



Strasbourg, 16 December 1991
<S:DEMO\DC\VENICOMM.RAP>

Restricted
CDL (91) 37

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**WORKING PARTY ON THE DRAFT ALBANIAN CONSTITUTION
(Venice, 22-23 November 1991)**

Meeting Report

1. On 22, 23 November 1991 a working party chaired by Mr. Malinverni and Mr. Steinberger met in Venice with an Albanian delegation to discuss the preliminary draft of the Albanian constitution. A list of participants appears in Appendix I.
2. A few days prior to the meeting a draft translation in English of the Second and Third parts of the proposed constitution was made available by the Albanian delegation. The document parts Second and Third that was discussed appears in document CDL (91) Misc1. The first part concerning 'General Principles' was not examined during the meeting because there was no translation available.
3. Discussion between the parties was open and friendly and a good working relationship was established. Considerable progress was achieved with valuable contributions made by all the experts present.
4. The working party examined most articles in the draft submitted and made comments and recommendations as relevant. A summary of these comments which will be forwarded to the Albanians and the experts appears in Appendix II.

5. Chapter IV - the Organisation and Management of Local State Power was not examined due to lack of time. A consideration of this chapter as well as a review of those Articles next to which "no observation" has been recorded may be usefully undertaken if there is another meeting before adoption of the Constitution.
6. A number of general comments on the preliminary draft were made:
 - Limitations on basic rights and freedoms of citizens should be covered by a general clause. Limitations should be proportionate to the legitimate goal but in no case should they encroach upon a fundamental right (Art.1).
 - Access to the Court and the right to a fair trial need strengthening (Art.5).
 - The conditions under which people may be deprived of their liberty need greater precision.
 - When a claim is made of a violation of rights, other than constitutional rights, by the executive power, the Constitution should guarantee access to the Court. This guarantee is lacking.
 - It is not clear whether the individual has direct access to the Constitutional Court (Art.125(9)).
 - The Constitution provides for decree laws to be enacted by the President. The power to enact laws by decree seems to be unrestricted. In western countries decree laws need authorization by parliament which also sets limits.
 - It is unwise to combine the powers of preventive and repressive constitutional control.
 - If the object is to guarantee those rights protected by the European Convention on Human Rights and the Social Charter then the language and structure of those texts should be more closely followed.
7. The Albanian delegates alerted the experts to several facts:
 - 1) A number of misunderstandings of the text would doubtless arise because of translation problems. International Human rights Conventions as well as, among others, the German, Italian, Spanish and United States constitutions had been consulted in the original language, translated into Albanian and then re-translated back into English for the draft.
 - 2) Albania is emerging from a situation where there have been no independent courts, where powers of judges have been unrestrained and the process of judging has been arbitrary. While taking account of Albania's particular history and experience, the intention was to construct a text that would protect fundamental rights and guarantee the independence of the judicial system in the classical tradition.

- 3) The wish is to have the draft Constitution ready for adoption in early March 1992. Further assistance with those articles of the text not discussed at this meeting would be appreciated.

8. Follow up

A further meeting between the Albanians, the representatives of the Venice Commission and their experts was recommended by the plenary session of the Venice Commission. The proposal made was for the meeting to take place in either Trieste or Bologna in January 1992 or in Venice during the next plenary meeting of the Commission (7-8 February 1992).

A P P E N D I X I

LIST OF PARTICIPANTS

ALBANIAN REPRESENTATIVES

Mr Kastriot ISLAMI, President of the People's Assembly
Mr Aleksander MEKSI, Deputy President of the People's Assembly
Mr Fehmi ABDIU, Member of the Commission for the drafting of the Constitution
Mr Arben IMAMI, Member of the Commission for the drafting of the Constitution
Mr Leonidha KOSTA, Member of the Commission for the drafting of the Constitution

VENICE COMMISSION

Mr Helmut STEINBERGER, Professor at the University of Heidelberg, Director of the Max-Planck Institute
Mr Giorgio MALINVERNI, Professor at the University of Geneva

EXTERNAL EXPERTS

Mr Andreas AUER, Professor of Constitutional Law, University of Geneva
Mr Sergio BARTOLE, Professor of Constitutional Law, University of Trieste
Mr David HARRIS, Department of Law, University of Nottingham
M. Didier MAUS, Directeur, Revue française de droit constitutionnel
Mr Philippos SPYROPOULOS, Professor of Constitutional Law, University of Athens

SECRETARIAT

Mr Régis BRILLAT, Directorate of Legal Affairs
Mr Mark NEVILLE, Directorate of Human Rights
Ms Madalen TEEPLE, Directorate of Legal Affairs

APPENDIX II

COMMENTS ON THE DRAFT CONSTITUTION OF THE REPUBLIC OF ALBANIA

These comments are for guidance only. They reflect the outcome of the discussions between the Albanian Delegation and the representatives of the Venice Commission For Democracy Through Law and the other experts attending the meeting in Venice on 22 and 23 November 1991.

SECOND PART - BASIC RIGHTS AND FREEDOMS OF THE CITIZENS

General Comment

- The suggestion was made that it may be useful, when drafting, to follow the terminology of the European Convention on Human Rights and the European Social Charter if, as was presumed, Albania planned to ratify these two instruments in the future.

Article 1

- para. 1: delete "of every individual ensured by law"

- para. 2: this paragraph should be deleted and a general limitation clause should be substituted following the outline of the second paragraphs to Articles 8 to 11 of the European Convention on Human Rights (ECHR). An example of such a limitation clause is as follows:

"Whenever under this Constitution rights and freedoms may be subjected to restrictions, such restrictions must be prescribed by law or pursuant to a law of the National Assembly and must be necessitated by pressing needs in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals or the protection of the rights and freedoms of others. The restrictions provided as well as their application must be proportional to the legitimate purpose.

In no case may the essential content of a right or freedom be encroached upon by these provisions or their applications."

- the following Articles should not be subject to the general restrictions: 2, 3, 4 (will require own specific restrictions), 5, 6, 7, 8, 9, 10, 11, 12 (will require own specific restrictions), 13, 19, 22, 23, 26 (it is for the law to regulate any restrictions here), 27, 28, 29 (it is for the law to regulate any restrictions here)

- social rights were not considered to be subject to the general restrictions although the possibility of following the example of the European Social Charter (ESC) Article 31 was pointed out

- the following Articles were to be made subject to the general restrictions: 14, 15, 16, 17, 18, 20, 21, 24, and 25

- para. 3: to be deleted, not required. If kept consider inclusion of a reference to the European Social Charter

Article 2

- para. 3: replace with "Abortion is allowed only when provided for by law" rather than specifying details in the Constitution

Article 3

- it is not the law that prohibits torture, as stated in the draft, therefore delete this reference. In addition the Article should also concern punishment as well as treatment (see Article 3 of the ECHR for formulation)

Article 4

- possibly link up with Article 42. Refer to Article 4 of the ECHR for text and possible list of limitations. (Total prohibition was favored by the Albanian Delegation because of their recent history)

Article 5

- para. 2: the court should not only be impartial but also independent (add independent). This paragraph needs expanding to include reference to entitlement to a "full fair and public hearing" which should not be limited to criminal proceedings but should also include civil proceedings (see Article 6-1 of the ECHR)

- para. 3: replace with "Nobody should be tried without being granted the opportunity of appearing before a court of law"

Article 6

- should those who fail to pay tax be sent to prison? This could be regulated here

Article 7

- problem of translation, should read "Individuals found guilty of an offence, are entitled to appeal to superior courts for a re-trial"

Article 8

- para. 1: this should be a separate Article concerning non-retroactivity of criminal laws (see Article 7 of the ECHR)

Article 9

- the word "citizens" should be replaced by "everyone"

Article 10

- no comment

Article 11

- para. 1: delete (there was discussion of replacing with a clause such as "everyone has the right to avail himself of a council of his choice in a court of law", but in view of the second paragraph it was considered best to delete the whole of the first paragraph)
- para. 2: "Everyone is entitled to defend himself **and** be defended by a lawyer"
The word in the original text "or" should be replaced with the word "**and**" as shown above

Article 12

- this Article needs substantial re-working
- the reasons for detention and who can be deprived of their liberty need formulation in this Article (see Article 5 of the ECHR)
- a remedy is required for those deprived of their liberty (see Article 5-4 of the ECHR)
- para. 1: this does not, for instance, take into account mental patients, children for educational supervision etc., a broader formulation is perhaps needed
- para. 2, no. 1: add at the end of the sentence the words "in a language he understands"
- para. 2, no. 2:
 - something more on pre-trial detention is needed. The reasons for detention need to be given as do the reasons for continued detention (ie to prevent the accused fleeing or tampering with witnesses etc.)
 - pre-trial detention needs regulation and individuals should be released as soon as possible. "As soon as possible" can be regulated by either providing for release within a reasonable time, for example not exceeding 1 year (or any other period), it can similarly be regulated by reference to the time being proportionate to the facts of the case in question. In re-drafting reference should be made to Article 5-3 of the ECHR

Article 13

- para. 1: reference should be made here to the International Covenant on Civil and Political Rights (ICCPR) Article 10-1 to improve the wording (under the wording that stands the court decision would have to specify the deprivation of all the rights (ie access to children, conjugal rights etc.)

Article 14

- this Article could become 3 separate Articles, privacy correspondence and home. Privacy is more normally linked to family life (see Article 8 of the ECHR)
- para. 3: "Home can only be entered into with the consent of the individual who occupies it ...". The word "owns" should be replaced by the word "occupies"
- para. 4: the words "threats to the community" were thought to be uncertain and too wide. The word "immediate" should be added before the words "dangers to human lives"

Article 15

- translation problem. The word "confess" should be replaced by the word "reveal"

Article 16

- freedom of the press and censorship should be looked at independently of broadcasting
- freedom of the press is a matter to be safeguarded under the Constitution, whilst broadcasting is a matter to be regulated through the law as it is a matter which needs organisation and authorisation. Comment was made that when there is a monopoly on broadcasting there is no freedom as such
- A provision such as that contained in the last sentence of Article 10-1 of the ECHR should perhaps be included. It reads: "This Article does not prevent States from requiring the licensing of broadcasting, television or cinema enterprises"

Article 17

- para. 1: The words "citizens are" should be replaced by the words "everyone is"
- It may be legitimate to put certain restrictions on this Article in relation to foreigners as this is a political right

Article 18

- this article should be entitled "The right to freedom of association" and references to "unions" throughout the Article should be replaced with the word "associations"

- para. 1: the word "citizen" should be replaced by the word "everyone"

Article 19

- the wording used in Article 12 of the ECHR is recommended in preference

Article 20

- para. 1: the word "citizen" should be replaced by the word "everyone", and the words "own and" should be inserted before the word "possess"
- para. 2: the words "profits should be made" should be replaced by "to acquire property"
- para. 4: the word "remuneration" should be replaced by the words "adequate compensation"
- para. 5: this and the following paragraph on private economic initiative should be made into a separate Article

Article 21

- para. 3: (relating to restrictions) can be deleted because of the general provision in Article 1

Article 22

- the words "extradition" and "extradited" in the title and in the text should be replaced by the words "expulsion" and "expelled"

Article 23

- the word "deportation" throughout the text should be replaced by the word "expulsion"
- regard should be had to the other provisions contained in Article 1 of Protocol 7 of the ECHR

Article 24

- no comment

Article 25

- no comment

Article 26

- para. 3: the right to vote is a universal one. Prisoners could, for instance, vote by post. This paragraph could be deleted and any restrictions could be regulated by law although not as part of the general clause in Article 1

Article 27

- para. 2: "nationality" is too strong and could be understood to be citizenship. It should be replaced by the words "national or ethnic origin"

Article 28

- in terms of drafting a preferred formulation would be:
"Equality of women and men"
Women and men enjoy equal rights"

Article 29

- no comment

Article 30

- no comment

Article 31

- para. 2: to be re-written as follows:
" Civil marriages are joined on the basis of legal equality of the future husband and wife by **order of the court** and can only be dissolved by this **order** in conformity with the legal procedures"

Article 32

- the Albanian delegation explained that the aim was of the Article was to require the State to establish a system of schooling which would be an enforceable right in a court of law
- para. 9: the word "atheistic" should be replaced by the word "secular" as it is more neutral
- para. 10: it was recommended that religious education should be in "their own national language" as opposed to "the Albanian language"
- para. 11: this paragraph should be replaced by the following: "Private schools may be established and function in accordance with the law"

Article 33

- the title of the Article should read "The right to **take part and enjoy culture and the right to copyright**"
- para. 1: the words "Everyone" should replace the words "Every citizen"

Article 34

- a general discussion took place on this Article. The reference to the applicability of this Article to citizens as opposed to everyone was confirmed
- in formulating this Article there is a choice. It can be formulated as an individual right (ie everyone has the right to healthcare) in which case there will be a subjective right and is left to the courts to decide on the right. This is however a very open ended commitment and leaves the State open to a heavy agenda.
- The other option is that it is left as an obligation of the State (ie the State has to provide healthcare) in which case the State can develop healthcare in a programatic fashion as resources allow
- the preference of the experts was to make it an obligation on the State rather than an individual right

Article 35

- no comment

Article 36

- it could be possible to include a clause for equal pay and work for women and men. It would add further strength to the general clause contained in Article 28. This would then be following the European model (see Article 4 par. 3 of the European Social Charter Article and Article 1 of the Additional Protocol)

Articles 37 to 39

- no comment

Recommendation for the inclusion of two additional Articles

- a recommendation was made for the inclusion of an Article dealing with reasonable hours of work (see Article 2 of the European Social Charter)
- the rights of the elderly could also form the subject of an additional Article (see Article 4 of the Additional Protocol of the European Social Charter). Assistance could go over and above pensions to include such matters as a right to a home etc.

Article 40

- para. 2: should be deleted as it is not for the courts of first instance to decide on the constitutionality of laws

- para: 3: this would best be dealt with under Article 103

Article 41

- this Article should find itself earlier in the Constitution before the Social Rights (the same could perhaps be said for Article 40)

- the word "citizen" should be replaced by the word "everyone"

Article 42

- para. 1: the words "the right and the" should be deleted as they are not necessary

- para. 2: problem of translation. The words "in the army in another function" should be replaced by the words "some alternative service"

- para. 4: (obligation to pay for public expenses) this could be a separate Article, but it could remain where it is if preferred

Article 43

- the words "the citizens" should be replaced by the words "human beings"

- the Article requires re-drafting and reference should be made to Article 15 of the ECHR or Article 4 of the International Covenant on Civil and Political Rights (ICCPR) which is slightly broader. The rights which are non-derogable must be listed

- note as the formulation stands it states that the law can only be restricted "to the extent permitted by the international law on this matter which has been endorsed and adopted by the Republic of Albania". The question is however posed as to what would happen if Albania had not adopted and endorsed any such international law? This problem can be avoided by following either the ECHR or the ICCPR formulations

Article 44

para. 1: the words "Law forbids to anybody" should be replaced with "No one" as it is not the law that forbids, but the Constitution that forbids

PART THREE
STATE ORGANISATION
CHAPTER I
NATIONAL ASSEMBLY

Article 45

Suggested modifications:

Paragraph 1

The National Assembly may not be considered the 'sole legislative organ; where the possibility of referendum exists, the people also legislate.

Paragraph 2

Consider whether it is necessary to make a distinction between 'people' and 'state'; the word state could be eliminated leaving '.....in the name of the people....'.

Article 46

In general:

the value of enumerating the competences of the National Assembly was questioned. By so doing there is a limitation placed on the subject matter of legislation; this is unwise because changed historical circumstances may expand the subject matter requiring legislative action.

Specifically:

Article 46(1) Refers to all laws. Should such power derive from Parliamentary action?

- (6) The subjects open to referendum and the referendum procedure should be specified.
- (8) This sub-article supposes the possibility of setting up investigatory commissions, there should be consideration of how these will be provided for.
- (9) 'Freedom of Broadcasting' should be moved to article 16 'The Right to Expression and Information'.

Article 47

A majority/proportional or mixed system is possible here. It is not clear which system is aimed at, this should be made explicit.

Article 48

Suggested modifications:

Paragraph 1

The National Assembly elects its 'organs' not its 'Presidency'.

Paragraph 2

"The National Assembly' on the basis of the 'laws' not 'organic law' approved by it", delete the word 'organic'.

The internal regulation governing the procedures alluded to should be specified.

Article 49

Suggested modifications:

Paragraph 1:

The National Assembly is convened in at least two ordinary sessions not 'two ordinary sessions'.

Paragraph 2:

Reads 'The meetings of the National Assembly are opened when the majority of deputies is present'. Consideration should be given to situations where the deputies refuse to convene (are on strike for example) in such a situation the National Assembly cannot open.

Article 50

Logically, some elements of this article should appear under article 47. Typically, they would appear in a text setting out electoral law and internal regulation of the Assembly, not in the Constitution itself. Some specification of electoral districts should be made which would provide against the problem of gerrymandering.

A question was raised regarding the compatibility of article 50 with Article 125(7).

Article 51

Suggested modifications:

Paragraph 1:

The right of initiative should not be granted to individual deputies but should be restricted to a small group of deputies (perhaps 20) to avoid overburdening of the Parliamentary machinery.

Add 'the modalities of this will be specified by organic law'.

Paragraph 3:

'Organic laws' should be specified.

Article 52

No observation.

Article 53

Paragraph 3:

Add after grave crime 'but may not be detained for more than one month'.

Paragraph 4:

Change to 'The deputy has no legal responsibility for his expressed opinions and votes cast ...'(delete the word actions).

Article 54

No observation.

**CHAPTER II
THE PRESIDENT OF THE REPUBLIC**

Article 55

Suggested modifications:

The term 'majorities' is not clearly employed. There is a need to clarify the meaning of 'voting members' in the third round.

In order to avoid the possibility that the President will be elected by a minority there was a proposal to change the wording from 'majority of voting members' to 'majority of all members'.

Article 56

Paragraph 1:

'fulfils conditions', these conditions apparently only exist in electoral law, they should appear in the Constitution.

Paragraph 3:

to avoid the situation where the election of the new President occurs before the expiry of the mandate of the last President the time limit of 'no later than one month before' should be clarified.

Paragraph 5:

it is unclear what the mechanism governing the voting system is, proportional or majority; if it is a majority system then a new election would be required.

Article 57

No observation.

Article 58

'The president of the republic has the following main competences':

Article 58(5)

add the word 'once' so that it reads: 'Has the right to return a Law once to the National Assembly and the local organs of power'.

Article 58(6)

reads 'Appoints the chairman of the Council of Ministers and accepts his resignation'.
Add 'and on his proposal appoints and dismisses the ministers'.

Article 58(11)

Should read 'Ratifies and abrogates treaties which are not examined by the National Assembly' (delete signs international treaties).

Article 58(21)

Here the problem of 'decree laws' was discussed with reference to Article 46, Article 69 and this article. It was suggested that there should be a special law governing the authorization of the government to issue decree laws. The missing provision with restrictive conditions on the exercise of decree law should appear under article 46.

Suggested modifications:

Proclaims the decree-laws approved by the Council of Ministers. The president of the Republic has the right to refuse to proclaim the decree. (Or: The President of the Republic may refer the decree-law to the constitutional Court arguing its incompatibility with the Constitution).

Article 59

The reference in this article to 58(1) should be deleted.

Article 60

The fifteen day period alluded to was considered too short.

Articles 61, 62, 63

No observations.

Article 64

Suggested modifications:

Paragraph 1:

It is not stated when presentation takes place. There should be clarification of this. Five days is too short a period; a better formulation might be 'Cabinet should be presented within five days after nomination.'

The decision to make approval of the Council of Ministers dependent on the National Assembly is dangerous. Here, even single members of parliament would have the power to accept or reject the Council members.

Suggested modification:

'The Council of Ministers and its programme are approved by the National Assembly with an absolute majority of members of Parliament votes', within five days from the date of presentation'.

Article 65

Does the swearing in occur before the vote or afterwards? If it occurs before then two Governments are in power at the same time.

Articles 66, 67

No observations.

Article 68

Suggested modifications:

'The Council of Ministers is a collective organ. The structure, attributes and organisation of the Council of Ministers are defined in the framework of law'.

Article 69

Paragraph 1:

'The Council of Ministers has the following main competences:'delete 'main'.

Article 69(3) The 'Council of Defence' is not self-explanatory. It should be mentioned/explained somewhere in the Constitution or it should not be referred to here.

Article 69(5) This clause should be formulated such that it is consistent with Article 58(11)

Article 69(8) gives some definition to the concept of decree-laws but Article 46 should be amended regarding these laws and should provide for Parliamentary authorization.

Article 70

Typing error, 'combining' should read 'co-ordinating'.

Article 71

No observations

Article 72

Change the word 'election' to read 'appointment'.

CHAPTER IV
ORGANISATION AND MANAGEMENT OF LOCAL STATE POWER

Articles 75-95 under this heading were not discussed due to lack of time.

CHAPTER V
THE BUILDING OF THE JUSTICE SYSTEM

Article 96

No observations but see comments under Article 103.

Article 97

The suggestion was to delete Article 97 because some cases before Courts would not fall under the definition provided by the Article.

However, because Albania has no history of independent courts the delegation felt, at least in a transitional period, clear definition of the Courts functions was necessary.

If the article was retained it was suggested that the second sentence might be modified to read 'The Courts mainly or in particular realise their functions by ...

Article 98

In this article 'participation' refers to that of a jury, not to the administration or organisation of justice. This should be more clearly expressed.

Article 99

No observations.

Article 100

Paragraph 2:

The words 'other lower organs' should be replaced by 'extra-ordinary' courts. A reformulation of the phrase could be 'This constitution prohibits the creation of extra-ordinary courts', not the 'law' prohibits.

It was made clear that the intention was to provide for administrative law separately. It was suggested that the formulation of this article did not make evident the meaning of the drafters.

The manner in which a separation of the branches of Justice will be established should be made clear.

It was suggested that it was easier, cheaper and more efficient, particularly in the case of a small country like Albania, to have one system of justice that is one Court of Cassation with a chamber for administrative affairs and Civil Affairs. It is stated in Article 100 '.... specific categories of matters can be set up within the system of courts...'. This was felt to be a confusing formulation if the intention is to have one system of justice. It is necessary to clarify that what is meant is sections of Courts and not separate courts per se, in order to avoid suggesting that there will be many courts with different competences. If this is reformulated here then the actual areas of competence that fall within the reach of the Court of Cassation can be made explicit in Article 102 (see below).

Article 101

Paragraph 1:

It was questioned whether members of the Court of Cassation would be chosen from people outside the profession or whether the system conceives that it will be only Barristers that become judges. It was suggested that where the legal profession is in formation consideration should be given to the possibility of lay judges.

Paragraph 2:

The president is appointed by the National Assembly. It was suggested that the President could be elected by and from the ranks of the Judges of the Court of Cassation themselves.

Paragraph 3:

5 years was a typing error - it should read 15 years.

It was felt that some statement should be made to the effect that the personal position of all judges is equal especially with respect to term of office.

Paragraph 4:

States that 'judges of the Court of Cassation can be discharged only upon justified decision of the National Assembly'. There was opposition to the idea of discharging through the National Assembly (if at a pinch, given the Albanian situation, it could be agreed that the Assembly appoints them). It was suggested that this paragraph should be deleted. However, if this paragraph of Article 101 is deleted it should be stated, somewhere, who has the power to discharge judges.

Article 102

Suggestions for modifications as follows:

Paragraph 1:

Insert after 'specifically defined questions' in civil, criminal and administrative law.

Paragraph 2:

Delete because unnecessary in a constitution.

Article 103

Suggestions for modifications are as follows:

Paragraph 1:

This paragraph could become the final paragraph of Article 96.

Paragraph 2:

Replace the word 'cancel' with the word suspend.

Paragraph 2:

After the words 'suspend judgement' in this paragraph, add the words 'that any Court that finds a law or decree is not in accordance with the Constitution it has not only the right but the obligation to refer the case directly to the Constitutional Court'. A Court should not be required to go through the Court of Cassation as a first step because this might block the process.

It should then be added that once the Constitutional Court has decided on the Constitutionality of the law, the referring Court must proceed on the basis of the decision given by the Constitutional Court.

Two proposals for rewording this article were made as follows:

- (i) If in the process of considering a certain matter, a court finds that a law adopted by the National Assembly does not comply with the Constitution, it suspends its judgement and refers the constitutional question to the Constitutional Court. The referring Court then proceeds on the basis of the decision given by the Constitutional Court.
- (ii) If a court considers unconstitutional a law or an act having the force of law the validity of which is decisive to its decision, it shall stay its proceedings and refer the issue of unconstitutionality to the Constitutional Court. After the decision of the Constitutional Court the court shall proceed on the basis of the decision of the Constitutional Court.

Paragraph 3:

Should be deleted. Courts should not be influenced by any other organ.

Paragraph 4, 5:

Deserve to be an article by themselves because the obligation to motivate is a very important responsibility in the decision making of all Courts.

Article 104

Paragraph 1:

It was felt that 'immunity' is too broad a concept if the idea is meant to express the fact that 'judges cannot be removed..'

Paragraph 2:

If, as was suggested, paragraph 4 Article 101 is dropped, then the second paragraph of Article 104 works on its own.

Article 105

No observations.

Article 106

Paragraph 1:

The word 'judged' in the first sentence should be changed to 'heard'.

Paragraph 2:

'The defendants are also entitled to a free choice of translators provided they pay for the expenses', was felt not to be in harmony with European human rights case law.

Article 107

Paragraph 2:

It was suggested that 'public order' is a confusing concept and should be replaced by the term 'legal order'.

Article 108

No observation.

Article 109

Paragraph 2 of Article 109 states that:

The Supreme Council of justice is headed by the President of the Republic. Its membership comprises the President of the Cassation Court, the Minister of Justice, the General Prosecutor and 10 magistrates elected in joint elections of the Cassation Court with the Office of the General Prosecutor.

It was suggested that perhaps five judges from the Court of Cassation and five judges from the 1st Instance or Court of appeal could make up the quota of ten judges.

Article 110

No observation.

Article 111

It was suggested that the Supreme Council of Justice should not become a political body, therefore, it should not be given questions such as those relating to amnesty.

Article 112

The words 'like other premiums' are unclear and should be reformulated.

Article 113

Paragraph 2:

to read 'legal defense and advice'.

Article 114

It was suggested that the whole subject of state responsibility in the area of material responsibility for damages inflicted by Court procedures should be assigned to statute law and should not figure in the Constitution.

Article 115

As formulated 'Supervision' appears to refer to 'supervision of judgements' in fact it refers to supervision over the technical organisation of the organs of justice. The words 'functioning of the organs' should be eliminated and replaced by 'supervision of the administration'.

Article 116

As formulated appears to suggest that the Court administers its own budget when in fact the meaning is that the Minister of Justice administers the budget. This should be more clearly stated.

Article 117

No observation.

**CHAPTER VI
CONSTITUTIONAL GUARANTEES**

THE CONSTITUTIONAL COURT

Article 118

Reads:

The Constitutional Court is the supreme authority which protects and guarantees observance of the Constitution.

Independent in the exercise of its functions, it is subject only to the constitution.

The competences of the Constitutional Court cannot be defined or changed by law.

The suggestions were that:

- (i) If the Constitutional Court is to be the final interpreter of the Constitution then it should be stated that the Constitutional Court is the Supreme authority and that it 'protects, guarantees, and interprets the constitution'. It is very important to add this phrase to paragraph one but if this occurs there must be a modification of article 58(21). If the constitutional Court is the supreme authority then the President of the Republic cannot argue 'incompatibility with the constitution'.
- (ii) Paragraph three is a problem because it limits the possibility of increasing the competence of the Constitutional Court. if the phrase is changed to 'the competences of the Constitutional Court cannot be abridged by law' then the possibility of enlarging its competence remains open.

A proposal for rewording this article was made as follows:

The Constitutional Court is the supreme authority which protects, interprets and guarantees observance of the constitution.

Independent in the exercise of its functions, it is subject only to the Constitution.

The competences of the Constitutional Court cannot be restricted by law.

Article 119

Suggested modifications:

To read: 'The Constitutional Court is made up of seven members, three of whom are elected by the National Assembly, two by the Supreme organs of Justice and two of whom are appointed by the President of the Republic. The President of the Republic would not 'elect' these members.

Article 122

Suggestion:

Perhaps the profession of University professor of law should be considered compatible with the profession of constitutional Judge. The capacity to select from the ranks of this profession would open a resource of very qualified people.

Article 125

Refers to the competences of the Constitutional Court and suggests that this Court has both preventive and repressive control.

A choice should be made between giving this Court preventive or repressive control but the two should not be combined powers of this body.

Two alternative texts have been proposed as possible substitutions for the current Article 125. They are as follows:

(i) The constitutional court has the following competences:

Par. 1: Deals with cases of incompatibility of laws and acts which have the force of law with the constitution;

Par. 2: Gives its opinion on the constitutionality of organic laws before their proclamation;

Par. 3: Gives its opinion on the compatibility of treaties and international agreements the Republic of Albania enters into, with the Constitution, before their ratification;

Par. 4: Examines the compatibility of laws and acts which have the force of law with the widely accepted norms of international justice and with treaties and international agreements the Republic of Albania has ratified;

Par. 5: Decides on constitutional controversies between the various organs of state power and between local and central organs of power;

Par. 6: Examines electoral complaints concerning the regularity of the election of the President of the Republic, of the National Assembly as well as the regularity of popular referendums, proclaiming the final results;

Par. 7: Examines the penal accusation against the President of the Republic;

Par. 8: Examines constitutional complaints raised by persons arguing a violation of their fundamental rights by a state organs after they have exhausted all remedies and appeals within the ordinary court system.

(ii) The Constitutional Court decides:

1. on the incompatibility of laws and acts which have the force of law under this Constitution at the request of the President of the Republic, of the Council of Ministers, or of one third of the members of the National Assembly;

2. on the constitutionality of organic laws before their proclamation, at the request of the President of the Republic, of the Council of Ministers, or of one third of the members of the National Assembly;

3. on the compatibility with this Constitution of international treaties and agreements before their conclusion at the request of the National Assembly or of one third of its members;

4. on the compatibility of laws with the general rules of public international law as well as with international treaties and agreements to which the Republic of Albania is a Contracting Party; at the request of the President of the Republic, of the Council of Ministers, of one third of the members of the National Assembly, or of a court before which such compatibility is a decisive factor in a case pending before it;

5. on controversies over their competences, rights or duties under this Constitution between the President of the Republic, the Council of Ministers, or the National Assembly on application by either one of these organs;

6. on constitutional controversies between the central state organs and the local organs, on application by the Council of Ministers or of the highest organ of the local authority concerned;

7. on the unconstitutionality of political parties, at the request of the President of the Republic or of the Council of Ministers;

8. on controversies over the lawfulness of the election of the President of the Republic, of deputies as well as over the admissibility of a referendum;

9. on the impeachment of the President of the Republic on application by two thirds of the members of the National Assembly;

10. on complaints of unconstitutionality, which may be entered by any person or groups of persons who claim that one of his/her/their rights or freedoms guaranteed under this constitution has been violated by public power (legislative, executive, or judicial powers, as the case may be);

11. in the other cases provided for in this Constitution or assigned to it by law of the National Assembly.

Article 126

Third paragraph should be deleted because contrary to the general referring procedure decided upon.

A proposal for rewording this article was made as follows:

In cases of urgent necessity, in order to avoid a serious danger to the public wheel or to prevent an irreparable damage to an individual, the Constitutional Court may order interim measures of protection and suspend the application of laws or other public acts until its final decision on the case.

Article 127

This article states ways in which the Constitutional Court is put into motion. It should list all operations and the wording should be precise.

Two alternative texts have been proposed a possible substitution for the current article 127. They are as follows:

(i) The Constitutional Court is brought into operation on demand of:

1. Ordinary courts (Art. 103);

2. The President of the Republic, the Council of Ministers or one fifth of the deputies who question the constitutionality or organic laws before their proclamation (Art. 125 Par. 2) or the compatibility of treaties and international agreements with the Constitution, before their ratification (Art. 125 par.3);

3. The President of the Republic, the Council of Ministers, one fifth of the deputies, district councils or communal councils who question the constitutionality of laws enacted by the National Assembly, within 30 days from their enactment;

4. Individuals who claim a violation of their fundamental rights (Art. 125 par.8);

5. Organs of state power who complain about usurpation of their constitutional competences by another organ of state power (Art. 125 Par.5);

6. Local state powers who complain about usurpation of their autonomy by organs of state power (Art. 125 Par.5).

- (ii) The rules of procedure of the Constitutional Court shall be determined by an organic law of the national Assembly.

Until such law enters into force, the Constitutional Court is authorized to exercise its functions with the entry into force of this constitution, on the basis of rules of procedure established for the time being by the Constitutional Court itself.

Article 128

The first sentence of this article should be changed from 'with a majority' to 'with a higher majority'.

Article 129

Superfluous can be deleted.

Article 130

In the second paragraph 'all organic' should be placed before 'laws'.

The formulation of this paragraph which states that all organic laws are approved with the majority of votes of two thirds of the deputies present could mean that adoption of such laws could be easily blocked.

Article 131, 132, 133

These were discussed conjointly. Two problems were raised:

1. It would take little more than 1/3 of the National Assembly to block an initiative to revise the Constitution;
2. If 20,000 voters ask for an amendment then a referendum is mandatory.