

A Constitutional Moment in Kosovo

20 June 2014

Kosovo's voters cast their ballots on Sunday 8 June, but still have no idea who won. The Central Election Commission (CEC) has reported near-complete results, giving the parties [very similar numbers of seats](#) as in the outgoing Assembly though with a few notable changes. The Alliance for the Future of Kosovo (AKR) missed the five percent cutoff while the new Initiative for Kosovo (NISMA) squeaked through, returning dissidents from the ruling Democratic Party (PDK) to the Assembly under their own banner. What no one knows, though, is what really matters: which parties will form [the next government](#) and run Kosovo for the next four years? About this, [a dangerous conflict](#) has broken out.

On one level the issue turns on two articles of the [Constitution](#). Article 84 (14), enumerating the competencies of the President, states that she “appoints the candidate for Prime Minister for the establishment of the Government after proposal by the political party of coalition holding the majority in the Assembly”. Article 95 (1) says “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.”

Simple enough? Not at all. One school argues article 95 requires the President to offer the mandate to them and no one else; if they fail to garner enough support in two attempts, each lasting 15 days, the only alternative is a new election. This argument cites on a commentary written by two Constitutional Court justices, which says the “coalition” in question can only be one that existed before the elections.

This argument is hard to square with the rest of the Constitution. First, note that the Albanian word *shumicë* means “majority” and “plurality”, so that the Albanian text implies that these articles are talking about the party that got the highest number of seats in the Assembly (and thus “won” the election), whether or not they have an outright majority. But that reading is wrong for two reasons. First, the (equally valid) Serbian text does not have this ambiguity, reading *većina* (majority) instead of *pluralitet* (plurality). Second, both languages agree the majority or plurality must be that which is “necessary to establish the Government”. Article 95 (3) explains that the government must receive “the majority vote of all deputies” and not a mere plurality. In context, it is clear the authors meant *shumicë* to mean majority, not plurality.

Next, the Serbian text of article 95 (1) is written in the plural, referring to consultations with the “political parties or coalitions that have obtained the necessary majority”. This phrasing is inconsistent with the argument that the article refers to a single party or a pre-election coalition. Finally article 84 (14) is clearly referring to the situation after the elections, when it has become clear which parties or coalitions hold a majority.

Where two readings are possible, the one that makes sense in both Albanian and Serbian, and is consistent with the rest of the Constitution, not to mention common sense, is correct. “Majority” means majority, more than half of the Assembly delegates; “coalition” means any group of parties, whenever formed.

Kosovo’s Constitution never refers to the concept of a party “winning the election”. The only people who can “win” are the Delegates who earn seats in the Assembly (and, in local elections, the mayors and members of municipal assemblies). They are the only winners, and the only losers are the candidates who failed to make to the Assembly.

The framers of the Constitution refer to the plurality party using different terms. Article 67 (2) states the “largest parliamentary group” proposes the President of the Assembly. Had they meant articles 84 and 95 to refer to this, they could easily have used the same formulation.

The next step, after the Central Election Commission makes the final results public and certifies the mandates of the members of the Assembly, belongs to President Atifete Jahjaga. She will have to tread carefully. The only clear and unambiguous obligation the Constitution imposes on her is to consult with the representatives of the majority coalition. Failure to do so may well constitute a “serious violation of the Constitution” entailing dismissal from office according to article 91 (3).

As things stand on 12 June, no coalition holds a majority. The LDK-AAK-NISMA coalition needs either the support of Vetëvendosje or many Serb and other minority Delegates. Some observers question a group of parties with very different programs coming together overnight with no visible goal beyond denying the PDK a mandate.

The Constitution does not explicitly require the President to nominate the person proposed by the majority – only to hear their proposal. The safest course is to consult the leaders of all parliamentary parties. Yet it is hard to justify nominating someone who clearly lacks majority support or a realistic prospect of gaining it in the fifteen days allowed, especially if by then, a solid majority has cohered around another candidate. Doing so may or may not rise to the level of a “serious violation” – different countries have different understandings of the scope of discretion allowed the head of state in these circumstances – but it seems unwise.

On 19 June the President submitted a request to the Constitutional Court, asking for clarification of her [obligations](#). The Constitution is not entirely clear on what happens next: while article 84 (9) gives her the power to “refer constitutional questions” to the Court, article 113 lists the matters that may be referred, none of which cover this situation. How to read these articles is up to the Court, and will set precedents for the future.

There is one other way out of this situation: the Assembly can amend the Constitution. Its members’ mandates begin when the CEC certifies the election results (article 70 (2)) and two thirds (80) of them, with the support of two thirds of the non-Albanian deputies (14 of the 20) can amend the constitution even if no government has been formed.

The decisions taken over the next few weeks will set precedents for future elections. The PDK secured a plurality in 2014; another party may do so next time. Flexibility and discretion may be good qualities to build into the system. Imagine an election where Vetëvendosje wins a plurality of 35 seats, with the PDK scoring 30 and the LDK, AAK and others splitting the rest. That would mean a solid majority of voters supported parties committed to normalisation and dialogue. Would it be right to deny them a government?