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98/811

Council of Europe
Conseil de l'Europe

Strasbourg, 24 February 1998
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CDL (98) 21
Or. Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

O P I N I O N

ON RECENT AMENDMENTS TO THE ALBANIAN LAW ON THE MAJOR CONSTITUTIONAL PROVISIONS

by Mr Serhiy HOLOVATY
(Ukraine)

OPINION

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I. INTRODUCTION

No one can be left unaffected by the tragic recent turmoil which has shaken the foundations of the Albanian state. The loss of life and damage to property will leave scars on the psyche of the nation for years to come. The recently-elected Albanian government should be commended for its efforts and achievements in stabilising a drastic situation and putting Albania on the road to recovery.

The effort required to rebuilding a state shattered by civil strife and without firm democratic foundations is immense. Specific measures to correct particular situations must be taken in the context of a systemic approach to balancing fundamental individual freedoms with state intervention to protect the collective public interest. Only then will the body politic be sufficiently stabilised to allow for the development of civil society and economic growth. It is in this context that the questions put before the rapporteurs must be considered.

II. STATE INTERVENTION IN THE CASE OF PYRAMID SCHEMES

There is no doubt that the social crisis precipitated by the pyramid scandal warrants direct state intervention to control and rectify the problem. The issue is whether Article 10 of *The Law on the Major Constitutional Provisions*[1] (the "Law") as constituted achieves this purpose.

Every society which aspires to achieve social harmony and economic prosperity must be governed by the rule of law. One of the fundamental principles of the rule of law is that an individual is free to engage in any activity except that which is expressly prohibited by law. Indeed, it is often enshrined by countries as a constitutional norm. Conditions which warrant suspension or encroachment on this right by the state must be clearly articulated and must be of an extra-ordinary nature involving matters of public order or national security.

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[1] Law No. 7491, dated 29 April 1991, as amended by Law No. 8255 Article 1, dated 19 November 1997

There a number of concerns regarding Article 10 of Chapter I of the Law arising from the attempt to establish both the principles of control and of freedom of economic activity in one section. First, the article emphasises state control over private economic activity. The scope of freedom to engage in private sector activity is put into question by the fact that it "should not develop contrary to the social interest and should not affect the security, freedom and dignity of man". These are very broad, ill-defined parameters which restrict such economic initiative.

Second, the third paragraph of Article 10, concerning the placing under administration the "unlawful activity of private subjects" is so broadly drafted that it could threaten the very economic development which Albania seeks to promote. While the "degree of intervention" is to be defined by law, the issue of what constitutes unlawful activity which "widely touches the interests of social groups or individuals, which opposes and damages the principles of the free market economy and of the national and international economic and fiscal policies, which infringes the economic and social stability of the country" is left undefined.

Conversely, the property rights guarantees set out in Articles 11 and 12 pale in comparison. Neither these guarantees nor the provisions in Article 10 providing that the right to appeal to the courts remains in tact, or that property will only be expropriated "for defence of the interests of injured parties" are likely to reassure domestic and international investors that the heavy hand of the state will not unduly interfere in their activity. Indeed, vague formulas such as "social interest" and "interests" of injured parties, individuals or social groups were traditionally used by communist regimes to smother individual rights in favour of the state. Given the interventionist accent in the Law, market actors will look sceptically upon restrictions on state interference described in these terms.

Unless there is a clear separation between the issues of **public order** and **private activity** in Albania's constitutional legislation, I fear that the intention of the Legislator to promote social stability and economic growth will be undermined.

I suggest that the two issues stand alone. The Law should first expand on and clarify the constitutional principles regarding the protection of property rights as set out in Chapter VI, Articles 27 (Right to Private Property and Inheritance) and 36 (The Freedom of Creation and the Intellectual Property Rights) of the Law. These principles could then be enshrined in a Civil Code and attendant legislation establishing the legal framework for the protection of the private sector and development of economic growth and social stability.

A separate provision would protect the public interest against social upheaval or abuse by economic actors. However, it should be clear that any such article is an exception to the general rule of personal freedom, and has a temporary emergency character. In this context, to underscore its exceptional character, the restrictive language of Article 10

would perhaps better be suited in the context of a clarified and expanded Article 41 (Temporary Restriction of Rights) in Chapter VI of the Law, rather than in Chapter I (General Provisions). A redrafted Article 41 could specify conditions under which the state is allowed to interfere in the private affairs of its citizens in order to preserve national security and to protect the public.

Legislation could then be drafted on the basis of this constitutional norm to deal with specific circumstances, such as the present case involving pyramid schemes. This approach would send an unequivocal message to market actors and society in general that the normal condition involves freedom to participate in market activity, with the understanding that in extra-ordinary situations the state reserves to itself the right to protect the public interest through intervention, if need be.

While the current particularities of the Albanian situation may dictate otherwise, government, in general, should eschew heavy handed intervention to control the behaviour of the market in favour of a comprehensive, systemic regulatory system designed to promote private sector development as well as to control abuse. A well functioning bankruptcy, securities, taxation and financial institutions framework will do more to stabilise Albanian society that the open-ended threat of forced administration and expropriation. Constitutions by definition should be difficult to change, and the specificity with which the issue of control of economic activity is laid out in the Law may only impede the government's desire to restore public confidence in the stability of Albania's institutions and economy. While Albania may not have much experience with market-oriented regulatory concepts, and they admittedly may not be readily achievable, they should nevertheless form the basis of any strategy of renewal.

III. "ROTATION" AND THE CONSTITUTIONAL COURT

It would be an understatement to describe the situation involving the Constitutional Court of Albania (the "Court") as complicated. From the material provided by Minister Imami it appears that this situation involves a naked struggle for power between the Court and the legislative and executive branches of power. The People's Assembly was forced to enact amendments to the Law to try and rescue the situation[2]. While it is difficult to comment on the political aspects of this conflict, some juridical conclusions can be made based on the materials provided and the text of the Law.

My comments involve the following five areas concerning Chapter V, Articles 18 and 23: the issue of rotation and renewal of judges; the term of office; suspension of the functioning of the Court; the functioning of the Court when not fully constituted; and effect of achieving the rotation.

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[2] Law No. 8257, dated 19 November 1997, Articles 1 & 2, amending the Law, Chapter V, Article 18 and adding Article 18/1 respectively.

1. Rotation and renewal

The issue of whether the appointment of a judge to the Court under Article 23 constitutes a "rotation" within the meaning of Article 18 would seem to be clear. On a plain reading of the original text of the Law, it seems to me that the two articles are clearly discreet and contemplate different circumstances. Article18 addresses the general scheme of rotation, and Article 23 addresses exceptional remedial situations which will continue to allow the Court to function fully constituted until the rotation mechanism is triggered again. It is difficult to argue with the conclusions of the minority decision of the Court (as presented by Minister Imami) that the interpretation given by the majority constitutes a usurpation of legislative authority.

The People's Assembly took the non-confrontational position in enacting Article 1 of the Law No. 8257 (now the last four paragraphs of Article 18 in Chapter V of the Law) in order to allow the state and its institutions to function properly. However, an argument could have been made that having breached the Law in this way, the Court lost its competency to function, calling into question the legality of all its decisions after May 1995. The clarification set out in Article 1 is, in my opinion, a very sensible solution to this impasse.

2. Term of office

The second paragraph of the amendment is designed to ensure that the rotation mechanism takes place within a reasonable period of time. This is entirely rational and acceptable as a norm to ensure the smooth functioning of the work of the Court. It should avoid any misunderstanding concerning timing for rotation in the future.

3. Suspension of the functioning of the Court

The third paragraph of the amendment imposes a check on the Court, clearly articulating the issue which the People's Assembly skirted in the first instance, namely that the Court loses jurisdiction and ceases to function if it does not perform its constitutionally mandated function to constitute itself in the manner set out in the highest law of the land. This again would seem to be a prudent and acceptable constitutional provision to facilitate the effective operation of the rotation system.

4. Jurisdiction of the Court when not fully constituted

The fourth paragraph of the amendment sensibly rounds out the mechanism of rotation to fulfil the intent of allowing the Court to function effectively. It acts as a check on possible machinations on the part of the legislative and executive branches to hinder the work of the Court.

However, the wording of paragraph four of the amendment appears to conflict with the first paragraph of the original text of Article 18, which provides that the Court is

"composed" of nine members. This implies that to exercise competent authority the Court should be fully constituted. Contextually, the balance of the original text and the amendments read together point to such an intention. Therefore, the last paragraph would appear to be an exception to the general principle of competency being vested only in a fully constituted Court.

Therefore, in order to remove any opportunity for misunderstanding between the two provisions, perhaps the final paragraph of Article 18 should be amended to make it clear that this provision operates notwithstanding the other provisions of the article.

5. Effecting the rotation

This concerns Article 2 of Law No. 8257, enacted as Article 18/1 of the Law. Although we do not have the benefit of the text of the Court's decision, I agree that the Court appears to have exceeded its jurisdiction in passing judgement on a validly enacted amendment to the Law. The Court does not appear to have the competence under Article 24 of the Law to strike down a constitutional amendment. The right to amend the Law rests with the People's Assembly in accordance with the procedures of Article 43 thereof, for which it is accountable to the people of Albania. The decision of the Court appears to usurp the authority of the People's Assembly, and as such runs counter to fundamental democratic principles. It is a travesty of democracy for appointed, unaccountable judges to arrogate to themselves supreme constitutional authority by supplanting the exclusive mandate of the elected people's representatives to amend the constitution of the state.

6. Conclusion

Any time the judicial system and process become politicised, the rule of law is threatened and the foundations of a country's major institutions are shaken. I again commend the People's Assembly for the practical and conciliatory approach taken in attempting to resolve the crisis and to keep intact all of the nation's institutions involved, including the Constitutional Court. Perhaps this situation points to the need for an effective mechanism to discipline unlawful, illegal, or unbecoming conduct on the part of Albania's judiciary. Models of such institutions are plentiful throughout the democracies of the world and perhaps a body such as the High Council of Justice could be mandated to perform this function.