



REACTION MEMORANDUM NO. 5 – ELECTORAL REFORM

TO: KOSOVO ASSEMBLY, PRESIDENT, PRIME MINISTER'S OFFICE, CENTRAL ELECTIONS COMMISSION

FROM: DEMOCRACY FOR DEVELOPMENT INSTITUTE (D4D)

TOPIC: REMOVAL OF AFFIRMATIVE MEASURES FOR FIRST CANDIDATES AND THE PRESERVATION OF GENDER QUOTA

DATE: 28 JANUARY 2014

CC: QUINT REPRESENTATIVES, EU OFFICE IN KOSOVO, NGOS, THE MEDIA

RECOMENDED ACTION

The Kosovo Assembly should remove the guaranteed vote for first candidates in the local elections while it should maintain the affirmative measure for the less represented gender.

ISSUE

Whereas the gender quota and the guaranteed seats for national minorities have legal basis in the constitution and have been well elaborated in various international conventions, the mechanism for the first candidates to be elected by automatism does not. The 'bearer of the list' can and should be successfully challenged as a violation of paragraphs 1 and 2 of article 45 of the Constitution of Kosovo, which arguably violates the right to be elected and the equal weight of the vote.

The gender quota of 30% is a justified affirmative measure allowed by Article 24 point 3 of the Constitution of Kosovo as well as by international standards and international court decisions. In a number of cases where affirmative measures have been challenged at the *European Court of Human Rights* in Strasbourg, this international court has afforded domestic courts a wide margin of appreciation to decide the cases based on the local particular contexts, as far as these measures were foreseen by law, had a legitimate aim and were not disproportionate to the eventual harm they may have caused. In the Kosovo context, the gender quota of 30% is an affirmative measure foreseen by the relevant legislation on elections. It has a legitimate aim, concretely it aims at repairing or compensating a historical injustice for women throughout history have been discriminated, treated unequally and were excluded from public decision-making processes. Clearly, the quota of 30% is not disproportionate for it does not even amount to the natural threshold of the population of female gender, which composes 50% of the population. As a result, there is no legal basis to challenge the gender quota, nor is it necessary to reopen of the constitution to further clarify this matter as it has been previously argued.

The way the two laws governing elections (local and national), the Kosovo Assembly legally obliges the citizens to vote for the bearer of the list automatically when marking their preferred party. The Law on Local Elections, on article 7, *inter alia*, provides that the vote for the Political Entity "...is considered as a vote for the first candidate from the list of candidates of that Political Entity...." A similar provision is also found on article 110 of the Law on General Election of 2008 but it was removed through an amendment in 2010. A number of problems have emerged as a consequence, which in combination with other legitimate affirmative measures infringe the right to free elections of Kosovo citizens.

Such an obligation created an affirmative measure for the first candidates similar to that created with the gender quota and the reserved seats for the minority communities. Given that the gender quota and the seats for minorities have a legitimate aim and are justified, the automatic vote for

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the first candidates is a clear violation of the key principle of democracy, *i.e.*, that of free, equal and unconditional election of political representatives by Kosovo citizens.

The latest local elections illustrated this problem in practice. AKR's candidate for the Municipal Assembly of Gjilan, Mr. Tefik Ibrahimimi submitted a request to the Constitutional Court challenging the automatic vote for the first candidate as an unconstitutional mechanism. Ibrahimimi claims that as a result of his party getting two mandates, those have been unjustly distributed to the first candidate and the female candidate as a result of the gender quota. Ibrahimimi was not elected although he had most votes (considering the bearer of the list could not be marked).

Guaranteeing the seat for the first candidate of the political entity, along with the quota can result in the undemocratic 'capture' of more than 50% of municipal assembly seats who would win their mandate automatically (first candidates together with the candidates of the less represented gender who get elected only as a consequence of the quota). This would mean that the rest of candidates are effectively running for less than 50% of the remaining seats. The price tag of such a vote capture is excessively high for the local governance since it 'accommodates' 5-10 assembly members (which is not little considering the size of the municipal assemblies range from 15 to 51).

OPTIONS

Relevant political and state institutions should use of the current political momentum to remedy this flaw which infringes on the free and democratic will of the people and violates the constitutional rights for free and equal elections. The electoral reform must remove the automatic vote for the first candidate who should be part of the electoral race on an equal footing with all other candidates on local elections. Citizens should be free to vote for the political party and the candidates of their choice and not give a mandate to an individual against their choice. If not addressed now, this provision will be challenged again at the Constitutional Court which eventually will have to decide whether it represents a violation of the constitution as we argue or not. If the Constitutional Court will not consider Mr. Ibrahimimi's case or rule it out as unclear, well prepared cases will challenge this provision successfully in the future. D4D is considering the possibility of requesting the Constitutional Court to allow D4D to submit an *amicus curiae* in Mr. Ibrahimimi's case to assist the court in understanding more clearly the challenge of Mr. Ibrahimimi against the first candidate as an unconstitutional and undemocratic form of winning an electoral mandate.

IMPLEMENTATION

Urgently	A well informed and unprejudiced discussion among political parties and relevant institutions should be initiated with the commitments to remove the legal obligation to vote for the first candidate on the list of candidates as part of the vote for the political entity. This change must be urgently included among the amendments of the Law on Local Elections in Kosovo.
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See previous memos:

[Memo1: Police overreaction](#)

[Memo 2: The two Germanies model](#)

[Memo 3: Set criteria for new municipalities](#)

[Memo 4: University of Prishtina](#)