THE INTERSECTIONS OF LAW WITH ISSUES OF CHOOSING AN ELECTORAL SYSTEM

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Abstract: The purpose of this article is to present some issues related to intersections of laws and legislation with issues of choosing an electoral system. I will be mainly focused in Albanian legislation and practices in the process in discussing, selecting and implementing the electoral systems in Albania as well as citizens rights and preferences with regards to these issues, as a fundamental pillar of democracy and rule of law.

Albania, as many other post communist countries is going through a long process of democratization of life and institutions. Elections are very crucial political processes for electing citizens to run the country and take all major decisions on the behalf of the others. Choosing an electoral system according to which votes of citizens will be transformed into seats of Parliament or offices for elected officials is a very complex process that requires consideration from all actors such as political parties, citizens, group of interests, non governmental organizations etc. These actors, being political or non-political ones will need to come up with an elaborated decision for choosing the most appropriate electoral system for a country, since there are many of them implemented all around the world. Factors, elements, issues, citizen’s interests, elections formulas and features to be considered when choosing an electoral system, as a matter of choice will be presented more deeply in this paper.

Keywords: Electoral System, Corrected Majoritarian (Albanian case - Parliamentary Elections in Albania in 2001 & 2005), Proportional System, Regional Proportional System (Albanian case – Parliamentary elections held in Albania in 2009), Citizen’s interest in choosing an electoral system.

1. Introduction

Political parties prefer the electoral system that favors them and of course lead them to a victory of majority of seats in legislative institutions or elected officials they promote or the ones that are supported by them. In different countries, political parties would prefer proportional representation versus majoritarian one and that is related to the size of a political party, the pre and post electoral agreement that parties carry out, the stability of government and the political tradition. I would like to analyze first what should be represented. Bases on democratic theories, the elections allow citizens to appoint or authorize their “representatives” lawfully – “officially authorized representatives” to articulate, verbalize and act in their behalf. In that sense, the institution of electing and selecting a representative that derives from private law, has been transposed into public

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law. As James Madison stated at *The Federalist Papers, No. 10*, during the time they were theoretically discussing for the suitable draft of the US Constitution, “… elected representatives would refine and enlarge the public view …”. Nowadays, requirements to respect and implement democracy’s principles are a certain and maybe the most important feature when an electoral system designed in a country. In this respect, what Madison called “public view” could essentially be interpreted as “public democratic view”. The main feature of the democracy is plurality of opinions, ideas which are reflected in political organizations, named political parties. Based upon this statement, an electoral system that favors the existence of more and more political parties could be labeled as the most democratic one. To follow the argument, Proportional Representation could be ideally the best system to put into practice that democratic principle. This way, all public views will be represented in state institutions or at the parliaments or other legislative institutions and the minorities views will also be represented; the political specter will be complete.

Another crucial element of democracy is the decision taking and decision making procedure by the majority, whether that is simple majority, absolute majority or qualified majority. In order to have what John Jay had insisted in *The Federalist Papers, No. 64*, “…the absolute necessity of the system …”, every country, when considers the political structure should be aware of its priorities. Since the time after Second World War, almost all countries inspired amongst peace, security, human rights, political stability of the state’s governments. The concern raised is whether Proportional Representation offers political stability. The most common system, used in Canada, India, the United Kingdom, and the United States, is simple plurality, first past the post or winner-takes-all. In this voting system the single winner is the person with the most votes; there is no requirement that the winner gain an absolute majority of votes.

**2. Electoral experience in Germany**

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1 The personal mandate which a person entrusts another person – power of attorney, as institute of private law, when applied electing state officials or Member of Parliament, is being converted into a collective mandate that a nation assigns to the MP-s. These collective mandates, in the beginning were interpreted as “imperative” mandate and later on “representative” mandates. At the end of nineteenth century, the intervention of Proportional Representation changed the meaning of the term “representation” from a legal to a factual relationship. Parliament came to be thought of as a portrait of the nation, as a small scale of reproduction of the collectivity of the voters. It represents the nation as a portrait represents its model and no longer as the trustee represents his mandatory. Parliament is a small scale reproduction of the whole country, a microcosm in the image of the macrocosm - Arend LIJPHART & Bernard Grofman, “Choosing an Electoral System”, Issues and Alternatives, American Political Parties and Elections, Co published with the Eagleton Institute of Politics, Rutgers University, PRAEGER, New York Westport. Connecticut, London, ISBN 0-275-91216-7, Which is the best Electoral System, Maurice DUVERGER, pg. 32.

2 Assemblies or Councils that have authority to take major legislative decisions for their countries.
In case we go back in history, Weimar Constitution\(^3\) in Germany had foreseen the Proportional Representation\(^4\) as electoral mechanism for the Members of Parliament to be elected in Reichstag. The representation of political wills and ideologies were fully accomplished when Reichstag was created, but there was no political stability in the country. It was hard to take decisions even by simple majority of the votes, since every political specter wanted to dominate and somehow eclipse the others. That tense and destabilized political situation was very much in favor of Adolph Hitler, when he wanted to expand his powers over Parliament and Government. In the case of Germany under Weimar Constitution, we should take into consideration even the fact that Germany did not have democratic tradition with respect to separation of powers, political plurality since it had been a monarchy\(^5\) before. That situation changed initially formally with the adoption of the new Constitution called “Fundamental Law of Germany – Basic Law\(^6\)” since two parts of the Germany, Federal Republic\(^7\) of Germany and Democratic Republic\(^8\) of Germany, were not governed under the same Fundamental Law, due to West and East influence of ideological views, political systems and economic approach. So in 1949, after II World War, Federal Republic of Germany changed the electoral system from Proportional Representation to Mixed Member Proportional\(^9\) Representation for the members of Bundestag – Parliament Chamber directly elected by people.

In terms of political stability, when Majoritarian Representation used or even Mixed Representation where Majoritarian Representation dominates, only big political parties can manage to be represented in Parliament, so the specter of political representation is narrow and evident – that means that when Government is created and entrusted by

\(^{3}\) Weimar Constitution had been approved by German National Assembly, in 1919. For more information, see: http://en.wikipedia.org/wiki/Weimar_Constitution.

\(^{4}\) Section 2 of the Weimar Constitution / Reichstag Articles 20 to 40 described the national parliament, the Reichstag, which was seated in the capital, Berlin. The Reichstag was composed of representatives elected by the German people by an equal and secret ballot open to all Germans aged 20 or older. Proportional representation principles governed Reichstag elections.

\(^{5}\) German Empire.

\(^{6}\) Grundgesetz – German term used to describe German Basic Law, for more information see: http://en.wikipedia.org/wiki/Basic_Law_for_the_Federal_Republic_of_Germany

\(^{7}\) Federal Republic of Germany was influenced by West ideology – separation and limitation of powers to the institutions, especially to the President and Prime Minister, democracy and human rights oriented, free private initiative and market competition.

\(^{8}\) Democratic Republic of Germany was influenced by East Ideology, Russian one, where the communist ideology dominated.

\(^{9}\) For more info, see: http://www.iuscomp.org/gla/statutes/GG.htm#38.

“… German Bundestag shall consist of 656 members. They shall be elected in a general, direct, free, equal and secret ballot by the Germans entitled to vote, in accordance with the principle of Proportional Representation combined with the personal election of candidates. Of the members, 328 shall be elected from nominations in the constituencies (first-past-the-post election system) and the rest from Land nominations (party-list proportional representation)…”, Art.1 of the Federal Electoral Law of Germany.
Parliament, the majority of votes is guaranteed. Thus most political initiatives or reforms coming from Government are most likely to pass and approved by parliament as well as practically applied in the country. Likewise, when high state officials are elected, the compromise required in selections and approval processes amongst political wings, is much more achievable when two or three of such than when more of them are to be part of the process, as happens in Proportional Representation.

3. Electoral experience in France
The case of France electoral representation is similar in terms of the stability it offers to the one described in Germany, of course with quite a few distinctions. After II World War, France adopted a democratic constitution, the one called VI-th Republic Constitution, approved on 1946. *A contrario* to Germany, France, as seen by the number of the constitutions approved by that time, had a longer experience in drafting, implementing constitutions and tailoring them according to the up to date needs of the political system as well as historical evolving trends. The electoral system provided there was a Proportional Representation\(^{10}\). Citizens were supposed to count their votes for political parties; that made possible a lot of political parties to be represented in Parliament. That caused problems in France in attaining the majority votes by members of Parliament, necessary to compose the Government; even when the majority was attained, the fluid alliances from the broad political specter, were able to dismiss the existing government and create a new one, based upon the new alliance. That happened several times and of course created a destabilized situation in governing the country. It also produced a risky precedent regarding the political stability in France and equilibrium needed for economical reform in the country. As a result, this political situation changed when the V-th Republic Constitution was adopted in France, by e popular vote, on 1958\(^{11}\). The electoral system changed from Proportional Representation to Majoritarian one. That had ensured political stability as a favor climate for all reforms in the country, especially economic ones.

\(^{10}\) Title II of the Constitution (1946), The Parliament.

Art.5: The Parliament is composed from the National Assembly and the Council of Republic.

Art.6: The two Chambers are, besides, chosen on territorial base: the National Assembly with direct universal suffrage; the Council of the Republic through the town and departmental collectivities, with indirect universal suffrage. The Council of the Republic is renewable for half. Nevertheless, the National Assembly can elect, with proportional representation, a number of advisers that have not to overcome a sixth of the total of the members of the Council of the Republic.

\(^{11}\) Title IV – Parliament; Art. 24 of the Constitution provided that members from the National Assembly shall be elected by direct suffrage. The National Assembly consists of 577 members known as députés (deputies), each elected by a single-member constituency. Deputies are elected in each constituency through a two-round system. 289 seats are required for a majority. For more info see: [http://en.wikipedia.org/wiki/French_National_Assembly](http://en.wikipedia.org/wiki/French_National_Assembly).
The stability of this system is reflected in the proof that in France the same electoral system and same procedural rules that applied since 1958 are in force even nowadays and the policy of stability rules has been applied even for other constitutional ruling in terms of political system.

For instance, in France, the way President is elected, offers another stability and equilibrium in government. The same way the lower Parliament Chamber is elected directly by people, President of France is elected by majoritarian system directly by people. The candidate for President that wins the majority of votes from the citizens will be officially the President of France. That means that President should have the full support and consent by people. That means that no matter what the political specter in Parliament looks like, no matter what political alliances or clans are created, no matter which candidate running for President will be part of the political scenarios if the people like the candidate, support his ideas and governing skills and vote for him.

4. Electoral experience in Great Britain
Great Britain offers a perfect model of electoral tradition coupled with political stability. It also offers a model of step by step and complete evolution leading to perfection. If we refer to history, since 1215 when Magna Carta was approved by the Baron’s and Noble’s Council, there were two major political or better ideological trends – the one that represented King’s wills and the other one that represented interests and rights of the British elite compounded by clerical nobles as well as non clerical nobles, barons, konts etc. From that time, political views were grouped in two major clusters, King on one side and its supporters and British elite – barons and nobles on the other side and their supporters, which were so much in favor of Parliament, a collegial association as opposed to King’s policies and course of its actions. That trend continued even during the Glorious Revolution in Great Britain between the Whigs and Tories. After the Revolution, in 1689 when Bill of Rights adopted by Parliament, these major groups and supporters, formalized into political parties named Conservator Party and Liberal Party. Since the electoral system that traditionally was applied to elect Member of British

12 I would like to bring to the readers attention the evidence that by that time, 13th century A.C, only the King and British elite had rights and privileges with respect to country government and decision making process. Citizens and other people did not have the right to participate to political institutions such as Magnum Council or to be represented at the council later named Parliament. That happened few centuries latter when the Parliament enlarged even by representatives from conte’s and other local districts, elected directly by districts people.
13 The Whigs’ origin lay in constitutional monarchism and opposition to absolute rule; parliament supporters. For more info, see: http://en.wikipedia.org/wiki/Whig_(British_political_faction).
14 The Tories were more friendly to royal authority; monarchy’s supporters. For more info, see: http://en.wikipedia.org/wiki/British_Tory_Party.
parliament, was simple majoritarian – first past the post\textsuperscript{15}, the two parties system was cultivated step by step. Nowadays, in UK, the two parties system is still applied, but political trends and previews political protagonists had changed. Conservator’s wings and Liberal ones had been merged into one single Political Party – Conservatory Party since they were considered ideologically two wings of the same political vision, the Conservators, meantime Trade Unions supported by labors, created a new political party, the Labor Party which nowadays dominates the political arena together with Conservator Party.

5. Electoral experience in Albania

As many post communist countries, after 1990-s Albania had tried hard to adopt and implement so far different electoral systems in order to ensure democratic principles of the MP-s elections. The electoral system that Albania inherited from communism was simple majoritarian; all Members of the Parliaments of that time were elected by people according to the system first past the post.

From 1991 – 2001, the electoral system had been Mixed Members Representation – MMR, from which 100 MP-s had been elected directly by voters according to first past post system and 40 remaining MP-s by a proportional formula, that had changed in some elections.

On 2001 Parliamentary elections, the electoral system applied was a mixed one – Mixed Member Representation; of the 140 seats of Parliament\textsuperscript{16}, 100 should be elected according to formula first past the post and 40 other according to a formula defined at Constitution of Albania and Electoral Law; That system favored mostly the party coalitions and alliances for 40 seats of MP-s.

The same electoral system was applied on Parliamentary elections on 2005. Again, the parties’ coalitions made possible that many of the votes for the biggest electoral parties\textsuperscript{17}, for the sake of the formula used for 40 remaining seats, were transported to the small parties with whom they had entered into pre electoral agreement\textsuperscript{18}. The system used both

\textsuperscript{15} For more info see: http://www.electoral-reform.org.uk/votingsystems.
\textsuperscript{16} See Art. 64 of the Albanian Constitution, “…One-hundred deputies are elected directly in single-member electoral zones with an approximate number of voters. Forty deputies are elected from the multi-name lists of parties or party coalitions according to their respective order…”
\textsuperscript{17} Biggest parties in Albania are considered to be Socialist Party which originates from the existing Party of Labor of Albania / PLA during communism time (it was formed after the dissolution of the PLA on June 1991) and Democratic Party (founded on December 1990) which was created after communism regime collapsed; for more info see: http://en.wikipedia.org/wiki/Socialist_Party_of_Albania and http://en.wikipedia.org/wiki/Democratic_Party_of_Albania.
\textsuperscript{18} The so called “Dushk phenomena” and later on “mega Dushk phenomena”.
times\textsuperscript{19}, offered stability for the country except few problems came about especially when qualified majority was necessary to elect the President of the Republic on July 2007\textsuperscript{20} by Parliament.

On 2008, Albanian Parliament approved a new Electoral Code\textsuperscript{21} based upon the amendments of the Albanian Constitution, Art. 64, where provided the changed electoral system - from Mixed Member Representation to Regional Proportional Representation\textsuperscript{22}. The agreement for changing the electoral system was reached mainly by two big political parties SP and DP and disputed by small political parties and non-parliamentary ones. This system favored big parties and of course parliamentary ones and somehow obliged small parties to enter into coalitions in order to win any mandate and other governmental offices as a reward for their contribution into the final elections result.

6. What should be considered when designing an electoral system?
When designing an electoral system it is recommended to consider a list of criteria which encapsulate what you want to accomplish, what you want to avoid and, in the very end, what you want your legislature and executive government to look like.

The legislature should be to some degree a ‘mirror of the nation\textsuperscript{23}’ which should look, feel, think and act in a way which reflects the people as a whole. An adequately descriptive legislature would include both men and women, the young and the old, the wealthy and the poor, and reflect the different religious affiliations, linguistic communities and ethnic groups within a society each region, be it a town or a city, a province or an electoral district, has members of the legislature whom it chooses and who are ultimately accountable to their area. The ideological divisions within society may be represented in the legislature, whether through representatives from political parties or independent representatives or a combination of both.

6.1 Keep It Simple and Clear

\textsuperscript{19} Mixed member Representation based on the Majoritarian System domination.
\textsuperscript{20} For more info on presidential elections, see: \url{http://en.wikipedia.org/wiki/Bamir_Top}. 
\textsuperscript{21} New Electoral Code was approved on December 29, 2008.
\textsuperscript{22} Art 64 of the Albanian Constitution provides that “…Parliament will be composed by 140 MP-s, elected according to a proportional system”\textsuperscript{; Also See part XII of the Electoral Code, Division of Mandates, Art. 163, where provided the formula according to which votes for political parties and coalitions was supposed to be transferred into seats of Parliament.}
Effective and sustainable electoral system designs are more likely to be easily understood by the voter and the politician. Too much complexity can lead to misunderstandings, unintended consequences, and voter mistrust of the results.

6.2 Maximizing Voter’s Influence

Voters should feel that elections provide them with a measure of influence over governments and government policy. Choice can be maximized in a number of different ways. Voters may be able to choose between parties, between candidates of different parties, and between candidates of the same party. They may also be able to vote under different systems when it comes to presidential, upper house, lower house, regional, and local government elections. They should also feel confident that their vote has a genuine impact on the formation of the government, not just on the composition of the legislature.

6.3 Facilitating Stable and Efficient Government

The expectations for a stable and efficient government are not determined by the electoral system alone. The perception of whether results are fair or not varies widely from country to country. The question whether the government of the day can enact legislation efficiently is partly linked to whether it can assemble a working majority in the legislature, and this in turn is linked to the electoral system. As a general rule, plurality/majority electoral systems are more likely to produce legislatures where one party can outvote the combined opposition, while PR systems are more likely to give rise to coalition governments. Sometimes, it might happen that PR systems can also produce single-party majorities and plurality/majority systems can leave no one party with a working majority. Much depends on the structure of the party system, the nature of the society itself and the electoral tradition.

6.4 Accountability of the Government

Accountability is one crucial element of representative government. Its absence may lead to long-term instability. An accountable political system is one in which the government is responsible to the voters to the highest degree possible. Voters should be able to influence the shape of the government, either by altering the coalition of parties in power or by throwing out of office a single party which has failed to deliver. Suitably designed electoral systems could facilitate this objective.

24 I would like to mention here the case of Albania in last Parliamentary Elections, June 2009, where Regional Proportional system was applied; Two main political parties won majority of seats in Parliament but none of them was able to govern. The elections results were a bit contradictory because of the system effects – SP won 620586 votes which were equivalent (according to electoral formula and coalitions formed) to 65 mandates, while DP won 610463 votes equivalent to 68 mandates. For more info see: http://www.cec.org.al.

25 Albanian case of Regional Proportional Representation that has similar effects as plurality one, Parliamentary Elections in 2009.
6.5 Accountability of the Individual Representatives
Accountability at the individual level is the ability of the electorate to effectively test on those who, once elected, betray the promises they made during the campaign or demonstrate incompetence or idleness in office. Some systems emphasize the role of locally popular candidates, rather than on candidates nominated by a strong central party. Plurality/majority systems have traditionally been seen as maximizing the ability of voters to throw out unsatisfactory individual representatives. Again, this sometimes remains valid. Sometimes the connection becomes vague where voters identify primarily with parties rather than candidates. Sometimes open and free list systems are designed to allow voters to exercise candidate choice in the framework of a proportional system.

6.6 Encouraging Political Parties
In a democratic system of government, could that be established or new democracies suggests that longer-term democratic consolidation requires the growth and maintenance of strong and effective political parties, and thus the electoral system should encourage this rather than establish or promote party fragmentation.

Electoral systems can be framed specifically to exclude parties with a small or minimal level of support\(^\text{26}\). Most experts also agree that the electoral system should encourage the development of parties which are based on broad political values and ideologies as well as specific policy programs, rather than narrow ethnic, racial or regional concerns.

6.7 Promoting Legislative Opposition and Oversight
Effective governance depends also on those who oppose and oversee them. An electoral system should help ensure the presence of a viable opposition which can critically assess legislation, question the performance of the executive, safeguard minority rights, and represent its constituents effectively. In this respect, it is recommended as much as possible that opposition groupings should have enough representatives to be effective and in a parliamentary system should be able to present a realistic alternative to the current government. Obviously the strength of the opposition depends on many other factors besides the choice of electoral system, but if the system itself makes the opposition impotent, democratic governance is inherently weakened.

6.8 Sustainability of Electoral Process
Elections do not take place in the academic books but in the real world, and for this reason the choice of any electoral system depends to some degree on the cost and administrative capacities of the country involved. Although donor countries often provide

\(^{26}\) This is the case of electoral systems where the minimum threshold for entering the Parliament applied for parties or coalitions.
substantial financial support for the first, and even the second, election in a country in transition to democracy, this is unlikely to be available in the long term even if it were desirable\textsuperscript{27}. A sustainable political framework should take into account the resources of a country both in terms of the availability of people with the skills to be election’s administrators and in terms of the financial demands on the national budget.

6.9 Applying ‘International Standards’

Finally, the design of electoral systems today takes place in the context of a number of international conventions, treaties and other kinds of legal instruments affecting political issues. While there is no single complete set of universally agreed international standards for elections, there is consensus that such standards include the principles of free, fair and periodic elections that guarantee universal adult suffrage, the secrecy of the ballot and freedom from coercion, and a commitment to the principle of one person, one vote.

Moreover, while there is no legal stipulation that a particular kind of electoral system is preferable to another, there is an increasing recognition of the importance of issues that are affected by electoral systems, such as the fair representation of all citizens, the equality of women and men, the rights of minorities, special considerations for the disabled, and so on. These are formalized in international legal instruments such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights, and in the various conventions and commitments concerning democratic elections made by regional organizations such as the European Union (EU) and the Organization for Security and Co-operation in Europe (OSCE).

And ... do not assume that defects can easily be fixed later.\textsuperscript{28} All electoral systems create winners and losers, and therefore vested interests. When a system is already in place, these are part of the political environment. At a time of change, however, it may be unwise to assume that it will be easy to gain acceptance later to fix problems which arise. If a review of the system is intended, it may be sensible for it to be incorporated into the legal instruments containing the system change. Take the time needed to get it right the first time.

7. Conclusions

The Choice of Electoral System is one of the most important institutional decisions for any democracy. In almost all cases the choice of a particular electoral system has a profound effect on the future political life of the country concerned, and electoral


\textsuperscript{28} See http://aceproject.org/ace-en/topics/es/esg.
systems, once chosen, often remain fairly constant as political interests solidify around and respond to the incentives presented by them\textsuperscript{29}.

Electoral system choice is a fundamentally political process, rather than a question to which independent technical experts can produce a single ‘correct answer’. In fact, the consideration of political advantage is almost the main feature in the choice of electoral systems, while the menu of available electoral system choices is often, in reality, a relatively constrained one.

Political institutions shape the rules of the game under which democracy is practiced, and it is often argued that the easiest political institution to manipulate, for good or for bad, is the electoral system. In translating the votes cast in a general election into seats in the legislature, the choice of electoral system can effectively determine who is elected and which party gains power. While many aspects of a country’s political framework are often specified in the constitution and can thus be difficult to amend, electoral system change often only involves new legislation.

Albania has traditionally applied electoral systems based upon majoritarian trends, except Parliamentary Elections of 2009 where Regional Proportional system was applied. Still, political parties are aiming to change again the electoral system for next Parliamentary Elections. Electoral systems are living documents that could be amended and changed according to political climate, interests and other circumstances. In that framework, it is recommended to take into account the criteria described above regarding designing process of electoral system. Reforms of the country such as obligations deriving from NATO accession as well as complete integration process to EU require political stability in Albania and region as well, so would be recommended that electoral system applied should offer that stability.