

Strasbourg, 12 May 1998  
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CDL (98) 47  
Or.fr.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**DRAFT CONSTITUTION  
OF THE REPUBLIC OF ALBANIA  
PARTS I & II**

**Comments  
by Mr Giorgio Malinverni  
(Switzerland)**

### **First part: Basic principles**

This part raises questions both pertaining to the legislative technique and to its substance.

1.
  - a) With respect to the legislative technique, it may be appropriate to put together in one single article the present articles 1-3 which are very brief.
  - b) Similarly, Article 8 is by its content (principle of legality) linked to Article 6 and could easily become the fourth paragraph of this article. This would reinforce the cohesiveness and unity of the provisions on the rule of law.
  - c) One may question whether a provision such as Article 6 para. 3 should appear in the Constitution. The directly applicable character of a provision, be it constitutional, legislative or even treaty-based, is in fact usually decided by the courts when they have to apply such a provision. The Constitution itself could therefore remain silent on this topic.
  - d) In Article 13 it would, in my opinion, be preferable to separate the first paragraph concerning the economic system from the second and third paragraphs concerning the army. These two questions merit to be dealt with in two separate articles.
2. As regards substance, I consider that the following comments should be made:
  - a) In Article 7 I have a preference for the alternative which prescribes in a clearer and more convincing way the principle of the primacy of international law over domestic law.
  - b) It is difficult to understand the exception to the principle of legality made at the end of Article 8. The principle of legality should apply to all State activity without exception.
  - c) The first paragraph of Article 10 creates a serious problem at the level of international law. It provides in fact that the Republic of Albania protects the rights of persons who, while belonging to the Albanian "nation", are nevertheless nationals of another sovereign State and domiciled as a general rule on the territory of this State.

In contrast with the second paragraph, which creates no problem in this respect, since it is limited to the protection of Albanian citizens, the first paragraph of Article 10 raises the problem of its compatibility with the principles governing international relations, such as non-interference in internal matters of other States, the sovereign equality of States and friendly relations between States.

Article 10 para. 3 gives rise to the same concerns in so far as it is not possible to conclude from the text whether the term "Albanians" refers exclusively to Albanian nationals, ie. persons having Albanian citizenship or an Albanian

passport or whether it also refers to individuals belonging to the Albanian "nation".

- d) The good intentions of the authors of Article 11 para. 2, are understandable, but it must be acknowledged that such a provision may in practice be abused.
- e) The second part of the sentence in Article 12 para. 4 may give the impression that the religious communities are exempt from the application of State law. Would it not be appropriate to clarify that, like other legal entities, they are governed, at least to a certain extent, by this law and that their autonomy is not unlimited?

### **Part two: the fundamental human rights and freedoms**

1. The authors of the draft should be congratulated on having started this chapter by a particularly well-drafted Article 1.
2. Article 3 sets out the conditions under which the fundamental rights guaranteed by the Constitution may be restricted. In its present form, this article seems to apply to all fundamental rights. This is however obviously not the case. There are in effect rights which cannot be restricted in any public interest and whose limitation may not be justified in any circumstance. This applies for example to the prohibition of torture, the presumption of innocence, etc.
3. This same Article 3 does not distinguish between simple restrictions of fundamental rights (e.g. para. 2 of Article 8-11 ECHR) and derogations (Article 15 ECHR) which enable the State to suspend, under certain circumstances, certain guarantees.

While the first type of restrictions is applicable at any time, the second type is only possible under exceptional circumstances. Rights which may not be subject to derogation even under such circumstances (cf. e.g. Article 15 para. 2 ECHR) should also be specified.

4. The second paragraph of Article 4 sets out the grounds for an unlawful discrimination. I think that the authors of this provision did not intend the list to be exhaustive but only to provide examples. Since discrimination might be based on other criteria than those expressly mentioned it would seem appropriate to insert before the list of unlawful grounds of discrimination the adverb "in particular".
5. In contrast to its second paragraph, the first paragraph of Article 5 does not set out a fundamental right. This paragraph is limited to setting out under which modalities Albanian citizenship may be acquired. As such, the paragraph should not appear in the catalogue of fundamental rights.
6. Such as it is drafted, Article 7 raises several difficult interpretation problems. Like the corresponding provision of the Ukrainian Constitution<sup>1</sup>, the third sentence of this article

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<sup>1</sup> See the opinion of the Venice Commission on the constitutional aspects of the death penalty in Ukraine.

gives room to serious doubts whether the death penalty is lawful in Albania. In any event, this penalty is not specifically outlawed. This question should be clarified in order to remove any ambiguity.

7. To the extent that it enshrines a real right to information, the second paragraph of Article 9 is welcome since it goes beyond what is guaranteed by the constitutions of several western States.

One may however wonder whether it is appropriate to provide for the public character of the sessions of all State organs. For example, do government sessions necessarily have to be held in public?

8. It might be appropriate to expressly prohibit in Article 12, in addition to forced labour, also slavery and servitude, as is done in most of the important international instruments.

In addition, work required in the ordinary course of detention and normal civic obligations should be added to the activities which should not be considered as forced labour (see Article 4 ECHR).

9. Article 13 is unsatisfactory in several respects:

- a) First of all, the first paragraph provides that no-one may be deprived of his/her liberty except in cases provided for by law. Nevertheless, the reader has to refer to Article 14 to learn the grounds making a deprivation of liberty lawful. Would it not be preferable to incorporate these grounds in the text of Article 13 in order to make the Constitution easier to read?
- b) To the extent that they both provide for a maximum duration of detention of 72 hours, paragraphs 2 and 3 of Article 13 duplicate each other. The more explicit third paragraph could be maintained and the second paragraph deleted.
- c) While the maximum duration of detention is fixed at 72 hours, Article 13 remains silent on the duration of custody. It should however at least be provided that a person who has been remanded in custody is entitled to a trial within a reasonable time or to be released on bail.
- d) Finally, Article 13 should indicate for which grounds the judge may order a person to be remanded in custody, as is done by Article 5 ECHR.

10. Article 17 also raises several problems. In effect, this article only guarantees certain rights to the accused in a criminal trial. In the draft Constitution there is however no article generally providing for the right to a fair trial in criminal, but also civil and even administrative cases. In particular, the following guarantees are missing: the right to be judged by an independent and impartial tribunal established by law; the right to be judged within a reasonable time and the public character of proceedings. Were these forgotten or deliberately omitted?

11. Article 19 provides for the right to be heard. This fundamental guarantee should

however not be limited to criminal cases but be extended in a more general manner, in particular to include administrative procedures.

12. The catalogue of fundamental rights appearing in chapter II is incomplete. In particular, the following are missing: the right to respect of private life, the right to property, the right to marriage and all social rights.
13. Article 25 raises at least two questions:
  - a) Would it not be appropriate to provide in paragraph 2 that no extradition may take place if the extradited person would be subject in the requesting State to the death penalty or exposed to cruel or degrading treatment?
  - b) The second sentence of paragraph 3, at least in its English translation, is not very clear. In which cases might a deportation, even provided for by law, be justified?