OPINION ON THE PROVISIONS CONCERNING THE ORGANISATION OF THE JUDICIARY CONTAINED IN THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF ALBANIA AND ON RELATED PROVISIONS

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Chapter VI of the provisional constitution begins by laying down certain basic principles, intended to govern the organisation of the country's courts: separation of the judiciary from other State authorities (Article 1); the courts' exclusive jurisdiction to settle both civil and criminal disputes (Article 2); the fact that justice is dispensed on behalf of the people and has a democratic basis (Article 3); the courts' obligation of compliance with the law and with the principle of equality before the law (Article 4); the obligation to give reasons for judicial decisions (Article 9); the requirement that hearings must be public (Article 12); and so on.

Albania's legislation therefore seems to abide by the basic principles governing the operation of the courts in a law-based State and to comply with European standards in this area.

The purpose of the comments set out below is therefore merely to attempt to improve the text under consideration, with a view to drafting a final version of the legislation relating to the organisation of the judiciary in Albania.

As regards layout, Chapter VI of the provisional constitution is divided into two sections, the first dealing with the judicial system in general and the second with the Constitutional Court. These two sections will be discussed separately here.

I. The judicial system (Articles 1 to 16)

The section begins with a few Articles of a general nature (Articles 1 to 4) and then goes on to provide that the judiciary shall include the Court of Cassation, Courts of Appeal, Courts of First Instance and military courts (Article 5). I have the following comments on this section.

1. In addition to civil courts (Court of Cassation, Courts of Appeal and Courts of First Instance), Article 5 refers to military courts. However, although fairly detailed rules are laid down concerning the first category of courts (in Articles 6 et seq. for the Court of Cassation and Articles 11 et seq. for the Courts of Appeal and Courts of First Instance), there are no specific provisions concerning the military courts. In a law on organisation of the judiciary it would be, to say the least, advisable to provide some indication, if only in general terms (the detailed rules could be set forth in a special statute), as to how the military courts are organised, their members and jurisdiction and what sentences they may impose (for example, may they pronounce the death penalty?). In any case, it is strange that the military courts should simply be mentioned, without there being at least some reference to the above issues.

2. In the case of the civil courts, as opposed to the military ones, Chapter VI does not contain any clear indication of the jurisdiction of the various courts making up the judicial system. Although Article 2 refers to criminal proceedings, civil liability issues and matters generally coming within the scope of private law, no mention is made of any administrative court. On reading this section, it is therefore difficult to understand how, by what courts and according to which procedures public-law disputes between private persons and the authorities are settled. In other words, with reference to a well-known distinction in French law, do administrative courts exist alongside the ordinary courts, or are disputes involving the administrative authorities dealt with by the civil courts or even by the authorities themselves? If the latter applies, would it not be appropriate, at least, to provide for a right of appeal to a Supreme Administrative Court or a special division of the Court of Cassation?

3. Along the same lines, Chapter VI has another shortcoming. Although paragraph 2 of Article 5 rightly bans extraordinary courts, no mention is made of specialised courts which may have special jurisdiction either *ratione materiae*, e.g. courts dealing with disputes relating to a specific field of the law - such as labour law (industrial tribunals), or *ratione personae* (e.g. juvenile courts).

4. As regards layout, it is unfortunate that general provisions, applying to all courts, have been intermingled with organisational provisions relating to specific courts. For instance, Articles 8 and 9, which are in fact general in nature, should come immediately after Articles 1 to 4 and not be placed between the Articles on the Court of Cassation (Articles 5 to 7) and those on the Courts of Appeal and Courts of First Instance (Articles 10 and 11).

5. With regard to removal of judges from office, Chapter VI provides for two separate procedures, depending on whether the judge is a member of the Court of Cassation (the supreme court) or another court. In the first case, the decision must be taken by parliament (paragraph 4 of Article 6), whereas in the second authority is vested in the Supreme Council of Justice (paragraph 3 of Article 15). The question can rightly be raised as to whether there are good grounds for this difference in treatment, which the difference in hierarchical status between the two categories of judges does not appear to justify. Authority in disciplinary matters, including the authority to remove judges from office, should be conferred on a specialist body such as a Supreme Council of Justice, and not a political institution such as parliament, even in the case of judges of the supreme court, for there is too great a risk that decisions will be based on political considerations, especially since the grounds for removal from office are not always very precise (see in particular the reference to mental illness in paragraph 4 of Article 6).

Moreover, whereas paragraph 4 of Article 6 provides that judges of the supreme court may be removed from office on the grounds set out in that paragraph, paragraph 1 of Article 10 provides that judges of the Courts of Appeal and Courts of First Instance cannot be removed from office while performing their duties. Why this apparently groundless difference in treatment?

6. It is difficult to understand why paragraph 2 of Article 6 provides that only the President and Vice-President of the Court of Cassation shall be appointed by parliament, voting on a motion by the President of the Republic, whereas the latter takes no part in the appointment procedure concerning other judges of the same court. It would be preferable if all judges, whether the President, Vice-President or other members of the court, were appointed according to the same procedure. In any case, the President of the Republic's involvement is not very judicious for reasons relating to compliance with the principle of separation of powers. It would be preferable if the President and Vice-President of the Court of Cassation were elected by their fellow judges, as paragraph 2 of Article 18 moreover provides with regard to the President of the Constitutional Court.

Although Article 6 contains provisions on the way in which judges are appointed to the supreme court, it is not known how judges are appointed to the other courts, since Article 10 contains nothing on this matter.

7. Article 13 deals with the Principal State Prosecutor. This Article raises at least two questions. Firstly, paragraph 2 refers to the prosecutor's judicial activities. Can it be inferred from this that the office entails yet other duties? If so, what are those duties?

Secondly, paragraph 1 provides that the Principal State Prosecutor handles the prosecution during investigation and trial. It is not very clear whether the

Principal State Prosecutor is solely a prosecuting authority or also an investigating authority. In other words, does Albanian law provide for investigating judges, in addition to the Principal State Prosecutor and trial judges? It should be pointed out in this connection that, according to the case-law of the institutions of the European Convention on Human Rights, the functions of investigation, prosecution and judgment must be fulfilled by separate bodies and simultaneous performance of these functions by the same persons (simultaneous office holding) is at variance with Article 6 of the Convention. In respect of these very sensitive issues, which are of the utmost importance in guaranteeing the fairness of legal proceedings, it would be desirable to lay down more explicit, more detailed rules.

Paragraph 4 of Article 13 is not very clear. Is it not contrary to the principle of the independence of the judiciary that prosecutors should be required to comply with orders from their superiors? The aforementioned principle applies to all members of the national legal service, including prosecutors! Moreover, it is difficult to understand in what way a prosecutor could receive orders from a judicial authority (see the end of paragraph 4 of Article 13).

8.Article 15 covers the Supreme Council of Justice. The following observations can be made concerning this Article.

Firstly, the fact that the Council is headed by the President of the Republic is quite astonishing from the angle of compliance with the principle of separation of powers. For the same reasons, the fact that the Minister of Justice is a member of the Council seems very unfortunate, to say the least. As for the nine distinguished lawyers who also make up the Council, it is not very clear who appoints them. Are they appointed by the members of the supreme court and the Principal State Prosecutor at a joint meeting? In any case, the English translation of the text of paragraph 1 of Article 15 is not sufficiently explicit.

Secondly, in view of the Council's significant powers, it might be considered unusual that it should itself adopt the rules governing the actual extent of its authority and how it functions. Would it not be more appropriate if all these matters were dealt with in a statute passed by parliament? This would, in any case, be a far more democratic solution.

9.Paragraph 2 of Article 12 defines a number of rights of the defence, in particular the right of a defendant who does not speak Albanian to be assisted by an interpreter. However, this is only one right, albeit an important one, of the defence. What is the situation with regard to the others, especially the right to be assisted by counsel, if necessary appointed by the court, etc. (see paragraph 3 of Article 6 of the European Convention on Human Rights)? However, more detailed rules on this subject may be laid down elsewhere. Perhaps in the chapter on fundamental rights?

II.**The Constitutional Court (Articles 17 to 28)**

10.Article 17 defines the task of the Constitutional Court. Although this court is responsible for safeguarding the Constitution, it does not come within its jurisdiction to ensure that the ordinary law is enforced, as the Article wrongly seems to imply. See also Article 27, which refers to constitutionality and lawfulness.

11.Although Article 18 does not contain any express provision on the subject, the twelve-year term of office of members of the Constitutional Court would appear not to be renewable. However, it would be preferable if this were stated in clearer terms.

12.Article 21 deals with the other offices which Constitutional Court judges are disqualified from holding. Although it is understandable - and even necessary - that such judges should not be allowed to become members of parliament or the government or to hold simultaneous office as judges in the ordinary courts (this follows from the principle of separation of powers), it is far more difficult to justify the fact that Constitutional Court judges are forbidden to join political parties or other political organisations. These proscriptions could even be regarded as infringements of the rights to freedom of opinion and freedom of assembly enjoyed by all citizens.

13.Article 24 defines the powers of the Constitutional Court. Some of the paragraphs are not very explicit and could be more precise. What is the exact difference between the powers conferred on the Constitutional Court in paragraphs 1 and 2?

Does the power conferred on the court at the end of paragraph 4 relate only to international treaties safeguarding human rights or to all international treaties? In the first instance, it is perfectly reasonable that the Constitutional Court should have jurisdiction, in view of the fact that the content of these treaties is almost identical with the series of fundamental rights normally set out in constitutions. On the other hand, judicial review of domestic law's compliance with all the international commitments entered into by a State is outside the scope of the habitual, normal jurisdiction of a constitutional court.

14.It should be specified in Article 25 whether the Constitutional Court has jurisdiction to perform constitutional reviews only according to an objective standard or only with reference to the particular circumstances of a case, or both at once.

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