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PROJECT AGAINST CORRUPTION IN ALBANIA (PACA)

Technical Paper

RECOMMENDATIONS FOR THE FUTURE REGULATION OF IMMUNITIES OF ELECTED OFFICIALS IN ALBANIA

Project Against Corruption in Albania, September 2011

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Introduction/Executive Summary

This Paper provides recommendations of the Project against Corruption in Albania (PACA) for reform of the current system of immunities for members of Parliament and members of the Government of Albania. The recommendations are based on analysis of the current regime of immunities and privileges as laid down in the Albanian Constitution, Criminal Procedure Code and Parliamentary Rules of Procedure, and an assessment of the available options for reforming this regime.

Under Activity 1.2.1 of its Workplan, the PACA Project is to “review the situation and applicable legislation of Albania and provide a comparative analysis... in order to yield recommendations to ensure conformity with international standards and GRECO recommendations.” Under the agreed project benchmark, the Council of Ministers is to undertake a policy position on immunities by December 2011. This contribution follows and builds on two previous activities conducted under this project component: a Technical Paper (CMU-PACA-07/2011) on “Immunities in Council of Europe Member States: Legislative, Executive and Judicial Office Holders”, which provided the Albanian stakeholders (the Parliament, the Government, the Prosecutor General and the High Council of Justice) with a comparative analysis of regulation of immunities in Council of Europe member states, together with a summary of good practices; and a PACA Roundtable event on “The System of Immunities in Albania: Comparative Analysis and Assessment of the Stakeholders’ Positions” held on 12 April 2011, which was attended by all the stakeholders.

This paper does not address the issue of the immunities of other categories of officials, except for recommendations on certain aspects of the immunities of judges that appear necessary for consistency with PACA’s recommendations. The immunities of judges are addressed in detail separately by the Euralius III Project (“Consolidation of the Justice System in Albania”). The paper is a key input to a final Roundtable to be held jointly by the PACA and Euralius projects on “Reforming the Albanian Law on Immunities: The Path Ahead” which will take place on 18 October 2011 with the aim of discussing the recommendations of both the PACA and Euralius projects and achieving agreement on the reform path to be chosen.

Summary of Recommendations

The main conclusion of the experts is that the immunities of elected officials (MPs and members of the Government) can only be restricted satisfactorily through amendments to the Constitution of Albania. The core recommendations are the following:

- Adopt changes to the Constitution according to an already existing proposal from 2008, with some limited but important alterations to the proposal. These changes should mainly achieve the following:
 - Restrict the inviolability of Parliamentarians to immunity from arrest/detention and search, with such immunity to be invoked by Parliament only if its functioning is disturbed.

- Abolish the immunity of members of the Council of Ministers, People's Advocate, Head of the High State Control and members of the Central Election Commission.
 - Resolve regulation of the immunities of judges in a manner that is consistent with the above changes and in line with the recommendations of the Euralius III project.
- Adopt changes to the Criminal Procedure Code and Parliamentary Rules of Procedure to reflect these changes to the Constitution.

1. Background and the existing system of immunities

In general, immunities come in two main forms: non-liability for opinions expressed, votes cast or other actions taken during the course of duty; and inviolability, which protects officials from certain legal procedures such as investigation, arrest, detention or prosecution.¹ The main concern of this paper is inviolability: Non-liability has little relevance for corruption offences², whereas inviolability is a central barrier to prosecution for criminal offences, including corruption offences or offences linked to corrupt behaviour.

1.1 Immunities: European regimes and good practices

Table 1 provides a comparative overview of the criminal inviolability of elected and government officials in Council of Europe and EU member states.

Criminal inviolability in Member States	CoE (47)	EU (27)	EU 1995 (15)
Parliamentarians	43	25	13
Head of state	40	22	11
Prime minister	19	11	6
Ministers	16	10	5
Ombudsperson etc.	10	3	2
High Court Judges	20	8	1
Judges	16	4	0
Chief Prosecutor	5	0	0
Prosecutors	4	0	0
Judicial Council	3	0	0

A closer analysis of these statistics³ shows that a wide range of officials covered by immunities, especially in the judicial sector, is a phenomenon of Eastern Member States of the Council of Europe and European Union, and even more so a phenomenon of non-EU CoE member states. For example, Italy is the only Western Member State granting immunity to the judiciary.

Drawing on the previous PACA Technical Paper comparing practices among Council of Europe member states, the following is a summary of good practices:

1 This is based on the understanding of immunities elaborated by the Council of Europe Group of States Against Corruption (GRECO). See GRECO (2005) 1E Final, Fifth General Activity Report of GRECO, Strasbourg, 18 March 2005. [http://www.coe.int/t/dghl/monitoring/greco/documents/2005/Greco\(2005\)1_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2005/Greco(2005)1_EN.pdf)

2 For further details see Tilman Hoppe, 'Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe', 5 Vienna Journal on International Constitutional Law No. 3/2011.

3 Table from: Tilman Hoppe, *ibid.*

1. The simplest way of limiting immunities is to grant public officials, at best only parliamentarians, no other immunity but **non-liability** for their decisions and speeches in duty, as is the case in the Netherlands. Such immunity may also legitimately be granted to the Head of State.
2. If, in addition, one wants to foresee also inviolability, it should only cover **arrests** - as in Ireland and Norway with parliamentarians, or in Andorra, Montenegro and Serbia for judicial officials, or, possibly **searches**.
3. Should inviolability go further and cover criminal proceedings in a broad sense, **corruption** offences should be **excluded** from inviolability, as it is (among other offences) in Portugal.
4. If corruption offences are to be included under the protection of inviolability, the competent organ should be forced to take responsibility and **actively invoke** inviolability when necessary (as in the case of two German regional parliaments).
5. **Decisions on the lifting of immunity should be** transparent, while the discretion of the decision-making body should be narrowed to ensure that inviolability is invoked only for the purpose it is officially constituted – i.e. to safeguard the functioning of the body in question. For example, the German regional Constitution of Brandenburg implements this, and the previous bullet point, through Article 58 of its Constitution, according to which “Each measure of criminal prosecution against a Deputy, each arrest or other restriction of his personal freedom has to be suspended if the Parliament so requests and if it disturbs the work of the Parliament.”

The experts wish to underline that they fully regard only options 1 and 2 as optimal. The options under bullet points 4 and 5 are good practices if complementing options 1 and 2. PACA’s recommendations for Albania reflect this view.

1.2 Immunities in Albania

Albania provides immunity in the form of non-liability to three categories of public officials (members of Parliament, members of the Government and the President of the Republic). However, broad inviolability against criminal prosecution is afforded to nine categories of officials, which is a very high number by European standards: the President, MPs, members of the Government, the People’s Advocate, members of the Central Election Commission, Head of the High State Control, Constitutional Court Judges, High Court Judges, and judges of general practice (ordinary judges).

The main focus of PACA’s assistance is the immunity afforded to elected officials, by which are understood members of Parliament and members of the Government. The immunities afforded to MPs in Albania are identical to those afforded to members of the Government (Council of Ministers) and are defined in Article 73 of the Constitution as follows:

1. A deputy does not bear responsibility for opinions expressed in the Assembly and votes given. This provision is not applicable in the case of defamation.
2. A deputy may not be criminally prosecuted without the authorization of the Assembly. Authorization is also required when he is to be arrested.

3. A deputy may be detained or arrested without authorization when he is apprehended during or immediately after the commission of a serious crime. In these cases, the General Prosecutor immediately notifies the Assembly, which, when it determines that the proceeding is misplaced, decides to lift the measure.

4. For issues contemplated in paragraphs 2 and 3, the Assembly decides by secret vote.

1.2.1 Non-liability

Article 73.1 provides immunity in the form of **non-liability** for deputies. In general, protecting free speech and voting in Parliament is good practice in 46 of 47 CoE Member States. PACA does not regard this issue as requiring further elaboration as it is not relevant to the fight against corruption (the main focus of the PACA assistance), no significant problems have emerged with this type of immunity in Albania, and no major changes to this form of immunity have been proposed.

1.2.2 Inviolability

Articles 73.2-4 establish the **inviolability** of MPs (and therefore members of the Government), specifically their immunity from arrest, investigation or any form of criminal prosecution. This type of immunity is the central issue of concern in Albania, and its restriction should be the main goal of reform. To elaborate somewhat on the scope of inviolability in Albania, the following points are key:

- Inviolability applies to all criminal offences, and no distinctions or exceptions are made (for example for less serious offences)
- The so called *in flagrante delicto* clause only applies to “serious crimes”, without defining these.
- Inviolability applies to any action that constitutes criminal prosecution, namely preliminary investigation, personal and house/office searches, the bringing of charges, etc. None of these actions may be performed by law enforcement agencies unless and until the Assembly has consented to them. These aspects of the law have come in for criticism especially because they prohibit even preliminary investigations without the prior authorisation of Parliament. Since such investigations (preliminary) are usually necessary if a reasoned request for the lifting of immunity is to be submitted to Parliament, the current system provides elected officials with a degree of protection that goes beyond the purpose of inviolability and is difficult to justify.
- The time period for which immunity applies appears to be the term of office of the official, and this interpretation is strengthened by a High Court Decision issued on 14 September 2009. In short, immunity no longer applies once an MP ceases to be an MP or a member of the government ceases to be a member of the government, but may be invoked again if the same person regains such a function.

The remainder of this paper looks at options to narrow the scope of inviolability under Albanian law (explained above) for elected officials, as this is the core concern of critics of Albania's regime of immunities.

2. Reform options without Constitutional amendments

Some Albanian scholars and stakeholders have expressed the view that it may be possible to achieve a reduction of the scope of protection afforded by immunities (but not a reduction in the list of officials covered by immunity) simply by amending articles 288⁴ and 289⁵ of the Criminal Procedure Code. Another option that is being explored in Albania since 2011 is to limit the effective protection afforded by immunity by amending the Parliamentary Rules of Procedure.

This section describes the two aforementioned options for reforming immunities that attempt to avoid amendments to the Constitution. The section concludes that neither option is feasible.

2.1 Amending the Criminal Procedure Code (CPC)

The Constitution states that deputies are immune from "criminal prosecution". It is unclear whether the legislator of the Constitution intended that "criminal prosecution" includes preliminary investigations. Desires have been expressed to allow the prosecution to gather preliminary evidence of a suspected criminal offence without a request for lifting immunity so that, based on the preliminary investigation, the prosecution would be able to submit a reasoned request for the lifting of immunity. Therefore, it has been suggested to exclude preliminary investigations from the constitutional notion of "criminal prosecution" through amendments to Article 288 and 289 of the Criminal Procedure Code. This (it is suggested) would mean that the prosecution would be able to perform preliminary investigations without authorisation from Parliament.

4 **Authorization to proceed:** 1. When an authorization to proceed with the criminal prosecution is required, the prosecutor shall make a submission to the competent authority; 2. The submission for the authorization of the criminal prosecution shall be presented not later than thirty days from the day in which the name of the person for whom the authorization is necessary has been entered into the registry. When he/she has been arrested in flagrante delicto, the submission for the authorization shall be made immediately and, in any case, before the evaluation session (first hearing in the court).

5 **Prohibition to perform investigative actions:** 1. Until the authorization to proceed is issued, it shall not be permitted to detain, apply security measures, conduct searches, physical examination of the person, identification, confrontation or interception of conversations or communication of the person for whom the authorization is required. He/she can be interrogated only if he/she asks for that him/herself. 2. When there is a proceeding against several persons, and the authorization is necessary for some of them and its issuance is delayed, the proceeding may continue only against those defendants for whom the authorization is necessary.

PACA position

- Only a Constitutional amendment or a Constitutional Court decision can clarify the meaning of the Constitutional term/notion “criminal prosecution” in a binding way. A change in a law that is below the Constitution cannot authoritatively modify a Constitutional notion. Therefore, in order to separate preliminary investigations from the constitutional realm of “criminal prosecution”, an amendment to the Constitution or an interpretation of the notion “criminal prosecution” by the Constitutional Court would be required.
- In addition, such an amendment on preliminary investigations would address only a single limited component of the overall problem of immunities of Parliamentarians.

2.2 Amending the Parliamentary Rules of Procedure (ROP)

This section considers two relevant issues related to the Parliamentary Rules of Procedure: amendments approved in February 2011 to allow the voluntary waiving of immunity by MPs, and other amendments that might be advocated on the basis of criticism of other aspects of the Rules.

2.2.1 Voluntary waiving of immunity

On 24 February 2011 the Albanian parliament adopted changes to the Rules of Procedure to allow members of parliament relinquish their immunity voluntarily via a written statement.

PACA position

The position of the PACA experts, which appears to reflect also a consensus among the Albanian political and judicial establishment, is that this solution does not in fact narrow the scope of immunity.

- Rules of procedure are internal regulations of the legislature; immunities are granted by the Constitution, which is a higher law that cannot be modified by the former.
- It is at least questionable whether deputies can individually waive their immunity. Immunities are not and should not be (only) a personal privilege but also a privilege of Parliament as an institution and thus can not be waived by mere discretion of the deputy concerned. For example, there is a consensus in German constitutional law that deputies cannot waive their immunity individually, which has been affirmed by the Constitutional Court recently: “The reservation [of Parliament to authorize criminal proceedings against deputies] primarily aims to preserve the working ability and functioning of Parliament. [...] There is no dispute about the fact that a deputy cannot legally dispose of his immunity, especially not waive it.”⁶

6 German Constitutional Court, Judgment of 17 December 2001, BVerfGE 104, 310 (327). Sachs, Grundgesetz [Basic Law], 4th edition, 2007, Art. 46, no. 12.

2.2.2 Reducing the discretion of Parliament in immunity proceedings

For cases where the authorisation of Parliament is required to lift the immunity of an MP, i.e. for all cases of criminal prosecution (and also prosecutions or lawsuits for defamation), the Rules of Procedure of Parliament (articles 118 and 119) define more specifically the procedure whereby a decision is made to grant (or deny) the authorisation.

Criticism has been raised in particular regarding the provision of Article 118 stating that requests for immunity to be lifted are accompanied by “supporting documents”, without specifying more closely what may constitute “supporting documents”. This appears to justify the Assembly requesting certain evidence (before lifting immunity), which could however only be produced after immunity is lifted – a seemingly insoluble dilemma. Some have argued that it is therefore necessary to alter the Rules of Procedure to define more closely what is meant by “supporting documents”, or even to rule out demands for supporting documents.

PACA position

- If the Constitution is amended in line with the 2008 proposal (see Section 3.1 below), the only form of inviolability remaining will be immunity from arrest and search (to be invoked by Parliament) – not from criminal prosecution in general as is currently the case. Parliamentary procedures will be necessary only for a much narrow range of circumstances.
- For the form of immunity that remains - inviolability from search and arrest – the PACA experts believe that it is highly doubtful that Parliament can limit its own constitutionally foreseen discretion by amending the Rules of Procedure. Again, changes to the Rules of Procedure are adopted by simple majority – Art. 75/2 of the Constitution, and thus cannot alter constitutional provisions that are adopted by a different legislator (two-thirds majority). PACA’s position is that the Constitution must do this.
- Limiting the discussion of reform to the option of restricting Parliamentary discretion within the process of lifting immunity means that the most important issues are not addressed - for example the list of officials covered, the question of which parts of criminal procedure are covered, etc.
- If Parliament looks into the merits of the case, this is a clear violation of the separation of powers, because Parliament actually takes on a judicial function.

2.2.3 Opinion of the Venice Commission on Waiving Immunities

In 2005, Albania presented a “Draft Decision” to the Venice Commission for review (hereinafter referred to as “Draft Decision”). The Draft Decision, to be adopted by the Assembly, aimed “at the waiver of immunity of the MPs only for criminal offenses related to corruption and abuse of duty. The waiver of the immunity shall be valid for the entire duration of the mandate, in accordance with the contents of the decision. The initiation of the

prosecution may be done after 48 hours following the written notice that the Prosecutor General submits to the Speaker of the Parliament.”⁷

The Venice Commission reviewed the Draft-Decision from an international and comparative legal perspective.⁸ However, its Opinion did not assess the Draft Decision from an anti-corruption perspective, in other words, whether it would bring the system of immunities in line with European anti-corruption standards.

PACA Position

- Even if the constitutionality of restricting immunity via a written statement by MPs would not be in doubt (see below), this solution would nevertheless be limited for the following reasons:
 - It would concern only the immunities of deputies and not of judges, ministers, the Court of Auditors, the Ombudsman etc.
 - It would lift protection only for a limited category of offences.
 - In line with the basic tenet of constitutional law that “immunities are not and should not be (only) a personal privilege but also a privilege of Parliament as an institution” the option could be regarded as feasible only if all members of Parliament would subscribe to it.
- The Opinion itself raised doubts about “infra-constitutional” laws running “counter to the apparent meaning of the Constitution” and thus providing only “dubious” solutions. This concern applies to the solution discussed by the Opinion. It also buttresses the concerns of PACA with infra-constitutional solutions in general, and those specifically discussed under Sections 2.1, 2.2.1 and 2.2.2.
- The Venice Commission pointed out that a three-fifths (60%) majority would be required to adopt such a decision. This is almost the same as the majority needed to change the Constitution (66%). It seems clearly illogical to pursue a solution that is partial and also questionable (even according to the Opinion), when an optimal solution is achievable with only a slightly larger majority.

3. Reform through Constitutional amendments

3.1 The 2008 Proposal

In 2008, the Democratic Party of Albania and the Socialist Party of Albania presented a Draft Law on Amendments to the Constitution. The proposed amendments were never submitted to Parliament formally as the two parties agreed to resume negotiations on the draft after the 2009 general elections. However, the uneasy political climate that followed the 2009 elections

7 Venice Commission, Opinion no. 361 / 2005, Restricted, CDL (2005)002, [http://www.venice.coe.int/docs/2006/CDL\(2006\)002-e.asp](http://www.venice.coe.int/docs/2006/CDL(2006)002-e.asp).

8 Venice Commission, Opinion no. 361/2005, CDL/2005)0005, [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)005-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)005-e.asp).

prevented any progress on this issue.

The basic changes proposed by the draft would:

- specify that non-liability applies to any criminal or civil proceedings brought against an MP (*with the exception of defamation*);
- abolish inviolability of MPs (*and therefore members of the government*) against criminal prosecution, with the exception of arrest and search (*with an in flagrante clause for serious crimes*);
- abolish immunities for the People's Advocate, Head of the High State Control and members of the Central Election Commission;
- reduce the inviolability of judges to cases of arrest and search (*with an in flagrante clause for serious crimes*).

PACA position

The PACA experts are of the opinion that the proposed Constitutional amendments are a valuable starting point, and go a very long way towards narrowing the scope of immunities in a desirable fashion, both for elected and other officials. Nevertheless, the experts wish to make some specific recommendations for alterations to the amendments. The amendments are reproduced in full below in track change mode (i.e. showing what was proposed for deletion and what the new wording of the Constitution would be), with each paragraph followed by PACA comments and recommendations.

Article 1

Article 73, paragraphs 1 and 2 are modified as follows:

Article 73

1. A deputy does not bear criminal, civil or any other sort of responsibility for opinions expressed in the Assembly and votes he casts while exercising his duties and rights as deputy~~given~~. This provision is not applicable in the case of defamation.

PACA position:

No comment by PACA, as this provision is not relevant in terms of anti corruption. As a general remark, protecting free speech and voting in Parliament is good practice in 46 of 47 CoE Member States.

2. A deputy cannot be arrested or deprived of his/her personal freedom in any form, and

~~cannot be subject to individual search or house search without the authorization of the Assembly. may not be criminally prosecuted without the authorization of the Assembly. Authorization is also required when he is to be arrested.~~

PACA position:

This is essentially good practice. However, the experts recommend the following alterations:

- For clarification, it would be good to replace “or house search” by “search of his/her house”.
- A clause should be added to specify that the Assembly can only deny authorization “if the functioning of Parliament is substantially disturbed”. This would make a clear link to the **purpose** of inviolability (to protect the functioning of Parliament), and reduce the probability of authorisation being denied arbitrarily. Historically, immunities were necessary to protect one branch of power against abuse from another. In modern states, under the rule of law, this function has become more or less obsolete. The only remaining legitimate aim of immunities is to keep Parliament – as the vital constitutional organ – working in cases of too many prosecutions against too many vital MPs. In addition, if Parliament decides on the merits of a case, this is a clear violation of the separation of powers, because Parliament actually takes on a judicial function.
- In addition, and in line with the good practices found elsewhere, rather than Parliament authorising arrests/searches, the mechanism should be inverted so that Parliament must take on responsibility for invoking immunity. PACA therefore recommends that the Article reads as follows: *“A deputy cannot be arrested or deprived of his personal freedom in any form, and he cannot be subject to individual search or house search if and from the time that the Assembly or a designated organ thereof invokes his/her immunity against these measures. The Assembly may only invoke immunity on the basis that the functioning of the Assembly is substantially disturbed. The Assembly has to be informed immediately as soon as any of the above measures is being enforced.”* This mechanism is similar to Art. 73 par. 3 and entails the following advantages:
 - Most importantly, confidentiality of preliminary investigations is ensured.
 - Parliament has to take active responsibility for the decision.
 - Lengthy deliberations in Parliament do not stall investigations.
- The quorum of the decision to invoke immunity could be lowered below a simple majority if it is desired to give special consideration to the rights of minority parliamentary groups.

3. A deputy may be detained or arrested without authorization when he is apprehended during or immediately after the commission of a serious crime. In these cases, the General Prosecutor immediately notifies the Assembly, which, when it determines that the proceeding is misplaced, decides to lift the measure.

PACA position:

This is basically good practice, as almost all constitutions contain an *in flagrante delicto* clause. This paragraph would not be necessary anymore if the Assembly has to invoke immunity in all cases. If the clause should however stand as it is, the experts recommend the following alterations:

- *In flagrante delicto* clauses are generally justified because being caught during or immediately after committing a crime means some sort of *prima facie* evidence is available to law enforcement. It is therefore not necessary to limit the clause to “serious crimes”. Most states apply the clause to all kind of offences (e.g. consider the example an MP who is caught driving drunk).
- If the limitation of the clause to “serious crimes” is to be retained, it is necessary to provide a clearer definition in the Constitution of which crimes are covered by the clause – for example “crimes with a minimum penalty of 1 year of imprisonment or corruption offences”.
- The current wording “*that the proceeding is misplaced*” should be replaced by “*if the functioning of Parliament is substantially disturbed*”. The meaning of “misplaced” is not clear, and the reasons for recommending such a wording are the same as for the recommendation on Article 73.2 above.

4. For issues contemplated in paragraphs 2 and 3, the Assembly decides by secret vote.

PACA position:

The experts strongly believe that votes on the lifting of immunity should be open, to ensure clear accountability for decisions to lift or deny the lifting of immunity. For reasons of data protection, it may be legitimate however for the deliberations of Parliament to be non-public.

Article 2

Article 126 is modified as follows:

Article 126

The judge of the Constitutional Court cannot be arrested or deprived of personal freedom in any form and he cannot be subject to any personal search or house search without the authorization of the Assembly. ~~be criminally prosecuted without the consent of the Constitutional Court.~~ The judge of the Constitutional Court ~~may~~ can be detained or arrested without authorization ~~only~~ if apprehended in the commission of a serious crime or immediately after its commission. In these cases, the General Prosecutor informs immediately the Assembly who can decide the lifting of the measure. ~~The competent organ immediately notifies the Constitutional Court. If the Constitutional Court does not give its~~

~~consent within 24 hours to send the arrested judge to court, the competent organ is obliged to release him.~~

Article 3

Article 137 is modified as follows:

Article 137

- ~~1. A judge of the High Court cannot be arrested or deprived of personal freedom in any form and he cannot be subject to any personal search or house search without the authorization of the Assembly. may be criminally prosecuted only with the approval of the Assembly.~~
2. A judge of the High Court may be detained or arrested without authorization ~~only~~ if apprehended in the course of committing a serious crime or immediately after its commission. In these cases, the General Prosecutor informs immediately the Assembly who can decide the lifting of the measure.

~~The competent organ immediately notifies the Constitutional Court. If the Constitutional Court does not consent within 24 hours to the sending of the arrested judge before a court, the competent organ is obliged to release him.~~

- ~~3. Other judges cannot be arrested or deprived of personal freedom in any form and he cannot be subject to any personal search or house search without the authorization of the High Council of Justice. The Judge may be detained or arrested without authorization if apprehended while committing or immediately after committing a serious crime. In these cases, the General Prosecutor informs immediately the High Council of Justice who can decide the lifting of the measure. may be criminally prosecuted only with the approval of the High Council of Justice.~~

- ~~4. A judge may be detained or arrested only if apprehended in the course of committing a crime or immediately after its commission. The competent organ immediately notifies the High Council of Justice. If the High Council of Justice does not consent within 24 hours to the sending of the arrested judge before a court, the competent organ is obliged to release him.~~

PACA comments on Articles 126 and 137:

The immunities of judges are addressed in detail separately by the Euralius III (Consolidation of the Justice System in Albania) project, and the PACA experts therefore avoid a formal position on judges' immunities in this paper. However, in the following areas the experts make the following recommendations in order to ensure consistency with the PACA recommendations for elected officials:

- To the extent that reforms preserve the inviolability of judges against arrest/search, , it is recommended to replace the phrase "*house search*" by "*search of his/her house*", and to either apply the *in flagrante delicto* clause to all offences or provide a clear definition of the crimes it is limited to.
- As in the case of the inviolability clauses for MPs, if the Assembly/High Council of Justice is to decide on arrests/searches, a clause should be added to specify that it may only deny

authorization *“if the functioning of the court in question is substantially disturbed”*.

- As in the case of the inviolability clauses for MPs, immunity should only apply if invoked by the Assembly/High Council of Justice.

Article 4

Article 61 paragraph 3, article 154 paragraph 5, and article 165 paragraph 2 are abolished.

PACA position:

This is good practice, and 37 out of 47 CoE Member States do not grant special executive officials inviolability. However, PACA notes that the proposal does not touch Article 103.3 of the Constitution, according to which members of the Council of Ministers enjoy the immunity of a deputy. Therefore:

- PACA strongly recommends that Article 103.3 is also deleted, in line with good practice and actual practice in the majority of CoE and EU member states.

Article 5

This law enters into force 15 days after publication in Official Journal.

PACA position

There should be a clarification at least in the reasoning of the law proposal that the law will affect all pending procedures when entering into force. This should not amount to unconstitutional retro-activeness of criminal laws, since it is only a procedural aspect applied retro-actively, not substantive criminal law.

3.2 Consolidated PACA Proposal

Including the above recommendations (leaving articles concerning judges aside), the law changing the Constitution would read as follows:

Article 1

Article 73, paragraphs 1 and 2 are modified as follows:

Article 73

1. A deputy does not bear criminal, civil or any other sort of responsibility for opinions expressed in the Assembly and votes he casts while exercising his duties and rights as deputy. This provision is not applicable in the case of defamation.

2. A deputy cannot be arrested or deprived of his personal freedom in any form, and he cannot be subject to individual search or search of his/her house if and from the time that the Assembly or a designated organ thereof invokes his/her immunity against these measures. The Assembly may only invoke immunity on the basis that the functioning of the Assembly is substantially disturbed. The Assembly has to be informed immediately as soon as any of the above measures is being enforced.

3. For issues contemplated in paragraph 2, the Assembly may deliberate in camera for reasons of data protection but decides by public vote.

Articles 2 and 3

[The immunities of judges are addressed in detail separately by the Euralius III (Consolidation of the Justice System in Albania) project.]

Article 4

Article 61 paragraph 3, article 103 paragraph 3, article 154 paragraph 5 and article 165 paragraph 2 are abolished.

Article 5

This law enters into force 15 days after publication in Official Journal, affecting all pending investigations and procedures.

3.3 Accompanying changes to the CPC and ROP

As the experts concluded in Section 2, while changes to the CPC and ROP are not sufficient to resolve the issue of immunity, the changes to the Constitution recommended above also imply the need for changes to the CPC and ROP to ensure their consistency with the Constitution. On the assumption that the PACA recommendations regarding Constitutional amendments are adopted, this would simplify CPC and ROP regulations a lot. The language of articles 288, 290 of the CPC and the respective article(s) of the ROP would read as follows:

- Article 288. Authorization to proceed: 1. In cases where the Constitution foresees the possibility for the Assembly or another organ to invoke immunity for a public official, the competent authority shall be informed immediately about the identity of the person, the category of measure applied, and the date and time when the measure has started to being enforced.
- Article 289. Prohibition to perform investigative actions: 1. If immunity is invoked by the

organ foreseen in the Constitution, it shall not be permitted to arrest or deprive of its personal freedom in any form, or make subject to individual search or search of his/her house the person, for whom immunity is invoked. 2. When there is a proceeding against several persons, and immunity can be invoked for some of them, the proceeding may continue only against those defendants for whom immunity is not invoked.

- The Parliamentary Rules of Procedure are internal regulations of the Assembly. Assuming the recommended Constitutional changes are passed, the Rules of Procedure could regulate immunities through one single paragraph to ensure that the Speaker of the Assembly immediately notifies the heads of all parliamentary political groups so they can initiate a decision by the Assembly (or a designated organ thereof) according to the general rules if invoking immunity (in other words, deciding to e.g. initiate the release of an MP who has been arrested) is deemed necessary.

Annex: Relevant text of the current Constitution

Article 73

1. A **deputy** does not bear responsibility for opinions expressed in the Assembly and votes given. This provision is not applicable in the case of defamation.
2. A deputy may not be criminally prosecuted without the authorization of the Assembly. Authorization is also required when he is to be arrested.
3. A deputy may be detained or arrested without authorization when he is apprehended during or immediately after the commission of a serious crime. In these cases, the General Prosecutor immediately notifies the Assembly, which, when it determines that the proceeding is misplaced, decides to lift the measure.
4. For issues contemplated in paragraphs 2 and 3, the Assembly decides by secret vote.

Article 90

1. The **President** of the Republic is not responsible for acts carried out in the exercise of his duty.
2. The President of the Republic may be discharged for serious violations of the Constitution and for the commission of a serious crime.

Article 103

3. Members of the **Council of Ministers** enjoy the immunity of a deputy.

Article 61

3. The **People's Advocate** enjoys the immunity of a judge of the High Court.

Article 154

5. A member of the **[Central Election] Commission** enjoys the immunity of a member of the High Court.

Article 165

2. The Head of the **High State Control** has the immunity of a member of the High Court.

Article 126

The judge of the **Constitutional Court** cannot be criminally prosecuted without the consent of the Constitutional Court. The judge of the Constitutional Court can be detained or arrested only if apprehended in the commission of a crime or immediately after its commission. The competent organ immediately notifies the Constitutional Court. If the Constitutional Court does not give its consent within 24 hours to send the arrested judge to court, the competent organ is obliged to release him.

Article 137

1. A judge of the **High Court** may be criminally prosecuted only with the approval of the Assembly.
2. A judge of the High Court may be detained or arrested only if apprehended in the course of committing a crime or immediately after its commission. The competent organ immediately notifies the Constitutional Court. If the Constitutional Court does not consent within 24 hours to the sending of the arrested judge before a court, the competent organ is obliged to release him.
3. Other judges may be criminally prosecuted only with the approval of the High Council of Justice.
4. A judge may be detained or arrested only if apprehended in the course of committing a crime or immediately after its commission. The competent organ immediately notifies the High Council of Justice. If the High Council of Justice does not consent within 24 hours to the sending of the arrested judge before a court, the competent organ is obliged to release him.