CDL(1995)074e-add-restr
Strasbourg 18 December 1995

ADDENDUM to the OPINION ON THE ALBANIAN LAW ON THE ORGANISATION OF THE JUDICIARY

(Chapter VI of the transitional Constitution of the Republic of Albania)

COMMENTS

by Mr Hektor FRASHERI
Minister of Justice of the Republic of Albania

REPUBLIC OF ALBANIA
MINISTRY OF JUSTICE
PRIVATE OFFICE OF THE MINISTER
Tel. & fax. : 00 355 42 238 59

For the attention of
Mr Gianni BUQUICCHIO
Secretary to the Venice Commission
Council of Europe
STRASBOURG

Tirana, 7 December 1995

Sir,

This paper is intended to present our position on the draft report dated 23 November 1995 concerning the organisation of the judiciary in Albania, prepared by the Venice Commission's group of experts chaired by Professor MALINVERNI, Vice-President of the Commission.

It emerges from the report that Albanian legislation on the organisation of the judiciary is not fully known. The experts rightly refer to Law No. 7561 of 29 April 1992 concerning certain changes to Law No. 7491 of 29 April 1991 "on major constitutional provisions". However, it is incorrect to consider that to date no legislative action is in hand, or that no enactment of the Albanian parliament is in force in Albania for defining the rights and duties of judges, their training, etc. In this connection we would point out that under the terms of the aforementioned Constitutional Law, and for the purposes of its application, the Albanian parliament adopted Law No. 7574 of 24 June 1992 "On the organisation of justice and some changes to the Criminal Procedure Code and Civil Procedure Code" published in Official Gazette No. 3, 1992, page 147. We feel that this law and the subsequent amendments thereto make it possible to clarify straightforwardly, if not altogether satisfactorily, many of the questions raised in the report prepared by the Venice Commission's group of experts. We are also aware that during the transitional period which marks Albania's decisive break with the communist past, further improvements will be required in the implementation of legislative reform, notwithstanding the results achieved. I shall endeavour to explain how our legislation addresses many of the problems already discussed in the material transmitted to us. I am quite convinced that the sustained interest of the Albanian democratic state in restoring an independent and effective judiciary is forcefully demonstrated by the adoption of the legislation now governing the procedure of tribunals and courts, such as the Civil Code and Penal Code, the forthcoming adoption of the Code of Civil Procedure and the Administrative Code, the commencement of activities in the National College of the Judiciary, and the review of current legislation on the organisation of the judiciary and the status of magistrates, which has been carried out in keeping with the requirements of existing and recent legislation thanks to the constant assistance rendered.

Section B: the ordinary judicial system

Separation and independence of the judicial power and the legislative power is a principle founded on Article 3 and Article 5, last indent, of the major constitutional provisions. The latter provision further stipulates that "the judicial power is exercised by the courts, which are independent and guided solely by law". In Article 1 of Law No. 7561 of 29 April 1992, judicial power is defined as separate and independent from other powers. It is exercised only by the bodies recognised by the law "on major constitutional provisions". These fundamental principles are correctly identified in the first paragraph of this section of the Commission's opinion as the cornerstone of the function of administration of justice in a State governed by the rule of law, reflecting European standards in the matter. In response to the comments made concerning this area, I would state the following opinions.

Item a: military jurisdiction is a constituent of the Republic's judicial system. Military courts, just like the other tribunals and courts, are independent and subject only to the law. Wherever courts are mentioned in the law "on major constitutional provisions" and Law No. 7561 of 29 April 1992, military courts are naturally included. Every principle laid down in Articles 2, 6, 7 and 8 and in the other provision mentioned above indubitably covers military courts too. The constitutional principles in question apply to all authorities of the judicial order, whereas other aspects mentioned under heading "a", such as structure, composition, powers and jurisdiction, are embodied and developed in special laws, a practice already current in other states. Indeed, the number of courts and their distribution over the territory are defined by Presidential decree in accordance with Article 6 of Law No. 7574 of 24 June 1992 "on the organisation of the judiciary". The special jurisdiction ratione materiae of the military courts at first instance and of the Military Court of Appeal, together with their composition, are established in Article 5 of this law, while receiving more detailed treatment in the Code of Criminal Procedure (Articles 13, 14, 75, 80, 81, etc). I would stress at this juncture that the powers of these courts take into account the opinion of the Council of Europe experts. Unlike the past situation, in practice they do not try cases simply on the ground that military personnel are implicated, but solely where military crimes and offences have been committed. The possibility of excluding civilians and minors from military trials is already provided. I am thus able to say that their powers of jurisdiction are considerably limited. The Military Criminal Code defines the infringements of the law which constitute military crimes and offences.

Item b: administrative jurisdiction

Judicial review of administrative disputes, ie between the citizen and the state, corresponds to an obvious gap in the legislation which the present democratic state system has inherited from the former communist one. Nonetheless, there have recently been very significant advances towards settlement of this class of litigation by an independent judicial authority. For instance, the law on "Administrative offences", the law on "Compensation and return of property to former owners" and many others already make provision for the review and settlement of such disputes by the existing courts. Jurisdiction in civil and criminal cases and in all other branches of litigation covered by special laws is assigned to the same courts. This is the reason why, as noted in the Commission's report, Article 2 of the law "on major constitutional provisions" does not mention the inclusion of administrative litigation in the jurisdiction of the courts.

The government has issued a special decree setting up a group of experts which, under Ministry of Justice supervision, is engaged in work on the drafting of the Administrative Code. The Code will define the concepts of administrative body and administrative act, specify administrative powers, make arrangements for adopting and appealing decisions, and regulate judicial process.

Item c: specialised tribunals

Since budgetary constraints preclude the constitution of special judicial systems such as juvenile courts, courts dealing with welfare questions, commercial courts and administrative courts, a separate chapter of the Civil Procedure Code which is in preparation will be devoted to special proceedings. It is planned to establish specific sectors and judges qualified to apply special, as opposed to general, rules of procedure. In line with the above arrangements, deriving from the adoption of codes, subsequent amendments will be made to the law on the organisation of the judiciary.

Item d: appointment of judges and term of office

Also under the terms of the law "on major constitutional provisions", the judges of the Court of Cassation, including its President and Vice-President, are elected by parliament (People's Assembly). This is an exclusive parliamentary power, and we feel that the nomination of the court's President and two Vice-Presidents by the President of the Republic in no way prevents parliament from fulfilling the responsibilities vested in it by the Constitution. Thus the members of parliament have unrestricted initiative to propose other lists of candidates and are guaranteed the right to deliberate on them.

Where district and appeal court judges are concerned, the constitutional laws and the law on the organisation of the judiciary do not prescribe any duration of appointment and specify no limited period.

Item e: immunities and guarantees against dismissal

We consider incorrect the conclusion drawn in the third paragraph of item "e" that the relevant chapter of the Constitutional Law No. 7561 of 29 April 1992 does not specify the grounds for removal of district and appeal court judges, and that there is no other applicable statutory provision in this regard. The relevant procedure is laid down in Article 19 of Law No. 7574 of 24 June 1992. This provision defines inter alia the grounds and causes for the removal of judges and the cases of disqualification for criminal acts and other offences, health reasons, and conduct incompatible with the moral standing of judicial office, stipulations which as a whole are in keeping with the various European conventions and the United Nations documents on the independence of courts. It should be further mentioned that according to the third paragraph of Article 6 of the aforementioned law, Court of Cassation judges may be neither arrested nor convicted for acts performed in the discharge of their office. The fourth paragraph deals with cases where they may be removed under conditions strictly defined by law. Article 10 concerns the immunity of district and appeal court judges. The apparent inconsistency in this respect may be due to the legislative technique, but we are of the opinion that there is no inequality whatsoever regarding immunity. The substance of Article 21 of the law on the organisation of the judiciary, we feel, tends to support this argument by dealing in general terms with the immunity of judges, "deputy" judges and prosecutors. Reference is made to judges in general, with no distinction between the various components of the judicial system. We are aware that there is room for further improvement in the substance of the aforementioned provisions.

Item f: qualification and incompatibilities

Regarding the minimum qualifications for judicial office, the experts were quite right to emphasise the questions raised by this subject. Their inclusion in a constitutional text would be inexpedient; they are to be clarified in detail by suitable legislation for all levels of jurisdiction.

We would nevertheless refer to Article 17 of Law No. 7574 on the organisation of the judiciary which provides that the offices of judge and prosecutor may be held by Albanian nationals in possession of a law degree, full rights and an unblemished moral character. It is obvious that the absolute requirement of a law degree renders initial training indispensable, and we realise the need for magistrates' postgraduate training. It is an accepted fact that during the period of communist rule it was impossible even to contemplate a judges' training institute, ie College of the Judiciary, whereas this need has been very evident and acutely felt since the restoration of democratic government. Now that the new Penal Code is in force, and in order to maintain current international standards relating to the composition of benches of permanent judges, many beginners in the legal profession are appointed to judicial office upon completion of their university courses, and the needs are still apparent. The problem of judges' training should be satisfactorily resolved once the National College of the Judiciary opens and begins operating.

Regarding the legal status of judges and prosecutors, attention should also be drawn to Article 18 of the aforementioned law providing for the incompatibility of this office with any other mandate of electoral origin, any other public office carrying emoluments and income, and any other function explicitly defined by law.

Item g: prosecutors

We have no particular comment concerning this institution except in relation to the fifth paragraph under this heading; it is stressed that the rights and duties of public prosecutors in the discharge of their functions are prescribed by the same law, "organisation of the judiciary". Their rights and duties, legal status, requisite qualifications, appointment, transfer and removal are governed by the provisions also applying to judges.

May we point out, however, that the structure, administrative subordination and legal (judicial) independence of this office, though settled by law at the present time, may be revised during the drafting of a new Constitution - particularly its administrative subordination and the legitimation and consolidation of its legal (judicial) independence. The entry into force of the Code of Criminal Procedure affords still stronger legitimation for the independent legal status of prosecutors in trying criminal cases.

Referring to the terms of Article 13 of the constitutional laws, we consider that the first paragraph effectively sanctions the principle of the accusatory system. The prosecutor's position in court proceedings must be seen in relation to the substance of Article 2, which assigns courts the position of authorities responsible for administering justice on the basis of legal process in conformity with universally acknowledged standards. It is in the same context and in accordance with these principles that the general rules of investigation and trial of crimes and offences are defined, and here the adoption of the Code of Criminal Procedure has allowed new procedural standards to be established. On numerous important points of procedure, the activity of prosecutors and criminal investigation departments is subject to court supervision. For example, police custody, short-term imprisonment, length of pre-trial detention, preliminary investigative steps, preliminary evidence, seizure and attachment are regulated in this way. More importantly, any facts incriminating an accused person are accepted as evidence only if verified and assessed by the court. Consequently, our conclusion is that no further question of an "executive monopoly over investigation" arises. According to law, the prosecutor no longer performs extra-judicial functions.

Item h: the Supreme Council of Justice

Under Article 15 of Chapter IV of the "major constitutional provisions", the Supreme Council of Justice is the sole authority that determines the appointment, transfer and disciplinary responsibility of judges of the courts of first instance and courts of appeal, as well as prosecutors. To give this vitally important body its foundation in law, we chose the Italian pattern from the existing continental models. As already noted, the Council is chaired by the President of the Republic (to ensure its independence, according to the letter of the law), and the Commission is also acquainted with the role and extent of participation of the Minister of Justice in the appointment procedure and the proposal of disciplinary measures. To the best of our knowledge, the right of the Minister of Justice to propose and discuss the candidatures of magistrates in his capacity as a member of the Supreme Council of Justice is accepted in some European states. Likewise, the Minister of Justice is entitled to propose disciplinary measures against judges, short of interference

with their judicial independence. The appointment of prosecutors at the proposal of the General Prosecutor is linked with the conception of the Prosecutor's Office as a strictly centralised body. Further improvements in this institution are plainly expedient in order to enhance its role and function, considering its vital importance. The same remarks apply to the suggestions made concerning its rules and operation. These matters will need to receive more attention during work to draft a new law on the organisation of the judiciary and especially the new Constitution.

Item i: court budgets

In accordance with the second paragraph of Article 29 of the "major constitutional provisions", the judiciary has its own budget, adopted at the proposal of the Council of Ministers by the People's Assembly and fixed at a sufficient level for its normal functioning. We see nothing unlawful in the fact that the Ministry of Justice, as a constituent and executive body of the government, calls for and accepts budgetary and financial estimates from the courts each year. The Ministry performs a function of good housekeeping by preparing a draft budget which caters for all components of the judicial system. These rules are enshrined in the law on the state budget, not established by Ministry of Justice administrative procedure. Thus, Law No. 7906 of 4 April 1995 on the 1995 State budget (Official Gazette Nos. 8, 9 and 10, 1995) and Law No. 7944 of 1 June 1995 (Official Gazette No. 13, page 557) provide that the budget allocated to the justice system shall be adopted separately for each of the following heads: Ministry structure; General Directorate of Prison Administration; judicial system, each court and tribunal being individually designated. It ensures that each of the budgetary items, and the accounting rules, are adhered to. Following the adoption of the budget by the People's Assembly, it is managed independently by the courts and tribunals themselves with no Ministry intervention.

Judges' salaries are far higher than those of other public officials of bodies coming under the budget. A Court of First Instance judge is paid three or four times more than an engineer or a doctor. Judges' and prosecutors' salaries are fixed by a law passed in the People's Assembly. It is already established that their salaries are not subject to reduction. It would of course be desirable to regulate this principle by law.

Section 2 (i): application of certain Penal Code provisions to judges and prosecutors

The foreign experts who made a valuable contribution during the preparation of the draft Penal Code offered no comment on the substance of the provisions in question. These provisions, in our opinion, ensure the administration of justice and guarantee the rights and interests of citizens. Ill-intentioned application of these and other provisions would certainly be detrimental to the image of justice and to the citizens' interests. In current practice, however, there are no occurrences of misapplication, much less ill-intentioned application.

Section D: Some related problems in the judicial system

a. Concerning "deputy" judges

Under the procedural arrangements governing the sole areas of civil litigation and minor criminal offences, the court is composed of a judge and two deputy judges, ie a bench. Deputy judges have the same rights as full judges with regard to procedure. This institution, as noted in the report, is also recognised in other countries. On the whole, deputy judges have law degrees or are undergoing university law courses. Deputy judges have the same rights and duties; their designation in the report under consideration as "non-permanent" has nothing to do with what are called extraordinary courts. It seems needless to draw any further distinctions.

b. Execution of civil judgments forms a specific chapter of the draft Code of Civil Procedure to be completed shortly. We are sure that it will settle the questions raised in the report. As to the execution of criminal judgments, the Ministry of Justice has finished preparing the draft of a new law and is in the process of incorporating all acceptable opinions put forward in this connection by the Council of Europe experts.

c. The independent legal professions (the Bar)

We consider that the Bar is already developing favourably. The role of the Ministry of Justice is to assist in the organisation and finalisation of this institution. During preparation of the draft law now in force, the Ministry of Justice made use of the relevant Italian, German, Scandinavian and English models. Lawyers' activity within a bar association structure affords greater assurance of independence, having regard to the conditions in our country and looking ahead to the renewal and rebirth of the bar tradition. The model chosen seems appropriate, but this need not rule out subsequent improvement.

The opinions expressed above do not contest the need for further improvement in the current legislation, including the Constitutional Laws, the organisation and operation of the Constitutional Court, and the judicial system itself. Rest assured that the activity of the Ministry of Justice is wholly devoted to creating suitable conditions for normal judicial activity guaranteeing the application of the principle of independence of the judiciary. We accordingly value the remarks made by the Venice Commission and deem your assistance indispensable.

Respectfully,

The Minister

(signature)

Hektor FRASHERI