President's Veto and His Role in Parliamentary Republics: Case of Kosovo

Zahir Çerkini[1]

Abstract: This paper, through an analysis and constitutional point of view, will clarify the constitutional position of the President that he has in parliamentary republics. This will be possible by reflecting the principle of separation of powers, its philosophy and its attitude toward the role of the head of state in parliamentarianism. The starting point of this writing is the analysis of the separation of powers and the impact of this principle on the democratization of countries. The reports that the President has with the Assembly will be addressed in this article in particular. Moreover, we will address the specifics that point out the role and position of the President in the Parliamentary Republic. Also, addressing the veto of the president as an institution that affirms the balancing power of the Assembly will prove its special position within the system itself. Kosovo, its constitution and its principles will be an inseparable part of this paper. The Republic of Kosovo has embraced the principle of the separation of powers, and has established a typical parliamentary system of government whereby the President has reserved a neutral position among all other powers.

Keywords: President; Parliament; Separation of Power; Right of Veto; Constitution

1. Introduction

The clear placement of positions and roles of powers in a governing system becomes possible only through the principle of separation of powers. Determining the role of the president (head of state in general, whether monarch or president), depends largely on his constitutional position in the landscape of separation of powers.

The principle of separation of powers is one of the first principles of antiquity in the attempt to establish democracy in the fight against the absolute form of political regulation (Saliu, 2004, p. 297), by its very significance, always reveals an

[1] Teaching Assistant, Faculty of Law of the University of Mitrovica Isa Boletini & PhD candidate, State University of Tetova, Republic of Kosovo, Address: Mitrovica, Str. Martiret e Kombit, No.6, ZIPCode 40000, Republic of Kosovo, Corresponding author: zahir.qerkini@umib.net.

AUDJ, Vol. 14, No. 2/2018, pp. 120-132

actuality (Cadart, 1990; Omari, 2012, p. 63). The principle of the separation of powers represents a constitutional value by which the principle of legal certainty of citizens is first guaranteed, avoiding the arbitrariness of power. “The principle of the separation of powers is one of the basic principles on which the rule of law functions and one of the fundamental principles on which democracy functions” (Gruda, 2015, p. 13).

The separation of powers is based on one another’s positioning of the three main branches of power, legislative, executive and judiciary. As a matter of principle, it has an organizational character (Zaganjori, Anastasi & Cani, 2011, p. 28) and the three state bodies function as separate from one another in the exercise of their powers (Omari, 2012, p. 110).

The principle of separation of powers is embodied as a result of the struggle for freedom and the removal of arbitrary powers to non-controlled and non-restricted. As such, in historical terms, it has changed its role depending on the social and political circumstances of the time. Although it is a principle that dates back to Aristotle[1] (Omari, 2012, p. 61), in the sense that it has today, originally, dates only from the ideas of thinkers like Locke and Montesquieu, and others in their era. Their ideas were against the tyranny and uncontrolled power of the monarchs of the time. Thus, the limitation of the power of the state chief of time marked the starting point of this principle. Through this limitation, some of the power had to be transferred to people where their power was confounded in the legislative power.

Eventhough, Locke believed that the principle of separation of powers would soften arbitrariness by the government (in this case the monarch as head of state), he failed to conceive that the powers were placed in the horizontal line so he did not see them as equal. It was not even against that the powers were all in an individual. He, unlike others, thought the powers were four, and not three or two (Omari, 2012, pp. 61-62).

As said above, through the mechanism of control and balance of powers, greater assurance is obtained in the first instance of the individual freedom of the citizens and their equality, because, as Montesquieu expressed, “an eternal experience shows that every man who has power is destined to misuse it, he goes so far as to find limits ... In order not to abuse this power, the power must stop power”

[1] Aristotle, the principle of the separation of powers, did not conceive as a principle where separate bodies, separated from each other, perform certain work, but he understood this principle only as an exercise of state activity in various forms. In his mind, the three powers conformed to a single figure (the principle of unity of power).

(Montesquieu, 2000). Montesquieu, presents another thinker who was against the absolute power of the time. According to him, political freedom would be when the three areas of exercised authority will respond to three powers (Midgaard, 2007, p. 307). If one power intervenes in another power or they unite, as would be the case when the senate and state chief co-ordinate the law, then it is at risk of producing tyrannical laws (Midgaard, 2007, p. 307).

One thing is clear, despite the efforts to limit arbitrariness, this did not happen in Locke and Montesquieu's time. Their ideas were limited to the first modern constitutional acts such as the US constitution. Also, the separation of powers, both seen as a division of legislative activity by the head of state rather than an organization in three forms of power. Moreover they did not at all count the Judiciary as part of the powers. The only way to limit the power of the monarch was seen by a collegial body that would be choosen by the people, which had the form of a congregation known as the Parliament.

These ideas led to the concept of parliamentary monarchies, later constitutional ones, and governance systems in the form of democratic republics. The principle of the separation of powers today does not imply a rigorous, even rigid, division of the functions exercising powers, in fact it means a division which lies between their control and their counterbalance. Despite the changes that the principle of separation of powers has undergone in its composition and understanding, it remains the same today without which there is no freedom and democracy (Omari, 2012, p. 64).

The principle of the separation of powers has been embraced by most of the democratic countries of the world, including post-communist ones in the group of which Kosovo is part (without exception from other Balkan countries which were part of the former Yugoslav Federation). Constitutional norms in these countries of the principle of separation of powers, besides the organizational role, are more viewed as a form and opportunity not to return to the dictatorships that have passed. In the Republic of Kosovo, this principle is found in its constitution, namely article 4, which states that the country is a democratic republic based on the separation and control of the balancing of powers. The legislative power is exercised by the Assembly, the executive Government and the judiciary is independent. The President represents the unity of the people by representing the country inside and outside and guaranteeing the democratic functioning of the institutions (Constitution of Kosovo, 2008, article 4). An expression in this way of this principle is important for the interpretation that will be made to the constitution

in various cases in order to avoid situations that would lead to the mixing of powers of power (Hasani & Cukalovic, 2013, p. 29).

From the reading of the Article it is noted that the President of the Republic, with a separate paragraph (and below in the constitution and with a separate chapter), definitively determines that he under no circumstances presents the Head of State as the executive carrier. In this paper, we will raise the issue between the parliamentary report and the head of state focusing on the competencies that the latter has in relation to the first. Understanding of his role, his position and the power of his competencies is done in the light of the review of the first constitution of the parliamentary system, which comes as a result of the principle of separation of powers and then of the President-Parliament report. Its role and nature in the parliamentary republics, like Kosovo, for many reasons is special.

2. The Position of the President in the Parliamentary Republics

Insofar posed above, the definition of the role of a president in a state depends largely on how he has chosen to govern the state by taking as a criterion the principle of separation of powers. In this regard, three types (systems) of governance are known: the parliamentary, presidential and semi-presidential system. In the light of the principle of the separation of powers, a system takes on the given epithet, depending on the dominant powers that one of the organs has and which consequently occupies the central place in that system. These models of government exist even when it comes to determining the constitutional position of the president within the state.

Most new democracies, especially those born after the fall of dictatorships in the 1990s, have chosen to belong to the so-called parliamentary republics. Thus, the central role in the exercise of institutional-political life has given parliament or, in a more generalized language, their representative assemblies. The parliamentary system, presents the model of governance based on the principle of the separation of powers, where this principle, in this system, does not appear in a strict form as in the presidential system (Bajrami, 2010, p. 90). The relations between the powers are regulated by a balancing mechanism between them, each of which independently exercising its power, and mutually controlled by each other. In terms of the role of the head of state and his position towards the representative body, debates about the parliamentary system initially develop into the role parliament has towards the government as executive power. This is because in countries where

the head of state is the bearer of executive policies, ie in presidential or semi-presidential systems where executive powers divide together with government, parliament as a legislative body and power has lost its legislative power over executive power as a perpetrator (Della Porta, 2006, p. 184; Pring, 1972). In this regard, in these countries, the president has competences that make him central to the state and determines the pattern of governance.

In the parliamentary system of government, the head of state has a more specific role. Apparently, for such typical systems, it is believed that the president has an entirely ceremonial role where he is just a "formal leader (puppet) and executive power is owned by a prime minister and/or council of ministers" (Heywood, 2008, p. 320). Exercising his duty in ceremonial form and his agreement with some constitutional powers are two features that characterize him in the parliamentary republics (Hasani & Cukalovic, 2013, p. 380). The type of competencies he exerts and the way of his choice determine his role in a system (Hasani & Cukalovic, 2013, p. 381).

Consequently, the system of governance and the role of the president in the republic can not be determined solely by taking into account one element and leaving the other apart. A president may be elected by the people and be called to popular legitimacy but, if his powers are faded, it can not be said that he represents a presidential model of governance. So, a combination between his powers and the way of his election determines his role in the republic. There is no doubt that the mode of his election is decisive for his political power (Hasani & Cukalovic, 2013, p. 384), even when elected by the parliament, the way of voting what size is required is very important (Hasani & Cukalovic, 2013, p. 384), but his position in the triangle of separation of powers depends "essentially on the extent of the executive powers that he/she has" (Hasani & Cukalovic, 2013, p. 384).

Based on the factors mentioned above, the Kosovo president, who is elected by parliament and exercises a number of competencies defined by the constitution, has a striking role for the parliamentary republics, which is the representation of the unity of the people as the head of state (Constitution of Kosovo, 2008, article 83). This power gives the president of the country greater independence from other powers and places him in a position over/outside the other powers (Vorpsi, 2006). In fact, the power derived from article 84.2 of the constitution, which gives the president the right to guarantee the constitutional functioning of the institutions, clearly presents the role of representation of the unity of the people, his position in the triangle of the separation of powers. Through this competence, the country's

president stands in a neutral position but not in the role of an executive power. The representation of popular unity best resembles its position in the state and its juridical nature.[1]

In post-communist countries and new democracies, the position of the president as a neutral power, dependent on the way of parliamentary election, but also with a range of competencies, divided or co-ordinated to him and other institutions, guarantees the removal of a president tyrannical with absolute power. Concentrating power on a single individual, in terms of the role of the president, in countries that do not have a high democratic culture would jeopardize the normal functioning of institutional life and democracy in general.

However, the competences of the President of the Republic of Kosovo cover a wide range of actions, and seemingly go beyond those of presidents elected by the people (Reka, 2012, p. 107). In cases where these competences are in relation to the assembly, we can divide them into two types: the competence which activates the work of the Assembly by the President and the competence that inhibits/corrects the work of the Assembly. Both powers are such that they basically have the principle of controlling and balancing the powers.

In the first competency, what is called the legislative competence of the president derives from article 79 of the Constitution by which he, in his scope, has the right to propose laws in the assembly. Such a competence, by some scholars, is not seen respecting the principle of separation of powers and makes the president to be active on the political scene, which contradicts his neutral position (Omari, 2009, p. 28).

The second competency relates to what is called the use of veto-returning to a re-examination of a law approved by the Assembly. This competence, in the case of Kosovo, is at the discretion of the president and does not go beyond other typical parliamentary models.

[1] For the role of the president in the parliamentary republic, the Constitutional Court also spoke in the Judgment on cases KO.29 / 12 and KO.48 / 12, date 1 July 2012, no. AGJ 284/12. Also, regarding the nature of the head of state, brought under the great debate between Schmitt and Kelsen, see: Prof.dr.Enver Hasani, Abstracts and Preventive Controls (Preliminary) of Constitutional Amendments and Protection from Discharge of Head of State: Kosovo Case, Magazine: ”Law”, No. 1/2013.

3. Constitutional Reviews on Presidential Veto

In a parliamentary system, maintaining the neutral position of the head of state is regulated by various constitutional mechanisms. This neutral position, set on other powers, does not make the president a completely ceremonial figure where he has a competence such as representing the unity of the people and guaranteeing the constitutional functioning of the institutions. These two competences challenge the president to any other institution take a role that will have a balancing and controlling nature in order to avoid any arbitrariness and overcoming the competencies to the detriment of the citizens and the country.

In places where the president is elected by parliament, but has the above mentioned competencies, the report between them is not so much divided. This is due to the fact that the president has been guaranteed some powers that hold in a way the control over the work of the assembly, but it is understood not so unreservedly. Such competence is also the exercise of veto.

The word veto has Latin origin which means to stop, block, reject something (McLean, 2009). As such, in the legal and political language, it is most often used in the sense of the competence of the head of state to stop or reject the approval of a law approved by the assembly. In the constitution, for the first time, it is placed in the US constitution as a defense mechanism to stop the lawmaking activity from interfering in the affairs and controlling the president’s work. Without the possibility of a full separation between the powers in the papers, he saw the president's use of the veto as sufficient to balance his report with the assembly. Also, it serves not only as a shield of the president of the assembly but also serves in removing non-constitutional texts from the laws (Federalist Letters, No. 73). Such a look at the right to use veto is more rigorous because of its own governing system of the presidential type. In parliamentary systems there is a shortage of this institute in its own content as well as in its use.

In Kosovo, and other parliamentary republics, where the role of the president is placed in a neutral position, veto right serves to carry out essential constitutional functions. It enables the president to participate in the legislative process as a representative of the unity of the people and secondly, to have an active role in constitutional debates within the country (Morina, 2014, p. 28). The role of the veto of the president is also seen as a mechanism for safeguarding the constitutionality of legislation regardless of whether the presidents are elected by the people or are the result of a vote in the Assembly (Morina, 2014, p. 28).

Although the Constitution of the Republic of Kosovo does not use the term veto, it recognizes such competence for the country's president. In its Article 84.6 it states "it has the right to return for review of approved laws if it considers it to be harmful to the legitimate interests of the Republic of Kosovo or one or more of its communities. The right to return a law can only be used once" (Constitution of Kosovo, 2008, article. 84 par. 6). Reading this article gives us a clear picture of the content of this right and how it is used. The content of this competence appears to be wide since the president has the right to use it for "the legitimate interests of the Republic of Kosovo or one or more communities" which decides in full discretion on its use, in particular when dealing with the first part "legitimate interests...".

As such, the competency is presented in the form of a suspensive veto but with characteristics of the typical parliamentary model of governance (Hasani & Cukalovic, 2013, p. 397). The use of this power by the president implies controlling a law both by the procedure and by its content. Therefore, in the materialization of this competence acts as a representative of the unity of the people in his political and ethnic sense (Hasani & Cukalovic, 2013, p. 397).

The constitutional language has followed a logical line of determination of this competence as this right to return to review the adopted laws comes as a result of the president's power to announce the laws issued by the Assembly (Constituion of Kosovo, 2008, article 84.5 & 80.2). This constitutional requirement for the promulgation of assembly laws gives legitimacy, among other things, to the use of veto by the president. The constitution, together with the power to restore the law under review, has determined the role and the ability of the president in the promulgation of laws, states that:

"2.The law approved by the Assembly is signed by the President of the Assembly of Kosovo and is promulgated by the President of the Republic of Kosovo after having signed it within eight (8) days after the law has been adopted. 3. If the President of the Republic returns the law to the Assembly, he or she must state the reasons for the return of the law. The President of the Republic of Kosovo has the right to return a law to the Assembly only once. 4. The Assembly, by a majority vote of all deputies, decides on the approval of the law restored by the President of the Republic, and the relevant law is considered promulgated. 5. If, within eight (8) days after the law is adopted, the President of the Republic of Kosovo does not make any decision for his promulgation or return, the law shall be deemed promulgated without his/her signature and shall be published in the Official Newspaper" (Constituion of Kosovo, 2008, article 80.2, 3, 4, 5).

Also, the Rules of Procedure of the Assembly specify the President's power to announce laws and to return them to the Assembly for reconsideration:

"2. The law signed by the President of the Assembly is sent to the President of the Republic for announcement. 3. If the President of the Republic returns the law for reconsideration to the Assembly, the Presidency of the Assembly shall immediately send it to the functional reporting committee for review. 4. The functional committee only examines the issues contained in the President's decision. Within two weeks of work, the commission, from the date of its receipt, submits the report to the Assembly with recommendations. 5. The Assembly, by a majority of the votes of all deputies, decides on the approval of the recommendation of the Committee on the remarks of the President, which, with the amendments approved, is considered promulgated. If the Assembly does not approve the commission's recommendation to the President's remarks, the law remains as previously approved by the Assembly and is considered promulgated. 6. If the President of the Republic, within the deadline foreseen by law, does not proclaim the law or does not return it to the Assembly, the law shall be deemed to be promulgated and published in the Official Newspaper of the Republic of Kosovo (Rules of the Assembly of Kosovo, 2010, article 61).

Initially, the right to return a law for reconsideration to the Assembly has been left to the President only once because of the fact that it would endanger the balance of powers and its constitutional position towards the Assembly if this competence was not limited. The sphere of its influence on the work of the Assembly would increase if this competence was to be used more than the constitution envisaged. However, having only one chance to turn a bad law does not mean that this is set for declarations. This competence, if used for its constitutional purposes, would enable a stumbling of the arbitrary power of the legislature along with other constitutional mechanisms.

At the stage of returning the law for re-examination in the Assembly, there are two important things to be discussed:

a) The manner of voting the decision (proposals for change in law) of the President by the Assembly, and,

b) Is the proposal for change by the President considered a legislative initiative?

In the first case, due to the careful reading of the Constitution and the Rules of Procedure of the Assembly, there is a controversy between them when it comes to voting in the Assembly. Article 80.4 of the Constitution states that the Assembly

by a majority vote of all deputies decides on the approval of the law restored by the president. Meanwhile, the Rules of the Assembly, under section 61.5 state that the Assembly approves the recommendation of the functional committee ie not the law but the recommendation of the commission. Thus, the constitution addresses it in a full vote, more of the law, while the Rules of the Assembly of the recommendation of the functional committee. This is a controversy between the constitution and the regulation because the notions used, the law on the one hand and the recommendation on the other hand, do not have the same meaning in this procedure (Morina, 2014, pp. 35-37).

The second important issue for discussion is that the proposals for change in the law that the President returns are considered a new legislative initiative and how far can they extend them? Concerning this issue, the Constitutional Court has given a response in its judgment. In its Judgment in the case of "Request of the President of the Republic of Kosovo, Mrs. Atifete Jahjaga, with which she contests the vote for the adoption of Law no. 04/1-084 "On pensions of members of the Kosovo Security Force (Constitutional Court of Kosovo, Case No. KO 57/12, 20 September 2012)", the Court was issued in the assessment of the constitutionality of the voting for the adoption of Law no. 04/L-oB4 on "Pensions of Kosovo Security Force Members" and returned for review to the Assembly of Kosovo with the Decision of the President of the Republic of Kosovo. Consequently, the President of the Republic of Kosovo addresses the Court to examine whether there has been a violation of the Constitution, respectively article 8004, during the voting in the Assembly regarding the decision of the President for the return of the law for review (Constitutional Court of Kosovo, Case No. KO 57/12, 20 September 2012). The country's president had returned to review the law with some concrete proposals made by adding an amendamnet within the law. In the present case, the President has not given any reason for changes within the law as it requires Article 80.3 of the constitution, but she has made an additional amendment. As the Constitutional Court notes, the right to convert a law into reconsideration does not imply that the president has a legislative right, that is, the right to propose laws from its scope governed by Article 79 of the constitution (Constitution of Kosovo, 2008). Therefore, it is not found in the constitution of Kosovo there is no statement that allows the President to make amendments to the law that he returns to review (Constitutional Court of Kosovo, Case No. KO 57/12, 20 September 2012), thus using this power the president is not allowed to amend the law. On the contrary, this would qualify as a mix in the work and legislative activity of the Assembly.

Juridically, the effect of using the veto on the part of the President can not go beyond constitutional authorizations. The difference in this sense is only the ruling model. Where there is a presidential model, it is understandable that its effects are greater. In typical parliamentary models where the head of state is defined as a representative of the unity of the people by placing it in a neutral position in the triangle of the separation of powers, the legal effects of the veto are only those that the constitution sanctioned in its text. This has to do with content and number of opportunities to use it. Our constitutional language has enabled the President only once to use this power for a law, next time he can not do it. This is characteristic of most post-communist countries in order to avoid concentration of power in single figures such as presidents. However, even in parliamentary models, it is very important who is the President. In places where presidents come as a result of political coalitions that are also the governing body of the ruling parties, the President has a more prominent role in the legislative power and the right to veto. In these conjunctures, it can hardly happen to turn the same law back to the president who has come from their ranks (their votes in the Assembly).

4. Conclusion

This article has attempted to clarify the role of the President and his position in the states that have for their governing system the parliamentary model. This is done in the light of the principle of separation of powers, its content and its adaptation at different times.

The new democracies have encountered problems and major challenges towards putting in secure positions of power. Although they have adopted the principle of separation of powers in their constitutions, the lack of a democratic and institutional culture has made it difficult to realize it in practice.

In the light of the principle of separation of powers, the President, in parliamentary governing bodies, has a neutral position in the triangle of separation of powers. Some of them stand on the three powers. This comes as a result of their choice but also of their competences foreseen by the constitution.

Preserving the position and role of the President as a representative of the unity of the people has produced various constitutional mechanisms. Among these mechanisms are its competences in the legislative activity of the Assembly. Among the most important is his right to review the adopted Assembly laws in order to counterbalance the power of the latter. However, the new constitutions, with a

parliamentary system, where Kosovo also belongs, have limited this right to the content and the manner of its use with a single purpose: the elimination of any attempt to arbitrary and absolute power.

The use of veto right is not only used for the purpose of removing legal irregularities in laws. This competence, in the countries that have elected the president from parliament, where he is a fruit of the parliamentary majority, has the political role and power to influence and control the work of the Assembly.

5. References

Bajrami, Arsim (2010). *Parliamentarianism. Comparative Aspects*. Pristina.

Bradshaw K. & Pring, D. (1972). *Parliament and Congress*. London: Quartet Books.

Cadart, Jasques (1990). *Institutions politiques et droit constitutionnel/Political institutions and constitutional law.* Economia.

Della Porta, Donatella (2006). *Basics of Political Science*. Pristina.

Gruda, Përparim (2015). *Separation of Power Constitutional Analysis*. Pristina.

*** Federalist Letters, Letter No 73 written by Alexander Hamilton, to the people of New York, March 21, 1788

Hasani, E. & Cukalovic, I. (2013). *Constitution of the Republic of Kosovo –Commentary*. Publication I. Pristina.

Heyewood, Andrew (2008). *Politics*. Pristina.

Malnes, R. & Midgaard, K. (2007). *Political Philosophy*. Pristina.

Montesquieu (2000). *On the Spirit of Laws*. Luarasi, Book XI. Tirana.

Morina, Visar (2014). The legislative property from the perspective of the kosovo constitution. *Denning Law Journal*, Vol. 26, pp. 19-45.

McLean, Iain (2009). *Summarizing Policy, Oxford, Translated and adapted to Albanian by Zef Simoni*. Book and Communication House.

Omari, Luan (2012). *Principles and Institutions of Public Law*. Tirana.

Omari, Luan (2012). *State of Rule of Law*. 4th Edition. Tirana.

Omari, Luan (2009). *Constitution of the Republic of Kosovo in a comparative overview*. Tirana.

Reka, Blerim (2012). President and Foreign Policy-A Comprehensive Review. *Constituency Magazine*, no. 1/2012. Pristina.

Saliu, Kurtesh (2004). *Constitutional Law-Book I.* 4th Edition. Pristina.

Vorpsi, Arta (2006). Constitutional Report, President of Parliament in the Parliamentary Republic. *Parliamentary Law and Legal Polic*y. Journal No: XXIX.

Zaganjori, Xh.; Anastasi, A. & Çani, E. (2011). *State of the Law on the Constitution of the Republic of Albania*. Tirana.

*** (15 June 2008). Constitution of the Republic of Kosovo.

*** (20 September 2012) Constitutional Court of the Republic of Kosovo, Judgment on the case The request of the President of the Republic of Kosovo, Mrs. Atifete Jahjaga, with which she contests voting for the adoption of Law no. 04/1-084 On the pensions of members of the Kosovo Security Force, KO 57/12, 20 September 2012 Nr. ref: AGJ297/12.

*** (April 2010) Rules of the Assembly of the Republic of Kosovo.