



POLICY ANALYSIS:

Vote of no-confidence and
the formation of a new government
in Kosovo-Challenges and way out for
a functional Parliamentary Democracy

Author: Robert Muharremi

19 May 2020



Contents

1. Executive Summary _____ 3

2. Introduction _____ 3

3. Background _____ 4

4. A Vote of No-Confidence _____ 4
and the Dissolution of the Assembly

5. A Vote of No-Confidence _____ 7
and the Formation of a new Government

6. Vote of No-Confidence _____ 11
in Comparison: Germany and Austria
Germany
Austria

7. Conclusion and Recommendations _____ 12

1. Executive Summary

On 25 March 2020, the Assembly of Kosovo approved a no-confidence motion against the Government, which triggered a constitutionally controversial process to form a new Government.

A vote of no-confidence is a traditional parliamentary instrument that reflects the government's dependence on and accountability to the parliament.

The Constitution provides in Art. 100¹ for a vote of no-confidence that may be initiated against the Government on the proposal of one third (1/3) of all the deputies of the Assembly or upon proposal by the Prime Minister.² The vote of no-confidence is accepted when adopted by a majority vote of all deputies of the Assembly of Kosovo.³ In such case, the legal consequence is that the Government is considered dismissed.⁴ The vote of no-confidence in the Constitution reflects a destructive vote of no-confidence as the Assembly is not required to simultaneously vote for a new government that will replace the dismissed government.

A vote of no-confidence does not automatically require the dissolution of the Assembly. The dissolution in case of a vote of no-confidence is in the discretion of the President. However, the President's exercise of discretion does not mean arbitrariness. The President must exercise his/her discretion in accordance with his functions and mandate in accordance with the Constitution.

The Constitution does not explicitly provide for how a new government should be formed after a successful vote of no-confidence. There is no provision in the Constitution that clearly explains the steps that need to be taken if the President decides not to dissolve the Assembly following a vote of no-confidence but instead

opts for the formation of a new Government.

The meaning and interpretation of the general constitutional provisions on the formation of a new Government, i.e. Art. 84 (14) and 95, are fraught with difficulties and inconsistencies as regards the formation of a new Government after a vote of no-confidence. It is also questionable if and to what extent the Constitutional Court's reasoning in Case K0103/14 of 1 July 2014 may be applied to the formation of a Government after a vote of no-confidence as this case relates to the formation of a Government after elections.

Comparing Kosovo's constitutional provisions on the formation of a Government after a vote of no-confidence shows that Kosovo's provisions are defective and that a clarification of the process after a vote of no-confidence by way of constitutional amendments is recommended.

2. Introduction

The present policy note is about the constitutional law aspects related to the formation of a new Government of Kosovo following a vote of no-confidence on 25 March 2020 against the acting Government.

The constitutional law aspects which are controversial and debated in Kosovo, are the following:

- 1. Is it required to dissolve the Assembly and to have new elections after the vote of no-confidence, or is it possible to form a new government without elections?
- 2. Is it possible to designate after such vote of no-confidence a candidate for Prime Minister who is not nominated by the political party or coalition that has won the relative majority in the Assembly?

¹References to Articles are references to Articles of the Constitution of the Republic of Kosovo, unless otherwise determined.

²Art. 100, para. 1 and 2.

³Art. 100, para. 4.

⁴Art. 100, para. 6.

These issues will be discussed on the basis of the Constitution of Kosovo, considering relevant case-law of the Kosovo Constitutional Court.

The purpose of this policy note is to explain the relevant constitutional provisions and to discuss possible interpretations of the relevant constitutional provisions. The paper will also critically discuss the Constitutional Court's case-law in respect of the election of a new Government as well as provide a comparison between two different models of a vote of no-confidence, i.e. the German model of a constructive vote of no-confidence and the Austrian model of a destructive vote of no-confidence.

3. Background

On 25 March 2020, the Assembly of Kosovo approved a no-confidence motion against the Government, which triggered a constitutionally controversial process to form a new Government.

On 3 February 2020, the Assembly of Kosovo had elected the ousted Government, led by Prime Minister Kurti from the Vetëvendosje Movement (LVV). On 20 January 2020, the President had proposed Kurti to the Assembly as a candidate for Prime Minister. The nomination of Kurti for Prime Minister reflected the results of the parliamentary elections of 6 October 2019 and a coalition agreement between LVV and the Democratic League of Kosovo (LDK) to form the new government. As a result of the elections, LVV gained 29 seats in the Assembly, followed by LDK with 28 seats.

Internal conflicts between LVV and LDK, such as the dismissal of the Minister of Internal Affairs (LDK) by the Prime Minister,⁵ motivated LDK to initiate on 20 March 2020 a vote of no-confidence against the Prime Minister and the Government. The vote of no-confidence was supported by opposition parties.

⁵<https://www.dw.com/sq/ldk-me-mocion-mosbesimi-p%C3%ABr-rr%C3%ABzimin-e-qeveris%C3%AB-kurti/a-52834263>.

⁶<https://euronews.al/al/kosove/2020/04/22/qeveria-e-re-thaci-therret-takim-me-lideret-e-partive-parlamentare>.

⁷Art. 4

⁸Art. 2.1.

Following the successful vote of no-confidence, the President held talks with the political parties represented in the Assembly. As a result, the President announced in April 2020 that new elections would not be held and that a new government would be formed by the political party or coalition, which can achieve a majority of votes in the Assembly of Kosovo. This seems to have been the consensus between the political parties represented in the Assembly, except for LVV, which demanded extraordinary elections after the pandemic crisis.⁶ There followed a number of exchanges between the President and acting Prime Minister whereby the President asked the acting Prime Minister to nominate a candidate for Prime Minister.

On 22 April 2020, the President started consultations with other political parties arguing that LVV had not submitted a nomination of a candidate for Prime Minister.

On 30 April 2020, LDK nominated Avdullah Hoti as candidate for Prime Minister. On the same day, the President issued Decree 24/2020 nominating Hoti as candidate for Prime Minister and LVV and other members of the Assembly immediately challenged the Decree before the Constitutional Court.

On 7 May 2020, the Constitutional Court adopted an interim measure suspending the implementation of the President's Decree 24/2020 until 29 May 2020, pending a final judgment on the challenge filed against said Decree.

4. A Vote of No-Confidence and the Dissolution of the Assembly

Kosovo is a Republic⁷ that is governed as a parliamentary and representative democracy. The Constitution sets out that 'the sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum and other forms in compliance with the provisions of this Constitution'.⁸

Political power is exercised by bodies established by the Constitution and vested with specific authority and responsibilities. The Constitution explicitly provides that Kosovo is 'a democratic Republic based on the principle of separation of powers and the checks and balances among them' as provided in the Constitution.⁹ The Constitution assigns the following authority to the Assembly of Kosovo, the President and the Government:

- The Assembly of the Republic of Kosovo exercises the legislative power.
- The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.
- The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentary control.¹⁰

The parliamentary form of democracy, as opposed to direct democracy, was confirmed by the Constitutional Court. In case K0103/14 of 1 July 2014, the Constitutional Court stated that

"Democracy, "vox populi" (voice of the people), requires the election of those who are going to represent the people's voice in the legislative body of the state. In a parliamentary democracy this is the supreme governing entity vested with a variety of competencies, at the same time subordinate to the principle of separation of powers and check

⁹Art. 4.

¹⁰Art 2.1

¹¹Para. 49

¹²References to Articles are references to Articles of the Constitution of the Republic of Kosovo, unless otherwise determined.

¹³Art. 100, para. 1 and 2..

¹⁴Art. 100, para. 4.

¹⁵Art. 100, para. 6.

and balances. One of the main responsibilities of the parliament is to decide by voting whom to empower with executive functions. The government stems from the prevailing political power within the parliament and is rooted into the political force that wins the elections."¹¹

A vote of no-confidence is a traditional parliamentary instrument that reflects the government's dependence on and accountability to the parliament. A vote of no-confidence can be in form of a destructive or a constructive vote of no-confidence. A vote of no-confidence is destructive if a parliamentary majority votes for the dismissal of the government with the consequence that the government has either to resign or is, by operation of the Constitution, dismissed. In case of a constructive vote of no-confidence, the challenged government may be dismissed only if the parliament simultaneously votes for a new government that immediately replaces the challenged government.

The Constitution provides in Art. 100¹² for a vote of no-confidence that may be initiated against the Government on the proposal of one third (1/3) of all the deputies of the Assembly or upon proposal by the Prime Minister.¹³ The vote of no-confidence is accepted when adopted by a majority vote of all deputies of the Assembly of Kosovo.¹⁴ In such case, the legal consequence is that the Government is considered dismissed.¹⁵ The vote of no-confidence in the Constitution reflects a destructive vote of no-confidence as the Assembly is not required to simultaneously vote for a new government that will replace the dismissed government.

Art. 100 does not provide for the dissolution of the Assembly as a possible legal consequence of the vote of no-confidence. The dissolution of the Assembly is addressed in Art. 82 in general terms. The Assembly must be dismissed in the following cases:

- (1) if the government cannot be established within sixty (60) days from the date when the President of the Republic of Kosovo appoints the candidate for Prime Minister.
- (2) if two thirds (2/3) of all deputies vote in favor of the dissolution.
- (3) if the President of the Republic of Kosovo is not elected within sixty (60) days from the date of the beginning of the president's election procedure.

As regards a vote of no-confidence, the same provision states that the Assembly may be dissolved by the President of the Republic of Kosovo following a successful vote of no confidence against the Government. In contrast to the three situations where the dissolution is mandatory, the dissolution in case of a vote of no-confidence is in the discretion of the President.

The President's exercise of discretion does not mean arbitrariness. The President must exercise his discretion in accordance with his functions and mandate in accordance with the Constitution. Art. 84 provides, inter alia, that the President guarantees the constitutional functioning of the institutions set forth by the Constitution. In Case No. K0103/14 of 1 July 2014, the Constitutional Court confirmed that 'considerable powers' are granted to the President of the Republic under the Constitution.¹⁶ The President is therefore not just a quasi-notary public that executes the political will of political parties but is a constitutional body vested with specific and original constitutional authority. The Constitutional Court explained that 'under the Constitution the President of the Republic represents the state and the unity of the people',

¹⁶Para. 63.

¹⁷Constitutional Court, Case No. K0103/14 of 1 July 2014, para. 94

¹⁸Para. 63.

¹⁹<https://www.evropaelire.org/a/28477582.html>

²⁰<https://www.evropaelire.org/a/28477582.html>

and that 'it is the President's responsibility to preserve the stability of the country'.¹⁷ However, in "representing the unity of the people" the President must not favor a sectional or party political interest, but must represent the will of all and act with impartiality, integrity and independence.¹⁸ Ensuring the political stability of the country and political impartiality are therefore key principles that must guide the President in the exercise of his discretion whether to dissolve or not the Assembly following a successful vote of no-confidence.

The provision on the discretionary dissolution of the Assembly by the President means that the decision to dissolve the Assembly following a vote of no-confidence is solely vested in the President. If the President refuses to dissolve the Assembly, the Assembly could still dissolve itself if two thirds (2/3) of all deputies vote in favor of the dissolution. The Assembly has therefore a constitutional mechanism to 'correct' the President's decision not to dissolve the Assembly if there is genuine parliamentary will to call for new elections.

As regards constitutional practice, a vote of no-confidence was approved in 2017 which resulted in the dismissal of the government led by the Prime Minister Isa Mustafa who headed a LDK-PDK coalition government.¹⁹ In this case, the President decided to dissolve the Assembly and to call for new elections.²⁰ It seems that in this case there was parliamentary consensus to dissolve the Assembly and to have new elections.

The situation is different as regards the vote of no-confidence in 2020. It seems that only LVV is in favor of the dissolution of the Assembly and for new elections, with PDK also supporting new elections after the pandemic and adoption of election reform package. The other political parties seem to be in favor of forming a new government under a LDK-AAK-NISMA coalition pretending that they have the necessary majority of votes in the Assembly to support the new government.

The question to be decided by the Constitutional Court will be if the President has exercised his discretion in a constitutionally correct manner by mandating a candidate nominated by LDK for Prime Minister instead of dissolving the Assembly. It should be pointed out that only LVV was strictly for the dissolution of the Assembly while the other political parties were against it, with PDK qualifying its demand for the dissolution of the Assembly subject to certain conditions. If there was genuine parliamentary will to dissolve the Assembly, the Assembly could have done so itself. However, not a single political party represented in the Assembly even purported to put the dissolution of the Assembly on its agenda.

The vote of no-confidence of 2020 is therefore not as clear-cut as the one in 2017 where there was consensus for dissolving the Assembly. It will therefore be difficult for the Constitutional Court to find a constitutionally incorrect exercise of discretion of the President not to dissolve the Assembly, as long as there are political parties that purport to have the necessary votes for forming a new government without the need for new elections.

5. A Vote of No-Confidence and the Formation of a new Government

The Constitution does not explicitly provide how a new government should be formed after a successful vote of no-confidence. There is no provision in the Constitution that clearly explains the steps that need to be taken if the President decides not to dissolve the Assembly following a vote of no-confidence but instead opts for the formation of a new Government.

The central provision for the election of the Government is Art. 95 in conjunction with Art. 84 (14). In the absence of a specific rule on the formation of the government following a vote of no-confidence, these provisions have to be applied.

Art. 95 sets out the following:

- 1. After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.
- 2. The candidate for Prime Minister, not later than fifteen (15) days from appointment, presents the composition of the Government to the Assembly and asks for Assembly approval.
- 3. The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo.
- 4. If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the Government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement.
- 5. If the Prime Minister resigns or for any other reason the post becomes vacant, the Government ceases and the President of the Republic of Kosovo appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government.
- 6. After being elected, members of the Government shall take an Oath before the Assembly. The text of the Oath will be provided by law.

Art. 84 (14) states that the President of the Republic of Kosovo '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'. Art. 84 is a general norm that lists the responsibilities of the President. Art. 95 is a

special norm that deals specifically with the establishment of the Government. Art. 95 addresses two different situations and it therefore contains two different rules. Art. 95.1 to 95.4 deal with the establishment of the Government after elections, whereas Art. 95.5 deals with the establishment of the Government when the post of the Prime Minister becomes vacant.

Art. 95.5 does not specifically state that it applies to the situation when the Prime Minister is dismissed due to a vote of no-confidence. However, in the absence of any other provision that deals with this situation, this provision must apply at least by analogy to the dismissal of the Prime Minister by a vote of no-confidence. Otherwise, the result would be constitutionally absurd as there would be no legal mechanism in place to replace the Prime Minister without new elections. Interpreting the Constitution in such a manner that new elections would be the only legal consequence would be inconsistent with the rule that the dissolution of the Assembly following a vote of no-confidence is in the discretion of the President. It would also prevent the Assembly from removing a Prime Minister that does not have the confidence of the Assembly, which is not consistent with the principle of parliamentary democracy and government accountability to the legislature.

The meaning and relationship between these provisions is controversial. Art. 84 (14) requires the President to appoint a candidate for Prime Minister after proposal by the political party or coalition holding the majority in the Assembly. This norm does not explicitly state if it applies only to the establishment of the Government after elections, or if it also applies to the establishment of the Government when the post of the Prime Minister becomes vacant.

Art. 95.1, which applies to the establishment of the Government after elections, does not require a proposal by the political party or coalition holding the majority in the Assembly

but only consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government. There is a significant difference if the President must act upon the proposal by a political party or coalition holding the majority in the Assembly or if he just has to consult with the political party or coalition that has won the majority in the Assembly necessary to establish the Government. A proposal would be binding on the President, while a consultation would still give the President discretion.

Pursuant to Art. 84 (14), the President appoints the candidate for Prime Minister, while pursuant to Art. 95.1 the President proposes the candidate. Then, under Art. 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. These provisions are significantly inconsistent as they differ in the use of the verbs "to propose" and "to appoint". The verb "to propose" implies that the President does not have the last word, while "to appoint" means that the President has the ultimate decision on who is going to be the Prime Minister.

The powers of the President as regards the establishment of a new Government were the subject-matter in the Constitutional Court's landmark decision in Case No. K0103/14 of 1 July 2014. As the Constitutional Court noted, '[t]he subject of the present Referral indeed concerns the power of the President of the Republic, as the head of state and representing the unity of the people of the Republic of Kosovo, to appoint a candidate for Prime Minister in accordance with the procedure to be followed for the establishment of a government after general elections'.²¹ The reasoning of the Constitutional Court in this case is limited to Art. 84 (14) and 95.1 to 95.4 as it concerns only the election of the new Government 'after general elections'. The Court's reasoning would therefore be of limited use to discern the meaning of Art. 95.5 and its relationship with Art. 84 (14). However, it is still useful to review the Court's reasoning as it might shed light and

²¹Para. 64.

provide arguments on how to interpret (or not) Art. 95.5.

In a first step, the Court analyzed the elements of Art. 84 (14), which are (a) the President appoints the candidate for Prime Minister; (b) after proposal by the political party or coalition; (c) holding the majority in the Assembly.²²

The Court concluded that the term 'coalition' in Article 84 (14) relates to eligible political entities which were certified by Central Election Commission (CEC) and passed the threshold established by CEC after the elections.²³

As to the meaning of the element 'holding the majority in the Assembly', the Court held that the meaning of "majority" would have to be in compliance with the constitutional principles in a democratic society. According to the Court, '[t]he majority may be absolute, more than the half of all seats in the Assembly, or relative, i.e. more seats than the other political parties or coalitions that have been registered in accordance with the Law on General Elections'.²⁴ The Court further explained that the 'requirement of "holding the majority in the Assembly" under Article 84 (14) of the Constitution must be read in conjunction with the provision of Article 95, paragraph 1, of the Constitution, i.e. the political party or coalition that has won the majority of seats in the Assembly, i.e. the highest number of seats'.²⁵

As regards Art. 95.1., the Court found that the President could not predict if the political party or coalition he has to consult for the nomination of the candidate for Prime Minister would obtain a sufficient majority of votes in the Assembly to establish the Government.²⁶ According to the Court, the words "necessary to establish the Government" would have the

same meaning as in Article 84 (14) to the effect that the political party or coalition could only be the one that has won the highest number of votes in the elections, respectively most of the seats in the Assembly. This would be the party or coalition that has received the greatest support by the voters to rule the country.²⁷

The Court supported its finding with reference to 'democratic rule and principles, as well as political fairness, foreseeability and transparency', which would 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 propose a candidate for Prime Minister to form the Government.²⁸ The President would not have any discretion to approve or disapprove the nomination of the candidate for Prime Minister by that party or coalition, but would be required to ensure that candidate's appointment.²⁹

The Court's interpretation of Art. 95.1. in conjunction with Art. 84 (14) is neither supported by the wording nor the purpose of the Constitution. Since Art. 95.1 is a special norm, it takes precedence over Art. 84 (14). The political party or coalition that has won the majority in the Assembly necessary to establish the Government pursuant to Art. 95.1 is not necessarily the political party or coalition that has received the (relatively) greatest number of votes and seats in the Assembly. The wording of Art. 95.1 suggests that it is not about a majority of votes and seats but about the majority to form the Government. A political party or coalition may have a relative majority in the Assembly but if other political parties or coalitions do not want to cooperate with it, it will not have the majority "necessary to establish the Government". The purpose of Art. 95.1 is to ensure that there will be a stable Government that has the necessary majority in the Assembly. This purpose is frustrated if the President is required to appoint a candidate from a political party or coalition that has the relative majority of seats in the Assembly but still not enough to form the Government. The Court's interpretation makes sense only in the

²²Para. 66.

²³Para. 72.

²⁴Para. 75.

²⁵Para. 80.

²⁶Para. 86.

²⁷Ibid.

²⁸Para. 88.

²⁹Ibid.

situation when the political party or coalition has at the same time the majority of seats and the majority to establish the Government. Where this is not the case, the Court's interpretation likely results in the situation that the candidate nominated by the political party or coalition with a relative majority in the Assembly will not have the necessary votes to establish the Government.

This leads then to Art. 95.4, which sets out the 'procedure according to which the President of the Republic appoints another candidate for Prime Minister, following the same procedure, if the proposed composition of the Government does not receive the necessary votes in the Assembly'.³⁰ According to the Court, Art. 95.4 is 'silent on the question which party or coalition proposes the new candidate for Prime Minister'.³¹ The Court concluded that in this situation it would be in the 'discretion of the President of the Republic, after consultations with the parties or coalitions, to decide which party or coalition will be given the mandate to propose another candidate for Prime Minister'.³² The President would have 'to assess what is the highest probability for a political party or coalition to propose a candidate for Prime Minister who will obtain the necessary votes in the Assembly for the establishment of a new Government'.³³ The Court concludes that '[s]ince, under the Constitution the President of the Republic represents the state and the unity of the people, it is the President's responsibility to preserve the stability of the country and to find prevailing criteria for the formation of the new government in order for elections to be avoided'.³⁴

The Court's interpretation of Art. 95.4 contradicts its interpretation of Art. 95.1. While in regard to Art. 95.1 the Court does not give the President the authority to assess the chances of obtaining a majority in the Assembly

"necessary to establish the Government", it does so in respect of Art. 95.4. However, Art. 95.4 applies primarily because the candidate appointed pursuant to the Court's interpretation of Art. 95.1 could not get a majority in the Assembly "necessary to establish the Government". If the President had the authority under Art. 95.1 as under 95.4, there would be no need to delay the establishment of the Government and start another round of voting in the Assembly. The Court's interpretation is also inherently inconsistent because in Art. 95.4 it follows a principle (i.e. the President's duty to preserve the stability of the country) that it ignores in Art. 95.1.

Irrespective of these findings, the Court's interpretation of Art. 95.1, 95.4 and 84 (14) may shed light on the interpretation of Art. 95.5. The Court's interpretation, which gives the political party or coalition with the relative majority in the Assembly the entitlement to nominate the candidate for Prime Minister, applies only to the establishment of the Government after general elections. Since the Court interprets Art. 95.1 consistent with Art. 84 (14), it means that Art. 84 (14) also applies only to the establishment of the Government after elections.

The rationale of Art. 95.5, which applies to the situation when after the elections the post of the Prime Minister becomes vacant, is fundamentally different, especially when the Government established pursuant to Art. 95.1 to 95.4 in conjunction with Art. 84 (14) was dismissed by a vote of no-confidence. In this situation, the respect for 'democratic rule and principles, as well as political fairness, foreseeability and transparency' is reflected in a majority of political parties and coalitions in the Assembly voting against the Government, clearly expressing their political will not to have as Prime Minister the candidate nominated by the political party or coalition with the relative majority in the Assembly. The situation reflected in Art. 95.5 is more like the situation addressed in Art. 95.4. where the need to ensure the stability of the country and to avoid elections vests in the President the authority 'to

³⁰Para. 89.

³¹Para. 90.

³²Ibid.

³³Para. 92.

³⁴Para. 94.

assess what is the highest probability for a political party or coalition to propose a candidate for Prime Minister who will obtain the necessary votes in the Assembly for the establishment of a new Government'.

In view of the Court's interpretation of Art. 95.1, 95.4 and 84 (14), it follows that the establishment of the Government after a vote of no-confidence does not require the President to proceed in accordance with Art. 95.1 and 84 (14) as interpreted by the Court. Instead, the President could nominate a candidate for Prime Minister based on Art. 95.5 following by analogy the Court's interpretation of Art. 95.4.

6. Vote of No-Confidence in Comparison: Germany and Austria

Germany

The German Basic Law (Grundgesetz) provides in Art. 67 for a constructive vote of no-confidence. The 'Bundestag' may express its distrust to a Chancellor only if it elects with a majority of its members a successor and requests the President to dismiss the Chancellor. The election of a new Chancellor leads to the dismissal of the current Chancellor.

The purpose of the constructive vote of no-confidence under the Grundgesetz is to avoid a situation where majorities are formed in the 'Bundestag' that agree on the dismissal of the Government, but are unable or unwilling to agree on a new Government. The result would be governmental instability.

The constructive vote of no-confidence is a reaction of the German experience with the Constitution of Weimar, which provided for a destructive vote of no-confidence. As Maurer explains, extremist left- and right-wing political parties, notably the Communists and National-Socialists parties, rejected more moderate Governments and used the destructive vote of no-confidence to cause political instability and to thereby increase their political power and influence. This eventually contributed to the

break-down of the Weimar constitutional order and the rise of the totalitarian Nationalist-Socialist regime. The destructive vote of no-confidence, an instrument of democratic control and accountability, was thus abused by anti-democratic political parties to undermine Germany's first democratic regime.

Austria

Austria follows the destructive model of a vote of no-confidence. A simultaneous election of a new Government as a prerequisite for a successful vote of no-confidence is not required.

In accordance with Art. 74 of the Federal Constitutional Law of Austria, the Government or individual members of the Government must be dismissed if the National Council expresses its no-confidence. For such a vote of no-confidence to be valid, half of the members of the National Council must be present. A simple majority of those present is needed. According to constitutional convention and practice, following a vote of no-confidence, the Government resigns.

A vote of no-confidence does not require any particular justification, neither is a wrongdoing of the Government a prerequisite. The National Council may for purely political reasons dismiss the Government. The vote of no-confidence is therefore a mechanism of political accountability of the Government to the legislature. It also means that a Government can only exercise its functions if it supported by a majority in the legislature, or in case of a minority Government, tolerated as such by the legislature.

Art. 71 of the Federal Constitutional Law of Austria provides that upon a successful vote of no-confidence, the Federal President must appoint a 'transitional Government' composed of members of the dismissed Government, state secretaries of a dismissed Minister or senior officials of Ministries, and must designate one of them to lead the transitional

Government. The Federal President has full discretion in appointing the members of the transitional Government as long as the members are those designated in Art. 71.

It is controversial how quickly the President must appoint such a transitional Government, but this seems to also be in the discretion of the President. There is no time limit for the transitional Government. The Federal Constitutional Law provides that the transitional Government remains in power until a new Federal Government is formed and sets no deadlines. This means that the transitional Government may stay in power until after new regular elections or if the National Council decides to dissolve itself and snap elections are held (Art. 29).

7. Conclusion and Recommendations

The Constitution of Kosovo does not have clear provisions and procedures on how to proceed with the formation of a new Government after its dismissal by a vote of no-confidence, as the above analysis has shown. The model of a destructive vote of no-confidence as expressed in the Constitution contains many legal uncertainties which may lead to different interpretations sparking political controversies that may also have an impact on the political acceptance of decisions of the Constitutional Court.

The following measures are recommended:

- 1. In order to avoid legal uncertainty and to ensure political stability, the Assembly should consider amending the Constitution to include a constructive vote of no-confidence following the German model. This means that a vote of no-confidence should only be approved if the Assembly votes at the same time for the formation of a new Government, respectively for a new Prime Minister. This will avoid questions as to whether the Assembly needs to be dissolved and if and to what extent the

President has the right to designate a new candidate for Prime Minister and subject to which procedure.

- 2. If the Assembly is not in favor of a constructive vote of no-confidence and wants to keep the model of a destructive vote of no-confidence, it should adopt the Austrian model which authorizes the President to designate a transitional Government until new elections are held. However, there should be a clear timeline when new elections should be held and within how many days following the vote of no-confidence the President must designate the transitional Government. The Constitution should also clearly set out who may be eligible to serve on the transitional Government and which powers such transitional Government has.



POLICY ANALYSIS:
Vote of no-confidence and
the formation of a new government
in Kosovo-Challenges and way out for
a functional Parliamentary Democracy

Author: Robert Muharremi

19 May 2020