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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT LAW ON THE ORGANISATION AND FUNCTIONING OF THE COUNCIL OF MINISTERS IN THE REPUBLIC OF ALBANIA

Comments by:

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I. The draft law that has been submitted is a kind of an "executive" act following from very general article 6 of the Constitution of Albania. Art. 6 states that "the organization and operation of the organs contemplated by this Constitution are regulated by their respective laws, except when this Constitution provides otherwise". The wording of the Constitution supposes the obligation of regulating issues concerning as well organization as operation (functioning ?) of the Council of Ministers in the form of a statute. In many countries the functioning is regulated rather by a lower-ranking legal act (a sub-statutory act), i.e. rules and regulations for the work of the Council of Ministers. Accepting the statutory form implies greater stiffness in the accepted solutions, it does not provide for the freedom of change permitted by rules and regulations. Every change to the manner of functioning governed by a statute will require approaching the parliament; for this reason it constitutes a greater limitation on the Council of Ministers in terms of governing its own „internum".

II. Taking this into account the special attention should be drawn to the art. 5 concerning structure of the Council of Ministers. The proposal is to put the names of ministries directly to the statute. There are three different variants. In my opinion it would be more rational to select variant **II**. Adopting variant **I** shall nearly implicate the concurrent adoption of other statutes about other ministries (this scenario mentions such a possibility). For one should doubt whether they would curtail themselves to appointing only the six ministries mentioned in variant I. Therefore, at the moment when a new Act on the Organization and Functioning of the Government is adopted, all the ministries which are supposed to exist on the day when this statute comes into effect should be enumerated in the statute above. Otherwise, this statute shall have to be amended the day after it comes into effect.

It is however possible to propose another solution. Instead of closed (enumerated) list of ministries (and concrete names of the ministries) expressed in the statute, it would be more useful to list in the statute the branches of government administration. It will give more power to Prime Minister, because the Prime Minister shall specify the detailed scope of activity of Minister, immediately following the nomination of the Council of Ministers or individual minister. A minister directing a particular branch (or two, three branches) shall be defined as a minister competent for matters determined by the name of a given branch. This solution is more flexible, creates better ground for changes in the structure of the Council of Ministers in the particular political situation when there is a need to establish one more ministry, [1]without changing the law. At this moment however this solution involves need to prepare new law on the classification of branches of government administration, or appendix to the draft law just discussed.

II. The general construction and placement of the Council of Ministers in the structure of the state organs have been specified in the Constitution. The key principle is the separation of powers as expressed in very general way in art. 7. Part V of the Constitution, which refers to the Council of Ministers is a part that describes in fairly great detail the composition of the

[1] This solution exists in Poland since 1997. Thera are 2 laws: 1) on the Organization and working procedures of the Council of Ministers and the Scope of activities of the Ministers, 2: on Branches of Government Administration. This solution, in practise, helped to solve some „coalition's problems .

Council of Ministers, the basic issues linked to appointing and dismissing the Prime Minister and individual ministers, the basic conditions to become a minister. The Constitution also specifies the competencies of the Council of Ministers and Prime Minister.

The model of the political system embraced by the Constitution may be termed as a fairly classic parliamentary and cabinet system that does not refer to the solutions of a chancellor system which more strongly situates the prime minister's position. The classic parliamentary and cabinet system always assumes the president's active role in nominating and dismissing ministers and this solution was duly embraced in this statute. This construction should not give rise to basic reservations. The question, however, arises whether all the statutory solutions fit within the bounds of the Constitution.

The Constitution specifies the basic political system framework for the scope of a statute's regulation. Every instance of overstepping this framework must elicit doubts concerning the constitutionality of the solutions embodied in a statute. The draft law that has been submitted gives rise to some doubts in this area. One of them is art. 6 concerning formation of the Council of Ministers. Article 96 provides for 3 rounds for election of the Prime Minister. Constitution refers to a certain type of institution called „navette", which is based on the following, i.e. the initiative belongs once to the President and once to the parliament. And so art.96par.1 states that the President appoints the Prime Ministers on the proposal of the party or coalition of parties that has the majority of seats in the Assembly. If the Prime Minister is not approved by the Assembly there is a second round, the initiative still belongs to the President; art. 96 par.2 states that the President appoints new Prime Minister. Constitution does not mention that the appointment is done on the proposal of the party or coalition of the parties like in par. 1. In the third round initiative belongs to parliament; the Assembly elects another Prime Minister. Article 6 of the draft statute does not follow this solution. In the light of this article the President three times repeats the same procedure. The Prime Minister is appointed to office by the President of the Republic always on the proposal of the party or coalition of parties that have the majority in the Assembly. It is therefore being proposed that an explicit limitation be placed on the President's rights. He cannot submit a candidacy at his own initiative,(as is provided in art. 96 par. 2 of the Constitution) but only in response to a proposal submitted by a party or a coalition. This statutory limitation constitutes a restriction of the President's rights rooted in the Constitution. It can be seen as contra legem fundamentalem.

In my opinion the entire construction of article 6 gives also rise to doubts from logical point of view. It is not logical to repeat the same procedure three times, and in each case, as the draft version of the statute indicates, at the proposal of a party or a coalition holding the majority. One could think that the notion of having a proposal from a party or a coalition holding the majority is being introduced as a requirement precisely in order to make it possible to appoint the prime minister during the first round. Since this is not happening (which may mean that the majority is fictitious), repeating exactly the same procedure at three stages and in every case making the President's decision dependent upon a proposal submitted by a party majority (as first round showed this majority did not exist) is illogical. Article 6 should therefore be amended. For it does not create an opportunity for overcoming deadlock situations while also raising doubts about its constitutionality.

III. Article which also gives rise to doubts is art. 3, containing the definitions of various acts issued by the Council of Ministers and ministers. The systematic of the acts as well as the definitions are very imprecise. There are different notions and definitions in the Constitutions (art. 118,119) and in this draft. The "rules", for instance, are not defined in art. 3,while they are mentioned in art. 119 of the Constitution. The system of acts is not very coherent.

Some of the definitions in article 3 are repeated in Chapter VI of the statute concerning acts that have been articulated in some other manner, e.g. (article 42- meaning of an act). This is a fundamental error in legislative technique. In my opinion article 3 is dispensable and it should be deleted. Chapter VI should, however, be re-worded in such a manner so as to avoid doubts concerning its constitutionality.

. Even more problems arise in connection with the category of „decisions with the force of law". The Constitution of Albania creates grounds for such acts in art. 101, which reads that "in case of necessity and emergency, the Council of Ministers may issue... normative acts having the force of law... The constitutional regulation is very general. The constitution uses the term "normative acts".. Art.3 uses the term decisions with the force of law, and defined these decisions as substatutory acts with a normative character.... In my opinion there is internal contradiction in this notion and definition. The decisions having force of law cannot be substatutory acts. They have force of law and that does mean that they are on the same level as statutes in the hierarchy of acts. It is a classical example of delegated legislative power. The reason for such delegation is to empower the executive organs with competencies to issue acts having just statutory character. In my opinion also the notion "decision" is not the best one. In the theory of law decision is rather act of an individual nature not having normative character. Taking this into account I think that this definition must be modified.
The regulation concerning cases of necessity and emergency in the presented draft is too general and imprecise, it creates excessive arbitrariness of interpretation for the executive branch, both in the issue of specifying a „case of need and urgency", as well as the duration of such a status (article 42). The issue of in what situations one could issue decisions with the force of law is rather unclear. Such general wording, therefore, is a detriment to the guarantees of human rights.

IV. Article 8 on the powers of the Council of Ministers as well as article 12 on the competencies of the Prime Minister are very imprecise. The division of competencies in reference to individual areas of the state's activity implies the repetition of some competencies, including, inter alia, the ones already mentioned elsewhere, viz. on issuing legal acts (see item 6a). The same concerns the competencies of the Prime Minister expressed, for instance in art. 12 .c ("he coordinates and oversees the work of the members of the Council of Ministers and the other institutions of the central administration of the state") and art.12 6 ("he assures the unity of political and administrative direction....coordinating the work and activity of the ministers"]. One can have impression that there is a different wording but the same substance.

V. Article 16 also elicits reservations. There are no constitutional grounds for introducing detailed conditions in order to become a minister. Article 103.1 reads: "anyone who is eligible to be a deputy may be appointed a minister". It is a very clear provision. This general principle permits in an ordinary statute only such exceptions which are provided for deputies. These exceptions are regulated in art. 15 of this draft. One may not, therefore, introduce additional criteria by statute, such as having a university education. Nor is it advisable to introduce another criterion with respect to the office of a minister such as the one enumerated in the statute, viz.: to have work experience in the exercise of civil or political functions for a period of time no less than seven years. I therefore believe that this article should be deleted. A similar solution has not been proposed in respect of the Prime Minister and the Deputy Prime Minister; this also indicates the clear lack of cohesiveness in the proposed solutions.

Some doubts involve also art. 30. In my opinion it is impossible to precisely define what does mean "personal interest" of the member of the Council of Ministers. Does fighting for higher

budget in the area of activity of the minister, could be described as a personal interest? This article must be either changed or deleted.

VI. According to me, article 46 is also not expedient. The features enumerated in this article which are indispensable for the validity of an act are of such a general nature, ensuing from the very principles of creating law that it is not expedient to repeat them here; all the more so since these are the conditions of validity for all acts issued by any bodies, and not just by the government or members of the government.

I also believe that article 47 is a misunderstanding. The normative acts of the Council of Ministers may be of different types, including ones, which will take more time before they come into force, since they may impose tasks on the entities bound thereby which these entities will not be capable of performing within 15 days. Thus the wording currently proposed in article 47 should be changed.

VII. As I said in the beginning, Chapter V is the conventional subject matter of rules and regulations concerning the manner and course of work in the Council of Ministers. In such a situation I think that it would be better if this part would be deleted from this draft and put to the substatutory law. The Council of Ministers will have more regulatory freedom in this area.

VIII. Concluding I believe that the draft law that has been submitted entails a number of defects. I have attempted to depict the most important ones above, viz. the ones relating to the system concerning the conformance of an ordinary statute with the constitution. I have not submitted more detailed remarks concerning its wording for basically two reasons: 1) I believe that the draft law must be modified in those areas of a more fundamental nature, 2) I think that there are many misunderstandings in detailed issues which are related to translation problems (especially what concerns the names and definition of the acts). Therefore certain issues must be explained by the authors of the draft version.

October 18, 2000