Strasbourg, 10 December 2013

CDL-JU(2013)021
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

in co-operation with
the Constitutional Court of the Republic of Albania

and
the "Hanns Seidel" Foundation

CONFERENCE ON

"THE CONSTITUTION AS INSTRUMENT OF STABILITY AND DEVELOPMENT"

Tirana, Friday 22 November 2013

Report by
Mr Sergio BARTOLE (Substitute Member, Italy)

First of all, let me thank the organizers of this Scientific Conference on the occasion of the XV Anniversary of the Constitution of the Republic of Albania. It is for me a great honour to have been invited to make a presentation on behalf of the Venice Commission. The adoption of the Albanian Constitution by the Parliament on 21 October 1998 and its approval by the popular referendum of the 22 November of the same year was the concluding passage of the process which started after the first Albania's pluralist election of March 1991. As a matter of fact, it required many years to get a positive result, which was obtained in a shorter period of time in other Countries which – as it happened to Albania – made the experience of the passage from a previous totalitarian regime to a democratic constitutional State, in compliance with the principles of the rule of law and of the separation of the powers. In the meantime the Parliament had substituted a "Law on major constitutional provisions" for the old Constitution of 1976 and a Constitutional Commission had approved a first draft of an entirely new constitution, which was rejected by the people through a referendum.

The success of the constitutional initiative of 1998 was possible because, step by step, Albania was able to internalize the principles and the values of the western European constitutionalism, and had the ability to find an agreement between these principles and values, on one side, and its State's identity, on the other side. In the development of this process the Venice Commission played an important role, helping and supporting the work of the Albanian political parties in drafting the text of the new Constitution. I remember taking part in meetings which a delegation of the Commission had with a delegation from Albania, and to suggest some revisions and improvements of the text prepared here in Tirana by the competent Albanian authorities. It would have been a mistake of the Venice Commission pretending to directly write and correct the result of the Albanian efforts. We were not in the position of depriving the representatives of the Albanian people of its constituent power. We could only offer our technical support on the basis of the experience of the European democratic States and of the Constitutions adopted by these States after the Second World War and in the second half of the XX century. We had at our disposal the European Constitutional Heritage, which could be an useful basis for an evaluation of the Albanian text, a basis which did not derive its legitimacy from the experience of one State only, but should be the result of commonly shared European constitutional principles and values. In this perspective the European Convention for the human rights and fundamental freedoms had a special relevance as far as it was the expression of a common understanding of the constitutional guarantees which had to be established in favour of the citizens of a democratic State.

The quotation of the European Convention has a specific justification. It is a convention adopted in the frame of the Council of Europe whose bodies, and specially the European Court of human rights, are in charge of its implementation. In the international practice the accession to the Council of Europe has been the first step on the way of the passage of a State from a totalitarian regime to a constitutional democratic one. But the accession is not completely free because it depends on the acceptance of the bodies of the Council which is positively adopted only if the concerned State complies with the requirements of the Treaty establishing the Council. This arrangement is the well-known machinery of the principle of the conditionality. Conditionality is the content and the possible effect of specific provisions (frequently named by the doctrine "HR clauses") of international treaties or agreements, whose purpose is the promotion of the compliance by national governments of the principles of the European constitutionalism, or even of the fundamental elements of the economic free market when the economic constitution of a State is at stake. The adoption of the Albanian Constitution is the result of the functioning of the principle of the conditionality as far as the membership of Albania in the Council of Europe was concerned.

It was not an easy task. The take-off of the development of democratization started a process of a deep renovation of the political structure of the State. The basic purposes of this process were commonly accepted by the protagonists of the Albanian transition, but a large acceptance of its modalities was missing. The referendum of 1994 did not succeed in approving a first draft of a new Constitution and the entire procedure had to start again. All people agreed on the necessity of opening the way to the accession to the Council of Europe but it was not easy to find a consensus on the possible content of the new fundamental law of the State. It was at this stage that the Venice Commission played an important role in clarifying the principles of the European Constitutional Heritage and in offering its support in the correct drafting of the text. In preparing this presentation I read some of the proceedings of the meetings between the Albanian delegation and the working group on Albania of the sub-commission on constitutional reform of the Venice Commission, and I got the impression that political reasons and conflicts were a relevant obstacle on the way of a satisfying conclusion of the initiative.

For instance, the attitude of reciprocal mistrust between the Albanian political parties is evident in the answer given by their delegates to the considerations of the representatives of the Commission that the constitutional provisions contained many details concerning the electoral law, “thereby requiring an amendment to the Constitution in the case of major changes in the electoral law”. This choice was particularly motivated by the desire to avoid any undue amendment to that law immediately preceding the date of the election. It was also said that “having regard to the specific tradition of Albania, it seems problematic to make the Prime Minister too strong”. The Commission criticized the proposal allowing the Prime Minister the power of discharging a minister only with the approval of the Assembly because it seemed “in contradiction with the system of parliamentary government and may lead to conflicts undermining political stability”. On the other side the Albanian delegation explained that the Constitutional Commission had not accepted a proposal for a constructive vote of no-confidence according to the German model. It was suggested that the President of the Republic may not be a member of a political party. As far as the nature of his functions is concerned, it is interesting underlining the fact that he should not have a real power of veto: “it might also be called - “it was said” –right to send back legislation”.

From the proceedings of the meetings we get the idea of a political society which is divided and fragmented by the cleavages between the political parties. In this situation Albania did not easily find the way to identify a common constitutional choice. Was the portrait of the divided political society the real picture of the Albanian national identity? Were these cleavages the identity and the unity which were the object of a centuries-old desire of the Albanian people according to the preamble of the Constitution? The question is strictly connected with the problem of the functioning of the machinery of the conditionality. Sometimes, looking at the behaviour of the new central eastern Europe democracies, the States of the western Europe have difficulties in understanding the troubles that, from Romania to Slovakia, from Ukraine to Albania, many, if not all the Republics of the old communist Europe had to confront. But we had and still have to keep in mind that the coexistence of the traditional identity of these Republics with the European constitutional Heritage was a problem which was not easy to be solved. It was certainly easy to be solved when the democratic transition regarded States which in the past had taken part and cooperated with the western Europe in the elaboration of the constitutional Heritage. Troubles and difficulties were much bigger when such a historical link was missing. Moreover, as it happened in Albania, the weight of the communist experience was very heavy as far as it had implied a cut of the cultural relations of the State with the western cradle of the constitutionalism. And eventually, if we look at the historical past, we can find additional difficulties in Albania for the growing of the accession to the principles of constitutionalism: we can think, for example, to the long presence of the Turkish Empire and,

in the ‘30ies of the past century, the dictatorial regime introduced by Zogu under the patronage of Italy.

All these factors were relevant in the process for the adoption of the Albanian Constitution. Therefore we can say that Albania deserves great appreciation for having overcome all the mentioned difficulties and troubles through the adoption of its fundamental law in 1998. The entering in force of this document was a substantial contribution to the stability of the Albanian State as far as its provisions offered a term of reference for the peaceful coexistence of the different political parties and for the solutions of their conflicts, at the same time that a basis for the economic and social developments of the country was established. The framers of the Constitution were conscious of their responsibility when in the preamble they looked at the future of the country “with the determination to build a social and democratic state based on the rule of law, and to guarantee the fundamental human rights and freedoms”.

In drafting the text of the Constitution they had in mind the European Convention for the protection of the human rights and fundamental freedoms, at the same time stating their engagements for the recognition of the social rights, whose explicit declaration was preferred for political reasons to a less binding statement of policies and programmatic principles.

Moreover the Constitution makes a clear choice for a parliamentary government. In the text the Assembly occupies the first place in its part devoted to the organization of the State. The President of the Republic, who is elected by the Assembly, does not have powers comparable to those of a Chief of State in a presidential Republic, and has the typical role of a mediator and guarantor of the constitutional equilibrium of the powers of the State. The Constitution closes the doors to the enlargement of his functions stating the principle that he cannot exercise others powers besides those contemplated expressly by the Constitution and granted by laws in compliance with it. This choice requires that he cannot be identified with the majority supporting the Cabinet or with the opposition. Therefore a high qualified majority is required for his election in three votes and the absolute majority in the following two. But, notwithstanding the fact that he cannot be a member of a political party, there is the danger of his possible party identification because the Assembly has to be dissolved by the incumbent President, if, after five ballots, nobody has been elected Chief of the State. It is evident that the following new parliamentary elections will have at the centre of the debate the identification of the candidates supported by the political parties running in the electoral competition.

Even in the selection of the Prime Minister the President has a very restricted scope of choice because he has to appoint the person proposed by the party or coalition of parties that has the majority of seats in the Assembly and this newly appointed politician has to get the approval of the Assembly. If this proposal is not approved, the President has perhaps a larger scope of choice but also in this case the approval of the Assembly is obviously required. If also the new Prime Minister is not elected, the President shall dissolve the Assembly: the decision goes back to the electors and to the choice they have to make between the different political parties. The proposal of giving to the will of the Prime Minister a substantial weight in the decision of the dissolution was not accepted at the time of a recent revision of the Constitution.

Therefore the political parties have an important role to play in the functioning of the Albanian constitutional system. This feature is coherent with the choice of the parliamentary government but it would require the presence of strong and effective counterpowers to check and balance the expansion of the de facto powers of the political parties. The experience of these last years shows interesting developments with regard to the concern of the Albanian authorities about the exigency of restricting and keeping under control the political activity

when the safeguard of the constitutional principles and values is at stake. For instance, when the Assembly adopted a constitutional revision to increase the number of the Central election commission from 7 to 9 in 2007, this result was not obtained and the politicization of the administration of the elections was not removed. A second step was made with a new constitutional reform, which transformed the commission into a body which is no more foreseen in the Constitution, but is set up under the Electoral Code. The observers had the impression that it was possible to reduce the highly politicised environment of the management of the elections by encouraging efficiency and professionalism. According to a joint opinion of the Venice Commission and of OSCE/ODIHR of 2009 the new regulation could contribute to avoid the regrettable results of the past administration of the elections. But the expectations were not fulfilled in the 2009 and 2011 elections. And in an opinion of 2011 the two international bodies mentioned above, came back again on the problem of the influence of the political parties suggesting a reconsideration of the system of the formation of the electoral commission "in order to narrow the scope for possible partisanship and politicisation of election administration that puts party interests above voter interests" (CDL-AD (2011) 042). The 2013 parliamentary elections emphasised the failure of the electoral system and the crisis of the institution entrusted with the task of insuring an efficient and fair management of the elections is day by day more evident.

On the other side the existence of a continuous political conflict which is extremely polarized, is evident also if we take into consideration the fact that with a new revision of the Constitution in 2012 the rules of the parliamentary immunity were changed. According to the new provision a deputy does not still bear responsibility for opinions expressed in the Assembly and votes cast, but an exception was made for the case of defamation. In this way the Assembly introduced again in the Constitution a very peculiar arrangement which was cancelled from the draft of 1998 on the basis of a suggestion of the Venice Commission. It is evident that the style of the political activity in Albania requires a special rule for cases which cannot be left to the solutions insured by a fair development of the parliamentary debate, The political conflict is still putting in danger the possibility of a correct debate between the parties and within the parties in view of a common understanding of the major problems of the Country.

Recently a new proposal was advanced to improve the political atmosphere in Albania by giving transparency to the electoral processes, by the strengthening of the democracy and recognizing larger moral authority to the State. The idea is to give to the people the power of directly electing the President of the Republic. Somebody highlighted the possibility of increasing through this electoral solution the political independence of the Chief of the State as a representative of the national unity according to the definition of the Constitution. Apparently the proposal does not imply an enlargement of the powers of the President, but it is evident that, if he is directly elected by the people, his political authority will increase and will give an enlarged scope to its powers of interference in the functioning and in the political decisions of the other bodies of the State, and specially of the Cabinet . But he would not be accountable before the Parliament as it happens to the Government because he is not responsible for actions carried out in the exercise of his duty and may be dismissed only for serious violations of the Constitution and for the commission of a serious crime on the basis of a final judgement of the Constitutional Court. Which does not necessarily imply the existence and the solution of political differences.

It is evident that the mentioned proposal is aimed at creating a strong alternative to the enlargement of the role of the political parties. The idea can be approved, even if the direct election by the people of the President could enhance his politicization through his identification with the political parties which have supported his election. In any case the strengthening of one of the governing bodies of the State should be balanced by the presence of strong bodies charged with the task of insuring the legality of the action of the

State and the compliance with the Constitution. Are these bodies present in the constitutional order of the State? Can they be identified with the Constitutional Court and with the Judiciary? My experience as a member of the Venice Commission teaches me that, for instance, the take-off of the Constitutional Court was very difficult and it was affected by a disproportionate measure when it was suspended after having been given a deadline for the rotation of its member. Moreover, in recent times, the functioning of the Court was in danger because of the supposed extension to its members of a legislation dealing with the lustration of the holders of State's bodies.

During all the time of the cooperation of the Albanian authorities with the Venice Commission, this body had to deal very frequently with questions concerning the Judiciary and the Constitutional Court. We shared the opinion that the present constitutional provisions made up a "reasonable constitutional basis for the significant reform of the judicial system", but we left to a detailed examination of the implementing legislation an evaluation of the existence of guarantees for a proper exercise of the judicial and prosecution functions (CDL(1995)074 rev). We had with the Constitutional Court an exchange of views about the legislation concerning the Court and we underlined again the necessity of rules concerning the rotation of the judges, while we supported the idea of the prevalence of the written procedure, the presence of a legal representation of the parties, a clear distinction between concrete and abstract review of the legislation, and the clear identification of the conflicts between powers. The rapporteurs favoured effects of the decisions of the Court only *ex nunc* (CDL(99)77). The Commission expressed the opinion that in the nomination of the judges of the Constitutional Court and of the Supreme Court the required consent of the Assembly of the Republic "includes the power to consider the" merits "(in the broad sense) of the choice and the right to reject it on those grounds" (CDL-AD(2004)034). Moreover in the "lustration case" it was said that "it must be ensured that the Constitutional Court as guarantor of the Constitution can function as a democratic institution: the possibility of excluding judges must not result in the inability of the Court to take a decision" (CDL(2009)123). Eventually prudence was suggested in dealing with the participation of the President of the Republic and of a member of the Cabinet in the activity of the High Council of Justice.

I tried to give some ideas about the most important documents of our cooperation because recently, in view of its possible accession to the European Union, Albania is envisaging to take legal initiatives for the reform of the Supreme Court and Constitutional Court. Apparently two main requirement should be satisfied, that is those concerning the rule of law and the prevention of corruption. The enhancement of the public trust in the Albanian justice is evidently at stake. Therefore both the efficiency of all the judicial machinery and the personal status of the judges have to be considered as far as all these two elements are considered by the National Strategy for Development and Integration 2007-2013, by the National Plan for Implementation of the Stabilization Association Agreement and by 2010 Opinion of the European Commission on the application of Albania for the candidate country status and the Anti-corruption strategy.

This initiative has to be dealt with following a specific *road map,* specially with regard to the organization of the judiciary. It could be advisable starting from the consideration of the relevant constitutional provisions. Are still the Albanian authorities satisfied with the provisions of Part Nine which is largely devoted to the High Court and its judges, while more detailed rules concerning the other judges are missing? What about the implementation of the constitutional rule which provides for the attachment of the offices of the prosecution to the judicial system? And is it still convenient the entrustment of the power of appointing of the "other prosecutors" to the President of the Republic on the proposal of the General Prosecutor without any intervention of a special representative body?

Only after having answered to these questions it will be possible deciding if and which constitutional reform is required in the matter. On this basis it will be convenient to analyze the ordinary legislation concerning the judiciary.

The same method should be adopted when the Constitutional Court is at stake. First of all, the Albanian authorities have to express their opinion about the constitutional provisions. Is there something missing? The following passage shall regard the ordinary legislation implementing the provisions concerning the Constitutional Court and the modalities of its possible reform.

Obviously I am here submitting to you only possible proposals for a cooperation without having the intention of interfering with the choices of the Albanian Cabinet and Parliament, but trying to design the best way of starting the cooperation you asked to us.