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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

ON

**THE REVISED DRAFT AMENDMENTS
TO THE CONSTITUTION**

OF ALBANIA

**IN THE FIELD OF THE JUDICIARY
(15 January 2016)**

BY

THE PARTY FOR JUSTICE, INTEGRATION AND UNITY



**PARTIA DREJTËSI, INTEGRIM DHE UNITET
JUSTICE, INTEGRATION AND UNITY PARTY
C H A I R M A N**

Rruga Myslym Shyri, Partia Drejtësi, Integrim dhe Unitet, TIRANA, ALBANIA

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Tirana, 16.01.2016

Re: Comments by the Justice, Integration and Unity Party with regard to the constitutional amendments contained in the draft proposal put forth by the High Level Experts

To the Attention of: The Special Commission of the Assembly of the Republic of Albania, On the Reform of the Justice System

The Venice Commission

Honourable Ladies and Gentlemen,

The Justice, Integration and Unity Party has reviewed with particular attention the proposed amendments to the Constitution of the Republic of Albania, in the framework of the reform of the justice system. This reform is of vital importance to our country, and therefore the Justice, Integration and Unity Party is entirely committed to achieving a final and all inclusive, comprehensive and productive draft, with the aim of establishing a reliable and principled system.

The Justice, Integration and Unity Party has studied the draft of the high level experts on constitutional amendments and values their work, as well as the work of other experts involved in this reform. Given the importance of this reform, in general, and that of the constitutional amendments in particular, the Justice, Integration and Unity Party wishes to make comments and proposals on five of the amendments proposed by High Level Group of Experts, as follows:

Comment/Proposal 1

On Article 64 of the Constitution and the safeguards of the equality of votes

Article 64 of the Constitution states:

“1. The Assembly consists of 140 deputies, elected by a proportional system with multi-member electoral zones.

2. A multi-member electoral zone coincides with the administrative division of one of the levels of administrative-territorial organization.

3. The criteria and rules for the implementation of the proportional electoral system, for the determination of the electoral zones and for the number of mandates for each zone are defined in the law on elections.”

As formulated, this article seeks to establish an electoral system which secures the fundamental constitutional principles on the free and equal vote of Albanian citizens. The article stipulates that the electoral system by which the Assembly deputies are elected is that of proportional

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representation, with electoral zones that are in accordance with one of the administrative-territorial divisions, leaving it to the Electoral Code to determine the zones and the number of deputies for each zone.

The current phrasing of the Constitution fails to address the over-two-decade reality that a considerable number of Albanian citizens are permanent residents outside of the Republic of Albania.

It is the view of those proposing these amendments that this runs contrary to the spirit of the Constitution. The Constitution is an integral law with a unifying spirit, and should be a uniform legal body, as the fundamental law of the state. The Constitution provides in Article 45, para. 4, that "The vote is personal, equal, free and secret". The spirit of article 45 of the Constitution should oblige the legislator to create the necessary legal conditions to ensure that the principle of equality of votes is fully implemented in order to be real and unaffected by technicalities.

The wording of Article 64 of the Constitution matches the multi-member electoral zones with one of the administrative and territorial divisions of the Republic of Albania. It follows that the sovereign is represented in the Assembly, on the basis of electoral zones with are set up in accordance with certain territorial divisions. **The direct link which the Constitution of the Republic of Albania makes between the place of residence and the zone on the basis of which citizens elect their representatives, does not guarantee the equality of votes between emigrants and Albanian citizens.**

Secondly, **Albanian citizens, permanently residing outside of Albania, find it difficult to be physically present in the Republic of Albania during elections**, unlike residents in Albania, hence technically creating an inequality between Albanian citizens with regard to exercising their voting rights.

Thirdly, Article 8, para. 2, provides that "The Republic of Albania protects the rights of its citizens temporarily or permanently residing outside its borders." **The particular care which the Constitution offers to citizens permanently residing abroad cannot be properly materialized as long as they are not provided with equal access, unhindered by technicalities, to the highest representing institution, which is the Assembly.**

Finally, the entering of the Republic of Albania into the European Union in the future, makes the lawmaker mindful with regard to constitutional provisions related to the election of Albanian representatives in the European Parliament. Hence, we support the proposal of the high group of experts, as worded in the revised draft submitted to the Special Commission of the Assembly for the review of the Constitution.

Based on the above, we propose that the following two paragraphs are added to Article 64:

"4. Albanian citizens, permanently residing outside of the republic of Albania, elect their representatives in special multi-member electoral zones, in accordance with the provisions of the law on elections.

5. Following membership of the Republic of Albania in the European Union, Albanian citizens elect their representatives in the European Parliament in accordance with the procedure stipulated in law."

The high rate of emigration by Albanian citizens predates the entry into force of the Constitution. Subsequently, it may be considered a stable reality, which if properly addressed, does not affect the stability of the Constitution, but secures the realization of a fundamental constitutional principle which is the equality of votes. It ensures that the spirit of the whole of the fundamental law of the state, enshrined in Articles 8, 45 etc., also covers the way in which the Assembly is elected. This amendment, aside from securing a basic right, also makes the fundamental law

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more cohesive. It adds a link between citizens residing abroad and special multi-member electoral zones, aside from the already existing link between citizens residing within the country and the multi-member electoral zone in which they reside. Moreover, it secures the principle of proportionality, by providing that the further detailing of the number of electoral zones and mandates of each zone is done by law, in accordance with the number of constituents in such zones.

Comment/Proposal 2

On Article 87 of the Constitution and preserving institutional hierarchy

According to the Constitution of Albania, the President of the Republic is an institution which is distinct from the traditional powers. Given his standing above the parties, the Constitution has vested the President with substantial competences in the area of justice. Specifically, in accordance with the principle of separation and balancing of powers, the Constitution grants the President the right to appoint members of the Constitutional Court and the general Prosecutor, with the approval of the Assembly. Likewise, the President appoints common judges and prosecutors on the basis of proposals received from the High Council of Justice and the General Prosecutor, respectively. The aim of these formulas utilized by the Constitution towards the appointment of justice officials is to make sure that the President (with his standing above the political parties) effectively protects the justice system from the interventions of institutions having a political character. The Analytical Document of the Justice System has come to the conclusion that following changes in 2008 of the manner in which the President is elected (the Constitution now allows for his election by a simple majority), the President can potentially be biased politically, and therefore can no longer perform this important function. These have been the reasons which have led to proposals for constitutional amendments regarding the appointment of judges. However, one third of the judges of the Constitutional Court will again be appointment by the President. It follows that the members of the Constitutional Court, which is to rule on the validity of Albanian legislation (aside from additional competences granted by the latest amendments), shall be appointed in one third of their entirety by an office elected by simple majority.

Another argument is the fact that the People's Advocate (Ombudsman) which does not have particular functions as does the President, is elected by a qualified 3/5 majority, as opposed to the simple majority electing the president. Institutional hierarchy requires that the Head of State, as representative of the unity of the people, should be the product of a qualified majority proportionate to such functions.

We are, therefore, of the opinion that the President should be elected in accordance with the current formula of 3/5 majority in the initial three rounds, and if such majority cannot be reached, then be elected by the people within a reasonable period of time.

For the above reasons, we propose that paragraphs 4, 5 and 6 of Article 87 be repealed and that paragraphs 2 and 3 be reformulated as follows:

"2. The President of the Republic if elected by secret voting and without debate by the Assembly. The Assembly may hold up to three votes for the election of the President. The first vote is held no later than seven days from the beginning of the procedure for the election of the President. Each of the other votes is held no later than seven days from the unsuccessful conclusion of the previous vote. The voting is considered performed even when no candidate is

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presented in the competition. New candidates may be presented in the second and third voting, in accordance with the conditions of point 1 of this Article.

3. The President is elected when a candidate receives no less than three fifths of the votes of all the members of the Assembly. If after the third vote, no candidate has obtained the required majority of votes, the election of the President of the Republic shall be done by popular vote.”

This would avoid political instability, which was due to the old formula and would simultaneously preserve the nature of the President as the first citizen of the country.

Comment/Proposal 3

On Article 109 of the Constitution and the cohesion of the Constitution

Article 109 of the Constitution deals with the representative organs of the fundamental units of local government.

Point three of Article 109 stipulates that, “Only citizens with permanent residence in the territory of the respective local unit may be elected as members of the local councils and as mayors of the municipality or commune.”

The integral nature and spirit that should permeate the Constitution, as well as the aspiration of the Republic of Albania and the Albanian nation to join the European Union, makes us address two parallel realities.

The amendments proposed by the high level experts and presented to the Special Commission of the Albanian Assembly, introduce into the Constitution this national aspiration for EU membership. Consequently, the provision of the right of EU country nationals living in Albania to elect and be elected is compatible with this aspiration, in as much as this principle is defined in the legal corpus of the European Union.

For this reason, we support the proposal by the high level experts to add paragraph 4, after paragraph 3, reading as follows:

4. Following accession of the Republic of Albania to the European Union, the right to elect and be elected shall also be given to EU citizens residing in the Albanian territory, in accordance with the stipulations in the European law and the provisions of the Albanian Electoral Code.”

This special right acknowledged to EU citizens due to the featuring of Albania’s EU aspiration in the Constitution, asks for the same right to be acknowledged to other foreign citizens mentioned in the Constitution, which citizens the Republic of Albania shows special care of.

Article 8, point 1 of the Constitution stipulates that “the Republic of Albania defends the national rights of the Albanian people residing outside its borders.” To preserve the integrity and the unifying spirit of the Constitution, the lawmaker should make sure that the exclusive right of Albanian citizens to elect and be elected in the local government organs, be extended uniformly to EU citizens and the foreign citizens of Albanian nationality with permanent residence in the Republic of Albania.

Starting from this reasoning, the proposers of these amendments ask for another point to be added, reading as follows:

5. The right to elect and be elected is also recognized to foreign citizens of Albanian nationality with residence in the Republic of Albania as provided by the Electoral Code.”

This formulation is consistent with the aspirations expressed in the preamble of the Constitution, the special care (both in letter and spirit) that the Constitution accords to EU citizens as well as foreign citizens of Albanian nationality, and is pursuant to international best practices.

Comment/Proposal 4
On Article 177 of the Constitution and its endurance

Article 177 of the Constitution defines the procedures for revisiting the Constitution.

Points three and four of this Article, read:

“3. The draft-project is approved by no less than two thirds of all members of the Assembly.

4. The Assembly may decide, with two thirds of all its members, to have the draft constitutional amendments voted in a referendum. The draft law for Constitutional revision enters into force following ratification by referendum, which takes place not later than 60 days after its approval in the Assembly.”

The Constitution of the Republic of Albania was approved in 1998. In less than 20 years, the fundamental law has been changed 5 times, with changes affecting a substantial part of it. The recently proposed amendments change almost one-seventh of the entire Constitution, and the changes are radical. Moreover, additional constitutional amendments in the past were contested due lack of transparency, as proposals for changes were made public only a few days before they were tabled to the Parliament.

Such developments have created a number of problems. First, the Constitution has shown high volatility, which runs contrary to its nature as the fundamental law of the state. Secondly, frequent changes, often without transparency, have created a climate of distrust among Albanian citizens. Thirdly, although the Constitution has been the product of a popular referendum, point four which allows the parliament to put amendments up for referendum, has not been applied in any of the revisions.

To avoid this abnormality, in particular the instability of the fundamental law, we propose that points three and four change as follows:

“3. The Assembly endorses proposed draft amendments to the Constitution with no less than two thirds of all its members.

4. The draft-amendments adopted by the Assembly, are subject to a referendum which should place no longer than 60 days following their parliamentary adoption.”

5. The referendum under the previous paragraph may also be initiated with the signatures of 100,000 citizens.

The Constitution as the fundamental law, is assumed to be and should be a diachronic document. Consequently, the haste to amend the Constitution without transparency and without a public debate is not compatible with the very reason of the existence of this law. Moreover, the high likelihood of achieving a qualified majority of 2/3 in the Assembly, on changes that are not in the public interest, but serve the ill-intentioned plans of the political class, point to the need of raising the threshold for such changes to pass.

The above proposal requires that the draft amendments be adopted by the Assembly by not less than two thirds of all its members, much in the same way as it is today. However, in order for the amendment to take effect, they need to receive a final endorsement. The final endorsement may take place within 60 days from the parliamentary approval, through a referendum.

In addition, one more provision is proposed, namely the one that enables 100,000 citizens to sign in favor of a constitutional amendment, even not tabled by the Assembly. In this way, the people who voted the Constitution in the referendum, regains its constitution-making function and is restored one of the powers which should be and is meant to be his exclusive prerogative.

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This formula guarantees the staying power of the constitutional text and its full transparency, while avoiding any constitutional changes at the expense of the public good.

Comment/Proposal 5

On the proposed annex concerning control of the figure of justice officials

Article Dh) of the Annex on the scrutiny of the figure by an Independent Qualification Commission, should make reference to cooperation with the Authority for Access to Information contained in Documents of the Former Secret Police to determine whether such officials used to hold such functions as may provide reasonable grounds to believe that the holder may present real danger to human rights and democracy, i.e., certain actual state offices with real powers on the design and implementation of governmental policies and practices relating to internal security, or certain state functions that involved the ordering or commission of human rights, including but not limited to intelligence, security and law enforcement, the judiciary and the prosecution offices during the communist regime.

However, this scrutiny shall be applicable only to the last 10 years of dictatorship and will have a short life span running parallel to the term of the Commission.

SHPETIM IDRIZI

Chairman of the Party for Justice, Integration and Unity