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THE CONTRIBUTION OF THE VENICE COMMISSION ON TO THE ALBANIAN LEGAL SYSTEM

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ABSTRACT

In their legal activity, states are often assisted by international actors to draft their legislative acts in line with international standards. One of these bodies is the Venice Commission, a Council of Europe body that, through its Opinions and legal advice, assists and supervises states in complying with the principles of democracy. The present study addresses the case of Albania and its relationship with the Commission. It seeks to identify the impact of the Opinions announced by the Commission on Albania and the issues for which it was necessary to submit a request for an Opinion. A recent case in which the Venice Commission has lent its expertise to Albania is the undertaking of a reform of the justice system. In this difficult process, the Venice Commission's recent Opinions have served as a guide for taking appropriate steps and for adopting a reform that guarantees an efficient and impartial justice system.

Key words: Opinions, Contribution, Venice Commission, Albania, Justice reform

INTRODUCTION

The European Commission for Democracy Through Law, otherwise known as the Venice Commission, has continuously contributed to Albania through its Opinions on legal issues. Albania's relationship with the Venice Commission has been long-lived, since the Parliamentary Assembly of the Council of Europe in 1995 expressed a favourable Opinion on Albania's application for membership in the Council of Europe (Parliamentary Assembly, 1995). The ratification of the Statute of the Council of Europe on 13 July 1995 and its entry into force on that day enabled Albania to become a member of the Council of Europe. In compliance with Article 3 and Article 4 of the Statute of the Council of Europe (1949), the Albanian state has been subject to a number of obligations and commitments to implement a democratic state governed by the rule of law and respect for human rights and fundamental freedoms. Albania implements the European Convention on Human Rights, all other ratified Council of Europe conventions, as well as the decisions of the European Court of Human Rights, which have a fundamental role in the Albanian legal system.

Albania's participation in the Council of Europe has at the same time enabled it to benefit from the Venice Commission's deliberations. The relationship between the Albanian state and the Venice Commission has been close, since the adoption of the first acts establishing a democratic system in Albania. Since 1991, the Venice Commission has compiled numerous studies and documents for Albania. This body has been involved in the discussion and dialogue on many issues in the legal field in Albania, from consulting and reviewing preliminary constitutional drafts to their final adoption. In addition to constitutional issues, the Commission has dealt with specific laws affecting different areas of life, ranging from property issues, the Electoral Code, the limitation of parliamentary immunity, freedom of religion, etc., and a number of constitutional amendments and decisions *amicus curiae*. The Venice Commission has assisted Albania in some fundamental issues in its legal system, such as judicial reform and

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the vetting of senior state officials. Most recently, it has forwarded its Opinion about the procedures regarding the discharge of the President of the Republic. Some of the Commission's Opinions and the impact of these Opinions on the Albanian legal order will be identified in the following.

OPINIONS OF THE VENICE COMMISSION

Legal adviser on constitutional matters

Although the implementation of a democratic system has been difficult for almost all the countries emerging from communist regimes, the difficulties for the Albanian state are present even today, as the legal system is still not functioning properly. The Venice Commission has made a valuable and consistent contribution to constitutional issues consistent with European principles and standards. The Commission has been present since the first step of reforming the system—changing a totalitarian system to a democratic one—sanctioning fundamental freedoms and human rights that did not exist until that time. The first issue discussed with experts of the Venice Commission concerned the review of the preliminary draft of the Law on the Constitutional Main Provisions, a law that served until the final adoption of the first democratic Albanian Constitution.

In this case the Commission provided its advice, not through an Opinion, which is one of its main instruments, but through a study, as in 1991 Albania was not yet a member of the Council of Europe. The working group examined a number of provisions of this law and made some comments and suggestions related to the restriction of fundamental human rights and freedoms, access to the court, constitutional control and the eventual liberation from monism and dictatorship (Venice Commission, 1991). At the beginning of this document, it was stated that “these comments are for guidance only”, indicating that the suggestions given were not binding, as is the nature of the Commission’s Opinions (Hoffmann-Riem, 2014, p. 580; Buquicchio and Durr, 2018, p. 518). While the review of the Law on Main Constitutional Provisions was the first study to be carried out on Albania, the Commission’s contribution as an adviser on constitutional matters was noteworthy in the process of adopting the Albanian Constitution in 1998.

The Commission adopted an Opinion on recent amendments to the Law on the Constitutional Main Provisions (Venice Commission, 1998). This Opinion dealt with three issues: the High Council of Justice, the additional provisions related to the rotation of judges in the Constitutional Court, and the new provisions on public administration and on illegal economic activities, in response to the request made by representatives of the Albanian state. At that time Albania was experiencing turmoil as a result of financial pyramid schemes. Following a request made by the Government, the Commission adopted the Opinion and conclusions issued for each of the three items required. These Commission conclusions led the Albanian state to make provisions in favour of the democratic system even though the situation was very difficult. The lack of a political culture, of a stable institutional and legal framework, of a political class, the lack of transparency and the high level of corruption were grave indicators for Albania and for the strict implementation of the Commission's recommendations. However, through the Opinion, the Albanian state authorities had received instructions on how to act in order to develop a transparent and impartial legal system.

Given that the Venice Commission is the main Council of Europe advisory body on constitutional matters, as also stated by Vople (2017, p. 813), we note here that the Commission’s role has been identified most clearly in the case of Albania. In many cases the Commission has expressed and provided its expertise for Albania, from the preliminary draft on constitutional issues, later constitutional amendments, and the final adoption of the Constitution. The Commission has contributed on many occasions when Albania has made constitutional amendments.

Thus, since its entry into force in 1998, the Constitution of the Republic of Albania has been revised three times, in 2007, in 2008 and in 2012, as well as when justice reform was undertaken in 2016, a reform that carried out a thorough review of the justice system. The 2007 amendments brought about the extension of the term of office of elected local government bodies from three to four years. In 2008, the procedure for the election of the President of the Republic, the procedure of government confidence, and the term of office for the Prosecutor General were changed (Parliament of Albania, 2015). In 2012, changes were made regarding immunity from prosecution for senior state officials, and in 2016 the chapter on judicial power in the Constitution was completely changed.

In each of these cases, the Venice Commission issued an Opinion on the constitutional changes of 2008 and on the reform of justice in 2016. On the 2008 amendments, the Commission concluded that they were generally in line with European standards (Venice Commission, 2008). As to the justice reform, the Commission drafted an Interim Opinion on Draft Amendments (Venice Commission, 2015) and an Opinion on the Revised Constitutional Draft for the Judiciary (Venice Commission, 2016c), which will be dealt with later.

The Venice Commission Opinion on the Council of Europe's request

Given the non-binding nature of the Opinions, we note that these Opinions cannot be initiated without the approval and request of the interested stakeholders for consultation. Thus, the Commission has no right to initiate an Opinion. The actors entitled to submit a request for an Opinion are, *firstly*, the member states of the Council of Europe, namely institutions such as the Parliament, the Government, the Head of State, etc.; *secondly*, the organs of the Council of Europe such as the General Secretary, the Committee of Ministers, the Parliamentary Assembly, and the Congress of Local and Regional Authorities, under Article 3/2 of the Statute of the European Commission; *thirdly*, international organisations such as the European Union, the OSCE/ODIHR and other organizations involved in the work of the Commission (Venice Commission Revised Statute, 2002, Article 2; Mehmetaj, 2019, p. 7).

In the case of Albania, the request for an Opinion from the Venice Commission has usually been initiated by the Albanian state, unless such a request came from one of the organs of the Council of Europe. Following the adoption of the Constitution on 28 November 1998—the first democratic constitution in Albania—and following accession to the Council of Europe, which had at the time adopted Protocol No. 6 of the Convention, the Parliamentary Assembly of the Council of Europe decided to consult with the Venice Commission on the compliance of the death penalty with the new Constitution of Albania (Venice Commission, 1999).

The Commission found that the Albanian Constitution contained no provision expressly permitting or expressly prohibiting or abolishing the death penalty (Venice Commission, 1999). The Commission adds that the Albanian state should not only focus on what is enshrined in the preamble to the promise to protect the right to life, but also to implement it in practice. For the Commission, the death penalty was no longer acceptable under European law and the death penalty should be considered not in keeping with the Constitution of Albania. Thus, after receiving the Opinion in March 1999, on 10 December of the same year the Constitutional Court of Albania ruled the death penalty unconstitutional in times of peace (Albanian Constitutional Court, 1999).

Apart from the request initiated by the Council of Europe bodies, there have been other cases in which a request for a Commission Opinion was made by international organisations such as the OSCE/ODIHR. These Opinions are identified as Joint Opinions, as in the cases of Joint Recommendations on the Electoral Law and the Electoral Administration in Albania of the European Commission for Democracy Through Law and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE (Venice Commission, 2004b); the Joint Opinion on Amendments to the Electoral Code of the Republic of Albania by the Venice

Commission and the OSCE/ODIHR, (Venice Commission, 2007b); and the Joint Opinion on the Electoral Code of the Republic of Albania by the Venice Commission and the OSCE/ODIHR (Venice Commission, 2009c).

The Venice Commission's contribution to a number of legal issues

In keeping with the main functions of its activity, such as addressing the analysis of democratic institutions, constitutional issues, or the examination of specific bills on elections, referendums, political parties, etc., the Commission has identified problems with various bills presented to it for a final Opinion. The Ombudsman, on his own initiative, requested that the experts of the Venice Commission comment on the Opinion on Recognition, Restitution and Compensation of Property in Albania (Venice Commission, 2004c). The working group emphasised the principle of fairness and justice in drafting a law and came to the conclusion that the draft presented before it did not really contradict constitutional, rule of law, and human rights, but needed some amendments to address technical issues of the bill under consideration (Venice Commission, 2004c). There have been other cases in which the Commission has stated its Opinion of a bill, such as the Bill on the Administrative Division of the Territory of the Republic of Albania (Venice Commission, 2004d), which could potentially fall into conflict with the Albanian Law on the Organization and Functioning of Local Government. It was the Albanian parliament that asked the experts to make an assessment in order to provide a definitive answer that guided the Albanian state's course of action.

On several occasions, the Venice Commission has expressed recommendations and Opinions on the establishment of an Electoral Code or the establishment of an electoral legal framework complying with democratic standards. One such was the Joint Opinion on the Adoption of an Electoral Law (Venice Commission, 2004a), and the Joint Opinion on the Electoral Code (Venice Commission, 2007b), which drew attention to transparency and complaints processes. According to the provisions of the Albanian Constitution (as amended by Law no. 9675, dated 13.1.2007), this brought about the increase of the members of the Election Commission from seven to nine members. The Joint Opinion (Venice Commission, 2009c), along with the Joint Opinion on Electoral Law and Electoral Practice in Albania (Venice Commission, 2011) rightly criticised the privileged treatment of party leaders that violated the principle of equality and discrimination. The Opinion also focused on the requirements for supporting signatures of the candidates for non-parliamentary parties, the inclusion of women in the candidate lists, the media's access to the campaign, and the rules for election campaign financing. In the Opinion's conclusions, the experts termed these issues as less effective.

In some cases, even those regarding constitutional issues, the Electoral Code and the referendum, there has also been criticism by the Venice Commission. Such criticism referred to the independence of the experts, citing lack of balance or bias in judgement. The recommendations given by the Commission have usually been deemed valid, but at times incorrect, on the grounds that they did not correctly reflect the issues under consideration. Such was the case of another Commission draft Opinion which was opposed by the parties it affected. For instance, the draft Opinion prepared by expert members of the Venice Commission "On the powers of the President to set the election dates in a parliamentary system" was opposed by the President of the Republic of Albania in a letter addressed to the President of the European Commission, Mr. Buquicchio (President of Albanian Republic, 2019).

The case concerned a request addressed to the Venice Commission by the ruling political party over the issue of the President's dismissal for exceeding his powers in approving his decree annulling the most recent election date in Albania (30 June 2019). The experts of the Venice Commission in charge of drafting the Opinion were of the opinion that the President had exceeded his powers in postponing the election date, but this did not legitimise the initiation of procedures for his dismissal.

Upon acquaintance with the draft Opinion, the President addressed a letter listing a number of points, which noted *inter alia* that the Venice Commission experts had exceeded the scope of work by interfering with the competencies of the OSCE / ODIHR, which is the highest institution for election monitoring, and that the draft Opinion was often contradictory and incomplete and presented conclusions that do not comply with the Venice Commission's mandate as an advisory body. These were the positions of the institution that was subject of judgement, while the Commission's overall draft Opinion was welcomed by the other side, viz. the ruling party. The Venice Commission rightly identified the irregularities encountered throughout the process in case. The Commission's criticism referred to both parties, the Presidential decree, which exceeds powers, and the majority, who cannot use it as an excuse to initiate his dismissal, as it raised doubts as to whether the case constituted a "serious violation" to justify his dismissal (Venice Commission, 2019).

Amicus Curiae for Albania

There have been some *Amicus Curiae* Opinions that have been given to Albania by the Venice Commission: the *Amicus Curiae* Opinion for the Constitutional Court, on the Interpretation of Articles 125 and 136 of the Albanian Constitution on the Appointment of Judges to the High Court (Venice Commission, 2004a); the *Amicus Curiae* Opinion on the Constitutional Court on the Law on Legalization, Urban Planning and Integration of Unauthorized Buildings of the Republic of Albania (Venice Commission, 2007a); the Opinion *Amicus Curiae* on the Law on the cleanliness of the figure of high functionaries of the Public Administration and Elected Persons of Albania, (Venice Commission, 2009b); the *Amicus Curiae* Brief to the Constitutional Court on the admissibility of a referendum to repeal constitutional amendments (Venice Commission, 2009a).

In this last *Amicus Curiae* the Constitutional Court asked the Commission to address two questions: (i) Can the people, under Article 150 of the Constitution, initiate a request to abrogate a Constitutional Law or constitutional amendment? and (ii), Is the principle enshrined in Article 2 of the Constitution stipulating that sovereignty in the Republic of Albania belongs to the people, in compliance with the provisions of Articles 177 and 150 and 152 of the Constitution? In this case, the Central Election Commission refused to organise a referendum on the repeal of constitutional amendments adopted by the Assembly, on the grounds that the relevant constitutional provisions refer only to the repeal of common acts and do not allow for a people's initiative to repeal constitutional provisions.

The Venice Commission's conclusion was that a referendum could be held in keeping with Article 177, while Article 150 was not applicable to constitutional amendments. It also added that "the constitutional provisions for a referendum and for constitutional amendments cannot in any way be regarded as a violation of the principle of the sovereignty of the people, but constitute balanced rules on how such sovereignty will be exercised" (Venice Commission, 2009a). Nevertheless, among Albanian academics there are also opposing views, since, according to some of them, the real question that did not get answered was whether or not the Albanian parliament had the right to interfere in the constitutional provisions for changing the electoral system without the approval of a constitutional referendum by the people.

There are two other *Amicus Curiae* Opinions which have been obtained following the adoption of the justice reform in 2016: *Amicus Curiae* Brief Opinion on the Constitutional Court referring to the restitution of property (Venice Commission, 2016a), and the other Brief *Amicus Curiae* Opinion on the Constitutional Court regarding the Vetting Law or the Law on Transitional Reassessment of Judges and Prosecutors (Venice Commission, 2016b), which will be dealt with below.

JUSTICE REFORM AND IMPACT OF THE VENICE COMMISSION

Despite continued changes to the Constitution and other legal acts, despite international influences and interventions, the construction of a legal system by European standards has not yet been achieved in Albania after the fall of the communist regime. Further difficulties lie with the model to be selected or suggested. As Bartole (2018, p. 2) puts it, choosing an appropriate constitutional model, guaranteeing the principle of separation of powers, and guaranteeing an impartial judiciary, has raised doubts. This is because experience has shown that the efficiency and integrity of the reformed legal system have not always been a satisfactory solution in the organisation of the judiciary. Countries like Albania have not only undergone a review of their legislation but have also undergone a vetting procedure to achieve a cleansed judiciary.

Thus, one of the most important issues discussed during the reform of the justice system was the undertaking in recent years of a judicial reform that would change more than 60% of the constitutional provisions, change the organs of justice and aim at the ultimate eradication of corruption. In these circumstances, the establishment of a Special Parliamentary Committee on the Reform of the Justice System (Assembly of Albania, 2015) by the executive and legislative branches marked an important step towards the implementation of an independent and accountable judicial system, which had been usually described as inefficient and biased.

This Commission prepared an analytical document (Assembly of Albania, 2015) which identified all the issues surrounding the judiciary since the entry into force of the Constitution of the Republic of Albania. The findings were shocking because the problems affecting the judiciary were numerous, related to the way they were organised and governed, the status of justice functionaries, the administration and, as a whole, to the ability of the system itself to operate according to European standards (Assembly of Albania, 2015). Constitutional reform in Albania focused on a complete overhaul of the judiciary through two parallel reforms, (i) the reorganisation of the permanent judiciary and (ii) the introduction of a temporary *ad hoc* vetting procedure intended to remove corrupt judges and prosecutors from the system.

The reform was adopted on 21 July 2016 and, alongside, out of 26 articles of the Constitution pertaining to the justice system, 21 were changed. A number of organic laws were adopted, including the provisional reassessment of judges and prosecutors of the Republic of Albania. However, what was the role of the Venice Commission in undertaking such a great initiative? (Mehmetaj, 2019, p. 2) Indeed, the Commission has been present since the early stages of reform. The Commission approved for Albania an Interim Opinion on Draft Amendments (Venice Commission, 2015), and after changes made to the Opinion, the established *ad hoc* Committee sent the final Opinion on the revised draft constitutional amendments on the Judiciary (Venice Commission, 2016), as well as the Brief *Amicus Curiae* Opinion on the Constitutional Court regarding the Vetting Law or the Law on Transitional Reassessment of Judges and Prosecutors.

The Venice Commission views the draft changes as falling into three main groups: *first*, changes deemed necessary for Albania to become a member state of the European Union; *second*, changes aimed at bringing about a permanent reform of the justice system, and *third*, transitional provisions concerning extraordinary measures aimed at assessing the adequacy of existing judges and prosecutors and freeing the system from those capable of corruption, or related to organised crime (Venice Commission, 2015). In its final Opinion, the Venice Commission stated that the draft constitutional amendments contained solid proposals for the future institutional structure of the Albanian judiciary and that the text as a whole was coherent and in line with European standards. In addition to addressing some technical issues, the Venice Commission reiterated that judicial reform should be stop at the constitutional level, but must be accompanied by a comprehensive legal package to regulate in detail the functioning of the

High Judicial Council and High Prosecutorial Council the evaluation bodies, etc., (Venice Commission, 2015).

For the implementation of the justice reform, the vetting process was conceived as essential, since vetting would mean the exclusion of judges and public officials whose image was not characterised by high integrity in exercising their public functions. This is considered an extreme but necessary measure to be undertaken, given the condition of the Albanian state, due to the extremely high level of corruption within the judicial system (Anastasi, 2016). The situation is so critical that it justifies a radical and urgent solution, that would not have been applied in other circumstances (Venice Commission, 2015). The process itself causes great tension within the justice system, destabilising the work of the judiciary, fostering mistrust in the justice system, and straining judges in their activity because of the attention focused on their work.

As we have mentioned above, among the Venice Commission decisions, there is another *Amicus Curiae* Opinion sent by the Constitutional Courts concerning the Vetting Act or the Act on Transitional Reassessment of Judges and Prosecutors. The Commission makes it clear that this Brief *Amicus Curiae* has no intention of taking a final position on the constitutionality of certain provisions of this Law, because this decision belongs to the Constitutional Court, but merely to provide the Constitutional Court of Albania with evidence as to the compatibility of the relevant provisions with European standards (Venice Commission, 2016b).

Act no. 84/2016 “On the Provisional Reassessment of Judges and Prosecutors in the Republic of Albania” or Vetting, is a process that provides for the reassessment of judges and prosecutors and other entities involved in the judicial system, based on three main criteria, (i) assessment of property, (ii) image control and (iii) professional skills assessment (Article 4 of the act). This process for re-evaluation of judges will be carried out by the establishment of a number of institutions such as the Independent Qualification Commission, the Special Appeals Panel and the Public Commissioners. In compliance with the Constitution (Article 179b) and according to the provisions published on the official website, the Independent Qualification Commission is a constitutional body, consisting of 12 commissioners, approved by Act No. 82/2017 of the Assembly of the Republic of Albania.

In addition to the entities belonging to the judiciary, efforts have also been made to institute vetting of senior political officials, so a request has been submitted to the Venice Commission for consideration of amendments to the constitutional draft for political vetting. In its Opinion (Venice Commission, 2018), the experts’ group states that the proposal to check the integrity of politicians does not provide proper guidance and the necessary protection at the constitutional level, and the Vetting proposal also lacks legal clarity and legal certainty as to the scope of its basis, its inadmissibility, loss of mandate and its implementation mechanism. Furthermore, according to the Commission, the amendments for Vetting in politics should have a legitimate aim and respect for proportionality. In the first case, the intention is justified because suspicion of politicians’ links to crime is a legitimate intent to adopt appropriate constitutional amendments and to subject politicians to a vetting process. The Commission set out a list of criteria to be applied when drafting constitutional amendments and the legal framework for politicians’ vetting.

CONCLUSIONS

The character of the Opinions given by the Venice Commission is diverse; a variety of issues have been addressed by it in the field of justice. Over the years, the Commission has made a valuable contribution to building legislation that meets European standards and that guarantees the rule of law. In line with its scope, it has dealt with the review of preliminary constitutional drafts, constitutional amendments and judicial reform. Thus, we can mention legal consultancy

on constitutional issues, on the adoption of the Constitution in 1998, on amendments made over the years and more recently on judicial reform. The Commission has also been present and assisted in the correct legal and democratic drafting of various laws, such as ownership, administrative segregation, limiting MPs' immunity, freedom of religion, the Electoral Code and *Amicus Curiae* decisions.

This paper has tried to conduct scientific research on all the contributions that the Venice Commission has made to the Albanian state, identifying the nature of the matter dealt with, whether it was a matter of legislation, constitutional issues or *amicus curiae*, the nature of the request directed by the legitimate entities and the impact of the Commission on the matters under consideration. Attention is also drawn to the most controversial issue in Albania, the justice reform, in which the Commission's role has been significant.

The ongoing problems with the rule of law and the malfunctioning of the justice system forced Albanian decision-makers to undertake a reform of justice in order to cleanse the courts of inefficiency and corruption. The constitutional reform was designed so as to completely change the judicial system, and two parallel reforms were undertaken at the same time within it: first, the permanent judicial organs were reorganised, and, second, a temporary vetting procedure was introduced in order to eliminate corrupt judges and prosecutors from the system, otherwise known as the Vetting law, about which it was again the Venice Commission, through its Opinion, that provided the proper directives to follow.

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