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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 Sergio BARTOLE
(Italy)**

REMARKS ABOUT RECENT AMENDMENTS TO ALBANIAN MAJOR CONSTITUTIONAL PROVISIONS, by prof. SERGIO BARTOLE, University of Trieste.

This opinion about the new text of art. 10 of the Albanian Constitution is based on the unofficial translation circulated by the European Commission for democracy through law (CDL (98) 2). The amendments were adopted by Law n. 8255 art. 1, dated November 19, 1997, and imply the addition of four new provisions. They will be dealt according to their order.

A) Art. 10 of Chapter 1 deals with the freedom of economic initiative. " the country's economy is based on the diversity of ownership, the free initiative of all economic subjects and the regulatory role of the state ". Four new alinea have been added to the previous text of this article.

1. The new third alinea regard " the unlawful activity of private subjects " which alternatively

- a) widely touches the interests of social groups or individuals,
- b) opposes and damages the principals of the free market economy and of the national and international economic and fiscal policies,
- c) infringes the economic and social stability of the country.

While the provisions sub b) and c) are dealing with unlawful activities which encroach upon generally relevant interests and values, the provision sub a) regards interests which have individual or sectional relevance. The identification of these interests could be very difficult because the rule does not provide any additional standard to qualify the concerned interests. Whatever social group or individual could claim the protection provided for by the Constitution and great difficulties will arise for the legislative or administrative decision making processes.

Therefore the Albanian legislator has to specify the scope of application of this provision in implementing it. The adoption of criteria aimed at circumscribing " the interests of social groups or

individuals " should be advisable to connect them with the social interest of the society at large and to avoid the danger of their identification with sectional interests which don't deserve the peculiar protection offered by the new constitutional provisions. On the other side, if the concerned social groups or individuals had not only social and economic links but also legal relations with the private subjects whose unlawful activity is at stake, it would be necessary arranging a coordination between the procedure introduced by the new provisions and the judicial remedies which the general rules of the civil and commercial law offer to the damaged social groups and individuals.

A further remark regards the placement of the unlawful activity (rectius the economic activity which has been unlawfully managed) under the administration of specialized national and international public institutions, when that activity " opposes and damages the principals of the free market economy and of the national and international economic and fiscal policies ". It should be emphasized that the measure has to be provisional and shall be followed by public activity aimed at restoring the functioning of the free market economy.

2. The identification of " the degree of intervention " is a task of the law, which has to establish also " the control and administration of these private subjects ": obviously the State can pretend to putting under control or administration " private juridical persons " or the properties of " physical persons " (but not the " physical persons " themselves !). On the other side, reserving the matter to the law is coherent with the principles of the rule of law. But the damaged parties probably have at their disposal judicial remedies too. Is it convenient substituting the new administrative protection for those remedies without at least entrusting the judiciary with the task of ascertaining the legal positions of the damaged parties ? The implementing law would better comply with the principles of the rule of law if it coordinated the administrative intervention with the judicial protection of the rights of the peo-

ple concerned. Settling the economic conflicts between private subjects has to be a task of the judicial bodies even if social interests are at stake and public intervention is required. The Italian legislation (the s.c. Legge Prodi) offers an example of this kind of solutions.

3. It is difficult coordinating the third new provision with the first one as far as events which don't " touch " directly " the interests of social groups or individuals " are concerned. If the measures provided for by new art. 10 can be adopted also in cases 1) b and c), which don't regard directly interests of social groups or individuals, the intervention of the state cannot be connected only to " the defense of the interests of injured parties ". When cases 1) b and c) are at stake, the intervention is an instrument of economic policies which does not have apparently a direct link with private interests. The implementing law should settle the question of the different modalities of the adoption of the new intervention in different situations. It is obvious that interventions which have different purposes should have different legal rules.

4. The last provision emphasizes the importance of the suggested coordination between the administrative intervention and the judicial procedures with regard to the legal positions both of the unlawfully acting subjects and of the damaged parties.

Summarizing the comments submitted in this paper we can say that:

- the interests of social groups or individuals which the provisions are aimed at protecting, have to be connected with general social interests, that can be identified with those mentioned in the second alinea of art. 10 itself (" economic initiative of juridical and physical persons should not develop contrary to the social interest and should not affect the security, freedom and dignity of man ") or with the principals of the free market economy and of the national and international economic and fiscal policies or with the economic and social stability of the country;
- distinctions should be drawn with regard to the different purposes

and contents of the State's intervention when the different aims of the new third alinea of art. 10 are at stake; the purpose of restoring the functioning of the free market after the State's intervention has to be dealt with ";

- the new intervention provided for by the amendments adopted by the Albanian legislator has to be coordinated with the judicial procedures dealing with the same " unlawful activity of private subjects ".

2. New articles 18 and 18/1 of Chapter V, II, are aimed at changing the rules concerning the membership of the Constitutional Court.

Art. 18 shall imply the appointment of the judges by two different State's organs (People's Assembly and President of the Republic) with the replacement of three of the incumbent judges after three years and of other three judges " after three other years ". The newly appointed judges will have a term of twelve years. The selection of the judges, who are replaced for the first and second rotations, shall be made by casting lots among all the judges concerned.

But the rules adopted for the selection are not very clear. One provision says that the judges " are selected by casting lots among each groups of judges elected by the People's Assembly and by the President of the Republic ". It apparently provides for separate selections concerning separately the two groups of judges. But this arrangement shall function only if it is previously established (also by casting lots ?) the provenance of the judges who have to be selected. The replacement has to interest three judges. Therefore two alternative are possible: on one side the replacement of two " presidential " judges and of one " parliamentary " judge, or - the other way round - the replacement of one " presidential " judge and of one " parliamentary " judge. Obviously the rules implicitly require that a judge elected by the Assembly substitutes for an incumbent judge previously elected by the Assembly, and a judge appointed by the President substitutes for an incumbent judge previously appointed

by the President. In any case it is clearly stated that the replacement of a judge according to art. 23 cannot be substituted for replacement by rotation. For that reason the joint effects of artt. 18 and 23 will produce a great mobility in the membership of the Court.

According to art. 18 " the non-execution of the rotation suspends the functions of the Constitutional Court ". The solution is not satisfying: the functioning of the Court is a priority of the constitutional order and it is not advisable having it suspended in the exercise of its functions. Moreover the provision is obscure because it does not say if and when the Court will start working again. It would be preferable stripping the execution of the rotation off the Court if this body does not comply with its duty of casting lots in view of the rotation. Perhaps the task could be entrusted to the joint responsibility of the President of the Republic and of the Speaker of the People's Assembly.

The last alinea of art. 18 states that, " if after the execution of the rotation the new judges are not selected or appointed within the above mentioned term, the Constitutional Court functions with the members left ". The compliance with this rule could oblige the Court to work with a reduced membership. It would be advisable allowing the judges who are not replaced, to stay in office until they are replaced (prorogatio). This solution would avoid the possibility of interferences of other State's bodies aimed at creating the conditions of a disorder in the functioning of the Court or of its inability in answering to the claims submitted to it.

The law is evidently badly drafted and deserves reconsideration. Getting rid of the Constitutional Court is not a purpose that the Parliament is allowed to pursue. The People's Assembly has to adopt the convenient rules for an efficient and continuous functioning of the Court.

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(prof. Sergio Bartole)