Political representation in positive law

MSc. Bledar Dika[1]
Lecturer at the University "Aleksandër Xhuvani", Elbasan
E- mail: bledar.dika@yahoo.it

Abstract

Looking at political representation in the norms and provisions established or positioned in the legal order, we can say that the Albanian legal order contains norms that try to preserve the autonomy of each representative, which formally positions political representation as a situation of representativeness. The legal order also contains norms which, starting from the idea of a permanent relationship between the representatives and the represented, discipline the moments and ways through which these relationships connect the representatives with the represented. However, political representation beyond the relational dimension must be manifested above all in terms of the representation of national unity and sovereignty. Only in this way can political representation enter into symbiosis with the very concept of the State of the right to guarantee subjective rights beyond sectoral or corporativist influences. In this sense, the institution of banning the mandatory mandate is sanctioned in positive law, as one of the fundamental principles of contemporary constitutions. However, the political-juridical reality has been able to establish this principle not only through strictly political behavior but also through normative corollaries. This paper aims to highlight the constitutional and legal moment in which political representation is located. To highlight how political representation approaches positive law when it tries to relate both to the representative and "popular sovereignty". Finally, the paper manages to conclude in critical terms on political representation, on its relationship with the represented subjects, and its bias in favor of political parties and their leadership.

Keywords: *Political representation, Constitution, positive law, mandatory mandate, political party.*

[1] MSc. Bledar Dika is a lecturer at the University of Elbasan "Aleksandër Xhuvani" for more than seven years. He is a researcher in "Public Law", focused on Constitutional Law and the protection of fundamental Human Rights in Albania.

I. Introduction

As per the Kelsenian model, the State does not have a personality of its own, much less a unique will, the expression of which would be the laws. When it is said that "the majority of parliamentarians and the will they exercise are identical to the will of the whole people" for Kelsen, this is nothing more than "a fiction, unstable from a psychological point of view (Kelsen, 1923 a: 165-166). Kelsen writes that "under certain conditions, certain actions of some persons - that is, of certain organs of the State - are charged not to them (that is, not to the organs that issue them), but to the State" (Kelsen, 1923b: 407-408). Thus, the very unity of the people is inconceivable except in legal terms. The unity of the people is presented from a legal point of view as "the submission of all to the state legal order" (Kelsen, 1929a: 35). What appears to us as a general interest is nothing more than a temporary pact between organized interests. "There is no general interest, but always and only the interests of groups that in any way seek to appropriate state power, the will of the State" (Kelsen, 1923: 478-489). Thus, Kelsen continues, seeing that the interests are conflicting between them, the general interest does not necessarily express the interest of the most powerful group, but is "the result, the compromise between opposing interests" (Kelsen, 1929b: 56).

According to Kelsen, the formalism of law guarantees the conditions for the free development of conflict between the parties and provides for the alignment of the result that emerges from the compromise between the groups.

The politicization of administrative law has and should have the same goal, politicization which should be almost total by listing every legally disciplinary aspect, to avoid discretionary power as much as possible (Kelsen, 1929/1982). For Kelsen, the Constitution as a formal act follows the same logic, for him "The Constitution expresses the political forces of a determined people, it is a document that proves a situation of relative balance in which conflicting groups for power remain until the arrival of a new order. If the demand to modify the constitution increases to the point that it cannot be put aside, it is a clear sign that there has been a displacement of forces that seeks to express themselves in the constitutional plan" (Kelsen, 1929/1981).

II. Literature review

Looking at political representation in the norms and provisions established or positioned in the legal order, we can say that the Albanian legal order contains norms

that try to preserve the autonomy of each representative, which formally positions political representation as a situation of representativeness. The legal order also contains norms which, starting from the idea of a permanent relationship between the representatives and the represented, discipline the moments and ways through which these relationships connect the representatives with the represented.

Finally, the legal recognition of political parties and their functions conditions the usual legislation such as laws, sub-legal acts, parliamentary regulations, and practices of institutions.

Being able to categorize the norms based on which the relationship between the representatives and the represented is legally recognized, we can start with the first group, which includes all those norms from which the concept of "the people" is evidenced.

Opening a small parenthesis, by people we understand a group of individuals who have some common objective characteristics (e.g., language, history, residence, etc.). The term people belong to that of "Nationality", i.e., "the people" who live in their State, and by the term "nationality" we mean a people mobilized towards political, economic, cultural autonomy", nationality in turn belongs to citizenship, and in conclusion, we can synthesize "people as unity of all citizens" (Demarchi, Ellena, Cattarinusi, 1994: 1350).

For our Constitution, "The People" is a unitary subject, whose interests inherit those of the individuals and groups that make it up. So, we are talking about all those provisions through which an exchange is carried out, in the broad sense of the word, between the People, the Republic and the State, precisely to underline that the people have a unity, a will, thus also a subjectivity of its own. In this sense, with the affirmation of popular sovereignty sanctioned in Article 2 point 1, it is emphasized that "Sovereignty in the Republic of Albania belongs to the people. This is further reinforced by point two of the same articles where it is quoted that "The people exercise sovereignty through their representatives or directly".

Among other things, Article 45of the Constitution, can legitimize the perception of the active electorate as a public function, and of elections as an activity directed exclusively at the formation of some State bodies. Article 70 point 1 should be added to these provisions, according to which "Deputies represent the people and are not bound by any mandatory mandate", thus underlining the principle of representation and the so-called "prohibition of mandatory mandate". It is precisely the latter, as it is also called the principle of the free mandate, through which the representative receives a mandate that is not legally bound by the instructions or orientations of the voters. So, once the elected person receives the mandate, he has no obligation, at least legally, to the voters for his activity.

At first glance, this may not seem very popular, but let's continue. Although we do not have specific legal obligations, we still talk about obligations between the

parties only in the context of the principle of political representation, that is, due to the fact that even though the representative does not feel legally bound by the voters to follow a predetermined line of behavior, he must still to account with his re-election, where voters can penalize him by not re-electing.

This elevates the relationship to political representation, surpassing the private one. So, the prohibition of the mandatory mandate is a necessity for the enforcement and non-degradation of political representation. In this sense, the European Council has expressed itself, which considers the mandatory mandate "an unacceptable requisite for a State that aims for democracy", therefore the institution of banning the mandatory mandate should be a key issue (Venice Commission, 2004). In Albania, even though the institute is directly sanctioned in the Constitution, the regulatory laws and the debate on this issue have been poor considering the importance and side effects that would have an efficient non-functioning of the institute. The logic is that of predicting specific sanctions for established relationships or those that can be established between interest groups and particular MPs. These reports often degrade into what is often referred to as "clientele", "capture", etc.

Where the phenomenon would corrupt the discretionary decisions of the representatives and with them of the bureaucracy, the decisions that should follow a rational and efficient line of resource allocation would be replaced by arbitrary and inefficient decisions, then occur in the situation where Albania has been around for a long time.

III. Albanian legislation on political representation

In relation to the positive law and the need for the provisions that discipline the prohibition of the mandatory mandate, in addition to the above-mentioned constitutional article, which anyway has a general weight, we can refer to: 1). Article 28 of Law 9367/2005 on the prevention of conflict of interests in the exercise of public functions, as amended by Law 9475/2006, Law 9529/2006 and Law 86/2012, and specifically for the figure of the deputy, it is provided that: a) not may be a leader or member of the governing bodies of profit-making organizations; b) cannot exercise private activities that generate income in the form of a natural commercial person, partnership of natural commercial persons of any form, independent professions of lawyer, notary, licensed expert, as well as consultant, agent or representative of profit-making organizations and cannot be employed, full-time, in another position; c) cannot actively own any share or share in the capital of a commercial company, if it results in a dominant position in the market; 2) we can also refer to law 9049/2003 on the declaration and control of assets,

financial obligations of elected officials and some public servants, amended by law no. 9367, dated. 4.7.2005, by law no. 9475, dated. .9.2.2006 and with law no. 9529, dated 11.5.2006, and with Law No. 85/2012 dated 18.09.2012, specifically in article 3 of this law the periodic obligation to declare the income of the deputy is provided and in article 25/1 the control that can be exercised to verify the authenticity and accuracy of the data contained in the declaration is provided ; we can finally refer to article 89 and 90 of the Electoral Code, which regulates the financing of electoral subjects from non-public funds and the registration of the latter. However, the law, at least in Article 90 of the registration of non-public funds, is delimited only to the figure of the political entity, which coincides with the political party, coalitions of political parties, as well as with the candidate proposed by the voters according to Articles 69 and 70. do not provide for the registration of public funds that personally interest the candidates of political parties and party coalitions, so in this case the code regulates only the funds that go in the name of the party entity and not the funds that specific candidates of a party can receive. It must be said that this is an important deficiency, taking into account the constitutional provision of the prohibition of the mandatory mandate, in Article 70 point 1, according to which "Deputies represent the people and are not bound by any mandatory mandate", in the light of the consolidated doctrinal interpretation this should be read that the deputy is not bound by any binding mandate even towards the party or coalition that proposes him as a candidate (Ciancio, 2008: 259-298). Thus, under the dictates of the principle of the free mandate, the candidate, after being elected deputy, can move from one coalition to another and from one party to another without having legal obligations to the party or the electorate, except for those of political representation which are chosen at the time of re-candidacy or his re-election. Therefore, in coherence with this, the registration of non-public funds received not only by political entities, parties, coalitions of parties and candidates proposed by voters, but also funds that can be received individually by all candidates from any entity that proposes them must be provided.

The principle of banning the mandatory mandate, as we saw, is the cornerstone of building a system that stays away from the influences of "third parties", anyway in Albania we are still at the forefront of dealing with the topic, seeing the discussions that the institute has had in western countries (Rodriguez, Modena, 1984).

The most prominent opinion is the one that sees the Parliament's decisions as free in following the suggestions that come from outside, however, the deputy has the opportunity to withdraw from these suggestions precisely under the tutelage of the free mandate, however, such behavior would have its consequences which would be evident in the relations with the party (Crisafulli, 1958: 606).

Following the norms that regulate political representation in positive law, we can mention Article 73 of the Constitution which foresees the non-responsibility

of the deputy for the thoughts, opinions and votes expressed in the Assembly in the exercise of his functions. This provision is also in line with the autonomy and independence of the representative, which can also be extended outside the Parliament (Zegrebelsky, 1979: 43). In this line, we can also add article 79 of the Constitution, which in point two provides for the conduct of the meetings of the Assembly with closed doors, thus separating the representative from the control of the electorate, we can also mention article 65.1 of the Constitution. which foresees the principle of prorogation (§), configuring the Parliament as a permanent body, and exalts as independent of the electoral fact, even if for a short time, the quality of being a representative of the people. On the other hand, there is the Regulation of the Parliament, which recognizes a series of norms from which an adequate guardianship of the position of the parliamentarian against his parliamentary group originates, which is the design of the political party within the Parliament (Savignano, 1967: 223). It is therefore this ratio of norms that allow and justify the disagreement of individual attitudes from those of the group.

Among other things, only in one provision of the Constitution, the representativeness of a body is separated from popular elections. Thus, in article 86 point 1 of the Constitution according to which the President of the Republic is the Head of State and represents the unity of the people and connecting this with Article 90, comma 1, which removes the responsibility of the President for the acts performed in the exercise of his duty and consequently removes the responsibility towards his constituents regarding the political orientations that these may have. All these examples seem to strengthen the idea that in the Albanian legal order, representation is simply a situation, fading representation as a relationship.

In the same light, the lack of provisions related to the responsibility of the elected to the voters should be read. To further reinforce the fact that in Albania political representation can be interpreted as simply a situation of representation, it is evidenced by the electoral law which regulates parliamentary elections, which has adapted a completely proportional system, where political representation itself resembles the representation of opinions and not of will. Consequently, in the electoral system that Albania has adopted, the decision on the formation of the Government and on its program belongs to the political forces that are in the Assembly and not directly to the electorate, which in turn ends up giving a representative warrant as if it were a "blank check" (Ragazzoni, 2012).

The notion of the people contained in the article of the Constitution is not only that which considers it, but also that of the people which consists of many citizens taken individually, equal among them, where everyone is the holder of fundamental rights and a member of sovereignty fractions (Crisafulli, 1957: 34). In confirmation of this, we can call the article where the active electorate is presented as an individual right, recognizing the personal interest of the voter in exercising

the right to vote. The recognizes the right to vote of all citizens (who are voters) and provides for the personalization of the vote and its equality, at the same time it prohibits certain laws from departing from the principle of universal suffrage.

Our constitution considers that the general will should be as effective and as legitimate as possible. The representative and executive bodies of this will must be renewed periodically and at the same time must emphasize the fact that in the last moments of the mandates these bodies must exercise as little power as possible, and in certain cases completely limit it. The reasons for this imposition must be seen in the light that in the period preceding and following the dissolution of the Assembly, the latter suffers a "withering" of its legitimacy, a renewal of representation and legitimacy is required, and the decisions in the last "torments" are not effective, the representativeness of the deputies is now considered faded, and therefore the legitimacy of the body to take constitutionally important decisions is also considered faded. This is confirmed by the example where the Constitution, in article 65 point 4 provides that "the Assembly cannot issue laws during the period of 60 days before the end of its mandate until the first meeting of the new Assembly" or in article 88 point two paragraph 2, where it is quoted that "When the presidential mandate ends in the six months preceding the end of the mandate of the existing Assembly, the procedure for the election of the President begins no later than 60 days before the end of the mandate of the Assembly", i.e. during the last 60 days of the Parliamentary mandate , the Assembly cannot elect the President of the Republic, because his legitimacy is considered to have faded. In this sense, the word should be interpreted that the 60 days of the end of the term should not only not start the procedure but also not finish it, thanks to the fact that in this period the decision-making legitimacy is considered to have faded, so the forecast goes beyond the procedural start, rationally including the conclusion or more precisely the deliberation.

In an analogous way, the final mandate of the Government should be considered, which in this period should perform simple organizational functions. However, what is important to emphasize is the fact that the temporary and limited duration of the Assembly creates a systemic relationship with the political responsibility of the Government towards the latter, in the sense that this responsibility is presented as a surrogate of that directly to the people. This is because the representatives model their attitudes towards the Government, according to the judgments of the electorate about good governance, often putting in place mechanisms that lead to extra-parliamentary crises. Because of this fact, of a premature renewal of political representation where crises are severe, the constitution provides for the institution of premature dissolution of the Assembly in article 65 point 3 of the Constitution, in article 67 point 1. part 2, in article 96 point 4, in cases of motion of confidence, Article 104 of the Constitution and cases of motion of no confidence, Article 105 of the Constitution

Always in the framework of political representation, we must also look at those provisions that discipline the so-called institutes of direct democracy, such as the referendum for the repeal of a law, which here must be seen as functional of political representation, that is, as an instrument of the represented people to control prescribed Acts of Parliament (Constitution, Part 11).

Finally, we also have the provisions on political parties, among which Article 9 of the Constitution stands out. which recognizes the freedom of their creation. So, recognizing all citizens the freedom to join the party, on the one hand, they are recognized to compete in a democratic way to determine the policy and direction of the country and on the other hand, it is forbidden that the Albanian political order is organized according to a mono-party regime that is, it is guaranteed through the Constitutional provisions that a pluripartidism system is implemented in Albania. This is further reinforced by clause two of Article 9 of the Constitution. Where it is quoted that: "Political parties and other organizations, whose programs and activities are based on totalitarian methods, that incite and support racial, religious, regional or ethnic hatred, that use violence to seize power or to influence state policy, as well as those of a secret character are prohibited according to the law".

For these reasons, the importance and mediation of the political party in relation to representation are directly recognized in the Constitution. Thus, Article 68 point 1 expressly recognizes the political party and coalitions of political parties, the status of the liaison, that is, the fact that there is a connection between the voters and the political party, that the voters practically vote for the candidates proposed and supported by the parties is recognized.

IV. Conclusions

In the final analysis, the effective representatives of the people in Albania are the political parties, this is demonstrated by the fact that the political parties in Albania have introduced a plebiscite element, where the electorate by voting chooses between different political programs and at the same time shows confidence in a leadership or defined leadership class. This fact is reinforced even more by all those norms which have introduced the proportional electoral system into our legal order by strengthening the political parties themselves and their leadership. In this sense, seeing the central role of political parties, it is necessary to look in the light of special importance not only those norms that regulate the electoral system (we are talking about the electoral code approved by law no. 10019 dated 29.12.2008) where parties operate, but also those that sanction the formation, financing, freedoms, and obligations of political parties[2].

[2] We are referring to those norms that start from the aforementioned constitutional articles, in the special laws that regulate the formation, activity, financing of parties up to those norms of the parliamentary

To avoid that the parties are representatives of the people dissolved from any relationship with the people themselves and with the concrete interests that they express, a revitalization of all those norms and provisions that guarantee parliamentarians an appropriate autonomy to parties or lists is required theirs.

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regulation that regulate the activity of parliamentary groups.