Albanian Helsinki Committee

ELECTORAL CODE 2003
(CRITICAL OVERVIEW)[1]

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1 Although this is a publication of the AHC, views expressed in this work are of the author and not necessarily of the committee as well.
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Preface

The political developments after the 1990s, the establishment of the pluralistic system, and the need to guarantee human rights and freedoms set forth the essentialness of drafting democratic legislation and creating an appropriate infrastructure for the realization in practice of these rights. Among these rights, political rights take up a special place. To that effect, positive developments have been achieved. The approval of the Constitution of the Republic of Albania in 1998, the drafting of the Electoral Code, the creation of pertinent institutions for managing the electoral process are some of the positive achievements in the area of realizing these political rights, and in particular, the right to elect and to be elected.

However, the realization of these rights depends not only on the existence of laws that sanction those rights and foresee all instruments that will make possible their realization in practice, but also on the political will of political parties and of institutions that are, by law, assigned to organize and conduct the electoral process. Voters themselves play an important role in this process; they should not only exercise their rights, but also contribute to the conduct of free, fair and democratic elections. Each and every voter, in an individual fashion or organized into organizations or groups, may contribute to the conduct of elections in matching with the relevant laws and the required standards.

The experience of these years has shown that the Albanian civil society, and human rights organizations in particular, have played a significant role in the progress of the electoral process in Albania. Their contribution has been and remains necessary for the electoral processes of the future. One of the areas to which the civil society has contributed is that of the improvement of legislation.

The making of a new electoral code, drafted also with the contribution of representatives from political parties, was a positive undertaking of the Albanians to improve the election process. Any law is drafted so that it may be enforced, but failure to comply with it leads to serious violations of the freedoms and rights of individuals.

In spite of the progress made in this direction, previous electoral processes in Albania as well as the elections of October 12, 2003, showed that there is still a lot to be done in this direction. The lack of political will to contribute to as correct a conduct of elections as possible, the weakness of institutions and other electoral bodies charged, by law, to manage electoral processes in Albania, the lack of respect for and trust in institutions that conduct and manage elections, dictate the need to employ the monitoring of electoral processes by objective, non-partisan and professional observers.

The Albanian Helsinki Committee, the very first human rights organization, equipped with experience in the field of monitoring in general and of election monitoring in particular, has rendered its contribution to the improvement of election legislation, the acquaintance with and compliance to it in the course of election processes, the conduct of electoral processes, sensitizing the public of its role in this process, and has reacted toward the violation of the freedoms and rights of citizens during the various phases of the electoral process.

During the elections of October 12, 2003 as well, the AHC monitored the preparations for the electoral process and its progress. For the monitoring of these elections, the AHC engaged 106 long-term observers who monitored different aspects of the electoral

process. Many of the problems noticed during these elections originated from the Electoral Code.

Given that the AHC not only criticizes the violation of human rights, but also recommends necessary improvements in laws and practices of their enforcement, through this publication authored by its legal advisor, aims at addressing some legal problems that have a direct impact on electoral processes and on the respect for the rights of citizens in these processes.

The approaches to the problems presented in this publication have built upon the long and rich experience of the author of this publication, on the analysis of problems noted by AHC observers as well as on AHC's assessments of electoral processes recently conducted in Albania. Nevertheless, it should be noted that the author of this work has been free to express his views and evaluations, independent from whether they are different from the views of other members of this organization.

The AHC avails itself of the opportunity to thank all of its observers for their tireless work, the staff of the AHC engaged in organizing the monitoring of electoral processes and in particular, the author of this publication for his contribution to the improvement of electoral legislation.

In spite of the different views that may exist regarding the issues addressed in this publication, the AHC appreciates the fact that this publication is a special contribution to further discussions about them in circles of lawyers and human rights specialists. We hope that this publication will incite debate and discussions about the Electoral Code, with a view to achieving its improvement and the conduct of free, fair and democratic elections.

The AHC takes advantage of this occasion to thank the Swedish Helsinki Committee for the financial support it provided for the realization of this publication.

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On the author of this work

Niazi Jaho, lawyer by profession, is a member of the Albanian Helsinki Committee and a legal advisor of this committee, board member of the AHRC and editor of the magazine "Human Rights," member of the National Refugee Committee and part-time legal advisor of the Assembly of Albania.

The study of different issues of the constitutional realm, penal procedure and penitentiary legislation take up a significant part of his research activity. For several years, Mr. Jaho has given visible contribution to the improvement of numerous draft laws, especially in the field of justice, of the protection of human rights, etc.

Mr. Jaho is the author of numerous articles, reports and speeches; he is a lawyer whose presence is noted through his critical views and constructive debates in seminars, conferences, round table discussions of experts as well as in the print and electronic media. The advocacy of constitutional principles, objectiveness and arguments, respect for alternative and even opposing views, all stand out in Mr. Jaho's writings, as an unbiased specialist free from political leanings.

For several years, Mr. Niazi Jaho has been engaged in issues relating to electoral legislation. With regard to the election Code of 2000, he was the author of two publications, the first one on the election of local government bodies and the second publication on the elections for the Assembly of Albania. Mr. Jaho addresses important issues relevant to the electoral code in these publications as well as renders explanations on disputable issues in this realm.

This is the third publication in this field and it pertains to the new electoral Code approved in 2003. The work presented here and the issues addressed in it relies upon the experience of elections held in Albania as well as on the practice of the elections for the local government bodies of 12 October 2003. In addressing disputable issues, the author of this work, on the one hand maintains a critical stance, but on the other hand he expresses his views on the possible ways or alternatives to improve the existing electoral Code.

This work may serve as material for discussions and debates that may occur in the future on this topic.

Introduction

The Electoral Code was approved in 2000, following the approval of the Constitution of the Republic of Albania (November 1998). The Code specifies the rules for elections to the Assembly, for elections of local government bodies and for referendums. In the spirit of and in matching with the implementation of the Constitution, Article 3 of this Code stipulates general principles:

a- Elections are conducted through free, secret and direct vote;
b- Any Albanian citizen, without any discrimination based on race, ethnicity, gender, language, political belief, faith or economic status, has the right to elect and be elected;
c- Voters freely exercise the right to vote;
d- Voters are equal in exercising the right to elect and to be elected;
e- The division of constituencies (electoral zones) is done including in each of them an approximately equal number of voters;
f- Any voter has the right to only one vote to elect an electoral subject or a referendum alternative;
g- Electoral subjects are free to wage electoral campaigns in every legal way;
h- Election commissions fulfill their functions in an unbiased and transparent fashion.

The above Code, approved in May 2000, became subject to changes in May 2001, whereas through law No. 9087, dated 19.06.2003, it was invalidated in its entirety and the new Electoral Code was approved. As can be seen, the previous Electoral Code was invalidated within a very short period of time from its approval (May 2000 – June 2003).
In our view, the main reasons were:
a- Elections for the Assembly of the Republic of Albania were held on June 24, 2001. These elections substantiated several violations and irregularities that were partially considered serious.
b- Immediately after the above elections, on 12 October 2001, the press carried the final OSCE/ODIHR report[1], which aside from noting achievements also emphasized some violations of the law. The report noted that the parliamentary elections of 2001 created possibilities for a further consolidation of democratic standards, following the local government elections that had been held in October 2000. Nevertheless, the same report, considering the observed violations that came especially as a result of the lack of political will, made several recommendations that sought the further improvement of electoral legislation. Among others, it recommended that a bipartisan parliamentary commission (government-opposition) be established for that purpose.
c- The project of changes that should be made to the Electoral Code were relatively numerous. For that very reason, it was considered more appropriate, also in terms of a practical employment of the law, that the previous Code be invalidated in its entirety.

[1] "Albania" newspaper, 12 October 2001

With a view to implementing the recommendations set forth in the OSCE/ODIHR report with regard to the establishment of the above Commission, the Assembly took three decisions: decision No. 15, dated 21.01.2002 that was invalidated through decision No.36, dated 16.05.2003 and finally decision No. 39, dated 23.05.2002, "On an addition to Assembly decision No. 36, dated 16.05.2002 "On the establishment of the Parliamentary Commission to review and implement OSCE/ODIHR recommendations on the parliamentary elections of 2001".[2] The final decision determined the makeup of the 16-member Commission (8 from the government and 8 from the opposition).

Although the commission was set up since January 2002, it was almost non-functional until May 2002. It worked erratically even after May 2002, although decision No.36 mentioned above stipulated that the Commission should begin work from the day of the approval of this decision and would complete its work within 2 months from its establishment.

The factors leading to this delay were several, but it is our view that they were mainly of a political nature. In fact, the commission did manage to compile the draft changes to the Electoral Code in May 2003, whereas the approval of the Code was done on 19 June 2003[3], that is less than four months before October 12 of that year, the date when the elections for local government bodies had been scheduled. The fact that the Electoral Code was approved with the consensus of political parties, especially of the two largest parties of the government and the opposition, has been considered positive.

Before the Code was approved, several ideas were put forth regarding constitutional amendments but they either did not find the necessary support or their review was postponed for a later time. Among these ideas, we may mention:

1. The OSCE/ODIHR report, among other things, recommended that elections be held in one single round. Based on that recommendation, discussions focused on whether article 64 of the Constitution should be altered, with the reasoning that the phrase, "in the first round of elections," indicated that there had to be a second round. In fact, this view did not gather support because article 64 of the Constitution (items 2 and 3) does not make a second round mandatory. As a result, elections done in one single round were not against the above constitutional provision.

2. Political parties, especially the two largest parties, raised the issue of increasing the percentage of votes that a party had to get in order to gain from the name list. In item 3 of article 64 of the Constitution, it is written: "Parties receiving less than 2.5 percent and coalitions of parties receiving less than 4 percent of valid votes on the national scale, do not profit from the relevant name lists."

However, this idea did not garner any support either. The following reasons were presented as arguments:

a- Considering the conditions of the country, and in particular the level of political emancipation, leaving some smaller parties out of parliamentary activity through the above-mentioned percentage would make the two larger parties more predominant.

b- The smaller parties in Albania would serve also in the future for the creation of political equilibra and possibilities for potential alliances, which would make

[2] Official Newsletter, no. 21, June 2002

[3] Electoral Code, special edition, July 2003, declared through decree No. 3868, dated 30.06.2003 by the President of the Republic of Albania

possible particularly the approval of laws requiring a qualified vote. They would also have a positive influence on the prevention of crises.

3. The smaller parties set forth the issue of altering the election system calling for a system leaning toward the proportional one. This proposal would require the amendment of item 1 of article 64 of the Constitution, which specifies that: "The Assembly is made up of 140 deputies. 100 deputies are elected directly from one-name constituencies by an approximate number of voters, 40 deputies are elected from the multi-name list of the parties and/or coalitions of parties according to their order."

With regard to this request, no comprehensive and studied discussion or debate was held, which would have served to present the advantages and disadvantages of the proportional system. Besides, in our view, it would not be advisable that such a major issue be resolved just on the eve of the elections of 12 October 2003. Nevertheless, this remains an issue that may be taken up at an appropriate time, presenting convincing arguments over which electoral system would be more suitable for the conditions of our country.

CHAPTER I

CRITICAL OVERVIEW OF THE NEW ELECTORAL CODE

It would be a mistake to ignore the positive novelties contained in the New Electoral Code that was approved on 19 June 2003. Such positive novelties would be the provisions that deal with the subjects of the principle of the inviolability of elections, the prohibition of the use of resources in support of candidates, political parties or coalitions, the appointment and duties of liaison clerks, etc. Of special significance are the dispositions talking about the meetings and decision-taking of the Central Election Commission (CEC), the acts of the CEC and their entry into force, complaints through administrative ways over decisions of electoral commissions and especially the procedure of their review by the CEC. It should also be considered positive that for the first time in our electoral legislation, the electoral college of the Appeals Court was created through a procedure specified in this code, thus relieving the Constitutional Court of addressing complaints that are irrelevant to it. The new electoral code foresees in a detailed fashion dispositions for a legal, balanced and controllable electoral campaign. This is to be found in article 136 (The Electoral Campaign in the public radio-television), article 138 (Schedule of broadcasts), article 140 (Monitoring of the electoral campaign). In the framework of changes effected, the CEC should set up, ten days before the beginning of the electoral period, a board whose duty is to implement the provisions of the Electoral Code on the electoral campaign in the public and private radio and television.

The new electoral code also specifies dispositions dealing with the use of special forces and structures throughout the electoral period. It is known that the opposition voiced concerns over the implementation of this provision, at the moment when the Council of Ministers approved the normative act dealing with this issue. However, debates were leveled out later on also because the stance of public order forces during the October 12 elections was considered correct and in matching with legal provisions, something accepted by all political forces.

Also important in the Electoral Code is its thirteenth part (Responsibilities and sanctions), which deals with the responsibility of persons charged with the administration of elections, the abandonment of duties by members of electoral commissions, administrative sanctions in cases when provisions of this code would be violated by members of the electoral commissions or by persons charged with duties according to this code, sanctions for the violation of principles defined in articles 3, 4 and 5 of this code, etc.

Nevertheless, it is our view that some provisions of the Electoral Code run against the Constitution and its spirit, while there are other provisions that are unclear, inaccurate or incomplete and that, in practice, may be accompanied by misinterpretations of possible harmful consequences, something proven in the 12 October 2003 elections. We are going to pause on those issues that are significant in our view although they may be disputable. Considering the relatively short time during which we were engaged to address this problem, we do not pretend to present a thorough and comprehensive study. In this work, we have not included the provisions of the Electoral Code dealing mainly with the elections for the Assembly of the Republic of Albania and referenda, although, as is known, they are an important part of the Electoral Code. This would naturally require a

much longer commitment considering both positive and negative experiences. Maybe the next parliamentary elections would bring forth arguments to reach fairer conclusions over the other parts of this code.

The elections of October 12, 2003, for local government bodies, although they marked a step forward in some directions, they also created some concerns that, in our view, have to do not only with the lack of political will, but also with some defects in the new code. In this regard, among other things, we shall pause on especially two issues that we consider essential:

a- Setup, role and functioning of electoral commissions

b- Voters' lists

1.1 Electoral Comissions

Aside from the Central Election Commission (CEC) the local government zonal commissions (LGECs) and voting center commissions (VCCs) were also set up and functioned during the October 12, 2003 elections. The Electoral Code also foresees the establishment of zonal election commissions (ZECs).

The Central Election Commission (CEC)

The CEC is a constitutional body. According to article 153 of the Constitution, the CEC is a permanent body that prepares, oversees, directs and verifies all aspects related to elections and referenda and announces their results. Article 154 of the Constitution determines the makeup of the CEC. It says that this commission is made up of 7 members, who are elected for a 7-year mandate. The Assembly elects two members, the President of the Republic appoints two and the High Council of Justice elects the other 3 members. Membership in the Commission is incompatible with any other state and political activity. The makeup of the CEC is regenerated every three years according to procedures defined by law. The above article also specifies that the member of the CEC enjoys the same immunity of the member of the Constitutional Court.

For the implementation of article 154 of the Constitution, article 17 of the invalidated Electoral Code determined the procedure for the election of CEC members. Thus, the Assembly would elect 2 members of the CEC based on the proposals by the Assembly Bureau, the President would appoint the 2 members following consultations with groups representing a broad spectrum of the society, whereas the High Council of Justice (HCJ) would elect the other 3 members through secret vote based on the proposals of the national judicial conference and individual candidates. All proposals and candidates had to be made public.

The three above bodies (Assembly, President and the HCJ), in electing the members of the CEC, had to take into consideration the criteria (qualities of members) defined in article 16 of the invalidated code.

The contents of articles 153 and 154 of the Constitution and for their implementation, articles 16 and 17 of the invalidated Code mentioned above, are completely sufficient to convince us that the lawmaker sought to create a CEC that would have the capacity of an independent, unbiased and politically free constitutional body.

Should the lawmaker have sought to make the makeup of this body politically balanced, that is to be set up based on the proposals of relevant political parties, he would have expressed this in the Constitution (in article 154).

With regard to the organization and functioning of the CEC, as a Constitutional body, it is elected by means of a special law, such as the Electoral Code, approved by a qualified vote of three fifths of all Assembly members.

Some political parties had raised the issue of the political balance of the CEC before the approval of the New Code. This issue became the target of discussions and debates during the drafting process of the new Electoral Code and with consensus all parties managed to approve article 22 of the Electoral Code in favor of the view that both the President and the HCJ should select CEC members based on the proposals of the respective political parties. In fact, several other issues of this code were resolved through consensus, although representatives of some slammer parties presented their remarks and observations.

It is our view that the contents of article 22 of the Electoral Code is not in matching with the Constitution and as such it should be invalidated.

Article 22 of the Electoral Code says that the "President of the Republic appoints two members of the CEC, based on the respective proposals of the two largest parties of the government and the opposition" and that the "High Council of Justice elects three CEC members according to the following procedure:

a- two members of the CEC are approved between two candidates proposed respectively by each of the two largest parties.

b- with regard to the third candidate, the High Council of Justice shall pursue the following procedure:

"The two largest parliamentary groups propose four candidates who are lawyers by profession. Each of the parliamentary groups selects two of the four candidates of the other group. The four selected candidates are submitted to the High Council of Justice to vote on not later than 48 hours after their submission." It should be said that even if it were not like this, the political balancing that article 22 of the Electoral Code seeks, could not have been achieved for the October 12, 2003 elections as it would require a period of time relatively longer than could be thought or desired.

The reasons why we say the above are:

- some members of the CEC had been elected according to the invalidated Code (article 17); their mandate is for 7 years and it cannot be interrupted only because, according to article 22 of the new Code, political balance had to be reached;

- party proposals cannot force the President of the Republic, in appointing the members of the CEC, to select the person that would achieve the balance;

- the HCJ is a constitutional body that is independent and that takes decisions collegially. It may be submitted (according to the law), party proposals but, considering the criteria determined in article 20 of the Electoral Code, (qualities required and conditions to be met in order to become a CEC member) as well as the voting procedure set forth in article 22 of the Code, it elects the persons it deems suitable, in spite of the fact whether they have been proposed by the government or the opposition.

It is exactly this legal stance of the HCJ that spurred reactions and accusations against it, only because it elected a CEC member from among those not proposed by the

opposition but from among those proposed by the government. Initially it was said that the HCJ acted in contradiction of the party agreement between the DP and the SP, while it is known that although consensus-based agreements between political parties in a pluralistic democracy are not only necessary but also essential, unless they are reflected in laws, they cannot be mandatory for state bodies too. A while later, there were statements saying that the HCJ acted in flagrant contradiction of the law, article 22 of the Electoral Code, but nobody undertook any initiative to redress the violated law.

If political will, expressed in parliamentary activity, that is the legislative body, would accept or require the option of a politically balanced CEC, the need would arise to proceed by either amending article 154 of the Constitution or by invalidating articles 153 and 154 of the Constitution and leaving the resolution of this issue up to provisions of the Electoral Code, as was done with other Commissions; although, in our view (as we shall discuss further down), it could also be discussed to not have these commissions created on the basis of proposals by political parties.

After studying the Electoral Code, it is our opinion that some other provisions too run against the Constitution. Concretely:

a- The dismissal of the member of the CEC according to article 24, item 3 of the Electoral Code, is done through two thirds of the votes of all Assembly members. It is obvious that this qualified vote sought to equate the CEC member to the other members of constitutional bodies, (Constitutional Court, Supreme Court, etc.). However, the Constitution[4] speaks specifically on the members of these bodies, by saying that their dismissal is done through two thirds of the Assembly, while it does not say anything regarding the CEC member. In such conditions, it is our opinion that the rule defined in article 78 of the Constitution, item 1, should be applied, which says: "The Assembly decides by majority of votes, in the presence of more than half of all of its members, except when the Constitution foresees a qualified majority". Therefore, the CEC member may be dismissed by the majority of votes in the presence of more than half of the deputies of the Assembly and not by two thirds of its members.

b- The Electoral Code also speaks about the procedure to be pursued in cases when the CEC member is detained or arrested in the act of wrongdoing (in such cases, item 2 of article 23 of the Electoral Code says that, the competent authority shall immediately notify the Constitutional Court, which may or may not render its consent).

It is said in article 24, item 4 of the Electoral Code that the CEC member may complain about the dismissal decision to the Constitutional Court and that it is the latter that takes the decision whether the dismissal was substantiated or not.

Seemingly, the above provisions were approved to equate the CEC member with the member of the Supreme Court as article 154 of the Constitution says that the CEC member enjoys the immunity of the member of the Supreme Court. However, the Constitutional Court cannot be added, through an organic law, competencies that are expressly defined in the Constitution. It is a different case with the members of the Supreme Court. The cases of detainment or arrest in the act of wrongdoing of a member of the Supreme Court according to article 137

[4] Articles 128 and 140 of the Constitution of the Republic of Albania

of the Constitution should be addressed obligatorily by the Constitutional Court. Likewise, the same is done for their dismissal in cases foreseen in article 140 of the Constitution. The "argument" that the CEC member too ought to have the protection that the member of the Supreme Court has is, in our view, unfounded. The reason we say this is because immunity is the guarantee of inviolability from criminal prosecution without the authorization of the relevant body. This right or this privilege cannot be extended a priori to other cases mentioned above.

c- The Electoral Code speaks not only about the dismissal of the CEC member in cases foreseen by article 24 (letter "a" up to letter "ë"), but also about the premature conclusion of his/her mandate (article 25, item 1, letter "a" and "b"). At first sight, these provisions appear normal and indisputable. However, we deem it necessary to address this issue not because the above provisions are in contradiction of the Constitution, but because the Constitutional Court held the following stance in one of its decisions:

The Prime Minister of the Republic of Albania addressed the Constitutional Court with the request to invalidate, as incompatible with the Constitution, article 14 of the law No. 8270, dated 23.12.1997, "On the High State Audit," among others, because the law also spoke about the cases of the dismissal and premature ending of the mandate of the Head of the High State Audit. The Constitutional Court accepted this request on the grounds that: "The non-definition in the Constitution of cases of dismissal or premature ending of the mandate, does not mean that those can be resolved through organic laws," and further down: "… the law on the High State Audit, by limiting the cases of the dismissal of the head of the High State Audit or the premature ending of the mandate, which have not been expressed in the Constitution, has gone beyond the limits of the latter".[5]

In the same decision, the Constitutional Court addresses the issue of the immunity of the head of the High State Audit, which according to item 2 of article 165 of the Constitution has the immunity of the Supreme Court justice (as does the CEC member that we mentioned above). With regard to this issue, the above decision of the Constitutional Court holds that: "Immunity has to do with the protection of a certain category of officials…and has as its element the irresponsibility for criminal offences and inviolability from criminal prosecution…", whereas "Immovability in the constitutional sense is an element of guaranteeing the independence of the body and not of the immunity. It has to do with the protection against dismissal from duty of senior officials."

The reasoning given in the decision of the Constitutional Court that because the Constitution does not say anything about the dismissal of the head of the High State Audit or about the premature ending of his mandate, these cannot be defined in an organic law, does not seem just because, through laws for the implementation of the Constitution, there may be a breaking down and concretization of issues that are not expressly foreseen in the Constitution (as is the case of the CEC member), as long as those issues are not in contradiction of any Constitutional provision or its spirit. However, individual views or individual

[5] Decision No.212, dated 29.10.2002, of the Constitutional Court, Collection of Decisions 2001 – 2002, publication of 2003, page 206.

criticism of this or that judicial decision may only serve for discussions of and debates over this problem in the doctrinarian aspect. The important thing is that in this concrete case, in which there are analogies with the case of the CEC member, the decision of the Constitutional Court is final and mandatory for enforcement by all bodies, including the legislative. Therefore, before approving articles 24 and 25 of the Electoral Code, the Assembly of Albania should have considered the above decision of the Constitutional Court. We would suggest that what was not done at that time be done in the framework of changes that may be effected in the existing Electoral Code.

d- Article 154 (item 2) says that the makeup of the Central Election Commission is to be renewed every three years according to procedures specified in the law. This procedure was defined in detail in the invalidated Code[6].

The new Electoral Code, for the implementation of article 154 of the Constitution, should have defined the procedures for the renewal of this Commission. In fact, article 26 of the Electoral Code only mentions the word "Renewal" in its heading, while in fact this is not about the renewal called for by the Constitution, whose procedure, as mentioned above, had been clearly defined in article 25 of the previous code. What does article 26 of the new Code say? It says concretely:

1. The mandate of the CEC member ends on the same date of the same month of the seventh year after his election.
2. The new members who replace members whose mandate expires, according to item 1 of this article and article 25 of this code (this is in reference to the premature ending of the mandate of the CEC member), are elected not later than 30 days from the date of the ending of the mandate. In an election period, the replacement is done not later than 5 days from the date of the expiry of the mandate.

As may be seen, article 26 of the new code only talks about the mandate of the CEC member and not about the renewal of the CEC makeup every three years. These are the reasons why we think that this provision needs to be addressed, also because the title partially does not match with the contents of the above article.

Zonal Election Commissions (ZECs), Local Government Electoral Commissions (LGECs) and Voting Center Commissions (VCCs)

According to the Electoral Code, all these three commissions are set up based on the proposals by the relevant political parties. This fact was used as one of the arguments to request or justify the creation of the CEC on the basis of proposals submitted by the political parties. The Constitution does not say anything about these commissions, although article 3, item 8 of the Electoral Code "General Principles," it is emphasized that "Electoral Commissions foreseen in this code fulfill their duties in a fair and transparent fashion." In reading the contents of the provision, it is clear that the law requires impartiality from all commissions, and not only from the CEC.

[6] Article 25 of the invalidated Code

The practice of previous elections, including the 12 October 2003 elections has shown convincingly that in many cases commission members have defended the narrow interests of the parties that proposed them. For the members of these Commissions, the highest authority has not been the law, but the party errands and dictate. This is a finding that was highlighted in the four interim reports of the Foreign Observers' Mission (FOM) in the local government elections of 12 October 2003, as well as in the preliminary monitoring report drafted by the Albanian Helsinki Committee.

For instance, the interim report 4, on the period 14-21 October 2003, by the FOM, says among other things: "The involvement of political parties in the counting process and tabulation of results was much greater than foreseen by the Electoral Code. The parties instruct their representatives in the electoral commissions at all levels to delay or challenge results" and further down: "The tabulation of results was interrupted and delayed in nine of the 11 mini-municipalities of Tirana. The Foreign Observers' Mission observed intentional delays or obstruction of procedures by LGEC members, such as, blocking the approval of the process verbal of results, which requires a qualified majority vote. In many cases, commission members resigned or did not participate in commission meetings. Furthermore, the Foreign Observers' Mission confirmed that the delays came mainly as a result of actions undertaken by LGEC members representing the opposition Democratic Party (PD)".

Apart from the above, it was striking to watch in the televised meetings of Commissions the political debates inside the LGECs, the party-oriented-disagreements among members especially in Tirana, the interviews of chairmen, deputy chairmen or members of commissions, before the electoral process was through, etc. Typical, but showing is the case when in the public meeting of the CEC, the candidate for Mayor of Tirana who did not agree with the procedure pursued by the CEC regarding the complaint presented by him, turned to two members of the CEC with the words: "On behalf of the party, I call upon you to leave the Commission!"

These and numerous other facts, which are difficult to include in the framework of this relatively summarized work, make us raise, at least for discussion, the issue of whether the need is rising for these commissions to be set up not based on party proposals?

We realize the importance of political will. We are conscious that in the conditions of a higher degree of emancipation, of an alleviation of the political atmosphere between the political parties, party influence on these commissions would probably be minor or better say less sensitive, but the reality ought to be assessed as it in fact is, not as we wish it to be.

On December 2, 2003, the Electoral College of the Tirana Appeals Court decided to declare invalid the result garnered from 130 voting centers of the city of Tirana. This decision is final and mandatory for enforcement. We do not know the concrete reasons why the elections in these voting centers were declared invalid because we are not familiar with the reasoning behind this decision. But, of course, the Electoral College reached the conclusion that there were legal violations in these polling stations, which may have affected the result announced through a decision of the CEC.

Violations of the law may have been committed by both VCCs and LGECs, but considering such a relatively broad area, it is our view that this is another indicator that the source of problems lies with the politicization of electoral commissions and party

interventions. Exactly the same thing could occur during the repetition of elections. In order to prevent that, we would suggest:

a- The CEC, in carrying out its legal duties, through its structures, should follow closely and control the activity of Electoral Commissions in order for them to rigorously enforce only the law;
b- Interventions of political parties in the activity of commissions should be prohibited;
c- Vacancies in these commissions should be filled;
d- Commission members should be retrained focusing attention especially on the provisions whereby violations of the law have been noted;
e- Elections should be monitored by foreign and domestic observers.

We would like to bring to the attention of readers that with regard to the proposal that the other commission not be created on the basis of party proposals, they could refer to the code of good practice in electoral issues, approved by the Venice Commission, on 5-6 July and 18-19 October 2002[7]. We emphasize from the very start that this is an opinion based on the basic principles for a democratic and transparent electoral process. This code and its explanatory instructions present the positive and negative experiences as well as the relevant recommendations. This code is neither the result of the study of our country's election legislation, nor a generalization of the practice of elections that have been held in the country.

The reason we emphasize this is to highlight the important fact that what is mandatory is the enforcement of the basic principles of the electoral process, whereas technical-organizational issues and even those regarding the setup of Electoral Commissions, considering the concrete conditions of every country, may vary.

It is true that the Code approved by the Venice Commission says: "Political parties should be equally represented in the electoral commissions…", but the same paragraph also says further down that: "or should have the possibility to observe the work of the impartial body"[8].

The code approved by the Venice Commission leaves room to also judge the other variants, starting from the Central Election Commission. Thus, it reads: "In the countries where there is not a long tradition of the independence of administrative authorities from political power, independent and impartial electoral commissions need to be set up for all levels, from the national level to the voting center level"[9], whereas further down (regarding the CEC) it says: "It should include: at least one member of the judicial system, one representative of the parties that are in parliament, one representative of the Interior Ministry, one representative of the national minorities[10]. Thus, this code also provides another variant for the makeup of the CEC.

The code approved by the Venice Commission, with regard to the creation of electoral commissions, places an emphasis on the realization of the objective that they should be independent and impartial at all levels. Considering the practice of elections in

[7] The Code has also been translated into the Albanian language (34 pages)
[8] Ibid., item 3.1, letter "e", page 11
[9] Item 3.1, letter "b", page 10
[10] Ibid., item 3.1, letter "e" and "d", pages 10-11

our country, can it be said that this objective can be achieved through the creation of commissions on the basis of political parties' proposals?!

I do not think so. Some of the arguments were presented above and it is therefore unnecessary to repeat them. In fact, it is worth-emphasizing that a more thorough study would bring about other facts in favor of the view that the Electoral Code, also in this direction, needs to be changed. Thus, from this standpoint, I would suggest that the ZECs and LGECs not be set up based on the proposals of the respective political parties.

What criteria should be followed? Naturally, this problem is not an easy one. For instance, the testing variant applied for civil service employees could be practiced, but of course not identically. We are somewhat reserved to maintain the same view regarding the LGCs, not because they may be politicized, but because the number of members of these commissions nationwide is large (32 – 33 thousand). As a result, even the costs for their creation would be substantial. However, regarding the creation of LGCs as well, variants could be discussed to minimize the influence of politics on them.

Endorsing the variant of the creation of Commissions not on the basis of party proposals or of politically balanced Commissions, we support the requirements of the Electoral Code that representatives of political parties be included in these commissions. In this regard, we also take into consideration what the Code approved by the Venice Commission says in that these representatives "should have the possibility to observe the job of the impartial body".

Nevertheless, we do not agree with items 3 and 4 of article 33 of the Electoral Code that talks about the representatives of the political parties in the CEC. It says: “representatives of seven political parties, which have the most number of seats in the assembly, have a permanent status in the CEC. They have the right to take part in all meetings held by the CEC also out of an electoral period" that "other political parties have the right to appoint not earlier than 150 days and not later than 40 days before the day of the elections and until the announcement of the final result, their temporary representative to the CEC."

Following you will find the reasons why we do not agree with the above wording of article 33 of the Electoral Code.

As such, we could mention:

a- Item 4 of article 154 of the Constitution says: "Electoral subjects appoint their representatives to the commissions. They do not have the right to vote." It stems from this that in this case the Constitution uses the phrase "electoral subject" and not political party.

b- Article 2 of the Electoral Code titled "Definitions" clarifies what "electoral subjects" mean. Item 25 of the above article holds: "Electoral subjects are political parties, coalitions registered with the CEC, their candidates as well as independent candidates in the ZECs or LGECs".

c- Article 33 of the Electoral Code does not mention the phrase electoral subject, but "the seven political parties" or "the other political parties," which, as is known, total 60 in Albania.

d- Article 33 does not condition the participation of political party representatives by a permanent or temporary status, but rather by the obligation of their registration with the CEC, which is referred to in article 154 of the Constitution.

e- Given that article 154 of the Constitution of the Republic of Albania conditions the right of the political party to send its representative, when he is an **electoral subject** by provisions of the Electoral Code, they cannot be recognized either the permanent status or the temporary status at a time when the party that delegates him/her does not have or no longer has the status of the electoral subject.

1.2 Voters' lists

Another concern that was observed in the elections for the local government bodies of 12 October 2003 was that of the voters' lists. It has been claimed that there have been manipulations in this direction, that thousands of voters were purposefully left out of the voters' lists. That there have been serious irregularities in the voters' lists is a fact. That the names of many voters did not appear in the final voters' lists is also a fact. However, to date, competent authorities have not verified that this was the consequence of some criminal offence.

Considering the experience of previous elections as well, one may reach the conclusion that this problem ought to be looked at more thoroughly, objectively and far from politicization.

Concretely speaking, it is essential to discuss the issue of what the population registration infrastructure in general and that of citizens who have the right to elect in particular; in other words, to discuss what the civil registry records and the fundamental registry look like, what do the shortcomings consist of, whether the existing legislation is complete or not. Besides, whether there are sufficient computerizing mechanisms that make possible periodical verifications and controls, what the role and duties of the respective state bodies related to this issue should be, what the rapport between these bodies and electoral commissions, etc.

The preliminary interim report 4 on the period 14 – 21 October 2003 of the FOM of OSCE/ODIHR, among other things, says: "Inaccuracies in the voters lists were mainly caused by problems coming as a result of the civil registry records system, especially of the lack of a centralized system. Adding to this is also the hesitation of many citizens to notify the authorities regarding the changes of their living quarters. The Foreign Observers' Mission also notes that the changes made to the voters' list after it had been officially finalized, were done upon request of the DP, while further confusion was created at the last minute of defining the location of voting centers"[11].

Special significance is attached to the compilation of the voters' lists in the code approved by the Venice Commission. "It – this Code says – is of vital importance to guaranteeing universal suffrage"[12]. But the very same code also gives special importance to the interest of voters. In that regard, the code says:

"… it is acceptable that voters not be automatically included in these lists, but only upon their request."[13]. The Venice Commission recommends:

a- Voters' lists should be permanent;
b- They should be updated at least one time per year;
c- The voters' lists should be published;

[11] This is the final preliminary report of the Foreign Observers' Mission (FOM) of OSCE/ODIHR.
[12] Code approved by the Venice Commission, item 7, page 16
[13] Ibid.

d- Voters should have the possibility to seek their correction, etc[14].

As may be realized, the voters' lists are official documents of voters' registration for every area of the voting center. A special chapter of the Electoral Code (chapter 2) speaks about the lists' compilation and review process. Article 55 says that "Civil registry offices compile the voters' lists, based on the documentation they possess in the fundamental civil registry records as well as in the citizens' register with the living address in the respective voting area, evidenced as such until five months before the mandate expires," whereas item 3 of the above article says: "The mayor or secretary of the Municipality or Commune approve and sign off on the preliminary voters' lists."

It is this very list that according to item 3 of article 55 of the Code is administered by the respective VCC and is posted in every voting center.

Based on what was said above, it results that the LGEC comes into the game (or starts to act), immediately after the voters' list approved by the mayor and secretary of the municipality or commune is made available to it. Following the announcement of the preliminary lists, the LGEC collaborates with the municipality and commune to organize notification of every voter, thus creating the possibility for them to become familiar with these lists and to request, as necessary, their correction.

The reasons for corrections are defined in article 58 of the Electoral Code, whereas regarding the right of voters to turn to the LGEC for the purpose of correcting the list, reference is found in item 2 of article 57 of the Electoral Code. The voter has the right to complain against the CEC decision, according to item 6 of article 57 of the Code, at the district Court where the LGEC is located.

It is a matter of fact whether the relevant bodies have respected or not the above legal procedure. It may be necessary for the problem to be addressed and the persons who have not abided by them to be held accountable in keeping with the law.

What attracts attention and what we think is very disputable is the content of item 3 of article 58 of the Electoral Code, which says: "The request for changes in the preliminary lists may be also submitted by political parties, electoral subjects and other interested institutions" that "In any case, requests should be accompanied by the relevant documentation." That in the cases of the change of the place of residence or the place of stay, when the personal data is not accurate and when the voter is registered in the wrong voting center "requests by the above subjects should be accompanied by the personal request of voters."

It is understandable that political parties, electoral subjects as well as the other interested institutions should present their requests for the correction of lists to the LGECs, although nothing is expressly mentioned about this in the law. However, the important thing and what in our view represents the essence of the discussions about this provision is: who do the above subjects complain to about a decision of the LGEC?! Article 146 of the Electoral Code does not permit complaints to the CEC or the court of the judicial district in which the LGEC is located as they could not present themselves as representatives of a voter without this voter's official authorization, i.e. they would not be legitimized. However, this is one side of the problem. The issue ought to be presented and resolved in principle. It is our view that only voters themselves ought to have the right to request the correction of preliminary lists. Besides, even if we were to accept for

[14] Ibid, page 6

a moment that somebody else might have this right too, it would not make any sense if all political parties (i.e. even those parties that were not registered with the CEC as electoral subjects), or other institutions, that nobody knows which they are, were to exercise it. It is worth mentioning that no line or sentence talks about such rights in the Code approved by the Venice Commission mentioned above, although special attention is devoted to voters' lists. On the contrary, only the voter is considered a central figure both for showing interest in or registration, and even for the right to correct the announced list.

What harm would that cause, somebody might ask. Why shouldn't all political parties and interested institutions have this right?

Such questions are not accompanied by legal arguments. Individual wishes or narrow party interests, although they may be understandable, should not give them attributions they have no reason to have; on the contrary, there may be cases that the rights currently given to them by the code in force may be accompanied by harmful consequences for the voters themselves, not to exclude the potential party frustrations or party-electoral commission conflicts. No legal arguments accompany these questions. Phenomena such as these manifested themselves in the elections of 12 October 2003. What was the procedure in fact? Until September 15, 2003, according to some incomplete data of the CEC, 4 electoral subjects, mainly the two largest parties, SP and DP, had presented requests for voters' lists corrections to the LGECs for 37,000 persons, while there were 2,160 such requests by voters to LGECs countrywide. Why was there such a big difference? Maybe the opposite should have happened. This cannot be explained only with the relatively scarce interest of voters (which cannot be denied), but also with the great zeal of the above subjects. But why?

That no voter would be unable to vote?! I wish I am wrong, but we don't believe that it is like that. The political parties, in such a manner, have sought to guarantee more voters who would vote in their favor. We also do not believe that these requests included voters suspected of voting not in their favor and, furthermore, if they were convinced that the voter who was not on the list was a member or supporter of the opposing party in the electoral race. Isn't it a telling element when we hear that the persons who were left out of this list, or the persons who were included in the requests submitted to the LGECs for lists correction would vote in favor of this or that party?!

Another problem related to this issue is the fact that the LGEC is not obliged to approve every request by political parties for the correction of the voters' preliminary lists. What is to be done? What actions are taken when there are refusals, even partial ones?

The political party, for the reasons we mentioned above did not complain to the court. What about the voters, were they notified one by one about the refusal decision? If not, are the parties (even morally) responsible of depriving the voters of the right to complain in court?

The possibility is not to be excluded that the voters, convinced that this issue would be pursued by the political parties, made up their minds and thought that their names would feature in the final voters' list.

There you have another harmful consequence that may have deprived the voter of the right to vote. In closing, it is our view that this is a serious problem that is worth discussing objectively and by referring to the facts. What all need to do in the future, that is political forces as well, is to intensify concrete work to sensitize voters to show greater

interest in becoming acquainted with the voters' lists, and in complaining in court if the circumstances require that.

With regard to the voters' lists, following the decision of the Electoral College of the Appeals Court on the repetition of elections in 130 voting centers in Tirana, an issue arose that in our opinion requires clarification and legal responses. Considering the fact that, as is being claimed, a relatively considerable number of voters were left out of the voters' lists for the elections of 12 January 2003, who, as a result, were not able to vote on October 12, it is being requested that the CEC, through a sub-legal act, should order the respective Tirana LGECs to add to the lists, based on the requests by electoral subjects, those voters who were not able to vote on 12 October 2003, so that they will have the possibility to exercise their right to vote on 28 December 2003, the day scheduled for the partial rerun of the election.

In our view, this request is not legal, as the previous lists cannot be changed, in spite of defects that they may have had. (It may also be possible that there may have been inaccuracies in the lists for some voting centers where the elections were repeated, but also in the voting centers where vote results have been considered legal). Therefore, corrections to the lists would impair the integrity of elections, thus having harmful consequences and serious contentions.

The CEC and the Electoral College, as is well known, have the right to declare invalid elections in voting centers, electoral units or the entire country. The main cause leading to taking such a decision could be a violation of the law that may have affected the announcement of the winning candidate (article 117, item 1 of the Electoral Code). In taking such decisions, the CEC and the Electoral College rely upon articles 109, 110 and 117 of the Electoral Code and not on whether the voters' lists, for different reasons, did not include these or those voters, or this or that claimed number of voters.

Reasons for changes to the voters' preliminary lists have been defined in article 58 of the Code, regarding the phase of voters' list compilation and review and not the review of complaints regarding the invalidity of elections. The Electoral Code does not foresee a correction of lists after a decision for the repetition of elections, but only their repetition not later than 4 weeks. It is not an omission of the lawmaker that the Electoral Code does not foresee a correction (addition or removal) in the lists even after the decision on the invalidity of elections. From this standpoint, the CEC does not have the right to order the addition of voters who did not vote to the existing lists. Issuance of such an instruction would establish a new legal norm, which is not a competence of the CEC.

We mentioned the figure of 130 voting centers regarding the repetition of elections. In fact, according to the CEC spokesperson, the elections are to be repeated in 118 voting centers, (this was a material error allowed by the Electoral College of the Appeals Court). The CEC spokesperson, in response to the request for the correction of lists on which the vote of 12 October 2003 was based, emphasized, "Irregularities in the lists will be addressed in keeping with the Electoral Code and other sub-legal acts."

CHAPTER II

REMARKS AND SUGGESTIONS FOR SPECIFIC PROVISIONS OF THE ELECTORAL CODE

1. **Article I of the Electoral Code** talks about the appointment and duties of the liaison clerks. This article says that the Apparatus of the Council of Ministers and the Prime Ministers' Office, all ministries, prefectures and municipalities are obliged to appoint a liaison employee and that: "In case any of these institutions does not appoint its liaison person, in keeping with the requirements and within the deadline defined in this article, then the head of the relevant institutions shall be considered to have taken over the functioning of the civil servant."
   In our opinion, this is solution is neither right nor effective, as it is hard to realize. Another procedure could be pursued to make possible the appointment of the liaison employee.

2. **Article 20** of the Electoral Code defines the criteria for the election of the CEC members. Item 2, letter "ç" of this article says: "the person should not have been an employee of the national intelligence service or of the state police during the past 5 years". We consider that explanations should have been given for the approval of this provision. Which are the reservations or doubts? Why is it conditioned by their being employed in these bodies while it is known that they are depoliticized? The same attitude, for instance, should be maintained even in the cases when this or that employee has worked for 23 years in these bodies and has been appointed later to other offices, let's say in the bodies of the prosecutor's office, the court, public administration, etc.?
   We consider it necessary to mention that such an excluding provision did not exist in the invalidated Code.

   In our view, this problem should be seen in the aspect of citizens' rights in a democratic society.
   Besides, with regard to item 3 of article 20 that was mentioned above, after "The CEC member should have not less than 5 years of work experience," the text, in our opinion, it should be added: "in one of the following areas" (the wording of item 1 of article 16 of the invalidated Code was more complete with regard to the same issue).
   The reason we say this is because looking at the way in which article 20 of the Electoral Code is written, it is understood as if the person should have experience in all the areas mentioned in item 3 of article 20 of the Electoral Code. This is mentioned only for purposes of accuracy as it is in fact inferred.

3. For the first time, the new Electoral Code defines the procedure that in taking decisions (most of the decisions), a positive vote of 5 members is required. This procedure is to be enforced in all commissions, beginning from the VCC to the CEC. The practice of the October 12, 2003 elections proved in an obvious manner

that this legal requirement was a blocking one and partially maybe even intentional. Therefore, we would suggest that these provisions be revisited.

4. **Article 27 of the Electoral Code.** This article talks about the election of the CEC chairperson and deputy chairperson. Item 2 says that the CEC chair is elected for a period of 3.5 years and has the right to be reelected. The same holds true for the deputy chairperson. We think that these provisions need to be revisited. The reason we say that is because the CEC is a constitutional body and the lawmaker does not mention at all the election of the chairperson or deputy chairperson in article 154 of the Constitution. Should we refer to article 125 of the Constitution, which deals with the makeup of the Constitutional Court (the constitutional court is also a constitutional body), it says that the Constitutional Court is renewed every three years and its chairperson is appointed for a period of 3 years.
With regard to the deputy chairperson of the CEC, although the issue of his/her election was raised a few days before the October 12 vote, it was postponed for an indefinite period. Seemingly, the reasons were of a political nature and the reasoning was that the CEC is not balanced politically. It is our view that the deputy chairperson should have been elected referring to article 29 of the invalidated Electoral Code (although a transitory provision should have been anticipated for this). What is to be done if no "political balance" is achieved in the other elections either? The CEC will remain without a deputy chairperson, while it is known, among other things, that according to item 5 of article 30 of the Code, "decisions are necessarily signed by the chairperson and the deputy chairperson."

   It is our opinion that the above issues may be resolved with consensus, but in keeping with the constitution and its spirit (if deemed necessary, appropriate changes may be made to the legal provisions). However, seemingly, in the wording of the above provisions, the goal of having political balance extended to the internal organization of the CEC must have been taken into consideration.

5. **Article 34, item 10 and article 40, item 10 of the Code.**
In the first one, it is said that "the ZEC is reestablished in conformity with the results of the latest elections for the assembly not later than one month after the announcement of the final results of these elections by the CEC," whereas in the second case, it is said that "the LGEC shall be reestablished in conformity with the results of the latest municipal council elections, not later than one month after the announcement of final results of the local elections by the CEC."

   We think that these two articles need to be revisited so that they will not remain formal. Such deadlines have not been fulfilled even before. In establishing such provisions, maybe our concrete possibilities and concrete conditions need to be taken into consideration. We are witnesses of the delayed constitution of the LGECs and VECs on the eve of the elections, also due to the fact that political parties did not respect deadlines for the submission of proposals.

6. **Article 80 and 81 of the Electoral Code.**
These acts deal with the obligation of the candidate to present the voters' list with the signature of 300 voters (candidates for deputies), whereas for candidates for

local elections, the number on the list varies between 50 voters and 300 voters. Observers of the Albanian Helsinki Committee (AHC), both in the elections of October 12, 2003 and in previous elections, have found that no verifications are made with regard to the signatures of voters on these lists. This is the reason that makes us suggest that the provision should also establish the duty to verify this list, otherwise this legal provision would remain something formal. It is of interest to mention here that part of the Code approved by the Venice Commission dealing with the submission of candidacies. It reads: "The submission of individual candidates or lists of candidates may be conditioned by the collection of a large number of signatures" and further down: "The verification of signatures shall be subject to clear rules, especially in relation to deadlines" that "the process of verification should, in principle, be conducted on all signatures"[15].

7. **Article 103 of the Code (Voters who are unable to vote themselves).**
It is our opinion that items 6, 8 and 9 of the above provision have remained and will remain formal, dealing with the right of voters who are unable to vote themselves and who may request their registration from the LGEC, presenting for this official documentation testifying to the kind and category of incapacity. With regard to blind voters, it is said that voting centers may be equipped with special voting tools, which would allow voters to read or understand the ballot and then vote in an independent manner.

The realization in practice of these provisions would match standards that we wish to achieve, but in the conditions of our country, this right or this possibility would hardly become a reality due to different reasons, as it is not easy for the voter to obtain the necessary documentation and then turn to the LGEC. Besides, he/she knows that he/she will be able to vote in the voting center, with the help of another voter, even without having these documents. Are we currently capable of ensuring the special equipment and tools that would help the blind voter to read or understand the ballot?

8. **Article 104 (protection of order in the voting center)**
It is written that when order and the orderly conduct of voting are endangered in the voting center, the VCC decides to suspend voting and seeks the help of police. The request in this case is submitted in writing and contains a brief description of the causes and circumstances, and that this request is signed by the VCC chair and deputy chair. We deem that in practice, there may be cases when a request by the VCC chairperson alone might suffice. This would refer to emergency cases.

In this regard, we think that what the Code approved by the Venice Commission says should be taken into consideration, "every electoral law should foresee the intervention of security forces[16], in the case of incidents. In such a case, the competence to call on the police should lie with the voting center Commission chair only. It is important to not allow every member of the voting center commission have this right, because what is called for in such

[15] Code approved by the Venice Commission , item 1.3, "Submission of Candidates," page 6
[16] This is in reference to forces guaranteeing order, that is security

circumstances is the immediate taking of decisions, which should not be disputed[17].

9. **Article 140 of the Electoral Code**, dealing with the electoral campaign with regard to private radio and television stations, says: "The CEC orders the NCRT to block the broadcasts of the radio-television operator…" and again further down: "In cases of violations, the CEC orders the NCRT…".

   We think that such an order should not be directed to a body elected by the Assembly. Besides, the NCRT itself is not an executive body. It is worth mentioning that the NCRT, when it takes decisions as a function of carrying out its duties, refers them for execution to the relevant body.

   Therefore, this part of this article leaves room for revision and the CEC decision should be obligatory for enforcement by the relevant body for the execution of such decisions.

10. **With regard to funds available to political parties (article 145)**

    Considering concerns and delays observed in the elections of October 12, 2003, in our opinion this provision should be clearer as pertains to not only the distribution of funds in a timely fashion, before the start of the electoral campaign, but percentages should probably be also considered, especially in favor of the smaller parties. This would in turn create greater possibilities for a more balanced campaign vis-a-vis the greater parties.

11. **With regard to complaints considered by the CEC**

    It is our view that in order to facilitate and not delay this procedure, the CEC ought to have a clearly defined procedure (without hampering the right of participating parties to submit proof and claims), but prolonged discussions and frustrated debates do not serve the issue. Besides, we cannot make sense of the practice followed by the CEC, which without withdrawing to take a decision, its members take a position publicly even with regard to the validity or invalidity of this or that evidence, and vote, publicly again, on the final resolution of issues that are the target of discussion. This practice, in our view, has nothing to do with transparency. On the contrary, considering that the CEC too is some sort of independent court that acts collegially, it should not make public the vote of each member before taking a decision. If we were in a courtroom, parties in the process would have the right to call for the dismissal of the judge. Therefore, we think that in order to prevent the harmful consequences of this practice, the Electoral Code should mention that, following a thorough examination of the case, the CEC should withdraw to take a decision. Supporting this decision is also what is mentioned in item 1 of article 160 of the Electoral Code, which reads: "The CEC decision is always in a written form". Could this decision be written in the presence of subjects that bring forth a complain, of the representatives of political parties and others present in the CEC meetings? Of course not.

    We also deem that the Electoral Code ought to expressly mention the right of the CEC to, depending on the case, announce partial results. This is in reference to

[17] Item 3.6, "Security," 112, page 34

those cases when evidence is considered complete and incontestable. Naturally, this does not keep the relevant subject from complaining to the Electoral College of the Appeals Court.

12. **With regard to the makeup of the Electoral College of the Appeals Court, Tirana (article 163)**
It is our opinion that what this provision says is not just: "each of the representatives of the two majority parliamentary parties and of two opposition parliamentary parties that have respectively the largest number of mandates in the Assembly, has the right to dismiss one of the eight names brought forth when the lots are drawn," that "none of the other parties has the right to oppose this", that "The procedure for the exclusion of names is secret", that the request, without any exception, only includes the name of the judge without mentioning the causes for the exclusion."

It is a positive thing that the election by lots is public and conducted in the presence of representatives of political parties and the media, but we cannot understand the political parties intervening and excluding one of the eight names brought out of the box. We are not aware of similar experiences in other democratic countries. Ultimately, even this court is independent, it is part of the judicial system, although it has been established to examine electoral complaints.

We also think that even the swearing in, foreseen in item 46 of the above provision, is redundant. It is not necessary that a judge who has already taken the oath of office to swear in again. The second swearing in does not boost the judge's responsibility. The contents of this provision cannot be justified with the fact that, in such a way, the trust of political parties is built in the judges who will be examining complaints by electoral subjects.

Nor does it seem appropriate that, as item 5 of article 163 of the Electoral Code says, "The mandate of the electoral college resulting from these lots lasts until the decreeing of the date of the next election for the assembly, for which new lots are drawn".

First because the frequent replacement of electoral college members, in our view, would not serve the improvement of professional experience in this realm and *secondly* because based on the wording of the above provision it derives that the other lots may be drawn even after the decreeing of the next election for local government bodies. Therefore, it would be useful that this provision become the target of discussions as well.

13. **Article 161 of the Electoral Code** says: "The Electoral College judge may not be subject to disciplinary procedures during the period covered by the college". We consider that such legal protection is not just as it places these judges in a privileged position in comparison with other judges. It would make no sense or it would not be justifiable to avoid disciplinary procedures on this judge only because he/she has been charged with the duty of handling complaints against CEC decisions. After all, these judges too are like all the rest. The situation is different with what is said in the other part of this provision on not removing the judge from his/her duties for reasons related to item 5 of article 57 of the law No.

8436, dated 28.12.1998, "On the organization of the judiciary in the Republic of Albania", as replacements of judges of this court may be accompanied by harmful consequences.

14. **With regard to the form and content of the complaint (article 169)**. Our view is that there is room for discussions on what is mentioned in this provision in that if the complainer does not object to the dismissal of the judge at the moment of submission of the complaint, then he has no more a right to object to this judge. Practice has proven that evidence that could represent a foundation for requesting the dismissal of the judge, could also be encountered later, that is after the submission of the complaint. The same could be mentioned regarding article 170 of the Electoral Code, which reads:
"If he interested party does not present its objection within two days from receipt of the notification of the complaint, it has no longer a right to object to any judge".

15. **Item 1 of article 173 of the Electoral Code** says: "The Electoral College judges and decides on complaints within seven days after the complaint has been deposited". Considering the importance that short deadlines have on complaints related to electoral processes or complaints, we think that this deadline could be reduced down to five days and, in any case, the decision should be written (argued).

16. **Serious defects have been observed in all elections with regard to the training of electoral commission members**. There have been numerous reasons for this. Among these, we could mention:
    a- their creation not in a timely manner
    b- their selection or proposals not based on their cultural, educational and professional qualities, but on the basis of their "persistence" or militantism in defending party interests. We would suggest that serious discussion be held about this issue in the future.

    This is naturally connected with the fact whether we will continue to work with commissions that are formed on the basis of political party proposals, or other variants could be employed to make them independent and impartial. Nevertheless, experience so far creates the conviction that more time is needed for the training of commission members. Besides, frequent replacements or withdrawals should be prohibited by law, to avoid what happened even in the elections of October 12, 2003. It would be natural to have exceptions.

17. **We think that the possibility could be examined to define by law the cases in which voters' complaints could be submitted to the court even after the announcement of final voters' lists, but not on election day.** For instance, in spite of the request to correct the preliminary voters' list, the LGEC has not taken any decision or has taken a decision after the final lists have been announced, etc.

It might be possible that complaints in these cases could be handled in court not later than 5 days before election day.

18. **The issue of voting by Albanian citizens living abroad could also be worth discussing.** Voting in the places where they are would be more democratic and all-inclusive. At the moment, this would be difficult to realize, but even with the current conditions, the lists would contain inaccuracies and data on the total participation of voters would be incomplete. It is also worth mentioning that those coming from abroad to vote, 2-3 days before election day or on the day of the elections could be deprived of the right to vote because of the inaccuracy of personal data in these lists, which should have been corrected within the legally established deadlines. We keep in mind the fact that voting commissions even for voters living abroad and who come back to vote are obliged to enforce, like for all other voters, the relevant procedures of the Electoral Code.

19. **The examination of complaints on the announcement of elections invalid is of special importance.** Item 4 of article 117 of the Code uses the phrase "interested person" and "competent court". We think that it needs to be made clear as to who falls under interested persons and which is the competent court. Besides, the 10-day deadline could be reduced to, let's say, 5 days. Because of the very importance that the declaration of elections invalid has, the issue might be discussed as to whether in the cases of invalidity of elections in electoral units (especially in the parliamentary elections) or around the territory of the Republic, complaints against the CEC decision could be made in the Supreme Court or whether the decisions of the Electoral College in the above cases could be objected to in the Supreme Court as well.

20. **W**e think that the Electoral Code could mention the competence of the Constitutional Court to examine and decide about issues related to the incompatibility in the exercise of functions of deputies and the verification of their election (article 131, letter "e" of the Constitution).

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This work would have been more complete and more tenable if we would have become acquainted with the final report of the OSCE/ODIHR on the October 12, 2003 elections. We hope that this report will also present recommendations on further improvement of electoral legislation.

In writing this piece, we also took into consideration the views expressed by some specialists and representatives of non-governmental organizations who were observers in the October 12, 2003 elections, at a round table organized by the Albanian Helsinki Committee on November 22, 2003.

Some of the defects of the Electoral Code that have been mentioned in this work, in our opinion, have to do with the fact that it (the Code), not only before the drafting of the project, but even after the work of the parliamentary bipartisan committee, did not

become the target of discussions and debates by a broad range of specialists. As is known, the draft-code was sent immediately to the Assembly for approval.

In our view, we need to draw lessons from this negative practice. And, in that regard, I would initially present the following suggestion:

If the Electoral Code were to undergo changes, after the main directions of these changes had been defined, the Assembly could take the initiative to trust this task to a group of specialists with experience in the field and not involved in any political party. After that, the Assembly or respective parliamentary commissions could on that basis, assess and decide whether it would be necessary to make further improvements. It would be recommendable if this work were to start immediately and established deadlines to be rigorously respected.