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Prepared by: BURIM EJUPI and DARDAN ABAZI, with contribution from EGZON DOLI (INDEP).

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Contact:

Konrad-Adenauer-Stiftung

Office in Kosovo
Mother Theresa Boulevard 30-3/6
KO-10000, Prishtina
Telephone +381 (0) 38 229 874
Prishtina@kas.de
www.kas.de/kosovo

Mr. Burim Ejupi, Executive Director of INDEP has experience in civil society since 1997. He was part of the team that established the NGO Forum. He worked in various local NGOs including Kosovo Civil Society Foundation (KCSF), and Kosovo Institute for Sustainable Development (KIPRED). He is one of the founders of the Institute for Development Policy (INDEP). Mr. Ejupi has served as a consultant for civil society organizations and political parties since 2000. Under his leadership, INDEP implemented more than 10 projects including 5 projects funded by the European Union Office in Kosovo. Mr Ejupi worked long with both central and local level of governance.

Mr. Dardan Abazi – With a background in political science, Dardan Abazi has a long experience in public policy with a special emphasis on tracking legislation in the field of energy, parliamentary research and advocacy. Dardan is certified by the Life Academy for Energy Efficiency and Planning and has participated in dozens of trainings on democratic governance, European integration and public policy in general.

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Introduction

Legitimacy and legality are widely used concepts in public discussion in the Republic of Kosovo. In the political life of Kosovo, these two concepts are mostly discussed in the post-election periods. For consolidated democracies, elections are considered a period for recuperating the legitimacy of governance and establishment of new institutions by following the legal rules of the political system. However, in the case of Kosovo, discussions over legitimacy and legality begin with the initiation of the process for creating the institutions.

In a representative democracy, citizens elect the deputies through votes which represent their will. Therefore, a parliamentary body in which the mandates "stem from the free votes of the citizens and begin from the moment of the mandate certification in accordance with the law in force".¹ However, taking into consideration the political system built in Kosovo, it has been often discussed whether mandates received due to the minority quotas or the gender quota are legitimate mandates.

The political crisis created since the conclusion of the June 11th elections has further raised dilemmas if our political system has been formed to avoid crises or to create them. The crisis of 2017 is similar to that of the previous elections (2014) where legitimacy and legality were seriously brought into question. In the constitutional sense, the Verdict of the Constitutional Court in case No. K0103/14 filed by the President of the Republic of Kosovo, determined that:

The use of terms "political party or coalition", when mentioned in relation to Article 84 (14) and Article 95, paragraph 1 and 4, of the Constitution, means the political party or coalition which has been registered in accordance to the Law on General Elections, participates as an electoral entity, is included in the ballot of the elections, passes the threshold, and consequently, wins Assembly seats;²

This decision of the Constitutional Court gave exclusivity to the winning party or coalition of the elections to propose the name of the candidate for election. However, the Court in case No. KO119/14 Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo, made clear the obligation of deputies that have to participate in the constitutive session and to find a way to make the Assembly functional:

It is a right and duty of all the deputies of the Assembly to find the method of electing the President and Deputy President of the Assembly, in accordance with the constitutional provisions in relation to the relevant Regulation of the Assembly and to make the Assembly functional.³

In such a situation the winning coalition has to propose in any case the candidate for the Head of Parliament, but at the same time nothing prevents them not to do so until they ensure a

¹ Republic of Kosovo, (2010), Law No. 03/L-111 on the Rights and Responsibilities of Deputies, Article 5.1, Prishtina: GZRKS.

² Constitutional Court, (2014), Verdict in the Case No. K0103/14, pg. 23, Prishtina.

³ Constitutional Court, (2014), Verdict in the Case No. KO119/14, pg. 41, Prishtina.

parliamentary majority. In the legal sense, nothing can prevent the blocking of the political system, even though this is not legitimate.

In contrast to the constitution of the Assembly where the legitimacy in obtaining a mandate is disputed, in Kosovo there is a dispute of legitimacy of the Government that arises from the Assembly elected through guaranteed seats. In addition to disputing the legitimacy getting elected, the governance legitimacy of Governments which do not have the nominal majority of votes was brought into question. Also because through the Constitution of the Republic of Kosovo, members of minorities have guaranteed numbers of seats and have to be part of the governing coalition.⁴ Even though the Constitution foresees that Ministers from the communities should not represent the parties elected in the Assembly, again for this a majority number of votes from the deputies of communities is required.⁵ Therefore, taking into consideration the fact that a large number of minority deputies are elected through guaranteed seats, doubts are continuously raised over the lack of legitimacy for these deputies.

In this form, the dispute of legitimacy has taken a chain effect. In Kosovo the elected Government has governed with a disputed legitimacy in the sense of the number of votes that the body which elected it had, specifically the Kosovo Assembly. Even though legally the Government had all the conditions to operate, there was a moral deficit which was being produced more from the political system rather than the circumstances of the daily politics context. For example, the Government of 2010-2014 had very little over 60 deputies and was being held in place by the guaranteed votes. Even though this Government took some big decisions, there were doubts if this Government had the legitimacy of the people to take decisions like the one of selling the distribution network for electrical energy.

The Thaçi 2 Government (2011-2014), in fact, was functioning completely within the rules of the game created with the internal right which was built based on the principles established in the Comprehensive Proposal for the Kosovo Status Settlement. Does this mean that our political system produces institutions which are not covered by full legitimacy? In order to answer this question, an in-depth review of concepts is initially required, of the consequences in the political system, and if these consequences can be recuperated.

This paper aims to enrich and broaden a debate which has a high probability of occurring in the Republic of Kosovo. With the political crisis produced after the two last elections, many voices have been raised requiring constitutional changes. This paper aims to shed light on the current discrepancy between that which is called legal and that which is legitimate, and discusses methods of how this can be changed.

⁴ Republic of Kosovo, (2008), *Constitution of the Republic of Kosovo, Article 96, Ministries and Representation of Communities*,

⁵ *Ibid.*

Democracy and the state

Democracy as a system of governance has its genesis in Greece. The word democracy comes from the Greek word *demos-people and cratien-rule*, hence the rule of the majority, or specifically the people. In this form of governance, the people are the bearers of sovereignty or the highest authority, out of which stem the basic institutions of the state. The exercising of sovereignty, consequently of authority, by the people as the core of democracy is fulfilled through two basic forms:

1. Direct exercise of authority by the people, and
2. Exercise of authority by the people, through its elected representatives.

Naturally modern democracy differs considerably from the one that existed in ancient Greece, specifically in the Greek city-states. Hence the main form of democracy in ancient Greece was direct democracy, which meant that all Greek citizen in a direct manner took part in the exercise of state authority. Such a manner of exercising authority, is a clear form of democracy even though impossible to be implemented in modern conditions and circumstances. In the city-state of Athens, in ancient Greece direct democracy was implemented through the assembly of all the people, called the ecclesia. Ecclesia was the assembly of about 40,000 citizens of Athens (except for women and children) who in a direct manner decided on issues which were related to exercising legislative and executive power. Decisions of this assembly were taken in most primitive ways like the cheering of the people. In addition to women and children, also slaves and foreigners did not have the right to vote in the assembly.

Such a model of a direct democracy through an assembly of all the people can be found also in Sparta, and in other Greek city-states. However, the forms of exercising democracy, changed with the passing of time, and all the way up to contemporary democracy, as a representative democracy.

Franklin D. Roosevelt in relation to democracy as a system of governance said "Let us never forget that government is ourselves and not an alien power over us. The ultimate rulers of our democracy are not a President and senators and congressmen and government officials, but the voters of this country". This, to emphasize the importance of having a strong popular support for the government officials.

Undoubtedly today, direct democracy cannot be implemented in practice, due to the inability for all the citizens to directly exercise state authority. However, elements of this form of democracy are found in countries like Switzerland, but that of another form, specifically through the holding of referendums in territorial administrative units, which consists of the participation of citizens of that unit in order to make decisions related to various issues.⁶ However, in most of the new democracies the form of representative democracy has been applied.

Today the only form of implementable democracy is the representative democracy, which consist of exercising of state authority by the citizen through elected representatives. While

⁶ See <http://direct-democracy.geschichte-schweiz.ch/> (accessed on 09.07.2017).

we find the genesis of direct democracy in ancient Greece, the genesis of representative democracy is found in England.

Otherwise England is also known as the cradle of parliamentarism, which means that the first sparks of representative democracy are found in this country, the Big Charter of Freedoms (Magna Carta Libertatum) opened the path for the abolishment of absolute authority of the king and the transfer of sovereignty to the people. This document and a number of other subsequent legal acts, like the Habeas Corpus Act, Bill of Right and others, promoted representative democracy, in the sense of recognising the rights of citizen to elect their representatives, through which state authority would be exercised.

Representative democracy and the exercise of sovereignty by the people, as one of the values of a modern state, is not excluded from application also in our country. "The sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised, in accordance with the Constitution, through the elected representatives, with referendums, and other forms, in accordance with the provisions of this Constitution".⁷ Therefore, the concept of the former President of America, Abraham Lincoln, has been incorporated, according to which sovereignty stems from the people, is exercised by the people and for the people.

The concept of representative democracy is directly related to the **people's legitimacy** for the elected representatives, by the bearers of sovereignty or the people. The current constitutional system in the Republic of Kosovo, does not guarantee that the will of the sovereign is also reflected in the representative body, specifically the Assembly, which in essence "challenges" itself the value of representative democracy.⁸

Legality and Legitimacy

If we look at the philosophy of law, legality and legitimacy are both close and apart from another as concepts. There is the people's legitimacy which is closely related to the political legitimacy, specifically the legitimacy of the political institutions. While legitimacy refers to the trust of people or the citizens in public authorities, as a result of which public authorities exercise state authority, legality refers more to the compliance of a certain action or inaction with the existing legal order.

If we look at the theoretical aspect, according to the German scholar Max Weber, legitimacy is an important social category, through the existence of which social tranquillity is ensured for the public authorities. However, within the constitutional structure of a state there can be given public authorities or institutions which are legal, but not entirely legitimate. On the other side, the existence of this relation of trust between the citizens and public authorities

⁷ Constitution of the Republic of Kosovo, Article 2.

⁸ With the Constitutional system of the Republic of Kosovo, when we consider the Assembly as a public representative institution, its composition does not completely represent the popular legitimacy, due to the existence of reserved seats (in the first two electoral terms after entry into force of the Constitution) and those guaranteed for the non-majority communities represented in the Assembly.

influences also the political authority in the case of decision making by these public authorities (Presidency, Parliament, Government, etc.)

For this reason, legality and legitimacy are considered separately as concepts in some countries, due to the existence of a discrepancy between that which is legal and what is legitimate. According to John Locke, the moment when a public authority or institution ceases to be legitimate, citizens are no longer obliged to submit to its orders.⁹ Something which does not really occur in practice. This is evident in states where there is a deficit between legality and legitimacy, where despite the fact that such institutions are legal, but not entirely legitimate, their decisions make the citizens submit to them. Therefore, in other words the existence of people's legitimacy for a public authority is related to the assumption that the actions and decisions of the representatives elected by the people are appropriate, are needed and supported by the sovereign-people themselves, who through voting has authorised its representatives to make such actions and decisions.

On the other side, legality refers to the legal situation, hence a certain action or act of the public authority being legal. While legitimacy has to do with the relation of citizen's trust, by authorising through voting the public authorities to exercise their state powers, legality has to do with concrete action, belonging to either the public or private law subject, to determine to what extent it complies with the legal order and norms. Therefore, in this case for "legality" as a concept, it is not relevant whether a certain action of the public authority has popular support or not, but the legality of the action or act is relevant.

In some countries there is such a relation where the action of the public authority is legal, but does not reflect the will and support of the people. Such situation can arise when for example the Assembly as the highest representative body, has such a composition or structure where a certain number of seats are "allocated" for the representatives of a certain non-majority community. Such is the case with our constitutional system, where even though legally the Assembly has 120 seats, from the perspective of legitimacy, the Assembly has 100 seats. This is due to the reason that 20 seats are guaranteed to the representatives of the non-majority communities in Kosovo.

If we look back to the historical context as an example to prove the difference between legitimacy and legality, it would be the termination of the Kosovo's autonomy under Yugoslav Federation in 1989. On the 23rd of March 1989 Kosovo's Assembly voted the amendments to the constitution which abolished the autonomy and the constitutional position of Kosovo as part of the former SFRY, promoted with the Constitution of 1974. In the voting of these amendments there were many members of the Serbian secret service who participated, where in conflict with the will of the citizens, and Kosovo was declared part of Serbia.¹⁰ Regardless

⁹ For more see <https://plato.stanford.edu/entries/legitimacy/> (accessed on 09.12.2017)

¹⁰ Milutinović et al., *op. cit.* (fn. 142), vol. 1, paras. 217-221. See also the ICTY Trial Chamber's judgment of 30 November 2005 in *Prosecutor v. Limaj et al.*, paras. 40-42.

of the technical voting procedures, this act was considered a “Belgrade’s unilateral decision” by the international community.¹¹

Even though the Assembly as such was completely legal, on the other side these constitutional amendments were in full contradiction with the will of the majority, specifically the will of over 81% of the Albanian population.¹² Such amendments were voted with a majority vote of all the delegates (a total of 190 delegates), where 10 Albanian delegates voted against the abolishment of the autonomy. For this reason, in the context of legitimacy and legality, such a voting in the then Assembly even though it was legal, was completely illegitimate as it did not reflect the wish of the Albanian people which comprised the majority or over 81% of the population for autonomy within the federation.

Kosovo as a state with a multi-ethnic society, perhaps also with “advice” from the international community has developed a constitutional system which from the perspective of non-majority community freedoms and rights can be regarded as an advanced example by other countries. Referring to the historical context of Kosovo’s Independence, its foundation is found in the Ahtisaari Package, a document which as a compromise for the declaration of Kosovo’s Independence, had an affirmative approach or that of positive discrimination towards the non-majority communities in Kosovo, with a special emphasis on the Serb community.¹³

This document, which has the character of an international agreement for the status of Kosovo, served as a basis for the development of a constitutional system and that of laws in Kosovo, specifically the promulgation of the Constitution of the Republic of Kosovo, and subsequently the establishment of state institutions. Starting from the simple fact that a special chapter of the Constitution refers only to the rights of non-majority communities, illustrates best the open approach that Kosovo has shown in this regard, even going beyond some of the standards foreseen by international legal acts in the protection of the rights of minorities and their inclusion in the institutional life.

In principal, the allocation of an advanced position for the non-majority communities within a given state, aims to improve conditions or avoid historical injustices and discrimination which were made towards a specific community within the society of that state. The Constitution of the Republic of Kosovo based on the Comprehensive Proposal for the Kosovo Status Settlement¹⁴ at least on paper, is a case that can be taken as an example by other countries in relation to the protection of non-majority community rights.

The inclusion of these communities in almost all the social and political spheres of Kosovo, apart from creating a good image for our society on one side, has provided the possibility for

¹¹ *United Nations, Official Records of the General Assembly, Sixty-third Session, 22 plenary meeting, 8 October 2008 (A/63/PV.22), p. 3 [Dossier No. 6]. See also Letter dated 1 October 2008 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly, A/63/461, Annex, para. 6 [Dossier No. 5].*

¹² For more see “Kosovo under Autonomy” available at <https://www.cla.purdue.edu/si/Team1Reporte.pdf> pg. 27 (accessed on 08.12.2017).

¹³ *Comprehensive Proposal for the Kosovo Status Settlement, date 26 March available at <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf> (accessed on 13.12.2017).*

¹⁴ *Ibid.*

such a constitutional position of the non-majority communities from the perspective of establishing the state institutions to be used also as a blocking mechanism, in particular from the Serb community in relation to issues of decision making which are attributed to state-building actions for Kosovo.

Inclusion in key decision-making processes which have to do with the general interest of the citizens and the state, only by deputies that are legitimate representatives, currently under our constitutional system apart from being legal, it is difficult to call it also absolutely legitimate. In such a situation the issue is raised of restoring legitimacy to the people, as a vital element of democracy.

Reserved and guaranteed seats for the non-majority communities in the Assembly and the lack of legitimacy

As mentioned, the focus of this research will be the issue of legitimacy in the Assembly of the Republic of Kosovo, as the highest representative body. In the single chamber structure of the Assembly of the Republic of Kosovo, 20 out of 120 seats are guaranteed for representatives of the non-majority communities in Kosovo, as per the following allocation:

1. Parties, coalitions, citizens' initiatives and independent candidates, which have declared to be representing the Serb community, will have the number of gained seats in the Assembly through open elections at a minimum of 10 guaranteed seats, in the event that the number of gained seats is lower than 10;
2. Parties, coalitions, citizens' initiatives and independent candidates, which have declared to be representing other communities in the Assembly will have the number of gained seats through open election at the minimum of the following guaranteed seats: Roma community one seat; Ashkali community one seat, Egyptian community one seat; and one extra seat will be given to the Roma, Ashkali or Egyptian community, subject to the overall number of votes received; Bosnian community three seats, Turkish community two seats and the Gorani community one seat, if the number of seats won by each community is less than the number of guaranteed seats¹⁵.

If an interpretation of this constitutional provision is made, it can be said that from this "positive discrimination" made towards the non-majority communities, there is type of discrimination which is damaging other communities, and is in favour of the Serb community. Additionally, this constitutional provision should be interpreted with the other provision which has to do with the "Transitional Provisions for the Kosovo Assembly"¹⁶ which made a difference between the reserved seats and those guaranteed for the non-majority communities, in the Assembly of the Republic of Kosovo. The discrimination within this "positive discrimination", is related to the fact that there is a considerable number of deputies

¹⁵ Constitution of the Republic of Kosovo, Article 64 paragraph. 1 and 2.

¹⁶ See Article 148 parag.1 of the Constitution of the Republic of Kosovo.

of the Serb community that hold the guaranteed seats in comparison to the number held by other non-majority communities.

The genesis or foundation for the development of the constitutional system in Kosovo is found in the Ahtisaari Package, which as a document was presented to have the character of an international agreement for the settlement of the Kosovo status. As part of this Package, as a compromise for statehood, the right of non-majority communities for a more advanced position in decision making was recognised, through the constitutional institutions (Assembly, Government, etc.).

The advancement of the constitutional position of non-majority communities in Kosovo and their inclusion in the decision-making processes through the Ahtisaari Package was guaranteed for the following issues:

Local Governance
Justice System
Issues which are part of the educational policies (in pre-school, primary, secondary and higher education)
Issues of language use, and
Issues related to and directly effecting the rights of the members of non-majority communities in Kosovo, like religious freedoms, symbols, cultural heritage and state holidays.

The determination of these five issues for the inclusion of the non-majority communities in the decision-making processes, was aimed at excluding them from the setting of daily policies, specifically from weakening their votes in the policy-making of the Assembly and Government.

In the first two electoral terms, it was foreseen for the reserved seats to be applied¹⁷, so that 10 out of the 20 reserved seats for the non-majority community would be reserved for the Serb community, irrespective of the number of votes received by the candidates of Serbian ethnicity in the general elections. Every seat won through the elections by the candidates for deputies of the Serbian ethnicity would be considered as additional seats for them in the Assembly, while the same logic was applied also for other non-majority communities, specifically one seat in the first two electoral terms was reserved for the Ashkali community, one for the Egyptian community, one for the Roma community, where an additional seat would go to one of these communities (Ashkali, Egyptian or Roma) which has received the largest number of overall votes in the election. Three seats would belong to the Bosnian community, two to the Turkish community, and one to the Gorani community.

¹⁷ *Ibid*, Article 148 parag.1.

Every seat won by the candidates which belonged to the above-mentioned communities through the elections, would serve as an additional seat for that community, to which the candidate belongs and has won the seat through elections. For example, if the Turkish community has won 2 seats through the elections in the Assembly of the Republic of Kosovo, then this community in addition to the two seats won through the elections would have another two seats which were reserved for this community, irrespective of the popular vote.

This method of allocating seats for the non-majority community in Kosovo has ended after the conclusion of the two first election mandates. Furthermore, in the transitional provisions of the Constitution, it was foreseen for the purposes of Article 148, paragraph 1, of the Constitution, that the current term at the time of the Constitution entering into force, would be considered as the first election term in the event that it lasts for at least two years from the date of the Constitution entering into force¹⁸.

Put more simply, if the Serb community through the popular vote in the parliamentary election had won 6 seats in the Assembly, now this community would gain another 4 seats in order to fulfil the quota of 10 seats in total which are guaranteed for the Serb community.

Whilst under the 'formula' of reserved seats, in the case when the Serbian community would win 6 seats in the Assembly through the popular vote, another 10 seats would be added to these 6 seats for this community, irrespective of the popular vote. As can be seen in both of these variations, as with the reserved seats and also those guaranteed, there is room for absence of legitimacy for the representatives of the non-majority communities who gain their mandates as deputies.

Through the constitutional mechanism of shifting from reserved seats to those guaranteed it was claimed that the influence of these communities in the parliamentary life was weakened, as this has caused the decrease of the number of deputies that belong to the non-majority communities¹⁹, ever since the third legislative term which was underway between the period of the Constitution of the Republic of Kosovo entering into force and the new parliamentary elections (2007-2010), and up to the last one, specifically the fifth legislative term.

Even though legally the Assembly of the Republic of Kosovo has a total of 120 seats, in reality the race between the candidates of political parties for deputies is conducted only for the 100 seats, which are then representatives with full popular legitimacy. The 20 guaranteed seats for the non-majority communities appear to make the race unequal from the outset between the candidates for deputies, being that the position of candidates for deputies from the non-majority communities is clearly more advanced.

In the last parliamentary election held on the 11th of June 2017, a candidate from the non-majority communities was made a deputy in the Assembly of the Republic of Kosovo with only

¹⁸ *Ibid*, Article 148 paragraph 2 of the Constitution of the Republic of Kosovo.

¹⁹ *In the third legislative term of the Assembly of the Republic of Kosovo, there was a total of 24 seats which belonged to the non-majority communities, available at <http://www.kuvendikosoves.org/?cid=1,158&legid=3&secid=107> (accessed on 07.07.2017).*

539 votes.²⁰ Whist the average, if we calculate the votes of all the deputies that have gained their mandate as a result of the popular vote, is about 16,856 votes²¹, which indicates that such a system of guaranteed votes, even though legal, weakens the legitimacy of the representative body.

The last parliamentary elections which produced the sixth legislative term were a continuation of such a composition, where not all deputies were made part of the legislative institution through the votes of the citizens, and furthermore for a considerable number of them the popular legitimacy is disputable. Being that a large number of constitutional institutions stem from or are elected by this Assembly, suspicions are made larger that the 'deficit' of legitimacy extends its effects also in the institutions that stem from a legislation that is not entirely legitimate.

With a structure of the Assembly which has 120 seats, of which 20 were **reserved** for the non-majority communities in Kosovo, as per our electoral system²², it results that political parties that ran in the June 11th of 2017 election have the following legitimate seats:

PAN (Kosovo Democratic Party, Alliance for the Future of Kosovo, Initiative for Kosovo, Justice Party, Unification Movement, Albanian Demo-Christian Party of Kosovo, Conservative Party of Kosovo, Democratic Alternative of Kosovo, Kosovo Republicans, Front Party, Social-democrat Party, National Front of Kosovo.	36 SEATS
SELF-DETERMINATION MOVEMENT	29 SEATS
LA (Kosovo Democratic League, Alliance for New Kosovo)	27 SEATS;
Serbian List (GRAĐANSKA INICIJATIVA SRPSKA LISTA)	7 SEATS
Turkish Democratic Party of Kosovo (KOSOVA DEMOKRATİK TÜRK PARTİSİ)	1 SEAT. ²³

In this situation with an Assembly which is completely legitimate, the Government elected by the legislative branch would be legitimate if it secured the votes of 51 deputies who have been elected with the votes of the people (absolute majority in the Assembly). Therefore, the 20 deputies of the non-majority communities who hold reserved seats would remain outside of these calculations for the election and establishment of the Government. The voting with another majority (which is foreseen by the Constitution of the Republic of Kosovo), outside of

²⁰ See [http://www.kqz-ks.org/Uploads/Documents/3.%20Ndarja%20e%20ul%C3%ABseve%20-%20Kandidat%C3%ABt%20e%20zgjedhur%20sipas%20Subjekteve%20-%20Seat%20Allocation%20\(by%20Party%20and%20Elected%20Candidates\)_ckqritzexj.pdf](http://www.kqz-ks.org/Uploads/Documents/3.%20Ndarja%20e%20ul%C3%ABseve%20-%20Kandidat%C3%ABt%20e%20zgjedhur%20sipas%20Subjekteve%20-%20Seat%20Allocation%20(by%20Party%20and%20Elected%20Candidates)_ckqritzexj.pdf) (accessed on 14.07.2017)

²¹ If we calculate the number of votes for all the candidates which have won the mandate for deputy through the elections, and dividing this with the total number of elected deputies through the popular vote, it appears that the average number of votes needed to be secured by a candidate for deputy is 16,865 votes.

²² Our electoral system during the period when reserved seats existed included an electoral threshold of 5% for political parties or coalitions that belonged to the majority community and 1% for political parties, coalitions of citizens' initiatives declared to belong to non-majority communities.

²³ Final results of the General Elections of the 11th of June 2017, available at http://www.kqz-ks.org/Uploads/Documents/2.%20Rezultatet%20e%20p%C3%ABrqjithshme%20sipas%20Subjekteve%20-%20General%20Results%20by%20Party_knaëhjqcix.pdf (accessed on 31.07.2017).

this logic would cast doubts over the legitimacy of this Government, even though it would be completely legal.

If we refer to the current situation in relation to the seats which are now **guaranteed** for the non-majority communities in the Assembly, from a total of 120 deputies of the Assembly, in the last parliamentary election of the 11th of June 2017, 12 of them won their mandate as a result of guaranteed seats for the non-majority communities in Kosovo, and only 8 candidates through the popular vote²⁴, hence leading to a candidate being elected as a deputy with only 539 votes.

With a simple calculation, it appears that only the 108 legitimate deputies of the Assembly should be included in the decision-making processes, in cases where the rights and interests of the non-majority communities would not be directly affected. Whilst on issues only effecting the interests of these communities, another 8 deputies would be added to this number from the ranks of the non-majority communities in Kosovo.

Bicameral Parliament

Clearly the reserved seats before and now those guaranteed, due to the political system, produce executive authorities (Governments) with disputed legitimacy. If in a representative democracy with a Government elected by the representative body, it firstly has to reflect the will of the majority of citizens that participated in the elections, then this electoral and democratic principle has been violated by the guaranteed seats. Hence, even though in other parliamentary democracies the legitimacy of the Government can be violated for other reasons, in Kosovo this legitimacy can be absent even before the Government is voted.

On the other side, the Constitution of the Republic of Kosovo, was also part of negotiations that brought the Comprehensive Proposal for Status of Kosovo known as the Ahtisaari Package. The Constitution in its Article 81, has foreseen that legislation for eight (8) different issues to be considered as vital legislation, the adoption of which will required two thirds of the members of the Assembly of the Republic of Kosovo, and also two thirds of votes from the reserved/guaranteed seats.

²⁴ See [http://www.kqz-ks.org/Uploads/Documents/4.%20Lista%20e%20qijth%C3%AB%20Kandidat%C3%ABve%20-%20Candidate%20list%20by%20Party%20\(as%20in%20Ballot\)_dajxqfiwu.pdf](http://www.kqz-ks.org/Uploads/Documents/4.%20Lista%20e%20qijth%C3%AB%20Kandidat%C3%ABve%20-%20Candidate%20list%20by%20Party%20(as%20in%20Ballot)_dajxqfiwu.pdf) (accessed on 14.07.2017)

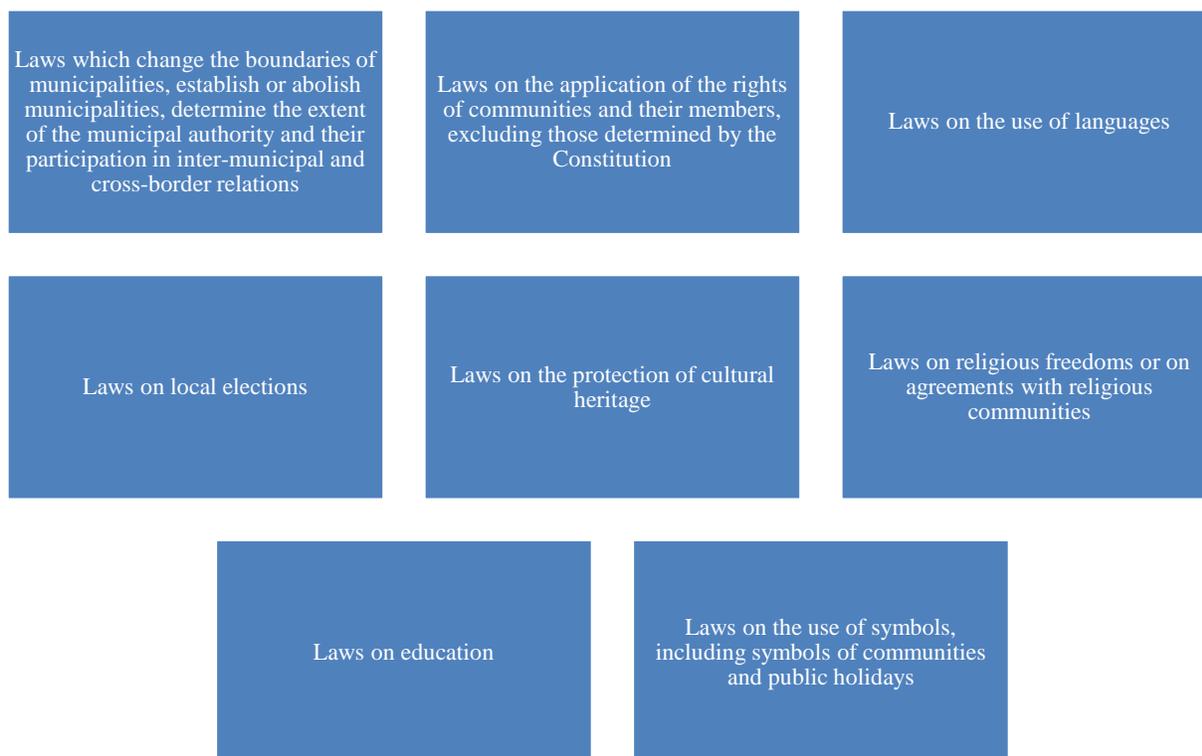


Figure 1. Legislation of vital interest – Article 81 of the Constitution of the Republic of Kosovo

These Laws cannot be subject to adoption through a referendum.²⁵ Legislation of vital interest includes elements that mainly have to do with the rights and freedoms of minorities. This legislation and the scope that these provisions cover, as mentioned in Article 81 of the Constitution of the Republic of Kosovo, are also the fundamental part of the duties and responsibilities of the Parliamentary Commission for the Rights and Interests of Communities and Returns.²⁶ This parliamentary commission is a permanent Commission, which means that every law has to go through this Commission.

Therefore, we have two realities that are producing a single problem. The first is related to the fact that there is a list of laws and issues for which a consensus is absolutely necessary from the minority deputies, and on the other side the guaranteed seats are creating non-legitimate Governments and the lack of the principle of representing the majority of the electoral body in decision-making. In these circumstances, a solution has to be found in order to guarantee the representation of the electoral body also on one side, and the interests of

²⁵ *Constitution of the Republic of Kosovo, (2008), Article 81, Legislation of Vital Interest, available at <https://qzk.rks-qov.net/ActDetail.aspx?ActID=3702>, accessed on October, 2017.*

²⁶ *Assembly of the Republic of Kosovo, (2017), Decision No. 06-V-006 for the establishment of fourteen (14) Parliamentary Commissions, available at http://www.kuvendikosoves.org/common/docs/Vendimi_06_V_006_Formimi_i_komisioneve.pdf (accessed on October, 2017)*

the communities which have been enshrined in the Constitution of the Republic of Kosovo on the other side.

A two chambered or bicameral parliament could be one of the possible solutions in order to ensure also representation as per the electoral principle: *the popular majority has the decision-making power*, and also ensuring the rights of communities are protected through sufficient institutional mechanism.

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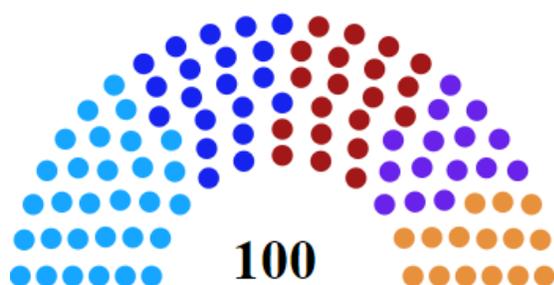


Figure 2. Chamber of Representatives

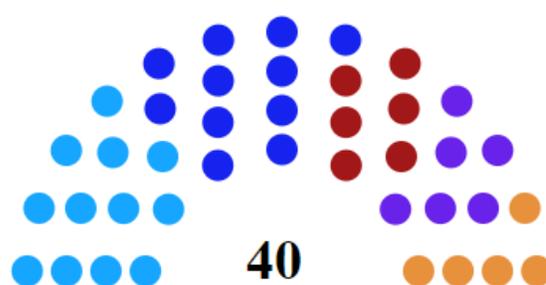


Figure 3. Chamber of Communities

The proposed model foresees that for the 100 deputies elected to the chamber of representatives, seats would be won directly through the votes of the citizens as per the determined electoral threshold. Practically, only the guaranteed seats would be eliminated. At the same time, from the list of deputies which have not obtained seats in the chamber of representatives, fifteen (15) Albanian representatives are elected subject to the allocation of seats to the different parliamentary groups, and another twenty-five (25) representatives of communities allocated in the same proportion as the allocation of guaranteed seats in the current system.

The Chamber of Communities would be able to adopt legislation of vital interest in the third reading with at least 3/5 of the votes in favour, and this would guarantee that the interests of all communities are protected. The Chamber of Communities would replace the current parliamentary Commission for the Rights and Interests of Communities and Returns, and would serve as a daily forum for discussing issues of interest for communities. To reiterate, if this system would have been applied in the last central elections, in the chamber of representatives there would be at least seven (7) minority deputies alongside twenty-five (25) other deputies.

Conclusions and Recommendations

Legitimacy and legality are two concepts that are widely discussed in the political system of the Republic of Kosovo. Discussions on the legitimacy and legality were significantly more emphasised in the post-election periods. This is because the Governments formed with a majority that is based on guaranteed votes were disputed as non-legitimate, as they lacked in reflecting the will of the people in their governance. Legitimacy carries with it an unwritten right which is in a larger sense moral. Because of this, often the issue of legitimacy in the general sense was more of a subjective nature in its interpretation. However, in the sense of legitimacy in representation, the principle should be valid for the deputies to reflect.

The legitimacy of Governments formed on a narrow basis and with votes from the guaranteed seats in the Assembly has been disputed. However, guaranteed seats have had a historical consequence and have been put in place in order to protect the rights of communities, and in particular on issues that the Constitution of the Republic of Kosovo has considered as "vital" for the communities. In the midst of the necessity for preserving these two principles, a midway solution is necessary that would not only preserve these two, but would potentially also advance the two further.

Constitutional changes need to be focused on the balance between the functioning of the internal democracy of the Republic of Kosovo by providing a system that guarantees legitimate institutions and the representation of the people, as well as the protection of community rights. The clear division between the necessity to have representative institutions and empowered representation of the interests of communities, automatically brings about the necessity to divide the parliament in two chambers. However, Kosovo needs to open the debate on constitutional changes and the balancing and approximation of the legal with the legitimate.

A two-chambered parliament would also ensure the proper representation of the interests of minorities through the increase in the number of deputies and their scope of action, and would at the same time ensure that the formation of institutions and the adoption of regular legislation would not depend on guaranteed votes. Finally, a broader legitimacy would be ensured along with equality in representation. At the same time a two-chambered parliament would balance the representation of the interests of communities in Kosovo and would increase the functionality of the state and its institutions. However, until the most ideal model is determined, the most important thing is for this debate to be opened, under the light of constitutional changes which are already present in the public discourse.