THE CHOICE OF AN ELECTORAL SYSTEM AND THE ISSUE OF STABILITY OF ELECTORAL LAW IN THE LIGHT OF THE ALBANIAN EXPERIENCE

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Brief Introduction

Elections have become synonymous with democracy. Elections has two components, they are highly technical and political, and these two elements are closely interdependent. A technically proficient election conducted in a negative political climate will be useless - and on the other side - an environment of political goodwill will not salvage a technically chaotic election. The process of electoral engineering is a complex one, and the choice of particular rules to govern elections is not an easy task: it has a crucial effect on the extent and type of political competition in a country. "That elections and political parties are necessary ingredients of democratic governance is accepted as an incontrovertible fact among most political scientists. Modern democracy is almost by definition representative democracy. Elections are a necessary condition of representative democracy. In representative democracy citizens participate in politics primarily by choosing political authorities in competitive elections. Elections, hence, are a necessary and crucial instrument to make democracy work"[1].

Elections and electoral systems are integral parts of a broader set of political institutions that constitute a democracy. Electoral systems are the primary institutional mechanism to regulate political competition. It is important not to see electoral systems in isolation. Their design and effects are heavily contingent upon other structures within and outside the constitution. The choice of electoral system and the choice of governmental type may be seen as the two most important institutional choices.[2]

Elections lie at the heart of representative democracy giving citizens a say in who governs them. The electoral process is the ultimate symbol and act of modern democratic societies: "democracy's ceremonial; its feast, its great function [...]", HG Wells called it.[3]
The purpose of elections is, first, to decide who will represent each individual constituency in the legislative body, and, second, what the overall composition of the legislature by political party will be. By translating votes into seats, these decisions are managed by the particular electoral system used for each single election. The electoral method is, hence, a key variable in the political process: it largely determines who gets what, when and how.[4]

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[1] G. Bingham Powell Jr., *Elections as Instrument of Democracy,* Yale University Press, 2000
[2] Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, Basingstoke: Macmillan,1994
[3] *Electoral systems: The link between governance, elected members and voters*, in http://www.europarl.europa.eu/aboutparliament/en/008407cea1/Office-for-Promotion-of-Parliamentary-Democracy.html
[4] A.Reeve and A.Ware, *Electoral Systems: A Comparative and Theoretical Introduction,* London: Routledge, 1992, p. 4.

Goals of the electoral system

According to Office for Promotion of Parliamentary Democracy there are seven features that the electoral system must take into account.

i) *Ensuring a representative parliament.* Parliaments should reflect the population that chose it, both in terms of political support, but also regionally and ethnically.

ii) *Making elections accessible and meaningful*. Voters should feel that their taking part will make a difference to the result, or else they will increasingly refuse to participate, undermining the legitimacy of the results.

iii) *Providing incentives for conciliation*. Electoral systems can be a tool for managing conflict. Equally, by having all sides represented in parliament, all parties have a stake in resolving disputes through an institutional framework.

iv) *Facilitating efficient and stable government.* The system should make it possible for the government to enact legislation, run the economy and carry out the other tasks of government.

v) *Holding the government and representatives accountable for their actions*. This is one of the corner stones of electoral systems.

vi) *Promoting and respecting a parliamentary opposition*. To be effective, governments also need to have an opposition to assess proposals critically, speak up for the interests of those not represented by the government, and provide reassurance to the electorate that there is always the possibility of changing governments at a later date.

vii) *Practical.* Designing the perfect electoral system may be a profitable academic exercise, but unless the voters can understand it and believe it to be credible, they will not support it. Its operation should be transparent, and produce results which people accept as fair.[5]

The international principles related to the structure of electoral law

Free and fair elections are a result of a sound electoral management system that is itself founded upon a sound legal and administrative framework. International organizations and other actors have developed through years formulation of specific principles in order to provide general and objective guidelines as the players in the electoral system make laws, rules, regulation and administrative decisions or guidelines.

To achieve the benefits of clarity, certainty and accessibility, the majority of electoral matters should be rendered in written law.

It is important to provide for elections through written law rather than through policy or custom: as the IDEA notes: 'written law provides the benefits of certainty, visibility and transparency. It is more readily subject to judicial interpretation and review, and is more useful to interested parties, including electors'[6].

An effective electoral law framework should be structured hierarchically: constitution, primary legislation, secondary legislation, orders/guidance.

[5] Electoral systems: The link between governance, elected members and voters.

[6] International Institute for Democracy and Electoral Assistance (IDEA), *International Electoral Standards Guidelines for reviewing the legal framework of elections,* http://www.idea.int/publications/ies/upload/electoral_guidelines-2.pdf *Guidelines,* p. 13.

Inclusion of the basic principles of the election system in the constitution creates a safeguard against frequent changes. Constitutional amendments are often subject to a qualified majority vote or other onerous processes. Thus, it is a recommended practice to include the fundamental guarantees protecting suffrage rights in a country's constitution. This would include provisions regulating the very basics of the electoral system, such as the right to elect and be elected, the institutions subject to democratic elections, and terms of office of elected candidates. As amendments to any constitution are normally subject to complicated and time consuming procedures, it is not desirable that constitutional provisions go beyond describing the very foundation of the election system and guaranteeing fundamental rights. In order to allow for necessary flexibility, provisions on the administration of the elections and other procedural matters should be left to legislation enacted by the parliament and administrative rules issued by authorised election administration bodies.[7]

The Venice Commission recommend enshrining basic electoral principles in a constitution or constitutional enactment as one means to preserve the stability of electoral law. The Venice Commission state that: "One way of avoiding manipulation (of the electoral system) is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries)[8].

The hierarchical approach is also endorsed by the Venice Commission which has said that once the most vital elements of elections have been protected by being placed in a constitution or higher law, then 'electoral law should normally have the rank of statute law. Rules on implementation, in particular those on technical questions and matters of detail, can nevertheless be in the form of regulations'[9].

A unified, consolidated electoral law is preferable to a fragmented law with separate legislative vehicles for different electoral events and dealing with different matters.

It is of fundamental importance that electoral law is accessible to citizens[10]. An electoral law that is fragmented (by which we mean found in a Electoral Commission large number of different enactments) is not accessible.

The Venice Commission recommends that: "In order to reduce the number of redundant provisions and enhance the consistency and the public understanding of the electoral legislation, it may be technically preferable to enact a unified electoral code, containing the general aspects of any election, and – in different parts of the law – the particularities of different elections…

Furthermore, there are sometimes inconsistencies between the electoral law and election-related provisions of other laws on, for example, political parties, mass media, referendums local self-government, or Civil and Penal Codes. Thus, a holistic approach seems to be necessary in order to harmonise election and election-related legislation"[11].

Reforms to electoral law should be undertaken with the goals of clarity and simplicity in mind.

The Venice Commission notes that: "Electoral reforms should be careful not to add increasingly detailed provisions to the electoral law. While it may be necessary to fill

[7] ODIHR, *Guidelines for Reviewing a Legal Framework for Elections*, p.4

[8] Venice Commission, *Code of Good Practice in Electoral Matters*, 23 May 2003, p. 26.

[9] Ibid. p.26

[10] Paragraph 5.8 of the 1990 OSCE Copenhagen Document.

[11] Venice Commission, *Report on electoral law and electoral administration in Europe*, 2006, p. 12-13.

loopholes in the law, a review of the election legislation should be undertaken with the aim to clarify and simplify complex provisions as well as to remove inconsistencies and unnecessary repetitions. Furthermore, serious effort should be made to harmonise electoral and election-related legislation"[12]. It also reminds us that: "Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently – and especially rules which are complicated – may confuse voters" [13].

Election legislation should avoid conflicting provisions between laws governing national elections, local elections and referendums.

Election legislation should avoid conflicting provisions between laws governing national elections and laws governing and local elections; provisions governing the administration of national elections should be in harmony with the provisions governing such other elections because court decisions at one level could affect legislation in other jurisdictions[14]. The Venice Commission state that consistency can be achieved by enacting one electoral law regulating all elections or at least enacting a unified electoral code, containing the general aspects of any election, and – in different parts of the law – the particularities of different elections[15].

The legal framework should require that central electoral bodies be established and operate in a manner that ensures the independent and impartial administration of elections.

Central electoral bodies are playing an increasing role in the administration and conduct of elections. In newly-emerging democracies, but also in long-established ones, the existence of an effectively-functioning central electoral body goes some way towards ensuring the independence and legitimacy of the overall election result[16]. This is a critical aspect of a 'free and fair' election.

Relevant provisions of the Albanian Constitution

The Albanian Constitution entered into force on 28 November 1998 and it defines Albania as a parliamentary republic. According to the Constitution, the Republic of Albania has a unicameral legislature composed of 140 deputies, who elect the head of state, the President of Albania and the Council of Ministers. In the Republic of Albania, the basic requirements of a democratic electoral system are determined by the constitution.

Article 1

1. Albania is a parliamentary republic.
2. The Republic of Albania is a unitary and indivisible state.
3. Governance is based on a system of elections that are free, equal, general and periodic.

Article 2

1. Sovereignty in the Republic of Albania belongs to the people.
2. The people exercise sovereignty through their representatives or directly.

[12] Venice Commission, *Report On Electoral Law*, paragraph 195.
[13] Venice Commission, *Code of Good Practice*, p. 26.
[14] IDEA, *Guidelines*, p. 15.
[15] Venice Commission, *Report on Electoral Law*, paragraph 12-13.
[16] IDEA, *Guidelines*, p. 37.

Article 9
1. Political parties are created freely. Their organization shall conform with democratic principles.
2. Political parties and other organizations, the programs and activity of which are based on totalitarian methods, which incite and support racial, religious, regional or ethnic hatred, which use violence to take power or influence state policy, as well as those with a secret character, are prohibited pursuant to the law.
3. The sources of financing of parties as well as their expenses are always made public.

Article 45
1. Every citizen who has reached the age of 18, even on the date of the elections, has the right to vote and to be elected.
2. Citizens who have been declared mentally incompetent by a final court decision do not have the right to vote.
3. Convicts who are serving a prison sentence have only the right to vote.
4. The vote is personal, equal, free and secret.

Electoral system in the Albanian Constitution 1998-2008

Article 64

1. The Assembly consists of 140 deputies. One-hundred deputies are elected directly in single-member electoral zones with an approximate number of voters. Forty deputies are elected from the multi-name lists of parties or party coalitions according to their respective order.
2. 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.
3. Parties that receive less than 2.5 per cent, and party coalitions that receive less than 4 per cent, of the valid votes on the national scale in the first round of elections do not benefit from their respective multi-name lists.

Article 64 of the Constitution (1998) established these features of the election system:
a) A fixed number of parliamentary mandates -140, with 100 deputies elected in single mandate election zones and 40 elected from party or coalition lists.
b) That "the total number of deputies of a party […] shall be, to the closest possible extent, proportional to valid votes won by them on the national scale […]" ;
c) That parties must obtain at least 2.5% of valid votes and coalitions must obtain at least 4% of valid votes, to participate in the allocation of the 40 supplemental mandates.

The required constitutional objective of proportionality in the composition of parliament was hampered by four factors:
- The number of supplemental mandates was fixed rather than variable.
- The number of supplemental mandates was relatively small (40) and thus not sufficient to achieve proportionality.
- The impossibility of 'taking away' any of the single seats won by a party candidate;
- The provision that the election was a two-ballot contest[17](Electoral Code, art 90).

Furthermore there were other serious shortcomings in the legal framework of the Albanian election:

i) The Electoral Code allowed parties to submit to the Central Election Commission internal party agreements for re-ordering mandate recipients according to party-stipulated criteria.[18] In general elections 2005, many parties submitted such agreements

[17] Each voter casted two ballots, one for a candidate running in the single mandate constituency and one for a party or coalition candidate list, without any restriction on any of his or her choices.
[18] As noted in the OSCE/ODIHR – Venice Commission joint assessment of 2004: "to the extent that [the law] would permit a re-ranking or "final" ranking of candidates to occur after a voter casts the ballot, then [it] would be contrary to OSCE Commitments and international standards."

to the CEC and the internal party agreements often contained formulas that took into account the electoral performance of the party/coalition list or of individual candidates in specific election zones. This was problematic because it lessened the certainty among voters concerning the translation of their votes into mandates being allocated according to transparent criteria.

ii) While according to article 154 of the Constitution, the power to elect CEC members was a constitutional prerogative of the Assembly, the President, and the High Council of Justice, article 22 of the Electoral Code limited the significance of this prerogative by the nomination power it gives to political parties. In effect, the two largest political interests controlled the functioning of the CEC through their nomination of members.

iii) The Code (art. 163) granted parties the right to influence the selection of the pool of judges that hear election appeals.[19]

iv) The parties were granted the unrestricted right to replace members of the first and second level of electoral administration *at any time* for *any reason*. They delayed submitting the list of nominees to vote counting teams until only two hours before the close of polls. Arguments in favour of such legal privileges were usually presented as ways to counter possible attempts to 'buy' election commissions' members. However, such privileges enabled parties, particularly the two largest ones, to exert a high degree of influence on the stability, professionalism, independence and impartiality of the election administration, and consequently created possibilities for a negative impact on the election process. [20]

Amendments of the Constitution on electoral system (April 2008)

"**Article 64**
1. Assembly is composed of 140 deputies, elected on proportional system with multi-names electoral zones.
2. The multi-name electoral zone corresponds to the administrative division of one of the levels of the administrative-territorial organization.
3. Criteria and rules on the implementation of the proportional electoral system, on the determination of electoral zones and on the number of seats to be obtained in each electoral zone shall be defined by the law on elections.

[19] The OSCE/ODIHR and the Venice Commission expressed their joint concern over respective formulation of Article 163 of the Electoral Code on such issue.
[20] There has been also political strategies which were within the law, but were considered problematic for a number of reasons. For example the registration of so called "independent candidates' in general elections 2001, were party candidates who *de facto* represented a political party, were trying to register *de jure* as an "independent" candidate. Then the allocation formula can be circumvented in a case where a voter casts his/her first ballot for the "independent" candidate and his/her second ballot for the political party that "supports" the "independent" candidate as this mandate is not considered to have been won by the political party who supported the "independent" candidate. In this manner, the political party is able to "inflate" its share of the 40 national mandates. The mandate allocation and use of pseudo "independent" candidates became the most contentious issues in the election campaign period 2001.

Article 65

1. The Assembly is elected every four years. The mandate of the Assembly starts with its first meeting after the election and ends on the same date, of the same month of the fourth year from the date of the first meeting. In any case, the Assembly remains on duty until the first meeting of the newly elected Assembly.
2. Elections for the new Assembly are held in the nearest electoral period that precedes the date of the termination of the mandate of the Assembly. Electoral periods and the rules for holding the elections for the Assembly are determined by the law on elections.
3. If the Assembly is dissolved prior to the termination of its full mandate, elections are held no later than 45 days after its dissolution."
4. The Assembly may not approve laws during the period 60 days prior to the termination of its mandate until the first meeting of the new Assembly, except in cases when extraordinary measures have been imposed."

The OSCE/ODIHR report on general elections 2005, recommended that the electoral system may be changed in order to avoid all shortcomings experienced in Albania through years. It was made clear for the political actors in Albania and international organizations that the electoral system in force, approved in 1998, was a complicated system with serious consequences and deviations in practice. The Electoral Code was not the proper mean to remedy these shortcomings. Venice Commission and OSCE/ODIHR in 2007 (CDLAD (2007)035) also underlined that, the electoral legislation then in force, did not give to the voters the possibility of clearly and rightly understanding the electoral procedure and its results.

As a consequence, the Parliament of Albania adopted in 21 April 2008 a new electoral system. The constitutional amendments repealed the previous controversial election system and introduced a system of regional proportional representation. The members of Parliament are now elected with closed candidate lists in 12 constituencies that correspond to the administrative regions of Albania. The constituencies are of different sizes, with the number of mandates ranging from 4 MPs in Kukës to 32 MPs in Tirana, based on the number of citizens registered in each constituency. The Electoral Code establishes a constituency-level threshold of three per cent of the votes cast for political parties and five per cent for coalitions to be eligible to participate in the allocation of mandates in a constituency. Individual candidates must pass the natural threshold (i.e. the number of valid votes divided by the number of mandates) in a constituency to receive a mandate.

In its opinion on amendments of the Constitution Venice Commission stated that: "*In general, electoral matters should not be regulated in detail in the Constitution. In Albania there is, however, an evident concern to ensure the stability of the electoral choices in a political framework where conflicts are frequent and there is no common acceptance or interpretation of important rules of the democratic game. While it is therefore welcome that the new constitutional regulation is less detailed and complex, it also seems appropriate that the basic choice in favour of a regional-proportional system is set forth in the text of the Constitution.*

The Venice Commission welcomed the abrogation of the Central Election Commission on the articles of Constitution by arguing: "*This amendment deletes the constitutional provisions on the Central Election Commission. While there is no need to regulate the Central Election Commission in the text of the Constitution, and such regulation may indeed prove too rigid, the need for an independent body responsible for the holding of elections seems indisputable in Albania. Such a body will have to be provided for in the*

electoral law and the Commission understands that this is indeed the intention of the Albanian authorities."[21]

The Albanian Electoral Code contains rules for parliamentary elections and local elections, concentrated in one single normative act. According to the Albanian constitution the electoral law requires for approval a qualified majority of 3/5 of the votes of the parliament (84 votes). As such, the Electoral Code is a joint legislative product of cooperation between the majority and the opposition in the parliament. The Electoral Codes and its amendments are drafted through bipartisan commitment: an *ad hoc* parliamentary committee had been always established with purpose to draft and submit to the Assembly the respective amendments. Within the *ad hoc* committee the procedure was always defined a consensus based approach, where the decisions are approved if the biggest parties of the majority and the opposition were in favour.

Following the constitutional amendments of 2008, a new Electoral Code was drafted and approved in 29 December 2008. The new Code was considered by ODIHR and Venice Commission in a joint opinion[22] and further recommendations were provided in order to enhance its compliance with international standards. The Parliament approved the recent amendments of the Electoral Code on 19 July 2012.[23]

Since 2005, it has been asserted that Albanian the legal framework provides a thorough technical foundation for the conduct of democratic elections. However, in practice the most repetitive shortcoming that was manifested is what OSCE/ODIHR call as number one recommendation: "*Parties should demonstrate the political will for the conduct of democratic elections commensurate with the broad privileges they enjoy under the law in regard to the conduct of elections. They should discharge their electoral duties in a responsible manner for the general interest of Albania. This extends to the performance of election commissioners and elected and appointed officials at all levels, who should refrain from basing election related actions and decisions on political considerations"*[24].

There is one element where the Albanian experience in drafting electoral rules can be relevant: *Timing of electoral law reform*. Successful electoral reform requires adequate time for all of the main stakeholders who are involved and interested to participate in the reform process. Pressure to deliver reform should not be at the expense of the time allowed for the discussion, debate and preparation of legislative proposals.

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[21] http://www.venice.coe.int/docs/2008/CDL-AD(2008)033-e.pdf

[22] http://www.venice.coe.int/docs/2009/CDL-AD(2009)005-e.pdf

[23] Time for the adoption of electoral rules has a crucial effect. In case *Ekoglasnost v. Bulgaria* (application no. 30386/05) the Strabourg court ruled that late adoption of substantial amendments to electoral law breached the right to free elections. The applicant was a Bulgarian political party founded in 1990 and based in Sofia. Relying on Article 3 of Protocol No. 1 (right to free elections), Ekoglasnost complained that the introduction of three new conditions for the presentation of candidates for the parliamentary elections of June 2005, shortly before the poll, had prevented it from taking part in the elections. The Court accepted that the Bulgarian legislature, by introducing an election deposit and a requirement of 5,000 signatures, had been seeking to resolve the problem raised by the participation in the elections of numerous formations that did not have real political legitimacy. By introducing at such a late stage into domestic law the election deposit and the requirement of 5,000 signatures supporting the presentation by a party of candidates for election, the Bulgarian authorities had failed to strike a fair balance between the legitimate interests of society as a whole and the right of the Ekoglasnost party to be represented in the parliamentary elections of June 2005.

[24] OSCE/ODIHR Final Report on the Parliamentary Election of 28 June 2009 in Albania

Let me give you one significant example. The 18 February 2007 local elections in Albania were held under a legal framework amended approximately one month before the election date. Although the electoral reform had been on the agenda of the parliament since December 2005, it had yielded little progress, and the aforementioned amendments were largely the result of a belated political agreement, rather than a comprehensive electoral reform effort. The amending of the electoral legislation, and the elections' postponement at a very late stage, led to the necessity to considerably compress all the legal deadlines for electoral preparations and procedures. This presented a major challenge to the election administration.

Because of the time pressure on drafting and adoption some of these amendments raised concerns. In addition to the above-mentioned possibility to change the order of candidates on lists after the results are known, some cumbersome procedures were introduced for the usage and administration of birth certificates as a means of voters' identification.
Furthermore, special transitory rules were adopted for voting of eligible voters residing abroad. Albanian legislation does not provide for out-of-country voting. Eligible voters residing abroad can only cast their ballot in their municipality of origin in Albania. The amendments foresaw that such voters would be marked before election day in the voter list as 'emigrants' and, in order to receive a ballot, would have to present, in addition to an Albanian passport, a second document issued by their state of residence. This provision was criticized for introducing excessive voter identification requirement and was widely interpreted as an attempt to narrow the number of emigrant voters. Such unequal treatment of voters was considered by ODIHR discriminatory and not in line with paragraph 7.3 of the OSCE 1990 Copenhagen Document, which guarantees equal suffrage.