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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT AMENDMENTS TO THE
CRIMINAL PROCEDURE AND CIVIL PROCEDURE CODES
OF ALBANIA**

on the basis of comments by

**Mr Peter PACZOLAY (Honorary President)
Mr Cyril RIBICIC (Member, Slovenia)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. By letter of 17 March 2014, the Minister the Minister of Justice of Albania, Mr Nasip Naço, requested an opinion on the draft law on an addition and amendment to Law no. 8116 dated 29.3.1996, "Code of Civil Procedure of Albania", as amended, and on the draft law on an addition and amendment to Law no. 7905 dated 23.3.1995, "Criminal Procedure of Albania", as amended (CDL-REF(2014)015).
2. This request is to be seen in the framework of a wider co-operation of the Venice Commission with the Albanian authorities for the reform of the Judiciary in Albania, as requested by the Minister by letter of 14 October 2013.
3. On 21 November 2013, a delegation of the Venice Commission, composed of Mr Sergio Bartole, accompanied by Mr Schnutz Dürr from the Secretariat and the Deputy Head of the Council of Europe Office in Tirana, Mr Olsi Dekovi, met (in chronological order): the President of the Constitutional Court of Albania, Mr Bashkim Dedja, the Deputy Minister of Justice, Mr Arben Isaraj, the Minister of Foreign Affairs, Mr Dimitir Bushati, and the Minister of State for Relations with Parliament, Mr Ilirjan Celibashi, in order to discuss judicial reform.
4. In parallel to these discussions, also on 21 September, the Minister of Justice met in Brussels with the President of the Venice Commission, Mr Gianni Buquicchio, accompanied by the Deputy Secretary of the Venice Commission, Ms Simona Granata-Menghini.
5. On the basis of these meetings, in a letter of 7 January 2014, the Minister identified six areas for reform for which he sought assistance from the Venice Commission:
 1. Checks and balances between the judicial, executive and legislative powers and within the judiciary itself;
 2. Redefining the constitutional position of the Supreme Court;
 3. Reforming the functioning of the High Council of Justice;
 4. Improving court administration;
 5. Improving the procedure of appointment of the Prosecutor General and defining the role of the Council of Prosecutors;
 6. Improving the constitutional position of the Judges of the Constitutional Court and defining the role of the National Judicial Conference.
6. The scope of the envisaged reforms, set out in the letter of 7 January 2014 and discussed in February 2014 in Tirana is thus very wide and involves both constitutional and legislative amendments.
7. On 18 and 19 February 2014 a delegation of the Venice Commission, composed of Messrs Sergio Bartole and Peter Paczolay and accompanied by Mr Schnutz Dürr from the Secretariat and the Head of the Council of Europe Office in Tirana, Mr Marco Leidekker, visited Tirana and had meetings with (in chronological order):
 - the Minister of Justice, Mr Nasip Naço, and Deputy Minister of Justice, Mr Ildir Peci,
 - the Chair of the Union of Judges, Mr Ervin Metalla,
 - the President of the Supreme (or High) Court, Mr Xhezair Zaganjori,
 - the Deputy Head of the High Council of Justice, Mr Elvis Cefa,
 - the Secretary General of the President's Office, Mr Arben Idrizi,
 - the Chair of the Bar Association, Mr Maksim Haxhia,
 - the Prosecutor General, Mr Adriatik Llalla,
 - as well as with the EU Delegation and EU and CEPEJ experts.

8. This opinion takes into account the information obtained during the above-mentioned visits. At its 98th plenary session (Venice, 21-22 March 2013), the Commission authorised the transmission of the results of the visits to the Albanian authorities prior to the next plenary session (CDL(2014)021).

9. *This opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Preliminary remarks

10. Both draft amendments have the same structure and a very similar content. They provide for the possibility to impose fines on lawyers and prosecutors who delay court proceedings through their absence or otherwise and they exclude access to the Supreme Court in certain cases. This opinion first examines the amendments to the Civil Procedure Code and will refer to the Criminal Procedure Code only to the extent that issues differ from those already raised in relation to the Civil Procedure Code.

11. This opinion is based on an English translation of the draft amendments, related articles of the Civil and Criminal Procedure Codes and explanatory memoranda. Some issues raised may be due to problems of translation.

III. Civil Procedure Code

A. Article 1 – adding a new Article 341/1 enabling the imposition of fines on lawyers

12. The draft amendments provide for the possibility to impose fines of up to 50.000 ALL on lawyers (and prosecutors) who cause undue delays in court proceedings, either through their absence or by other means.

13. The explanatory report sets out that amendments to the Law on the Profession of Lawyer adopted in 2012 had not addressed the issue of the punishment of lawyers who are repeatedly absent in civil or criminal judicial hearings. Such punishment would improve the administration of justice according to the standards of Article 6 of the European Convention on Human Rights. While the explanatory memorandum as such is not subject to this opinion, it should be pointed out that while trial within reasonable time is an important element of the standards set out in Article 6, this article itself does not call for the punishment of lawyers. It would be preferable to express the idea that by adopting the amendments Albania intends to achieve the standards of trial within reasonable time set out in Article 6 of the Convention.

14. During the meetings, the authorities explained that such punishment was necessary because in Albania lawyers frequently did not show up at court hearings in order to delay the proceedings. The President of the Union of Judges conceded that sometimes lawyers remain absent from proceedings and this would cause the postponement of court sessions. He pointed out however that often the lawyers were blackmailed by their clients to do so. Punishing the lawyers would not solve the issue.

15. In some countries the absence of a party from the hearing in civil proceedings will result in a judgement by default against the absent party. There are of course exceptions when other interests have to be safeguarded, e.g. the best interest of a child, but the introduction of such a provision in the Civil Procedure Code, in most cases, might help avoiding the punishment of the lawyer because he or she would lose the interest in being absent if this would not result in a delay of the proceedings.

16. In principle, fining lawyers for causing deliberate delay of court proceedings is acceptable as long as standards of fair trial are respected. No automatic sanction can be foreseen and the circumstances in each case need to be examined individually.

17. Draft Article 341/1 of the Civil Procedure Code provides that punishment is possible only if the absence or other delay is “without reasonable cause” and punishment can intervene only “after hearing the lawyer or the prosecutor”. The judge is obliged to examine whether there was “a barrier to take part” [in the hearing]. The judge thus has to examine the circumstances of the delay caused by the lawyer. The burden of proof that a delay was caused by the lawyer would thus lie with the judge and the lawyer could provide proof that there was a reasonable cause for the delay.

18. The draft Article 341/1 provides that the amount of the fine is to be determined in proportion to the harm caused by the absence or the delay. This welcome reference to the principle of proportionality should be extended to cover not only the objective harm but also the subjective situation of the lawyer.

19. Unless this is a mere issue of translation, the draft amendments should make it clear that not an absence from court “proceedings” but an absence from a court “hearing” can result in a fine. Conversely, the clause “or unfairly prevents or delays the normal proceedings of the hearings” (emphasis added) might be too narrow. Lawyers can delay proceedings not only at hearings but also at other procedural stages.

20. Like against a lawyer, the fines can also be imposed against prosecutors. Instead of fines, disciplinary proceedings against the prosecutor might be sufficient. If however the drafters deem it necessary to impose fines also against prosecutors, it should be ensured that the fine is not covered by the State, which the prosecutor represents.

21. Finally, in order not to defeat the purpose of the provision, the hearing of the lawyer should not delay the main proceedings.

B. Article 2 – Introduction of a new Article 432/1 of the Civil Procedure Code excluding certain types of appeals to the Supreme Court.

22. A major issue raised both in the letter of 7 January and during the meetings in Tirana is the backlog of some 12.000 cases at the Supreme Court. Many of the pending cases relate to issues of immovable property¹. The Minister of Justice and the President of the Supreme Court agree that the Court should reduce its case-load through more uniformisation judgements.

23. In uniformisation judgements, the plenum of the High Court decides on the provisions of the law, which have been interpreted differently by various appeals courts or – preventively – when such diverging interpretations are likely. These decisions have the force of binding precedent and should allow deciding similar cases more quickly. Given that uniformisation judgements are not abstract but are given in individual cases, the Venice Commission’s delegation did not object to this practice.

24. It seems however, that uniformisation judgements alone will not be sufficient for dealing with the backlog within reasonable time. In 2013, 5600 cases had been settled at the High Court but 5400 new cases had been registered.

¹ On 31 July 2012, the European Court of Human Rights has given a pilot judgement a typical property case : Manushaqe Puto and others v. Albania (application nos. 604/07, 43628/07, 46684/07 and 34770/09).

25. One solution proposed during the meetings was to transform the High Court into a real cassation court, which should not take any evidence and look into points of law only. In addition, any first instance jurisdiction should be removed from the High Court. The Venice Commission's delegation supported this idea.

26. The draft Article 432/1 uses another, *a priori* complementary approach. It maintains the general possibility to appeal to the Supreme Court but excludes the possibility to appeal to the Supreme Court in eleven cases, which concern mostly intermediary, procedural decisions and appeals against decisions of nullity.

27. This approach of exclusion of appeals to the Supreme Court seems reasonable and could indeed contribute to a reduction of the number of appeals to the Court. It remains however doubtful whether these exclusions will be sufficient without an exclusion of full appeals to the Court on the merits.

C. Article 3 – Transitional provisions

28. During the meetings in Tirana, the Venice Commission's delegation was asked whether the exclusion of appeals to the Court under draft Article 432/1 of the Civil Procedure Code could also apply to cases already pending before the Supreme Court.

29. The members of the delegation expressed doubts whether this would be only a merely procedural issue or could amount to a limitation of the right of access to court, if their cases, some of which were possibly pending for years were cancelled. Draft Article 3 settles this issue by providing that cases already pending before the Supreme Court are not concerned by the exclusion under draft Article 432/1. This is to be welcomed.

IV. Criminal Procedure Code

A. Article 1 - adding an Article 431/1 to the Code of Criminal Procedure providing for fines for lawyers.

30. Draft Article 431/1 of the Criminal Procedure Code is identical to draft Article 168/1 of the Civil Procedure Code. Even if the role of the defence council is more important in criminal proceedings than that of the parties' lawyers in civil proceedings, the considerations relating to Article 168/1 apply also to Article 431/1. In the application of this provision, the above mentioned safeguards (e.g. burden of proof, hearing of the lawyer, proportionality in the determination of the fine) have to be applied with the required caution in order to avoid arbitrary judgements against lawyers and prosecutors.

B. Article 2 – adding an Article 432/1 to the Code of Criminal Procedure excluding access to the Supreme Court in certain cases

31. Draft Article 432/1 is similar to draft Article 432/1 of the Civil Procedure Code in excluding the appeals to the Supreme Court in specific types of cases.

32. In the case of criminal proceedings, Article 2 of Protocol no. 7 to the European Convention on Human Rights, which provides for a right to appeal against criminal sentences, has to be respected. Draft Article 432/1 excludes mostly appeals against decisions favourable to the accused or convicted or they relate to a second appeal which is not required by Article 2 Protocol 7 of the Convention. Therefore these exceptions seem acceptable.

33. Like for the Civil Procedure Code, it seems however doubtful whether these amendments will result in a sufficient reduction of the case-load of the Supreme Court.

C. Article 3 – Transitional provisions

34. Article 3 of the draft amendments provides that cases already pending before the Supreme Court are not affected, which is welcome.

V. Conclusions

35. Overall, the draft amendments of the Civil and Criminal Procedure Codes are in conformity with standards and will contribute to improving the efficiency of the judicial system in Albania.

36. The fines provided for lawyers who delay court proceedings are acceptable if the safeguards provided for the draft are applied in a way excludes arbitrariness.

37. The exclusion of certain types of appeals to the Supreme Court is acceptable, provided they ensure the right to an appeal under Article 2 Protocol 7 of the Convention in criminal cases. These amendments may indeed result in a reduction of the number of appeals to the Supreme Court. However, it remains doubtful whether this reduction will be sufficient for having a significant impact on the case-load of the Supreme Court. The draft amendment does not address the proposal of transforming the Court into a cassation court that would only deal with points of law in appeal.

38. The Venice Commission remains at the disposal of the Albanian authorities for further assistance on the draft amendments to the civil and criminal procedure codes and especially for wider reforms of the judicial system in Albania.