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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

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

**Comments**
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The draft Parts I and II of the Constitution of Albania submitted by the Constitutional Commission are worthy of much respect and are a valuable basis for further discussion of the Constitution. The partly realistic character of the texts (no unrealistic promises) is remarkable. The following comments address under A some basic questions and provide under B comments on several articles. Many questions however depend on the organisation and functioning of the State and an assessment is only possible when all parts of the draft Constitution are available.

## A. Some basic questions concerning the draft Constitution (parts I & II) of particular relevance for the position of the individual with respect to the State

1. The constitutional and law-based State (the rule of law in the formal sense)

a) Articles 6 and 8 of part I address fundamental issues. Both articles are linked. They are related both to substantive and procedural law and thereby to the whole legal order. Article 6.1 establishes the principle of legality: "the law constitutes the basis and the boundaries of the (better: 'of any') activity of the State." Article 8, on the other hand, allows in principle an exception from the principle of legality ("except when provided otherwise in it") which applies not only to the "organisation" but also to the "functioning of the organs". This exception is problematic and should not be admitted.

b) Article 6.2 provides that the Constitution is "the highest law in the Republic of Albania".

It is important to provide expressly in the text of the Constitution that all other laws are only valid in accordance with the Constitution. In this way, the principle that the Constitution is binding for everyone - both individuals and the State - is clearly set out at the beginning. The legislative power which, as a general rule, decides by simple majority is bound by the Constitution and has to respect the constitutional order including the fundamental rights.

In the Constitution it should also be provided that all infra-legal norms (e.g. decrees and regulations of the President or the government) may only be issued on the basis of and in accordance with the laws and the Constitution. In this way, it is avoided that the Executive issues on its own norms without a legal basis and it is ascertained that all norms issued by the Executive are clearly based on democratically approved and legitimate laws.

Where there are no norms, there is freedom. Where there are norms, they are binding on the organs of the State and "enable the citizen to regulate his conduct" (see ECHR, Silver case, vol. 61 § 88) (legal certainty). In addition, the application of norms valid for everyone avoids arbitrary specific treatment (principle of equality).

In this context, the question arises whether the Constitution provides for a body controlling respect for the hierarchy of norms and the compatibility of norms with the Constitution.

2. No right without remedy

Each right only has a value in so far as it may reliably be enforced through the courts. It is therefore important for the rule of law that the application of statutes in a particular case may be reviewed by the courts. Basic rights are fundamental. The judicial protection of basic rights is as fundamental. However, in his or her every day life, the citizen is usually confronted with

ordinary statutes. There is not in every case a question of respect for fundamental rights as such but simply the question whether the public authorities respect the rules provided for by the statute. The right of the citizen to be able in each case to address a court independent from the political powers is therefore basic. It is so basic that the institutional right of access to courts as such is conceived as a fundamental right. The Germans call this basic right of comprehensive access to courts "Krönung des Rechtsstaates" (= the crowning of the rule of law).

It is against this background that the guarantees provided in Article 13 of part II for the deprivation of liberty, in Articles 15-20 for criminal matters, in Article 27 also for other matters (civil and administrative?) and in Article 28 have to be assessed.

While the procedure in criminal cases (Articles 13, 14-20) is regulated in a very detailed and partly confusing manner, the individual basic right of everybody for access to court in general, including in civil and administrative matters, is set down in Article 27 in a way not providing adequate transparency. The text of the Constitution could be guided partly by Article 6 ECHR: "in the determination of his civil rights and obligations or of any criminal charge against him or whenever his rights have been affected by any public authority, everyone is entitled to a fair and public ...". The access to court should also be guaranteed for administrative matters. In administrative matters the State confronts the citizen on a daily basis using its prerogatives as public power. It is therefore of essential importance that the citizen is able to defend his rights with the help of an independent and impartial court against the Executive also. It is not essential that a "speedy trial" (Article 27.2) is offered, but that the citizen may obtain a decision "within a reasonable time".

Is it foreseen to provide specific judicial protection for fundamental rights?

3. Strengthening of fundamental rights through public international law

The catalogue of fundamental rights within constitutions contains the rights considered elementary for the individual. The catalogue of fundamental rights set down in international treaties, reflecting the unhappy experience of peoples, provides important support for these catalogues of basic rights.

The draft Constitution in its part I addresses in Article 7 the relationship with public international law in general (and in relation to the restriction of basic rights in part II, Article 3.2 - see below under 4.b). The incorporation of public international law into domestic law is not provided for by Article 7. It is however important that public international law rules in the field of basic rights are valid and directly applicable at the internal level. By their subject matter, these rights address the position of the individual in the State, and with respect to the State, and reinforce the national fundamental rights.

Treaties concerning fundamental rights should therefore be regarded as automatically incorporated into national law by virtue of the Constitution. If this is not possible, the Constitution should provide that such public international law conventions may be incorporated by the legislature into national law. In order to avoid conflicts with public international law rules, the incorporated basic public international law norms should have primacy over the Constitution (see Articles 26 and 27 of the Vienna Convention on the Rights of Treaties) or at least equal status with constitutional rules.

4. Limitations of basic rights

Article 3 of part II addresses limitations of fundamental rights.

a) Limitations (Article 3.1) may be established "only by law for a public interest or for the protection of the fundamental rights of others. A limitation shall be in proportion with the situation that has dictated it and shall fall as soon as the situation ends." In Article 3.2 the "core of the rights and freedoms" is protected against infringement by any limitation. Thereby, particularly important provisions are contained in the Constitution. Only lawful limitations of basic rights are possible. The principle of proportionality is established for all limitations provided for by law or in an individual case. Finally, the Constitution contains a guarantee of the essence of fundamental rights (Wesensgehaltsgarantie).

b) But there are also a number of questions. Article 3.2 limits possible limitations to limitations contemplated in the ECHR. The first question is what has to be regarded as the ECHR. Does it include protocols I, IV, VI (abolition of the death penalty) and VII? Since the ECHR is not incorporated into national law and therefore is not applicable at the inner State level, the limitation of the possibility of restrictions may only apply to the national basic rights provided for by the national Constitution as far as they are identical to the basic rights of the ECHR. The right to marry (Article 12 ECHR), for example, does not appear in the text of the draft Constitution and therefore does not enjoy the protection against limitations provided for by Article 3.2. If the ECHR, including the Protocols, were incorporated into national law, Article 3.2 would provide for protection in accordance with the extent of the rights guaranteed by the ECHR.

c) Article 3.1 allows limitations of human rights "for a public interest or for the protection of the fundamental rights of others" and thereby possibly gives the erroneous impression that all basic rights may be limited. This is not the case. The right to life, the prohibition of torture, the prohibition of forced labour and the principle *nulla poena sine lege* may not, under Article 15 ECHR, be derogated from in emergency situations and may in no case be limited. For the sake of clarity this should be stated expressly in the text of the Constitution.

d) On the other hand, according to Article 3.1, limitations are possible "for the protection of the fundamental rights of others". This provision is too stringent. Other rights of third parties, for example reputation, which may not have the character of fundamental rights, merit legal protection. I therefore propose to delete "fundamental".

e) Emergency situations: usually, specific provision is made for limitations of basic rights in emergency situations (cf. Article 15 ECHR).

5. Responsibility for damages caused, etc.

Article 29 of part II provides an elementary fundamental right, part of the rule of law in the material sense (materieller Rechtsstaat).

## B. Remarks with respect to various provisions of parts I & II of the draft Constitution of Albania

1. Part I (Basic principles)

Article 3
This article should be integrated into part II in the form of an individual right of the citizens entitled to vote ("every citizen has"). It might be added that elections take place "by secret ballot". The secret character of elections is an important element of their free character.

Article 5
Proposal: "The political independence and the integrity of the territory ..." (cf. Article 2 no. 4 of the UN Chart).

Articles 6 & 8
Cf. under A no. 1a) and b) above.

Article 7
Cf. under A no. 3 above.

Article 10
Conflicts with international law and the national law of other States are not excluded. The sentence "recognises and protects the national rights of the Albanian people who live outside its borders" makes a promise which probably cannot be kept.

Article 11
This article, destined to protect the democratic character of the parties, entails the risk of becoming a trap for democracy and might be used against opposing parties. There is also a difference whether activities of legal and natural persons aiming to overthrow the free legal order of the State by totalitarian means, or the incitement to racial, religious or ethnic hatred for example, are prohibited by means of criminal law or whether the legal person itself is prohibited.

Article 13 (and Article 27.1 of part II)
The possibility to expropriate property against adequate compensation should expressly be provided for under certain conditions (e.g. when necessary in the public interest).

Articles 17-20
The proposal strongly emphasises national symbols. It might be possible to merge Articles 17-20 into a single one with several sections.

2. Part II

Article 1.2
Here the word "inviolable" might be added ("are indivisible, inviolable and inalienable").

Article 3
Cf. under A no. 4 above.

Articles 7 et seq., in general
In Articles 7 et seq. the wording "has the right", "is guaranteed", "is free" etc. is used. Probably the original language is more precise. In the English version, the wording "shall have" or "shall be" should be used.

Article 7 (variant I)
Does the word "arbitrary" mean that the death penalty is or should be permitted by law? A clarification is recommended.

Article 8.4
Could this special provision be used to curtail the freedom guaranteed in Article 8.2 at its very root? It might be added in paragraph 4: "..., stations, with due respect for the guarantees provided for by paragraph 2".

Article 12
What about conscientious objectors against military service (freedom of conscience and religion, cf. Article 10)?

Articles 13, 14-20 and 27-28
Cf. under A no. 2 above.

Article 16
"No one may be considered guilty until ...". Possibly the translation is not very accurate. "To be presumed innocent" (Article 6.2 ECHR) is something else (positive quality) in comparison to the "no one may be considered guilty" formulated in a negative way.

Article 22
As a general rule, the fundamental rights have been worded in a very satisfactory way. It is recommended to word Article 22 in an analogous way as an individual right: "Everyone shall have ...".

Article 23
Same remark as for Article 22.

3. Rights which might be included in the catalogue of fundamental rights

The right to marry and to found a family: cf. Article 12 ECHR.

The right to education and the right of parents to education: cf. Article 2 of the additional Protocol to the ECHR.

The right to petition: this is an important old right. The text might be worded: "Everyone shall have the right individually or together with others to address written requests or complaints to the appropriate authorities or to Parliament".