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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

ALBANIA

DRAFT JOINT OPINION

ON THE AMENDMENTS TO THE CONSTITUTION OF 30 JULY 2020 AND TO THE ELECTORAL CODE OF 5 OCTOBER 2020

on the basis of comments by

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I. Introduction

1. By letter of 21 October 2020, Mr Ilir Meta, President of the Republic of Albania, requested an urgent opinion of the Venice Commission on the electoral amendments of 30 July and 5 October 2020, that is the constitutional amendments approved by Parliament on 30 July 2020 (CDL-REF(2020)074), as well as Law N° 118 on some additions and amendments to Law N° 10019, dated 29.12.2008 - Electoral Code of the Republic of Albania as amended (CDL-REF(2020)075), which amended the Electoral Code of the Republic of Albania as amended as of 23 July 2020 (CDL-REF(2020)073).

2. The Bureau of the Commission decided, in the light of the short time remaining before the next plenary session and of the complexity of the matter, not to authorise the urgent procedure. The opinion was therefore prepared under the ordinary procedure. According to the established practice, the opinion has been prepared jointly by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR").

3. Mr Eirik Holmøyvik (Substitute Member, Norway), Mr Oliver Kask (Member, Estonia) and Ms Katharina Pabel (Substitute Member, Austria) acted as rapporteurs for the Venice Commission. Mr Don Bisson acted as rapporteur for ODIHR.

4. Due to the COVID-19 pandemic, no visit to Tirana was possible, but video conferences were held on 23, 24 and 27 November 2020, as well as on 1 December 2020, with the President of the Republic, the Prime Minister, representatives of parliamentary groups of the National Assembly, extra-parliamentary parties, the Minister of Justice, the Central Electoral Commission, the Ombudsman as well as non-governmental organisations and the international community represented in Tirana.

5. This Joint Opinion is provided with the goal of assisting the Albanian authorities, political parties, and civil society in their continued efforts to develop a sound legal framework for democratic elections.

6. This Joint Opinion was approved by the Council for Democratic Elections at its online … meeting and adopted by the Venice Commission at its online … Plenary Session (Venice, …) following a written procedure supplementing the sub-commission meetings.

II. Scope of the Joint Opinion

7. The scope of this Joint Opinion covers only the constitutional and legislative revisions officially submitted for review ("the amendments"). In particular, it will not address the amendments brought by law No. 101/2020 adopted on 23 July 2020. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in Albania.

8. The issue of the constitutionality of 1) the procedure for revising the Constitution and the legislation and 2) the substance of certain elements of the revised legislation was raised during the discussion. According to their constant practice, the Venice Commission and ODIHR will not address this issue but focus on the conformity of the texts submitted with international standards.

9. In his request, the President of the Republic asked a number of specific questions. The Opinion will not address them separately but address them in the framework of the overall analysis of the constitutional and legislative amendments submitted for review.

10. This Joint Opinion is based on unofficial English translations. Errors from translation may result.

III. Executive summary

11. The Venice Commission and ODIHR regret that the procedure for the adoption of the amendments to the Constitution as well as of Law No. 118 was extremely hasty. A wide consultation among the political stakeholders and non-governmental organisations, providing adequate timeframe, should have taken place before the amendment of such fundamental texts.

12. The Venice Commission and ODIHR also regret that nearly all MPs from the opposition parties then present in Parliament resigned in 2019 and have since then constituted the extra-parliamentary opposition. The fact that Parliament is not composed of the full number of members is in itself not problematic with a view to international standards given that it operates in line with the constitutionally prescribed quorum.

13. The Venice Commission and ODIHR urge the Albanian political forces – both in and outside parliament – to ensure the normal democratic functioning of the institutions in the country, in the interest of the Albanian people. They underline once again the need to restore the Constitutional Court as quickly as possible.

14. The Venice Commission and ODIHR recall that political commitment to fully implement electoral legislation in good faith is a basic element of successful electoral reform and reiterate the absolute need for dialogue and loyal co-operation among state institutions.

15. The Venice Commission and ODIHR make the following key recommendations to be followed before the April 2021 parliamentary elections:

A. That all authorities enter into a constructive dialogue and do their utmost to implement the electoral law on time; they should start as soon as possible, and in a transparent manner, to clarify the impact of the amendments, and the electoral administration should be provided with sufficient means to implement them;
B. To avoid any further amendments of the electoral legislation before the next parliamentary elections; in particular, the delimitation of constituencies should not be changed;
C. That leaders of political parties refrain from being candidates in multiple constituencies;
D. To clarify the impact of the amendments relating to coalitions for Article 96 of the Constitution on the appointment of Prime Minister.

16. Furthermore, the Venice Commission and ODIHR recommend, after the 2021 parliamentary elections:

A. To abolish the possibility for leaders of political parties to compete in several constituencies;
B. To respect equal rights for all parties in a coalition to appeal actions and decisions of the coalition;
C. To introduce the possibility for individual candidates to submit complaints and appeals against the allocation of seats inside a list;
D. To clarify the definition of the threshold for local elections in the sense that it applies at municipality level, if necessary through a by-law;
E. To revise Article 67(4) of the Electoral Code in order to reduce the minimum number of candidates to appear on a list;
F. To consider making an exception to the 1 % national threshold for national minorities.
G. To continue addressing outstanding ODIHR election-related recommendations.

17. The Venice Commission and ODIHR stand ready to assist the Albanian authorities, in particular to facilitate the implementation of the revised Electoral Code.

IV. Analysis and Recommendations

18. The Venice Commission and ODIHR will examine the conformity of the procedure as well as of the content of the amendments with international standards. As already said, the opinion will not address the constitutionality of the amendments. This should be the task of the Constitutional Court as soon as it becomes functional again. The Venice Commission and ODIHR have already made clear that it is of vital importance for Albania to restore the Constitutional Court and the High Court as quickly as possible, even more so in a time in which highly complex questions pertaining to the constitutionality of public affairs in Albania present themselves.[1] Nevertheless, the dissatisfying situation regarding the Constitutional Court should not lead to a full halt of any legislative activity. In the absence of a Constitutional Court, all authorities should ensure, in a very thorough, way the conformity with the Constitution of the procedure they follow as well as of the texts they propose for adoption and eventually adopt.

A. Stability of electoral law and procedure

19. Stability of the electoral law is crucial to ensure trust in the electoral process, and in particular to exclude any suspicion of manipulation of the electoral legislative framework. According to the Venice Commission's Code of Good Practice in Electoral Matters, and as explained in the interpretative declaration on the stability of electoral law,[2] no changes of principle (related to fundamental elements, for instance the electoral system, the composition of the electoral management bodies, and the drawing of constituency boundaries) should be introduced within 12 months of the elections.

20. The one-year rule applies only to *fundamental elements* of the electoral system. However, the closer to the elections the amendments to electoral legislation are passed, the more they may influence the election results. The amendments in question concern three main elements: the constituencies, the introduction of open lists and the suppression of the coalitions (*apparentements*).

21. Whilst the constitutional amendments changed the rules on the delimitation of constituencies, those were not modified by law No. 118. Stability of electoral law has therefore not been put into question in this field. The Venice Commission and ODIHR strongly recommend not to change the delimitation of constituencies before the next elections, because this would be in clear breach of the principle of stability of electoral law.

22. It is difficult to anticipate the effect of the introduction of partially open lists on the results. Preference voting will be effective only if it reaches a certain threshold: to change the ranking of the list, a candidate must receive more preference votes than the average number of votes received for each of the seats won by the party or coalition; in any case, the quotient may not be larger than 10,000 votes (Article 163.3 of the Electoral Code). The effect of this innovation will depend on the behaviour of the voters, more precisely on the more or less extensive use they will make of the possibility to vote for a specific candidate. Even if a rather small number of mandates could be distributed differently based on this amendment for the upcoming elections, there might still be some impact on the campaigning tactics. Some interlocutors of the Venice Commission and ODIHR considered that this change would not have a major impact on the results. The level of impact based on this change has to be seen in the elections, but it cannot

[1] Venice Commission, Opinion on the appointment of judges to the Constitutional Court of Albania, (CDL-AD(2020)010), in particular para. 101 et seq. ODIHR Final Report on the 2019 local elections in Albania, recommendation No 5.
[2] Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, II.2; interpretative Declaration on the Stability of the Electoral Law (CDL-AD(2005)043).

be excluded that the amendment changes the voting behaviour for many voters and has an impact on the campaigning, too. While its effects have still to be assessed, it seems that this innovation should not be considered a fundamental change.

23. There is no fundamental change with the replacement of the threshold from 3% (parties) or 5 % (coalitions) at regional level to 1 % nationally (Article 162(1) of the Electoral Code). Like the former, the new threshold should be ineffective due to the natural threshold linked to the size of constituencies, except, possibly, for individual candidates and parties representing (small, concentrated) national minorities. An exception for the latter could therefore be considered after the 2021 elections.

24. A change which might appear as fundamental concerns the suppression of coalitions as allowed by the former version of the Code (*apparentements*: the coalition is considered as a single list in the first allocation of seats). It is unlikely that it will lead to changes in the allocation of a large number of seats. However, in a tight electoral competition, such changes could be decisive for the obtention of the majority of seats in Parliament. The requirement of special majorities for the revision of certain pieces of legislation, including the electoral law, (Article 81(1) of the Constitution) and, of course, for constitutional revision (Article 177(3)) has to be taken into consideration too. It has to be noted that, in 2017, the rule on coalitions was not applied following a consensual political agreement, so in practice no real change would take place vis-à-vis the last parliamentary elections.

25. While deleted from Article 68 of the Constitution, the term "coalition" stays in Article 96(1) of the Constitution, which provides that, "[at] the beginning of a legislature, as well as when the position of Prime Minister is vacant, the President of the Republic appoints the Prime Minister on the proposal of the party or coalition of parties that has the majority of seats in the Assembly". In case of rejection, the President has to appoint another Prime Minister. From the discussion held with Albanian stakeholders, it does not appear that a "coalition of parties" in Article 96 of the Constitution has the same meaning as in the Electoral Code. It would be suitable to make this clear before the 2021 parliamentary elections, possibly by a political agreement.

26. Under these conditions, it is doubtful that the changes on rules for coalitions as provided for in the former version of the Code can be considered as a fundamental change.

27. At any rate, the Venice Commission's guidelines on stability of electoral law make several exceptions concerning the possibility to adopt amendments, even to fundamental rules, later than one year before elections. One of them concerns the texts "written in the constitution or at a level higher than ordinary law". This exception should not be understood in a formalistic way but as enabling amendments made by consensus – like the 23 July 2020 amendments in Albania, which took place nine months before elections called for 25 April 2021.

28. The constitutional amendments had to be approved, in conformity with Article 177(3) of the Constitution, by not less than two thirds of all members of the Assembly. The amendment of the Electoral Code had to be decided on by a three fifths qualified majority (Article 81(1) c of the Constitution). Both amendments were approved by an overwhelming majority in Parliament.

29. However, the large majority in the Assembly has to be considered in the specific Albanian context of 2020. Nearly all MPs from the opposition parties present in Parliament in 2019 resigned and since then constitute the extra-parliamentary opposition. The Venice Commission and ODIHR cannot but regret opposition MPs left Parliament and thereby refrained from having any political influence on the amendments. These MPs were replaced by parliamentarians who were next in the lists (these MPs now constitute "the parliamentary opposition" - the Parliament is now composed of 122 members instead of 140). The Venice Commission and ODIHR recall that parliamentary mandates belong to individual MPs and not to parties, in conformity with the principle of a free and independent mandate, and that "party-administered mandate" goes

against the European electoral heritage.[3] The possibility to lift a mandate is strongly connected to the principle of the free mandate. Moreover, the Venice Commission and ODIHR consider that the fact that Parliament is not composed of the full number of members is in itself not problematic with a view to international standards, given that it operates in line with the constitutionally prescribed quorum.

30. The Venice Commission and ODIHR recall that successful electoral reform is built on at least the following three elements: 1) clear and comprehensive legislation that meets international standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; 3) political commitment to fully implement the electoral legislation in good faith. Debate on an electoral system should be broad and allow relevant stakeholders to bring forward positive and negative effects of this reform.[4]

31. This does not mean that all changes to the electoral system should be consensual, and in particular agreed by parties not represented in Parliament (even if they left it, at their own initiative). However, legislative amendments concerning key societal and political institutions, such as electoral laws, should be made after an inclusive process involving the general public.[5] This is still truer for constitutional amendments.[6] Constitutional amendments should not be rushed, and "should only be made after extensive, open and free public discussions",[7] involving "various political forces, non-government organisations and citizens associations, the academia and the media"[8] and providing for "adequate timeframe".[9]

32. The procedure for the adoption of the amendments to the Constitution was extremely hasty. The formal procedure in the Parliament was extraordinarily short (about one week), and the whole process from the presentation of the initiative to its adoption lasted only one month. There are no international standards on how long the procedure in the Parliament has to last, but it has to guarantee a public discussion of the amendments in substance. The Albanian authorities informed the Venice Commission and ODIHR that the initiative for the revision of the Constitution was presented on 30 June; that hearings took place with Representatives of civil society in the field of human rights protection on 3 July, with representatives of the academic world on 6 July, with state institutions and international partners on 7 July. However, the hearings were held only a few days after the initiative was presented, which begs the question if the said stakeholders were in a position to properly assess the draft amendments. Even if the Prime Minister explained that the possibility to organise public consultations was limited due to the COVID-19 measures, it remains a fact that the whole process was hasty, given the potential importance of the constitutional amendments for the coming election. Moreover, the adoption of the amendments to the Constitution took place just less than 9 months before next elections. In such a case, the consultation among the political stakeholders and non-governmental organisations is especially important. The same concerns apply to the adoption of the 5 October amendments to such a fundamental legislation as the Electoral Code.

[3] Venice Commission, Report on the Imperative Mandate and Similar Practices (CDL-AD(2009)027), in particular para. 39.
[4] See, e.g., Venice Commission, CDL-AD(2017)012, Joint Opinion on the draft laws on amending and completing certain legislative acts of the Republic of Moldova (electoral system for the election of the Parliament), para. 10, 25-28.
[5] See Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.5.iv.
[6] Report on constitutional amendment (CDL-AD(2010)001), in particular para. 204, 245.

[7] Venice Commission, CDL-AD(2004)030, Opinion on the Procedure of Amending the Constitution of Ukraine, par. 28
[8] Venice Commission, CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, par. 19. ; Urgent Interim Opinion on the draft new Constitution of Bulgaria, CDL-PI(2020)016, para. 15.
[9] Venice Commission, CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary., par. 18.

33. This contrasts with the process which led to the 23 July amendments to the Electoral Code, where, positively, the authorities and political parties engaged in an open, inclusive and comprehensive discussion of many components of the electoral reform. This process was also more inclusive, given the specific Albanian political context, since it also included the extra parliamentary opposition.. These developments demonstrated a constructive attitude both on the part of the government and on the part of the opposition which enabled addressing some election related recommendations issued in 2015-2019 by ODIHR and national stakeholders.

34. While it does not fall within the Venice Commission's and ODIHR's mandate to investigate the political negotiations which may have been conducted behind the scenes and which led to the approval of the 5 October amendments, they cannot but regret once again that the constitutional amendments went against the most basic rules of democratic law-making, even assuming that the object of the amendments had been previously discussed with the extra parliamentary opposition. Democracy governed by the rule of law is not only about the formal adherence to procedures allowing the majority to govern, but also about deliberation and a meaningful exchange of views between the majority and the opposition. The Venice Commission and ODIHR urge the Albanian political forces – both in and outside parliament – to ensure the normal democratic functioning of the institutions in the country, in the interest of the Albanian people.

35. Irrespective of how fundamental and how consensual the adoption of the amendments was, another condition pertains: "In general any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election."[10] This means that the changes must be understandable and applicable by the electoral administration, the candidates, the voters and the observers.

36. It should be noted in this context that the amendments entered into force after the President had called for the elections, that is after the opening of the electoral process.

37. During the meetings held with the Albanian stakeholders, members of the newly established Central Electoral Commission and representatives of NGOs argued that the implementation of the amendments under consideration raised several difficulties in terms of legal certainty. The Venice Commission and ODIHR are not in a position to assess whether the amendments will bring about serious practical difficulties. They recall that political commitment to fully implement electoral legislation in good faith is a basic element of successful electoral reform and reiterate the absolute need for dialogue and loyal co-operation among state institutions.[11] They recommend therefore all authorities to enter into a constructive dialogue and to do their utmost to implement the law on time; they should start as soon as possible, and in a transparent manner, to clarify the impact of the amendments, and the electoral administration should be provided with sufficient means to implement them. The Venice Commission and ODIHR are at the disposal of the Albanian authorities, and in particular the Central Electoral Commission, to provide any assistance needed to facilitate the implementation of the law.

B. Substance

38. According to the Code of Good Practice in Electoral Matters, "[w]ithin the respect of the (other) principles (enshrined in the Code), any electoral system may be chosen".[12] In particular circumstances, the very nature of the electoral system can however be problematic in a specific country.[13] There is no element which would lead to consider that it is the case with the electoral

[10] Interpretative Declaration on the Stability of the Electoral Law (CDL-AD(2005)043), II.5.
[11] Opinion on the appointment of judges to the Constitutional Court of Albania, (CDL-AD(2020)010), para. 108.
[12] Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, II.4.
[13] See, for example, Joint opinion on the law for amending and completing certain legislative acts (Electoral system for the election of Parliament) of the Republic of Moldova (CDL-AD(2018)008), para. 21.

system in place in Albania after the adoption of the amendments under consideration, whose reach is relatively limited.

39. In particular, there are no international standards concerning the choice between closed and open lists and, if the latter are chosen, the extent and impact of the preferences expressed by voters. This is also true for the admission or not of electoral coalitions for the purpose of the allocation of seats (*apparentements*) and the existence of a rather low threshold at regional level (like in the former text) or at national level (as introduced by the amendments).

40. Most 5 October amendments in the Electoral Code are technical, sometimes related to technical errors from the last set of amendments of the Code. Amendments relate to the procedure of calling the elections, electoral justice system, registration of electoral coalitions and candidate lists, ballot paper outlook and its validity, rules on counting the preference votes and allocation of seats. These amendments are reasonable as largely reflecting the recent constitutional changes and could have a positive impact on the electoral processes..

41. Specific amendments, however, deserve further consideration. In the political party coalitions – which are now joint lists -, one political party has to have the leading role (Article 65 (3) of the Electoral Code).[14] In case the small political parties would prefer to have a co-operation based on parity, such coalitions are not allowed. While there are no international standards pertaining to the modalities of presenting joint candidates' lists, the Venice Commission and ODIHR were informed about the discontent of smaller parties vis-à-vis equality of the coalition partners. It is important to note that the principle of equal suffrage guaranteed by international treaties and standards, such as Article 25 of the ICCPR and the First Protocol to the ECHR, Article 3 does not directly apply to the relations between the coalition partners, unless specific rules discriminating individuals in their right to stand for election are in place..

42. The relations between coalition partners, including on their decision-making and potential parity status, are largely subject to mutual agreement. The Venice Commission and ODIHR have previously recommended that a legislator should not overregulate the internal activities of political parties. At the same time, while assuming broad discretion of political parties in their functioning, including with other political parties, there should always be a venue for resolving internal disputes. Therefore the Venice Commission and ODIHR recommend revising Article 65 after the 2021 parliamentary elections in order to ensure the individual right of coalition members to appeal the decisions and actions of the coalition. In the meantime, parties in a coalition should commit not to take decisions without each other's agreement.

43. According to Article 67(3) of the revised Electoral Code, the leader of the political party may be nominated as a candidate in up to four electoral zones (constituencies) for parliamentary elections. This is an exception to the general rule that every person may stand as a candidate in only one list and one electoral zone. In conformity with the principle of equal suffrage guaranteed by international treaties and standards, all persons should have the right to stand in the elections on the same terms.[15] It is very doubtful that the preferential treatment of political party leaders follows a legitimate aim. Furthermore, being candidates in several districts may have a positive impact on the publicity of the candidates, what again may lead to a privileged situation. A similar provision, which had been criticised in the 2009 ODIHR Final Report on the 2009 parliamentary elections,[16] had been repealed in conformity with the ODIHR's recommendations. Political leaders should commit themselves to refraining from applying in several constituencies, and this provision should be revised after the 2021 parliamentary elections.

[14] As already noted, the Venice Commission and ODIHR will not assess the conformity of the legislative amendments to the Constitution, including to the deletion of the term "coalition" from Article 68. The term "coalition" stays in Article 96.

[15] See also, for example, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, I.2.2, on equality of opportunity.

[16] Recommendation No. 2.

44. According to Article 67(4), the number of candidates in the multi-name list may not be less than the number of seats to be filled in the respective electoral zone, plus two. This may pose a challenge for small political parties or even coalitions, if their support level would let them have only a small number of seats in the Parliament. Most of the persons in the candidates' list would not have a real chance to be elected. If the aim of the requirement is to avoid a situation where seats in the Parliament could remain vacant, a specific regulation may be provided for the filling of the vacant seats. Article 164 provides for safeguards against such a situation. The Venice Commission and ODIHR recommend revising Article 67(4) after the 2021 parliamentary elections in order to reduce the minimum number of candidates to appear on a list.

45. The introduction of preference voting which, under certain conditions, will lead to the seats not being allocated according to the order of the list, could lead to disputes concerning the allocation of seats inside a list to candidates. The Venice Commission and ODIHR recommend therefore to introduce the possibility for individual candidates to submit complaints and appeals against the allocation of seats inside a list.

46. Article 163(5) makes an exception in the distribution of mandates according to the number of preference votes in case the candidate with fewer votes belongs to the least represented gender. This system of guaranteeing gender parity in Parliament in the distribution of mandates goes beyond the Code of Good Practice in Electoral Matters and its 2006 interpretative declaration, which only accepts the implementation of the parity principle among candidates.[17] The position taken during the elaboration of the Code was mainly based on the opinion that, should the voter be given a full choice between candidates, provisions on gender parity could go against it. The question could be raised whether this position is still to be supported in a time when the emphasis is put on gender parity at national as well as at international level. At any rate, according to the revised Electoral Code, the voters' choice has only a limited impact on the determination of which candidates on a list are elected; under these circumstances, the guarantee of a gender-balanced representation does not pose a problem, but should, on the contrary, be praised.

47. For the parliamentary elections, the Electoral Code (Article 162.1) clearly sets a nationwide threshold of votes cast at 1 per cent to allow parties or coalitions to enter the Assembly. For the local elections, the Electoral Code does not clearly set a minimum threshold allowing contesting parties and coalitions for distribution of seats in local councils. Instead, Article 166.3 refers to Article 162 for the purposes of seats allocation in a local council. This lacks clarity on at what territory each contesting party and coalition needs to receive minimum 1 per cent of the votes cast - in each corresponding electoral zone or nationwide. It should be applied at municipality level in order not to exclude minority or local lists from local councils. In line with the principle of legal certainty, the Venice Commission and ODIHR recommend clarifying the definition of the threshold for local elections in the sense that it applies at municipality level, if necessary through a by-law. An amendment of the Electoral Code could be envisaged before the next municipal elections.

[17] Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, I.2.5; see also Declaration on Women's Representation in Elections (CDL-AD(2006)020).