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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT LAW

ON THE ORGANISATION AND THE FUNCTIONING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA

Comments by:

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Comments on the "Law for Organization and Functioning of the Constitutional Court of the Republic of Albania" (Draft 1999.)

Art. 1. 2. For questions not regulated in the Law "the general procedural rules" apply.

For the sake of legal certainty it is recommended that the kind of procedure (civil, criminal, or administrative) be specified. For direct applicability even the relevant chapters of the Code of Civil (od other) Procedure could be referred to. It is possible that these subsidiary rules vary according to the given procedure of the Constitutional Court: for instance as a general rule the Civil Procedure prevails, but for the criminal accusation of the President of the Republic the Criminal Prodedure applies.

Art. 2. The Constitutional Court guarantees the respect for the Constitution and determins its final interpretation.

This Article supposedly repeats the Constitution or the Constitutional Court Act (which I unfortunately was not able to read together with the text of the Law.) A further competence of the Constitutional Court could be added: the annulment of unconstitutional Laws. This is the competence that makes a Constitutional Court for a Constitutional Court.

Art. 3. 3. Responsibility for "any action that violates the activity of the Constitutional Court".

An unusual provision. Although specific circumstances in Albania may justify it I do not think that such sanctions could maintain or further the authority of the Constitutional Court. The provision is too wide and vague. See also Art. 54.

4. No right to give opinion or make public declarations concerning pending cases.

Such a prohibition makes sense only for members of the Court, the clerks and other staff. A ban on comments on cases in the press or by state organs or even by the parties would be unconstituional.

Art. 6. 2. Financial means include every non forbidden income.

The provision is not understandable in the context of the Article which provides for the implementation of Art. 3. concerning the financial independence of the Court.

Art. 10. In his absence, the chairman's duties are delt with by "a member appointed by him".

Does it mean that the Chairman of the Constitutional Court appoints the Vice-President of the Court? Or is it an appointment of a deputy for a single occasion? Article 7. that does not speak of a permanent deputy chairman seems to affirm the second interpretation. But even in this

case the delegation of the powers of the president to a judge should be regulated by law. The person of the acting chairman could for instance be determined by the principle of seniority.

Art. 11. 4. The Chairman "organizes the work among judges".

If this means the appointment of the judge referring the case to the plenary session ("relater" in the words of Art. 24.) it will be provided for by Art. 24. I can hardly imagine other organizational measures taken by the Chairman without endangering the independence of the judges. Item 4. seems therefore to be not necessary.

Art. 13. Own police forces

I am not sure whether it is appropriate to keep police forces "in the service" of a Constitutional Court. Regular police or security forces can of course maintain the order at the Constitutional Court. Probably the problem is only a linguistic one.

Art 14. and 15. Immunity of judges

If the immunity of the judges and their salary are regulated in depth, the incompatibility rules should also be included in that chapter.

Art. 18. 2. Closed doors can be ordered when necessary

Public process as a main rule is not guaranteed if the Constitutional Court is totally free to decide on the exclusion of the public. The condition for closed doors ("when the Court thinks it to be necessary") is too broad. Why would not the usual grounds in the Civil or Criminal Procedure be applicable for the constitutional process?

Art.20. Oral process

I understand that the Albanian Constitutional Court shall follow the principles of public and oral process also in its own procedure. One could, however, take the peculiarities of a constitutional court in consideration. The Constitutional Court has competencies where it does not decide on a concrete infringement on a concrete person's right, therefore no facts shall be established. In cases of abstracte norm control (but similarily, if the unconstitutionality of a law or a decree shall be decided upon in a concrete case) the Court examines only legal arguments which must be submitted already in the request. According my experience laymen petitioners but also ministers or members of parliament can usually not present new legal arguments during an oral hearing. If - very rarely - a legal question shall to be clarified or the legislative history or the motivs for the regulation, the better way is to ask for written explanation.
According Art. 20 the oral process is not the main rule but the absolute one. It seems me to be advisable to allow for exception and to make it possible to the Constitutional Court to reach the decision in a written process in all competencies and in cases where there is no need for guaranteeing proceedural rights of a party. Such a possibility would be an enormous practical help for the Constitutional Court.

Art. 21. Defense

The application of the right of defense to the constitutional process from the constitutional guarantees in the criminal procedure seems not to be necessary and has not in all kind of cases a sense. I suppose the Law means rather the principle of the contradictory process.

Art. 22. The "neutrality" principle

All the three sentences in items 1., 2 and 3 are true but they are self-evident. It is not usual to elevate such obvious statements into the guiding principles of the constitutional process. They must be true for all judges, moreover - mutatis mutandis - for all civil servants in a democratic state. I think stressing those principles may be useful in a given political culture but not in the form of putting them into the Law.

Art. 23. 3. Publication of the summaries of decisions

A collection of decisions prepared by the Court itself, should be an official publication. It would be useful if the Law provided for the stucture of that publication. Obviously, such a collection contains the tenor of the most important decisions and a summary of the reasons. It is not clear what does it mean that the Court "put these summaries at the disposal" af state institutions etc. It is enough if the Court has to publish it.

Art. 24. 2. The Chairman appoints the "relater" judges

The method of appointment can not be objected. Nevertheless, I should like to refer to the more usual method that the Law provides for an objectiv selection of the judges drafting the decision (alphabetical order, number of the file or of registration etc.)

Art. 25. 3. (in connection with Art. 35. and 36) The request contains the names of interested persons. They include the persons (organs) against whom the request is submitted. The secretary general notifies the interested persons in due time.

Does the applicant alone define who are the "interested persons"? I see nowhere any provision concerning the power of the Court to involve other parties into the process. The same is valid for

Art. 37. and 38. Experts and witnesses are called on "with the request of the parties".

Is it really intended that only the parties can initiate to hear an expert or a witness? Only concerning written documents one finds Art. 56 which obliges anyone to provide the Court with documents. It is to be assumed that this provision is broader than Art. 26 according to which documents will be attached to the case "with the request of the parties".

Art. 27. 2. Exhaustion of all remedies is requested only in case of a complaint for violation of the right to fair trial.

The Article, item 1. does not require that in case of violation of other "fundamental freedoms and rights of the individual" the applicant has to exhaust all judicial remedies (if any). It follows that in these cases the injured person may sue for remedy parallel in the ordinary courts and before the Constitutional Court. In order to avoid such parallelity the usual solution is that the constitutional process is indeed the last judicial means following all ordinary (and in some jurisdictions: extraordinary) remedies.

Art. 28. 3.

The both conditions for passing the case to the plenary session - legitimacy of the applicant and competence of the Constitutional Court - are conjuctive. For refusing the case, the item lists the same conjunctive conditions, that is both of legitimacy and competence must be lacking. Would it not be enough for not passing the case to the plenary if either the request is not submitted by authorized applicant or the competency of the Court can not be established? (That is: in the second half of the sentence and would be replaced by or.)

The same provision introduce the term "meeting of judges". There is no rule on the composition of this body. Is it the plenary session?

Art. 30. 2. "With prior approval of the Chairman a member of the Court" may preside over the plenary session.

See the remarks on Art. 10.

Art. 31. and 32.

I am not convinced that the Articles about rights and duties of judges are necessary. Once again, there are partly self-evident, partly it sounds rather strange to declare a judge's right "to express freely his opinion" in the final discussion. One provision may be kept and formulated more clearly: the duty to vote expresses that there is no possibility to abstain from voting. But this is included in Art. 46.

Art. 42. 2. Suspension of the application of a law is notified to the organ that approved the law

According to item 1. it is "the judge's meeting" that decidens upon suspension. Is it the plenary session?
The suspension of the application of a law effects all adressees of the given provision. Therefore the decision should be published in the Official Gazette or where it was published originally.

Art. 45. Limits of examination

It seems to me that the Law allows for not to be bound by the petition, although the examination remains "usually within the object of the request". According to the wording of the Article the exceptions have no limit. In would be not unnecessary to add that the Court shall remain within the object-matter of the petition even if it examines other laws than indicated in the motion. A further rule may be useful: if the applicant withdraws his/her request the Court may continue the process, provided that the clarification of the constitutionality of a law or otherwise the decision of the case is of public interest.

Art. 46.

Items1-6 and 7-8 are of procedural nature. Item 7 - the decision of the Constitutional Court is compulsory and final - is substantial. The two kinds of rules could be separated.

Art. 48.

The rule in the second sentence is not understandable. "The applicant can re-bring the (refused) request if conditions of having the necessary majority are created." What are the "conditions of a necessary majority"? The 2/3 of all judges - for practical reasons all plenary sessions - do have the conditions of a necessary majority. On the other side: from where could the appplican know that the majority of all judges has changed his mind and will now vote for his request?

Art. 51. Annulment of a law

Whether the gap caused by the annulment of a law be filled by a new regulation is in the decision of the legislation or government. The notification of the "proper organ" as foreseen in the Article has a sense if the essence of this rule is that the lawmaker has to respect the opinion of the Constitutional Court and has to "take the measures foreseen in the decison". In this case this is a pioneering rule.

The Law lacks of the regulation of other consrquences of the annulment of a law. At least the time of the annulment should be regulated: whether the law loses effect as a rule ex nunc or ex tunc. The impact of annulment on legal relationships and affairs based on the annihilated norm should also be regulated. (For instance: no effect on already closed legal relationships except criminal sentences etc.)

Art. 52.

This rule says that decisions on the interpretation of the Constitution have retroactive effect. I am not sure that this provision is practicable. Was it intended to rule that the interpretation shall apply for all actually running cases?

Art. 53. Interpretation of decisions

It is evident that the Court can correct technical mistakes in an earlier decision. I have, however, doubts whether it is advisable to deliver interpretations or to complete the decision with new rulings. In my opinion concerning the similar provision proposed by the Georgian Constitutional Court I already demonstrated the arguments that speak against the interpretation of an earlier decision. It is against the legal certainty, the final character of the decision, the dividing line between interpreting and changing the decision can not be drawn. I think, "to add" something to the decision (to the tenor? to the reasons?) would be even worse.
If the Law maintains this rule, the procedural preconditions should be regulated: who can initiate the interpretation? When?

Art. 54. 2. Implementation of Constitutional Court decisions

The decisions of the Constitutional Court are final and binding erga omnes. They are compulsory also for all "organs of the state administration". I cannot see what is the practical effect of a general rule that makes the government responsible for enforcing Constitutional Court decisions "through its administrative organs". From the point of view of the separation of powers such a special duty seems to be disquieting. The most important decisons of the Constitutional Court are self-executing as the annulment of laws or administrative acts or - in Albania - court decisions. If I understand correctly, positive rulings of the Court for future legislation are obligatory, as well (Art. 51.) Is then the rule in item 2. necessary?
I do not think that fines are appropriate measures for ensuring implementation of Constitutional Court decisions. (One should ask the Russian Constitutional Court about its experience with fines.)

Art. 57. Public announcement of "problems" of the Court

A very unusual provision. The "problems related to the activity of the Court" may incude anything - even political problems with the implementation of decisions or other political disputes between the Constitutional Court and other high state organs. This provision makes the impression that the Constitutional Court will have a forum to announce its position in political debates. It is better to avoid it. On the other side I feel doubts whether public mass media can constitutionally be obliged by a law to publish anything (be it a statement of a state organ).

Budapest, Sept. 13 1999.

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