

# Impact of Constitutional Changes 2008: Is Albania Ready for a New Constitutional Reform?

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## Abstract

The constitution is considered as the fundamental act of the state and generally, the mechanisms that allow its revision are well thought out by the legislator these interventions to be effective and at the right moment. The constitutional amendments of 2008 to 11 articles of the highest act of the state indicated that political interests were placed opposite the lack of transparency and lack of public information, being excluded from decision-making. The question arises now is: Does the constitutional changes brought in April 2008, the expected effect or were motivated by the interests of the political class to avoid difficulties in the process of electing the President? The purpose of this paper is the analysis of the effect of these changes and the proposal for a constitutional reform in several basic institutions of the state and society. Currently, although we can conclude that it is still early, we can objectively assess the impact and consequences that led to constitutional system and social changes. In this context, it is necessary to become a proper analysis and a thorough study before discussing about another constitutional reform. The recent past should serve as a reference point to understand that we should show prudence before you reproduce the amendments to the Constitution.

**Keywords:** constitutional reform, transparency, Constitution, mechanisms, impact

## 1. Introduction

If we do a retrospective in time, to understand the whole process in which discussions have passed and then the decisions on constitutional changes, the first element that will draw attention to us is very short time and the tendency for this process to "monopolized" by actors and factors, which had interests and direct impacts on the performance of these changes. The commission on Legal Affairs, Public Administration and Human Rights, in meetings of the dates 7, 9, 14, 16 and 18 April 2008, acting as the responsible commission, took into examination the draft law "On Amendments to the Law no. 8417, dated 21.10.1998 (Constitution of the Republic of Albania)", as amended, at the initiative of more than 1/5 of Assembly. In the Law Commission took place in principle the discussion of the draft amendments to the Constitution. Rapporteurs appointed by the commission made, their comments about the proposed amendments and based on initial consultations they presented some new proposals.

On 21 April 2008, with an unreasonable hurry, just within a few hours and indoors, which preclude any kind of transparency, the major political forces decided to intervene in the 11 articles of the constitution, specifically in Articles 64, 65, 67, 68, 87, 88, 104, 105, 149, 153 and 154. The small parties were avoided. To general public lacked the information. There were several reactions, generally in visual and written media, but they were not taken into consideration. The draft amendments were adopted. The Parliament did not avail the right they sent for assessment through a referendum. Due to the non-completion of the 1/5 quorum of deputies was not reached that the draft constitutional amendments subject to referendum. This is a right, which the Constitution stipulates<sup>1</sup>. In this regard, the initiative did not succeed nor the movement "For the protection of the constitution", which was to organize a referendum in order to be prevented hasty decisions. The Constitutional Court stated that the organization of a referendum on constitutional issues should be in accordance with Article 177 of the Constitution.

Before analyzing the effect of the constitutional changes widely of 2008, I think it is important to be concentrated on the proposals and the respective arguments of the representatives of the major political forces to reinforce the necessity of intervention in the constitution, in order to guarantee the stability of the government. To be taken into consideration is the fact that the originators of these constitutional amendments have not paid attention to other articles, which were affected by these changes. For example, a typical case is the term of the General Prosecutor, who is 5 years old. The Constitution has been amended, but prosecutors in duty were appointed before the constitutional changes, when the mandate, there was no term. In addition, one of the principles of the rule of law is that laws generally do not have retrospective effect. However, constitutional changes had no transitional provision and the time when it expires is legally ambiguous.

## 2. The amended Electoral Code - a backward step for representative democracy

If we analyzed the amendments proposed by the Parliamentary Group, of the Socialist Party, signed by more than 1/5 of deputies, their focus was on changing the electoral system model defined in the Constitution. Thus

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<sup>1</sup>Article 177 of the Constitution of the Republic of Albania

from mixed majority-proportional system that provided the previous constitution, is proposed proportional system with multi-name-election areas. The rapporteur of the largest opposition party at that time, said that the proposed bill, with the presented system would bring simplification of the voting process in the calculation of competitive seats for each subject, and of the issuance as soon as the election results, guaranteeing of government stability, more just representation of women in legislative, etc... This model of electoral system helps in maintaining, updating and creation of political elites, it realizes a distribution, most diverse political, between the political forces in the whole territory of the country and provides a more just representation between the vote, and division of seats in the Assembly.<sup>1</sup>

It was also argued that the new proposed electoral system was in accordance with all fundamental constitutional principles of guaranteeing the free vote, the wide access to voting and larger political competition. The system will result in compliance with all recognized principles of the OSCE ODIHR or Copenhagen card for electoral systems that guarantee free and honest elections. The adoption of these changes would make possible the continuation of work on electoral reform related to the reflection of these changes and addressing of a number of other issues in the Election Code. The conclusion in a faster time of constitutional and legal framework will lay the foundations for the timely and quality preparation of the upcoming electoral process to enable a fair and free election process, in respect of the international standards largely recognized in this field and our constitutional norms.

In this context, it is worth to note that, despite these changes are justified by the compliance, within the context of the principles affirmed in the Charter of Copenhagen and other institutions, which guarantee genuine democratic standards. In reality, these changes did not bring any innovation. They failed to produce a more democratic electoral model and I do not think they increased their representative democracy. Suffice it to mention the fact that since the adoption of the constitutional amendments and until now, has not been developed any referendum even though the Albanian society has undergone several reforms of great importance not only of a constitutional nature, but also social.

The last case is administrative-territorial reform, which would be subject to referendum easily, if the Electoral Code would be reformed in order to effectively enhance the democracy of voters to express their will directly. The Electoral Code of year 2000, predicts referendums in a particular part, and treats the meaning of referendum<sup>2</sup>, limitations on the exercise of the right of referendum,<sup>3</sup> the procedures for the conduct of referendums,<sup>4</sup> and specific types of referendums.<sup>5</sup> Meanwhile it appears that in electoral codes of the period from 2000 to December of 2008, has a special chapter "for referendums". This chapter, although it is applicable, is not included in the code of 2008. In 2004, the OSCE / ODIHR and the Venice Commission have recommended to be reviewed almost all the provisions of this chapter.

In the framework of electoral reform following an agreement reached on 1 July 2004 between the ruling Socialist Party and the opposition Democratic Party, the presence, established and chaired a Technical Expert Group in order to design changes to the Electoral Code, in accordance with the joint recommendations, made by the OSCE / ODIHR and Council of Europe.<sup>6</sup> The group included as independent experts and the experts appointed by political parties, prepared legislative drafts, which should be presented to a special parliamentary commission on electoral reform for discussion and decision-making. The lack of an agreement on the composition of the Central Election Commission blocked the work of the Technical Expert Group and the special commission up to reach an agreement SP-DP on October 14.

The agreement, facilitated by the presence, provided that a member of the CEC to lose his place and substitute member appointed by the largest party in opposition, the DP. This agreement resolved one of the most controversial issues in the past elections in Albania and paved the way for the adoption of other steps in the electoral reform, as legal package in relation to voter lists and the beginning of the verification and registration of citizens.<sup>7</sup> By not taking into consideration the recommendations, in December 2008 electoral code was

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<sup>1</sup>Report: On the draft law "On some Amendments to the Law no. 8417, dated 21.10.1998", "The Constitution of the Republic of Albania", as amended.

<sup>2</sup>Article 114 of Law No. 8609, dated 08.05.2000, No. 8780, dated 03.05.2001 "The Electoral Code of the Republic of Albania"

<sup>3</sup>Article 115 of Law No. 8609, dated 08.05.2000, No. 8780, dated 03.05.2001 "The Electoral Code of the Republic of Albania"

<sup>4</sup>Article 116 of Law No. 8609, dated 08.05.2000, No. 8780, dated 03.05.2001 "The Electoral Code of the Republic of Albania"

<sup>5</sup>Chapter II, Section 1 of Law No. 8609, dated 08.05.2000, No. 8780, dated 03.05.2001 "The Electoral Code of the Republic of Albania"

<sup>6</sup>OSCE / ODIHR and the Venice Commission of the Council of Europe, Joint Recommendations on the Electoral Law and Electoral Administration in Albania, Opinion no. 273/2004 (Warsaw / Strasbourg: November 2, 2004)

<sup>7</sup>Report of the Head of the OSCE Presence in Albania OSCE Permanent Council's June 2, 2005.

adopted, that is in force. Under the provisions<sup>1</sup> of this code, heads of political parties were given the right to present their candidature in one or more zones. This is a franchise that is contrary to Article 18 of the constitution.

So, my opinion is to restore the previous electoral model, viz. to the mixed proportionalmajoritarian system, because in my view, the compromise of major political forces for a consensual electoral code was not effective for the Albanian representative democracy because, it removed the voter from the candidate. This was reflected in the recent parliamentary elections widely. Beside it, continued to consolidate the old tradition of electoral culture where the voter “bigoted” of a particular party showed no “revolt” by voting, institutional mechanism in the hand even in those cases where, there were completely principled and programmaticinconsistent with the preferred candidate of the party leader. In this context, I think it is doing a regression and it is necessary to amend the constitution by changing the electoral system.

### **3. President of the Republic after April 2008 - representative of the parliamentary majority, but not of the unity of the people**

In the fourth part of the Albanian Constitution, many provisions are reserved to the President of the Republic. “*The President of the Republic is the head of state and represents the unity of the people*”<sup>2</sup>. This provision has not changed even though in principle, because it is sanctioned, the all Albanian Constitutions, however, I think that has changed fundamentally and conceptually, bringing regression to the consolidation of the constitutional position of head of state. If we were to do a retrospective on the image of the President in post-communist Albania, we will highlight the fact that the position and his role has changed in three important constitutional phases, thereby defining the form of state and government.

In the period of Provisional Constitution may say that Albania has been a form of government characterized by semi-presidential featured although in fact the President is not elected directly by the people, but elected by Parliament and in the first voting, required a qualified majority of 2/3 of the members of the Assembly. “*The President of the Republic of Albania is elected by the National Assembly between at least two candidates for five years, by secret ballot and by a majority of two thirds of the votes of all deputies. If in the first voting does not obtained the required majority becomes a second vote in which the president is elected by an absolute majority of votes of all deputies.*”<sup>3</sup>

This majority was not essential because, its failure led to a second ballot which only required 50% + 1 of the members of the Assembly, which means that the President, who had to appoint a significant part of the constitutional bodies, of guarantee, substantially elected by the majority who possessed the Assembly. This brought a vulnerable constitutional system, as lacked any element of guarantee, because not predicted the election of President directly by the people, not predicted majorities qualified for the selection of members of the bodies of guaranteeas well as not guaranteed any form of neutrality and impartiality within the system.

With the adoption of the Constitution of 28/11/1998, constitution-maker, deliberately, taking advantage of previous mistakes, was led about a presidential figure approved by a qualified majorities that evoked the stimulation of consensus among the parties by maintain the parliamentary form of government in a guaranteed constitutional system. In fact, Albanian Constitution provides no qualified majorities for the election of organs of warranty. However this regard guaranteed with a consensual presidential figure who nominated the most part of these bodies. The election of President, not by a temporary majority, but by a joint vote of the majority and the opposition, not only fulfill the purpose of the constitution-makers, but guaranteed the system of constitutional bodies appointments by providing them with the elements of impartiality and neutrality in harmony with the Constitution.<sup>4</sup>

If we refer to the current Constitution, after the constitutional changes, we conclude that the President of the Republic, if he can not be chosen with the dialogue, ie from 3/5 of votes in the first three ballots, then in two recent ballots, is constitutionally guaranteed the right to parliamentary majority choose the preferred candidate to represent the unity of the people. “*The President is elected in the first, second or third voting, when a candidate receives not less than three-fifths of the votes of all Assembly members. In the fourth and fifth voting elected president is the candidate who receives more than half of the votes of all members of the Assembly.*”<sup>5</sup>

The question in this situation is: Can represent the unity of the people, a president elected with 71 votes, or would it be a genuine representative of the unity of a president elected according to the space provided in the first three rounds? I think that for Albanian democracy, more appropriate would be the second option, namely a

<sup>1</sup>Article 67 of the Electoral Code of the Republic of Albania

<sup>2</sup>Article 86/1 of the Constitution of the Republic of Albania

<sup>3</sup>Article 25 of Law no. 7491, dated 29.04.1991 “On Main Constitutional Provisions”

<sup>4</sup>Gajda R -The role of the President of the Republic of Albania in ensuring the constitutional order. Constitutional modifications, 2008, a glitch in the system warranty, DrejtësiaShqiptare.com, 2014

<sup>5</sup>Article 87/3 of the Constitution of the Republic of Albania.

president by a qualified majority. Recently, it has been widely discussed for another election formula of the president directly by the people. In fact, this discussion is even earlier and, it is proposed in the Law Commission meeting, which took into consideration the articles of the Constitution that would be subject to amendment.

At its meeting on 16 April, the Commission of Laws continued with the consideration of other proposed articles. The integrated draft law accompanied by an explanatory report, which provides legal arguments for the necessity of the proposed amendments. In addition to comments on the electoral system, the report clarifies also the new proposals for the election procedure of the President of the Republic, in order to avoid political and institutional crisis unnecessarily, which would lead to early elections.<sup>1</sup> So, the main reason that political forces gave to justify this change consisted in eliminating the potential and hypothetical risk of system blocking from the opposition, resulting in early elections.

In the meeting of 18 April, in relation to Article 5 of the draft law, which amend the article 87 of the Constitution "on the procedures for the election of the President of the Republic" a group of more than 1/5 deputies of the Assembly lodged in the Commission an suggestion to the amendment of this article, which had in its essence the election of President by the people. After the voting in the Commission, the amendment with 13 votes against and 5 in favor was not adopted by the Commission. The commission with 13 votes in favor and 5 against approved the amendment presented in integral text for the draft law according to the proposal of two relators. By assessing the final integrated draft, which is approved by the Law Commission in accordance with the Constitution, the article 177 by the formal - legal viewpoint, the provisions of the draft law, presented to the plenary session for approval, were signed by more than one fifth of all deputies.

According to my view, all the progress in constitutional changes and especially the procedure of election of the President of the Republic is hurried, because the consequences have had a direct impact on standards of democracy of independent institutions. Currently the biggest danger is the loss of warranty in choosing independent bodies. Despite the fact that the current president and the ruling majority have different political affiliations, however, can not claim dominance of the constitutional principle of loyalty, as each of them can block the will of the President. Presidents can hinder the promotion of personalities on top politicized of independent institutions, but on the other hand, the parliament has the constitutional space for not approve candidates proposed by the head of state. So, practically constitutional changes of 2008 brought no greater guarantee for the stability of the constitutional system.

#### **4. The effect of the constitutional changes in the appointments and issue of mandates.**

The Constitution of Albania, as in many democratic constitution, for some major institutions are clearly defined the mandates of their leaders. With them are related quite procedural issues, enabling the realization of relevant tasks and, in particular, to realize two basic democratic-governing principles: the division of power and their control-balancing. Normally, the duties, requirements, terms and competencies for these mandates or other representatives of main institutions or independent ones, expressed in the articles of the constitution, in the relevant decrees and laws.

Through them, at least in the formulation, the main goal has been and remains the quality and ability, honesty, transparency, reliability and impartiality in the selection, appointment or election. Also, in addition to the above features, such processes can be singled out and the following:

- requirements to be met;
- process of selection, appointment or election;
- the mandate (how long can he stay on task, how many times can be selected);
- legal substitution, release or removal from the duty;
- powers and responsibilities;
- privileges and immunities.<sup>2</sup>

What should be emphasized is the fact that as a result of these changes resulted that there was a lack of coherence because many situations directly related to the mandate remained pending and uncertain. The current deadline of the general prosecutor's mandate is five years. The Constitution has been amended, but prosecutors were appointed before the constitutional changes, when there was no long term. How to solve this constitutional problem, in the situation when the originators of these amendments had not anticipated any transitional provision in connection with the termination of the mandate of the the general prosecutor? Here there is a place for doctrinal discussion. A part of lawyers, think that the calculation of the 5 year term of the mandate should start after constitutional changes, another part, of Americans and German lawyers have the opinion that the general prosecutor, which has exercised the function before constitutional changes should have a mandate indefinite.

If we refer to the Albanian model for the appointment of judges of the Constitutional Court and the

<sup>1</sup>Report: On the draft law "On some Amendments to the Law no. 8417, dated 21.10.1998, "The Constitution of the Republic of Albania", as amended

<sup>2</sup>Panorama Newspaper: Opinion -Rexhep Meidani "Reflections on Constitutional changes", December 17, 2011.



Supreme Court, where everyone has an equal sphere of competence, there were weaknesses and shortcomings in functioning, and is frequently charged that this model has issued judges that do not guarantee independence and impartiality in the trial. In this context, we note that this model has functioned without debate, only in the periods when the appointment of judges has been the product of previous agreements between the parties, which usually indicates that the appointment of a judge is conceived as a political appointment. This is evidenced, and by the conflict between the President of the Republic and the Parliament on the appointment of judges, who not only did not solve, but also was worsened even more, especially after the 2008 constitutional amendments, which clearly was felt a cooling of institutional relations between President and the majority.<sup>1</sup>

## 5. Conclusions

In Albanian society this year is being widely discussed for amendments and constitutional reform. It is thought that the time is right to take such a step, although the possibility is still in consultation stage in different ranks, including civil society, academics and members of political life. Asked where they should be extended these reforms, I think that I gave the answer during the above treatment. In my opinion, the essence of constitutional reform should be to fix the errors of constitutional amendments of 2008. It should be considered as advantage, the fact that the decision is waived within closed doors, giving access to the public to express its views in relation to issues where reform should focus. Albania needs to reform that extends in many components of the constitutional system. A real and serious review should be subject to the Central Election Commission, which should be aimed, the transformation of this structure, by its current bipartisan, in an independent institution in constitutional law, similar to the initial version of the Constitution. This serves to increase the standard of representative democracy. I do not let more space to legitimacy of will, of the chairman of the party, which often reaches to the limits of arbitrariness, including candidates in electoral lists "favorite", who are not necessarily the best. Therefore, in the interest of expanding the representation and promotion of individuals with intellectual potential and integrity. I think the best alternative for Albania is majoritarian electoral system with proportionate elements. Its application will reveal the new political elite, would bring more diverse political distribution and reconfiguration of the parliament in the right proportion between vote and mandate sharing. Another issue that should be at the center of proposals for reform should be the procedure of election of the President of the Republic. In my opinion, the current formula does not guarantee a consensual president and representative of the unity of the people, but bring an expression of the will of the majority. I disagree with lawyers who think that the election of the President should be realized by the people with direct although this idea is supported by a part of civil society and academics. If we were to make such an amendment to the constitution, I think this should be regarded as a substantial amendment, because it affects the basic constitution part. If we were to make such an amendment to the constitution, I think this should be regarded as a substantial amendment, because it affects the basic constitution part. Thus, in the hypothetical case of converting the proposal into law, we can say that Albania has approved a new constitution and not amendment to earlier constitution. For this reason, I think that the procedure of electing the president should be by qualified majority, just as was predicted before the constitutional amendments of 2008. Finally, my proposal regarding the issue of appointment and mandates of officials who are in charge of independent bodies is to show special attention to any attempt aimed at limiting the mandate in violation of the law. The law has no retroactive effect, to this principle should not be overlooked, as it is detrimental to democracy and constitutional justice.

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<sup>1</sup>Anastasi A, April 2012 "Issues of institutional independence relations and the process of appointment of judges in the Republic of Albania" - Constituito - Magazine studies to issue legal-constitutional and parliamentary, Prishtina, page 79.