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(VENICE COMMISSION)

**DRAFT JOINT OPINION
ON THE ELECTORAL CODE
OF THE REPUBLIC OF ALBANIA**

**by
the Venice Commission
and
the OSCE/ODIHR**

on the basis of comments by

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I. INTRODUCTION

1. *This joint opinion on the Electoral Code of the Republic of Albania is provided by the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Council of Europe's European Commission for Democracy through Law ("Venice Commission"). This joint opinion comments on the most recent version of the Electoral Code of the Republic of Albania¹. Earlier opinions² of the OSCE/ODIHR and the Council of Europe's European Commission for Democracy through Law (Venice Commission), as well as numerous election reports from previous OSCE/ODIHR and Council of Europe observation missions in Albania, provide excellent background for understanding the historical development of the Code. The most recent version of the Electoral Code continues to incorporate recommendations for improvement. The most significant change is the introduction of a new electoral system intended to alleviate abuses that occurred under the old electoral system.*

2. *The present opinion was elaborated following resolution 1320 (2003) of the Parliamentary Assembly of the Council of Europe, which invites the Venice Commission to formulate opinions concerning possible improvements to legislation and practices in particular member states or applicant countries.³*

3. *The Electoral Code of Albania provides a thorough technical foundation for elections. The recent reform continues to improve the Code and reflects the commitment of Albania to enhance the legal framework for elections. Although the new code continues the process of electoral reform and addresses a number of important previous recommendations offered by the OSCE/ODIHR and the Venice Commission, the provisions related to media access and campaign financing are less effective. These are areas that could be improved with future amendments.*

4. *It should also be noted that any positive impact the Code may have in conducting the process in line with OSCE commitments and other international standards for democratic elections, will ultimately depend on the level of political will exhibited by the political parties and authorities of Albania to implement the Code in good faith.*

5. *This opinion is based on an unofficial English translation of the Electoral Code provided by the OSCE Presence in Albania (CDL-EL(2009)005). The translation reviewed consists of 186 articles of text on 109 pages. Also included in the review is Annex I to the Electoral Code, which lists the number of voters estimated for the twelve proportional representation electoral zones. The Code and Annex I are reflected in Republic of Albania Law No. 10019, dated 29 December 2008.*

6. *In addition to the Code, this opinion is based on:*

- *an unofficial English translation of the Constitution of Albania;*
- *the OSCE/ODIHR Election Observation Mission Report on the 18 February 2007 Local*

¹ Herein "the Electoral Code" or "the Code".

² See Joint Opinion on Amendments to the Electoral Code of the Republic of Albania, CDL-EL(2007)018, prepared by the OSCE/ODIHR and the Council of Europe's European Commission for Democracy Through Law (Venice Commission) (Opinion 435/2007 (Strasbourg/Warsaw 5 July 2007) and herein "the 2007 opinion"); Joint Recommendations on the Electoral Law and the Electoral Administration in Albania made by the OSCE/ODIHR and Venice Commission on 2 November 2004 (Opinion no. 273/2004, CDL-AD(2004)017 and herein "the 2004 opinion").

³ Point 11.ii.b.

Elections;

- the OSCE/ODIHR Final Report on the 2005 Parliamentary Elections in Albania, 3 July and 21 August 2005;

- the report of the Ad hoc Committee of the Parliamentary Assembly of the Council of Europe for the observation of the parliamentary elections in Albania (3 July 2005) (Doc. 1664, 12 September 2005);

- the report of the -Congress of Local and Regional Authorities of the Council of Europe on the observation of the local elections in Albania held on 12 October 2003 (CG/CP (10) 16, 8 December 2003);

- the report of the Congress of Local and Regional Authorities of the Council of Europe on the local by-elections in Tirana (Albania), 28 December 2003 - Addendum to report Albania, CG/CP (10) 16 (CG/Bur (10) 87) - 23 February 2004, and

- the Code of Good Practice in Electoral Matters adopted by the Venice Commission, including the Guidelines on Elections (CDL-AD(2002)023rev).

7. This opinion was adopted by the Venice Commission at its XX session (Venice, ... 2009).

II. EXECUTIVE SUMMARY

8. The recent reform continues to improve the Code and reflects the commitment of Albania to enhance the legal framework for elections. A major step in addressing previous recommendations in the Electoral Code is the adoption of a new electoral system for members of the National Assembly, based on amendments to the Constitution adopted in April 2008, which, with regards to this aspect of the reform, were welcomed by the Venice Commission.⁴ Changes in the formation of the CEC are also significant as the CEC is no longer established under a constitutional appointment process, but is now elected by the National Assembly.⁵ In line with previous OSCE/ODIHR recommendations, the new code provides for a voter registration system based on national computerised and modernised civil registers. These changes and improvements are the culmination of an electoral reform process that was initiated by political parties and has been ongoing since 2003.

9. Although the Code continues to be improved, there are areas in the Code that should be addressed in future amendments, these include:

- Provisions which grant special candidacy rights for National Assembly elections to the chairpersons of political parties.
- Requirements for signature support for candidacy for non-parliamentary parties;
- Ambiguous requirements for including women candidates on lists of candidates;
- Provisions on access to media, paid political advertising and public funding of campaigns that provide less favourable treatment to non-parliamentary political parties, and
- Provisions for removal of members of lower election commissions that may hinder the professional and non-partisan performance of the election administration.

10. The above areas should be considered for future amendments. However, the fact that the Code can be further improved should not detract from the positive improvements made to the

⁴ See Opinion on the amendments to the Constitution of the Republic of Albania, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008) (CDL-AD(2008)033)..

⁵ These changes in the Code were made possible when the National Assembly amended the Constitution on 21 April 2008. These Electoral Code amendments are consistent with the 21 April 2008 amendments to the Constitution of Albania made by the National Assembly.

legal framework for elections over the last several years. Albanian stakeholders and institutions involved in the reform are to be commended for their efforts and the resulting improvements.

11. This joint opinion discusses the above matters and other issues that remain to be addressed in the Electoral Code.

III. DISCUSSION OF THE ELECTORAL CODE

A. Election System for the National Assembly

Overview

12. The Constitution of Albania was amended by the National Assembly on 21 April 2008. Some of the amendments repealed the complicated election system that used a combination of proportional representation and single member electoral zones. This system allocated 100 mandates in a plurality election in each electoral zone and an additional 40 mandates based on an electoral subject's share of the national votes. The prior election system had an element of proportionality that attempted to allocate mandates in proportion to a political party's or coalition's national share of the valid votes. However, political parties were able to circumvent the constitutional goal of proportionality by applying various strategies in Assembly elections. Although the strategies for the 2005 elections were different from the strategies applied in the 2001 parliamentary elections, the goal of obtaining a disproportionate share of the mandates was the same.⁶ In both elections the allocation of mandates was controversial and subject to legitimate criticism. The April 2008 constitutional amendments address this issue.

13. Article 64 of the Constitution now provides that 140 members of the Assembly are elected "on a proportional system with multi-names electoral zones". Article 64 also provides that these zones correspond to the administrative divisions "of one of the levels of the administrative-territorial organisation". The rules for implementation of the electoral system, including the level of administrative-territorial organisation that is to be used for electoral zones and number of mandates to be elected in each electoral zone, are to be determined by the Electoral Code.

14. Article 2(25) of the Electoral Code provides that the "Electoral zone is the administrative territorial division of the region for the elections for the Assembly and the municipality or the commune in the case of local government elections." There are currently twelve administrative regions in Albania. Thus, there will be an election in each region (electoral zone), based on proportional representation, for National Assembly elections.

15. The formula for allocation of mandates in each regional constituency is stated in Articles 162 and 163 of the Code. Article 162 establishes a three percent (3%) legal threshold for political parties and a five percent (5%) legal threshold for coalitions. A political party or coalition whose percentage of valid votes in the region is less than the legal threshold does not participate in mandate allocation in the region.⁷ The threshold applies in each regional election.

16. Mandates are allocated in a regional constituency to political contestants using *D'Hondt* divisors (1, 2, 3, 4, 5, *et seq.*) for the initial allocation and *Sainte-Laguë* divisors (1, 3, 5, 7, 9, *et seq.*) for allocating mandates to political parties within a coalition. The vote totals of electoral contestants are divided by the divisors to arrive at a series of quotients for each political subject. Mandates are allocated to the highest quotients in sequential order.

⁶ See OSCE/ODIHR Final Report Republic of Albania Parliamentary Elections, 3 July 2005, at pp. 4-5.

⁷ Article 65 provides that the registration of coalitions is based on the national level. A political party that participates in a coalition cannot participate in another coalition, nor can it submit multi-name list of candidates outside the coalition in which it participates.

17. The number of mandates to be allocated in each electoral zone will be based on the population. According to Annex I of the Electoral Code, the estimated voting populations of the twelve electoral zones range from 78,770 to 748,322, with an average of 264,396.⁸ Depending on the population of a region, the number of seats to be distributed could generate a natural threshold, understood as the percentage of votes needed to get one seat, as high as – or higher than – the legal thresholds of three percent (3%) and five percent (5%) imposed by Article 162 of the Electoral Code for political parties and coalitions.⁹ While this phenomenon is not unusual for this type of electoral system, it must be noted that the combined effect of the natural and legal thresholds may reduce the number of mandates won in the Assembly by smaller political parties and candidates supported by groups of voters (“independent candidates”). Regardless of this potential effect, departure from the previous electoral system, which was subject to much abuse, is a positive development.

Special Treatment for the Chairpersons of Political Parties

18. In a negative development, a new provision grants special candidacy rights to the chairpersons of political parties. To protect the candidacies of political party chairpersons, the Code allows the chairpersons of political parties – and chairpersons only – the right to run on the political party’s list *in each of the twelve electoral zones* for the National Assembly.¹⁰ This special treatment for the chairpersons of political parties violates the fundamental principle of equality¹¹ and of non-discrimination.¹²

19. The special treatment granted to the chairpersons of political parties in the exercise of candidacy rights appears to be contrary to international and European standards. ***The Venice Commission and the OSCE/ODIHR recommend that Article 67(3) of the Code be amended to respect the fundamental principles of equality and non-discrimination.***

Gender Requirements Related to Candidacy

20. Under Articles 4 and 7 of the Convention for the Elimination of Discrimination Against Women, a state has a positive obligation to take special, temporary measures to ensure the *de facto* equality of men and women, including in political and public life. In addition, the Albanian Parliament adopted in July 2008 a Law on Gender Equality, which aims at establishing equal women representation in State institutions. The Code attempts to take effective measures for women. Article 67(5) requires that in Assembly elections, for each electoral zone, “at least thirty percent of the multi-name list and/or one of the first three names in the multi-name list should be from each sex”.¹³ However, this provision might be subject to different interpretations. Arguably, this provision gives the list presenter one of two options: (1) one woman in the top three candidates or (2) thirty percent (30%) of the candidates must be women, who can appear anywhere on the list, including being placed as the very last names on

⁸ It should be noted that these are only estimates and subject to changes as there were changes in the populations of these electoral zones.

⁹ For additional details on legal/natural thresholds, please see: [European Commission For Democracy Through Law \(Venice Commission\), Comparative Report on Thresholds and Other Features of Electoral Systems, Strasbourg, 15 December 2008, CDL-AD\(2008\)037.](#)

¹⁰ Article 67(3) of the Code states: “The chairpersons of political parties which are running either on their own or as part of a coalition are exempt from this rule, and they can candidate in one or more electoral zones for the elections to the Assembly.”

¹¹ Article 26 of the International Covenant on Civil and Political Rights; Article 7 of the Universal Declaration of Human Rights; Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Paragraph 7.6 of the Copenhagen Document. The issue raises a question of conformity with Article 30 of the Additional Protocol to the European Convention on Human Rights (possibly combined with Article 14 of the Convention).

¹² Article 2 of the International Covenant on Civil and Political Rights; Article 2 of the Universal Declaration of Human Rights; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Paragraphs 5.9, 7.5, and 7.8 of the Copenhagen Document.

¹³ Lists that do not meet this requirement are to be rejected.

the bottom of the list. Thus, as written, this article might not be equivalent to an “effective measure” promoting the representation of women in the Assembly. ***The Venice Commission and the OSCE/ODIHR recommend that the “and/or” text in Article 67 be changed to “and”. It is further recommended that Article 67 be reviewed to provide more efficient mechanisms to promote women representation in parliament.***

21. For local government elections, Article 67 states that “one in every three names on the list should be from each sex”. Although this appears to be a stronger requirement than is required for Assembly elections, Article 67(6) allows a political party to purchase an exemption for the requirement by paying a fine to the CEC. ***The Venice Commission and the OSCE/ODIHR recommend that Article 67(6) be amended so that a political party cannot purchase an exemption from the law. A political party list of candidates that does not meet legal requirements should not be registered.***

Nomination Procedures

22. Article 68 provides that multi-name lists of candidates may be submitted by a political party or coalition (an electoral subject). Article 69 allows an individual citizen to be nominated as an electoral subject within 40 days before election day, with the signature support of at least one percent (1%) of the voters in the list of voters of the respective electoral zone. It is understood that “list of voters” should be construed as referring to the preliminary voter lists, as the final voter lists would only be published 25 days before election day. The nomination of an individual is commenced by an “Initiating Committee” composed of no less than nine voters from the respective electoral zone. However, the exemption from signature support requirements granted to parliamentary political parties does not also extend to a candidate, proposed by voters, who holds a mandate in the Assembly. ***The Venice Commission and the OSCE/ODIHR recommend that the exemption be equally available to a candidate supported by a group of voters if such a candidate already holds a mandate.***

23. Article 70(5) exempts a candidate proposed by a group of voters from the requirement for supporting signatures in local government elections if the candidate is a mayor of a municipality or a commune. However, the exemption does not extend to a candidate, proposed by a group of voters, who holds a mandate on a local government council. Article 70(6) provides such an exemption to political party candidates. ***The Venice Commission and the OSCE/ODIHR recommend that the exemption be equally available to a candidate supported by a group of voters who holds a mandate on a local government council.***

24. Article 68 requires that lists of political parties or coalitions, which do not have a mandate in the previous Assembly, be supported by 10,000 and 15,000 registered voters, respectively. These numbers appear excessive if they are meant to apply at the level of the constituency. Indeed, it is unclear whether the signature support requirement applies to the contestant at national level, or for each of the contestant’s lists. Based on the number of registered voters in Albania and the number of administrative zones, the number of required signatures should be substantially lower.¹⁴ It is also not clear why a percentage, as applied to individual citizen candidates (Article 69), would not be used for political party and coalition registration. It is generally recommended that the requirement for signature support not exceed one percent (1%) of the registered voters in the constituency.¹⁵ Indeed, the numbers of 10,000 and 15,000 are quite high in comparison with the previous law, which only required 7,000 and 10,000

¹⁴ Annex I to the Code provides estimated numbers for voters in the twelve electoral zones. Ten of the twelve electoral zones indicate numbers less than 303,000.

¹⁵ One percent (1%) is recognised as a maximum needed for signature support. See Venice Commission *Code of Good Practice in Electoral Matters* (CDL-AD(2008)023rev, I.1.3.iii).

signatures for a political party or coalition, respectively, to be registered *nationally*. It would seem that the numbers of 7,000 and 10,000 should be reduced by a factor of 12 instead of increased. ***The Venice Commission and the OSCE/ODIHR recommend that these provisions be clarified, and that the signature requirements be reduced uniformly to a maximum of one percent (1%) of the registered voters in an electoral zone.***

25. Article 71(2) provides that a voter cannot support more than one political party or coalition with the voter's signature. The signature support process is not an election itself and there does not appear to be a justifiable reason for limiting the right of voters to support the ballot access efforts of more than one political party, coalition, or candidate. A voter should be able to support more than one candidacy with the voter's signature. In addition, checking whether a voter has given support to more than one contestant would appear to be burdensome, if at all feasible. ***The Venice Commission and the OSCE/ODIHR recommend that Article 71(2) be amended to remove this restriction on voters.***

26. In a positive development, Article 73(6) requires the CEC, no later than 90 days before election day, to issue a special instruction for the rules for verification of the candidacy documentation. This would appear to include rules for verification of supporting signatures. In past elections, the CEC has not adopted a decision regulating the procedures for verification of support signatures and this has resulted in inconsistent verification of supporting signatures. As this amendment legally requires a special instruction to be issued by the CEC, it is more likely that there will be a procedure in future elections for conducting signature support verification in an objective and non-discriminatory manner.

Limitations on Candidates Proposed by Groups of Voters

27. Article 69(2) provides that a candidate proposed by a group of voters cannot be "directly or indirectly supported by any other subject or candidate running in the elections". A similar provision is found in Article 70(2). Candidates should not be prohibited from expressing views concerning other candidates or from answering questions from voters as to which candidates or political parties are best suited to be colleagues in the Assembly. An expression of such views would be "directly or indirectly supporting" another candidate or electoral subject. In their current form, these articles are too broad and could be applied to restrict legitimate campaign expression designed to enable voters to make informed choices. ***The Venice Commission and the OSCE/ODIHR recommend that Articles 69(2) and 70(2) be reviewed to ensure that they cannot be interpreted or applied to restrict the freedoms of expression and association, which are especially important in election campaigns.***

B. Media Access Provisions

28. The new media access provisions are stated in Articles 80 through 85 of the Code. These are areas that could be improved with future amendments.

29. Ideally, a regulatory framework for elections will ensure the unimpeded flow of full information to voters from all candidates and political parties participating in the elections because an election is about the right of the voters to choose their government after having received fully complete information on all candidate choices. It is not the purpose of the regulatory framework to ensure that parliamentary parties maintain an advantage over non-parliamentary parties or that a political party candidate has an advantage over a non-political party candidate. The overarching rule should be the principle of non-discrimination. Articles 80 through 85 of the Code provide less favourable treatment to non-parliamentary parties as did prior versions of these articles. As a result, these articles should be carefully considered.

30. Article 80 of the Code regulates the "electoral campaign on Public Radio and Television." However, Article 80 makes no provision for a candidate nominated by a group of voters. Such

candidates are simply excluded from the free airtime on Public Radio and Television. **The Venice Commission and the OSCE/ODIHR recommend that such candidates be included in the allocation of free airtime on Public Radio and Television.**

31. Article 80(3) introduces a new provision, which provides: “Public Radio and Television broadcasts free political advertising by estimating the broadcasting time within the free air time in accordance with point 1 of this article.” This would appear to permit parliamentary parties an advantage in political advertising on Public Radio and Television and to double their advantage over non-parliamentary political parties in regard to the total airtime on Public Radio and Television.

32. Aside from the issue of doubling the advantage of parliamentary parties, this provision appears contrary to the principle that all political advertising must be allowed to all electoral participants under equal conditions. Where a state permits political advertising in the media during elections, it must ensure that all contending parties have the possibility of buying advertising on and according to equal conditions and rates of payment.¹⁶ **The Venice Commission and the OSCE/ODIHR recommend that Article 80(3) be amended to provide that all political parties and candidates have the possibility of buying political advertising according to equal conditions and rates of payment.**

33. Article 81(1) of the Code states: “During political airtime of news broadcasts, Public Radio and Television must apply an equal time ratio for all parliamentary parties that in the previous parliamentary elections obtained up to 20 percent of the seats in the Assembly. The parties that obtained more than 20 percent of the seats in the Assembly, are entitled to airtime that is allocated equally among them. Each of these parties is entitled to double the amount of airtime of a party that has obtained up to 20 percent of the seats in the Assembly.” This provision raises concern as it treats news coverage as if it is the same as free airtime for political parties. Concerning news coverage, it is commonly accepted that:

Member states should adopt measures whereby the media which are owned by public authorities, when covering election campaigns, should do so in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate.¹⁷

34. Article 81(1), which dictates the amount of news coverage provided to parliamentary political parties, raises a question of compatibility with the above principle. **The Venice Commission and the OSCE/ODIHR recommend that Article 81(1) accordingly be amended.**

35. Conversely, when it comes to news coverage of non-parliamentary parties, Article 81(4) allows the application of “professional criteria for news”, but only if such professional criteria do not result in airtime “greater than the time applied for parliamentary parties.” This is of concern since citizens should have a right to receive news and information. Article 81(4) also is of concern since a state should not itself determine media content or exercise political authority or influence to determine media content.¹⁸ Newsworthiness should be determined by professional standards and not based on the degree of political authority or influence a particular political party holds. **The Venice Commission and the OSCE/ODIHR recommend that Article 81 be amended to delete the provision that limits professional news coverage of non-parliamentary parties if such coverage exceeds the news coverage of parliamentary parties.**

36. Article 84 of the Code regulates private radio and television during elections. Article 84(2)

¹⁶ See Council of Europe Committee of Ministers Recommendation CM/Rec (2007)15 on measures concerning media coverage during election campaigns.

¹⁷ *Id.*

¹⁸ *Id.*

requires that the news coverage of private radio and television be based on the same formula used to allocate free airtime on Public Radio and Television to parliamentary political parties in Article 80. Article 84(2) also limits news coverage of non-parliamentary parties if such coverage results in coverage “greater than the time applied for parliamentary parties.” Article 84(2) raises questions of compatibility with the two principles discussed in paragraphs 33 and 34 above. Article 84(2) discriminates in favour of specific political parties and raises questions of compatibility with the principle that a state should not itself determine media content or exercise political authority or influence to determine media content. ***The Venice Commission and the OSCE/ODIHR recommend that Article 84 be accordingly amended.***

37. Article 84(5) of the Code provides: “The total airtime for political advertisements, during the whole electoral campaign, by each private radio and television station may not be more than 45 minutes for each party that has obtained up to 20 percent of the seats in the Assembly and 90 minutes for each party that has obtained more than 20 percent of the seats in the Assembly.” Article 84(5) raises a question of compatibility with the principle that political advertising must be allowed to all electoral participants under equal conditions. ***The Venice Commission and the OSCE/ODIHR recommend that Article 84(5) be amended to provide that all political parties and candidates have the possibility of buying political advertising according to equal conditions and rates of payment.***

38. Article 84(9) of the Code states: “The airtime for the advertisements of non-parliamentary parties and candidates proposed by the voters must not exceed 10 minutes for the whole electoral campaign.” In addition to the issue of equality of opportunity in the area of paid political advertising, Article 84(9) might censure the political message of a non-parliamentary party or candidate proposed by a group of voters if the message extends beyond 10 minutes. ***The Venice Commission and OSCE/ODIHR recommend that Article 84(9) be amended to remove this discriminatory limitation on political advertising.***

39. Regulation of media during electoral campaigns is a challenging and complex area in every country. The regulatory framework for media during the elections should respect the editorial independence of the media, while at the same time ensuring that all political contenders and parties are treated in a fair and non-discriminatory manner. In some areas, such as paid political advertising, “fair” requires “equal opportunity” for all political contestants and parties and no advantage should be given to parliamentary parties. ***The Venice Commission and the OSCE/ODIHR recommend that Articles 80 through 85 be thoroughly reviewed with the goal of improving these articles in the same positive manner in which other areas of the Electoral Code have been improved.***

C. Campaign Finance Provisions

40. The campaign finance provisions of the Code have also been amended. The new campaign finance provisions are stated in Articles 86 through 92 of the Code.

41. Article 86(1) stipulates that the Assembly shall determine the amount of public funds to be provided to a select group of electoral contestants – political parties in the Assembly. Article 87(2) states that fifty percent (50%) of the public campaign funds is “to be distributed among political parties registered as electoral subjects and having seats in the Assembly” “on the basis of the number of mandates won in the elections for the Assembly”. The remaining fifty percent (50%) of public campaign funds “is to be distributed among political parties registered as electoral subjects and which have obtained not less than 2 seats in the Assembly in the preceding elections for the Assembly, in proportion with the votes obtained by them nationwide”. This text means that only parliamentary parties are allocated public funds for the elections. It is questionable whether the parliamentary parties in the Assembly should give all of the public funds for the electoral campaign to themselves. ***The Venice Commission and the OSCE/ODIHR recommend that these provisions be amended to provide some public***

funding mechanism for non-parliamentary parties.

42. Moreover, the second allocation is given to award the winners by forcing the losers - those who did not obtain any seat but had at least two seats in the previous Assembly - to pay back their initial allocation to the CEC [Article 87(2)b and 87(3)], which re-allocates these funds among the winners [Article 87(5)]. This raises an issue of concern since, ideally, it is hoped that there are sufficient campaign funds for all electoral contestants so that voters are fully informed. It is unavoidable that some electoral subjects, who met the legal requirements to be placed on the ballot, will not be successful in the elections and will fail to secure a mandate. These electoral subjects should not now be punished. The system of public funding for campaigns fulfils the public policy objective of providing information to voters about all electoral contestants, even those that ultimately fail to win a mandate. ***The Venice Commission and the OSCE/ODIHR recommend that Articles 86 and 87 be accordingly amended so that the campaign funds of losers are not withheld and distributed among the victors.***

43. Articles 89 and 90 regulate the use of private funds for electoral campaigns. Parliamentary parties already have campaign funds due to the largess of the Assembly under Article 86 and 87 of the Code. As noted above, non-parliamentary parties are excluded from receiving public funds and must rely solely on private donations. As a result, parliamentary parties are not impacted by Articles 89 and 90 as much as non-parliamentary parties are impacted by these articles. Article 90(3) limits campaign expenditures by tying the expenditure limit to ten times the largest amount of public funds given to a parliamentary party. The problem with this formula is that parliamentary parties can establish an unreasonable expenditure limit by reducing the amount of public funds parliamentary parties take from the state budget. Article 90(4) provides a similar limit for candidates nominated by groups of voters, which is fifty percent (50%) of the largest amount of public funds given to a parliamentary party. ***The Venice Commission and the OSCE/ODIHR recommend that these articles be reviewed to ensure that they will not have a negative impact on non-parliamentary parties or independent candidates.***

44. Article 91 of the Code regulates the auditing of campaign accounts by the CEC. There is a concern with Article 91(3), which allows the CEC to verify data in the campaign finance reports. The concern is that the CEC, established by the parliamentary parties, can start contacting the contributors to non-parliamentary parties even if there is no factual basis that would suggest an enquiry is justified. Such a provision is often abused. The regulatory body contacts a contributor and the contributor, due to the political considerations, denies making the contribution. The political party and its officials then face criminal sanctions. ***The Venice Commission and the OSCE/ODIHR recommend that Article 91(3) is amended to provide objective and non-discriminatory criteria that are required to be satisfied before the CEC can contact contributors of private funds.***

D. Election Administration

Central Election Commission (CEC)

45. Article 154 of the Constitution of Albania, which established the CEC as a constitutional body, was repealed by the constitutional amendments of 21 April 2008. The CEC is now regulated only by the Electoral Code. This amendment is only one of several amendments adopted over the years in the electoral reform process in Albania. It should be recognised that these amendments may contribute significantly to reduce the highly politicised environment in the election administration that has been observed in past elections in Albania. Although it is not the purpose of this joint opinion to provide a complete history of the changes in the election administration in Albania, it can be stated that the cumulative effect of the amendments should encourage more efficiency and professionalism in election administration. Two issues must however be raised for reminder. First, even if not provided for in the Constitution, the existence

of independent, impartial election commissions at all levels is a cornerstone of democratic elections.¹⁹ Second, professionalism does not mean that political parties cannot be involved in the nomination process; so-called professionals are not always independent from political forces, as soon as they are nominated or appointed by political bodies; and non-politicised members are not *per se* going to act in a professional manner by simple virtue of their non-partisan nomination.

46. Article 12 of the Electoral Code establishes a CEC consisting of seven members. Members serve a term of four years and can be re-elected. Article 14 regulates the election of CEC members and Article 15 regulates the election of the Chairperson of the CEC. Taken together, these articles attempt to establish a CEC where four members, including the Chairperson position, are nominated by the parliamentary majority in the Assembly and three members are nominated by the parliamentary opposition in the Assembly. All members are elected by the Assembly, and the nomination process includes several steps that allow the chairpersons of parliamentary groups and parliamentary groups to be involved.²⁰

47. The following steps, based on the text of the translated Article 14, are taken to elect the six members of the CEC (excluding the Chairperson). First, there are to be four “proposing subjects”. The four “proposing subjects” are: (1) “party that has the largest number of seats from the parties of the parliamentary majority”, which has two candidacies; (2) “party of the parliamentary opposition which has the largest number of seats in the Assembly”, which has two candidacies; (3) “deputies’ groupings of parliamentary majority parties, with the exception of the biggest party of the majority”, which have one candidacy; and (4) “deputies’ groupings of the parliamentary opposition parties, with the exception of the biggest party of the opposition”, which have one candidacy.

48. Different rules apply to the election of the first four positions to be nominated by the largest majority/opposition parties and the final two of the smaller majority/opposition party groupings. Concerning the first four nominations belonging to the largest political parties in the majority and opposition of the Assembly, Article 14 states:

b) the proposing subjects, during the selection phase, present no less than two candidacies for each vacancy. Chairs of the parliamentary groups of the proposing subjects select, collegially, four candidacies in accordance with the

¹⁹ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II.3.1.

²⁰ Article 14 states: “1. Assembly of Albania elects the CEC members in accordance with the following procedure:

a) two members are proposed from the party that has the largest number of seats from the parties of the parliamentary majority, and two members from the party of the parliamentary opposition which has the largest number of seats in the Assembly of Albania;

b) the proposing subjects, during the selection phase, present no less than two candidacies for each vacancy. Chairs of the parliamentary groups of the proposing subjects select, collegially, four candidacies in accordance with the criteria provided in letter (a) of this point. The proposing subjects of letter (a) select one candidature from each sex;

c) candidacies selected in accordance with letter (b) of this point, are submitted to the Assembly for approval;

ç) the fifth member of the CEC is elected from the candidacies proposed by deputies’ groupings of parliamentary majority parties, with the exception of the biggest party of the majority grouping. The sixth member of the CEC is elected from the candidacies proposed by deputies’ groupings of the parliamentary opposition parties, with the exception of the biggest party of the opposition. The proposing grouping presents a list with no less than two candidacies for the respective vacancy.

The list of candidates that has accumulated the highest number of supporting signatures of deputies of the respective parliamentary groups of the parliamentary majority and opposition, including also the deputies of the two biggest parties from each grouping, is presented to the Assembly for voting. If two or more lists have accumulated the same number of supporting signatures, all the candidacies included in these lists are presented for voting.

2. Voting for the election of the CEC members in accordance with this article is carried out in one single day. “

criteria provided in letter (a) of this point. The proposing subjects of letter (a) select one candidature from each sex;

49. The above text distinguishes two steps: proposition and selection. It may be subject to different interpretations. For the proposition step, it would appear that the deputies of the proposing subjects offer as many candidates as they desire, but no less than two for each candidacy. This results in at least eight candidates. Then, it would appear, the two chairpersons of the proposing groups, i.e. the chairpersons of the parliamentary groups of the largest party of the majority and of the largest party of the opposition, "collegially" narrow the number of candidates to four. In practice, this gives the main opposition party a right to select two names from a pool proposed by the main party of the majority, and vice-versa. It is unclear whether the requirement for "one candidature from each sex" applies to the selection of the remaining four candidates, or only to the selection made by the proposing subjects under letter (a) of Article 14. However, it could also be argued the phrase "one candidature from each sex" should be interpreted to mean that each proposing subject of the first four nominations has one female CEC slot and one male CEC slot, which should result in two female members on the CEC because there will be two women in the remaining four candidates.

50. The next step, according to Article 14, states "candidacies selected in accordance with letter (b) of this point, are submitted to the Assembly for approval". However, the text does not state the procedure for this approval. It is assumed that each candidacy is voted on and each candidate who receives at least 71 votes in the Assembly is approved. Article 14 does not address the situation where a candidacy fails to receive approval. ***The Venice Commission and the OSCE/ODIHR recommend that these two points be clarified.***

51. Article 14 then discusses the election of the remaining two CEC members. It includes three steps: nomination of lists by groups of MPs, collection of support signatures for the lists, and vote. The right to nominate candidates for the remaining two CEC seats belongs to groupings of MPs from the smaller political parties' of the majority/opposition in the Assembly. The term "grouping" used in the code does not refer to parliamentary groups but to any group of at least two MPs who can belong to different parliamentary groups, except those of the two largest parties, as long as they are on the same side of the political spectrum. Concerning these two CEC slots, "The proposing grouping presents a list with no less than two candidacies for the respective vacancy." It is not clear why the phrase "no less than two" is used since only two vacancies remain and the subsequent voting is done on the basis of "lists of candidates". There are no requirements regarding the sex of the candidates for these two positions. The text of Article 14 then provides:

The list of candidates that has accumulated the highest number of supporting signatures of deputies of the respective parliamentary groups of the parliamentary majority and opposition, including also the deputies of the two biggest parties from each grouping, is presented to the Assembly for voting. If two or more lists have accumulated the same number of supporting signatures, all the candidacies included in these lists are presented for voting.

52. The number of lists nominated by MPs groupings is not limited. Only the lists, which obtain the highest number of support signatures on each side of the political spectrum, are presented for a vote by the Assembly. Although the largest political parties in the parliamentary majority and opposition cannot participate in the nomination of the lists of candidates, they participate in the signature support and Assembly voting, which gives them considerable influence on deciding who, among the MPs from the smaller parties allied to them will eventually obtain the fifth and sixth seats on the CEC. It is understood that the Assembly then votes on the individuals nominated on the lists which obtained the highest number of signatures on each side of the political spectrum, hence on at least two names for each of the two remaining seats. In case of a tie in the number of support signatures, the Assembly votes on all individuals

nominated on these lists.

53. The election of the Chairperson of the CEC is relatively straightforward. First, “the parliamentary group of the biggest party of the parliamentary majority submits to the Assembly a list of no less than four candidacies”. Then, “the parliamentary group of the biggest party of the parliamentary opposition selects two from the four candidacies proposed”. The Assembly votes on the remaining two candidates and the candidate who “obtains more than half of the votes of the Assembly deputies is elected as the CEC Chairperson”. The Deputy Chairperson of the CEC is elected by the CEC from within the six CEC members.

54. The Assembly’s control over the CEC extends from election of CEC members to removal. Although the prior Code did permit the removal of a CEC member by the Assembly, a dismissed member had the right to appeal the dismissal decision to the Constitutional Court. The suppression of such a right could make easier a removal for political reasons. ***The Venice Commission and the OSCE/ODIHR recommend that consideration be given to providing the right of appeal to a dismissed member.***

55. Article 19 regulates the filling of CEC vacancies. Article 19(2) provides that vacancies are filled using the initial appointment procedures of Article 14. Article 19(2) has the following sentence: “Otherwise, the candidacies are proposed from the political party which meets the criteria of ranking and affiliation.” It is assumed that “otherwise” refers to possible changes in the ranking between political groups in Parliament and in MPs’ affiliations, however, this provision would benefit from more clarity.

56. According to Article 19(3) if the mandate of a member of the CEC ends prematurely during an electoral period, he/she is to be replaced by the Assembly as soon as possible, but no later than 48 hours after the creation of the vacancy. It means that the Assembly has to have a session in the first two days (incl. Saturday and Sunday) after the termination of the mandate of the CEC. Before the session the candidates to the CEC have to be found and their consent to start their duties practically immediately is needed. Such procedure might be too speedy to apply. It could be suggested to reconsider the nomination procedure for the replacement of the members of CEC. A possible solution could be a nomination procedure of substitute members beforehand. ***The Venice Commission and the OSCE/ODIHR recommend that this regulation be reconsidered.***

57. Article 19(5) provides for special appointment of the CEC “if the mandate of the CEC terminates in the nine last months before the end of the Assembly mandate.” The appointment of members is made according to Articles 14 and 15 “by always maintaining the equal proportions of political representation”. Although this additional phrase is rather vague, it would appear that shifting political alliances within the Assembly likewise shifts the right of appointment, but only in cases where the full CEC is reconstituted under Article 19(5). ***The Venice Commission and the OSCE/ODIHR recommend that the original language text of this provision be checked to ensure that it reflects the intent of the legislator.***

58. Article 23 of the Electoral Code provides that the CEC can issue “acts”, which are either “decisions” or “instructions”. Article 23(3) requires that every “normative act” be voted on by the CEC. Article 24 governs the voting process for CEC decisions. Although Article 24 does not specifically mention “instructions”, Article 24(1)(d) does reference “acts of a normative nature that aim to regulate issues related to elections”. ***The Venice Commission and the OSCE/ODIHR recommend that consideration be given to amending Article 24 to specifically include “instructions” as subject to the voting rules of Article 24. Further, consideration should be given to amending Article 24 to provide greater detail on the contents of a CEC decision.*** Article 144, which governs the content of a CEC decision on electoral appeals, is illustrative. Article 24 could be amended to require that all CEC

decisions provide a factual explanation of the circumstances and facts and legal analysis that supports the decision.

59. Article 18(1) sets the criteria for expiry of the mandate of a member of CEC. Point (a) of that clause provides expiry of the mandate, if the member performs a political activity. Point (dh) provides the end of the mandate, if by acting or failing to act, he threatens the activity of the CEC concerning the preparation, supervision, direction and verification of all aspects that pertain to elections and referenda, as well as to the declaration of their results. Although the provisions are appropriate in themselves, they can give ground for arbitrary practice. **The Venice Commission and the OSCE/ODIHR recommend that reasons for dismissal be stipulated more clearly.**

60. According to Article 23(5), the normative acts of the CEC enter into force after their publication in the Official Journal, except for those cases when the circumstances impose their immediate entry into force, while other acts enter into force immediately. The provision should be reconsidered. Unpublished norms might be applicable as instructions for the members of lower electoral bodies, but the principle of rule of law does not allow application of norms which are not published. Especially responsibilities and sanctions (Articles 168 to 176) cannot be applied in these cases.

61. Finally, the OSCE/ODIHR and Venice Commission again underscore that a partisan approach in the functioning of the election administration, whereby party interests are being placed above the common objective to deliver an electoral process in line with international standards, is not conducive to the professional conduct of democratic elections. In this regard, **it is recommended considering further streamlining Central Election Commission decision making mechanisms in order to avoid deadlocks that could be motivated by partisan interests.**

Zone of Electoral Administration Commission (ZEAC)

62. The level of election commission administration below the CEC is the Zone of Electoral Administration Commission (ZEAC). This applies to all elections, which is a novelty of this code.²¹ The geographical territory covered by a ZEAC should not be confused with the geographical territory covered by an electoral zone, understood as a constituency, which for parliamentary elections is based on the administrative level of the region. According to Article 27(2) of the Code, the territorial jurisdiction of the Zone of Election Administration, "as a rule, is the same with the administrative district in accordance with the law that regulates the territorial organization of the Republic of Albania." Article 27(2) also provides that districts with more than 70,000 citizens entitled to vote are divided and municipalities with more than 40,000 citizens entitled to vote constitute a Zone of Election Administration of its own if the total number of the citizens entitled to vote at the district level is greater than 70,000. Further, in municipalities which have more than 100,000 citizens entitled to vote, the CEC may establish two Zones of Election Administration. For the Municipality of Tirana, each of the boroughs constitutes a Zone of Election Administration of its own.

63. A list of ZEACs is attached as an annex to the Electoral Code, defining 66 Zones of Election Administration. The corresponding 66 ZEACs are meant to fulfil the tasks formerly vested with 100 Zone Election Commissions for national elections. It is also understood that for the election to Local Government Units, the 66 ZEACs will perform the tasks formerly vested with the Local Government Election Commissions, which were one per Local Government Unit (384 in 2007). Each ZEAC will have to organise elections in more than six local government units on average. This could represent a challenge, considering the tasks involved, in particular with regards to the registration of candidates and lists, checking signatures, handling election

²¹ In the previous version of the Code, Zone Election Commissions were established for parliamentary elections and Local Government Election Commissions for local elections.

material, organising the count for several LGUs in one single counting centre, etc.

64. Article 27(5) provides that “ZEACs are established by the CEC not later than 9 months before the end of the Assembly mandate, on the basis of the number of citizens entitled to vote “on the last date of the electoral period for setting the election day, according to the information given by the General Directorate of Civil Status (GDCS)”. The phrase “on the last date of the electoral period for setting the election day” is confusing and should be clarified.

65. The ZEAC consists of seven members and a secretary, each appointed by the CEC. Two members are proposed by “the main party of the parliamentary majority”; two members are proposed by “the main party of the parliamentary opposition”; one member is proposed by “the second party of the parliamentary majority”; and one member is proposed by “the second party of the parliamentary opposition”.²² Should this appointment process fail to achieve a “political balance”, then Article 29(1) provides that “the respective group is compensated with the candidacies of the main party until a political balance between the majority and opposition has been reached”.

66. In half of the ZEACs, the seventh member is proposed by “the first party of the parliamentary majority” and in the remaining half of the ZEACs the seventh member is proposed by “the first party of the parliamentary opposition”. The sharing of seventh members is to be based on objective criteria of (1) “random selection” and (2) “equal distribution in the electoral territory”. In those ZEACs where the seventh member belongs to the main party of the parliamentary majority, one of the ZEAC members representing the main party of the parliamentary majority is elected chairperson while, for the other half, one of the members of the ZEAC representing the main party of the parliamentary opposition is elected chairperson. The deputy chairperson is of the opposite political affiliation to that of the chairperson. The ZEAC secretary is proposed by the party that proposes the deputy chairperson of the ZEAC.

67. Similar to the appointment process for the CEC, there is a requirement for the largest political parties to appoint women to the ZEAC. The text states that: “30% of the members proposed respectively from the biggest party of the majority and from the biggest party of the opposition should be from each gender”.

68. Article 32(2) allows a political party who has nominated a member of the ZEAC to substitute its member. The OSCE/ODIHR and the Venice Commission have previously criticised this provision in the Code. The ability of political parties to control the actions of the persons they have appointed to election commissions, by virtue of the unlimited powers to appoint and remove members at will, significantly hampers the development of an independent, professional, efficient, and non-partisan election administration. The Venice Commission’s Code of Good Practice in Electoral Matters is quite clear on this point: “The bodies appointing members of electoral commissions must not be free to dismiss them at will.”²³ The ability to arbitrarily replace members of election commissions without legal cause also raises an issue of compatibility with international and European standards.

69. Article 32 of the Code already provides broad grounds for removal of a member of the ZEAC who does not fulfil the member’s duties as required by the law and subsidiary regulations issued under the law. Where such a situation exists, then a political party can bring this matter

²² Article 29(4) states: “The ranking order of the parties for the purpose of allocating the seats of the ZEAC, in accordance with the definitions of this Article, is made based on the number of mandates won by the political party in the previous elections for the Assembly. In the case of local elections, the ranking is determined in accordance with the number of the votes won nationwide for the local councils in the previous elections by the parliamentary parties. If two or more parties have the same number of mandates and it is impossible to decide the benefiting party, their ranking is determined based on the number of votes won nationwide. If two or more parties have the same number of votes, their ranking will be determined by lot by the CEC.”

²³ See Venice Commission, Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II 3.1 f.

to the attention of the CEC and, at the appropriate time after the anticipated removal, appoint a new member. Thus, in addition to the concern noted in paragraph 61 above, there is no practical need for such a provision.

70. The conduct of elections by the election administration should be professional and efficient. Arbitrary removals of election commission members, which are not based on the failure to fulfil legal duties, do not facilitate the professional and efficient administration of elections. In fact, arbitrary removals disrupt the continuity of election processes and are not consistent with the other positive changes introduced into the Code's regulation of the election administration.

71. Although service on a ZEAC is temporary and the ZEAC is not a permanent body, the ZEAC nonetheless is an important institution of the Republic of Albania when elections are conducted. Thus, persons who hold positions on the ZEAC must be completely free from political influence or pressure. ***The Venice Commission and the OSCE/ODIHR recommend, consistent with the international and European principles and the Code of Good Practice in Electoral Matters, that the Electoral Code be amended to provide that a member of an election commission can only be dismissed for failure to fulfil the member's legal duties imposed by the Code.***

72. As noted by the 2004 and 2007 opinions and prior election observation reports, election administration has been highly politicised in Albania. This high degree of politicisation should be reduced due to the cumulative affect of these amendments, particularly due to the reduction of the number of election commissions and the number of commission members.

Voting Centre Commissions (VCC)

73. Article 36 of the Code provides that the Voting Centre Commission (VCC) is composed in accordance with the manner and the criteria provided by Article 29 for the ZEAC, with the exception of the thirty percent (30%) gender requirement stated in Article 29(1). Thus, concerns stated above regarding the ZEAC also apply to the VCC. The concern about legal provisions, which allow a political party that has nominated a member of the ZEAC to dismiss and replace its member, is particularly applicable since a similar provision in Article 39(2) allows discretionary replacement of a VCC member. ***The Venice Commission and the OSCE/ODIHR recommend that Article 39(2) of the Code be amended in the same fashion as recommended for Article 32(2).***

74. It should be noted that Article 42, which regulates meetings and decisions of the VCC, does not contain a quorum requirement for meetings and decisions. ***The Venice Commission and the OSCE/ODIHR recommend that Article 42 be amended to include such a quorum requirement.***

E. Observers and Transparency

75. The articles regulating observers are now Articles 6 and 7, which have replaced former Articles 18 and 19. Articles 6 and 7 provide broad rights for observers, including the right to examine electoral material and documentation. The Electoral Code also provides that a complaint can be filed when an application for observer accreditation is rejected.

76. New Article 6 has changed the accreditation eligibility criterion for Albanian and foreign non-governmental organisations, as well as international organisations. Previously, accreditation was given to organisations "specialised or engaged in the area of protection of human rights". The new Article 6 allows accreditation to organisations "specialised or engaged in the area of good governance and democratisation". It is not clear to what extent, if any, this change will limit the ability of observer groups, both national and international, to obtain accreditation. Since the new accreditation criterion would appear to be narrower in scope, it is

possible that this amendment could have a negative impact on the overall transparency of election processes. Should an organisation's accreditation for observer status be denied in the 2009 elections, which would have been granted under the previous version of the law, then this amendment would have to be considered as a negative change in the legal framework. It is important to apply the provision in a broad manner to consider also organisations specialised in the area of protection of human rights as protecting democratisation. This issue should be followed in the 2009 elections by accredited observer groups.

77. Article 6(1) grants political parties the right to appoint an observer "for every table of the Ballot Counting Centre". Article 6(3) regulating observers for candidates presented by an Initiating Committee of voters, however, is limited to an observer to the Ballot Counting Centre". ***The Venice Commission and the OSCE/ODIHR recommend that Article 6(3) be amended to be consistent with Article 6(1).***

F. Voter Registration

78. Voter registration is regulated in Article 46 to Article 57 of the new code. Voter lists have been a source of controversy for past elections in Albania. Controversy over voter lists has extended not only to issues of accuracy of the lists, but also to the identification documents used as a basis for registration, and for identification before voting. Problems in this area have been critically addressed by the Parliamentary Assembly of the Council of Europe in its Report on the Observation of the parliamentary elections in Albania (3 July 2005), which dealt also with problems relating to addresses. Due to the high level of distrust among the political actors in Albania, it has been difficult to separate perception from reality concerning the degree of "inaccuracy" of voter lists. Regardless of whether the problem is one of perception or reality, the recent amendments confirm the efforts to improve the accuracy of voter registers. In line with previous OSCE/ODIHR recommendations, the new code provides for a voter registration system based on national computerised and modernised civil registers kept at local Civil Status Offices. The bulwark of this effort is the creation and maintenance of a permanent data base that contains reliable and accurate information on citizens.

79. Improvement in the maintenance and quality of the basic data on citizens should improve the quality of voter lists. New provisions in the Electoral Code continue these efforts. As with prior versions of the Code, there will be a preliminary voter list, a process for revision and changes, and the preparation and posting of a final list. An adequate legal foundation exists for accurate voter lists. Political will, human resources, and adequate funding are necessary to build upon this legal foundation. The administration of the next elections will in large part determine the effectiveness of the new Electoral Code provisions.

G. Voting Procedures

80. It should be noted that the concern, expressed in both the 2004 and 2007 opinions, over the recording of official information on an individual voter's disability, remains. This concern is due to Article 108(6) of the Electoral Code, which regulates voting by a voter who cannot vote without assistance. Clause (6) of Article 108 requires the identification of such voters in official state documentation that "proves the type and category of disability". Although this may be intended to assist voters with specific needs, the requirement for an official government label of "disability" in order to vote is not consistent with international standards. ***The Venice Commission and the OSCE/ODIHR recommend that the law facilitate voting by a person with a disability without imposing the stigma that may be associated with an official state declaration of the person's disability.***

81. It should also be noted that the new Code does not change the procedures for voting by military and police forces personnel. The Code of Good Practice in Electoral Matters counsels that these personnel should vote at their place of registered permanent residence whenever

possible.²⁴ The 2004 and 2007 opinions recommended applying the rule of Article 111(2), which required such personnel to vote in their domiciles, to all elections and not just local elections. ***The Venice Commission and the OSCE/ODIHR again recommend the amendment of Article 111.***

H. Appeals of the Decisions of Election Commissions before the CEC

82. Article 124 limits the right to appeal to the CEC against the ZEAC decisions to any political party, being or not a member of a coalition, and any candidate proposed by the voters, and to those individuals or political parties whose requests for registering as an electoral subject have been refused, and to subjects appealing against the refusal of requests for accreditation as observers. Still, the Code does not allow appeals by voters who have been denied their right to vote or who find some voting procedures to be conducted in contradiction with law. The Code of Good Practice in Electoral Matters states in Section II.3.3.f that all candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections. It has to be reminded that not only the right to be elected but also the right to vote in elections conducted according to law has to be protected. ***The Venice Commission and the OSCE/ODIHR recommend that Article 124 of the Electoral Code be accordingly amended and revised.***

83. Article 143 (3) gives the deadlines for the CEC to decide on the appeals. There are two different time-limits: a 10-day time-limit for deciding on decisions on the approval of the table of elections results and a 2-day time-limit for all other appeals. Paragraph 75 of the 2007 Joint Opinion on amendments to the Electoral Code of Albania by the Venice Commission and OSCE/ODIHR welcomed that the deadline has been extended to ten days, which appears to be more realistic in light of the high number of appeals that have been filed with the Central Election Commission in past elections. ***The Venice Commission and the OSCE/ODIHR recommend*** that the 2-day time-limit should be extended, as the administrative procedure before the CEC is investigative and it would not be possible to ask for documents, call for experts etc in such a short time. According to Article 144 clause (4) the decisions of CEC on appeals have to be accompanied by the dissenting or concurring opinions. Such opinions can usually be written after the text of the decision of CEC is available to its members. Thus the time-limit for the adoption of the decision is in practice even shorter.

I. Appeals of CEC Decisions to the Electoral College

84. Article 146 of the Code regulates the procedure for selecting judges on the Electoral College. The procedure has remained unchanged from the previous Electoral Code (Article 163). Clause (3) gives the two largest political parties of both the parliamentary majority and opposition the right to remove one of the judges selected by the initial lottery. Already in the 2004 Joint Recommendations, the OSCE/ODIHR and the Venice Commission had criticised this privilege and recommended its use to be phased out.²⁵ Article 146(3) raises a question of compatibility with the principle of the independence of the judiciary.²⁶ Under Article 14 of the International Covenant on Civil and Political Rights, a state has an obligation to ensure the impartiality of courts and tribunals. As noted by the United Nations Human Rights Committee, this requires judges to be selected without political interference and the prohibition on political interference extends to “appointment, remuneration, tenure, promotion, suspension and

²⁴ See, e.g., Venice Commission Code of Good Practice in Electoral Matters, point I.3.2.xii.

²⁵ See paragraph 109, OSCE/ODIHR and Venice Commission, Joint Recommendations of 2 November 2004 (Opinion no. 273/2004, CDL-AD(2004)017).

²⁶ See Paragraphs 5.12 and 5.13 of the OSCE 1990 Copenhagen Document and Paragraphs 19.1 and 19.2 of the OSCE 1991 Moscow Document. See also Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges; UN Basic Principles on the Independence of the Judiciary.

dismissal” of judges.²⁷ A system that grants to four specific political parties a significant role in the selection of the judges on the Electoral College is a system that facilitates political interference in the establishment of the judiciary and is contrary to Article 14 of the ICCPR. Further, this provision is unnecessary since a judge can be challenged and excluded from a case where justified by the facts.²⁸ **The Venice Commission and the OSCE/ODIHR recommend that Article 146(3) of the Electoral Code be accordingly amended and revised to comply with Article 14 of the ICCPR.**

85. Article 151 (2) enumerates a number of motives for exclusion of judges from hearing a case. These provisions should be understood within the framework of the case-law on Article 6 paragraph 1 of the ECHR by European Court of Human Rights.

86. Article 145 limits the right to appeal a CEC decision to the Electoral College to “electoral subjects”. However, an “interested person” has the right to participate in proceedings before both the CEC and Electoral College. Article 145 does not expressly recognise the right of an interested person, who has been adversely affected by a CEC decision in a case in which the interested person participated, to appeal to the Electoral College. **The Venice Commission and the OSCE/ODIHR recommend that Article 145 be amended to provide the right to appeal to voters and other electoral stakeholders (“interested persons”) who may have a legitimate interest in seeking appellate review of a CEC decision (see also paragraph 75a).**

87. The Code does not foresee the possibility for the Electoral College to invite other interested parties to the proceedings which were not parties in the proceedings before the CEC. It is thus possible that a person whose rights have been affected by a decision of the CEC, may not appeal to the Electoral College if he/she was not invited to the procedure before the CEC or if his/her request to participate in the proceedings according to Article 133 (2) was rejected. In view of Section II.3.3.f of the Code of Good Practice in Electoral Matters quoted above **the Venice Commission and the OSCE/ODIHR recommend that the Code be amended accordingly.**

J. Invalidation and Repeat Elections

88. Article 160 of the Code provides that the elections shall be declared invalid “if there have been violations of the law.” While it is assumed that the term “law” should not be understood as referring to the Electoral Code only but in a broader sense, this could be usefully clarified. Article 160 also provides that elections are invalidated “if the voting has not begun or has been suspended for more than six hours.” On a similar provision in the former version of the electoral code (Article 117), the previous Joint Opinion on Amendments to the Electoral Code of Albania by the Venice Commission and OSCE/ODIHR (CDL-AD(2007)035) suggested “to consider whether such time limit should be reduced”. **The Venice Commission and the OSCE/ODIHR reiterate this recommendation.**

89. Article 160 regulates invalidation of elections in voting centres and Article 161 regulates the holding of repeat elections if the CEC’s determination of invalidity “influences the allocation of mandates in the electoral zone or nationwide”. Article 161(2) provides that “A case when the number of voters who have voted or could have voted in the voting centre or centres declared invalid is equal to or greater than the number of voters required for the allocation of one seat in the respective electoral zone, based on the calculation of valid votes in the electoral zone, performed in accordance with article 162, shall be considered as having an impact on the allocation of seats for the Assembly.” The intent of this rule appears to require a repeat election

²⁷ See General Comment No. 32 of the United Nations Human Rights Committee (adopted 27 July 2007), interpreting Article 14: Right to equality before courts and tribunals and to a fair trial (U.N. Doc. CCPR/C/GC/32 (2007).

²⁸ See Article 151, Article 153 clause (2), and Article 155 clause (2).

“when the number of voters who have voted or could have voted in the voting centre(s) declared as invalid” is of a sufficient quantity to either change (1) the resulting quotients or (2) ranking of resulting quotients and such change would shift the allocation of a mandate from one electoral subject to another electoral subject. If this is the intent, it is not clearly stated in the English translation. The text should state very clearly that the “number of votes required for the allocation of one mandate in the electoral zone” has to be determined by considering potentially new quotients and a re-ranking of quotients. In other words, one cannot simply look at a difference in vote totals for the electoral subjects. Although this would be possible in a simple election between two contestants, it does not automatically apply to proportional representation formulas which rank quotients that result from a series of divisions. This is particularly true for the Code, which uses *D’Hondt* divisors (1, 2, 3, 4, 5, *et seq.*) for the initial allocation to electoral subjects and *Sainte-Laguë* divisors (1, 3, 5, 7, 9, *et seq.*) for allocating mandates to political parties within a coalition. ***The Venice Commission and the OSCE/ODIHR recommend that Article 161 be amended to state more clearly and in greater detail the application of the rule for repeat elections.***

K. Provisions on Referenda

90. The reform has not touched upon the legal framework for referenda. Article 185 in the final and transitory provisions provides that “Part Nine “Referenda” of the law no. 9087, dated 19.06.2003, “The Electoral Code of the Republic of Albania”, as amended, as well as any part of its provisions that are related to it, remains in force until the approval of the new law on general and local referenda.” A recent controversy over the notions of “constitutional referendum” and “general referendum” suggests that aspects of the chapter on referenda should be further clarified. The provisions on referenda could be integrated into the Code or left to be regulated by a special law, but it is recommended to avoid unreasonable differences between the conduction of elections and referenda, as otherwise there will be need for additional education of the members of Electoral Commissions and problems in conducting the voting might appear more easily.

L. Technical Drafting Questions

91. Article 9 of the Electoral Code regulates setting the date for Assembly elections. Article 9(1) provides: “If the mandate of the Assembly expires earlier than 30 days from the beginning of the electoral period, elections are conducted during the preceding electoral period.” It would appear that, in the event of mandate expiration “earlier than 30 days from the beginning of the electoral period”, then the holding of elections “during the proceeding electoral period” could result in elections being held several months before the new Assembly’s mandate would commence. ***The Venice Commission and the OSCE/ODIHR recommend that the text of Article 9 be checked to ensure that the original Albanian text correctly states the intent of the legislator.***

92. Article 9(5) of the Code states: “Pursuant to paragraph 2 of article 104 of the Constitution, the elections are to be conducted no earlier than 30 days and no later than 45 days after the dissolution of the Assembly.” Article 9(5), unlike Articles 9(4) and 9(6), does not state the “when” event that triggers Article 9(5). Although the “when” event could be determined by consulting Article 104(2) of the Constitution (dissolution of the assembly after a negative vote on a motion of confidence), it would be better for the text of Article 9(5) to be similar in format to Articles 9(4) and 9(6). ***The Venice Commission and the OSCE/ODIHR recommend that Article 9(5) be amended to state the event that the word “when” is intended to reference.***

93. The Albanian Parliament adopted in February 2009 a Law no.10066, which amends law no.8952 on identity documents, and modifies the official term designating ID Cards to “*Letërnjoftim*”, while Article 105(1)a) and Article 179 of the Electoral Code still use the term “*kartë identiteti*”. In order to avoid any possible confusion regarding the officially valid ID

documents to be used for the identification of voters before voting, ***the Venice Commission and the OSCE/ODIHR recommend*** that the relevant provisions of the Code be amended to reflect the legally valid terminology.

IV. CONCLUSION

94. The Electoral Code of Albania provides a thorough technical foundation for elections. The recent amendments continue to improve the Code and reflect the commitment of authorities in Albania to improve the legal framework for elections. Although the amendments continue the process of electoral reform, amendments related to media access and campaign financing are less effective. These are areas that could be improved with future amendments. However, the fact that the Code can be further improved should not detract from the commitment and concrete efforts made by the authorities in Albania or the positive improvements made to the Code over the last several years.

95. The Venice Commission and the OSCE/ODIHR continue to stand ready to assist the authorities of the Republic of Albania in their efforts to create a legal framework for democratic elections in conformity with Council of Europe and OSCE commitments and other international standards for democratic elections.

96. It has however to be reminded that the stability of the electoral legislation is important for the public's confidence in the electoral process.²⁹ Amendments should therefore take place in the future when necessary to improve the conformity of the legislative framework with international standards, but should otherwise be avoided in principle.

²⁹ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II.2.b; Interpretative Declaration on the Stability of Electoral Law (CDL-AD(2005)043).