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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

O P I N I O N
ON RECENT AMENDMENTS TO THE LAW ON MAJOR CONSTITUTIONAL PROVISIONS OF THE REPUBLIC OF ALBANIA

adopted
by the Sub-Commission
on Constitutional Reform
on 15 April 1998

on the basis of opinions by

Mr Sergio BARTOLE (Italy)
Mr Serhiy HOLOVATY (Ukraine)
Mr Luis LOPEZ GUERRA (Spain)
and
Mr Joseph SAID PULLICINO (Malta)

1. By letter dated 4 December 1997, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Mr Birger Hagård, asked the European Commission for Democracy through Law to give an opinion on recent amendments to the major constitutional provisions of Albania, concerning:

- the High Council of Justice (Article 15 of Chapter V of the Law on the Major Constitutional Provisions);

- additional rules on the rotation of the judges of the Constitutional Court (Articles 18 and 18/1 of Chapter V of the Law on the Major Constitutional Provisions);

- new rules on the public administration of unlawful economic activity (Article 10 of Chapter I of the Law on the Major Constitutional Provisions).

2. The Minister of State for Legislative Reform and Parliamentary Relations of the Republic of Albania, Mr Arben Imami, addressed a further request to the Commission to examine these three issues.

3. The Commission held a preliminary discussion at the meeting of the Sub-commission on Constitutional Reform on 5 March 1998 and at its Plenary Meeting on 6 to 7 March 1998, on the basis of written contributions by Mr Bartole (Italy), Mr Holovaty (Ukraine), Mr Lopez Guerra (Spain) and Mr Said Pullicino (Malta).

The present text was approved at the meeting of the Sub-commission on Constitutional Reform on 15 April 1998 in Paris with Mr Triantafyllides (Cyprus) in the chair.

I. ARTICLE 15 OF CHAPTER V ON THE HIGH COUNCIL OF JUSTICE

A. The new law

4. Article 15 of Chapter V of the Law on the Major Constitutional Provisions was amended on 27 August 1997.[1] The additions made are shown in italics in the following amended version of Article 15:

> "The High Council of Justice is headed by the President of the Republic and is composed of the Chief Justice of the Court of Cassation, the Minister of Justice, the General Prosecutor, and nine lawyers distinguished for their abilities. They are elected once in five years *as provided by Law*, enjoying no right for immediate re-election, as follows:
>
> - *Three members are from the ranks of the Judiciary;*
>
> - *Two members are from the ranks of the prosecutors;*

[1] *By Law No. 8234.*

- *Four members are elected by the Parliament out of whom two are from the ranks of lawyers, one from the professors of the Law Faculty and one from the ranks of the Judiciary.*

The High Council of Justice is the only authority which decides upon the nominating, transferring and disciplinary responsibilities regarding the judges of the first level, those of Appeal and prosecutors, as well.

The High Council of Justice's way of operation and exercising its activity is defined in the internal rules it approves."

B. Observations by the Commission

- The role of a High Council of Justice

5. Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State. Obviously, such a Commission or Council could, if abused, be an instrument of undue interference by the Executive and a means for undermining the independence of the judiciary. This situation would be further aggravated where this body merely appears to have the legitimacy of a constitutional organ that should ensure the independence of the judiciary, but, in practice, it is used to subjugate the judiciary on behalf of the Executive.

6. The main task of such an institution is to exercise powers formerly attributed to the executive power and parliament concerning the administration of the judiciary. Among these powers, the Albanian Law includes "nominating, transferring and disciplinary responsibilities" with respect to judges.

7. Although from a comparative standpoint, the composition and powers of these Councils vary considerably, all of them share a common characteristic. The reason for their existence is due to a desire to safeguard the independence of the judiciary, i.e., to guarantee that the judge, in his or her capacity as the solver of conflicts, is subject only to the law and the Constitution and free from all other influences, be they public or private.

8. The Albanian Law on the Major Constitutional Provisions proclaims the independence both of the judicial power as a whole (Article 1, Chapter V: "The judicial power is separate and independent from the other powers") and of the individual judge (Article 8, Chapter V: "In exercising their competencies the judges are independent and subject only to the Law on the Major Constitutional Provisions and to other laws in general"). The collective independence of the judiciary as a whole must be considered as a guarantee of the individual judge’s independence with respect to the Executive. This collective independence is reflected in the powers vested in the High Council of Justice as an autonomous constitutional organ.

- Composition of the High Council of Justice

9. An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised. Furthermore, in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

10. Another reason for including members other than judges in the Council of Justice is to counteract the tendency to protect one's group to the detriment of the common good.

11. Constitutional provisions often require other professionals apart from judges to be present in these entities. This is the case in Italy, Spain, France, Greece and Portugal. As far as the appointment of the members is concerned, a majority of constitutions provide for some of the councillors to be elected by members of the judiciary, but the provision that some members must be either *ex officio* or elected by the executive or legislative power is also common. A combination of these two elements may also be found, e.g. in France, Italy and Portugal.

12. However, no uniform standard rule appears to exist concerning the composition of the High Council of Justice. Nevertheless, a basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other *ex officio* or elected members. The Commission has underlined the need for such a balance already in its opinion of 4 December 1995 on Chapter VI of the Transitional Constitutional of Albania (document CDL (95) 74 rev.).

13. The composition of the Albanian High Council of Justice seems to follow this pattern and the *numerical* balance struck appears to be substantially acceptable. It presents a reasonable mix as to the qualifications of its members, as well as a diversity of political backgrounds, the Councillors being integrated in, or emanating from, different powers of the State.

14. The High Council of Justice includes five judges (the President of the Court of Cassation and four other career judges), three prosecutors (the General Prosecutor plus two others), two lawyers, one professor of law and two high-ranking members of the Executive (the President of the Republic and the Minister of Justice). Therefore, from a professional viewpoint, judges and prosecutors are clearly in the majority (eight out of thirteen members). Experience and understanding of the problems confronted by judges and prosecutors are thus reasonably guaranteed.

- Selection and appointment procedure

15. Four members of the Albanian High Council of Justice are *ex officio* members. These

are the President of the Court of Cassation, the Minister of Justice, the General Prosecutor and the President of the Republic.

16. The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal stage and prosecutors. The nomination of these judges and prosecutors has been exclusively entrusted to the High Council of Justice, thereby removing these decisions from undue political influence. However, it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government. It should be noted that in France the President of the Republic and the Minister of Justice do not participate in the debates concerning disciplinary sanctions.

17. Four other members are elected by Parliament and the five remaining members are elected, as provided by law, from the ranks of the judiciary (three) and of the prosecutors (two). Since only two members actually belong to the Executive branch (the President of the Republic and the Minister of Justice), sufficient independence from the Executive power is guaranteed. The members elected by Parliament are actually six, since it also elects two of the *ex officio* members: the President of the Court of Cassation and the General Prosecutor (under Articles 6 and 14 of Chapter V of the Law, respectively). This contrasts with only five members elected by the judges and prosecutors. The Commission would have preferred, in accordance with its opinion expressed already in document CDL (95) 74 rev., that a majority of the members be elected by the judiciary.

18. As for the five members elected from the ranks of judges and prosecutors, according to the information available to the Commission, they are elected in separate meetings of all judges and prosecutors. This is however not expressly provided for by the Constitution. While other matters may be left to ordinary legislation, this important issue should be addressed by the Constitution itself. A Statute might then specify that the three members who are elected from the ranks of the judiciary should represent the various judicial categories. Furthermore, the pool of judges from which the selection is made might also be specified, such as two from the Judges of the Court of Appeal and one from the judges of first instance.

19. The Albanian opposition has expressed concern about the high number of members of the Council to be elected by Parliament. In general, it seems legitimate to give Parliament an important role in designating members of the Council. Taking into account the highly confrontational nature of Albanian politics, a concern that all members elected by Parliament may tend to represent the point of view of the parliamentary majority can however not be dismissed out of hand. A solution should therefore be found ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require a two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate.

- <u>Re-election</u>

20. Councillors who are not *ex officio* members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the Council's members.

21. Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the *ex-officio* members. The influence of the *ex-officio* members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Council's work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten.

- Functions and powers

22. The Albanian constituent power has opted to give the High Council of Justice an executive function, and not a consultative one. It is in fact the only authority which *decides* upon the nominating, transferring and disciplinary responsibilities regarding judges at ordinary and appeal levels, as well as prosecutors. Thus the Executive and Parliament have renounced these powers, delegating them to this Council. Some other countries have given to their Council in addition the possibility to render advisory opinions on envisaged legislative measures concerning the judiciary. The Albanian authorities might wish to examine this possibility.

23. Whereas judges of both stages and prosecutors are subject to the authority of the Council in matters of discipline, the President and members of the Court of Cassation may be removed from office only on the basis of a reasoned decision of the People's Assembly where it is certified that they have committed a serious criminal act, specifically provided for in law, or where they are mentally incapacitated (Article 6 of Chapter V). It is debatable whether the protection against removal accorded to the Judges of the Court of Cassation is preferable to the protection granted to other judges and to prosecutors under Article 15, since this article purports to have matters relating to their duties and discipline decided by a body which is essentially made up of their own peers.

- Procedural matters

24. Taking into account the specific situation in Albania, it would seem appropriate to grant by statute to the members of the Council immunity from prosecution for acts carried out in the exercise of their functions.

25. Article 15 finally provides that the High Council of Justice defines its way of operating in the internal rules it approves. Any such rules should be well defined and accessible for verification, especially where proceedings regarding transferring and disciplinary responsibilities are concerned. In matters of discipline, these internal rules should provide adequate guarantees for the judges or prosecutors involved to have a fair and impartial hearing with proper and sufficient safeguards for their fundamental rights.

C. Conclusions

26. The setting up of bodies such as the High Council of Justice is nowadays considered to be a means of achieving and strengthening the autonomy of the judicial power. The Venice Commission has reasons to expect that the amendments to Article 15 Chapter V, introduced by Law 8234 of 27 August 1997, provide for a High Council of Justice comparable to those found in other European countries. Some technical improvements should be made, such as providing for a gradual renewal of the Council. Taking into account the specific situation in Albania, it seems advisable to take steps to ensure that the parliamentary opposition also has a say in the designation of the members of the Council; if this is respected and if Article 15 is correctly applied, it should provide an effective tool for an independent judiciary in line with those existing in other democratic countries.

II. ARTICLE 18 OF CHAPTER V ON THE ROTATION OF CONSTITUTIONAL JUDGES

A. Background

27. To understand the present conflict between Parliament and the Constitutional Court on this question, it is necessary to give a brief overview of the developments leading to the present situation.

28. Articles 18 and 23 of Chapter V of the Law on the Major Constitutional Provisions on the Composition of the Constitutional Court were worded as follows:

"Article 18

The Constitutional Court is composed of nine members, five elected by the People's Assembly and four by the President of the Republic.

The members of the Constitutional Court elect, through a secret ballot, their chairman, who holds this office for three years with the right of re-election.

The term of the three members of the Constitutional Court, selected in the first election, ends in three years. They are selected by casting lots among each group of judges elected by the People's Assembly and by the President of the Republic. After three other years, three other judges are replaced in the same way, by casting lot. The newly elected judges hold their offices for a 12-year term.

Article 23

The term of a Constitutional Court judge ceases when:

a) he does not exercise his duty for justified reasons for more than six months;

b) he presents his resignation;

c) he is appointed to another position which is not compatible with his judicial function;

d) his term expires; in this case, the judge may continue to perform his functions beyond his term only if a case that has begun cannot be concluded within his term.

When, for one of the above-mentioned reasons, the term of the Constitutional Court judge ends before the expiration of his stated term, either the People's Assembly or the President of the Republic, depending on the means by which the judge was initially elevated to the Court, elects a new judge who will remain in this office until the end of the term of the replaced judge."

29. The members of the Constitutional Court took their office in May 1992. Under section 3 of Article 18, the first rotation of Constitutional Court judges therefore should have taken place in May 1995.

30. In late 1994, three judges of the Constitutional Court resigned. These judges were replaced by three new judges in January 1995.

31. On 2 June 1995, the Constitutional Court, acting on its own initiative, took a decision that the object and purpose of section 3 of Article 18, to provide for a gradual renewal of the Constitutional Court, had already been achieved by the resignation of the three judges and their replacement and that therefore there was no necessity to proceed to a rotation in May 1995. The decision appears in Appendix I to the present opinion. In the decision the Court notes that the interpretation of constitutional laws is its prerogative and that therefore its decision does not violate the principle of *nemo iudex in causa sua*.

32. On 19 November 1997, Parliament adopted a Constitutional Law, Law No. 8257, adding further sections to Article 18 and introducing a new Article 18/1 into the text of the Major Constitutional Provisions:

"Article 18

.....

The replacement of a judge of the Constitutional Court for the reasons provided by Article 23 is not considered as a rotation.

If the three-year term finishes or when one of the reasons provided by Article 23 is verified, the selection or the appointment of the new judge is done within 30 days.

The non-execution of the rotation suspends the functions of the Constitutional Court.

If after the execution of the rotation the new judges are not selected or appointed within the above-mentioned term, the Constitutional Court functions with the members left.

Article 18/1

> The Constitutional Court should accomplish the first rotation within 30 days of the entry into force of this law."

33. In a decision of the Constitutional Court of 5 December 1997 the reasons leading Parliament to the adoption of this constitutional amendment are described as follows:

> "In the accompanying report justifying the law presented by a group of deputies, which was turned into law upon its approval by the People's Assembly, the reasons that dictated the need for the proposed law in question are set out. In summary, these reasons are:
>
> a) the Constitutional Court has not carried out its duty, but has acted in contravention of the norms that require its renewal at the end of the first three year term after its election;
>
> b) the Constitutional Court has continually, and especially with its last decision (the declaration of Article 7 of Law No. 8227 dated 30 July 1997 "On the financial control of judicial non-banking persons who have borrowed money from the general public" as unconstitutional) violated the major constitutional provisions and the spirit of those provisions;
>
> c) because the renewal that is ordered by law was not carried out, 'it is necessary to prohibit the Constitutional Court from the further performance of its functions, as constitutionally delegitimated';
>
> d) the mistaken interpretation made by the Constitutional Court of Article 18 of Law No. 7561 dated 29 April 1992 and the failure to perform the renewal show that it has a political character, something which is also demonstrated by the position that it has taken against measures of a social nature taken by the Government."

34. On 5 December 1997, the Constitutional Court, acting on its own initiative, decided that Article 2 of Law No. 8257, introducing the new Article 18/1 into the Major Constitutional Provisions, is unconstitutional since it repeals a decision of the Constitutional Court and delegitimises the Court. The text of the decision appears in Appendix II.

B. Observations by the Commission

35. Both the actions of the Constitutional Court and of Parliament require a number of comments from the point of view of the Commission.

- <u>As regards the decision of the Constitutional Court of 2 June 1995</u>

36. The Commission does not in any way question the fact that the Constitutional Court of Albania is the body competent to interpret the major constitutional provisions of this country. Nevertheless, the decision taken seems unfortunate.

37. First of all, it is undisputed that the wording of Article 18 requires the replacement of

three judges selected by the casting of lots after three years. The Constitutional Court relies on the purpose of Article 18 to arrive at a result which differs from the fairly clear wording. As a matter of principle, it is true that the Constitutional Court does not necessarily have to stick to the wording only but may take into account the object and purpose of provisions as well as other relevant factors. However, it always requires particular justification to arrive at a result which, at first sight, is in contradiction to a fairly clear wording. The arguments put forward by the minority of three judges, voting against the decision, seem convincing, in particular that Article 23 of Chapter V of the Major Constitutional Provisions provides that the term of office of a judge replacing another judge who has resigned runs until the end of the term of the replaced judge. The replacement of the judges did also not coincide with the date at which rotation should have taken place. There was therefore no gap in the text which required having recourse to general principles of interpretation.

38. The Constitutional Court should also have exercised self-restraint since the personal interests of the judges taking the decision were at stake. This necessarily diminishes the authority of the decision. The Court itself was obviously aware of the circumstance as is evident from its reference to the principle *nemo iudex in causa sua*.

39. It would therefore certainly have been better if the Constitutional Court had stuck to the wording of the constitutional provisions.

- As to the constitutional amendments adopted on 19 November 1997

40. It is the prerogative of the constituent power to adopt constitutional amendments. In the Albanian constitutional order there is no provision which would prevent the constituent power from amending the Constitution in order to make it clear that the interpretation given by the Constitutional Court to constitutional provisions may no longer be regarded as valid. A requirement of rotation of Constitutional Court judges, even though some of these judges have previously been replaced in a different manner, also in no way violates Council of Europe standards. It was therefore legitimate for the constituent power to change the Constitution after the Constitutional Court had rendered a decision in contradiction to the intentions of Parliament, especially as the amendment has an effect *ex nunc* with the first rotation taking place within a month after the entry into force of the amendment and not *ex tunc*.

41. However, a number of qualifications have to be made:

a) First of all, it has to be noted that, if it is in principle legitimate for Parliament to amend the Constitution to get around the consequences of a decision of the Constitutional Court, this possibility should be used sparingly. The authority of the Constitutional Court suffers if Parliament acts in this way. In the present case, having regard to the problematic character of the Constitutional Court's decision, the reaction by Parliament seems nevertheless entirely understandable.

b) It is however disturbing that Parliament adopted these constitutional amendments not as a reaction to the Constitutional Court's decision soon after the decision but only 2 years and 5 months later. This gives the impression that the intention of the amendment is not to rectify an interpretation by the Court but to punish a Court which had rendered other decisions disagreeable to the parliamentary majority. The texts

cited by the Constitutional Court in its decision of 5 December 1997 confirm this suspicion. In a constitutional democracy, the various State organs have to fulfil their role and such acts of one organ against the other do not contribute to the consolidation of the democratic institutions.

c) In addition, the provision that "the non-execution of the rotation suspends the functions of the Constitutional Court" is inappropriate and might harm the constitutional order of Albania. It goes against the common interest both of the citizens and of the State, as the citizen is deprived of the protection of his/her constitutional rights and the State is deprived of the guarantees of one of its essential constitutional and democratic institutions. Other solutions which would safeguard the proper functioning of the constitutional order would have been more appropriate. An amendment of Article 18 could, for instance, provide that, in the event of the Constitutional Court failing to perform the rotation, there would be an alternative procedure, e.g. the President of the Republic and the Speaker of the People's Assembly would perform the drawing of lots for the rotation.

- As to the decision of the Constitutional Court of 5 December 1997

42. If the constitutional amendment adopted by Parliament deserves criticism, this decision of the Constitutional Court seems even more irresponsible.

43. First of all, the major constitutional provisions of Albania provide no basis for the Constitutional Court to control the constitutionality of constitutional amendments. The Constitutional Court could therefore not oppose a constitutional amendment which in no way violates fundamental principles. Secondly, the constitutional principle, that the decisions of the Constitutional Court are final and binding, does not prevent the constituent power from amending the Constitution and thereby depriving a previous decision of the Constitutional Court of its basis. The Constitutional Court therefore overstepped the limits of its authority and entered into a political dispute with the People's Assembly which can only be to the detriment of the functioning of both organs.

44. In this context the Commission noted that the President of the Constitutional Court, Mr Gjata, has been removed from his office because of alleged co-operation during the communist period with the Albanian security service and the security service of a neighbouring country. The Commission is not called upon to express an opinion on this issue and will not do so. It is also not in possession of all the facts. It wishes however to underline that in proceedings against a judge of the constitutional court any suspicion of a politically biased decision has to be avoided and that applicable procedures have to be scrupulously respected.

C. Conclusions

45. In conclusion, the Commission would appeal both to the Parliament and to the Constitutional Court of Albania to co-operate in a climate of mutual respect between the organs of the State, with each organ staying within the limits of its own powers. Each organ has its own functions and has to resist the temptation to become a mere instrument in the partisan struggle between political forces. Especially in a new democracy, such as Albania, it is important that the citizens learn to respect the constitutional organs of the State and do not regard them as simple

emanations of political parties. This is only possible if the State organs themselves act responsibly and show respect for each other.

46. The Commission therefore calls on the Constitutional Court of Albania to respect the wish of the constituent power that the rotation of the judges should be performed. It calls on the Albanian Parliament to modify the provision leading to a suspension of the Constitutional Court. It expresses the hope that both organs will, in the future, co-operate with each other and not fight against each other.

III. ARTICLE 10 OF CHAPTER I ON PUBLIC ADMINISTRATION OF UNLAWFUL ECONOMIC ACTIVITY

A. Background

47. Article 10 of Chapter I begins with a statement proclaiming the freedom of economic enterprise, with the provision that this freedom "should not affect the security, freedom and dignity of man". The following four sections were added to Article 10 on 19 November 1997.[2]

> The unlawful activity of private subjects, which widely touches the interests of social groups or individuals, which opposes and damages the principles of the free market economy and of the national and international economic and fiscal policies, which infringes the economy and social stability of the country, is placed under specialised national and international public institutions for administration.
>
> The degree of intervention, as well as the control and administration of these private subjects by the above-mentioned institutions, is defined by the law.
>
> In these cases, the State has the right and the duty to take possession of the property of private subjects only for defence of the interests of injured parties.
>
> No-one can be denied the right to file a complaint in court against the control measures, the administration and the disposal of his property, as well as to ask for full compensation of damages suffered.

It should be noted that the right to property appears in Article 27 of Chapter VI of the Major Constitutional Provisions.

48. The Minister of State for Legislative Reform and Parliamentary Relations of Albania, Mr Imami, has on two occasions provided the Venice Commission with explanations concerning the background for the adoption of this constitutional amendment. This amendment is, in fact, a reaction to problems caused by the so-called "pyramid financial schemes" in Albania. In accordance with the recommendations of the international financial institutions it proved to be indispensable to put these schemes under the control of State-appointed administrators to protect in particular the interests of the people having invested in these

[2] *Article 1, Law No. 8255 For an Addition to Law No. 7491 on the Major Constitutional Provisions.*

schemes. This was done by a special law. The Albanian Bankruptcy Law of 1995, is, according to the explanations given, a law drafted outside Albania which has never been applied within the country and which, under present conditions, it would be impossible to apply to the pyramids.

49. By a decision dated 13 November 1997 (Appendix III), the Constitutional Court of Albania declared this special law incompatible with Articles 3, 10 (before the amendment) and 11 of Chapter I of the Major Constitutional Provisions.

50. The constitutional amendment is destined to give a constitutional basis to the control of the pyramid schemes by State-appointed administrators.

B. Observations by the Commission

51. There is no doubt that the social crisis precipitated by the pyramid scandal warrants direct State intervention to control and rectify the problem. The constitutional amendment therefore has a legitimate purpose. It would certainly have been preferable had the legal order in Albania, in particular the bankruptcy laws, provided a sufficient framework to cope with the scandal without the need for specific *ad hoc* legislation. Nevertheless, the argument that this was not possible in the Albanian case seems plausible.

52. The fact that the Constitutional Court had decided that there was no sufficient constitutional basis for such State intervention does not prevent the constituent power from introducing such a constitutional basis (see above, para. 43). The need for State regulation of private property is acknowledged in other constitutions and in Article 1 of the First Protocol to the European Convention of Human Rights.

53. The Commission sees therefore no reason to object to the principle and purpose of the constitutional amendment.

54. However, the issue is whether Article 10 as amended is the best means to achieve this purpose. The first section of the amendment, which provides the basis for the State intervention, uses a large number of broad concepts to which it is very difficult to give a precise legal meaning. The Commission notes that Minister Imami has confirmed that for the State intervention to be legal, all the various conditions have to be fulfilled cumulatively and not alternatively. Therefore, the vague character of only one or the other condition would not seem to matter so much. However, all three conditions, i.e. that the activity

a) widely touches the interests of social groups or individuals;

b) opposes and damages the principles of a free-market economy and of the national and international economic and fiscal policies;

c) infringes the economic and social stability of the country;

are difficult to define as a matter of law.

55. It has to be acknowledged that already the previous text contained general concepts,

such as "the social interest". Nevertheless, these concepts were more appropriate since the social interest is linked to the general interest while now more problematic notions such as "interests of social groups or individuals" are introduced.

56. The Commission notes however that the statute providing for the administration of the assets of the pyramids contains a detailed definition of the entities concerned.

57. The fact that only unlawful activities are concerned according to the text introduces a more legal element. The exact meaning of "unlawful" remains however puzzling. An activity which is as such unlawful, e.g. drug-trafficking, can hardly be put under State administration. The meaning seems more to be an economic activity which has been unlawfully managed. If the unlawfulness resulted from the existing Albanian legislation, it would seem that the amendment does not add a lot to the possibilities of State intervention. It the unlawfulness does not result from existing legislation, the constitutional amendment does not provide any basis for State intervention.

58. The definition of the conditions for State intervention in this section therefore cannot be described as very successful. It has however to be admitted that the very broad and general terms of the decision of the Constitutional Court and the very succinct reasoning made the task of the Albanian legislature very difficult. It also had to act under time pressure.

59. It is certainly welcome that the further sections require that the degree of intervention is defined by law, that intervention should only take place for the defence of the interests of injured parties and that the control measures may be appealed to in court. The courts must have the possibility to intervene at the different stages of the procedure.

60. Nevertheless, the impression remains that the text, which responds to a pressing social need of the moment, is not viable as a long-term principle of the Albanian constitutional order. In fact, it would have seemed preferable, if indeed the Constitutional Court considers that the present constitutional rules do not allow for such an intervention, to introduce a provision on the right of the State to regulate private property into Article 27 of Chapter VI on the right to private property or to deal with this specific problem within the framework of Article 41 of Chapter VI on the temporary restriction of rights. A re-drafted Article 41 could specify conditions under which the State is allowed to interfere in the private affairs of individuals in order to preserve national security and to protect the public. Such restrictions would have to be temporary in character and be replaced afterwards by a comprehensive regulatory system designed to promote private sector development as well as to control abuse.

61. A well-functioning bankruptcy, securities, taxation and financial institutions framework will do more to stabilise Albania's society in the long-term than the open-ended threat of State administration and expropriation. Constitutions, by definition, should be difficult to change and the specificity with which the issue of control of economic activity is set out in the law may undermine the government's desire to restore public confidence in the stability of Albania's institution and economy.

C. Conclusions

62. The Commission therefore notes that the constitutional amendment has a legitimate

purpose and may have been required by specific and temporary needs. It cautions however against the repeated use of such *ad hoc* constitutional amendments in the area of economic regulation and considers that the text actually chosen should not be integrated as it is into the future Constitution of Albania.