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COMMENTARY ON THE DRAFT ALBANIAN CONSTITUTION AS SUBMITTED FOR POPULAR APPROVAL ON 6 NOVEMBER 1994

Introduction

At the request of the Albanian government, the European Commission for Democracy through Law formed a Working Group to examine the draft Albanian Constitution which was submitted for referendum on 6 November 1994.

The Working Group, chaired by Mr G. MALINVERNI and including also Messrs. G. BATLINER, Z. KEDZIA, F. MATSCHER, A. SUVIRANTA, members of the Commission, Mr A. LUARASI, associate member of the Commission from Albania, and Mr A. AUER, expert, met in Strasbourg on 27 October 1994. In the course of this meeting, it proceeded to an exchange of views with a multipartite delegation from Albania composed of Mr T. SHEHU, Secretary General of the Democratic Party, and Mr K. TRAJA, former Vice Minister of Justice, representing the government, as well as with Mr N. DOKLE, Vice President of the Socialist Party, Mr P. MILO, Vice President of the Social Democratic Party, and Mr V. MELO, President of the Human Rights Party. Mr S. BARTOLE, substitute member of the Commission, submitted a written commentary on the draft Constitution.

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Commentary

The Working Group considers that the draft Albanian Constitution, which represents a serious effort to adopt a Constitution in conformity with European criteria for upholding democracy, calls for a certain number of observations which are set out in the commentary which follows. This commentary follows the structure of the draft Constitution and is accordingly divided into six parts.

I. FUNDAMENTAL PRINCIPLES

The Commission attaches great importance to this part of the draft Constitution which contains the principles upon which the political life of the State will be founded. In addition, these principles will constitute the basis for interpreting the Constitution as a whole.

General Observations

1. The Commission believes that the list of principles established in Chapter I is incomplete. It is unfortunate that the protection of human rights, as a principle, nor the supremacy of law, nor local democracy, do not form part of the fundamental principles of the Constitution. The structure of the draft betrays an overly institutional approach to this fundamental instrument.

Chapter I (and particularly Articles 6 and 7) includes some restrictions on and conditions for the exercise of certain fundamental rights which are only first guaranteed later on, in Chapter
II. It is usual to impose such restrictions, to the extent that they are strictly necessary, in legislative texts in a manner such that their conformity with constitutional provisions guaranteeing fundamental freedoms can be reviewed, if necessary, on a case by case basis.
Measures implementing the limitations and restrictions on fundamental freedoms set out in Articles 6 and 7 could, on this draft, escape review in respect of their compatibility with the human rights provisions.

Observations on particular provisions

2. Political Parties

Article 6(2) prohibits political parties which place the existence of the Albanian Republic or its democratic institutions in danger. Strictly interpreted, this prohibition does not give rise to any objections in itself - an analogous provision can also be found in the European Convention on Human Rights (Article 17); it is nevertheless open to the risk of abusive interpretation. It should rather be clear that a political party that wishes to modify existing institutions, even profoundly, and to replace them with other democratic institutions, cannot be banned. It would therefore be preferable to provide that political parties must act in a manner compatible with the Constitution.

Article 6(3), which prohibits political parties having a religious or ethnic basis, can be understood as aiming to protect against elements of fundamentalism. As drafted, the provision is nonetheless open to abuse. Problems potentially deriving from the political activities of certain religious or ethnic entities should be resolved on a case by case basis and not by a complete prohibition on all activity (cf. general observation 2 above).

In this general connection, the Commission particularly commends the provision attributing competence to the Supreme Court in the matter of the banning of political parties (Art.115(4)).

3. Conduct and organisation of religious communities

As regards Article 7 of the draft, the Commission finds the prohibition on the use of religion for political purposes in Article 7(3) to be an excessive invasion of freedom of religion. It must be recalled that numerous questions of an ethical character, upon which religious bodies can - and even must - express themselves in a clear and precise manner, can have a large application in the political sphere.

One can also question the extent of the prohibition in Article 7(3) on religious activities imperilling the Republic of Albania or its institutions. Article 36, which allows for such restrictions on freedom of religion as are necessary for public security, for the maintenance of public order, or for the protection of health or morals or the rights of others (a provision directly inspired by the European Convention on Human Rights) appears entirely sufficient.

The provision in Article 7(4) whereby the leaders of "large" religious communities must be Albanian citizens born in Albania and resident there for at least 20 years is not easily reconcilable with existing standards of freedom of association, nor with the principle of the separation of religion and State, as affirmed in Article 7(1), nor with the principle of equality before the law.

4. Relationship between international law and domestic law

Article 10, governing the relationship between domestic law and international law, requires more precision. In effect, it does not establish the rank of international law in the Albanian legal order. Rather, it appears to establish only a general obligation to respect international law. Nor does Article 72(9), and especially its subsection c), which concerns international treaties in the domain of human rights and fundamental freedoms and which provides that certain international treaties shall be ratified "by law", decisively clarify the place of international norms guaranteeing fundamental rights within the Albanian legal heirarchy.

5. Other observations

- In Article 2(3), the secret character of the ballot is not guaranteed.

- Article 3(2) provides for the exact and "uniform" application of legal norms. It would be preferable to guarantee freedom before the law and to provide for the principle of non-discrimination. A uniform application of the law is not always necessary or even desirable.

II. FUNDAMENTAL RIGHTS AND FREEDOMS

The Commission recalls its opinion CDL (93) 13 concerning the conformity in particular with the European Convention on Human Rights of a previous draft text revising the Albanian Constitution in the matter of fundamental rights, which text has been taken up in part in the draft Constitution presently being considered by the Commission.

General observations

1. The Commission notes with satisfaction that the authors of the draft Constitution have sought to limit restrictions on fundamental rights to the greatest extent possible.

2. The question of the review of the constitutionality of laws by ordinary courts is not regulated in a very precise manner. Article 57 declares the principle of access to the courts in case of a violation of one's human rights, which allows for the conclusion that the draft enables ordinary courts to review State conduct in the light of the constitutional provisions on human rights and freedoms. This system of diffuse review would appear to be sufficient, notably to the extent that it would allow the ordinary courts to decline to apply a legislative provision which is considered to be contrary to the Constitution. However, the second paragraph of Article 103, which attributes compulsory jurisdiction in the matter to the Supreme Court, weighs down the procedure and introduces a degree of centralised review which appears to contradict the conception of diffuse review.

3. In addition, it would be desirable to use the formulation "necessary in a democratic society" in respect of restrictions on fundamental rights.

Observations on particular provisions

4. Right to life (Article 19)

Article 19(2), concerning the death penalty, should stipulate that such punishment can be applied only in the execution of a final judgment of a competent judicial authority (cf. Article 6 of the International Covenant on Civil and Political Rights).

Article 19(3) must be considered to give rise to discrimination on the grounds of sex.

It must also be emphasised that Protocol No. 6 to the European Convention on Human Rights abolishes the death penalty in time of peace.

5. Freedom of expression (Article 20)

Article 20(2) can be interpreted as allowing for prior censorship. It would be preferable to exclude this and to adopt the substance of Article 10(2) of the European Convention on Human Rights, which authorises only such restrictions as are provided for by law and are necessary in a democratic society.

The provision as a whole should be reconsidered with a view to ensuring consistency with Article 10 of the European Convention on Human Rights.

6. Guarantee of personal security (Article 23)

Article 23, concerning security of the person, makes no mention of the reasons justifying the deprivation of an individual's liberty; it contains a sole substantive guarantee in its second paragraph, stating that a deprivation of liberty cannot be effected save when there are sufficient grounds justifying such deprivation. In the absence of an exhaustive list of those circumstances in which the Constitution authorises the legislative, judicial or executive powers to provide for, order or execute a measure depriving a person of his or her liberty, there exists a not insubstantial risk of arbitrariness (potentially aggravated by the inconsistency in the terms detention, arrest, and pre-imprisonment). Moreover, the provision in Article 37(2) whereby arrested persons, even without being convicted, are deprived of the right to be elected, serves to accentuate this risk (see also point 7 infra). It would be desirable, therefore, that the Constitution contain a provision comparable to Article 5 of the European Convention on Human Rights, which provides in an exhaustive manner for cases of restrictions on personal liberty, including those having no connection with criminal procedure (e.g, in case of mental illness or contagious disease). Article 23(6) could be better drafted, relying, for example, upon Article 5(4) ECHR. It is also difficult to provide by law, as is foreseen in Article 27(3), for a maximum duration for detention on remand.

7. Presumption of innocence

The ineligibility of persons on remand (Article 37(2)) is incompatible with the presumption of innocence.

8. Protection of minorities

Article 44(1) on the protection of minorities is a provision which the Commission particularly commends. Nonetheless, it is worth mentioning that this provision is a general one whose implementation will require concrete legislative measures.

9. Procedural Guarantees

Article 56 lacks precision. A provision similar to Article 6(1) ECHR should be adopted.

10. Other observations

- Articles 19 to 45, as well as Articles 54 to 59, set out what might be described as classic fundamental rights, whereas Articles 46 to 53 set out economic and social rights. It would be preferable to place all provisions containing classical rights together.

Rights of defence, for their part, are set out in three separate provisions (Articles 26, 56 and 58). It would be preferable, from a technical perspective, to merge these three provisions.

- Article 31, guaranteeing a general right of appeal, is too absolute in its wording. In effect, certain decisions of small importance need not be subject to an appeal. It is also unclear whether this right applies solely to criminal matters or whether it extends also to civil cases.

- Article 33(2) appears to be too restrictive in the matter of access to information of a personal nature. Such restrictions are legitimate only in the case of private life. For the rest, the second paragraph of Article 33(2) suffices. In Article 33(3), the prevention of crime could usefully be added to the reasons for keeping information secret.

- Article 38, concerning restrictions on freedom of association, should be modelled upon Article 11(2) ECHR.

- Paragraphs 1 and 2 of Article 48, at least in their English translation, are contradictory in that the first paragraph prohibits restrictions on the right to strike whereas the second expressly provides for such a possibility.

- Finally, the provision authorising medical treatment without consent in the best interests of the patient (Article 58(2)) could give rise to problems.

III. ORGANS OF THE STATE

Powers of the President of the Republic

1. The draft gives to the President of the Republic, who is elected by Parliament (Article 79), some considerably more powers than are normally conferred on the Head of State in a parliamentary regime. These powers appear to be closer to those conferred on the President of the French Republic.

In particular, according to Article 84, the President fixes the dates of national and local elections without the requirement of a proposal from the government, and has the right to propose to Parliament that a question be put to referendum. He can chair meetings of the government and determine the agenda for these. He can conduct relations directly with the directors of State bodies without passing through the competent Ministry and, in addition, under Article 61(2), gives authorisation for the extraordinary extension of the legislature's term of office.

Disqualifications

2. The absence of an incompatibility of functions as between a member of Parliament and a member of the government (Articles 64 and 90(2) is not unusual. However, the proposed system accords to members of the government a significant weight in the work of Parliament: under Article 71, members of the government have the right to participate in all sessions of Parliament and of its committees. Although unusual, these privileges accorded to members of the government could have the advantage of facilitating close links between parliamentary and governmental activities.

3. In general, the question of disqualifications ought to be reconsidered with a view to ensuring consistency. This applies not only to Parliament and government, but also to the judicial power.

Parliament

4. The quorum rules in Article 68(2) and 69 could frustrate the adoption of laws: in effect, the requirement of a positive vote of a majority of members present, constituting at least one third of the total number of deputies, would allow the opposition to block the adoption of a bill by its simple abstention. This defect could be cured by a stipulation that the required majority is a majority of members present and voting.

Recourse to referenda

5. The procedures for recourse to referenda are not regulated in a very precise manner.

According to Article 72(3), it is for Parliament to decide on the holding of referenda. It appears that this refers to an extraordinary referendum, decided upon by Parliament, and not to the popular referendum requested by a fraction of the electorate (cp. Articles 84(3) and 84(4)). In this case, the Constitution should establish which are those laws or matters that Parliament may submit for referendum and, further, define the legal consequences of a popular vote.

From a technical perspective, it would be preferable to replace the term "repeal" by "approval or repeal" in the second paragraph of Article 72(3). It is inadvisable to leave to Parliament the power to alone decide upon the issue of referral for referendum, and the respective powers of Parliament and of the people should be clearly separated in this respect. In addition, the role of the President in the holding of referenda ought to be clarified.

On the power of initiative in the matter of the holding of referenda to revise the Constitution, see Part VI *infra*.

Procedure for the nomination of the Prime Minister

6. The nomination of the Prime Minister, as provided for in Article 87, is very complicated. It is provided that priority shall be given to the nomination of the candidate nominated by the party which obtained the greatest number of popular votes; in default, the President nominates the candidate from the party which obtained the second greatest number of seats; in default of which the party with the third greatest number of seats ""names" the Prime Minister; if parliamentary approval is still impossible, Parliament is dissolved. What if another party obtained, in the event, a greater number of seats? In addition, in the absence of an absolute majority of any one party, it would not necessarily be the largest party who would nominate the Prime Minister. Moreover, the two stage parliamentary vote of confidence, first in respect of the Prime Minister (Article 87(3)) and then in respect of the government (Article 89) is rather unusual.

Treaty-making power

7. Additional clarification of the respective powers of Parliament, of the President and of the government in relation to international treaties would also be desirable. It should be specified in particular when treaties are ratifiable by the President (Article 84(10)) and when ratifiable by the government (Article 91(7)). It must be borne in mind, as well, that it is incorrect to affirm that Parliament "ratifies" and rejects treaties (Article 72(9)): in general, Parliament can approve treaties, but they are always ratified by the executive, which retains treaty-making power. This could be merely a problem in the translation.

In addition, one can speculate as to the meaning of treaties of a "political" character, referred to in Article 72(9) of the draft.

8. Other observations

- It is not clear whether Article 66 provides for immunity from arrest for members of Parliament.

- Article 68(1) does not specify in what circumstances Parliament may decide to hold its sessions in private. One can also question whether it is in itself legitimate to exclude publicity of parliamentary sessions.

- In Article 81, the expression "the party" should surely be replaced by the words "a political party".

- It should be specified whether a law may be promulgated even in the absence of an intervention by the President (cp. Articles 75(1) and 84(3)).

- Article 83 does not identify the competent authority for deciding upon the incapacity of the President of the Republic. For example, one could foresee the conclusion of an agreement on the question between the Prime Minister and the Speaker of Parliament (this being the solution adopted in Italy).

- Article 84(20) does not expressly provide that the non-approval by Parliament of decrees of a normative character shall automatically entail their annulment ex tunc.

- It would be desirable for Article 86 to expressly define the powers of the National Security Council.

- It may be questioned whether it is desirable that the President should have the power of decision in the matter of lifting the immunity of members of the government (Article 98).

- In general, the draft should contain more detailed rules in respect of public finances.

IV. THE ORGANISATION OF JUSTICE AND THE CONSTITUTIONAL COURT

Independence of the courts

1. A provision guaranteeing the term of office of all judges for life (or until the age of retirement), an essential element in the independence of the judicial power, would be desirable: Article 102, relating only to the Supreme Court, is silent on this point.

2. The participation of the General Prosecutor in the Supreme Council of Justice, as well as that of the directors of the prosecution service at the option of that organ (Article 109), raises the question of the apparently exaggerated role of the General Prosecutor in the administration of justice. Whatever the status of a prosecutor, one should not lose sight of the fact that the prosecution is one of the parties to criminal proceedings and that its involvement in the nomination of judges risks creating problems having regard to the requirements of independence and to the principle of equality of arms.

3. The existing provisions governing removal from judicial office are inadequate. Articles 102(4) and 105 appear to be contradictory. It would be preferable to stipulate the precise conditions and procedures for the removal of all judges, and that these be set out in a single provision.

4. On Article 112 and the question of disqualifications, see the observations contained in Part III, supra, points 2 and 3.

Access to courts in respect of administrative matters; review of the legality of administrative action.

5. The draft does not expressly guarantee a right of access to the courts in order to challenge alleged violations of the law by the administration other than constitutional violations. While it is true that Article 3 recognises the principle of legality in respect of acts of the administration, the means for reviewing such legality are not defined. In the absence of administrative courts, it may be supposed that the ordinary courts will have jurisdiction in the matter. However, the draft Constitution could usefully specify that this is the solution chosen.

6. Other observations

- In Article 115(3), it should be specified whether litigation involving local authorities are among those conflicts between State organs coming within the jurisdiction of the Constitutional Court.

- In the case of doubt about the compatibility of provisions of laws predating the new Constitution, the Constitutional Court should be empowered to decide upon the question.

V. LOCAL AUTHORITIES

It would be desirable, in general, that this fifth chapter be more detailed, and that it should be inspired in this connection by the existing transitional Constitution. This is the case notwithstanding the existence of implementing legislation.

VI. FINAL AND TRANSITIONAL PROVISIONS

The Commission has considered the question of which authority has the initiative in respect of revisions to the Constitution. It emerged from the exchange of views beween the Working Group and the Albanian delegation that this initiative is vested in the same organs as enjoy the power to initiate legislation, Article 73 being applicable mutatis mutandis to this matter. Such a solution is in any case more than desirable, and could moreover be expressly provided for.

Finally, it is worth asking whether the procedure for revising the Constitution, in Article 130, is not excessively rigid, and capable of frustrating all attempts at constitutional revision.