

The way out of Kosovo's Political crisis

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There has been a lot of talk about the possibility the President of Kosovo may call new parliamentary elections if the Assembly does not soon resolve the crisis it finds itself in. But this is the wrong solution to the wrong problem.

Advocates of new elections base their argument on two points, one political and one constitutional. Legally, some say, the President's responsibility to "guarantee the constitutional functioning of the institutions" should be read as an umbrella power that includes calling extraordinary elections. Politically, new elections offer a chance of escaping from a government crisis that is growing more damaging by the day. Neither of these points stands up to scrutiny.

Article 82 of the [Constitution](#) says the Assembly will be dissolved in four circumstances, none of which obtains today. Article 70 says the members of the Assembly have individual mandates that begin on the day election results are certified and end in one of seven ways, of which only one - dissolution - affects the whole Assembly. If the President dissolved the Assembly outside the circumstances enumerated in the Constitution, it would represent a curtailment of the rights of the legislature's members by action of the executive and thus violate both the assembly members' rights and the principle of separation of powers.

The Constitutional Court has already ruled on the mirror image of this issue when it struck down proposed amendments to the Constitution that would have shortened the current President's mandate, by way of providing for direct election of the President. The Court [ruled](#) that:

268. The mandate was based on the Constitution. So it is with the mandate of the President of the Republic. That mandate is inviolable so as to ensure adherence to the principle of the Separation of Powers and to preserve certainty in the legal and constitutional order. 269. Furthermore, the early termination of the term of office of the President of the Republic is an event which is foreseen by Article 91 of the Constitution [Dismissal of the President] only in limited circumstances, as conviction of a serious crime, serious illness or commission of a serious violation of the Constitution. 270. However, the early termination of the President's mandate as envisaged by the proposed amendment touches upon fundamental constitutional principles, in particular, the principle of the

prohibition of the shortening of a legitimately obtained mandate of a constitutional office as well as the principle of protecting the justified confidence of the citizens in the laws of Kosovo and the election and mandate of their President based upon such laws.

All of this applies with equal force to the mandate of the delegates of the Assembly:

- Their mandate is also based on the Constitution;
- The principle of separation of powers applies;
- Early termination is foreseen only in exceptional circumstances listed by the Constitution;
- The “principle of the prohibition of the shortening of a legitimately obtained mandate of a constitutional office” protects them;
- The citizens have a right to confidence that their elected representatives will serve their full term unless otherwise provided by law.

In reaching this decision, the Court actually cited its reasoning in an [earlier case](#) that explicitly concerned the mandates of Assembly members.

The two situations are not identical; for one thing, the Assembly is blocked, while Jahjaga was fulfilling her duties in 2012. But the differences are not deep enough to outweigh the fundamental principles involved. Just as the Assembly could not end the sitting President's mandate early, by providing for a new election, so the President cannot end the Assembly members' mandate by calling new elections. The same principles of separation of powers and of the citizens' confidence in their elected officials' mandates apply to both.

But what about the Court? Could the President, or one of the parties, ask it to intervene, by granting implied powers or clarifying its past decisions? In normal circumstances, that might be a wise course. But not today, when the Court itself is [not properly constituted](#) and faces a profound challenge to its own legitimacy. For the Court to intervene now, when its constitutional foundation is in question, would risk irreparable damage to its credibility and role.

The ombudsman has submitted a [complaint](#) against the extension of the three international judges' mandate. There are several reasons why the mandate was not lawfully extended. First, the EU [did not accept](#) the President's offer of powers to appoint to the Constitutional Court. Second, the law has no provision to extend a mandate that has expired. Third, the extensions have not been published in the

Official Gazette (as is required for them to take effect). Fourth, with respect to Judge Carolan, his mandate ended with his resignation and the law has no provision to retract a resignation.

Nor would a new election necessarily provide an exit from the crisis, which was not caused by election results but rather by the laws and constitutional provisions, as interpreted by the Court, that govern the process. When the rules of the game are defective, the solution is not another roll of the dice; it is to change the rules.

The current deadlock can arise whenever the plurality party (currently, the PDK) is opposed by a group of parties comprising more than half of the Assembly's delegates. There is no reason to expect a new election to change this configuration, which after all reflects the electorate's preferences. It is true that small shifts in the results could give the PDK the majority it seeks, by elevating friendly parties above the five percent threshold and pushing unfriendly ones below it. But that is not a reason to have a new election: it represents a major temptation to tamper with the vote and squander one of Kosovo's major recent achievements, namely conducting a relatively clean, free and fair election without international supervision. A new election could also give the VLAN coalition the plurality, but if combined with new, PDK-aligned parties passing the threshold it could lead to the same deadlock with the positions simply reversed. Alternatively, if three main blocs contest the election (PDK, LAN and Vetëvendosje), the result could easily be similar to the current deadlock.

Under the rules as set out by the Court, in any situation like this the Assembly can only function if one of two things happen: either the plurality party agrees to nominate someone it does not support and may not trust; or the majority of delegates agrees to vote for a candidate they do not support and may not trust. This is a bad set of rules. It makes little sense to have an election in the Assembly with only one candidate. Kosovo's party leaders may well be acting selfishly and may be unwilling to compromise, but it is easy to imagine leaders in far more established parliamentary systems stumbling just as badly under rules like these.

So what is to be done?

The beginning of wisdom is to admit there is no legal way out of this crisis, because the rules - the Constitution, laws and their interpretation by the Court - are flawed. The Assembly cannot act

because it cannot constitute itself; the President cannot act because she does not have the power; the Court cannot act because it is not properly constituted. Since there is no solution under the rules, the

rules must be changed. The best solution is the smallest change to the rules that would lead government out of crisis by allowing all three branches to constitute themselves and prevent a similar crisis in the future.

Kosovo's leaders should go back to the spirit of February 2008, when they acted as "the democratically elected leaders of the people", united in a common, fundamental goal - independence. The goal now should be laying down reliable rules for the transfer of power through elections. The rules need to provide clear answers for situations like this one, when the parties are deeply divided, so that the institutions of state may form.

There are many fair ways to do this. To elect the Assembly leadership, for example, each party could nominate one person, and the whole Assembly could vote on these candidates using a secret ballot, with the winner becoming president and the runners-up vice presidents. Or the top four nominees could rotate, each taking the presidency for one year. Or the bottom nominees could drop out successively until there are only two. Or the Assembly could use the single transferrable vote. All parties should be willing to unite behind the goal of a system immune to a persistent deadlock that threatens Kosovo's statehood.

Alternatively, leaders could agree to a road map including provisions for constituting the Assembly, naming a government, and enacting the needed reforms to the Constitution and laws to ensure the crisis is not repeated. The road map could provide that the Assembly will elect the speaker nominated by the PDK; that the President will offer the first chance to form a government to the PDK, but if it fails, the second mandate will go to the VLAN coalition; and that no party will circumvent the agreement by any means, including recourse to the Court. The President is best placed to propose a compromise along these lines; if she does so, the international community should back her up. That – and not a new, unlawful election – would be a real show of leadership.