



The Constitutional Reform in Albania

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Abstract

The Constitution protects and guarantees the rights of citizens, as well as it organize the powers inside the state. The Albanian constitution, with the changes of 2008, deformed the sovereignty of the people, as well as it made de facto the government unaccountable before the parliament. This hasty constitutional changes produced a powerful prime minister that controls almost all the powers of the state. Seeing these consequences, this paper clarifies the main milestones where the constitutional reform in Albania should be focused, with the aim that the sovereignty of the people to be fully implemented as it is required by the constitution and by the democratic system. The main milestones of the reform are; the changes of the electoral system, the accountability of the government before the parliament, the direct election of the president, as well as the the application of referendums. These are the main topics that we will treat in this paper, based on constitutional law, on the decision of the Constitutional Court, as well as in the literature that has in focus this field.

Keywords: *constitutional reform, electoral system, accountability of the government before the parliament, the direct election of president, referendums*

1. Introduction

James Madison argued for a representative democracy based upon its unique ability to “pass” private interests “through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations” transcend private interests,¹ Representation does not simply amplify a voice that was not being heard; it creates it anew. It gives a voice to those who were otherwise silent and who acquire a political existence only because they now have a voice. But not just any voice, or the representatives' voice; the previously silent now have their own voice. The representative action is constitutive of their voice toward a third party and of their normative status toward the representatives who voice them. Regardless of how one considers the contents of the mandate, representation comprises a set of constitutive rules in which the representatives have certain duties toward the represented.² In representative democracy, citizens allocate decision-making power to policy makers, whose preferences do not necessarily coincide with those of their constituents.³

¹ Michael Serota , Ethan J. Leib; *The Political Moralitical Morality of Vality of Voting in Diring in Direct Democrect Democracy* , 2013, p. 1601

² Andre Santos Campos, *The British Academy Brian Barry Prize Essay: Representing the Future: The Interests of Future Persons in Representative Democracy*, 2020

³ Jenni Jaakkola, *ESSAYS ON THE DECISION-MAKING IN REPRESENTATIVE DEMOCRACY*, 2015, p. 15

Sovereignty in the Republic of Albania belongs to the people. 2. The people exercise sovereignty, through their representatives, or directly.⁴ The sovereignty of the people is fundamental, as from it derives the sovereignty and authority of the government and all powers, but also the sovereignty of the state itself. According to Article 70 of the Constitution: "Deputies represent the people.⁵ Since the people are the absolute sovereign, they exercise power through their representatives and directly. The constitution, through the electoral system, must clearly define the way in which the representatives are elected, especially the members of the parliament. Being a parliamentary republic, all powers originate from the parliament. Any violation of the sovereignty of the people, by its representatives, is a violation of the rights of the people. They are the absolute owner of the state and the source of all powers, and the representatives are simply elected officials who exercise their duties through payment. The public business and the public budget come from the people and belong to them. The elected candidates simply administer the public business of the people. The efficiency of representatives in democracy is another matter because here we will focus only on the fact that deputies do not represent the will of the people. The constitution must be reformed precisely in the points related to the election of deputies, the responsibility of the government, the election of the president, as well as the application of referendums, since they are previewed by the constitution, but not implemented.

2. The Electoral Reform

Albania needs an immediate reform in the electoral system, which is the basis of a democratic system. The current electoral system has violated the sovereignty of the people and the democracy in Albania. Directly or indirectly, it produced a prime ministerial republic, or a king without a crown who controls the parliament through the list of deputies, from where the government and the president are voted, but also the high judges, as well as some constitutional bodies. As a consequence, this system avoid political competition, it has deviated the will of the people, it is against the constitution and democratic principles. The electoral system violates the constitution because.

- *It violates the principle of vote equality*

In point 3 of Article 163, of the Electoral Code, it is previewed that: "In the beginning, are entitled to the mandate, the candidates who have received a number of preferential votes, greater than the quotient obtained by dividing the number of votes of the subject by the number of mandates won by the subject. In any case, the quotient cannot be more than 10,000 votes.⁶ The Constitution in Article 45 defines that; *The vote is personal, equal, free and secret.*⁷ In this case, the voting result is not determined by the preferential vote of the people, but by the ranking in the list made by the leader of the political party. According to the electoral law, voters' preference for candidates does not have equal value with that of the ranking made by the leader of the political party. The provision of the Electoral Code that, the order of candidates of the multi-name list is changed if a candidate listed in the second part breaks the quotient, violates the right of voters to equal vote.⁸

The ranking in the preferential list of the leader of the party in this case is more important than the vote of the entire electorate together. The leader of the party usurps the sovereignty of the people and determines exactly who the winning candidates will be. A deputy can win with eight hundred votes, but does not win with nine thousand votes from the people. This is a flagrant violation of the equality of the vote, as it gives more importance to the ranking in the preferential list of the party, than to the vote of the people, which should be decisive. The limitation created by Article 163 of the Electoral Code for the right to equal vote, is a limitation exceeding Article 17 of the Constitution. The preferential vote of the people does not affect the distribution of mandates and the quotient interferes with the effects of this vote.⁹

- *The electoral system violates the right to choose*

Article 163 of the Electoral Code not only does not respect the equality of the vote, but constitutes an unjustified limitation of this constitutional right. The limitation by legal provision of the right of the voters to determine through the preferential vote the winning candidate, giving in this process a determining role to their ranking by the electoral subject,

⁴ Albanian Constitution (KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË (Ndryshuar me ligjet: nr. 9675, datë 13.1.2007; nr. 9904, datë 21.4.2008; nr. 88/2012, datë 18.9.2012; nr. 137/2015, datë 17.12.2015; nr. 76/2016, datë 22.7.2016; nr. 115/2020, datë 30.7.2020; nr. 16/2022, datë 10.2.2022.) Article 2, point 1.

⁵ Albanian Constitution, article 70

⁶ Electoral Code of the Republic of Albania, 2021, article 163 point 3

⁷ Albanian Constitution, article 45, point 4

⁸ Decision of the Constitutional Court of Albania, no. 28 date 30.06.2021 (V-28/21)p. 3, 4.

⁹ Ibidem, p. 12

does not guarantee either any public interest or any right for any other subject of law.¹⁰The parties and their leader can rank the candidates in the list, but the people should determine their ranking by announcing the winners according to the votes, since it is the sovereign who is responsible for choosing the representatives and not the party leader. In this case, we see that the deputies represent the will of the leader and not the will of the people. It seems as the leader in this case represent all the people. In this case, Albania has also passed the absolutism of Louis XIV, as now it appears to us that the crownless king who is produced by this electoral system, it is not only the law, the parliament, the government, the state, but also the people. All the sovereignty of the people is usurped by an person and this, even in the most absolutist regimes, has not been so extreme. In this aspect, the Constitutional Court decided that point 3 of Article 163, of the Electoral Code, in some electoral areas with a small number of voters, or with a low number of mandates, transforms the preferential vote into an illusory right, as it violates the essence of the right to choose.¹¹

- *Discrimination and inequality before the law,*

Non-discrimination is provided for by Article 18 of the Constitution. The Electoral Code creates favoritism towards the candidate who is ranked higher on the list of the party and openly discriminat the candidate who, even though he secured more preferential votes, cannot be declared the winner, due to his ranking on the second list.¹² So there is blatant discrimination, in addition to the inequality of the vote and the violation of the right to choose. This discrimination is clearly unconstitutional, but also anti-democratic. The Constitutional Court decided that item 3 of Article 163 of the Electoral Code violates the right to choose, as it does not meet the criterion of proportionality.¹³ So the electoral system violates the principle of equal vote, the right to choose, the sovereignty of the people, and openly discriminates and penalizes the candidates.

The new electoral law must represent the sovereignty of the people and in the conditions that Albania is at the moment, it would be ideal to have an electoral system like that of Kosova that is proportional national with open lists, where the candidate is elected directly by the people and not from the party. In the end, neither the party nor the party leader bears the sovereignty, because that belong to the people.

3. The Election of the President by the People

In many European countries, presidents or the heads of state are elected directly by the people by popular vote; however, in 13 countries, presidents are elected indirectly by members of parliament.¹⁴ It has generally been assumed that directly elected presidents obtain a higher degree of legitimacy than their indirectly elected counterparts. The former are thus expected to be activist and take full advantage of the powers inherent in their office while the latter are believed to be more passive in carrying out their duties. If this were true, any parliamentary democracy that had just emerged from authoritarian rule should be wary of adopting direct popular elections for president since that could potentially lead to power struggles between the country's heads of state and government and consequently result in political instability.¹⁵ A popular argument made is that allowing direct presidential elections strengthens democratic practices. Another argument posits that multiplying the number of political contests may fatigue voters and decrease their participation levels.¹⁶ So a commonly repeated political debate within parliamentary systems is whether or not the public should directly elect the head of state. Being the head of state, it would be legitimate for the president to be elected by his own citizens and serve them. Better a strong president elected by people than a weak president that is depended from political parties.

With the constitutional reform of 2008, the president can be elected with a simple majority, from a qualified vote that was before. This turned the president into an employee of the majority, rather than a representative of the unity of the people. Even the method of his election with a consensual vote again produced a weak puppet president, far from people. Since both methods have not been efficient, the only way for the president to have authority, but also and for the majority to continue to govern without obstacles, is the direct election of the president. The President of the Republic is the Head of State and *represents the unity of the people.*¹⁷ *Since he carries the unity of the people, he cannot be the*

¹⁰ *Ibidem*

¹¹ *Ibidem* p. 16

¹² *Ibidem*

¹³ *Ibidem*, p.17

¹⁴ *Europe: Fact Sheet on Parliamentary and Presidential Elections Updated February 13, 2023 p. 1*

¹⁵ Amir Abedi, *Presidents with Prime Ministers: Do Direct Elections Matter?* - Book Review, 2009, p. 798

¹⁶ Tavits, M. (2009). *Direct Presidential Elections and Turnout in Parliamentary Contests. Political Research Quarterly*, 62(1), 42-54. <https://doi.org/10.1177/1065912908317026>

¹⁷ *Albanian Constitution*, article 86

president of the majority, nor of political compromises, but he must be the president of all people. Article 89 of the Constitution stipulates that the President of the Republic may not hold any other public office, may not be a member of a party or perform any other private activity.¹⁸ The constitution requires that the president must not be a member of any political party, but almost all presidents have been members of them and they have withdrawn formally from the party. The direct election of president will bring political stability.

4. The Responsibility of Government before the Parliament

Responsible government is properly described as comprising of two different 'types' of accountability of the Executive Government to Parliament. They are: (a) individual ministerial accountability; and (b) collective executive accountability. The first class refers to the duty of each government minister to be personally responsible for activities conducted by himself or herself and by any government departments which he or she administers. The second refers to the accountability of the Executive Government as a collective body to the Parliament. Although some reference is made to the first type of accountability in this article, the emphasis is on the doctrine of responsible government in its collective sense. For convenience, all references to the doctrine of responsible government in the following discussion refer to the collective sense of the doctrine unless the individual sense of the doctrine is specified.¹⁹ In parliamentary republics, the government is responsible before the parliament. The Albanian Parliament has failed in its supervisory role towards the government and this since the Constitutional amendments of 2008.

According to Article 104 of the Constitution, it is the Prime Minister who presents the motion of confidence to the Assembly. In case the motion of confidence is voted by less than half of all the members of the Assembly, the Prime Minister, within 48 hours from the voting of the motion, asks the President of the Republic to dissolve the Assembly.²⁰ Why to dissolve the Assembly, when in fact in this case the majority could elect a new prime minister? This places the deputies before the obligation, either to vote for the prime minister, or to lose the mandate of the deputy. This excludes the competition within the party, where the leader of the majority must be prime minister, or otherwise the deputies will lose their mandates. This punishment of elected representatives forces them to vote for him.

Article 105 provides that; One-fifth of the deputies have the right to submit a motion of no confidence for the Prime Minister in office, proposing a new Prime Minister. 2. The Assembly can vote a motion of no confidence against the Prime Minister only by electing a new Prime Minister with the votes of more than half of all its members. 3. The President of the Republic decrees the dismissal of the incumbent Prime Minister and the appointment of the elected Prime Minister, no later than 10 days from the voting of the motion in the Assembly.²¹ Even in this case, the motion of no-confidence must necessarily be accompanied by a new prime minister. Disbelief must not necessarily have to be accompanied by a candidacy of a new prime minister that is openly failed without the approval of the majority. It addresses the work of the government and the accountability. This article has never been implemented, while before 2008, we had many cases of motion of no confidence. Undoubtedly, the no-confidence motion should be matured, in order not to distract the government from its duties, but on the other hand, this does not mean that the no-confidence motion should never be implemented.

5. The Application of Referendums

The referendum is a process that allows citizens to approve or reject laws or constitutional amendments proposed by the government. Referendums come in several flavors. Petition referendums allow citizens to challenge laws approved by the legislature. Legislative referendums are measures referred to the voters by the legislature for their approval. Some legislative referendums are mandatory. Forty-nine states, for example, require that voters approve constitutional amendments. Other legislative referendums are less binding. At the extreme are advisory referendums. Governments use these referendums to gauge public opinion, but the outcomes of such elections have no direct implications for law or policy. The initiative is a process that allows ordinary citizens to propose new laws or constitutional amendments by petition. The main difference between initiatives and referendums, therefore, is that citizens can write the former whereas

¹⁸ Albanian Constitution, article 89

¹⁹ Lipton, Jacqueline --- "Responsible Government, Representative Democracy and the Senate: Options for Reform" [1997] UQLawJl 2; (1997) 19(2) University of Queensland Law Journal 194, p.194

²⁰ Albanian Constitution, article 104

²¹ Albanian Constitution, article 105

only government officials can draft the latter.²²

Referendums and initiatives, offer the people a chance to speak more clearly than is possible through representative processes. Courts, commentators, and political leaders have defended or described direct democratic outcomes as the voice of the "people themselves."²³ Referenda and initiatives, by giving people the chance to vote yea or nay as to this or that particular outcome, make people feel as though they have more input. In fact, however, such processes actually limit people's ability to make effective use of their political power to influence the overall array of outcomes.²⁴ Although there may be many differences between the direct democracy voter and the elected representative, the most basic and foundational similarity—the ability to make coercive law that binds others—is the one that establishes a structural relationship of political representation.²⁵ Supporters of this form of direct democracy have long argued that in democratic systems, referendums increase civic participation and improve accountability.²⁶

Questions about voter competence are a common facet of direct democracy debates. Many people believe that ordinary citizens are incompetent because they base their political choices on limited factual foundations.²⁷ Certain forms of participatory democracy have been introduced to address political disengagement. Often these efforts do not deliver the envisaged results, as they exacerbate existing inequalities by attracting only certain groups of citizens.²⁸

Albania has a historical tradition of direct democracy, even older than that of ancient Greece, which seems to be a more developed copy of the Albanian canonical tradition. The government of the mountains of Albania has been totally democratic, since the representation was for every home and every adult male and was far better than in a representative democracy today. As long as that sovereignty in the Republic of Albania belongs to the people, they must exercise it directly. This has remained only in the constitution, as it was never been implemented, as the law for the referendums must be approved. So people in Albania do not use their power in electing the representatives or in direct referendums.

6. Conclusions

Albania should undertake a constitutional reform that must be focused on the electoral system, the election of the president by the people, the accountability of the government before the parliament, as well as on the application of referendums. These reforms remain in the will of the current political class, which has always intended to amend the Constitution according to their current interests. Therefore, an awareness outside of politics, mainly academic, is needed to show its importance in a democratic system. Representative democracy stems from the sovereignty of the people, and any political attempt to take the people's sovereignty and usurp their power is anti-constitutional and anti democratic.

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²² Arthur Lupia and John G. Matsusaka, *DIRECT DEMOCRACY: New Approaches to Old Questions*, 2004, p. 465

²³ Sherman J. Clark, *A Populist Critique of Direct Democracy*, Harvard Law Review Vol. 112, No. 2 (Dec., 1998), pp. 434-482 (49 pages) Published By: The Harvard Law Review Association

²⁴ *Ibidem*

²⁵ Michael Serota, Ethan J. Leib; *The Political Morality of Voting in Direct Democracy*, 2013, p. 1605

²⁶ Topaloff, Liubomir. "The Rise of Referendums: Elite Strategy or Populist Weapon?". *Journal of Democracy*, vol. 28, no. 3, July 2017, pp. 127-40.

²⁷ Arthur Lupia and John G. Matsusaka, *DIRECT DEMOCRACY: New Approaches to Old Questions*, 2004, p. 467

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