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(VENICE COMMISSION)

COMMENTS

ON THE AMENDENTS TO THE CONSTITUTION OF THE REPUBLIC OF ALBANIA

(Adopted on 21 April 2008 by the Assembly of the Republic of Albania)

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The Assembly of the Republic of Albania recently adopted some amendments of the Law n. 8417, dated 21 October 1998, "Constitution of the Republic of Albania". The amendments deal with:

1) the election of the Assembly,
2) the election of the President of the Republic,
3) the relationship of confidence between the Assembly and the Council of Ministers,
4) the appointment of the General Prosecutor and
5) the abrogation of the constitutional rules concerning Central Election Commission.

The Venice Commission is called to give an opinion on these new constitutional rules of the Republic of Albania, even if the text was approved and there is no more procedural space for its revision before their promulgation until a new procedure is open. We have to keep in mind that the revision of the constitutional provisions on the election of the Assembly was required by an OSCE/ODIHR Election Observation Mission Report concerning the parliamentary election of the Republic of Albania of 3 July 2005 and by a joint opinion on amendments to the electoral code of the Republic of Albania adopted by the Venice Commission and the OSCE/ODIHR (CDL-AD(2007)035).

Both mentioned documents underlined that the electoral legislation then in force did not give the voters the possibility of clearly and rightly understanding the developments of the parliamentary electoral procedure and the future results of it. Moreover, the documents complained because the political parties were allowed to easily bypass the provision of art.64.2 of the Constitution which required that "the total number of deputies of a party or a party coalition shall be, to the closest possible extent, proportional to the valid votes won by them on the national scale in the first round of elections".

The rules concerning the election of the President of the Republic keep the peculiar solution according to which the Assembly has to be dissolved if it is not able to elect a new President in five ballots, notwithstanding the criticism expressed by somebody that such a machinery substantially implies a blackmail obliging MPs to accept a candidate they don't like to avoid the dissolution. Provisions dealing with the relationship between Assembly and Council of Ministers are aimed at rationalizing the Albanian system of government. The amendments concerning the General Prosecutor and the Central Electoral Commission try to comply with European legal standards in the concerned matters.

All the amendments are examined in the following paper in the order of the list presented in the opening lines of the paper itself.

1. The new art. 64 of the Constitution adopts the line of providing directly in the Constitution for the choice of the electoral system. Many commentators think that the electoral matter should be left to the ordinary legislation keeping in mind the exigency of easily changing the electoral rules according to the political and social developments of a people. But it is evident that the Albanian legislator is especially interested in insuring the stability of the electoral choices in a political frame where political conflicts are frequent and there isn't a common acceptance or interpretation of important rules of the democratic game.

On the other side, the new provision does not offer detailed indications about the implementation of the proportional system and does not state the principle that the total number of the deputies of a party or of a coalition "shall be, to the closest possible extent, proportional to the valid votes won by them on the national scale". It abrogates the previous coexistence of single member electoral zones and multi-name electoral zones: this novelty should avoid some of the old and negative practices of the Albanian political parties which are criticized in the documents mentioned in the opening paragraph of this paper. According to point 2 of art. 64, the new multi-name electoral zones have to be established on the basis of the administrative

division of one of the levels of the administrative-territorial organization. This choice leaves a lot of discretion to the legislator. The entities of the different levels of the administrative-territorial organization have different territorial extension. Preferring one or another level can have important effects on the application of the proportional system because it is well known that it has satisfying results for the little political parties if the multi-name electoral zones have a large territorial extension with a great deal of voters and, consequently, many seats are at stake. Restricted multi-name electoral zones with a minor number of voters, where not many seats are at stake, work in favour of the great political parties or of the great coalition of political parties.

On the other side, in the amendments there is a slight preference for the minor political parties as far as point 3 of the old art. 64 is abrogated and there is no more a rule providing for the exclusion from the distribution of the seats of the political parties which receive less than 2,5 per cent, and of the party coalitions that receive less than 4 per cent of the valid votes on the national scale. But the abrogation of the emphasis and the special guarantee of the implementation of the proportionality of the system (old art. 64.2) cancels the possibility for the minor parties to claim an individual violation of the electoral principles before the competent judges if the proclamation of the electoral results doesn't state a correct correspondence between the total number of deputies assigned to a political party or to a coalition of political parties and the valid votes won by them. The minor parties have only the chance of claiming – in conformity with the existing procedural rules - the violation of the principles of the system of proportionality by the legislator before the Constitutional Court, and not its direct application.

The new art. 65 provides for new rules concerning the mandate of the Assembly. It is silent about the date of the first meeting of the Assembly after the new election, but the following art. 67.1 states that the President of the Republic convenes the newly elected Assembly not earlier than the date of the termination of the mandate of the preceding Assembly, but no later than 10 days after such mandate has expired. Perhaps this provision should have been strengthened by a rule stating a clear deadline for the completion of the electoral operations. In this way, the terms of the responsibility of the President of the Republic under art. 67.2 would have been more clear.

In art. 68 both a definition of political parties and a reference to ordinary legislation on political parties are missing. Perhaps the legislator did not think that these qualifications are necessary as far as unqualified groups of voters are allowed to present candidates for the elections. But it should be advisable mentioning that the ordinary legislation on the political parties has to be kept in mind. The reference to the electoral legislation could not to be sufficient.

Notwithstanding the criticism expressed by the documents of the Venice Commission and of the OSCE/ODIHR the provision of art. 68.1 keeps the authorization of the parties or groups of voters which submit candidates to fix the ranking of the candidates, and therefore it clearly limits the freedom of choice of the voters.

2. The new art. 87 and 88 deal with the election of the President of the Republic. The new art. 88, 2/1, is especially important because it provides for the rules concerning the beginning of the relevant procedure, a point which is not sufficiently clarified by art. 87.2.

But in this amendment of the Constitution the meaning of a provision is not clear. According to it "a voting is deemed as completed even when no candidates are running in the competition". Does it mean that if, for instance, in the third voting there isn't a candidate, the procedure goes on directly to the fourth voting? In this case doesn't the third voting take place? Therefore we have to arrive at the conclusion that, when the procedure moves from one voting to the following voting, the candidates are allowed to retire from the competition. This interpretation is also confirmed by the following § 4 which states that "if, after the fourth voting, there are no candidates left to compete, new candidates may run…".

Moreover, another question arises: do the amendments require a new submission of all the candidacies before the beginning of a voting? Is a new submission required even to the candidates who took part in the previous voting? Perhaps we can say that the text implies that a candidacy which is not abandoned is automatically transferred from one voting to the following voting until the President is elected if the candidate does not retire. In any case the point deserves to be clarified.

Paragraph 5 of art. 87 provides for the dissolution of the Assembly if - after the fifth voting - the President is not elected. It is an alternative which can favour choices aimed at avoiding the election of the President in the fourth and fifth voting by more than half of the votes of all the members of the Assembly but not by a qualified majority. Apparently the solution helps an election supported by a popular majority larger than the parliamentary majority supporting the Prime Minister and the Council of Ministers, but it implies a major politicization of the election of the Chief of the State, his identification with a popular political majority and can have important effects on the system of government of the Republic of Albania.

On the other side, we could argue that it is evidently a provision aimed at obliging the Members of the Assembly to make a positive choice if they want to avoid the dissolution. But when the suggestion is not accepted, new elections are called, therefore they will have the competition for the Presidency at the centre of the debate: the voters will express their vote not only according to their political preferences but also having in mind the election of the President. While – as a rule – the President has to be elected by the Assembly by secret vote and without debate (art. 87. 2), a popular election cannot avoid a public discussion on the political position of the candidates. As a matter of fact, after the elections the President will probably be elected on the basis of the choice of the voters.

The result is certainly coherent with the democratic principles even if it can imply the substantial abandonment of the previous parliamentary Albanian system of government and an apparent approaching to a presidential system of government as far as it requires a direct or indirect election of the Chief of the State by the people. The relevance of the popular choice will have political effects which have to be underlined: a Chief of the State who is – directly or indirectly - elected by the people will have a political authority which a President elected by the Parliament does not have. Did the Albanian legislator take into account these possible effects of the amendments? Is the Albanian system of government organized in such a way to sustain the possible consequences of a cohabitation of a President and a Prime Minister of different (or, even, of the same) political orientations who are supported by the popular vote?

Perhaps the Albanian legislator could answer that in any case the final result of the reform could be that, after the election of the Assembly, the election of the President and the appointment of the prime Minister and of the Council of Minister will take place at the same time according to a common political line establishing the basis for their cooperation. The Constitution does not give to the President important political powers, he is apparently a President with functions of guarantee and safeguard of the constitutional rules, but the President could find in the interstices of the system some space for an enlargement of his political influence, especially if he is strengthened by an explicit popular preference. As a matter of fact the “super party” position of the President can be endangered by a warm political debate during the election of a new Assembly.

The Albanian legislator should balance the exigency to have a President elected and the compliance with the principles of the parliamentary system of government. Perhaps it could be advisable to lower the level of the suffrage required at the fifth voting even if this solution could apparently conflict with the principle of majority.

3. The evaluation of the new art. 104 has to be made in connection with the reading of the following art. 105 and the rules concerning the election and the functions of the President of the

Republic. Art. 105 introduces the s.c. constructive vote of no confidence: when the Assembly vote a motion of no confidence, it has to elect a new Prime Minister with the votes of more than half of the members of the Assembly. If a new Prime Minister is not elected, the vote on the motion of no confidence does not have any legal effects. It is a solution which restricts the discretionary power of the President in the procedure for the appointment of the Prime Minister and the formation of the Council of Ministers. But what happens when the Prime Minister resigns without a previous vote of no confidence?

Moreover art. 104 provides for a request of the dissolution of the Assembly submitted by the Prime Minister whose motion of confidence is voted by less than half of all the members of the Assembly. Is the Prime Minister obliged to submit such a request? Or may he leave the decision about the dissolution to the President after the resignation of the Council of Ministers? Apparently the amendments provide for a mandatory dissolution (and, therefore, for a mandatory submission of the relevant request by the Prime Minister defeated by the Assembly). Art. 104.2 fixes a deadline for the dissolution and does not give any space to the exercise of discretionary powers by the Chief of the State. Both the articles don't offer an explicit answer to the question, it could be advisable to look at the German experience of the constructive vote of no confidence and draw inspiration from the German practice in the implementation of the amendment and in view of a possible revision of them.

In any case these rules are an example of mechanical rationalization of the system of government which could be not perfectly fitted for the Albanian difficult political situation. This can be said even if the rules are balancing the possibility of an indirect popular election of the President with a restriction of his constitutional powers.

4. Art. 149 deserves two main remarks. It could have been advisable prohibiting the reappointment of the General Prosecutor to avoid his dependence of the President of the Republic and of the Assembly. The General Prosecutor has to be independent and neutral, while this solution favours his research of the approval of the mentioned institutions in view of his reappointment.

Moreover, it is not possible justifying the amendment of § 4 with the cancellation of the periodic submission of the report on the status of criminality, which obliged the Prosecutor to have a periodic relation with the Assembly. It would have been better to clarify the meaning of the expression "periodically" fixing clear deadlines for the report. But, perhaps, the Albanian legislator thinks that such a report could be required by the Assembly any time.

5. The abrogation of the part of the Constitution dealing with the Central Elections Commission requires a special attention to the measures which the Albanian legislator will take in the field.