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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Draft Law on the organisation and functioning of the Council of Ministers of the Republic of Albania

Comments by Mr Sergio Bartole (Member, Italy)

THE DRAFT LAW ON THE ORGANIZATION AND FUNCTIONING OF THE COUNCIL OF MINISTERS OF ALBANIA

By Prof. Sergio Bartole, University of Trieste

1) The draft is dealing with the organization and the functioning of the Council of Ministers without taking care of the administrative branches or departments which should be dependent on the Council and be entrusted with the task of executing the decisions jointly adopted by the Council itself and by the Ministers separately. Therefore the draft is designing a structure of the executive power which does not give a clear idea of the real content of the distribution of the competences between the different Ministries and between the Ministries and the Council of Ministers.

A complete picture of the matter should be required instead if an opinion had to be given about the structure of the Government as a whole. In art. 5 the structure of the Council of Ministers is supposed to include not only the prime Minister, the Vice prime minister and the Ministers, but also the Ministries. Therefore in the language of the draft the expression " Council of Ministers " apparently means the overall organization of the Government, but we are not informed about the modalities which will be adopted in arranging the branches and the offices which have to implement the policies of the Council of the Ministers. For instance, it is not clear which will be the division of work inside the six Ministries of the Variant I of art. 5 which apparently implies that each Ministry will deal with the competences of more than one of the Ministries listed in Variant II or Variant III.

Will the six Ministries have only one department entrusted with the task of dealing with all the competences of the Ministry, or will the functions be dstributed among more than

one department? Informations about these aspects of the matter are necessary in view of giving an opinion about the relations between the Council of Ministers, its President that is the Prime Minister, the Ministers and the administrative officials who are in charge of the direction of the departments and the branches of the Ministries.

If we stick to Variant II or III of art. 5, we are in danger of increasing the number of the Ministers too much. It could be advisable to adopt Variant I allowing a Minister to delegate some functions to one or more than one Vice ministers.

2) Notwithstanding the content of art. 5, the draft is mainly dealing with the organization and the functioning of the Council of Ministers, on one side, and of the office of the prime Minister, on another side. Some provisions are merely repeating the content of constitutional rules, while a great deal of them are implementing the rules of the Constitution.

In listing the competences of the Council of the Ministers, art. 8 adopts the guideline that the principal directions of the general State's policy, the decisions concerning the relations with other State's bodies and the legislation have to be adopted by the Council itself. This choice is apparently conflicting with art. 102.1 b) of the Constitution, which is repeated in the draft sub art. 12 dealing with the competences of the Prime Minister. It can originate conflicts inside the Council of Ministers. Perhaps an adequate and balanced solution could be adopted underlining that the Prime Minister has the responsibility of conceiving and submitting to the Council proposals concerning the decisions of the Council itself, on one side, and, on the another side, has to coordinate and oversee the implementation of the decisions of the Council of the Ministers by the Ministers. Points b), c) and ç) of the first alinea of art. 12 should be better coordinated than they are

in the draft. I mean that their mutual connections and their relations with the competences of the Council of the Ministers should be adequately emphasized, clarifying the different roles of the prime Minister at the different stages of the activity of the Government. Perhaps it could be suggested the adoption of three different provisions: each of them should deal with one of the functions (and the stages) concerned. In this way the modalities of the exercise and the scope of the discretion given to the Prime Minister could be bettere explained.

Evidently the Albanian internal political situation does not allow the establishment of a leadership of the prime Minister similar to the leadership of the Chancellor in Germany, and requires joint decisions of the Council of the Ministers in the field of the general State's policy in view of insuring the equality between the political components of the majority in power.

Along the same line of reasoning another point deserves careful attention and drafting. While the Prime Minister has the authority of resolving disagreements between Ministers, he is allowed to suspend the application of acts of the Ministers " presenting them to the Council of the Ministers " (art. 12) first alinea d) and art. 12.3 third alinea). It could be advisable clarifying that the disagreements mentioned in the first provision are better qualified as conflicts of competences, while political disagreements are dealt with by the second provision. Therefore the Prime Minister should be allowed to discharge a Minister only if the Council of the Ministers had not been able to settle the political disagreement submitted to its attention by the Prime Minister. Such a solution could strengthen the position of the Council of the Ministers. Leaving instead things as they presently stand in the draft, it is the position of the Prime Minister which is strengthened: it could be an alternative more coherent with the explict provisions of the Constitution

which apparently leaves a great deal of freedom to the prime Minister in sacking a Minister. But which is the better solution from the point of view of the Albanian political situation?

Art. 8.6 b) and art. 12 1 and 4 second alinea should be coordinated as far as both of them are dealing with the appointment of high political functionaries and of employees of the foreign service. Is the Prime Minister allowed to submit proposals for the appointment of high political functionaries to the President of the Republic only on the basis of a decision of the Council of the Ministers? And which are the powers of the President of the Republic in the matter? Is he allowed to reject a proposal underpinned by a decision of the Council of the Ministers? I don't think so: we have to keep in mind that the mentioned provisions are increasing the cases of intervention of the President with regard to art. 92 of the Constitution, and therefore the new presidential powers (that is those added by the draft) are not covered by a constitutional provision entrusting them directly to the Chief of the State. He has to stick with the proposals of the Government at least as far as functions which are not mentioned in the Constitution are at stake, but I guess that also powers listed in art. 92 e., f.,h., and i. of the Constitution the President of the Republic is bound to comply with the proposals of the Government which are in conformity with the Constitution.

It is doubtful if the requirement of higher education for the appointment of a Minister is in conformity with the democratic principles. I guess that art. 16 third alinea conflicts on this point with art. 103.1 of the Constitution.

3) It is not clear which is the relation between art. 20 which provides for the appointment of the chief of the cabinet of the Prime Minister, and art. 22 according

to which a General Secretary (who is not mentioned amog the components of the office of the Prime Minister) has to be appointed in the Office of the Prime Minister. Are we dealing with the same person or with two different persons? Apparently there are two different persons, but it is evident that the law is providing only for the functions of the General Secretary which are the typical functions of the head of an office. Is he the chief of the office and does the office include the cabinet? In any case the point should be clarified listing the functions of the chief of the cabinet of the Prime Minister. Conflicts have to be avoided if two different persons and roles are at stake. Functions dealing with acts and relations of the Prime Minister and with the coordination of the activities (not interesting the functioning of the Council of the Ministers) and directly depending on the Prime Minister should be reserved to the Chief of the Cabinet.

If the legal service provided for by art. 25b) has to deal with items sub b), c), e), f) and g) of the same article, it should be organized as an office depending on the General Secretary but it has to be kept separated from the office of the prime Minister. Perhaps it could be advisable distinguishing the office (cabinet) of the Prime Minister and the office of the general secretary which is at the service of all the Council of the Ministers. Art. 22 properly provides for the appointment of the General Secretary by the Council of the Ministers, even if he is supposed to be directly linked to the Prime Minister and depending on him (look at art. 28).

Can the request provided for by art. 30 second alinea be submitted by anybody who is not the Minister concerned? Who is in charge of preparing the minutes of the meetings of the Council of the Ministers? I suppose the General Secretary. This task of him should be mentioned.

Art. 45, which is an important provision aimed at implementing the principle of the rule of law, deserves a careful drafting. The draft can correctly use the verb " to delegate " in the last sentence of the article, but in the second sentence a different expression should be substituted for " delegated " because this second sentence is dealing with questions (matters or items) which are given directly to the competence of the organ concerned. There is a delegation only when an organ is allowed to transfer the exercise of its own functions to another organ. This is not the case dealt with by art. 45 second sentence, which regards functions directly attributed by a law to the organ which is entrusted with their exercise.

Perhaps it could be advisable underlining that the principle of legality requires that a law provides not only for the entrusting of a function to a State's body and regulating the modalities of its exercise (formal legality), but also for the guidelines affecting the content of the decision, which has to be received in the act which is the result of the exercise of the function concerned (substantial legality).

Art. 119.1 of the Constitution should be repeated in art. 42.

University of Trieste, November 23 st., 2000

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