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"Fifth Anniversary of the Adoption of the Constitution of Albania - Achievements and Challenges"

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«The Constitution and the Electoral Process in Albania»

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The Constitution and Electoral Process in Albania[1].

Basic constitutional principles related to elections.

We can find basic constitutional principles related to elections properly enshrined in art. 1, 2 and 9:

- Albania is a parliamentary republic.
- Governance is based on a system of elections that are free, equal, general and periodic.
- The people exercise sovereignty through their representatives or directly.

Such principles are consistent with international instruments as Democratic elections and representative government are recognised as international human rights standards since the 1948 Universal Declaration of Human Rights, which affirmed: The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

To varying extents, these principles were upheld under the International Covenant on Civil and Political Rights, and European Convention for the Protection of Human Rights

[1] Sources from the Constitution
Art. 1.1. Albania is a parliamentary republic
Art.1.3 Governance is based on a system of elections that are free, equal, general and periodic.
Art. 2.2 The people exercise sovereignty through their representatives or directly.
Article 9
(1) Political parties are created freely.
Article 22
(1) Freedom of expression is guaranteed.
Part II, Chapter III-Political Rights and Freedoms (art. 45-47)
Part III Chapter I and II (art. 64-73)
Part four art. 81, 87 and 92
Art. 96.4
Art. 108, 109.1 and 2, 110
Art. 131
Part Eleven art.150-152
Part 12 art.153 and 154
Art. 170 and 177

and Fundamental Freedoms (hereinafter, Convention).[2]

Amongst the basic principles stands art. 9 that provides about freedom of political parties and transparency of their financial sources.

Strictly related to political parties freedom, are individual freedoms and especially freedom of expression and freedom of the media which can easily be said to be cornerstones of a healthy democracy (art. 22).

Political rights and freedoms are protected by art. 45 through 48 of chapter III.

Active and passive suffrage are levelled by the Constitution as to the age limit: every citizen who has reached the age of 18, has the right to vote and to be elected.

Active suffrage is granted even to convicts serving a prison sentence and may only be withheld by a final court decision in case of mental incapacity.

Passive suffrage is limited in the cases provided by art. 69 of the Constitution and, for candidates to local government organs, by the requirement to be domiciled in the respective electoral unit provided by the Electoral Code (art. 13 EC).

Art.64 to 67 relate to the election of deputies to the Assembly and their mandate term.

The Assembly consists of 140 deputies: 100 are elected in single member electoral zones, and 40 in a nation-wide constituency based on party or coalition lists, with a barrier of 2.5 % for political parties and 4% for party coalitions. A unique feature of the Constitutional system is that the overall representation, compounded both of deputies elected in single member zones and deputies elected on multi name lists, has to be as proportional as possible to the votes cast for each electoral subject: *The total number of deputies of a party or a party coalition shall be, **to the closest possible extent**, proportional to the valid votes won by them on the national scale in the first round of elections.* The way through which such result is achieved is detailed in the Electoral Code, hereinafter EC, (art. 67) through the allocation of 40 "compensatory mandates". In order to have a proportional overall representation, the EC provide for the initial deduction of the number of seats won

[2] The preamble to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms reaffirms the profound belief of the Contracting States in those Fundamental Freedoms which are the foundations of justice and peace in the world and are best maintained ... by an effective political democracy. However, electoral rights as distinct from the right to live in a representative democracy - are not addressed in the body of the convention, but appear in Article 3 of the First Protocol, which provides: The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.le The European Court of Human Rights subsequently observed that the words of the preamble are of primary importance since they enshrine a characteristic principle of democracy, developing from the idea of an ‚institutional right to the holding of free elections ... [moving] to the concept of ‚universal suffrage and then, as a consequence, to the subjective rights of participation the right to vote and the right to stand for election to the legislature.

in single-member zones, from the number of seats allocated to each party or coalition according to the votes received.

Art. 69 provides for ineligibility of candidates holding a number of state or public positions: in addition to judges, prosecutors; military servicemen on active duty; and other State Officials specifically mentioned, the Constitution refers to the ordinary law to provide other cases of ineligibility for other high officials of the state Administration. The ineligibility issue for public officials has been raised before the European Court for alleged violation of art. 3 of the Protocol 1 to the Convention[3]. The Court has clarified that some limitations to the passive suffrage are to be accepted because the aim of securing political impartiality in certain civil service positions is considered legitimate for the purpose of restricting the exercise of the applicants' subjective right to stand for election under Article 3 of Protocol 1, especially in light of the fact that the limitation only operates for as long as the applicants occupy politically restricted posts.

Incompatibility is provided by art. 70 for the mandate of Deputy with any other public duty, but being a member of the Council of Ministers. Ordinary law can, again, specify other cases of incompatibility.

The Assembly is elected for four years (art. 65), but it is dissolved ahead of time if it cannot agree on electing the President of the Republic, after 5 ballots (art. 87.7); or if it fails to elect a new Prime Minister (art 96.4).

The Organs of Local Government[4]

Local Government units are Communes, Municipalities and regions. Representative organs of those units are the councils. Communes and Municipality councils are elected every three years, by general direct elections and by secret ballot, by the voters who have a permanent residence in the territory of the respective local unit. A general and direct election by the same voters, is also provided for the Mayors. Regional councils are formed by Municipalities and Communes delegates. Rules for the councils' and mayors' elections are detailed in the EC.

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[3] In *Ahmed and Others v. United Kingdo*m, (65/1997/849/1056) the Court dealt with restrictions limiting senior local government officers' involvement in certain types of political activity, including limitations on the right to be a candidate in elections. The applicants challenged the limitations as denying their rights to participate fully in the electoral process (Article 3 of Protocol 1). The Court noted that under Article 3 of Protocol 1, States may impose restrictions on an applicant's right to contest seats at elections. However, these restrictions must be seen in the context of the aim pursued by the legislature in enacting the limiting regulations. Here, the aim of securing political impartiality in certain civil service positions was considered legitimate for the purpose of restricting the exercise of the applicants' subjective right to stand for election under Article 3 of Protocol 1, especially in light of the fact that the limitation only operates for as long as the applicants occupy politically restricted posts. The Court concluded that there had been no violation of Article 3 of Protocol 1.

[4] Article 2 of European Charter of Local Self-Government Strasbourg, 15.X.1985: The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

Referenda

The Constitution provides for two types of referenda: Constitutional referenda (art. 177) and general referenda (art. 150-152).

The Constitutional referendum is provided for by art. 177 par.4 and 5 of the Constitution. It can be initiated only by the National Assembly members. The provision stipulates two different kinds of referenda.

As to the first type, the Assembly may decide, with two-thirds of all its members, that the draft constitutional amendments be voted in a referendum.

The draft law for the revision of the Constitution enters into force after ratification by referendum, which takes place not later than 60 days after its approval in the Assembly *(art. 177 par.4).*

This case is a rather peculiar case, because the same majority that would have the power to approve finally a constitutional reform (according to par. 3 of the same art. 177), is given also the opportunity to opt for a referendum on the same draft constitutional amendments that it could legitimately approve itself.

The *political* scenario is therefore of an Assembly that wants to share with the population the responsibility of a constitutional amendment, although the political parties represented in the Assembly do have the necessary majority to approve such a constitutional revision.

The legal scenario is that of an ordinary initiative for the parliamentarian revision of the Constitution.

Any such initiative can develop along 3 different paths:

1. a failure of the initiative, for lack of the required number of assenting Assembly members (2/3);
2. the final approval of the revision with the vote of not less than two thirds of all the members of the Assembly;
3. the alternative decision, by the same majority as in case 2, to have the draft constitutional amendments be voted in a referendum.

The second case of constitutional referendum is when a *constitutional amendment is put to a referendum when this is required by one-fifth of the members of the Assembly* (art. 177 par.5).

This case represents a traditional case of a qualified minority that requests a referendum be held in order to challenge the majority's decision, by submitting the same draft amendment of a constitutional revision that has already been approved by the Assembly with the relevant legal majority, to the popular will.

The "General" referendum is not related to Constitutional amendments.

Art. 150 of the Constitution provides for two types of "general referendum". The first one is initiated by 50.000 voters; the second, by a group of MPs or the Council of Ministers.

The general referendum initiated by the voters, according to art. 150 par. 1 of the Constitution can have two different objects:

1. *The people, through 50 thousand citizens who enjoy the right to vote, have the right to a referendum for the abrogation of a law,*
2. *as well as to request the President of the Republic to hold a referendum about issues of special importance.*

It is noteworthy that a referendum about "issues of special importance" can only be requested to the President of the Republic who will decide "whether or not to hold" it (art. 129 EC), after the control of Constitutionality by the Constitutional Court. It is an important power that has been handed to the President of the Republic by the EC.

The Central Election Commission

The Composition of the CEC according to the new EC, is tackled by the distinguished contribution of Mr. Njasi Jaho, that raises many interesting legal and Constitutional questions.

The overall assessment of such contribution is that the EC has not implemented the Constitutional provisions about CEC members' appointment in a manner consistent with the Constitution and even with the Guidelines on elections adopted by the Venice Commission at its 51st Plenary Session[5].

The argument is, in short, that the independence and impartiality of the CEC as envisaged by the Constitution, would be lost through the appointment procedures provided by the EC, which give the political parties the right to present a pool of nominees to the Constitutional Organs that are entitled to appoint the CEC members among such nominees.

Although the mentioned remarks are very serious, however I do not consent with some of the supporting considerations.

First, I would like to remind that the Venice Commission guidelines, further confirmed by the Code of Good Practice in Electoral Matters[6], assess that *it is both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior.*

[5] In Venice, on the 5a-6 July 2002.
[6] Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002)

However, in states with little experience of organising pluralist elections, there is too great a risk of government's pushing the administrative authorities to do what it wants. This applies both to central and local government - even when the latter is controlled by the national opposition.

In these cases, "*independent, impartial electoral commissions* must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least remove serious suspicions of irregularity". So far, we all agree.

What has not been considered, but is a well known fact, is that impartiality of an organ can be achieved both through the appointment of impartial members or through a balance of politically representative members. In the latter case, the impartiality of the body will be the result of the balance of different political positions[7].

No doubt, therefore, that the current rules for the composition of the CEC and its appointment provided by the EC do respect, in principle, the requirement of impartiality, outlined by the Venice Commission and the international community.

More problematic is the point raised in the paper about the Constitutional Organs (Assembly, President of Republic and HJC) being bound in their choice by the nominees from the political parties, as provided by art. 22 of EC.

It cannot be disputed, as far as I know of Albanian electoral history, that Albania is a country where it has been very difficult to find "independent and impartial" personalities, able to withstand political pressures from all parts, without being accused of, or perceived as siding with one or the other political party. It is for this simple reason, it has to be reminded, that the former electoral code mechanism had raised such strong criticism. Such concerns led to the new provisions and the current norms are the most widely accepted for the balance they are able to achieve.

In this scenario, while it could be argued that the letter of the Constitution would allow the President of the Republic and the HCJ to appoint CEC members disregarding the political agreements and their nominees, however I do believe that such a decision by one or the other Constitutional Organ would entail a double consideration of political and legal nature: from a political point of view, the decision not to abide to a political agreement of this importance, would give way to a serious and profound institutional crisis; from a legal point of view, the breach of the rules of EC should necessarily bring the matter before the Constitutional Court. And this body would finally assess the constitutionality of art. 22 of the EC, being granted that as long as it stands, it has to **be** abided by. It would appear by Mr. Njasi Jaho notes that in the recent history it has not

[7] A party-oriented formula for the composition of electoral commissions may be a solution available, but the examiner must apply particular scrutiny to its actual consequences. The views of any opposition forces, if available, can obviously help to identify the practical consequences and weaknesses of a particular arrangement. If the legal framework adopts a party-oriented formula, then it should address how and when changes in commission membership should occur when there are changes in the strength and membership of parties, especially where there are new parties (ODIHR **Guidelines for Reviewing A Legal Framework for Elections)**.

been so, although I am not acquainted with the case. But the violation of a law does not mean, per se, that a new legal framework has been enacted. As to the author of these notes, the EC procedures for the election of CEC members set in art. 22 appear a reasonable and balanced implementation of the Constitution (art. 154.2) and there is no reason why they should be considered as infringing it.

Another interesting point is raised about art. 154.4, to conclude that after the final results are declared, electoral subjects would loose their status and as a consequence, their representatives at the CEC which goes against the Constitution.

I think that the legal definition of "electoral subjects" by art. 2.25 is limited "for the purposes of this code" and does not apply, therefore to the Constitutional provision of art. 154, although we can read there, as well, the same wording. Art. 33 of the EC implements the constitutional provision, with a different status attributed to the seven most influential political parties, and the others. It is, again, a reasonable provision and should therefore be upheld.

As to art. 23.2 of EC, there is a request that the relevant authority be entrusted upon the Constitutional Court by means of a separate law. With all due respect for the different opinion, I would argue that the EC is a law, it is a qualified law, and it can entrust to the Constitutional Court such a power as long as it is consistent with the Constitutional provisions: through art. 154.5 (CEC members enjoy same immunity as High Court members); 137.2 has for High Court Judges the same provision that art. 23 EC has maintained for CEC members.

The critical remark about art. 24.3 that requires a majority of 2/3 of all the Assembly members in order to decide the dismissal of a CEC member, is correct. Art. 78 of the Constitution, indeed, is clear that decisions are taken by a majority of votes in the presence of more than half of the Assembly deputies "except for cases where the Constitution provides for a qualified majority". Any such decision, taken by the Assembly according to art. 78, would be hard to be contested as a non valid one. In any case, it has to be stressed that items 2 and 3 of art. 24 have to be read together with item 1: that is a CEC member can be dismissed only in the cases provided by item 1, according to the procedures of items 2 and 3.

I do not share, however, the second part of the same remark: "the decision of the Assembly cannot be challenged in the Constitutional Court". On the contrary, I believe that the right of appeal of the dismissed member should be upheld, and no other body could be competent to review an Assembly decision, but the Constitutional Court. Such a case would fall within the authority of art. 131 lett. f of the Constitution.

The voters lists

The distinguished lecturer's proposal to revise art. 58.3 does not appear to be, at least directly, a Constitutional matter.

Neither it is possible to claim that the EC has run counter the Code of Good Practice of the Venice Commission.

The option of the Albanian system is that of a general and permanent electoral register, regularly updated, as a task for the public service. Individual voters and "other interested institutions" may file requests for changes of the preliminary voters' lists. It appears to me that the EC is very open towards the goal of achieving a good voter list, to the best possible extent. Any means in that direction should be praised and not discouraged.

The remark that political parties will file requests only for their own interest is not relevant: it is exactly through the interests of the different political parties, and other interested institutions, that the goal of a good voter list will be achieved.