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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE AMENDENTS TO THE CONSTITUTION OF THE REPUBLIC OF ALBANIA

(Adopted on 21 April 2008 by the Assembly of the Republic of Albania)

on the basis of comments by

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I. Introduction

1. At its meeting in Strasbourg during the Third Part of the 2008 Session of the Parliamentary Assembly, the Monitoring Committee decided to ask the opinion of the Venice Commission on the amendments to the Constitution of the Republic of Albania adopted on 21st April 2008 (document CDL(2008)095).

2. Messrs Bartole, Jowell and Kask were appointed as rapporteurs and provided comments (documents CDL(2008)108, 109 and 110). A first discussion on the basis of these comments took place at the 76th session of the Commission on 17 October in the presence of Mr Ilir Rusmajli, President of the Legal Affairs Committee of the Assembly of the Republic of Albania. Subsequently Mr Bartole provided an revised version of his comments taking into account this discussion.

3. The present Opinion was adopted by the Commission at its … Session on … following a further exchange of views with Mr Rusmajli.

II. Preliminary remarks

4. The Amendments to the Constitution focus on the provisions on electing the Assembly and the President. When examining the text, it has to be borne in mind that the revision of the constitutional provisions on the election of the Assembly was required by an OSCE/ODIHR Election Observation Mission Report concerning the parliamentary election of the Republic of Albania of 3 July 2005 and by a joint opinion on amendments to the electoral code of the Republic of Albania adopted by the Venice Commission and OSCE/ODIHR (CDL-AD(2007)035). Both the mentioned documents underlined that the electoral legislation then in force did not give to the voters the possibility of clearly and rightly understanding the electoral procedure and its results. Moreover, the documents criticised that the political parties were allowed to easily bypass the provision of Article 64 subsection 2 of the Constitution, which required that "the total number of deputies of a party or a party coalition shall be, to the closest possible extent, proportional to the valid votes won by them on the national scale in the first round of elections ".

5. In Albania the quick manner in which the amendments were adopted without extensive public discussion was widely criticised. At the 76th session of the Commission Mr Rusmajli pointed out that, while the procedure in which the text of the amendments had been adopted was indeed speedy, there had been beforehand a long and extensive discussion of the issues addressed by the amendments. The Commission nevertheless underlines the need for extensive public discussion before adopting constitutional amendments, providing not only members of parliament but also civil society with a real opportunity to provide their input.

III. Comments on specific amendments

Article 1 amending Article 64 of the constitution

6. Article 64 of the Constitution formerly provided for an electoral system that used both (1) single-member electoral zones (100 deputies) and (2) a nationwide constituency for the allocation of supplemental mandates (40 deputies) to political parties and coalition lists. Apart from a threshold of 2.5% for political parties and 4% for coalitions in order to be represented in parliament the total number of deputies had to correspond to the closest extent possible to the number of valid votes cast. In the light of the complexity of that system (and its apparent openness to abuse), this amendment introduces a regional-proportional system, with a total of 140 deputies. The new subsection 3 provides that the law on elections will set out the detail on the implementation of this provision, the determination of the electoral zones and the number of seats to be obtained in each of them.

7. In general, electoral matters should not be regulated in detail in the Constitution. In Albania there is, however, an evident concern to ensure the stability of the electoral choices in a political framework where conflicts are frequent and there is no common acceptance or interpretation of important rules of the democratic game. While it is therefore welcome that the new constitutional regulation is less detailed and complex, it also seems appropriate that the basic choice in favour of a regional-proportional system is set forth in the text of the Constitution.

8. The practical consequences of this choice depend to a large extent on the size of the new electoral districts. The smaller these districts are, the more difficult it will be for smaller parties to gain seats. While the present intention of the Albanian legislator seems to use the twelve regions as electoral districts, there is no constitutional guarantee that the size of electoral districts will not be reduced in the future. Only the principle of proportionality as such is now protected by the Constitution and no longer its concrete application through the requirement that the distribution of seats had to correspond to the closest possible extent to the distribution of votes. The smaller political parties will therefore no longer be able to claim a violation of electoral principles if the number of seats attributed to them is considerably smaller than would correspond to the number of their votes.

9. Despite the abolition of the threshold to be represented in parliament, the new electoral system is therefore clearly less favourable to smaller parties. This is, however, not in violation of European standards and, provided it is faithfully implemented, the reform should be viewed positively, as it introduces a system that is less complex than the previous system, as well as being closer to the voters, more easily implemented and better understood by ordinary voters.

Article 2 amending Article 65

10. The amendments to this article mainly aim at providing more clarity and are of a more technical nature. Sub-section 1 provides that the outgoing Assembly remains on duty until the first session of the newly elected Assembly. The scope of this provision could be further clarified. According to sub-section 3, if the Assembly is dissolved prior to the termination of its full mandate, elections are held no later than 45 days after its dissolution. Although that principle is common in democratic countries, an exception could be appropriate for the duration of the mandate of the Assembly in this case. If early elections are held, the time at which general elections are held will remain the same for future elections as well. If those elections are held in a period when e. g. the budget should be adopted, the provision may bring some difficulties for all electoral periods, not only once. It could be thus suggested to stipulate that ordinary general elections will take place at a certain date or month of the year when the mandate of the Assembly ends. The term of the mandate is less important than the functioning of the parliament and the constitutional system. The new subsection 4 provides that the Assembly may not approve laws during the period of 60 days prior to the termination of its mandate except when extraordinary measures have been imposed (under Part XVI of the Constitution – Article 170 et seq.). Disabling the Assembly for its last 60 days may prevent an unpopular government from abusing the end of its mandate. However, the electors voted for a 4 year term and not for 4 years minus 60 days, and there is a danger that during that period governance will be paralysed, a situation which might tempt the introduction of extraordinary measures.

Article 3 amending Article 67

11. The new provisions provide more clarity.

Article 4 amending Article 68

12. Sub-section 1 of this new Article provides that candidates for deputies can be “presented” (nominated) for the electoral zone by only one of the “proposing subjects”, which include political parties, coalitions of political parties and voters. The definition of a political party will have to be found in the legislation on political parties. The sub-section moreover rightly prohibits that the same candidate may be nominated by more than one proposing subject. It does not address the issue whether the same candidate may be proposed by the same proposing

subject in more than one electoral zone but a prohibition on such a practice could (and should) be part of the new electoral law. Sub-section 1 in addition provides that the ranking of the candidates in the multi-name lists may not be changed after the submission of the list to the respective electoral commission. It is indeed welcome that the proposing subjects may no longer change the ranking once the list has been submitted. The wording of this sentence does not seem to directly exclude that the voters may influence the ranking (open list system) but the intention of the Albanian legislator seems indeed to keep a closed list system. This choice could be reconsidered.

Article 5 amending Article 87

13. This article, together with Article 87, regulates the election of the President of the Republic. The most important change introduced is that, while hitherto a majority of three-fifths of the members of the Assembly was required in all five rounds, now the absolute majority of the members of the Assembly is sufficient in the fourth and fifth rounds of voting. On balance, this change is welcome. While the election of the President of the Republic should indeed preferably be based on a consensus of the main political forces, there comes a time when a decision has to be taken and the majority principles has to be allowed to prevail.

14. The new solution makes it also less likely that, due to the failure to elect the President, the Assembly has to be dissolved, with the election of the President becoming a main issue in the parliamentary elections. While the solution of dissolving the Assembly and holding new elections if the Assembly fails to elect the President is fully in line with democratic principles, there is a risk that it may have unintended consequences for the political system. Following such an election, the President will probably be elected on the basis of the choice of the voters. One may wonder whether the Albanian system of government is organised in a way enabling it to sustain the possible consequences of a cohabitation of a President and a Prime Minister of different (or, even, of the same) political orientation who are both supported by the popular vote. The Constitution does not give to the President important political powers, he or she is apparently a President with functions as guarantor and safeguard of the constitutional rules, but the President could find in the interstices of the system some space for an enlargement of his or her political influence if he or she is strengthened by an explicit popular preference. As a matter of fact, the position of the President above the parties may be endangered by a hot political debate during the election of a new Assembly. The Albanian legislator should balance the exigency to have a President elected and the compliance with the principles of the parliamentary system of government. Perhaps it could be advisable to further lower the level of the suffrage required at the fifth round of voting even if this solution could apparently conflict with the principle of majority.

15. As regards the details of the solution, the provision in sub-section 4 that lots should be drawn, if, at the fourth round, no one candidate has achieved more than half the total votes, and there are more than two candidates with the same votes, seems to introduce an unnecessary degree of arbitrariness into an otherwise rational process. Moreover, it should be clarified in sub-section 5 what happens if the newly elected Assembly fails to elect the President in the first round of voting by an absolute majority.

Article 6 amending Article 88

16. According to the redrafted sub-section 2, the mandate of the President is extended only in case of war. It may be clear in the Albanian original whether this extension is automatic. It also has to be taken into account that, by virtue of Article 170, sub-section 6, of the Constitution no presidential elections may take place during the implementation period of extraordinary measures. This means that, if the mandate of the President expires during such a period imposed for other reasons than war (such as natural disasters), the Speaker of the Assembly will have to take the place of the President. The merits of this distinction could be further discussed.

17. The newly introduced sub-section 2/1 provides important clarifications.

Article 7 amending Article 104

18. This Article deals with a motion of confidence (as opposed to a motion of no confidence under the next section) moved by the Prime Minister in his Council of Ministers. Previously, if such a motion were rejected, then another Prime Minister would be elected within 15 days. Here if fewer than half of all the members of the Assembly vote for the motion, the Prime Minister "requests" (does this mean may or must request?) the President to dissolve the Assembly. The amendment changes the balance between the Assembly and the Government as, although there may well be possibilities for the Assembly to elect a new Prime Minister, the no confidence vote towards the incumbent leads to extraordinary general elections. The amendment makes the opposition more eager to present a (pre-emptive) motion of no confidence and members of Assembly supporting the government become more subordinate to the will of the government. While the amendment might be justified as favouring stability by providing an incentive to MPs to support votes of confidence in the Council of Ministers, it may also be regarded as an excessive strengthening of the position of the Prime Minister. The previous solution seemed more balanced or one could have given to the President the possibility to decide on whether to call new elections or propose a new government.

Article 8 amending Article 105

19. The new wording introduces the so-called constructive vote of no confidence: if the Assembly votes a motion of no confidence, it has at the same time to elect a new Prime Minister with the votes of more than half of the members of the Assembly. This solution, which exists in other European countries such as Germany, may indeed contribute to increased political stability.

Article 9 amending Article 149

20. The new wording provides that the General Prosecutor is appointed by the President with the consent of the Assembly for a five year mandate with the right to be reappointed. This amendment seems a step back and risks compromising the impartiality of the Prosecutor General, especially in the period when he or she is seeking re-election. A longer term without the possibility to be reappointed would be preferable. In an Opinion on draft amendments to the Constitution of Ukraine (CDL-AD(2008)029, paragraph 33) the Venice Commission stated: *"Under the proposed Section 3, the term of office of the Prosecutor General would be extended from 5 to 7 years. This longer term should diminish the politicisation of the office and could be a guarantee of the impartiality of the Prosecutor General. It seems, therefore, a step in the right direction. It would seem even better to provide that the Prosecutor General may stay in office until reaching the age of retirement or, if a limited term of office is preferred, to exclude the possibility of reappointment, as is the case for constitutional judges under Article 148 of the Constitution. Otherwise, the Prosecutor General may be unduly influenced in his or her decisions by the desire to be re-elected."*

Article 10 abrogating Part XII of the Constitution

21. This amendment deletes the constitutional provisions on the Central Election Commission. While there is no need to regulate the Central Election Commission in the text of the Constitution, and such regulation may indeed prove too rigid, the need for an independent body responsible for the holding of elections seems indisputable in Albania. Such a body will have to be provided for in the electoral law and the Commission understands that this is indeed the intention of the Albanian authorities.

IV. Conclusions

22. The constitutional amendments adopted in April 2008 are generally in line with European standards. The majority of the amendments can be regarded as improvements and clarifications of the existing text. This does not apply to the amendments to Article 104 on the vote of confidence and Article 149 on the Prosecutor General. The latter amendment does indeed appear a regrettable step back making this institution less independent.

23. The amendments to the electoral provisions of the Constitution seem mostly welcome. The Constitution will henceforth contain less detail on electoral rules. This is welcome but only if the legislative rules which will be adopted are in line with European standards. In particular, it will be crucial to ensure in the electoral law that elections will continue to be organised by an independent and impartial body. The new electoral system based on a proportional system within regions follows the example of other European countries. This seems a good model, which strikes a balance between the need for proximity between the voters and those elected and the need for a representative system, provided the electoral districts are not too small. For these reasons the implementation of the constitutional amendments in the electoral law is of particular importance and the Venice Commission is available to assess the revised electoral legislation.