

Working Party on the Chapter of the revised Albanian Constitution relating to fundamental rights

1. On 5 February 1993 in Venice, a Working Party chaired by Mr Malinverni and Mr Steinberger met an Albanian delegation for an exchange of views on the part of the Albanian draft Constitution relating to fundamental rights. The meeting was held in response to a request from President Berisha to the Commission through the intermediary of the Council of Europe Task Force on Albania. The list of participants is reproduced in Appendix I.
2. A few days before the meeting, an English translation of the part of the draft constitution relating to fundamental rights (CDL (93) 6) had been submitted to the Commission. During the meeting a draft Constitution was presented comprising a section on fundamental rights which had been slightly amended since the initial text. The part of the draft Constitution relating to fundamental rights as amended is reproduced in Appendix II.
3. The Working Party conducted its work in two stages. First of all, general remarks were made on the draft Constitution. Secondly, the Working Party drew up a commentary on each article of the draft in turn. The following observations and suggestions were made.

I. General remarks

The participants considered that the draft raised major problems on a number of points, as follows:

4. The draft did not follow a real systematic design. In particular, it did not distinguish clearly between individual freedoms and social rights, which would make them difficult to implement. Some of the provisions in the social field were liable to take on a programmatic character.
5. The draft had a number of lacunae:
 - a) It did not mention certain fundamental rights:
 - economic freedom and the right of free choice of occupation, equal access of citizens to the civil service;
 - equality before the law;
 - freedom of association;
 - freedom of research, freedom of science and art;
 - the right to conscientious objection;
 - the freedom of religion;
 - protection of minority languages.
 - b) Furthermore, certain of the fundamental principles guiding the modern state were absent from the part of the draft Constitution relating to fundamental rights, such as:
 - the legality principle, particularly the legal basis requirement;
 - the principle of the separation of powers, particularly the independence of the judiciary;
 - the primacy of international law over domestic law, the direct applicability of international law and its position in the hierarchy of standards.

Moreover, the right to judicial protection for rights of a legal (infra-constitutional) nature did not seem to be clearly defined.

- c) The question of restrictions on fundamental rights was not addressed. The Working Party advocated taking the second paragraphs of Articles 8 to 11 of the European Convention on Human Rights as the model for provisions on this matter.
- d) In general, the freedoms were not affirmed as such but rather formulated in a negative manner, i.e. State interference was prohibited. This approach, derived from the American Constitution, diverged from that of the European Convention on Human Rights and was liable to raise difficult problems of interpretation. See, for example, Articles 18 para. 1, 19 para. 1, 20 para. 1, 21 para. 1 and 30 para. 2 of the draft.
- e) No clear provisions were set forth on whether the Constitutional Court would continue to exist under the new Constitution or what would be the arrangements for verifying constitutionality.
- f) Generally, there was some confusion between the level of the Constitution, the level of the law, and natural law.
- g) The participants made a number of comments on the English terminology. In particular, they came down in favour of using an expression corresponding to "shall" rather than "may" in the original text.

II. Examination of each article in turn

(Remarks appearing in section I are not repeated).

Article 17

6. The participants stressed the danger that para. 2 might be interpreted as permitting prior censorship. The concept of "abuse" in para. 3 should be interpreted in accordance with the proportionality principle. Clearer wording based on the second paragraphs of Articles 8 to 11 of the European Convention on Human Rights would be preferable to an expression which might well have been used by authoritarian regimes. The fourth paragraph appeared too comprehensive. Lastly, it might be desirable to combine freedom of religion and freedom of expression in one article.

Article 18

7. Several problems arose here.

In the second paragraph, an exception should be included for unconscious persons.

In the fifth paragraph, the possibility of ordering personal control might be extended to include the Attorney General, if he was part of the judiciary.

Furthermore, specific regulations might be laid down for prisoners.

Lastly, the wording of the text did not take account of the application of the law to private relations between individuals. Cf. Article 13 of the German Constitution:

Article 13 Grundgesetz

"1) The home shall be inviolable.

2) Searches may be ordered only by a judge or, in the event of danger in delay, by other organs as provided by law and may be carried out only in the form prescribed by law.

3) Otherwise, this inviolability may be encroached upon or restricted only to avert a common danger or a mortal danger to individuals, or, pursuant to a law, to prevent imminent danger to public security and order, especially to alleviate the housing shortage, to combat the danger of epidemics or to protect endangered juveniles".

Article 19

8. It would be desirable to enshrine explicitly the freedom of association. The term "lawful purpose" was ambiguous and might imply that authorisation was required in order to set up associations.

In the second paragraph, the restrictions regarding civil servants should concern only associations having a bearing on their duties, but not other associations.

Article 20

9. The matter of a positive obligation on the State arose.

It would be preferable to refer to physical expropriation (measures seriously restricting the exercising of the right of ownership, for which compensation would be due).

Article 21

10. The wording might be brought into line with Article 1 of the First Protocol to the European Convention on Human Rights:

Article 1 of the First Protocol

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

Article 22

11. The second paragraph should specify which special categories of workers were meant.

Article 23

12. The right of petition could be formulated more clearly.

Article 24

13. It would be desirable to refer to the law, at least for cases not dealt with in the Constitution, eg acquisition of nationality by marriage.

Article 25

14. This was a liberal provision.

The Constitution should refer to the law for exceptions to freedom of movement, including those relating to foreigners not satisfying the requirements. Foreigners should be guaranteed the right to emigrate.

The members of the Albanian delegation specified that the second paragraph did not apply to extradition, which should be covered by international treaties.

Article 27

15. The maintenance of capital punishment for men only as liable to infringe Article 14 of the European Convention on Human Rights (discrimination based on sex).

Article 29

16. The substance of Article 4 (1) of the European Convention on Human Rights was not followed (prohibition on slavery and servitude).

The exceptions set forth in Article 4 para. 3 of the Convention might usefully be mentioned.

Article 30

17. The Albanian delegation pointed out that Article 30 comprised only rights of a procedural nature.

Article 30 concerned the implementation of all subjective rights (including those involved in civil cases regarding interpersonal relations), whereas Article 47 solely concerned constitutional rights.

Instead of "without due process of law", it would be preferable to use the phrase "according to a procedure prescribed by law".

It would be useful to make the first paragraph of article 30 into a separate article and merge the other paragraphs into a further separate article.

The second paragraph could state that the court should have previously been established by law and include the right to a decision within a reasonable time.

The word "hearing" should be replaced by the word "trial".

Article 32

18. The possible grounds of detention should be indicated more clearly. To that end, the wording might be based on Article 9 of the International Covenant on Civil and Political Rights or Article 5 of the European Convention on Human Rights.

The provision would be clearer if the second and third paragraphs were merged. The judicial authority should always be a judge, not a public prosecutor. Further details would be needed on the duration of detention on remand and whether or not a release could be requested. The fifth paragraph should specify that the appeal should be lodged with a court. The further problem arose of the application of Article 32 to persons interned pending extradition in special rehabilitation institutions for reasons of illness. Lastly, the second paragraph should provide for informing the person concerned in a language comprehensible to him/her.

Article 34

19. A clearer reference might be made to the presumption of innocence.

Article 35

20. This rule was not strictly necessary. A person could be convicted in his/her absence if he/she deliberately failed to attend the hearing, or in the case of minor offences.

Article 36

21. Certain rights should already be applied at the stage of questioning by the police authorities. It would be possible to limit the cases of free legal assistance (see Article 6 (3c) of the European Convention on Human Rights).

Article 37

22. The provision might specify the cases in which a retrial could be ordered.

Article 38

23. This principle was recognised under Article 2 of Protocol No. 7 to the European Convention on Human Rights solely for criminal cases.

An exception might be stipulated for inconsequential cases.

Article 39

24. Entitlement to compensation might be restricted to cases where an individual is deprived of freedom.

The second paragraph should apply to all persons deprived of freedom.

Article 40

25. It would be better if the second paragraph read "Access to public education is open to all".

Article 41

26. This provision was clearly not directly implementable.

Articles 42-43

27. These provisions should be interpreted as including the right to family life.

Article 44

28. In the second paragraph, forced treatment might be permitted for vaccinations or other reasons of public health.

Both paragraphs should apply to everyone, not only citizens (or, possibly, vice versa), but their beneficiaries should remain the same.

Equality before the law should be mentioned in order to prevent legislation from creating inequality.

Article 45

29. The second paragraph diverged from Article 14 of the European Convention on Human Rights in listing a limited number of grounds on which discrimination was prohibited. It would be desirable to set forth a non-exhaustive list on the model of the Convention. At the very least, discrimination based on language or colour would have to be prohibited.

Article 46

30. Should this provision not lay down the right of ethnic minorities to exist?

Article 47

31. The provision might specify that access to a court should be open whenever an individual alleged an infringement of his constitutional rights.

III. Follow-up to the meeting

32. The Chairmen of the Working Party recalled that the Commission was available to continue the work which had been launched in October 1991 on the occasion of a visit by a Commission delegation to Tirana and continued at the Working Party's meeting in Venice in November 1991.

The members of the Albanian delegation took note of the comments and suggestions on the draft and undertook to inform the Commission of subsequent developments, possibly through the intermediary of Mr Luarasi, associate member of the Commission in respect of Albania.

APPENDIX I

LIST OF PARTICIPANTS

ALBANIAN REPRESENTATIVES

Mr Rustem GIATA, President of the Constitutional Court/President de la cour constitutionnelle

Mr Feti GJILANU, Judge in the Supreme Court/Juge a la Cour supreme

Mr Theodori SOLIAKU, Legal Adviser of the President/Conseiller au President

Mr Krenar LOLOCI, Professor of constitutional law at the University of Tirana/
Professeur de droit constitutionnel a l'Universite de Tirana

Mr Aleks LUARASI, Professor at the University of Tirana, Associate member of the European Commission for Democracy through Law for Albania/Professeur a l'Universite de Tirana, Membre associe de la Commission europeenne pour la democratie par le droit pour l'Albanie

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Mr Helmut STEINBERGER, Professor at the University of Heidelberg, Director of the Max-Planck Institute/Professeur a l'Universite de Heidelberg, Directeur de l'Institut Max-Planck

Mr Giorgio MALINVERNI, Professor at the University of Geneva/Professeur a l'Universite de Geneve

Mr Gerard BATLINER, President of the Academic Council of the Liechtenstein Institute/
President du Conseil Scientifique du Liechtenstein Institut

Mr Klaus BERCHTOLD, Ministerialrat, Bundeskanzleramt, Wien

Mr Sergio BARTOLE, Professor of Constitutional Law at the University of Trieste/
Professeur de droit constitutionnel a l'Universite de Trieste

EXTERNAL EXPERTS

Mr Andreas AUER, Professor of Constitutional Law, University of Geneva/
Professeur de droit constitutionnel a l'Universite de Geneve

Mr Stefan TRECHSEL, Vice-Chairman of the Human Rights Commission/Vice-Pr esident de la Commission des Droits de l'Homme

SECRETARIAT

Mr Regis BRILLAT, Directorate of Legal Affairs/Direction des Affaires Juridiques

Mr Mark NEVILLE, Directorate of Human Rights/Direction des Droits de l'Homme

Mr Pierre GARRONE, Directorate of Legal Affairs/Direction des Affaires Juridiques