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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**OPINION**

**ON THE  
PROVISIONS ON THE JUDICIARY IN  
THE TRANSITIONAL CONSTITUTION OF  
THE REPUBLIC OF ALBANIA  
AND ON RELATED PROVISIONS**

by

**Mr Antti SUVIRANTA  
(Finland)**

**ANTTI SOVIRANTA**

**31 July 1995**

**Provisions on the Judiciary in the Transitional Constitution  
of the Republic of Albania**

**COMMENTS**

**Introduction**

The Committee on Legal Affairs and Human Rights of the Council of Europe has asked the Venice Commission for an opinion on Chapter VI ("The Organization of Judiciary and the Constitutional Court") of the Transitional Constitution of the Republic of Albania. As one of the Commission's Reporters on Albania, I have been asked to present my observations on the Chapter.

Chapter VI is divided into three subchapters: I. The Judiciary System; II. The Constitutional Court; and III. Transitory Provisions.

Chapter VI as a whole is in my opinion comprehensive and consistent, and it can fulfil its function as the constitutional base of the organization and exercise of the judicial power, constitutional jurisdiction included, in a satisfactory manner. Several comments on the details of subchapter I will, however, follow. I have no detailed comments to make on the contents of subchapters II and III.

The Council of Europe standards in this field do not need to be fulfilled by the Constitution alone, but by the legal system as a whole. Chapter VI of the Transitional Constitution in fact refers several questions concerning the judicial system and the Constitutional Court to be regulated by ordinary legislation and other rules of lower degree. Whether the Al-

banian law in this field is in conformity with the Council of Europe standards can thus be ascertained only by an examination of this whole web of rules.

### *I. The Judicial System*

The subchapter on the Judicial System covers in addition to the court system also the prosecutors (Arts. 13 and 14) and the legal profession (Art. 16). I have no special comments in regard to these parts of the subchapter.

Art. 2. The Constitution does not expressly provide for a judicial review of administrative decisions (decisions of local government bodies included). On the contrary, the Council of Ministers is entrusted with the task to abrogate illegitimate acts of the Ministries and other central bodies of State administration (Art. 37 of Chapter IV), and the Ministers shall correspondingly abrogate unlawful orders and instructions of subordinate bodies, enterprises and institutions (Art. 40 of Chapter IV). Whether legislation on judicial review of administrative decisions can despite these provisions be enacted on the basis of paragraph 3 of Art. 5 otherwise than by way of constitutional amendment seems to depend on constitutional interpretation.

Art. 5. According to this article, the judiciary consists of, among others, Military Courts. Judges of the Military Courts are not, however, mentioned in Art. 10 (on the immunity and guarantees of judges) and in Art. 15 (on the authority which determines the nomination, replacement and disciplinary responsibility of judges).

Art. 6. To secure the independence of the Court of Cassation especially from politics without making it totally isolated from the values of the society at large is a difficult task. The election of the President, Vice President and other Judges of the Court by the People's Assembly (Parliament) for a

limited term only—even when the term is as long as seven years—with a possibility of reelection constitutes a certain danger to the independence of the Court.

When the President and Vice Presidents are elected by the People's Assembly on the proposal of the President of the Republic, the Constitution does not expressly provide whether the People's Assembly is free only to approve or disapprove the proposal of the President or whether it can substitute another person for the one proposed by the President.

That a Judge of the Court of Cassation can be removed from his office before the end of his term by a reasoned decision in the serious cases mentioned in paragraph 4 of Art. 6 cannot in my opinion be questioned, despite the fact that the power to pass such a decision has been entrusted to the People's Assembly. But exactly because of the limited discretion in making such a decision, the decisive power might in my opinion be entrusted as well to, e.g., the Constitutional Court.

Art. 10. This Article contains certain important guarantees for the judges of the Courts of First Instance and of Appeal. However, the terms of office of these judges and the grounds upon which they can be disciplined or dismissed are not defined in the Constitution. In my opinion, this is a defect of the constitutional protection of the independence of the judiciary. In the third paragraph of this article there is nevertheless a provision stating that no law may limit the guarantees of judges as provided for by international standards. In so far as such standards include requirements bearing upon the terms of office of judges or upon the grounds on which they can be disciplined or dismissed, these requirements are thus protected also by the Constitution.

According to the third paragraph of Art. 5, the organization of the courts is regulated by law, and according to the second paragraph of Art. 10, the immunity of First Instance and

Appeal Court judges may be withdrawn and they may be removed from office only by a competent body, consistent with circumstances and procedures provided for by law. Such laws should thus define the terms of office of First Instance and Appeal Court judges as well as the grounds on which they can be disciplined or dismissed, hopefully in a manner protecting the independence, impartiality and well-functioning of the judiciary.

The materials given to me for drawing up my observations include a Statute "Defining the function and administration of the High Council of Justice". According to the preamble of this statute, the statute has been approved by the High Council of Justice in accordance with the third paragraph of Art. 15 of Chapter VI of the Transitional Constitution. The High (Supreme) Council of Justice is indeed in the said paragraph authorized to approve a statute which defines the manner in which the Council functions and acts. According to Art. 8 of the Statute, however, the Council—or, as regards warnings, the Minister of Justice—is entitled to apply certain disciplinary measures, dismissal included, to judges and deputy judges for violations of job position discipline and ethics as well as for professional incapacity. The cases in which judges may be dismissed are listed more in detail in Art. 9.

The material contents of Articles 8 and 9 of the Statute are in my opinion hard to reconcile with the authorization in the third paragraph of Art. 15 of Chapter VI of the Transitional Constitution: they do not concern "the manner in which the Supreme Council of Justice functions and acts"; nor can the second paragraph of this Article, indicating this Council as the "sole body that determines the nomination, replacement and disciplinary responsibility of judges", entitle it to create norms defining which kinds of disciplinary measures shall be applicable to judges and in which cases these measures may be inflicted. These matters belong in my opinion to the "circumstances and procedures" mentioned in the second paragraph of Art. 10 of Chapter VI of the Transitional Con-

stitution and should therefore only be "provided for by law", that is by an Act of the People's Assembly, as foreseen in Articles 15 and 16 of Chapter II of the Transitional Constitution. Moreover, the third paragraph of Art. 15 of Chapter VI of the Transitional Constitution can hardly authorize the Supreme Council of Justice to delegate part of its disciplinary powers over judges to the Minister of Justice, that is to the Executive Branch.

Also if the question is disregarded whether the Supreme Council of Justice has acted beyond its mandate when it has approved Arts. 8 and 9 of the Statute, the contents of these articles give rise to some adverse comments. The grounds in Art. 8 for applying disciplinary measures (short of a dismissal) to judges are in my opinion extremely vague and wide and may intimidate judges and thus diminish the independence of the judiciary. The same is true of some of the grounds in Art. 9 for dismissing judges: that they fail a professional test, that they periodically violate their job discipline, that they demonstrate through their acts that they are professionally incompetent, that they commit immoral acts. It might of course be said that the composition and the traditions of the Supreme Council of Justice will in practice secure that it administers these provisions despite their vagueness and width in an equitable manner. But should the provisions not be themselves drafted so as to encourage the judges to independent and fearless action?

Art. 15. The composition of the Supreme Council of Justice seems to me problematic. It is important that there is a good and efficient system of prosecutors. The prosecution is, however, one of the parties before the Court in a criminal procedure, and having regard to the impartiality of the courts and the principle of equality of arms, it seems odd to accord one of the parties—the General Prosecutor directly and his office indirectly—a say in the nomination, replacement and disciplinary responsibility of judges. Moreover, as the Transitional Constitution does not define the composition of the Gen-

eral Prosecutor's office, this office might even have a majority in the general meeting electing nine members of the Supreme Council of Justice.

### **Conclusion**

As already said, Chapter VI of the Transient Constitution can in my opinion fulfil its function as the constitutional base of the organization and exercise of the judicial power, constitutional jurisdiction included, in a satisfactory manner. I have, however, also mentioned that it needs to be supplemented at least with ordinary legislation, especially in regard to the immunities and guarantees of judges under the Cassation level. The periods of office of these judges should be predetermined and long enough—in my opinion preferably for life, that is until retirement age—and the grounds for their dismissal or other disciplining should be narrow and precise enough.