OFFICIAL OPINION OF THE SOCIALIST MOVEMENT FOR INTEGRATION IN CONNECTION WITH THE CONSTITUTIONAL AMENDMENTS

After examining the project delivered by the group of experts appointed to prepare a draft for constitutional amendments, after learning about the process followed for the preparation of the draft, the Socialist Movement for Integration expressed this official position:

I. HOW WE READ THE PRELIMINARY OPINION OF THE VENICE COMMISSION ON THE DRAFT CONSTITUTIONAL AMENDMENTS ON THE JUDICIARY

1. In addition to suggestions of a purely technical nature, the opinion of the Venice Commission deals with several fundamental issues of principle, which should characterise reform in the system of justice in the Republic of Albania. The Venice Commission puts an emphasis on three main issues that should guide the preparation of the Constitutional amendments:

a. Consensus;
b. Minimalist interventions in the text of the Constitution;
c. Simplification (reduction) of the new institutions preliminarily proposed.

2. The guarantees that are related to the process (taking into consideration the remaining part of it) imply, principally and above all, decision-making of a political nature by the Assembly, understanding and implying political consensus as an essential basis, meaning the active participation of the opposition in the approval of the constitutional amendments.

2.1. The Constitution is the origin of a country's legality. It is considered as a pact of the citizens, it is the basis of the legality of the state, where it embodies in a way that is immunised the rights and duties of the citizens. The Constitution is of vital importance, because it constitutes the legal frame that gives norms to the activity of the state. For this reasons, it is essential that not only its content, but also its form shall be ideal. **Both the form as well as the content of the amendments submitted should find the consensus of all the political actors, also in this way affecting public trust about interventions in the Constitution.** The participation of all forces is essential to guarantee the long life of **the process.**

3. Minimalist interventions in the text of the Constitution.

3.1. The proposed model of constitutional changes is still far from the approach proposed by the Venice Commission for minimalist amendments and interventions in the text of the Constitution. Of course, the opinion of the Venice Commission should not define precisely, from the quantitative point of view, how much these amendments should be, but the proposed draft of 57 articles is quite clearly far from that approach. The importance and impact of the process, of this reform, certainly require constitutional amendments of a fundamental nature, but not quantitatively. The intervention with 57 articles in a constitutional text of 183 articles in practice has a spirit more in the direction of a new Constitution than of constitutional amendments. From the view of legislative technique, such a step is not to be recommended either;

3.2. Our suggestion is to prepare a draft of amendments that has been shortened and is in the nature of principles.

4. Simplification (reduction) of the number of institutions.

4.1. The consensual process and minimalist interventions, which are related more to the form of submission of the amendments and the process, also has another side that has to be considered, also according to the opinion of the Venice Commission: that of simplification of the institutional scheme. Before the creation of a scheme of reorganization of the justice system, **we judge first there should have been a logical connection between the solutions proposed related to the modelling of the institutions of the justice system and the conclusions reached from the Analysis of the Justice System in Albania.** One solution might have been that bases on this analysis, amendments would be proposed that guarantee the functioning of the existing institutions, amending the rules of their functioning, based on the functional analysis of those institutions;

4.2. In this sense, it might have been sufficient to change the composition of the High Council of Justice, also including the prosecutorial system in the HCJ and

changing the ratio of *judges and those who are not judges* as members of the HCJ, in order to avoid the corporatism that has been evident to date;

4.3. Such an approach goes in the direction of simplification of the scheme of institutions, as the Venice Commission proposes, because even from the point of view of the unitary principle, it would have been more acceptable instead of two councils or two bodies (judiciary and prosecution) to have a single one;

4.4. In this newly thought out scheme, the Tribunal of Justice is an acceptable solution and one that does not overload the existing scheme of institutions, also because of the fact that it will be an ***ad hoc*** organization, which solves some of the deadlocks created in the current scheme of the justice institutions;

4.5. At the same time as inspection goes in the direction of unity, the appointment and disciplining is divided. This kind of doubling up in conceptualising the institutions goes in opposite directions.

II. THE CONSTITUTIONAL COURT

5. In the public debate that has been held in connection with the Constitutional Court, discussions about the composition are divided in two directions: that of the appointment of its members by a qualified majority of 3/5 or a qualified majority of 2/3.

6. In our understanding, we think that the suggestion of the Venice Commission referring to the case of Hungary is not linked in a mandatory way with the qualified majority, but with the inclusion of the opposition in the process of appointment and in the consensual taking of decisions.

7. A good example that has functioned so far as concerns consensual decision-making, and which is not linked to the taking of decisions by a qualified majority, preserving the balance, is the election of the members of the Central Election Commission. The practice to date in appointment of judges of the Constitutional Court according to a political agreement for parity between the majority an the opposition has also given results. By its behaviour, the Constitutional Court has not created much room for public contestation. It has been and remains an uncontested court.

8. The Socialist Movement for Integration has a proposal that resolves this deadlock, a proposal that is found in the technical analysis of the draft amendments. This proposal not only simplifies the procedure, but also avoids potential deadlocks in the Assembly during the election of the members, as has often happened in the past two years in the election of members of the High Court.

III. THE ROLE OF THE MINISTER OF JUSTICE

9. There is no doubt that the suggestion of the Venice Commission about the presence of the Minister of Justice in the Judicial Tribunal is logical. It is also logical that the presence of the Minister of Justice as a member of body that appoints/discharges judges and prosecutors is excessive.

10. But on the other hand, the presence of the Minister of Justice should not cast doubt on the principle of checks and balances. The Minister should be the bridge linking the judiciary and the executive.

11. The proposed draft rightly suggests that the function of inspection of judges and prosecutors and a disciplinary proceeding against them be taken from the High Council of Justice and pass to a new constitutional institution, which is the High Inspectorate of Justice. If this is accepted, first, it will create a parallel Minister of Justice. We think and suggest that the function of inspection remains, in a natural way, with the Minister of Justice, as happens in the majority of European practices and countries and under conditions when it is removed from the High Council of Justice; otherwise, the danger is high for the creation of corporatism with a closed cycle.

12. The creation of an independent inspectorate separated from the High Judicial Council or the High Prosecutorial Council creates the apparent impression of an optimal solution, but it increases the danger so far present in connection with accountability and holding responsibility. Therefore, in order to establish a balance between the powers, we suggest the placement of the Minister of Justice in the public duty of initiating a disciplinary proceeding and representing this procedure before the decision-making organ, where he now is not a member. That is, the Minister is a party in the process and not a decision-making. Of course, the law should establish full guarantees that when this

duty is not exercised by the Minister, the Chairman of the High Court or the General Prosecutor himself should be able to exercise it.

13. Even under conditions when a High Judicial Council and a High Prosecutorial Council would be an acceptable option as two different institutions, the Croatian model for their composition might be followed, which guarantees plurality of election and representation, as the opinion of the Venice Commission recommends (a good example of election might be the Croatian model in which one place from among the members elected by the Assembly is guaranteed to the parliamentary opposition). This also avoids the current blocking debate, 3/5 or 2/3, as well as guaranteeing the process will not be blocked in the future, and also, every opposition to come will feel itself represented in those institutions).

IV-THE HIGH COURT

14. As the analysis has shown, but also the experience of recent years confirms, the High Court is such only ***de jure***. ***De facto***, it acts as a Court of Cassation, without saying that it frequently turns into a court of third instance. In addition to being far from an efficient court, the High Court furthermore cannot accomplish the function that the current Constitution attributes to it, that of unification of the judicial practice. In this sense, confirmation now *de jure* and *de facto* of a court that guarantees the unification of the judicial practice, and avoidance of the model *de facto* of a court of cassation, would have a positive effect, both in terms of effectiveness or efficiency, as well as in terms of improving the quality of the rendering of justice. This kind of understanding means having a single high court, with colleges according to the respective jurisdictions, and not the creation of a parallel system in the hierarchy of the courts. If we were to go toward the latter, the system would only become more complicated and we would be far from the simplified scheme sought by the Venice Commission. Following the logic proposed in the draft amendments, parallel systems would have to be created not only for administrative justice but also for civil or criminal justice. In practice, we would have to have three or more high courts.

V-THE PROSECUTION

15. The current formulation of the text of the Constitution is more than sufficient and guarantees the sanctioning of the principle that the only organ that has exclusivity of criminal investigation is the prosecutor's office. On the other hand, since the Constitution links the organisation of the prosecutor's office with that of the judicial system, every further detailing would be too much. For the above reasons, only minimal clarifications are needed in the text of the Constitution, in order to give an active role to the prosecutor's office. And furhter detailed regulations are to be fixed in the specific laws.

VI- THE CAREER PRINCIPLE

16. The experience to date that Albania has had shows better than anything that the time has come for implementing the career principle, in the amount of 100%, within the judicial system. This suggestion has also been brought out in the Progress Reports of the European Commission on Albania. It is the moment to close off the possibility for jurists from outside the system to be inserted into it and for promotion in career within the judicial system to be the only possibility and solution.

VII- THE MANDATES OF THE CURRENT CONSTITUTIONAL INSTITUTIONS

17. We support the opinion of the Venice Commission that the mandate of the institutions should be interrupted only in those cases when the institution no longer exists after the constitutional amendments.

VIII- ON THE TRANSITIONAL EVALUATION OF THE QUALIFICATION OF JUDGES AND PROSECUTORS (*THE VETTING PROÇESS*)

18. Detailed provisions are excessive in the text of a Constitution and do not fit with the nature that the fundamental law of a country should have. Our proposal is for a single transitional provision to be drafted in which makes the vetting process is made precise, in the nature of a principle. In order to carry out the evaluation process, we propose

that the Constitution shall sanction the creation of the Independent Qualification Commission, as well as the issues on which this commission will decide, and concretely:

a. The moral and professional integrity of the judges and prosecutors;
b. Their assets, in relation to the declarations made.

19. In the same way, in order to guarantee that the process will be not blocked during the implementation phase, with appeals to the Constitutional Court, the provision has been included that: "*The Law on the Organisation and Functioning of the Process of Re-Evaluation is approved by no fewer than 3/5 of the members of the Assembly and cannot be appealed to the Constitutional Court".*

20. The draft provides, in a reflection of the Opinion of the Venice Commission, that an appeal to the Disciplinary Tribunal of Justice may be taken against the decision of the Re-evaluation Commission. At the same time, the composition, organisation and functioning of the Independent Qualification Commission should and will be regulated by law, not in the text of the Constitution.

IX- TECHNICAL ANALYSIS OF THE DRAFT SUBMITTED

21. In what follows we will deal only with those articles where the Socialist Movement for Integration has *suggestions and proposals*.

21.1 In connection with the articles that precede the membership of Albania in the European Union, we suggest that they be reformulated acceding to the suggestions set out by the Venice Commission.

21.2 Article 3 of the draft should be stricken, because the current formulation of the Constitution is a better guarantee.

21.3 We propose that article 13 of the draft be reformulated as follows:

"*In article 125, paragraphs 1 and 2 are reformulated with this content:*

"1. The Constitutional Court consists of nine members.

2. The appointment of members to vacancies is done by the President of the Republic, who collects candidacies, according to the consensual proposal of the parliamentary groups. The consensual candidacies are voted on by the Assembly.

3. If the parliamentary groups do not succeed in reaching consensus on the proposals, then the President of the Republic transmits for voting, for every vacancy, alternative candidacies, on the joint or separate proposals of the parliamentary groups. In this case, the candidacies are voted on by joint, secret and direct voting by the deputies of the Assembly and the judges of all levels of the judicial power.

4. The deputies and judges enjoy the right to one vote for every vacancy.

5. The rules for the voting procedure are defined in the rules of organisation and functioning of the Assembly.

6. The judges are elected for nine years, without the right to re-appointment.

7. The candidacies for members of the Constitutional Court should meet especially these criteria: the candidates should have work experience as a judge of no less than 15 years or experience as a jurist of no less than 20 years as prosecutor, advocate, law pedagogue, employee in the public administration, not to have been convicted previously, not to have taken part in political activities of political parties, and also not to have taken part in the leading organs of political parties".

21.4. We propose that article 16 of the draft be reformulated as follows:

Article 128 is amended as follows:

A member of the Constitutional Court enjoys immunity for opinions expressed and decisions taken in the exercise of his functions.

"1. A member of the Constitutional Court has disciplinary responsibility according to the procedure regulated by law. The Assembly decides on the discharge of a judge of the Constitutional Court by three fifths of all of its members when:

a) it finds serious professional and ethical violations during the exercise of duty;

b) he is convicted by a final judicial decision of the commission of a crime;

c) it verifies the fact of physical or mental inability to exercise duty.

2. The reasons for discharge are verified after their investigation by a special investigative commission created according to article 77."

21.5. Article 18 is proposed to be stricken. "***Public power***" is a new term and one that creates confusion. The current regulation in the Constitution is complete.

21.6. Article 19 should be stricken, and we propose that it be added as a reformulation in the transitional provision, as a guarantee for the protection of the law on Vetting.

21.7. Article 21 of the draft does not bring anything and therefore should be stricken.

21.8. We propose that article be stricken, because first, the High Administrative Court should not exist, and second, special courts are created by law, according to today's provision in article 135 of the Constitution.

21.9. For article 24, referring to the above reasoning, we propose this reformulation:

Article 136, paragraph 1, is reformulated with this content*:*

> *"1. The High Court consists of 17 members, who are appointed by the President of the Republic, on the proposal of the High Judicial Council.*
> *2. Within the High Court, three colleges are created, which are the civil college, the penal college and the administrative college.*
> *3. In addition to the procedures and criteria defined by law, candidacies for members of the High Court should meet especially these criteria: the candidates should have work experience as a judge of no less than 15 years, should not have been previously convicted, should not take part in political activities of political parties, and also shall not have taken part in the leading organs of political parties.*
> *4. The procedure and criteria for selection, proposal and discharge of the members of the High Court are regulated by law:.*

21.10 Article 28 should be stricken, because not reducing the pay of a judge is a guarantee already achieved in the current Constitution.

21.11. In article 29, the words “High Administrative Court” should be stricken.

21.12. In article 30 the words “High Administrative Court” should be stricken.

21.13. For article 31, we propose this reformulation:

***Article 141 is reformulated as follows**:*

“1. The High Court has the function of unifying the judicial practice, taking particular judicial cases to the joint colleges for examination.
2. Cases from the lower courts may also enter into the jurisdiction of the High Court, but in every case only when making the judicial practice the same and unifying it should be done.
3. The High Court has review jurisdiction only as a an extraordinary means of judicial appeal, according to the procedure defined by law”.

21.14. In article 32, the words “High Administrative Court” should be stricken.

21.15. We propose this reformulation for article 33:

Article 147 is reformulated as follows:

“1. The Council of Justice functions at and under the care of the President of the Republic. The Minister of Justice, the Chairman of the High Court, the General Prosecutor, the Chairman of the High Judicial Council and the Chairman of the High Prosecutorial Council take part in it.
2. The Council of Justice does strategic planning of the judicial system and that of the prosecutor’s office, examines and coordinates state policies in the field of justice and is responsible for guaranteeing the independence, responsibility and well-being of the judicial power in the Republic of Albania.

3. The Minister of Justice is responsible for drawing up state policies in the field of justice, as well as for the inspection and disciplinary proceeding of judges and prosecutors. An inspection and disciplinary proceeding is done within the limitations and provisions established in the Constitution and by law. The organisation of the structures of inspection, entitlements and limitations, rules for the examination of a proceeding, as well as the procedural guarantees for the subjects of the proceeding are defined by a special law.

4. The examination of a disciplinary proceeding is done by the organ that appointed him. An appeal against the decision is taken to the Tribunal of Justice.

5. The Tribunal of Justice consists of nine members, of whom six are members from the High Court and three are members from the Constitutional Court; the nine members are chosen by lot. The five members who took part in took part in the judicial body do not take part in the Tribunal of Justice. More detailed rules for the examination of the proceedings, the procedure and decision-making of the judicial body and the Tribunal of Justice are designated by law".

21.16. A new article should then be added, with this content:

***After article 147, 147/1 is added with this content**:*

"1. The High Judicial Council consists of nine members, five of whom [are] elected from the ranks of the judges of all levels of the judicial power, by direct voting, whereas four [are] elected by the Assembly, according to the principle of parity of representation of the parliamentary groups of the majority and the minority. The criteria and procedure of election of the members are regulated by law.

2. The members of the High Judicial Council exercise duty for a period of five years, without the right of immediate re-election. The mandate of a member of the High Judicial Council is linked to his being a judge.

3. The Chairman of the High Judicial Council is elected at the Council's first meeting, by 3/5 of the votes of all the members. When the High Judicial Council does not reach the required majority in the first voting, within

seven days from the first voting, a second voting takes place, in which the Chairman is elected by a majority of all the members. The mandate of the Chairman corresponds with that of member of the High Judicial Council.
4. The Minister of Justice takes part in meetings of the High Judicial Council, in order to communicate the positions of the High Council of Justice on issues of the competence of the High Judicial Council".

21.17. In article 34 the words "High Administrative Court" should be stricken, and points "*c*" and "*d*" of paragraph one, as well as paragraph 2.

21.18. Article 35, 36 and 37 belong to the legal regulations and should be stricken from the text of the Constitution.

21.19. Articles 38, 39, 40 and 41 fall, because this, we propose, should be the function of the Minister of Justice. That is, that institution cannot be created as has been proposed here.

21.20. We propose this formulation for article 42 of the draft:

After article 147/ë, article 147/f is added, with this content:

"The Tribunal of Justice consists of nine members, of whom six are members from the High Court and three members from the Constitutional Court; the nine members are chosen by lot. The five members who took part in the judicial body do not take part in the Tribunal of Justice. More detailed rules for the examination of proceedings, the procedure and decision-making of the judicial body and the Tribunal of Justice are designated by law".

21.21. We propose this formulation for article 43 of the draft:

Points 1 and 2 of article 148 are reformulated as follows:

"1. The Prosecutor's Office exercises criminal prosecution, including criminal investigation, and also represents the accusation at trial in the

name of the state. The Prosecutor's Office also performs other duties are set by law.

2. The prosecutors are organised and function at the judicial system.

3. The Assembly may create by law a special investigation unit that operates within the Prosecutor's Office".

21.22. We propose this formulation for article 44 of the draft:

***After article 147/2, article 147/3 is added, with this content**:*

"1. The High Prosecutorial Council consists of nine members, five of whom are elected from the ranks of prosecutors of all levels of the judicial power, by direct voting, whereas four are elected by the Assembly according to the principle of parity of representation of the parliamentary groups. The criteria and procedure of election of the members are regulated by law.

2. The members of the High Prosecutorial Council Exercise duty for a period of five years, without the right of successive re-election. The mandate of a member of the High Prosecutorial Council is linked to his being a prosecutor.

3. The Chairman of the High Prosecutorial Council is elected at the Council's first meeting by 3/5 of the votes of all the members. When the High Prosecutorial Council does not reach the required majority in the first voting, a second voting takes place within seven days from the first voting, at which the Chairman is elected by a majority of all the members. The mandate of the Chairman corresponds with that of member of the High Prosecutorial Council.

4. The Minister of Justice takes part in meetings of the High Prosecutorial Council in order to communicate the positions of the Council of Justice on issues of the competence of the High Prosecutorial Council".

21.23. In article 45, paragraph 2 is stricken.

21.24. It is proposed that articles 46, 47 and 48 be regulated by law.

21.25. Article 49 is stricken and it remains as it is today in the Constitution.

21.26. We suggest that article 50 be transferred to law.

21.27. Article 52 should be stricken and it should remain as it has been provided in the Constitution today.

21.28. Article 53 should be stricken, because in light of the proposals made by us, as well as respecting the recommendation for simplification of the constitutional institutions, the Council of Appointments brings nothing new.

21.29. Article 54 should be stricken.

21.30. Article 55 should be reviewed according to the proposals made by us throughout the text.

21.31. We propose that article 56 be reviewed according to the suggestion of the Venice Commission, for the premature end of the mandate. The interruption of the mandate takes place only for those cases when the constitutional institution is no longer provided to exist.

21.32. For article 57 et seq., we propose this reformulation:

Transitional provision

"1. All judges, including the members of the High Court and the Constitutional Court, all prosecutors, including the General Prosecutor, the members of the High Council of Justice, the inspectors of the Inspectorate of Justice of the Republic of Albania, as well as legal advisers, will be subjected to an evaluation and re-evaluation according to the procedure and criteria provided by law.
2. For carrying out the process of evaluation for the subjects provided in paragraph 1 of this article, the Independent Qualification Commission is created. The composition, organisation and functioning of the Independent Qualification Commission are regulated by law[1].
3. The independent commission of evaluation decides on:

a) The moral and professional integrity of the judges and prosecutors;

b) Their assets in relation to the declarations made.

4. The review of the decisions of the courts rendered by the judges is prohibited, except according to the manner and procedure provided in the Constitution and in the Codes of Procedure.

5. An appeal may be taken to the Tribunal of Justice against a decision of the Re-evaluation Commission.

6. The Law on the Organisation and Functioning of the Process of Re-Evaluation is approved by no fewer than 3/5 of the members of the Assembly and cannot be appealed to the Constitutional Court".

22. Convinced that the arguments, text and spirit of the amendments satisfy and meet all that has been found by the opinion of the Venice Commission:

- ***Consensus;***
- ***Minimalist interventions in the text of the Constitution;***
- ***Simplification of the institutions;***

we judge and believe that this opinion of ours not only makes possible the approval in the formal aspect of these constitutional amendments, but also guarantees the long life of this reform.

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