Formation of a New Government without Elections from the Perspective of Kosovar Constitutional Law

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I - Introduction

The Republic of Kosovo is a parliamentary regime as illustrated by the accountability of the government before the parliament, the Assembly of the Republic. The executive branch is formed by the president (head of State) and the government led by the prime minister. The president elected by the Assembly *prima facie* looks like a formal head of state in parliamentary systems. Thus, most of his/her competences are exercised in cooperation with the prime minister/government or the Assembly. However, some presidential attributes and powers remind semi-presidentialism. In this vein, the president represents the unity of the people, guarantees the constitutional functioning of the institutions, issues decrees, has the right to return adopted laws for reconsideration, proposes constitutional amendments, leads the foreign policy and is the Commander-in-chief of the Security Force.

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2 Art. 92 Constitution.
3 Art. 94 Constitution.
4 Such as appointing to high judicial offices, declaring state of emergency, establishing and appointing diplomatic missions.
6 Art. 83 Constitution.
7 Art. 84-2 Constitution.
8 Art. 84-4 Constitution.
9 Art. 84-6 Constitution.
10 Art. 84-8 Constitution.
11 Art. 84-10 Constitution.
12 Art. 84-12 Constitution.
He/she also plays a role in the government formation as he/she appoints the candidate for prime minister.\textsuperscript{13} This is precisely the controversial competence in the current conflict in Kosovo. The caretaker Prime Minister Kurti complains about the use of discretionary power by the president, which in his opinion the constitution does not attributes to the latter. The president Thaçi, on his turn, considers acting legally and criticizes the prime minister for his refusal to name a candidate in order to form a new government.\textsuperscript{14} Obviously, the scope of presidential powers needs further interpretation.

Anyway, presidential powers and the formation of a new government must be put in the context of the whole constitutional system. As a matter of fact, constitutional interpretation cannot be considered understanding something that is predetermined.\textsuperscript{15} Interpretation is needed on the contrary when there are gaps, inconsistencies, or contradictions, be it because the text was elaborated in haste or because of conflicts between the framers. Both reasons certainly hold true for Kosovo. Thus, sometimes the constitution does not prescribe in detail the concrete consequences of a situation; there are only some vague indications without any directly applicable syllogism. In these cases, it might be helpful to refer to the travaux preparatoires of the Constitution.\textsuperscript{16} In Kosovo, the latter were apparently lost in 2014 when the Constitutional court had to decide on the prime minister’s appointment. However, the fact that the final text is not clear suggests that the consensus during the constitution-making was not strong enough to come out in the text. For this reason and because the interpretation is conceived as a permanent concretisation and adaptation of the constitution, the currently prevalent method of constitutional interpretation tends to subordinate historical and subjective considerations to more comprehensive and

\begin{itemize}
  \item \textsuperscript{13} Art. 84-14 Constitution.
  \item \textsuperscript{15} See K. Hesse, \textit{Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland}, 18th ed., C.F. Müller (1991),19-29.
  \item \textsuperscript{16} But see A. Barak, “Constitutional interpretation”, in: F. Mélin-Soucramanien (ed), \textit{L’interprétation constitutionnelle}, Dalloz (2005), 91-118, 92: “Many aspire in vain to uncover what the legal meaning of a text ‘truly’ is. This is a fruitless search: a text has no ‘true’ meaning. We do not have the ability to compare the meaning of a text before and after its interpretation, through focus on its ‘true’ meaning. There is no pre-exegetical understanding of a text, for we can only access and understand it through an interpretive process. Only different interpretations of a given text can be compared. The most to which we can aspire the ‘proper’ meaning, not the ‘true’ meaning.”
\end{itemize}
systematic approaches. The aim is to give consistency to the whole text and an *effet utile* to all provisions.\textsuperscript{17} This is what I will attempt to undertake here from an outsider point of view and in a comparative way.\textsuperscript{18}

The current problems in Kosovo may be summarized as follows: What are, regardless the dismissal of the outgoing government, the consequences of a successful vote of non-confidence? The Kosovar constitution refuses to adopt a solution of “constructive motion of no-confidence” as initiated in the Constitutional Framework for Provisional Self-Government and as it functions in several other systems.\textsuperscript{19} Hence, there is no positive outcome at the issue of a successful motion of no-confidence and especially no incentive for finding a new majority. According to the constitution, a motion of no-confidence\textsuperscript{20} may be presented by one third of the deputies of the Assembly;\textsuperscript{21} it is accepted when adopted by an absolute majority\textsuperscript{22} and the government considered dismissed.\textsuperscript{23} Therefore, the Kurti government is a simple caretaker since March 2020 until the formation of a new government.

How such a new government may be established? The Constitution does not indicate any clear-cut solution and the Constitutional court delivered several judgments in the electoral context. The only case regarding the consequences of a no-confidence motion was declared inadmissible.\textsuperscript{24} Thus, several questions are raised. The first concerns the dissolution: how is it organized, which are the presidential powers therein and is this outcome compulsory after a no-confidence vote (II)? If not, a second series of interrogation deals with Article 95-5 and the conditions under which a new government could be elected. It is especially important to know whether and to what


\textsuperscript{18} Ten constitutions will serve as reference in this contribution: Albania, Bulgaria, Croatia, Czech Republic, Germany, Romania, Serbia, Slovak Republic, Slovenia, Spain.

\textsuperscript{19} So in Albania, Art. 105 Constitution; Germany, Art. 67 and 68 Basic Law and Slovenia, Art. 116 and 117 Constitution.

\textsuperscript{20} Art. 99.

\textsuperscript{21} Art. 100-1.

\textsuperscript{22} Art. 100-4.

\textsuperscript{23} Art. 100-6.

\textsuperscript{24} Constitutional court, judgment KO 124/19.
extent the judgments on Article 95-1 related to the electoral context can or should be transposed to the formation of a new government during the legislature and after a no-confidence vote (III). It will then be appropriate to examine the questions submitted by Prime Minister Kurti to the Venice commission (IV) before some concluding remarks (V).

II – The dissolution, a compulsory procedure?
The possible obligation would consist in the dissolution of the Assembly by the President, mentioned in Article 82-2. This would lead to early elections. Yet, neither the Constitution nor the case-law of the Constitutional court nor previous practice of no-confidence votes clearly indicate whether this is an obligatory consequence of a no-confidence motion. Therefore, a comparative overlook may shed some light on this institution. In Kosovo, as a matter of fact, the formation of the government is principally treated in the context of the preceding parliamentary elections and not during the legislature and after a no-confidence vote.

1. The dissolution in comparative constitutional law

The significance of dissolution in comparative constitutional law is ambiguous. Sometimes, and this is the most classic conception inherited from constitutional monarchy, it is qualified as counterpart of Parliament’s overthrow of the government. Hence, it appears as a weapon of the executive. Sometimes, and this corresponds more to the contemporary “rationalized” parliamentarism, it is mainly a sanction for the lack of parliamentary majority. When the freshly elected Parliament does not invest the government appointed by the president, it may elect another government with a new majority; in case of failure, the president dissolves the Parliament. This version of parliamentarism in general conceives the presidential competence neither as unfettered nor as automatic: it depends on the (majoritarian) behaviour of the Parliament. Another variation of this conception does not give the Parliament a second

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25 In 2010 and 2017 according to Art. 84-4 Constitution and in 2019 according to Art. 95-5 Constitution.
27 Bulgaria, Art. 99 and 111; Croatia, Art. 109, 109a), 109b), 113-7; Germany, Art. 68; Serbia, Art. 130 and 131; Slovenia, Art. 111 and 117; Spain, Art. 114 in combination with Art. 99.
chance to find a majority but provides for a prompt dissolution.\textsuperscript{28} The constitution of Kosovo comes close to these latter situations, but which one?

2. The dissolution in the Kosovar Constitution

The terming of Article 82 does not seem to impose a prompt dissolution. Its paragraph 2 employs the word “may” by opposition to “shall” in the previous paragraphs, which means that the president is authorized to dissolve if the conditions required for the exercise of this competence are met. Beyond some linguistic discordances, namely between the English and the Albanian version of the text,\textsuperscript{29} the request submitted to the Venice commission alleges that the verb “may” must be interpreted as an obligation of the president\textsuperscript{30} since no alternative is indicated in this same text. The argument appears quite formal almost as the preceding paragraphs use the word “shall”. Moreover, an alternative is offered by Article 95-5 and the previous practice supports only partially this interpretation.

Put in a systematic perspective, it is worthy to note in addition that the dissolution is inserted in the chapter dedicated to the Assembly and not to the president. As a result, the constitutional system might conceive the dissolution neither as a presidential weapon – there is no presidential discretion - nor as an automatism – there is no “blind” obligation - but rather as a parliamentary instrument, a margin of appreciation or an \textit{ultima ratio} stated by the Parliament when no majority is available. Admittedly, this lecture implies a close cooperation between the Parliament and the president consisting for the president in refrain from taking any initiative but to wait for the Assembly’s decision. Given the importance of the Assembly in the Kosovar constitution and the visible concern about a government provided with a parliamentary majority, I would conclude that, indeed, the dissolution is only the ultima ratio but not an obligation, that it is in the hands of the Assembly and not in those of the president. If this holds true, another way for the establishment of a new government is opened.

\textsuperscript{28} Czech Republic, Art. 35 and 73; Romania, Art. 89 after two attempts of the same government to obtain a confidence vote in the Parliament; Slovak Republic, Art. 113, 115.

\textsuperscript{29} In Albin Kurti’s request before the Venice commission, it is explained (p. 6) that the English version of the constitution is the “authentic source of the draft constitution” since this version was approved by the ICR (International Civilian Representative) before being translated and accepted by the Assembly.

\textsuperscript{30} Request, 8-10.
III - The appointment of a new candidate by the president: Article 95-5

The alternative solution might be the formation of a new government pursuant to Article 95-5. This provision deals with the resignation of the prime minister or the vacancy of his post “for any other reason”. The chosen terms, although lacking precision, are large enough to include the vacancy after a successful motion of no-confidence. As a matter of fact, several constitutions employ the term of “resignation” (and not of “dismissal”) for designing the withdrawal of the government after a no-confidence vote. According to Article 95-5, the President “appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the government”. The formulation is similar to Article 95-1. Insofar, the question of a possible transposition of the case-law on Article 95-1 is raised.

1. The formation of governments following parliamentary elections according to Article 95-1

The relevant constitutional provisions concern the election of the government, the competences of the President and the competences of the Constitutional Court. These provisions resulted in several important decisions of the latter regarding the political majority authorized to present a candidate for prime minister and the scope of presidential powers. They are also source for reflection about the role and the competences of the Constitutional court.

a) The majority authorized to propose a candidate

According to Article 95-1, the President proposes a candidate “in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the government”. Article 84-14 stipulates that the president appoints the candidate for prime minister for the establishment of the government “after proposal by the political party or coalition holding the majority in the Assembly”. The candidate

32 Bulgaria, Art. 111, 112; Croatia, Art. 113; Czech Republic, Art. 62; Romania, Art. 106; Slovak Republic, Art. 102-1g), 115-2, 117; Serbia, Art. 132, 133 but “dismissed” is used as well; Spain, Art. 101, 114.
33 See Albin Kurti’s request, 10.
34 Art. 95 Constitution.
35 Art. 84-14 Constitution.
36 Art. 113 Constitution.
who receives the majority vote of all deputies of the Assembly is considered elected.\textsuperscript{37} Absolute parliamentary majority is clearly necessary for the investiture of the government whereas it is somewhat unclear to which majority Articles 95-1 and 84-14 refer when mentioning the political party or coalition, for the two formulations diverge. The most coherent solution, which underlies Article 84-14 (“majority in the Assembly”), would point to the \textit{parliamentary} majority and not to the \textit{electoral} one. Admittedly, in most situations, this divergence is indifferent because the most successful party in the elections may well be the party that would conclude an alliance with smaller groups in order to gather a majority in the Assembly. But sometimes the largest party fails to find a governmental partner and then the parliamentary majority may be composed of several smaller parties forming a coalition made up \textit{after} the elections.

The Constitutional court does not share this opinion. Its judgment KO 103/14 was delivered after the 2014 elections which gave the PDK a majority of seats - 30 out of 120 - yet far from the majority in the Parliament.\textsuperscript{38} Asked by the president how to proceed for the appointment of a candidate, the court solved the question in a surprising way. In its opinion, there was no difference between Articles 84-14 and 95-1. Both provisions should be read as granting the right to propose its candidate to the party or coalition that had won the most seats on the last elections. In particular, no coalition formed after the Assembly’s inaugural session and consequently not registered by the Central electoral commission is acknowledged by the court as authorized to name a candidate. The principal explanations the court gives are grammatical or derived from applicable electoral legislation which seems rather strange because normally laws should be consistent with the constitution, not the constitution with laws. The only substantive motivation is contained in the following statement: “The democratic rule and principles, as well as political fairness, foreseeability and transparency require the political party or coalition that won the highest number of seats as a result of the elections to be given the possibility to

\textsuperscript{37} Art. 95-3 Constitution.
propose a candidate for Prime Minister to form the Government”.\textsuperscript{39} The same reasoning prevailed in another judgment regarding the election of the speaker of the Assembly.\textsuperscript{40} This time, the court pretended that the largest party or coalition has the same meaning as the largest parliamentarian group, which is still more disputable. Both judgments triggered a dissenting opinion of the American international judge Carolan who, criticising strongly the reasoning of the court’s majority, put forward the argument of the 
parliamentary
majority.

How high political tension in Kosovo might be, making this question so sensitive, is revealed by contrast with a comparative overlook. Most constitutions here considered lack any reference to majority and simply vest the president with the competence to choose an appropriate candidate.\textsuperscript{41} The other texts opt in favour either of parliamentary majority,\textsuperscript{42} or a rather ambiguous regulation which could be interpreted in favour of one or the other majority.\textsuperscript{43} Likewise the presidential powers are a sensitive item in Kosovo needing to be defined precisely.

\textit{b) The presidential powers}

Pursuant to Article 95-1 of the constitution, the president chooses the candidate “in consultation with” and according to Article 84-14 “after proposal by” the concerned party or coalition. This means at least that the President is not allowed to choose anybody; either there could be some discussions aimed at achieving a majority vote - Art. 95-1 - or the president is bound by the proposition of the party or coalition -Art.84-14 -. These divergent wordings confirm the defects of the constitution-making process.

\textsuperscript{39} Judgment KO 103/14, paragraph 88.
\textsuperscript{40} Constitutional court judgment KO 119/14; see also KO 84/18.
\textsuperscript{41} Czech Republic, Art. 68 Constitution; Basic Law of Germany, Art. 63-1; Constitution of the Slovak Republic, Art. 102(g); Constitution of Slovenia, Art. 111; Constitution of Serbia, Art. 127; Spanish Constitution, Art. 99-1.
\textsuperscript{42} Art. 103-1 of the Romanian Constitution: “The President of Romania appoints a candidate for the office of Prime Minister after consulting the party disposing of an absolute majority in Parliament or, if no such party exists, after consulting the parties represented in Parliament (emphasis added by the author); see also the Albanian Constitution, Art. 96-1: “The President of the Republic, at the beginning of the legislature, as well as when the post of the Prime Minister remains vacant, appoints the Prime Minister on the proposal of the party or coalition of parties that have the majority of seats in the Assembly” (emphasis added by the author).
\textsuperscript{43} Constitution of Bulgaria, Art. 99-1: “Following consultations with the parliamentary groups, the President shall appoint the Prime Minister-designate nominated by the party holding the highest number of seats in the National Assembly to form a government (emphasis added by the author). Constitution of Croatia, Art. 98-4: “The President of the Republic shall: (...) Confide the mandate to form the Government to the person who, upon the distribution of the seats in the Croatian Parliament and consultations held, enjoys confidence of the majority of its members” (emphasis added by the author).
Obviously, the framers did not check the coherence of the final text. It seems thus especially important to adopt a systematic method of interpretation seeking for the harmonisation of the constitutional provisions. In this respect, the best strategy for obtaining a majority may consist of opening a space for discussion between the president and the party/coalition concerned. This is the rationale of the constitutions that either open the consultation to other parties or do not specify at all the appointment process. Such a solution supposes a good relationship between the president and the Assembly or its largest party, which is far from being ensured in Kosovo. Insomuch a more careful option, which defines and limits clearly the presidential competences, is perhaps better.

Likewise, the Constitutional court in its judgment KO 103/14 opts clearly in favour of a purely formal competence by declaring that the president must appoint the proposed candidate. This interpretation is certainly inspired also by the idea that the appointment of the prime minister is first of all a parliamentary prerogative.

c) The competences of the Constitutional court

According to Article 113-1 of the constitution, “the Constitutional court decides only on matters referred to the court in a legal manner by authorized parties.” It is not the place here to comment the whole catalogue. Only the items relating to the government’s formation process will be touched on. Such requests can be brought before the court by the president of the Republic as it happened after the 2014 elections, the Assembly, or the government. They can challenge a law, decree or regulation of the other political authorities or allege a conflict between the constitutional competences of the Assembly, the president, and the government. Furthermore, at least 10 MPs have the right to contest, within eight days from the date of adoption, “the constitutionality of any law or decision adopted by the Assembly”. As the election of a government
results in a decision of the Assembly,\(^5\) the court can be called by three legal manners in the process of formation of a new government. Thus, 30 deputies submitted on May 1\(^{st}\), 2020 a referral to the Constitutional court challenging the presidential decree of 30 April which proposes the leader of LDK, Avdullah Hoti, as candidate for prime minister. At the same time, they asked for an interim measure suspending the implementation of the presidential decree until the decision of the court. The court held the request for grounded and suspended the process of government formation until May 29.\(^5\)

While this is the legal situation as to the court’s competences, it has not always been so. Several judgments\(^5\) and namely the one regarding the government’s election,\(^3\) in fact, lacked legal basis. In all these cases the court accepted, like under the Yugoslav era, to deliver a sort of advisory judgment in absence of any constitutional dispute.\(^4\) Thus in 2014, prior to any conflict with the Assembly and before appointing a candidate, the president of the Republic asked the Constitutional court how to interpret the constitutional provisions concerning the appointment of a candidate for prime minister. Obviously, the referral was inadmissible, because outside of Article 113. Even though the court was manifestly incompetent and its decisions contributing to increase the stalemates after each election, these decisions cannot be erased, they are still binding.\(^5\) Therefore, the question of an analogous application outside the electoral context and more specifically after a no-confidence vote appears crucial.

2. Transposition of the case-law on Article 95-1 to Article 95-5?

It might be painful for the Constitutional court to abandon its well-established case-law, all the more as it has been largely criticised. But is the solution found in this case-law

\(^{50}\) Constitutional Court, judgment KO 47/16.

\(^{51}\) Constitutional Court, judgment KO 72/20.

\(^{52}\) Mainly the judgments KO 98/11 concerning the interpretation of the scope of immunity of the political bodies, KO 97/10 on the interpretation of the status of an interim president and KO 130/15 on the interpretation of the principles contained in the document entitled “Association/Community of Serb majority municipalities in Kosovo general principles/main elements” with the spirit of the Constitution.

\(^{53}\) Constitutional court, judgment KO 103/14.

\(^{54}\) Among the here examined jurisdictions, a request for interpretation is provided by the constitutions of Bulgaria, Art. 149-1(1) and the Slovak Republic, Art. 128; on the political context of this judgment, D. Berisha, “Fraktions- und Regierungsbildung in der Rechtsprechung des Verfassungsgerichts der Republik Kosovo”, MIP 25 (2019), 121-129.

feasible? It would imply that the president asks the Vetëvendosje (Self-Determination Movement, VV) to propose a candidate what he did several times without receiving an answer, because the outgoing prime minister considers that only early elections are consistent with the constitution. This way, the largest party, although unable to gather a majority, can block the formation of a new government indefinitely. There seems to be no issue from this deadlock unless the caretaker prime minister acts by explicitly refusing or accepting the mandate. Insofar, the transposition of the electoral case-law appears inappropriate or at least inefficient.

Furthermore, and regardless whether it is feasible, the transposition of the electoral case-law turns out to be contrary to fundamental principles of parliamentarism and the Kosovo constitution. Indeed, the vote of no-confidence can occur rather long time after the last parliamentary elections so that the electoral majority could considerably differ from the parliamentary majority. This way, the deputies would be deprived from their freedom to form valid or recognized coalitions. A parliamentary majority, even if it existed, would be without any effect because unable or unauthorized to form a government. Such a result appears completely opposite to the rationale of a parliamentary regime. This seems to be a strong reason for refusing the transposition of the electoral case-law on Article 95-1 to the case of no-confidence vote according to Article 95-5.

Therefore, the question is raised whether the Constitutional court could revise its position. It should be recalled that the court already changed substantially its case-law regarding the admissibility requirements. In the relevant decision, it underlines that, “in its present composition”, the court has another conception. Is this imaginable in our configuration? It is indeed, when interpreting the necessary majority mentioned in Article 95-5 as the parliamentary majority and not the electoral majority. In addition, paragraph 4 of this provision and other constitutions of the region point to the idea that successive mandates could be granted, starting from the first party until minor political formations. In this operation, the presidential powers might be more formal when the order of the mandated parties is foreseen or more substantive if the president can

56 In this sense also D. Berisha, “Fraktions- und Regierungsbildung in der Rechtsprechung des Verfassungsgerichts der Republik Kosovo”, MIP 25 (2019), 121-129 (126 f.).
57 The clearest text in this respect is Art. 99 of the Bulgarian Constitution.
choose which party he/she addresses. This is the option put forward in paragraph 4 of Article 95 of the Kosovar constitution. Yet, this provision does not exactly concern our hypothesis, but the one where a candidate did not obtain the majority to be invested. Here, the constitution seems to give discretion to the president in respect of the choice of the candidate.

Anyway, this solution is not without inconvenient. It prompts strategies such as those occurred under the outgoing government: the LDK broke the governmental coalition voting in favour of the non-confidence motion and, being the second largest party, concluded an alliance with other parties in order to form a governmental coalition with a LDK prime minister. For sure, this is probably not exactly what the voters intended in the last elections. To that extent, this solution is certainly less democratic than new elections.

IV – The request of Prime Minister Kurti to the Venice Commission
During the writing of this opinion on 1 May, Prime Minister Kurti asked the Venice commission for its advice. Simultaneously, 30 deputies submitted to the Constitutional court a request against the decree No 24/2020 dated 30 April of the president of the Republic, proposing Avdullah Hoti as Prime Minister candidate to the Assembly. The referral was accompanied by a demand for interim measure. The Venice commission declined the invitation giving the priority to the court’s decision. The court did not yet examine the content of the referral but accepted to adopt an interim measure suspending the government formation process until May 29. Hence, it might be advisable to briefly answer the questions raised by Mr. Kurti in his request for an Opinion. These questions are as follows:

1. Is the President’s failure to call for elections after a successful motion of no-confidence in accordance with the Constitution?
In my opinion, it is in accordance with the constitution since the president “may” – he is authorized – to dissolve the Assembly. The dissolution is not a competence of the president on his "own"; it can be exercised only in cooperation and on the proposal of the Assembly.

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58 In this sense the Constitutions of Croatia (Art. 98 and 109a)), Czech Republic (Art. 68), Slovak Republic (Art. 102g)), Slovenia (Art. 111), Serbia (Art. 127), Germany (Art. 63) and Spain (Art. 99).
59 Constitutional court, judgment KO 72/20.
2. Is the deadline set arbitrarily by the President for the nomination of a candidate for Prime Minister and the formation of the government in accordance with the Constitution?

The president fixed a deadline only after several refusals of the prime minister either to name a candidate or to renounce it. Albeit not foreseen by the constitution, the deadline does not appear as arbitrary to the extent that it was intended to prevent an indefinite deadlock. Yet, it is not sure that the president had this competence.  

3. Does the President's imposition of his own political will in the process of forming the “new Government” exceed his proper role and function as the Head of State, thereby not in accordance with the Constitution?

As Head of State, the president is in charge of ensuring a smooth functioning of the political institutions in conformity with the constitution regardless the measures he takes for so doing might fit together with his own political will. Another question is whether the president’s actions were all in conformity with the constitution in the case at hand. It may well be that by initiating on his own a deadline and form a new government exceeds his role under the Kosovo Constitution.  

4) Is bypassing the election winner and forming the “new Government” on the basis of consultations with the losing political parties in accordance with the Constitution?

The president’s consultations with all political parties are neither prescribed nor forbidden by the constitution. The fact that he proposes a candidate to the Assembly who belongs to the second party is contrary to the Constitutional court’s case-law after elections. Yet it is not sure that this case law is applicable to the case at hand. As a matter of fact, this new government coming after a vote of no-confidence would be issued from a new coalition with a majority in the Assembly. This kind of situation, corresponding neither to Article 95-1 nor to Article 95-4, is regulated by Article 95-5 but needs further interpretation. Thus, although not provided for by the constitution, it seems not inconsistent with it.  

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60 In favour: D. Berisha, “Fraktions- und Regierungsbildung in der Rechtsprechung des Verfassungsgerichts der Republik Kosovo”, MIP 25 (2019), 121-129 (127) and more doubtfully below under Concluding remarks.  
61 See below under Concluding remarks.  
62 Constitutional court judgment KO 103/14
VI - Concluding remarks

It results from these answers and the previous developments that no evident or completely convincing solution emerges from the constitutional law.

First, with respect to **dissolution**, the latter is, without any doubt, consistent with the constitution and a democratic issue. Yet, since Article 95-5, obviously, is applicable in cases of resignation after a no-confidence motion, dissolution does not derive as a necessary consequence from a no-confidence vote. Furthermore, dissolution is not at the discretion neither of the president nor of the prime minister but of the Assembly. The Parliament should concretely manifest its supreme authority in the state in deciding if it prefers a dissolution or a new government without elections. This could have been the subject of the presidential consultations, but their conclusion should have been reflected in an Assembly decision apparently lacking in the present case.

Second, concerning the party with the best **electoral** scores, here the VV, the obligation to appoint a candidate coming from this party can lead to a stalemate of the whole process when this party, without renouncing its right, omits to name a candidate since there is no deadline fixed by the constitution. Here again, the only outcome could be a decision of the Assembly, and not of the president, fixing a deadline or choosing another solution. Admittedly, this is not provided for by the constitution, but it neither seems to be opposed to it.

Third, when it comes to the coalition with the largest **parliamentary** majority, solution which seems to be the most appropriate to the aim pursued, it proves to be an incentive to destabilising actions to the extent that a party could anticipate and organize this issue by initiating a no-confidence vote and concluding then a coalition with other parties in order to obtain the majority in the Parliament. Admittedly, this way out is not the most democratic one. Yet, the coherence wants that if the Assembly has the last word and if it decides to favour this solution, there seems to be no constitutional objection.

This conclusion is so dissatisfactory likely because the constitutional text entails a number of deficiencies, be they linguistic, stylistic or substantial.\(^6^3\) These defects and

some important gaps deserve remedies. So, for instance, it should be made clear who – the president or the Assembly – must act after a vote of no-confidence and within which delay. Deadlines should be also imposed to the consulted parties as to the proposed names of candidates. A situation like the present one, where the positions of the protagonists are completely opposite, cannot find any outcome if there is no minimal regulation. Of course, there will always remain some ambiguities for the reason alone that different political forces work together in constitution-making. The sometimes more substantive, sometimes more formal presidential competences are probably the result of a political compromise between two different conceptions of the desired regime. Providing more procedural rules could calm down some tensions and overcome some conflicts, but so long as there is no consensus on these questions, it is likely that tensions will continue to exist. Another ambiguity is the double refutation of the Italian “model” and the German one. These two models of the post-WW2 constitutions represent each one a research of governmental majority. The Kosovar constitution incorporates the aim but denies the means. It aims at achieving parliamentary majorities and governmental stability, but it rejects the German mechanism of constructive no-confidence motion without accepting openly the Italian style of new governments’ formations without fresh elections. So, there is a risk of chronic instability and quick sequences of elections. While this could appear very democratic, it is also expensive – and Kosovo is a poor country - and favours corruption.