed case KO88/21, namely the Referral of the President of the Republic of Kosovo for (i) *“the interpretation of the notion “the largest parliamentary group” in the context of the allocation of seats in the CEC for the parliamentary groups represented in the Assembly of the Republic of Kosovo, in terms of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo; and (ii) “for resolving conflicts of authorizations of parliamentary groups to propose the CEC members”*.
79. The Court notes that based on the facts of this case, it results that (i) on 22 April 2021, the President of the Republic had sent a request to the parliamentary groups for the nomination of candidates for CEC members; and (ii) between 29 April 2021 and 12 May 2021, the parliamentary groups represented in the Assembly, who are not eligible to participate in the allocation of reserved seats, namely LVV, PDK, LDK and AAK, had proposed the respective members, whilst political entities which hold guaranteed seats reserved for non-majority communities in Kosovo, also submitted their nominations.
80. The President of the Republic of Kosovo, on 12 May 2021, has appointed eight (8) members of the CEC. Two (2) other members were not appointed by the President of the Republic of Kosovo, because (i) LVV proposed three (3) candidates for CEC members, while PDK proposed two (2) candidates for CEC members, and claiming *“lack of clarity”* in the context of paragraph 4 of Article 139 of the Constitution which stipulates that *“if fewer groups are represented in the Assembly, the largest group or groups may appoint additional members”*, the President of the Republic of Kosovo addressed the Court with a request for interpretation of *“the largest parliamentary group”* in the context of the abovementioned provision, respectively whether the vacant positions in the CEC belong only to the largest parliamentary *group or groups*; and (ii) the Bosnian community, in the current structure of the Assembly, is represented by three (3) different political entities with an equal number of seats in the Assembly, and there were three (3) proposals submitted to the Presidency from this community, the same is entitled to only one seat in the CEC. Accordingly, the President of the Republic alleges *“lack of clarity”* in the context of paragraph 4 of Article 139 of the Constitution with respect to the appointment of the CEC members from among the communities that are not in majority, in cases when a community is represented by more political entities, but with equal number of seats in the Assembly.
81. In the context of the circumstances mentioned above, and emphasizing that *“the lack of clarity of competencies is making impossible for the President to appoint all members of the CEC, as a body which administers and manages the free, equal and direct elections in Kosovo”*, the President of the Republic of Kosovo addressed the Constitutional Court with (i) the request for interpretation of the

notion of the “*largest parliamentary group*” in the context of paragraph 4 of Article 139 of the Constitution, based on paragraph 9 of Article 84 of the Constitution; and (ii) the request to resolve the conflict of “*authorizations*” of parliamentary groups to propose the CEC members, based on item 1 of paragraph 3 of Article 113 of the Constitution.

*Regarding the assessment of admissibility in the context of paragraph 9 of Article 84 of the Constitution*

82. In assessing the admissibility of the President’s Referral for interpretation of lack of constitutional clarities pursuant to paragraph 9 of Article 84 of the Constitution, and the relevant request for an answer to four (4) questions submitted to the Court and which will be fully reflected in the Resolution on Inadmissibility that will be published in accordance with the procedural rules in the following days, the Court found that the Referral of the President is inadmissible. The Court through its case law including case KO79/18, in which also a request by the President of the Republic for interpretation of paragraph 4 of Article 139 of the Constitution was considered, clarified, that (i) paragraph 9 of Article 84 of the Constitution is not independent of Article 113 of the Constitution; (ii) paragraph 1 of Article 112 of the Constitution may not be interpreted outside the context of Article 113 of the Constitution;; and (iii) based on Article 113 of the Constitution, the Court is limited in its possibility to take a consultative or advisory role by answering questions submitted to it, as this role would be in conflict with its fundamental role to resolve cases brought before it.

*Regarding the assessment of admissibility in the context of item (1) of paragraph 3 of Article 113 of the Constitution*

83. In assessing the admissibility of the Referral of the President, based on item 1 of paragraph 3 of Article 113 of the Constitution, concerning the resolution of the conflict of “*authorizations*”, between the “*constitutional competence*” of the President and the “*competence of the parliamentary groups represented in the Assembly*” for the nomination of CEC members, the Court initially notes that the aforementioned Article of the Constitution, stipulates that the President of the Republic of Kosovo, as one of the three authorized parties, is authorized to raise issues of “*conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo*”. This provision has been interpreted by the Court, initially through the Resolution in cases KO131/18 and KO181/18,, where it clarified the three cumulative constitutional criteria that must be met in order for the referrals raised in the context of this Article to pass the admissibility test. In the above-mentioned cases, the Court had clarified that in terms of Article 113.3.(1) of the Constitution, the following three criteria must be met: (i) the conflict must be raised by one of the three authorized parties; (ii) the conflict arises over “*constitutional competences*” of the Assembly, the President and/or the Government of the Republic of Kosovo;; and that (iii) there is a conflict.
84. The Court clarified that in the circumstances of this case the first constitutional criterion was met, because the Referral was submitted to the Court by the President of the Republic of Kosovo, as one of the three authorized parties. However, the Court found that the second constitutional criterion in the context

of Article 113.3.(1) of the Constitution is not met, because as the Court clarified in cases KO131/18 and KO181/18, the alleged conflict must stem from the constitutional competences defined by the Constitution for the authorized parties. In the circumstances of the present case, unlike Articles 84 (26), 139 (3) and 139 (4) of the Constitution, which define the constitutional competence of the President for the appointment of the Chair of the CEC and the manner for the appointment of members of the latter, the competence of the President for the appointment of the CEC members is not determined by the Constitution, but only by the Law on General Elections in the Republic of Kosovo, namely item (a) of paragraph 3 of its Article 61.

85. Therefore, in the assessment of the Court, in the circumstances of the present case, the President of the Republic did not raise before the Court a conflict of “*constitutional competencies*” as established in Article 113.3 (1) of the Constitution, and therefore, the Court declares the Referral of the President of the Republic of Kosovo inadmissible pursuant to Article 113 of the Constitution and rejected the request for imposition of an interim measure based on Article 27 of the Law on the Constitutional Court.

## **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113, paragraph 1, of the Constitution, Article 27 of the Law and Rule 59 (2) of the Rules of Procedure, on 2 July 2021, by majority

### **DECIDES**

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

**Judge Rapporteur**

**President of the Constitutional Court**

Bajram Ljatifi

Gresa Caka-Nimani