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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

R E P O R T

**on the Mission to Tirana as a Liaison
for the Venice Commission**

by

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Introduction

Following the letter of the Secretary of the Venice Commission, Mr Giovanni Buquicchio, of 22 December 1997, renewing my appointment as a legal expert, I went to Tirana, Albania, from 6 to 31 January 1998.

The mission was not only intended to ensure the liaison between the Venice Commission and the Albanian Constitutional Commission charged with the drafting of a new Constitution as well as with other organisations active in the Balkan country. Its purpose was also to take care of the last details of the visit of the President of the Venice Commission, Professor Antonio La Pergola, to Tirana, which took place between 8 and 10 January 1998.

This report is a follow-up to a previous one relating to a mission carried out in the period November-December 1997. Therefore, the understanding of many legal and political aspects referred to in this report is given for granted. However, any point raising doubts should hopefully appear clearer by reading the two reports jointly.

The Visit of Professor La Pergola

The visit of Professor La Pergola (See [Annex 1](#) for a report) increased the visibility of the Venice Commission among the legal and political circles and revived the public debate on the constitution. Both majority and opposition forces recognised the special role to be played by the Venice Commission as the most competent legal advisory body in the constitution drafting process. Albanian authorities expressed this opinion not only to the President and the representatives of the Venice Commission during their visit, but also later on other occasions, publicly and in the press. A full press review of the mission is kept at the Secretariat of the Venice Commission, Directorate of Legal Affairs.

One article published in the newspaper “Rilindja Demokratike” mentioned declarations by the President of the Venice Commission that strongly criticise the government and its policies. These declarations were completely invented and never took place. Anyway, it is worth remembering that some newspapers like to exploit the names of international institutions and personalities to endorse their own political views. That often happens with the name of the Council of Europe and also happened later in January during the visit of the Ambassador of the OSCE Office for Democratic Institutions and Human Rights (ODHIR) Mr Stoudmann. He was probably the first who reacted to this kind of journalism, by defining it rather primitive and unprofessional. The scarce credibility of the article on Professor La Pergola’s visit is however also shown by the fact that nobody asked our office to confirm, deny or comment the alleged declarations.

Requests for Advice to the Venice Commission

The visit of the Venice Commission delegation was also useful to establish further contacts between the Venice Commission and Albanian authorities. Following these contacts, the Minister of State for Legislative Reform and Parliamentary Relations, Mr Arben Imami, with a

letter delivered by hand on January 28 (Annex 2), asked the advice of the Venice Commission on a series of issues that have become the object of intense political conflict. Some of them relate to amendments made to the current constitutional provisions in the last months, namely:

- the composition of the High Council of Justice, which is the body responsible for the appointment, replacement and discipline of judges and prosecutors. It has been the subject of an amendment to Article 15 of Chapter V (See Annex 3 for the full text of the Law);
- the possibility of active intervention by the State to protect the interests of people affected by the “pyramid” financial schemes. It has been the subject of an amendment to Article 10;
- the rotation of members of the Constitutional Court, subject of an amendment to Article 18.

Mr Imami also asked for a comment on the recently passed Law “On the Organisation of Justice in the Republic of Albania”.

The request was accompanied by a number of supporting papers explaining and motivating the position of the government. Both the letter written by Mr Imami and the political situation call for a reasonably quick legal opinion of the Venice Commission. This proposal was raised, *inter alia*, also in paragraph 23 of Doc.7978 of the Parliamentary Assembly of the Council of Europe, Addendum II to the Progress Report, of 6 January 1998.

The composition of the High Council of Justice poses serious questions as regards the independence of the judiciary and its freedom from substantial influence from political power. Given its fundamental role in the administration of the judicial branch in Albania, it is probably the most important question and should be addressed in the first place. The opinion on many provisions regarding the organisation of justice in the Balkan country also depends on how the High Council is determined to administer them.

The wish to protect the independence of the judiciary, allegedly, was the purpose of a hunger strike initiated by a group of judges in early January. In particular, the group claims that a number of provisions of the recently passed “Law on the Organisation of Judiciary” is especially aimed at discharging judges who were enrolled after a six-month accelerated course in Law. A delegation of these judges also met with Professor La Pergola during his visit to Tirana. The strike was also supported by the opposition, who appealed to a number of international institutions (including the Venice Commission) “to exercise their impact on the Albanian government.”

The strike was terminated on January 30, after mediation conducted by OSCE Ambassador Daan Everts (See Annex 4 for Mr Everts’ Statement and the text of the reached agreement). The core of the agreement is that an international expert opinion will be issued on the contested articles of the Law, while the Ministry of Justice will suspend their implementation. The opinion will subsequently be the basis for amendments to the Law, if necessary. It is worth noting that paragraph 3 of the agreement calls for a legal opinion of the Venice Commission or of other experts of the Council of Europe.

The OSCE Ambassador is also taking steps in an effort to solve the controversy on the issue of the rotation of Constitutional judges currently dividing the Parliament and the Constitutional Court. A solution accepted by all parties involved has not been found yet. Setting aside all these issues would be important also to pave the way to more reasonable political dialogue on substantial topics such as the constitution.

On many of these matters, Mr Scott Carlson, ACCAPP lawyer and co-ordinator, and I have been often asked to express our legal opinion. In fruitful and constructive co-operation, we have provided the various delegations and some diplomats with brief memoranda aimed at clarifying legal issues firing the political debate (See Annexes 5 and 6). These papers have been used to distinguish reasonable criticism from political slogans and as background information and basis for exploring ways for mediation and reasonable compromise. It may be worth pointing out that they are by no means intended to substitute, engage or jeopardise the role of the Venice Commission. However, they can be a useful starting point for more accurate, expert and specialist analysis.

The Visit of the Tri-Parliamentary Delegation

The aforementioned materials were used as background information by a Tri-Parliamentary delegation (renamed “Troika” by Albanian commentators) that visited Tirana on 22 and 23 January. The mission was based on an idea of the OSCE Ambassador in Tirana Mr Daan Everts, in conjunction with the co-chairmen of the Parliamentary Commission for the drafting of the constitution, Mr Sabri Godo and Mr Arben Imami (See Annex 7 for their submissions to the delegation).

The delegation was composed of seven senior members of the Parliamentary Assembly of the Organization for Security and Co-operation in Europe, the Parliamentary Assembly of the Council of Europe and the European Parliament. The purpose of the mission was to break the deadlock in the constitution drafting process.

The delegation, after meeting with a broad range of national leaders, issued a declaration (See Annex 8). The delegation expressed its views on the constitutional process and “observed that the Constitutional Commission of Parliament is a legally valid mechanism for drafting a new constitution”. The expression “as also noted by eminent constitutional scholars” is a clear reference to the previous visit and findings of Professor La Pergola.

The Venice Commission of the Council of Europe is expressly mentioned under the same title. A proposal is made in the declaration as to establishing an international advisory group, representing European parliamentary institutions, which should complement existing consultative groups, such as the Venice Commission. Supposedly, the purpose of this group should be to have a mediation role.

The OSCE Presence has sent letters to the various political actors concerned by the declaration seeking their reaction to the January 23 Declaration. It is too early to know what the results are, but it appears that some proposals are now ruled out. It is unlikely, for instance, that the opposition Union for Democracy will call again for new elections or a constituent assembly; or that it will reaffirm that a new constitution will be drafted when they are in power. The firm

position taken by the “Troika”, which also takes notice of some of the opposition’s grievances, might play a fundamental role in resuming a more civilised dialogue between political forces and opening the way to work on the constitution.

The Parliamentary Commission

The Parliamentary Commission, established with decision No. 339 of 3 September 1997, has met two more times, in December and January. The Commission has also met with Professor La Pergola and the Tri-Parliamentary delegation. No substantial issues have been discussed.

A translation of the draft rules of procedure now exists and is attached (See [Annex 9](#)). Neither the text nor the translation is final. The hope is, once again, that all the opposition parties will join its work soon.

The Co-operation with ACCAPP and Other Organisations

ACCAPP (Administrative Center for the Coordination of Assistance and Public Participation) is a body responsible for organising national and international participation in the Albanian constitution drafting process. ACCAPP serves as a liaison for the Parliament and its technical staff and also for NGOs and donors. Co-operation with them has continued to prove very useful and effective in both directions. ACCAPP is also responsible for issuing a monthly information bulletin on constitutional activities, the Constitutional Coordinator. I wrote an article for it, which is basically a shortened version of the report on the visit of Professor La Pergola.

I also wrote another concept paper, a simple document for the general public intended to explain some legal issues in easily accessible language. This time its topic was the “Scope and Limitation of Legislative Power”. The concept paper was intended as part of the preparation materials for a forum organised by the ORT/USAID Albania Democracy Network Program, where I acted as a facilitator. The purpose of the workshop was to gather inputs for the constitution on the subject of the legislative branch. A large number of representatives from non-governmental organisations and Albanian lawyers attended the meeting.

Conclusions

The visit of Professor La Pergola, the continuous presence of a representative of the Venice Commission in Tirana and the considerable debate on legal issues have greatly contributed to enhance the role of the Commission, and of the Council of Europe, as a fundamental actor in the constitution drafting process and as an impartial referee in the solution of certain legal disputes in Albania. Political dialogue between parties or institutions still fails to meet the standards of most Western European countries. This makes it even more difficult to find solutions in a situation that requires reconciliation, and appropriate political decisions and legal choices to pull Albania out of economic difficulty, social distress and legal uncertainty. The heated political debate also makes it difficult to believe that there will be virtually no conflict about the content of a future constitution, as most Albanian politicians affirm.

The collection of information on the political and legal situation will be useful for future work by the Venice Commission and the Council of Europe. Future missions by delegations of the members of the Venice Commission could be even more effective if time is found for advance briefing by the local representative. My personal work has become more effectual thanks to an improved knowledge of the Albanian political and legal situation. The development of personal

contacts within political, legal and diplomatic circles has also contributed towards increasing the awareness of the Venice Commission's role and activities. Now the challenge will be to prevent Albanian authorities from asking the outside intervention of the Venice Commission, the Council of Europe or the OSCE to settle every single legal dispute arising in the political arena.

Giovanni FAVILLI

R e p o r t
on the visit of Mr Antonio La Pergola,
President of the European Commission for
Democracy through Law (Venice Commission),
to Tirana, Albania

Following the request of Mr Arben Imami and Mr Sabri Godo, co-chairmen of the Albanian parliamentary commission for the drafting of the Constitution, Mr Antonio La Pergola, President, and Mr Giovanni Buquicchio, Secretary of the European Commission for Democracy through Law (Venice Commission), went to Tirana from 8 to 10 January 1998.

The purpose of the mission was to express once more the readiness of the Venice Commission to assist Albania in the Constitution drafting process and collect further information on the legal and political situation. The delegation was very clear in pointing out its technical and legal role. It will be for other bodies to have the political task of finding ways to involve the opposition in the process.

The visit had a very busy schedule (see the attached agenda). Mr La Pergola met with the highest authorities in the country and with all the actors involved in the drafting process. In addition, he also encountered a number of members of the Constitutional Court and a delegation of judges carrying out a hunger strike.

Throughout the visit, Mr La Pergola reminded his interlocutors that the Venice Commission will provide its legal expertise only if asked so by Albanian authorities, respectful, as usual, of the sovereignty of national legislative bodies. Its advice would not be binding. The Venice Commission could also give its contribution in raising the legal awareness and preparation of constitutional judges and members of the parliamentary commission in certain technical matters through *ad hoc* seminars, round tables and conferences.

Moreover, Mr La Pergola told the Albanian authorities that a special task force had been set up within the Venice Commission to provide legal assistance to the Balkan country. Its members would be ready to go to Albania for short periods of times and address the various problems arising during discussions and drafting. These projects would be part of the solution of an issue that Mr La Pergola deems fundamental: the formation and the continual education of a qualified class of jurists.

He also pointed out that Constitutions need broad consensus and participation of all political forces if they are to last for a long period of time and survive alternation of different political parties in power. The future Constitution of Albania, in the President's view, should be an independent and neutral guarantee for all parties. It should guarantee government, opposition, local authorities, the judiciary and the human rights of the citizens.

Most Albanian politicians expressed the urgent need for a Constitution as a fundamental tool to provide stability to the country and confidence to foreign investors. Albania, they affirmed, is now the only country in Europe without a Constitution. To achieve legal certainty and a proper

working of the rule of law, it is necessary, they said, to have clear and reasonable legislation and, most of all, a fundamental text. Mr La Pergola stressed the additional need for politicians with good will, respect of State's institutions and readiness to political compromise. In this respect, he pointed out that it would be a mistake to set a strict deadline or hasten too much the drafting of the Constitution. More so because Albania is not in a constitutional vacuum, having a package of interim constitutional laws first approved in 1991.

Mr La Pergola recognised the moderate stance of the majority and its willingness to wait for the whole opposition to join the constitutional drafting process. Mr Daan Everts, OSCE Ambassador in Tirana, took action to make an additional European effort to involve the opposition and prevent the majority from proceeding alone. With this purpose he organised a joint mission of the parliamentary assemblies of the European Union, the Council of Europe and OSCE that will take place on January 22 and 23. He also proposed the Venice Commission to support it with its advice on the legality of the envisaged procedure through the parliamentary commission and the fairness of its composition.

Mr La Pergola replied that the Venice Commission's advice must be asked by interested governments or by organs of the Council of Europe. Moreover, the Venice Commission is a collegial body. This means that its expertise cannot be given by just one of its components and requires some time.

Mr La Pergola, however, expressed his views on the procedure followed by the current government for the drafting of the Constitution and found it perfectly in line with the constitutional provisions in force. In particular, he noted that Law No. 7491 of 29 April 1991 "On the Main Constitutional Provisions", the substitute for a Constitution until a new one is adopted, states under Article 44, in chapter IX (final provisions):

"The provisions of this law operate until the adoption of the Constitution of the Republic of Albania, whose draft will be prepared by the Special Commission appointed by the People's Assembly.

The members of the commission and the deadline for submitting the draft Constitution shall be defined by a special decision of the People's Assembly."

The current government took the special decision mentioned in Article 44 on 9 September 1997 (No. 339). The Commission is composed of 21 members, of whom 12 are from the majority and 9 from the opposition.

Furthermore, the President of the Venice Commission found that the representation of various political forces in the parliamentary commission is quite fair, since it gives the minority parties a share of seats more substantial than their vote percentage in Parliament. Even if the election system had relied on the calculation of votes according to the proportional system, it is possible to demonstrate that the majority is still under-represented in the commission and all the minority groups, including the Union for Democracy, are to different extents over-represented.

The voting procedures in the parliamentary commission have not been decided yet. The proposal of the two co-chairmen, Mr Godo and Mr Imami, according to which decisions should be taken with a 2/3 qualified majority, has not been approved for the time being.

Mr La Pergola also took note of the fact that the idea of submitting the Constitution to a referendum was originally conceived for the draft of November 1994. It has no constitutional basis, but it is generally felt in the Albanian political system that the new Constitution should have popular endorsement and approval.

Mr La Pergola pointed out that an option based on a different track from the current one (parliamentary commission, Parliament, referendum), such as a choice in favour of a constitutional assembly, would not be prevented in principle. It would require, however, a constitutional amendment.

The idea of drafting a new Constitution through a constituent assembly is supported by the Democratic Party-led Union for Democracy. The President of the Venice Commission had a long meeting with its leader, Mr Sali Berisha, whom he had first encountered when the Albanian politician was President of the Republic.

Mr Berisha repeated his longstanding accusations against the current government: profiting from unfair elections, not respecting agreements, infringing the independence of judiciary, and so on. As regards the Constitution, he said his party is ready to discuss it in a round table, but the proper way to achieve a fundamental text should be through a constituent assembly resulting from new elections. The current parliament, in his opinion, does not have the moral authority for drafting a long lasting Constitution.

The parties not belonging to the Union for Democracy, and the international community, are very much against the idea of new elections in a country where law and order is not yet fully restored. Mr La Pergola mentioned that similar risks relating to public order could come from holding a referendum on the Constitution.

Mr Berisha, as most of the personalities the delegation met, expressed the view that agreement on the content of a future Constitution would not be a problem. A vast majority of the political spectrum agrees on the idea of a parliamentary republic and thinks that disagreements only exist on procedural issues.

Mr La Pergola said for his part that transforming the current interim constitutional provisions into a final text could raise some problems. Firstly, it should be decided which parts of the current texts should be kept and which should be changed. Secondly, it would be necessary to guarantee that Constitution be observed with a system of constitutional review. Associated with this is the problem of granting the independence of the judiciary. Thirdly, there are many kinds of parliamentary republics. The right choice for Albania would depend also on the electoral system.

Other problems arising from actual drafting could include the regulation of the motions of no-confidence, the option for bicameralism, the powers of the President of the Republic, the division of power between central and local government, and the rank and role of international treaties. On all these points, Mr La Pergola thought that the alleged general identity of views should be verified.

The mission turned out to be useful in collecting information on the Albanian legal and political situation, not only on the Constitution, but also on recent legislation on the High Council of Justice and the organisation of the judiciary. The mission will also serve to establish a basis for

future work by the Venice Commission, which enjoys a high reputation throughout the political spectrum and the legal circles. The diffuse opinion - to be verified in practice - that there is virtually no conflict about the content of a coming Constitution offers some hope on the possibility of Albania of finally having a permanent fundamental law in the not too distant future.