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ELECTION DAY: THE CANDIDATES, THE VOTERS, THE REPRESENTATIVES OF POLITICAL PARTIES AND THE OBSERVERS

by

Michel Bosshard¹

Foreword

The present notes are based on an English informal translation of the amended Albanian Electoral Code, Law No 8609 dated May 8, 2000 provided by CoE on August 8, 2003.

The speaker is of French mother tongue and thanks the audience for its indulgence regarding his English.

Introduction

This presentation is restricted to the role and interaction of the candidates, the voters, the representatives of political parties and the observers during the Election Day.

The goal of the presentation is to underline some of the questions that might arise during Election Day as to the intervention of the above mentioned players.

The presentation shall be the basis of an open debate allowing the sharing of experience and concerns.

If the voters, the representatives of political parties and the observers are expressly entitled to be present in the Voting Centre², this is not the case of the Candidates.

Thus I shall start reviewing the status of the Candidates before reviewing the status of the other actors.

A. The candidates³

During Election Day, the candidates might appear as regular voters, but not as member of the Voting Centre Commission (VCC)⁴, Zone election Commission (ZEC)⁵ or Local Government Election Commission (LGEC)⁶.

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²Art. 105 Electoral Code (hereafter EC).

³Art. 2-3 & 13ff EC.

⁴Art. 45-3 EC.

⁵Art. 34-3 EC.

⁶Art. 40-3 EC.

A Candidate can have representative⁷ which have to be accredited⁸.

The Electoral Code does not rule if a Candidate can be his own representative...

However, the designation of representative is not obligatory⁹.

Thus it is possible to conclude that a non represented Candidate should have the same rights as a representative of the Candidate; he will have the same obligations, specially the prohibition to act in a manner that could influence the voters¹⁰.

And if the Candidate has representatives? Can the Candidate make use of the rights of representatives? Can the Candidate remain in a Poling Centre and observe the electoral proceeding?

It has to be reminded that the representative of the Candidate has to be accredited for one or more specific Poling Centres.

Only the accreditation will allow the representative of a Candidate to remain in a Centre.

Thus, in my opinion, a Candidate, represented or not, will have to get special accreditation if he wants to remain in a Poling Centre to observe the Election.

According to the Constitution¹¹ and the Electoral Code¹², all voters are equal in the exercise of the right to vote. The Candidate can vote.

As regular voter, like all other voters for electing local government organs, the Candidates will have to be domiciled in the respective municipality or commune¹³.

The name of the voter shall be stated in the final voter's list.

The voting Candidate, like other voters, shall present to the VCC a recognised identity document¹⁴.

⁷Art. 83 EC.

⁸Art. 83-1 EC.

⁹Art. 83-1 EC, last phrase.

¹⁰Art. 83-2 EC.

¹¹Art. 45-4 Constitution.

¹²Art. 3-4 EC.

¹³Art. 109-3 Constitution and art. 76-1 EC.

¹⁴Art. 100-1 EC.

If said document can not be presented, the VCC will have to refuse the Candidate the right to vote!

Like all other voters, the Candidate shall not to do any propaganda at the voting Centre and within a range of 150 meters around it¹⁵.

You might have media wanting to shoot picture of the candidate casting his vote.

It is not up to the VCC to allow or not the presence of the media: the Electoral Code does state that accredited media will have the right to enter the Poling Centre¹⁶.

The accredited media will be admitted, provided that the secrecy of the vote and the order of the Voting Centre is preserved at any time. No entrance for unaccredited media!

The media shall not take pictures of voters, excepted the Candidate if he gives his agreement.

No interview shall be allowed in the voting Centre. In order to avoid disorder, the media shall be handled in a very restrictive matter in case of affluence at the Poling Centre.

B. The voters¹⁷

A voter is any Albanian citizen¹⁸, minimum 18 years old¹⁹, not excluded by a judicial²⁰ decision, registered in the final voter's list²¹.

For the local Elections, voters have to be domiciled in the respective municipality or commune²².

The voter is entitled to cast only one vote²³.

Thus, it is very important to make sure that the voter will not vote twice.

To avoid any abuse, the system chosen in Albania is to strike the name of the voter from the voter's list and to mark the voter with a special ink.

¹⁵Art. 97-1b EC.

¹⁶Art. 18-1 EC.

¹⁷Art. 2-28 & 9ff EC.

¹⁸Art. 3-2 EC.

¹⁹Art. 45-1 Constitution & art. 9-1 EC.

²⁰Art. 9-2 EC.

²¹Art. 10 EC.

²²Art. 76-1 EC.

²³Art. 3 EC.

It is important that these proceeding are respected, the voter being known or not by the VCC members.

All voters are equals²⁴ and all shall be marked.

I will come back later on the details of the voting operations.

I wish to mention the specials cases:

- drunk, armed or scandal making voters;
- disabled voters²⁵.

The voters member of the armed forced²⁶, students²⁷, special voters²⁸ and the voters in institutions²⁹ have to be considered as regular voters. The only difference is, for the members of the armed forces, for students and for special voters, that they must not vote at their place of domicile, and, for the people in institutions, that the Poling Centre will come to them!

The drunk, armed or scandal making voters will have to be banned from the Poling Centre by the VCC, if necessary with the aid of the police³⁰.

If possible, the VCC members shall try to solve the problem themselves and avoid calling the police in the Poling Centre.

If a voter is denied the right to vote because of his attitude (example: making propaganda, drunk, scandal) the incident shall be recorded in the official record³¹.

If said problematic voter comes back later in order to cast his vote and shows that he is willing to follow the rules, the VCC shall let him vote and record this in the official record.

Voters who can not vote themselves³² are persons who, for physical reasons, are unable to vote by themselves.

Does this mean that a person unable to vote by herself but for other than physical reasons (example: can not write or read) can not be assisted?

²⁴Art. 3 EC.

²⁵Art. 103 EC.

²⁶Art. 63 & 107 EC.

²⁷Art. 64 & 96-4 EC.

²⁸Art. 61 EC.

²⁹Art. 62 & 106 EC.

³⁰Art. 104 EC.

³¹Art. 100, 104 EC.

³²Art. 109 EC.

In my opinion no: this voter should be allowed assistance. The legislator might just have forgotten this possibility (if this issue is not due to a translation problem).

It will be the task of the VCC to handle those cases in a flexible way. Oppositions and complains against the decisions of the VCC will be recorded in the official record.

There is one point where the VCC shall not be flexible: a person may only help **one** voter who can not vote himself³³. A voter can not give assistance to more than one other voter.

Thus is not possible to let a voter help his grand-mother, his mother, his wife, his daughters and his sons.

The Electoral Code has been adopted and has to be respected!

That means: no family voting, even if this has long been a tradition.

It will be the task of the VCC to make sure that this ancestral practice has no more application during the 2003 Elections!

Two points have to be reminded:

1. the members of the VCC can not assist voters;
2. the “can not vote themselves voters” can but **must not** register with the LGEC³⁴.

C. The representatives of political parties³⁵

The Electoral code does make a distinction between accredited representative of a candidate and non accredited representatives³⁶.

It shall be clear to the VCC that only accredited representatives of a candidate can stay at the Poling Centre.

The rule of Art. 105-3 is not understandable has it will induce unnecessary in/out traffic at the Poling Centre.

In my opinion the VCC shall try to persuade the representative of the candidates to agree on certain time for their meeting, without necessity to have unaccredited person coming to the Poling Centre.

I wish to remind here that an organisation shall never have more that two observers at the same time in a Poling Centre³⁷.

³³Art. 103-2 EC.

³⁴Art. 103-6 EC.

³⁵Art. 2-17 & 83 EC.

³⁶Art. 105-3 EC.

³⁷Art. 18-2.

D. Observers³⁸

The last mentioned rule does also apply for domestic or international observers.

As for the other persons, excepted the voters, the observed shall be accredited.

Furthermore, like any person entering the Poling Centre, the observer shall be discrete, not carry any propaganda, flags, etc...

The observers shall not intervene or comment the proceeding of the vote, the VCC being the only authority at the Poling Centre.

Thus the observers shall not assist impaired voters, help counting ballot or any other task.

The VCC shall keep this in mind and ask the observer to stop or leave the Poling Centre.

Like all other accredited persons, the observers shall at all time carry their accreditation in a very visible way.

The observer shall not perturb the order of the Voting Centre with small talks or other activities.

E. The Voting³⁹

On October 12, 2003, voting will take place from 07h00 until 19h00⁴⁰.

The voting material shall have been received by the VCC no later than 12 hours before the opening of voting⁴¹, respectively 24 hours⁴². I wonder why we have these two different figures in the Electoral Code...

At 06h00 the VCC will meet to prepare the Poling Centre⁴³ and will perform the tasks foreseen in the Electoral Code⁴⁴.

I wish to highlight two particular tasks:

1. The setup shall assure the secrecy⁴⁵.

³⁸ Art. 18ff EC.

³⁹ Art. 97ff EC.

⁴⁰ Art. 8-1 EC.

⁴¹ Art. 93-2 EC.

⁴² Art. 48-3 EC.

⁴³ Art. 97 EC.

⁴⁴ Art. 97 EC.

⁴⁵ Art. 97-1 a.

This is an important issue. If the VCC sees that the provided voter's screens are too small or unsuitable to preserve the secrecy, it is the duty of the VCC to organise an alternative solution (like installing curtains).

The VCC shall make sure that no one can observe the voters through the windows. If necessary the windows shall be covered with posters or other material.

2. The VCC shall check if all material has been received⁴⁶.

It is very important that this check is made as soon as possible, this means as soon as the material is received (the day before the election).

Only an early check will allow opening the Voting Centre on time.

If something is missing, the VCC shall immediately order additional material.

While checking the material, the VCC shall not forget that there will be only one ballot box, excepted in Tirana where there will be two boxes⁴⁷.

The voting shall not start before 07h00⁴⁸.

Thus, the VCC members, the local observers and the representatives of the Candidates shall not vote before 07h00.

In order to open the Polling Centre at exactly 07h00, I recommend that the VCC members, the local observers and the representatives of the Candidates vote during the day, at a moment of low affluence.

Steps of voting

	Action	Reference in EC	Responsible
a)	Check the voters ID	Art. 100-1	Chairman of the VCC
b)	Strike the name of the voter on the voters list	Art. 100-2	Chairman of the VCC
c)	Sign the back of the ballot paper, have the voter sign the voters list	Art. 100-2 & 91-1	Chairman & secretary of the VCC
ç)	Stamp the back of the ballot paper	Art. 100-2	Secretary of the VCC
d)	Eventually record incident	Art. 100-3+4	Chairman of the VCC
dh)	Mark the left hand of the voter with ink	Art. 100-5	Member of the VCC
e	Issue secret vote and fold ballot paper	Art. 100-1	Voter
ë	Put vote in ballot box and leave	Art. 101-2	Voter/ Member of the VCC

I recommend that a member of the VCC stays at all time in front of the Polling Centre in order to manage the queue and to avoid too many voters at the same time at the desk of the Chairman⁴⁹.

⁴⁶Art. 97-1 EC.

⁴⁷Art. 90-5 EC.

⁴⁸Art. 98-1 EC.

⁴⁹Art. 105-2, 104 EC.

From time to time a member of the VCC shall check that no propaganda has been posted in the voting booth or around the Voting Centre and that a pen is available to the voters.

The Chairman has to make sure that the representatives of the Candidates and the observers, at all time, sit apart of the VCC members, stay quiet and do not influence or even talk with the voters or between themselves⁵⁰.

The Chairman shall make sure that the voters do vote alone, unless a helper is authorised by law.

In such a case, the Chairman shall insure that the helper is a voter and will help a **single** voter. The helper has to be registered in the official report book and he shall state that he will fill the ballot paper has instructed, that he will not influence the voter's choice, that he will not make public the vote and will not assist any other voter⁵¹.

For the special case mentioned in Art. 100-6 EC, the CEC has issued special instructions.

At 19h00 the Poling Centre will close⁵².

The voter already in the queue at 19h00 has the right to vote after 19h00⁵³.

After the last voter has voted, the Chairman shall make sure that only the authorised persons remains in the Poling Centre⁵⁴.

A point is not mentioned in the law: shall the ballot box slot be sealed from the closing time until time to open the ballot box has come?

After reconciliation, the VCC will proceed with the counting, according to the Electoral Law⁵⁵.

Conclusion

On Election Day, the VCC will be confronted with many different protagonists.

Using common sense shall in most of the cases lead to a satisfactory solution of an eventual issue.

The VCC has to remember that they play a key role for the success of the Elections.

⁵⁰Art. 19-2, 104 EC.

⁵¹Art. 103-3 EC.

⁵²Art. 108 EC.

⁵³Art. 8-3 EC.

⁵⁴Art. 108-2 EC.

⁵⁵Art. 109 EC.

They have to make sure that the main principles of the constitutions are respected:

- One man, one vote
- Secrecy
- Free and uninfluenced participation for all entitled voters, young or old, men or women

Keeping an orderly and organised Poling Centre shall help the VCC in keeping an overview of the situation and avoiding problems.

The VCC, like the other Electoral authorities shall plan, act and not only react.

I hope that this Conference did bring you some instruments to reach this goal.

Your participation today shows that you are concerned and involved in the proceeding and demonstrate your will to move ahead.

I wish you many successful Election Days!

ELECTORAL COMMISSIONS

by

Bernard Owen¹

Introduction

This paper is not a resume of what should be known about election commissions. It is meant to be read by those who know the Albanian electoral code. Other papers will deal with election day and electoral litigation. The aim is to consider how commissions are expected to work and what difficulties they will encounter.

Whatever the questions they deal with all laws have at one point or other to be interpreted. Whoever works on a law or sets up a committee will be surprised by unexpected « side effects » when the law is applied.

Electoral Commissions can make decisions in many ways. Voting is the most common way either by simple majority of the members that are present, majority of all members of the commission, voting on a qualified majority (for example, two-thirds majority). Another method is not to vote but to decide by consensus. Upon hearing this many will say “That’s impossible”. Well it is not. It works but in quite a different manner than when a vote takes place. The Chairman does not act in the same way when decisions are taken by consensus. He has to listen to everyone and at the right time has to say “It seems that this position is adopted”. I have attended meetings of commissions where it works that way and I have never seen a member walk out saying “I don’t agree”. I will give you orally some examples if you so wish.

Why do I start by giving examples of what is done worldwide and can come as a surprise to some of us ? What we have to aim at is the will to work together and to reach a common goal. Public opinion will look closely at the commissions and apart from a minority will be impressed by its efficiency and the authority it has over all who are involved in preparing and running elections. It is the way to have the election results accepted by all.

The authority of the CEC must not be challenged either by other commissions or any other authority except when the electoral code introduces the possibility of court action. This depends on the follow-up of all CEC decisions and the respect of timetables. It is the efficiency of the CEC that will insure the respect of the electoral code and the regulations that will follow.

The CEC is composed of seven members that have a seven-year mandate and are proposed by political parties and appointed by the President and elected by the National Assembly and the High Council of Justice (articles 20 –23).

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According to article 131 CEC regulations are divided into decisions and instructions. All normative acts have to follow a complicated procedure that will diminish its efficiency. The procedure comprises 3 votes :

- one on the principle;
- one article by article (or section); and
- one on the regulation as a whole.

This means that members have to be practical and flexible for agreements to be reached. Otherwise in case of dire necessity such procedures could lead to taking quick decisions in the form of administrative measures.

Furthermore, no definition is given as to what are decisions and instructions. We can deduce that decisions deal with the answer of an appeal coming from inferior commission while instructions are regulations given to lower commissions by the CEC on the way to apply and consider the law.

Electoral commissions are set up to apply the electoral code so as to reduce possible mistakes and fraud. Mistakes appear when the electoral code is complicated or not clear. Fraud is made possible when, there again, the electoral code is complicated by too many unnecessary checks. The most efficient check on fraud is bipartisan control over all operations.

Where does fraud take place ?

It is often heard that fraud takes place in the transmission of results and at the level of the CEC. I personally do not think this is the most important point. The reason is that the CEC acts are public and that computer programming can be checked by simulating the system on a number of polling stations and zone commission results. On the other hand, greater vulnerability is found in out of the way or distant polling stations where opposing parties cannot find volunteers to be members of polling station commissions and/or local pressure either for or against the authorities can render ineffective all that on paper seems perfect. This is of course not the case of polling station in the main cities where parties are present as well as observers and the media. We can deduce from this that the regularity of an election can be measured by the presence or not of members of opposing parties in the polling commissions or as party delegates if the law has commission of an administrative composition. The larger the presence of opposing parties the less chance of fraud happening. This does not mean that fraud is impossible but that it is made difficult.

Differences in the way the vote takes place between the city, where most of the economic activity takes place, and the countryside, can be a sign of fraud. It is usually said that "it is well known that this part of the country is for such a party". Unfortunately this does not only have an effect on the way citizens vote but there can be pressure on the commission members to act differently from what they should. There has been a recent case where everything was in place for the organization of perfect elections. The electoral code (printed under a three-colored cover) and other pertinent laws dealt with all the usual points. At the end of the voting the results showed a very different election depending on what part of the country they came from. One candidate obtained 20% of the vote in the main city, 36% of the vote from the zone next to it, and 90% of the votes in the three zones that were farther away. We were in those far away districts and saw that the party delegates had been refused either accreditation or were not admitted inside the polling stations.

The CEC and rules and regulations

The electoral code has to be applied and this entails the issuing of rules and regulations. In some countries commissions have issued more than 200 such regulations.

A number of difficulties occur in this respect :

- The electoral code has precedence over regulations.
- The electoral code is published and distributed or available well before the election.
- Regulations have to be known by everyone concerned (lower commissions).
- Regulations have to be distributed on time. Late regulations can be looked upon by lower commissions as of little use and can lead to different interpretations throughout the country.

The fact that the electoral code has precedence over regulations has consequences. The CEC has to be careful in working out the necessary regulations which can be the result of their own findings or remarks from lower commissions without contradicting the law. The members of the CEC have lawyers and they usually have a very legalistic approach to the law allowing themselves a narrow interpretation of it. This is said in comparison to decisions of a Supreme or Constitutional court.

- Regulations are published well after the electoral code is known. Some lower commissions know the electoral code and already consider their application in a different manner to the regulation that they have just received. Human nature likes habits and is not keen in changing its way of thinking. We have seen cases of local commissions not applying the law in the way they should according to regulations arguing that the law said differently even though it didn't.
- Regulations have to be known by all at the different levels of the commissions so that there has to be a clear way of communicating not only on the way regulations are sent to all concerned but lower commissions must have a very simple way of answering that they have received such regulation.
- Regulations have to be sent out in time : this is the reason why communications have to be efficient. There have been situations where regulations have been sent out on polling day. In that case, the radio is the only remedy.

The number of meetings of CEC and other long-standing commissions

Article 30 - 10 of the electoral code states that *"meetings of the CEC are open to the public..."* and article 38 - 4 has a similar rule for the ZEC. It is during these meetings that decisions that will govern the administrative tasks of the CEC and ZEC are taken as well as the findings and report of the work of the preceding commission made. In some countries the number of these public meetings have been limited to one or two from the announcement of the election to election day. This of course is insufficient. The chairman should take the initiative of holding fixed weekly meetings and more frequent ones as the election day approaches. Each meeting

will be reported by the media but it is advisable for the secretary to give a brief public announcement of what was decided. Confidence in the work of the commissions can only come from what is known about the work that is being accomplished.

Voter registration

The electoral code adopted a difficult and complicated way of organizing the voter register. It has adopted what is considered as compulsory registration because the voter list is compiled from "The fundamental registers of civil status" (article 51 - 12). We do not know the efficiency of this type of registration in long-lasting democracies but we do have figures for those democracies that have voluntary registration. In those countries figures of non-registered voters go from 10% and can reach 25% depending on the mobility of the population.

Article 53 - 1 and 2 involves the CEC not only in the supervision of the way local authorities do the registration but also in the implementation of the regulations. In regards to the October 2000 elections, it would seem that the attitude of the CEC has been liberal as to who could vote, either people registered in the civil register or the voter register.

In regards to the previous paragraph two points have to be considered :

1. CEC regulations : Article 55 is clear and introduces regulations to deal with practical issues, for example, how the transfer from civil status office to the National Registry of voters is made. There is undoubtedly a need for a regulation to coordinate a difficult exercise.

The electoral code also implies the issuing of the following CEC regulations: article 57 deals with changes in the voters' list requested to the LGEC by means of a form approved by the CEC. During the revision process every municipalities communicates every week with the National Register of voters. This needs precision as to the names and figures that are exchanged and the CEC should issue regulations on the subject. Article 61 encourages the CEC and municipalities to find other ways of making public the voters' lists. It goes without saying that it should be applied to all. In order to be applied to all it can only come from CEC regulations.

Regulations have to be practical in order to be able to implement simple procedures, for example : the change of domicile and the paperwork it involves (article 57 -2).

2. Supervision of the registration procedure: this is even more difficult as it means either having thorough reports from the ZEC or going throughout the country for random checks or both. The electoral code (article 54) goes even farther by stating that the National Registrar of voters is kept and administered by the CEC. This is an important task which calls for a regulation giving brief instructions as to the way the CEC member in charge has to follow the numerous steps of registration including where would his office be, when would he be available in his office, what information would he need from the different organizations or institutions with which he deals, what authority would he have as a member of the CEC or would he be obliged to refer to the chairman.

The electoral code itself in article 53 calls upon the CEC to regulate the administration of the voters' list. Beyond this general statement many specific cases are given.

According to article 57 of the electoral code the LGECs review preliminary lists in conformity with acts of the CEC. As far as the military, article 63 states that they are added to the list of voters by the ZEC but are struck off the list of their domicile by procedures designated by the CEC. Lastly, the CEC has to issue a regulation so that students are not registered on more than one voters' list (article 64).

After certification of the lists the CEC sends a copy to the ZECS, which publishes them in the local media and announce them in public places in their zone according to instructions received from the CEC. Does that mean that the CEC issues regulation giving definitions of what are local media (how many copies, number of media) ? The CEC will know from previous experience how far regulation must go.

Difficulties arise from the deadlines set by the electoral code. The whole registration process occupies a time-frame that goes from 6 months to 10 days before election day. This is when everyone is involved in the election process and is the most busy and overloaded time period.

The work that preceded the drafting of the electoral code was very clear on this issue. We stressed the point that the voter register should be permanent and be revised yearly. This means regularly and at fixed times so as to give local authorities and the CEC regular and clear working habits at a time that is not a busy election period. Fixing the dates for the revision of the register to the upcoming election does not work if the assembly is dissolved as the time-frames do not allow it.

The wording of the electoral code does not make a choice between a register made from voters in alphabetical order or their domicile. This could lead to confusion and could be clarified by CEC regulations.

We were surprised on arrival to find that the law had been interpreted liberally. We were also glad to find that the CEC had organized what appeared to be an efficient national voter register beginning with the collection of data from local civil registries and bringing them to Tirana. This was started over two years ago. In Tirana there was a large room with fifty computers and three shifts a day work, which centralized the data. The whole voter register was done in alphabetical order starting with the surname, name of father, first name, and date of birth.

Furthermore, the polling stations were numbered rationally from one to over three thousand. A month and a half before the election a free number had been set up 08 00 0811 that was available to all citizens over the country. The voter could call this phone number and request the polling station number where he or she had to vote to which one of the ten receptionists with computerized information could answer, for example Tirana 7, N° 18 (the national number.) I watched one of the women at work at ten past nine she had already 10 phone calls. Since the beginning of this interesting experience there have been 35,000 phone received. This is only meant as an added source of information and does not replace the posting of the provisional register.

It would appear that once the elections are over the CEC will not be fully responsible for the organization of the voter register. We have to wait to see the results of those elections but if there is no major problem regarding the voter register it would be a pity to change what we have seen at work. The only change we would then encourage would be the yearly upkeep of the list (preliminary list, public display, final list) with which we have dealt in another part of our commentaries.

The Boundary Commission

The Boundary Commission is of mixed composition. 4 technicians, 4 political members and the Secretary of the CEC as chairman. It meets every 5 years beginning January 12, 2003. It issues recommendations to the Assembly after the report has been accepted by the CEC (a 5-member vote). Finally, the CEC delivers instructions to the ZEC as to the final boundaries (article 35).

The only difficulty which the CEC might find is the stringent $\pm 5\%$ difference of voter per zone in comparison to the national average. Article 73 gives the usual criteria that the zone's boundaries must respect, including geographic barriers, demographic or historical developments, and economic links. The electoral code goes into so many details that the $\pm 5\%$ difference will be difficult to respect. When presenting its report to the Assembly the CEC should observe a very liberal attitude regarding these questions.

A positive attitude of the electoral code is to be mentioned. The boundaries are based on figures of voters that participated in the last election rather than the population or registered voters, which are not as accurate.

Electoral Campaign Monitoring

According to article 142 the Media Monitoring Board is set up 10 days before the start of the electoral campaign (40 days), does not have more than 7 members and "three months prior to election day the CEC and the National Council of Radio-Television sign a memorandum...for the purposes of monitoring" (article 142 - 1). This means the rules of the Monitoring Board.

The CEC has examples of how private firms in other countries work so that setting up rules is not too difficult. Complications lie in the daily report, which not only comes in at the national level but also from local monitors at the ZEC or LGEC level.

The sanctions decided by the CEC are clearly stated in the electoral code (article 137 - 67 for public television and radio and article 140 - 2 for private counterparts). Media electoral campaign is a sensitive matter and it would preferable for the sanctions to be decided in public meetings, either the usual weekly meetings or special meetings.

Registration of Zone Candidates

Articles 78 – 79 of the electoral code are clear as to the procedure that the ZEC has to follow. The proposed candidate submits the required documents 32 days before polling day. The ZEC has 2 days to verify the accuracy of the document. The ZEC then gives the opportunity to the proposed candidate to correct any discrepancies. The prospective candidate has 2 days thereafter (the 28th day before the election) to submit the corrected document.

The electoral code does not say when the ZEC has to transmit its remarks concerning the registration of the candidate. We can safely assume that it is within the 2 days but will the prospective candidate receive the remarks in time to correct his documents ? The CEC should give instructions to the ZEC to be liberal in the way they consider the time given to the prospective candidate. The ZEC could take into account the time it took for the candidate to receive the documents for correction or the time taken to correct the mistake.

Registration of parties – Finance

Article 145, which makes reference to law 8580 of 17-2-2000 on political parties provides clear indications as to the state financing of parties competing in elections. The difficulties will appear when elected members have moved from one party to another or have registered with a new party because the difference can be 10 to 30% of the funds distributed. CEC regulations could take into account what happened during preceding registration of parties and issue regulations.

Keeping Order at the Voting Center

In case of disorder the voting center commission is given the right to call in the security, which is usually a decision of the chairman (article 29). It is commonly recognized that in such cases one man has to take the initiative either the chairman or the vice chairman. In the electoral code, not only does the commission has to ask, but the request has to be in written form and contain a short description of the reasons and circumstances. It is not logical to expect the commission to sit down and write a request while someone might be setting fire to the center. There is no way of going against the electoral code but let us hope that common sense prevails.

How to vote

The voter marks in "the appropriate place" (article 92 - 4) with an "x", "+" or another mark that clearly indicates the choice of the voter.

The equivalent term of "in the appropriate place" written into the electoral code of an old democracy once lead to a large-scale fraud. It is unlikely that there would be such a fraud in Albania but Voting Commissions should be aware that the mark which goes outside or touches the limits of "the appropriate place" is valid.

Final and Provisional Results

The CEC can regulate the way provisional results are published or not. On election evening and the two days following the proclamation of the provisional results these can evolve as time goes on. This is due to the fact that city results come in first and can be different to results coming from the provinces, which come later because of communication systems. This leads to a dilemma for the CEC : should the television show the provisional results as they start coming in together with commentaries or should they wait until the following evening or later ? The two ways have advantages and inconveniences. Partial results can lead part of the population to think that they have won while the following results may show a different trend. This can lead to a feeling of being deceived and even to uprisings based on the impression of results having been rigged by the CEC when the first results where considered as negative or positive. A long wait for the first round of partial results, usually a couple of days, can be perceived by public opinion as time used to tamper with the results.

What should be done ?

Article 29 indicates the time span for the CEC to publish the final results of the elections. “ *The declaration is made no later than 3 days from the date when the Central Elections Commission receives all the official data from the election commissions and the court decisions...* ” It is a good point that the CEC should publish final results only after “*official data and court decisions*”. The reason for this is that some countries that had set a fixed time limit for a Constitutional court to give the official results did not take into account the results of all the appeals and hundreds of cases were not considered once the official results were known.. However, the CEC should have regulations regarding partial results and the consequences that their progressive publication by the media entails. This is an essential part of communication strategy and educational activity of the Central Electoral Commission.

ELECTORAL LITIGATION IN THE AMENDED ALBANIAN ELECTORAL CODE¹

by

Eugenio Polizzi²

Foreword

The present notes are based on an English informal translation of the reviewed Albanian Electoral Code provided by the Venice Commission's secretariat on August 8 2003³.

Introduction

The complaints system at first designed by the Electoral Code of May 8 2000⁴, in the 11th part, at artt. 140 and following, for complaints against election commissions decisions, has been deeply renovated after a long and fruitful political debate, an ad hoc Bipartisan Parliamentary Committee's work and round tables with the assistance of the International Community.

The new 12th part, under the common heading of Complaints and appeals, groups two chapters: the first one dealing with appeals of the Election Commissions' decisions administratively (from Art. 146 to 161); the second chapter, dealing with appeals "on the results of elections, judicially" (from Art. 162 to 174).

It has to be verified if the title of the second chapter, referring to the judicial appeal of the decisions *on the results of elections*, might be an inaccuracy or actually corresponds to the will of the law.

At a first scrutiny, the complaints system has been amended according to a widespread feeling that the judicial review as envisaged by the first code, should be limited, and the system be amended in the sense that the administrative chain of complaint be followed up to the top, that is the CEC; only afterwards, the case decided by the CEC could be reviewed by a Court.

Moreover, in the course of the Round Table of year 2002, both Constitutional Court members and High Court representatives had stressed their preference for a complaint system that would keep both institutions out of the electoral process, contending that the respective roles are assigned by the Constitution, and the electoral litigation is not among them. The general conclusion was that neither the Constitutional Court nor the High Court should be involved in the election dispute. The recourse to the Judiciary should be addressed to the Appellate Court of Tirana, reinforced by judges from other appellate courts in the election period.

¹As approved by the law n. 9087 on 19.6.2003.

²Barrister, Milan, Italy.

³Some remarks in the report have been found to stem from translation's inaccuracies: when the case be, it will be specified in the following footnotes.

⁴Amended first time by law May 3, 2001.

It can be said that the new provisions later approved by the Parliament and now under scrutiny, are fully consistent with those conclusions.

The appeal system is therefore designed in a way that every electoral subject has the right to appeal decisions of Election commissions to the CEC (except LGEC decisions provided by Art. 58 [57, p 6?]⁵ about voters lists, that are appealed to district courts). The CEC decisions, in turn, may be appealed to the Election Panel of the Court of Appeal of Tirana.

In case of no timely action by the CEC, the electoral subject will be allowed to address its complaint directly to the Election Panel of the Court of Appeal of Tirana.

These notes have been drafted when their author did not have any knowledge of the first implementations of the new provisions by the CEC and the Albanian Courts. Some comments may therefore appear of little use; others, outline issues that have already been solved by the practice of the Albanian authorities. If this is the case, accept my apologies.

I. ADMINISTRATIVE APPEAL

A. Subjects of an appeal

Art. 146 n.1 clarifies that the right of administrative appeal is granted to every electoral subject, as defined by the code at Art. 2 n. 25⁵; according to this, “Electoral subjects are political parties, coalitions registered with the CEC, their candidates, or independent candidates registered with a ZEC, or LGEC”.

A first question strikes the reader and expects to be answered: are electoral subjects the only ones that can file a complaint against election commission decisions? what, if an election commission decision should violate an electoral right of a subject that were not included in the meaning of Art. 2 n. 25: a simple voter; a nominated but not yet registered, independent candidate; an NGO wishing to observe the elections whose application for accreditation had been rejected? would such a person/party be destitute of any redress against the electoral commission decision?

As to the last example, an NGO wishing to observe the elections, Art. 18 n.4 of the Code has a direct answer: *A complaint against the refusal to grant the accreditation can be filed according to the procedures contemplated in this Code.*

So we can draw a first answer to the above question : it is not only electoral subjects that have the right to file complaints against election commission decisions.

A second question linked to the one we are trying to give an answer is: are political parties electoral subjects as such, or only when they are registered?

Art. 15 n. 1 of the Code seems to suggest that political parties become electoral subjects as such only after the registration with the CEC.

The problem of the refusal of registration by the CEC is of course of great relevance.

⁵Such is the exact number, although both in the available English translation and in the Albanian text published by the OSCE, the relevant paragraph bears the number 26 of Art. 2.

But for CEC decisions, the judicial redress should find no obstacle in the letter of the code⁶ (see *infra*), a different issue is when the decision were taken by a lower commission. But the answer should still be the same: if an election commission decision should violate an electoral right of a subject that were not included in the meaning of Art. 2 n. 25, then the way to the judicial redress should not find any obstacle and be granted on the basis of the general principles of the rule of law and constitutional provision of Art. 42 n.2⁷.

It could be disputed, in such a case, if the competency should be of the district court as for general rules of the civil procedure code, or the electoral college by the appellate court of Tirana. Probably the latter would be better qualified, since its competency is established specifically for the electoral litigation.

B. Objects of a complaint/ appeal

It is clear that the Code provides only for redress against ZEC, LGEC and CEC decisions. As to ZEC and LGEC (that we shall hence refer to in this paper, as “DC” district commissions) Art. 146 n.1 provides that DC decisions may be appealed to the CEC within two days from the date the decision was taken (with the exception that LGEC decisions about voters lists, are appealed to district courts).

It is therefore a general rule that refers to any decision by district commissions. If we look at Art. 37 that sets the “duties of a ZEC” and Art. 43 about LGEC, we can see how most of those duties are implemented through decisions: and each decision can be challenged to the CEC. Of course, also the decision to make a recount (Art. 111 n.2) is subject to appeal.

However, Art. 115 provides that: *Decisions taken during a recount of ballots are final, while the results announced can be appealed.*

As to the **CEC decisions**, these can be appealed to the Court of Appeal of Tirana (see *infra*).

No mention is made in the code of **VCC decisions** as subjects of complaints or appeal. And yet, it is enough to read Art. 47 of the Code, to realise that also VCC take decisions, and they should be possible object of complaint or appeal. A specific VCC decision is, according to the author of this report, also the “tabulation of results of the voting centre” provided by Art. 109⁸.

⁶*The Electoral College of the Appellate Court of Tirana has indeed already overruled a CEC decision not to register a political party.*

⁷*Art. 42 n.2 : Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.*

⁸*The same rule provided by Art. 115 should apply for any decision taken during the ordinary tabulation of the VCC protocols, according to Art. 110: only the voting center results would be appealed.*

However, already in the course of the 2002 round table, the possibility of appeals against VC decisions had been an issue: the denial of VCC protocols as being a “decisions” subject to formal complaint being upheld by many Albanian experts and tackled in the CEC chairman notes. It is a stand, according to the author of this report, that legally has no ground: it is enough to read Art. 47 and Art. 109 of the Code, to realise that also VCCs take decisions, and they should be possible object of complaint or appeal.

However, such a stand probably addresses, in a different way⁹ a largely shared concern about VCC performances, their reliability, and the loyalty of the VCC members to the parties they officially represent.

The understanding by the author of this report of the system set by the Code on the issue, is that VCC decisions are generally reflected in the district commission decisions and the latter are subject to complaint to the CEC: no need to appeal the VCC decision.

The conclusion is not fully satisfactory.

If the VCC protocol is not challenged as such: (the decision of the VCC is not contested because the parties are satisfied with the results that appear in the copies of the protocol issued to their observers) and the problem arises, instead, when the results from VCCs are tabulated by the DC and it eventually appears that the results from VC n. x are different from those issued to the parties from that VCC; in such a case no question that the plaintiff will file a complaint against the DC tabulation, on the grounds that VC x results are different from those issued to the plaintiff himself.

Therefore, the complaint will be filed with the CEC, according to Art. 146. What is complained about, in this case, is a tampering with VCC’s protocols, and the subject of the complaint is the DC tabulation where such alleged tampering is shown.

The situation is different in the following scenario: an electoral subject complains that the results recorded in a VCC protocol are not correct. This may happen for a number of different reasons: the ballot papers counting was not accurate and the VC results are disputed; ballot papers have been sorted in different lots to where they belong; decisions taken according to Art. 109 are contested, and so on. In all such cases, the VCC protocol is challenged.

The question that remains unresolved is: how would it be appealed according to the existing rules ?

An answer can be found in Art. 37 n.6¹⁰: the ZEC “*examines the complaints of electoral subjects concerning the conduct of elections in the zone, makes decisions on issues of its own competence and forwards to other organs issues of their own competency.*”

It appears in fact that DCs may examine complaints and take decisions on “issues of their competence”. Such decisions, taken over complaints concerning the conduct of elections, will be among the decisions that might be appealed to the CEC.

⁹Such concern has led many participants to the RT to propose that the ballot paper counting be implemented at district level, under the supervision of the ZEC/LGEC.

¹⁰The same would of course apply to LGECs, per Art. 43.

As to a challenged protocol, the district commission decision that incorporates the VC results, will be appealed to the CEC according to Art. 146, thus shifting to the CEC the appellate venue of issues that could have been solved directly by the district commission (opening indeed the way to a second appeal to the CEC). Such indeed seems to be the will of the Code approved by the Parliament: to skip the first degree appeal venue, and to establish the CEC as the only administrative appellate body.

Hopefully, such a system will not undermine the ability of any interested party to seek redress in a lawful manner.

C. The administrative appeal procedure

a. Term for the appeal

Art. 146 provides that DC decisions may be appealed to the CEC “within two days from the date the decision was taken”; Art. 148 provides that the appeal is deposited “within 48 hours of the date the decision was announced”. Unless there were a translation problem, the two provisions appear quite different: not only because a computation by days or by hours can lead to quite different consequences; but also because the date of the decision taking (being signed by all relevant commission members) may in principle be quite different from the date of its announcement. In practice, since DC meetings are public (Art.38), the decision taking and its announcement should be the same. In case of Art. 110 where the presence of the public is limited, we have seen that only the declaration of results would be subject to appeal, hence the term would be counted from its announcement, while interlocutory decisions, taken in the course of the tabulation would not be appealed as such. In case of actual difference between the decision taking and its announcement the latter should be the relevant term.

b. Term for the preliminary examination

The procedure for the registration and preliminary examination of the appeals is commendable. A member of the CEC designated by lottery makes a preliminary verification of the admissibility of the appeal and reports to the CEC within 24 hours; in the following 24 hours, at a public hearing the CEC takes a decision to reject the complaint or to accept it. In the latter case, a thorough examination will follow in plenary session.

c. Composition of CEC in the appellate procedure

Art. 151 provides that CEC takes an interlocutory decision to accept or reject the complaint for the reasons of Art. 150 (competency of the CEC, legal title of the plaintiff, timeliness of the complaint) at a public hearing. For the purpose of such a decision, the general rules of Art. 30 n.4 should apply: *Meetings of the CEC are valid when attended from no less than four CEC members.* Decisions are taken by the majority of members present.

If the decision were related to complaints on the declaration of the results (by the DC), a qualified majority would be required and decisions would be approved when no less than five members vote in favour (Art. 30 n.5).

In case the complaint were accepted at the preliminary verification, as to the requirements of Art. 150, the actual examination of the case would be held “in plenary session” as per Art. 155.

Unfortunately, the term “plenary session” is found in the Code only in Art. 151 and 155. It is hard for the interpreter to explain its meaning¹¹. Assuming, of course, that the problem were not related to a translation problem, or internal rules of the CEC that are unknown to the author had provided for plenary sessions and their definition, the plenary session is normally used as opposite to a smaller, specialised committee that is often representative of the whole body. But the code does not provide for the Election commissions to work in committees vested with full powers to take decisions. Art. 151 would suggest that the plenary session be a session somehow more qualified or larger than the one that takes the interlocutory decision. The latter follows the ordinary rules of Art. 30, as we have seen: meetings of the CEC are valid when attended from no less than four CEC members; decisions are taken by the majority of members present. A more qualified and larger session seems to be only the one when a majority of 5 votes in favor is requested (Art. 30 n.5). However, such a majority (not called a plenary session) is provided only for a number of issues and the two provisions could be in contrast if “plenary session” were meant as the qualified majority of Art. 30 n.5.

In theory, plenary session could also mean a session where all members are present. But such a requirement, not provided for in other parts of the Code, could be too stringent and make the complaint system impossible to work, leaving it to just one member of the CEC, the option of boycotting the meeting and opening the way to the judicial review per Art. 146 n.2.

d. The administrative hearing before the plenary session of the CEC

Before the session begins, the administration of the CEC summons the parties (Art. 154 n.2). Since the plenary session has been publicly announced as per Art. 151, the summoning cannot be interpreted in the sense of notification, for which there would be no time nor legal deadlines. The third paragraph provides that “if one or both parties do not appear..” and so it suggests that only two parties may be interested in the case, (although this is not necessarily the case). Although the CEC may be bound to summoning only two parties, it should be accepted that any other party that deems to have an interest in the case, should be entitled to take part in the hearing, fully vested with all necessary powers.

Parties are entitled to prove the facts on which they base their requests and claims, submitting for examination only that evidence which is essential and related to the object of the adjudication (Art. 156). The rule is so clear and so general that there should be no doubt about the possibility and the right of parties to show the evidence of their claims. As long as it is documentation that we are talking about, no problem. What about a testimony? Will parties be allowed to prove their claims through testimony, that is eyewitnesses? The issue is very delicate and to this moment is open to the discussion. Different options could be envisaged. One option is that Art. 157 limits the examination to the “electoral documentation”; another that a testimony could be accepted as long as it does not contradict an electoral document. In this last case, when it is alleged that a document has been forged, the whole issue should be addressed to the judiciary.

In any case, the CEC seems to have very large powers: it will be up to this body to act in a consistent way, and to issue sub statutory acts meant to clarify its own competencies and rules of procedures consistent with the law.

¹¹The problem does not exist, indeed, since the term “plenary session” has been found to be only a translation mishap. The Albanian text reads “public session”.

e. The recount of ballots

One of the most sensitive issues, the recount of ballots, has been addressed by the new code, and once again the competence has been taken away from the Judiciary and held out to the election commissions.

The code still provides a ballot recount procedure as an administrative process in cases of close results between candidates (Art. 111). The matter is not the object of this report.

But the CEC has been given the authority, during the adjudication of an electoral appeal, to order a re-evaluation of contested ballots (Art. 157). While the recount per Art. 111 is strictly limited to very stringent criteria, the provision of Art. 157 is extremely broad, consenting the re-evaluation whenever the CEC should “consider it necessary”. No procedure is established for the re-evaluation and it will be appropriate that the CEC issue a sub statutory act, clarifying who, when, how and where such a re-evaluation should take place. Procedures provided by Art. 113 for the recount by district commissions should be upheld as much as possible.

No limit is set by the law for the re-evaluation of the ballots: one voting centre, the electoral unit, the whole country? It is clear that the 3 days term for the final decision could be too short in case of a large recount. But the need for a large re-evaluation should be appreciated as a possible ground for an invalidation according to Art. 117 and 161.

D. About election invalidation as per Art. 117 electoral code

Rules about invalidation of elections have been amended, but while the possibility to invalidate the results of one voting centre seems now excluded by par.1 (where the VC provision has been deleted¹²), it still remains in the last paragraph: is it a mistake¹³?

The only body that can invalidate elections, in any case, is the CEC. It will decide after consultations with the relevant ZEC or LGEC. The request for such a declaration can come from anyone (argument from the last paragraph of Art. 117); the interested election commission may propose to invalidate the election in its own electoral unit; or the CEC may act of its own initiative, because of the knowledge that it has of the violations, or disasters or suspension of the voting procedure.

Invalidation is declared only when the violations of law (or natural disaster) are relevant to affect the final result of the election in terms of allocation of seats in the assembly or local councils, or the mayoral election or the result of referendum.

The violations of law that can lead to the invalidation are all violations, as long as they be of such a size to alter the results in the territorial unit.

Of course, no violation will lead to the invalidation if it can be redressed: with a recount for instance. But if no recount is possible, because ballot papers have been lost, the box is open and envelopes have been tampered with, then the invalidity of the election in the relevant election unit would be the necessary consequence.

¹²The remark stems from a translation inaccuracy, because the Albanian text still provides also in the first paragraph for invalidation of a voting centre's results.

¹³The acute remark of Mr. Celibashi, under the former 113, was that it makes sense to re run the elections in the whole election unit, once the invalid partial results would affect the overall result, rather than saving the VC results where elections have been run properly, and run only in limited voting centres (not so few, though, to be irrelevant); the pressure on some VC could be too strong.

II. THE JUDICIAL APPEAL

A. Subjects of the judicial appeal

While Art. 146 n.1 clarifies that the right of administrative appeal is granted to every electoral subject, as we have seen above, no similar norm is set in chapter two, for the judicial appeal. The omission is not trivial, because the relationship between the two processes – the administrative and the judicial one- is not at all clear in the code. The judicial appeal is it an extension of the administrative one? A further step of the same appeal, or is it a completely distinct process? The title of Chapter II does not help to answer to the question, in so far as it refers to “decisions on the results of elections”, while Art. 162 n.1 provides that an appeal can be taken against “the decisions of the CEC”, that is, any decision of the CEC.

In the silence of the law, it could appear that whenever the decision that is appealed was indeed the ruling over an administrative appeal, in that case, only the interested electoral subject can further complain to the Court. On the contrary, if the filed decision were an original CEC decision, taken within its own authority, in such case any person (legal or physical) whose electoral rights had been violated by the decision, will be entitled to appeal the decision to the Court (e.g. an organisation or a citizen who were not authorised as an observer). Consistently with such a conclusion, Art. 117 provides that “*Every person, who is interested*, may appeal against the CEC decision on the invalidity of the elections in certain voting centres, election units, or in the whole territory of the Republic with the relevant court in accordance with this Code, not later than 10 days after the declaration of the decision by the CEC.”

B. Objects of the judicial appeal

As we mentioned earlier, the heading of the Chapter II refers to “Decisions on the Results of Elections”. However, Art. 162 provides the judicial review not to decisions on the results of elections (that could also be by District Commissions), but to “decisions of the CEC”. On the contrary, Art. 172 again refers to “an appeal about the results of the elections”. Apparently there is a contrast of difficult solution: ZEC/LGEC decisions on results of elections, are to be appealed to the Court rather than to the CEC? Moreover, to limit the redress to the only CEC decisions on results could curb the basic rights to redress, and would run counter the Constitutional provisions.

The way out of this unhappy wording is perhaps that DC decisions on results are first appealed to the CEC according to the general rule of Art. 146; and all CEC decisions (of any kind) that can affect the results of elections, are subject of judicial appeal.

It has to be held, therefore, that all decisions by the CEC are subject to judicial appeal, as long as they might have had an influence on the results. Let’s take the case of a list of candidates whose registration has been rejected by the CEC as per Art. 85 or a political party per Art. 76. The decision is not as such “on the results of elections”, but it can certainly weigh on the results of elections. The decision should be admitted to the judicial review.

According to Art. 31, CEC issues either “decisions” or “instructions”. There is no definition of the two terms in the code. It is to be seen whether only “decisions” can be appealed, and “instructions” are not; or the term decision has been used in Art. 162 in a non technical way to mean any kind of decision (that were not, of course, an internal, preparatory act): for instance, the appointment or dismissal of ZEC members (Art. 29.8).

If we think that some instructions by the CEC could, in theory, be illegitimate and run against the law, we could well imagine that a judicial redress should be available for electoral subjects, in order to avoid that a number of operations be implemented, illegally, on the basis of such instructions. The alternative option would be to wait for the implementing decisions and to file a complaint against them: for the sake of economy of the electoral process, I would propose that instructions might be appealed as such to the Court, falling within the larger meaning of “decisions”. Especially because instructions are very likely to be able to affect the results of elections.

C. The Judicial appeal of DC decisions

In case of no timely action by the CEC following a complaint filed by an electoral subject, the electoral subject will be allowed to address its complaint directly to the Election Panel of the Court of Appeal of Tirana (146 n.2). In such a case, the Electoral college of the Court will have the same powers as the CEC (reviews the merits of the case).

What will be the procedure in such cases?

D. The hearing before the Electoral College of the Court of Appeals

The device of establishing a special, temporary electoral college, formed by judges chosen by lottery at a National level by the High Council of Justices, is a very interesting feature of the new, amended code.

Probably some details of the working modalities are still to be refined, and the High Council of Justices might be called upon to issue some necessary instructions in order to ensure the automatic and transparent assignment of cases to the 5 judges panel, out of the 8 judges college. In fact, the provision that *the appeals shall be distributed among the judges according to the procedures of this Code* (Art. 171 n.2) does not seem to have been implemented and the relevant procedures are missing (at least in the available translation). Of course, if 3 judges were successfully challenged, no question about the remaining five to form the panel. But, in case there were no challenges or more than five judges were unchallenged, how are the appeals to be distributed? Moreover, each panel will require a chair, that is not provided for, by the code. And yet, a rule should be set: the chair will be given to the most senior? Or to the magistrate with most experience; or to the magistrate who has chaired the court where he/she belongs? Probably the electoral college has already an answer for such questions, to which I am most interested.

The working services (secretariat) are to be provided by the Appellate Court of Tirana.

The chairman of the Appellate Court of Tirana retains a specific power, that is to order the electoral subjects and interested parties to be notified. The norm does not specify what electoral subjects are to be notified: under “interested parties”, we can understand the plaintiff, as well as the party that might have an opposite interest to the plaintiff. By requesting the notification of “electoral subjects”, the norm could be well interpreted in the sense that all electoral subjects should be notified, since all of them would have an interest in the discussion about the case, impinging on the results of elections.

In examining the complaint, the Electoral College applies the rules contemplated in the Code of Civil Procedure in the Chapter on the adjudication of administrative disputes. The parties in the process of examination of an appeal about the results of the elections have the rights contemplated in the Code of Civil Procedure (Art. 171 and 172). The assessment of such rules is out of the scope of the present notes.

III. THE COMPLAINT PROCESS RELATED TO THE VOTERS' LISTS

An appeal against the LGEC decision taken about the voters' list can be filed within 48 hours from its announcement, in the court of judicial district where is located the LGEC. The court judges with a judicial panel composed of three judges and makes a decision within two days. The decision of the district court is final (Art.57).

Issues related to voters' list are the only one that are treated in a different way, and the competency for appeals is attributed to district courts. The exception is sound because of the specificity of the issue, and its preparatory nature of the elections themselves.

Summary of issues open to discussions:

- the title of the second chapter, referring to the judicial appeal of the decisions *on the results of elections*, is it an inaccuracy or actually corresponds to the will of the law?
- what if an election commission decision should violate an electoral right of a subject that were not included in the meaning of Art. 2 n. 26?
- Political parties, are they electoral subjects as such, or only after registration?
- VCC decisions, are they subject to appeal?
- What is a plenary session of the CEC?
- Are there limits to the evidence that can be brought to the CEC in the administrative appeal ?
- Are DC decisions on results of elections to be appealed to the CEC or to Court?
- CEC instructions, are they subject to judicial appeal?
- How are appeals going to be distributed among the judges of the Electoral College?
- Who is the chair of the electoral panel?

THE COUNT AND THE PROCLAMATION OF RESULTS

by

Kåre Vollan¹

1. Introduction

This session will discuss the count and the proclamation of results. The provisions of the Election Law as revised on 19 June 2003 (hereinafter called the Law) will be discussed. In some instances we will propose that further instructions are issued to give a tighter procedure for the count. Such instructions may already be in place, but they have not been available to the author. Our comments are based upon generally accepted principles for good election. We will also assess former practice and the main risks of the processes.

The following documents are useful for the definition of international criteria for good elections:

1. Code of good practice in electoral matters. Guidelines and explanatory report, adopted by the Venice Commission at its 52nd session, hereinafter called the *Guidelines*.
2. Guidelines for Reviewing a Legal Framework for Elections. OSCE/ODIHR March 2001.
3. The CSCE Copenhagen Document of 1990.
4. OSCE/ODIHR: Existing Commitments for Democratic Elections in OSCE participating states on 30 June 2003.

The main principles of all these documents are the requirement for a *clear* and *transparent* procedure for the count and the publication of results.

2. The Main Challenges of the Count and the publication of results

The general fear during the count is that fraud can happen. What does it help if the voters' registers are perfect and the polling is calm and orderly, if the figures are being manipulated later? This fear is being expressed during the count in the polling station, the aggregation of the results and during the publication of the same. Unfortunately it has happened that the fear has been justified, but doubt may be cast even on correct processes. This is due to lack of transparency. It has not been possible to verify that the process has been carried through without any kind of manipulation or inaccuracies.

The aggregation of results is also often questioned. Sometimes the transport of ballot material from the polling stations to the next level of commissions (such as the Local Government Election Commission - LGEC) and sometimes the computer software for calculating the results is challenged. Very often the questions asked and measures taken are not the most adequate for controlling the process.

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The key condition for securing the count and the aggregation of results is *transparency*. A transparent process will both secure the count against fraud and irregularities, and it will create the general confidence in the process.

Transparency means a well-defined and predictable process, involvement of all parties, possibilities for verifying the process, timely publication of results and partial results, and a fair possibility for the public or individuals to challenge the results.

In Section 3 we will describe the processes as they are outlined in the law, and in Section 4 we will discuss some of the main issues related to the processes.

3. The Process according to the Election Law

3.1 Count

The counting of the ballots is done in the polling station. The persons who are allowed to follow the count are the members of the polling station commissions, one accredited representative of each candidate, one accredited representative of each registered party participating in the election which has not nominated a candidate for deputy of mayor and accredited observers (Article 108).

The process of the count should be described in detail, with sufficient checks and balances for each step. The count is, according to Article 109, proceeding as follows:

- a. the number of persons having voted according to the lists of voters is counted and recorded.
- b. the number of unused ballots is determined according to the stubs.
- c. the number of spoiled ballots is determined.

This is done before opening the ballot box. The number of voters having voted (a) is recorded in the protocol. This is important, so that the figure can be matched against the number of ballots found in the ballot box later. The number of ballots found in the box should not be used to adjust the first figure.

Then the ballot box is opened. The ballots are all checked for their validity. The ballot paper is invalid if:

- the ballot paper does not have the official size, colour and format
- the ballots bears signs which may disclose the identity of the voter
- the ballots include expressions in favour or against electoral subjects

The vote is invalid if:

- there is a vote for more than one candidate,
- the vote is blank,
- the voter's preference is not clear,
- the vote is given to someone who is not on the ballot.

The third bullet above indicates that if the intention of the voter is clear, the ballot should be deemed valid.

If there are objections to the conclusions of the validity of a ballot paper or a vote, this is recorded on the back of the ballot and in the protocol. The contested ballots are kept in a separate envelope.

The ballots are counted per candidate or party/coalition. Now the chairman fills in the tabulation of the protocol and all the members sign the protocol. Any objections are also recorded in the minutes.

The valid and invalid ballot papers shall be put in different envelopes.

The Law does not provide for a clear requirement for the reconciliation of the results, see Section 4.7.

The protocol is worked out in an original signed by all members of the commission. Any disagreements are recorded and decisions are taken by majority votes. Members or representatives may add their comments. The original is packed together with the ballot material in the ballot box, one copy is placed in an envelope outside of the ballot box and one is posted at the polling station. In addition all members of the commission, representatives and observers should receive a copy.

The ballot box is sealed and the chairman, the deputy chairman and the secretary deliver the ballot box and the envelope with the results to the LGEC within 24 hours upon the close of the polls.

3.2 The tabulation at LGEC level

No later than two days after the Election Day, the LGEC performs the following in the presence of the members of the LGEC, representatives of electoral subjects and observers, according to Article 110:

The chairman ensures that all ballot boxes are encountered for.

The ballot boxes are opened and the original tabulations removed. After having let the members of the LGEC examine the boxes, they are again sealed.

The results for the municipality are now tabulated, and a protocol is drawn up. Any disagreements are recorded and decisions are taken by majority votes. All the members of the LGEC sign the protocol. All those present may receive a copy of the tabulation, and it is posted at the site of the LGEC for public review.

At this point in time, there is not an explicit mention of reconciliation of results.

3.3 Re-count

For the election of a person (deputy in single member constituencies or a mayor) an interested subject of the election can request a recount if the difference between the winner and the next is less than the number of votes declared invalid during the count or 150 votes. This article (Article 111) underlines the danger of invalidating votes during the count.

The recount is performed by the LGEC according to the procedure of Article 112.

Present are members of the LGEC, one representative of the CEC and representatives of political subjects (observers are not mentioned, but believed to be included as well).

The process of counting follows closely the one of the polling station. The polling stations of the Local Government area is done one by one, and the recount counts if any discrepancy from the original result. Any disagreements are recorded and decisions are taken by majority votes. All members sign the tabulation. All those present may receive a copy of the tabulation.

3.4 Publication

The CEC announces the official results within three day of receiving material. Before that the results have been made available at polling station level as well as at LGEC level. It is not said explicitly, but it should be anticipated that media, are allowed to publish the partial results as the protocols are finalised.

4.0 Issues

We will in the following discuss how transparency is built into the law and also discuss where the law should be complemented by further instruction in order to enhance the control of the process.

4.1 The location of the count

The counting of ballots is carried out in the polling station. This is important. Ballots are perishables. If they are kept unprocessed for a long time, suspiciousness will easily arise that there may be possibilities of manipulation. Even though it is very exhausting for the polling station staff to proceed directly with the count after a long polling day, it is important that the commission with observers are all present during the count.

This is also in accordance with the Guidelines Section 3.2.2.4, 45.

4.2 Representation during the count

Another main element of the transparency of the count is the presence of representatives of the candidates and observers at polling stations and LGECs during the count. This represents checks and balances of the process, which come in addition to the broad political representation in the polling station commissions. The representatives are given fair opportunity to record any protest they may have to the process.

For this system to work properly, it is important that any validated protest is raised also at higher-level commissions. Experience from earlier elections has shown that a high number of notes have been taken down, not all of them significant, but the representatives of higher levels have not done a proper scrutiny of the protests, and brought the validated ones (only) up for further investigation.

In a few polling stations where the multi-party presence have been weak, there have been violations in the past, both on the signatures in the voters registers, the lack of reconciliation and on invalidation of ballots.

Ref. the Guidelines Section 3.2.2.4, 46 and the Copenhagen document Paragraph 7.4.

4.3 *The procedure of counting*

The process is described in some detail in the law. The count is lead by the chairman, and it seems that it is anticipated that the chairman counts each vote, while all other members and representatives are watching. This is a safe, but also time-consuming procedure. The polling unit will normally not have more than 1,000 voters (Article 94), which makes the process feasible. Good training in the process is, however, a necessity.

Ref the Guidelines for Reviewing a Legal Framework for Elections Section XIII, B.

4.4 *Validation of signatures*

The voters sign the voters' registers upon receipt of a ballot paper. This is an important record of how many voters actually received a ballot paper. The signatures should be examined carefully. There has been instances earlier where the signatures of a polling station have been written by a few hand only, and even 100% turnout has been recorded in this way.

Ref the Guidelines for Reviewing a Legal Framework for Elections Section XIII, B.

4.5 *The judgement of invalid votes*

The Law says that a vote is invalid 'when it is not clear who it is voted for'. This indicates that if the intention of the voter is clear, the ballot should be deemed valid. It is important that the training material is clear on this, so that ballots are not rejected for pure formalistic reasons.

Ref the Guidelines for Reviewing a Legal Framework for Elections Section XIII, A.

4.6 *Invalidating votes*

Observers have previously reported instances where votes have been invalidated by adding indications on ballots during the count. A very high number of invalid votes have sometimes been reported and cast a dark shade of suspiciousness over the results.

If there is more than one indication on a ballot, it is invalid. The control during the count is therefore important. It is technically possible for persons who are in touch with the ballot papers to put an extra cross for a candidate. The rigorous procedure of the count is probably meant to prevent this.

One should be particular aware if the number of invalid votes is very high. If that is so, a review of the invalid votes may disclose signs of irregularities such as different style in adding of the indications, one pen being used across many ballots for the second indication, etc. If any doubts, this should be brought to the attention of a higher commission.

One security measure in place is the possibility for re-count if the number of invalid votes exceeds the difference between the two candidates with the highest number of votes.

In many countries the blank votes are recorded separately. This is done because the reasons for giving a blank vote are often different from other invalidation categories, which are mainly due to lack of knowledge of the process. It could be advisable for the future to include the number of blank votes as a separate item in the protocols so that the need for more voter information can be more clearly identified.

Ref the Guidelines for Reviewing a Legal Framework for Elections Section XIII, B.

4.7 *Reconciliation*

Before opening the ballot boxes in the polling station, the following figures are established:

- a. The number of persons having voted according to the lists of voters.
- b. The number of unused ballots according to the stubs.
- c. The number of spoiled ballot.

a. + b. + c. should be match the number of ballots submitted to the polling station. The Law is, however, not clear on what should be done if the numbers do not tally.

Even more important is the lack of procedure in the case the number of ballots found in the ballot box (the sum of valid votes, invalid ballot papers and invalid votes) does not match the number who has voted according to a) above. The CEC should (and has maybe) issue a clear procedure for what should be done.

If the number of ballots in the ballot box is lower than the numbers derived from the voters' registers, it could mean that some voters have left the polling station with the ballot paper without casting it in the ballot box. This is not serious. However, if the discrepancy is high, it could be an indication of an irregularity.

If, on the other hand, the number in the ballot box is higher than the number, which should have been voting, it may indicate ballot stuffing, which is a serious offence.

The rules pursued by the polling station commissions, should be clear on the process in the cases that the figures do not tally. One option is to recount if the number in the box is higher, of if it is lower and the difference exceeds say 1 %. If they still do not reconcile, it should be clearly noted in the protocol and a higher Commission should make the decision.

Also at the LGEC level, there is no mention of the reconciliation requirements. Again the number of ballots (a + b + c) should be checked against the number of ballots issued to the polling station, and the number found in the boxes against the number having voted in according to the voters registers.

The CEC should give instructions to cover this point in such a way that figures, which are not tallying, will be examined closer.

Ref the Guidelines for Reviewing a Legal Framework for Elections Section XIII, B.

4.8 *Publication of protocols and detailed tabulation*

The protocols are distributed to all present at both the Polling station as well as the LGEC level, and the results are posted at public display. This is important and facilitates all organisations with a possibility for a parallel tabulation of results. Some would like to do this as the results come in, others would check later.

It is important that every observer or representative can check his or her own witnessed result against the full tabulation. Therefore the LGEC detailed tabulations should be made available as soon as possible, i. e. not only the final result for the local government area, but the tabulation down to polling station level. Then every participant can check that the entry of his or her polling station is correct.

Often a lot of emphasis is put on transport of voting material, the security of the stores and the computer systems. This is important, but it is important also to be aware that the voting material is only reopened in rare cases. The important document is the protocol which exists in many copies and which was established with a number of witnesses immediately upon closure of the vote.

The tabulation is a fairly simple one. For a municipality it can easily be done on a PC with a spreadsheet program. Therefore the best check is to perform a parallel tabulation based upon verified protocols. In that way the computer based tabulation is also checked.

Ref the Guidelines Section 3.2.2.4, 46, and Guidelines for Reviewing a Legal Framework for Elections Section XIII, C.

4.9 *Publishing partial results - the role of the media*

In many countries, the electronic media set up a service to publish the results, as they are available. They will then also make their own tabulation and publish these as preliminary, unofficial results, together with predictions of the final results. This service is extremely important. Even though the results are not final and changes may happen later, they give an immediate picture and it raises the confidence of the figures.

If it is not already done, the CEC should facilitate such a service so that partial results can be published, as they are made available at polling station level.

Ref the Guidelines Section 3.2.2.4, 50, and Guidelines for Reviewing a Legal Framework for Elections Section XIII, D.

4.10 *Reconciliation at CEC level*

Sometimes in the past problems at lower levels have not been dealt with at CEC level. This seems to have changed later, but it is important that this work is continued and that mistakes are recorded and dealt with to the best of their ability. Reconciliation should also take place at this level.

Ref the Guidelines Section 3.2.2.4, 51, and Guidelines for Reviewing a Legal Framework for Elections Section XIII, E.

5. Previous experience

The electoral process has improved considerably since 1996 up to 2001. It is expected that such improvement will continue. However, observation reports from the elections in 1996, 1997, 2000 and 2001, as well as the referendum in 1998, can provide a good source of information about issues which one should be in particular careful with.

The following are the main problems reported earlier:

- The general lack of order and efficiency during the count,
- Lack of multi party representation in the polling station,
- Purposely invalidation of ballots,
- Lack of scrutiny of the signatures on the voters lists combined with a large discrepancy between the turnout recorded based on voters lists and the number of ballots in the ballot box,
- Lack of reconciliation of the figures at all levels,
- Lack of scrutiny of doubtful polling stations at CEC level,
- Publication of incomplete tabulation at CEC level.

Some of violations reported on earlier may have been due to wilful acts, other to lack of experience and weak organisation. However, the experience has created a suspiciousness, which it is important to remove by maintaining a strong process. To a large extent the Law has taken many of the issues below into account.