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Changing the manner of electing the President of the Republic of Kosovo

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Abstract. The Constitution of the Republic of Kosovo in its basic provisions has constituted the principle of separation and control of the balance between state powers as a fundamental principle of democracy, by designating representative bodies belonging to state powers such as Parliament, Government, and Judiciary. In addition, the Constitution sanctions other state bodies that have a constitutional character and together create the form of governance in the Republic of Kosovo. Among them also the President functions as a constitutional body exercising the executive duty and having ceremonial competencies. The President in Kosovo is a neutral authority because he/she is a representative of the people’s unity. The authorities in Kosovo create a "check and balance" among themselves for the normal functioning of the state. Kosovo is considered a parliamentary Republic, not sanctioned by the constitution but implied based on the decision of the Parliament of the Republic of Kosovo. In addition to electing the Government, the Parliament also elects the President of the Republic, so in this study, we will address the function of the President, the exercise of his duties, his competencies, and his relationship with other state bodies. We will also analyze the system of governance and the principle of separation and balance of powers, with special emphasis on the constitutional position of the President in the Republic of Kosovo. Among other things, we will address in particular the complexity of the procedures for the election of the President of the Republic of Kosovo. Considering the ongoing problems that have accompanied the presidential elections in the Republic of Kosovo and that continue to be so, it is necessary to clarify whether “the constitutional reform initiative for the President of the Republic of Kosovo to be voted by the people is considered the most current and best way of overcoming the present parliamentary stalemate in the election of the candidate for the President of the Republic, as well as whether the implementation of this reform is conditioned by the will of the political parties and the people”. In general, from the stated scientific elaboration of the topic, we can conclude that the intention of this paper consists in determining the constitutional regulation of the institution of the President of the Republic of Kosovo applied in the parliamentary system, empirical elaboration of problems that accompanied the election of presidents in the Republic of Kosovo as well as the immediate need to change the manner of electing the President of the Republic of Kosovo.

Keywords. President, Assembly, elections, constitution

Introduction

The principle of separation of powers constitutes the constitutional basis of democratic states. The issue of separation of powers was presented as a request for the separation of state bodies in the performance of state functions and as a necessity for the independent action of state powers both legislative, executive, and judicial, in order to as objectively and legally as

possible perform state functions through specialized mechanisms of state power (Susuri, 2014, f. 35). The theory of separation of powers bases the mutual independence of state bodies on the existence, in each state, of basic functions diverse from each other that can be exercised only separately (Omari, *Parime dhe institucione të së drejtës publike*, 2012, f. 110). Today in all democratic regimes there is a separation of state power between different bodies, in the sense that each body is specialized in performing a function. According to the classical or ideal concept of separation of powers, the competence to set general legally binding norms for citizens should belong to the Parliament. The government and the courts only have to follow the norms set by the representatives of the people (Omari, *Parime dhe institucione të së drejtës publike*, 2012, f. 112). The separation of power into legislators, executive, and judiciary, implies their independence, responsibility, and mutual control (Aziri, 2012, f. 59)

The Republic of Kosovo as a newly configured state has managed to specifically separate the functioning of these state powers in its constitution. Despite the separation, the state authorities cooperate to function normally or as the Americans say that (Vicki, J. & Mark, T., 2006) "state powers function as a basketball game; each of them, even though they are separated, run and aim to score a basket" (p. 1481).

The state of Kosovo is part of the group of modern states with republican governance, and at the same time it is determined as such by the basic provisions of the Constitution of 2008, in the article 4 par. 1 defines that "*Kosovo is a democratic Republic based on the principle of separation of powers and control of the balance between them*" (Assembly of the Republic of Kosovo, 2008). It is noticed that in this sanctioning there are gaps regarding the definition of the form of government, whether it is a parliamentary, presidential, or semi-presidential republic. Furthermore, based on Article 4 in paragraphs 3 and 4, the Constitution of the Republic of Kosovo constitutionalizes the state bodies that exercise state power, starting from the legislative, governing, and judicial power. In principle, according to the Constitution, state power is manifested in three basic forms, constitutional, legislative, executive-administrative, and judicial power. Such a separation is made in a balanced way, meaning that their weight and counterweight exist, they are intertwined, and there is no absolute superiority of one power over the other (Kryeziu, 2017, fv. 124-125). This is so since the parliamentary system is a form of governance of power based on the principle of separation of powers, in which there is a separation of the three powers and their mutual control (Bajrami, *Draftimi i Kushtetutës*, 2007, f. 84).

Constitutional institutions are constituted starting from the Assembly, the President with respective constitutional powers, the Government as an executive body, and the judiciary. This manner of separation of powers has excluded the President of the Republic of Kosovo and the Constitutional Court, which are not part of the separation of powers, but rather mechanisms of balance between these powers (Bajrami, *Sistemi kushtetues i Republikës së Kosovës*, 2011, pp. 154-155). So, since the control of the flexible type is applied, this means that the President and the Constitutional Court are external mechanisms of control of the powers, except for the parliamentary control exercised in relation to the Government. Although the Constitutional Court is not part of any of the three traditional powers, it is of special importance in our state system and its independence is a very significant, perhaps crucial factor, for the protection of freedoms and fundamental rights of citizens and to guarantee the independence of other institutions, in compliance with and protection of the Constitution (Omari, *Ndarja e pushteteve dhe pavarësia e institucioneve kushtetuese*, 2011, f. 117). Within the scope of the separation of powers, according to the article 4 par. 3 of the Constitution, the President of the Republic of Kosovo is attributed the representation of the unity of the people, the representation in the country and abroad, and the guarantee of the democratic functioning of the institutions of the

Republic of Kosovo. The President of the Republic is considered an institution remaining outside the three traditional powers, but having some competencies, based on which he undertakes actions related to the activity of these three powers; this is also the case with the President of the Republic of Kosovo.

Furthermore, the fact that we have a President with such competencies is proven by analyzing certain competencies of the President of the Republic with the Constitution of the Republic of Kosovo; it is observed that in addition to representation powers attributed to the head of state in the parliamentary system, he also exercises a considerable number of competencies of the executive power that are attributes of the presidential and semi-presidential system. However, the powers of the executive character are exercised by the President symbolically, as the Constitution attributes the executive power to the Government.

Research Method

The research methodology we have used in this study is based on quantitative, descriptive, analytical, and comparative methods. The quantitative method was conducted through a survey, in order to provide primary data regarding the opinion of the citizens on changing the manner of electing the President of the Republic of Kosovo. The survey conducted with citizens of Kosovo, respectively with 108 (one hundred and eight) respondents, of which 66.7 percent, were female, 50.3 percent were aged 18-25 years, 94 percent with university education, who were from different cities of Kosovo, dominated by Prizren, Prishtina Peja, Gjakova and other cities.

Research Results and Discussion

The manner of election of the President of the Republic of Kosovo

In general, the chief of state is elected in different ways: a) by direct elections by the people, b) by special indirect elections, when voters elect the "electors", who on their behalf elect the chief of state (USA), c) by the highest representative body (Saliu, 2001, f. 236). The president of the Republic is always elected (Llukiq, R., & Koshutiq, B., 1986, f. 153). Constitution of the Republic of Kosovo, in the article 85 defines that the President of the Republic of Kosovo is elected by the Assembly of the Republic, respectively by the deputies of the Assembly of the Republic by secret ballot. Than in the article 86 specifies that the election of a new President must take place thirty (30) days before the end of the term of the incumbent president. So, President of the Republic of Kosovo is elected by the Assembly, by secret ballot.

Based on the procedures in the constitutional and legal aspects, the criteria that a candidate must meet to apply for the position of President of the Republic of Kosovo are determined. Common criteria in most constitutions including our constitution are the age criterion, citizenship, and the specified number of signatures. Regarding the age criterion, according to the article 85 of Constitution, the candidate for the President of the Republic in Kosovo is to have reached the age of thirty-five (35).

Thus, the right to run for president according to article 86 of our constitution is provided to all citizens of the Republic of Kosovo, unlike the Constitution of the Republic of Albania in the article 86 par.2 stipulating that only an Albanian-born citizen can be elected President.

Then, the next criterion is to collect several signatures to support the candidacy. Every citizen of the Republic of Kosovo can be nominated a candidate for President if they manage to secure the signatures of at least thirty (30) deputies. Thus, knowing that the Assembly has a total of one hundred and twenty (120) deputies, implies that a maximum of four candidates can enter the race. An additional criterion that must be met by the Law on the President of the Republic of Kosovo is that the candidate for President in the Republic of Kosovo except for the

above conditions must be a permanent resident of Kosovo for at least ten years (Assembly of Republic of Kosovo, 2009).

The candidate needs two-thirds (2/3) of the votes in the first and second rounds or the qualified majority of all deputies of the Assembly of the Republic. And if in the first two rounds they do not manage to get enough votes to be elected president, then they continue with the third round, and then the absolute majority of votes is applied, so that to be elected to this position they need to secure sixty-one (61) votes. Therefore as a result of all this a total of three rounds of voting can take place.

In this case, the question arises as to how what should be the quorum of the deputies present in the first two rounds of voting when the qualified majority of votes are needed for the election of the President! Although the Constitution of the Republic of Kosovo has not sanctioned the quorum of the present deputies, this open constitutional issue has been resolved based on the Decision of the Constitutional Court of the Republic of Kosovo for the election of President Behxhet Pacolli in 2011, which clarifies that [...]“all one hundred and twenty (120) members of the Assembly should feel obliged to participate in the plenary sessions, and that the candidate that in the first and second round manages to secure two thirds (2/3) of the votes of all deputies will be elected President, minus those who have received permission from the President of the Assembly and the candidate who receives eighty (80) or more votes is elected, otherwise, the voting continues with the third round ” (Assessment of the constitutionality of the decision of the Assembly of the Republic of Kosovo No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011, 2011, p. 12)¹.

However, the Constitutional Court had avoided this precedent created in terms of the quorum of deputies who should have been present during the election of President Hashim Thaci in 2016, thus exceeding the previous interpretation and defining as a criterion the validity of the procedure for the election of the President of the Republic of Kosovo that [...]”in the first and second rounds of voting at least two thirds (2/3) of all deputies of the Assembly must be present and vote, while in the third round at least the majority of deputies must be present and must vote” (Constitutional review of decision No. 05-V-233, dated 26 February 2016, on the election of the President of the Republic of Kosovo, 2016, p. 11)². Furthermore, it clarified that for the validity of the decision for the election of the President, it is neither a precondition nor a constitutional requirement that all one hundred and twenty (120) deputies be present and vote. It should be emphasized that the decision, in this case, was taken by a majority of votes, which included the votes of two international judges that in the contested decision of the election of the former President Behxhet Pacolli, did not agree with the unconstitutional announcement of the procedure for the election of President Pacolli by the Assembly of the Republic of Kosovo and had separated the opinion with the reasoning for this separation of opinion in writing.

In this way, the Constitutional Court of the Republic of Kosovo had exceeded its decision taken years ago when it had declared unconstitutional the manner of electing President Behxhet Pacolli in the same circumstances. However, since the Constitutional Court is not

¹ During the election of former President Behxhet Pacolli, in the first and second round 67 deputies were present, while in the third round 65 deputies. Thus the Constitutional Court concluded that the first and second rounds were invalid as there had not been a sufficient number of deputies present to make up the quorum of at least the 2/3 (two-thirds) of majority as required.in accordance with the Constitution, therefore as a result of this the third round could not be held.

² In the case of the election of former President Hashim Thaci in 2016, in the first, second and third rounds, the quorum of the present deputies was 81 (eighty one) and he was elected president in the third round with 71 (seventy one) votes. So the number of deputies present and of the deputies who voted was sufficient to reach the majority needed to elect the president in accordance with the Constitution.

linked to the general effect because in the future it may change the procedure to an analogous matter and give the procedure a different direction (the overruling concept) (Traja, 2000, f. 103). So they can challenge the previous cases and their doctrine regarding the protection of constitutional law (Sadushi, 2004, f. 197). Therefore, it could be said that the Constitutional Court of the Republic of Kosovo had changed the procedure regarding the decision made in the case of the election of President Hashim Thaci, being this an analogous matter in the case of the election of President Behxhet Pacolli, thus giving the quorum of MPs present and that they should vote another way, and by this, it created a new standard.

Also, during the election of the candidate for President of the Republic of Kosovo there must be more than one candidate until a qualified or absolute majority is reached. Whereas article 82, par.1, item 3 of the Constitution sets if within sixty (60) days from the day of the beginning of the election procedure, the President of the Republic of Kosovo is not elected, then the Assembly is dissolved and new elections are announced. All constitutional conditions must be respected and applied cumulatively during the election of the President, including the standard established by the decision of the Constitutional Court of the Republic of Kosovo in the case no. KO47/16 (Constitutional review of decision No. 05-V-233, dated 26 February 2016, on the election of the President of the Republic of Kosovo, 2016), regarding the quorum of deputies present during the voting in the Assembly, otherwise, their disregard will result in the unconstitutionality of the election of the President.

From the above said, it results that while the Constitution of the Republic of Kosovo, stipulates that the President is elected by the Assembly, then it turns out that the Republic of Kosovo applies the manner of electing the President by the representative body.

The result of the President of the Republic of Kosovo election by the absolute majority in the Parliament

The history of parliamentarism in the Republic of Kosovo from 2008-2020 proves that in the four ballots that the Assembly of Kosovo organized for the election of the President, except when Atifete Jahjaga was elected president, in all other cases not one candidate managed to be elected in the first round ballot, but the third round ballot had to be held (Tërnavë, 2014, f. 43). According to the European Commission, the president Mrs. Atifete Jahjaga was elected on April 7, 2011, following an agreement between the coalition parties (Kosovo Democratic Party - PDK and New Kosovo Alliance - AKR), as well as the main opposition party (Democratic League of Kosovo - LDK), in accordance with the constitution (European Commission, 2011, p. 5), with the mediation of the American ambassador at that time Mr. Christopher Dell. The memorandum of political agreement had the following content: the joint presidential candidate for a transitional period was Mrs. Atifete Jahjaga until the necessary constitutional changes are made that would pave the way for the election of the President of the Republic of Kosovo directly by the people³.

Consequently, for the election of the candidate for the President of the Republic, the political coalition is necessary, the agreement of the political parties to propose the joint candidate for the President of the Republic of Kosovo, as was the case with the election of the presidents: Fatmir Sejdiu, Atifete Jahjaga, Behxhet Pacolli, and Hashim Thaci, because the election of the candidate for the President of the Republic of Kosovo, cannot be secured only by one political party, especially with the qualified majority of votes but also with an absolute one. This is verified by the report of the European Forum for Democracy and Solidarity, where

³ Memorandum of Understanding between Mr. Behgjet Pacolli, Mr. Isa Mustafa and Mr. Hashim Thaci, Prishtina, April 6, 2011, item 1.

among other things it was concluded that President Hashim Thaci was elected president as a result of the political agreement reached between the Kosovo Democratic Party and the Democratic League of Kosovo in December 2014, as the post of president belonged to the Democratic Party of Kosovo. It is further pointed out that he was elected president in the third round by an absolute majority of votes, after failing to receive two-thirds of the votes in the first and second rounds (European Forum for Democracy and Solidarity, 2016, p. 6). The conditionality of the election of the president with the achievement of political coalitions determined that the president in the Republic of Kosovo is indirectly dependent on politics, an action that violates the constitutional criterion that the candidate for president must be apolitical. In all these cases, whenever there was political instability, the citizens of Kosovo suffered the consequences that consisted of holding early elections, creation of dysfunctional governments, inefficiency and ineffectiveness of the adoption of laws and decisions in parliament, and obstacles to the functioning of other state institutions as well.

Table 1. Presidents of the Republic of Kosovo from 2008 to 2020

President	Fatmir Sejdiu	Behxhet Pacolli	Atifete Jahjaga	Hashim Thaçi
Mandate	(2008-2010)	(2011-2011)	(2011-2016)	(2016-2020)
Election of President in round :	III	III	I	III
Coalition	PDK-LDK	PDK-AKR	PDK-LDK-AKR	PDK-AAK

Source: (State Portal of the Republic of Kosovo)

Although, after the election of President Atifete Jahjaga, as agreed by the political parties, they drafted constitutional amendments to change the way of electing the President in 2012, nevertheless, the Constitutional Court, after evaluating each proposed amendment, issued the decision stating the unconstitutionality of the proposed eight amendments because they diminished human rights and freedoms in the second chapter of the Constitution, while the provisions of the other proposed amendments were in line with the Constitution (Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, 2012).

Kosovo's immediate need to change the manner the President is elected The President of the Republic of Kosovo as mentioned above is elected by the Assembly of the Republic, respectively by the deputies of the Assembly of the Republic by secret ballot. Given the situation that existed in Kosovo whenever we had presidential elections, political crises, difficulties that have arisen during the election of candidates for president, the conditional election of the president with the election of the Government simultaneously, the election of the president in the third round only after the political coalitions was formed, are some of the main factors that justify the need to change the system of electing the president in the Republic of Kosovo and thus create the conditions for ensuring the constitutional and political stability of the state in the future. In these circumstances, which manner of electing the president is more appropriate to be applied in Kosovo should be considered: the parliamentary system - the election of the president by the people, the semi-presidential system, or the presidential system! Of all these systems, the parliamentary system when the president is elected by the people is

the most suitable system to be applied in Kosovo, as there would be no need to change the system of governance. Moreover, from the survey conducted with citizens of Kosovo, respectively with 108 (one hundred and eight) respondents, 82.4% were in favor of changing the system of electing the president, and 91.7% prefer the election by the people.

Fig.1- Responses of the citizens if the manner of electing President of the Republic of Kosovo

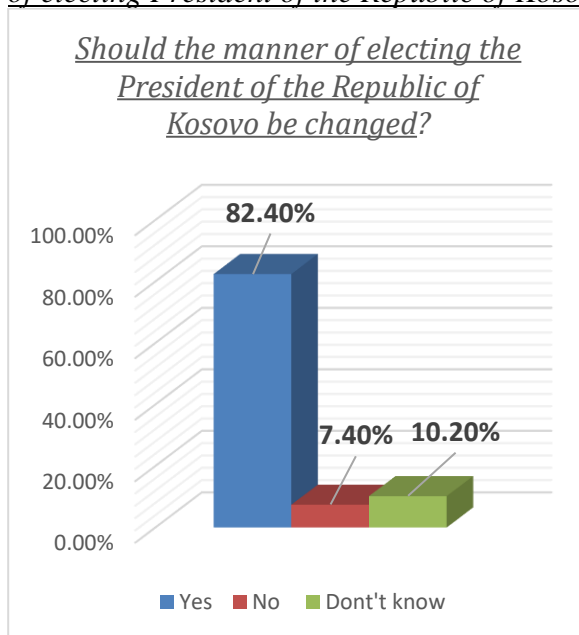
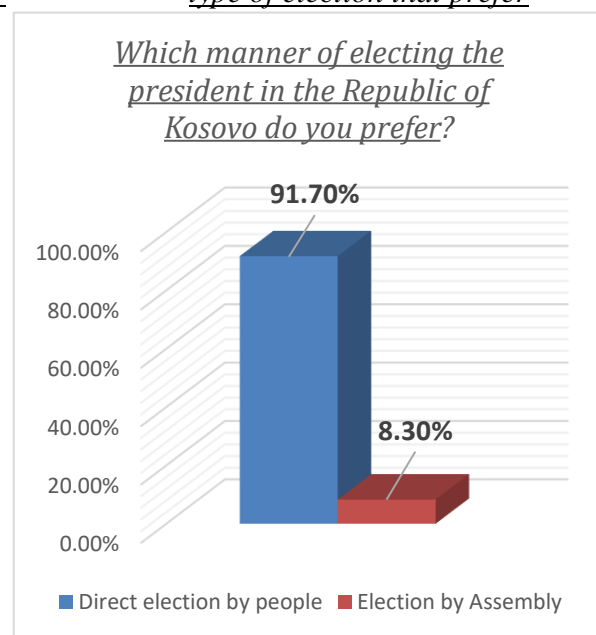


Fig.2- Responses of the citizens about the type of election that prefer



As a result of this manner of election, he/she will be able to exercise his/her powers independently without taking into account Parliament's objections at all. In this system, the president will enjoy the people's legitimacy therefore he/she must exercise his/her powers in accordance with the will of the people. But in Kosovo, the application of the semi-presidential and presidential system would change the form of state governance and the competencies of the president in relation to other powers. This would be a reason and need to entirely change the constitution. Therefore, given the fact that Kosovo is in the initial stage of parliamentarism and does not yet have a stable democracy, these other systems of electing the president cannot be applied at the moment.

Therefore, it should be pointed out that the initiative of constitutional reform that the President of the Republic of Kosovo is voted by the people is the most necessary and appropriate form to avoid the obstacles that accompanied the election of the candidate for the President of the Republic, that should be realized in terms of defining the form of government, changing the presidential electoral system and its competencies and some other institutions that are linked with the institution of the President. It would now be preferable to apply the two-round majority system where:

1. in the first round the candidate will be elected president if he/she wins the absolute majority of votes, otherwise, it is continued with
2. the second round in which the two candidates who have won the most votes in the first round participate and finally the candidate that wins the most votes is elected president.

At the same time, we think that the citizens have an important role in changing the model of government without whose readiness it is impossible to implement the direct election of the

President. To concretize this, the poll conducted showed that 92.6% will participate in the elections if the President is directly elected.

Fig.3- Responses of the citizens if they will participate in the next elections if the President is directly elected by the people

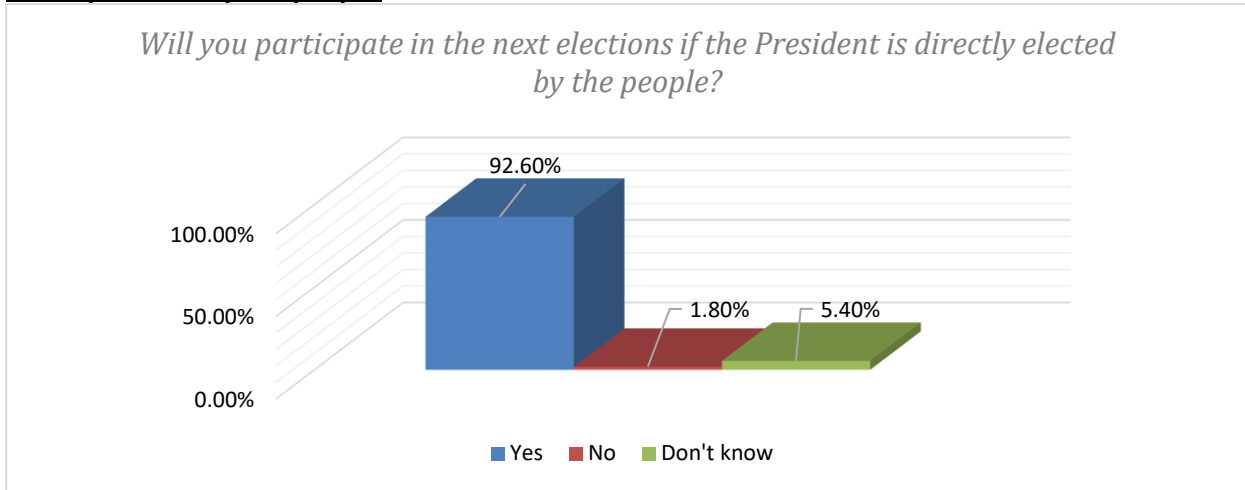
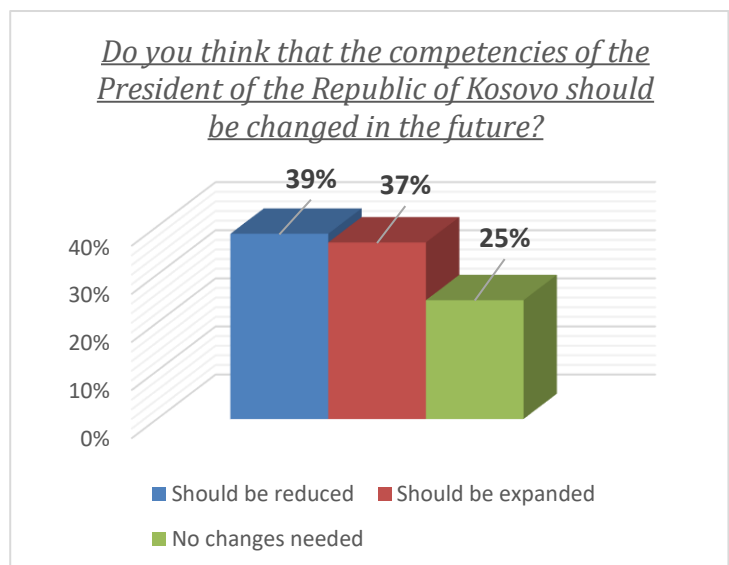


Fig.4-Responses of the citizens about changing competencies of the President of the Republic of Kosovo in the future

Based on the method of the countries that applied the direct election of the president it results that presidents have more executive powers than the presidents elected by parliament. As a result, the executive powers of the president in the Republic of Kosovo should be expanded, at the same time, due care must be taken in eliminating duplicitous powers that may be created in the executive field, although it should be noted that the president currently has very advanced powers and that some of the powers he/she enjoys are features of systems that apply the direct form of electing the president. In this regard, regarding the change of powers of the president, 39% of respondents stated that the powers of the president should be reduced, while 37% stated that they should be expanded. In these circumstances, there is very little difference whether to reduce or expand the powers of the president according to the perception of the respondents.

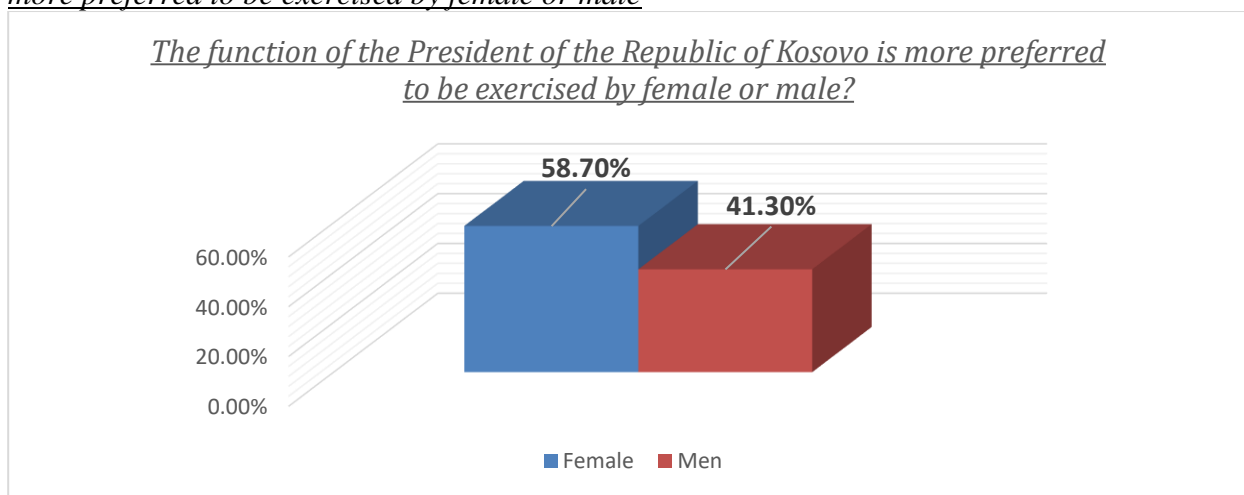


More specifically, the direct election of the president will initially reduce and change the competencies of the Assembly of Kosovo. With the constitutional changes, the president is envisaged to be a fully independent authority. He/she will be a symbol of unity and will guarantee the constitutional functioning of institutions. Above all, the election of the president will not be conditioned by the election of the government.

The implementation of this constitutional reform is conditioned especially by the readiness of the political parties to vote for the constitutional changes that need to be made in terms of changing the manner of electing the president, respectively the approval by two thirds (2/3) of deputies of the Assembly, including two thirds (2/3) of members of the Assembly who hold guaranteed seats for community representatives according to the article 144 par.2 of Constitution, as well as the will of the people of Kosovo to implement this form of election, respectively participation in the presidential election. It is also important that the initiative for constitutional reform is initiated by the authorized constitutional parties.

Knowing that the country of Kosovo experienced having a woman exercising the function of the president that unlike previous female presidents was distinguished for holding a full constitutional mandate, it is a rare phenomenon in our society to encounter a woman at the leading state position. Therefore, starting from such a situation, we found it reasonable to ask the citizens if they prefer to have a female or a male in the office of President, and the result was that 58.7% stated that this function should be exercised by a female, while 41.3% stated that this function should be exercised by a male. But, in relation to this perception of the citizens, we are reserved in its accuracy as most of the respondents, specifically 66.7 percent, were female.

Fig. 6- Responses of the citizens if the function of the President of the Republic of Kosovo is more preferred to be exercised by female or male



In terms of the time for the implementation of this constitutional reform, it is good to implement the recommendation of the Venice Commission regarding the changes of the electoral systems that must be made at least one year before the elections (Venice Commission, 2002).

Conclusion

On the topic: "Changing the manner of electing the President in the Republic of Kosovo", based on the amendment of the constitution and the electoral law we have come to the following conclusions:

- Based on the provisions of the Constitution of the Republic of Kosovo, Kosovo is defined as a democratic, independent, and sovereign state, without defining the form of government.
- The President of the Republic of Kosovo is elected through a representative body, the Assembly of the Republic.

- The Constitution of the Republic of Kosovo does not specifically define the presence of deputies present in the Assembly session who vote for the election of the candidate for the President of the Republic; this provision by the judgment of the Constitutional Court has clarified the presence of deputies, of the quorum and of the deputies who vote.
- We conclude that the election of the President affects the political achievement of parliamentary groups with sophisticated interests for both the election of the President and the election of the Prime Minister. The qualified constitutional majority creates a depression in the political forces for the creation of a quorum for the election of the President, as the census of 81 deputies creates difficulties for the consolidation of state institutions, and the stable functioning of state powers. The non-consolidation of power, respectively the inauguration of the President of the state creates dissatisfaction in the parliamentary groups, in the electoral groups, and the public opinion.

Recommendations

- Based on this, we recommend that the initiative for constitutional reform for the election of the President in direct elections by the citizens of the Republic of Kosovo should commence as soon as possible.
- The initiative to amend the Constitution of the Republic of Kosovo in order to change the voting procedure for the President of the Republic of Kosovo by the people, we think would be an adequate manner that would exceed the polarization of political entities and weakening of the functioning of state powers.
- We think that the experience of the countries that have changed and practiced the manner of electing the President directly resulted positively in the stabilization of state powers.
- The direct election of the president would affect the institutional independence and the constitutional and political stability of the country.

Constitutional violations committed by previous presidents, as a result, have led to a political blockade on the stagnation of the constitution of parliament, etc. These are just some of the obstacles blocking the respectable institutions of Kosovo that compel us to make changes in the Constitution of the Republic of Kosovo. Based on the analysis of these unconstitutional actions, it is an immediate need for the institutions of Kosovo to start amending the Constitution, changing the electoral law so that constitutional stability is reached.

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