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O P I N I O N

ON THE LAW ON THE MAJOR CONSTITUTIONAL PROVISIONS OF THE REPUBLIC OF ALBANIA

(HIGH COUNCIL OF JUSTICE)

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THE ALBANIAN LAW ON THE MAJOR CONSTITUTIONAL PROVISIONS

Opinion by Dr Luis LÓPEZ GUERRA (Spain)

1) Introduction

The High Council of Justice, provided for in Article 15 of the Albanian Law on the Major Constitutional Provisions belongs to that type of institutions generally known as Councils of the Judiciary or by similar expressions (Consiglio de la Magistratura, Consejo General del Poder Judicial, Conseil de la Magistrature), introduced in the post-1945 European Constitutions, commencing with the French Constitution of 1946, and, more significantly, in the Italian Constitution of 1948. The main task of these institutions is to exercise competences formerly attributed to the Executive power, concerning the government of the judiciary. These competences are not judicial in nature, since the Councils are not Courts of Justice, but rather administrative. Among these competences, the Albanian Law includes "nominating, transferring and disciplinary responsibilities" affecting judges.

Although from a comparative standpoint, the composition and powers of these Councils vary considerably, all of them share a common characteristic: their very existence is the result of a desire to protect the independence of the judiciary, i.e., to guarantee that the judge in his conflict-solving activity is subject only to the law and the Constitution, excluding all influences from other sources, either public or private. That desire explains why a series of decisions related to the administrative status of judges as members of a complex organization, which requires managing, financing and supervision, are attributed to an organ which ensures that the judge will not be conditioned in his jurisdictional role by pressures affecting his professional situation, coming from other powers of the State.

Traditionally, in the European model of judicial organization, decisions concerning the appointment, transfer, and promotion of judges, as well as the inspections and,

eventually, disciplinary measures, were the task of the executive power and, more specifically, of the Ministry of Justice. Therefore, from a historical point of view, the creation of the Councils of the Judiciary in countries as France, Spain, Portugal or Italy meant that some of these functions were taken away from the Ministry of Justice in order to protect the independence of the judge vis-à-vis the Government. The Councils were designed as organs separate from and independent of the Executive power, assuming (with varying intensity, according to each Constitution) the most relevant aspects of the "government of judges."

2) Composition of the Councils of the Judiciary. Characteristics and appointment.

Guaranteeing the independence of judges and the creation of an autonomous Council of the Judiciary do not imply the self-government of judges, i.e., that the management and direction of the administrative organization of the Judiciary must necessarily be in the hands of judges themselves. On the contrary, the constitutional provisions concerning the composition of these organs establish, as a general rule, the presence of members who do not belong to the judiciary, representing other powers of the State, or academic or professional sectors of society.

This presence is justified since the objectives and goals pursued by the Councils of the Judiciary relate not only to the interests of the members of the judiciary themselves but also, more broadly, to the general interest as well. Processes such as the selection, formation and promotion of judges have a relevance that reaches beyond the particular interests of the judicial personnel directly affected, since they determine the quality and impartiality of the justice, and the expectations of the citizens in obtaining expedient and adequate service from the Administration of Justice. Furthermore, in a system guided by democratic principles, it seems reasonable that the Council of the Judiciary should be linked to the representation of the will of the people, as expressed by Parliament or by other elected State organs.

Another related reason frequently cited to justify the presence of non-judicial members

on the Councils of the Judiciary is the need to combat corporativist tendencies, whereby the defense of the status quo of the members of the Judiciary would result in measures contrary to the common good.

Considerations of this nature often result in two consequences:

a) Concerning the profile of council members, in many cases constitutional provisions require that, in addition to members of the Judiciary, other professionals also must be present in these entities. Such is the case in the constitutions of Italy (Article. 104), Spain (Article 122), France (Article 65 referring both to the judicial and the prosecutors' chambers of the Council), Greece (Article 91, in relation to the Superior Disciplinary Council) and Portugal (Article 220 which allows for the presence of non-judicial personnel in the Superior Council of the Judiciary, protected by the same guarantees as the member judges).

b) Concerning the selection of members of the Councils, while the majority of the constitutions provide for a part of the councillors to be elected by members of the judiciary, the provision that some members must be either ex officio members or elected by the executive or legislative power is also common. In Italy, the President of the Republic is one of the ex officio members, two-thirds of the Council being elected by members of the judiciary, while the other third is chosen by Parliament. Similarly, in France the President of the Republic is a member of the Council ex officio; his place may be occupied by the Minister of Justice. In addition to Italy, the Parliament is empowered by the constitution to elect the council members in Spain (the entire council), Portugal (seven out of sixteen members) and France (where the Presidents of the Chambers designate two members of the Council, in its two formations). Thus, in France, Italy and Portugal a mixed formula is used to select councillors, while in Spain the Parliament enjoys a monopoly over the appointment of council members..

In any case, the independence of the Council is ensured by guaranteeing that its members cannot be removed during the period of their appointment. Also, a common

rule is that, no matter who chooses the members, a majority of them must be career judges (or, in France, career prosecutors in the prosecutors section of the Council).

3) Article 15 of Chapter Five of the Albanian Law on the Major Constitutional Provisions

The Albanian Law on Major Constitutional Provisions proclaims the independence, both of the judicial power as a whole (Article 1, Chapter 5: "The judicial power is separate and independent from the other powers") and of the individual judge (Article 8, Chapter 5: "In exercising their competences the judges are independent and subject only to the law 'On the Major Constitutional Provisions' and to the other laws in general"). The collective independence of the judicial power as a whole must be considered, as shown before, as a guarantee of the individual judge´s independence with respect to the Executive; and the expression of that collective independence is reflected in the powers vested in the High Council of Justice as an autonomous Constitutional organ.

The provisions introduced by Albanian Law 8234, of August 27th 1997 provide for a High Council similar to those found in other European countries:

a) As for its composition, the Council includes five career judges (the President of the Court of Cassation and four others), three prosecutors (the General Prosecutor plus two others), two lawyers, one professor of law, and two high-ranking members of the Executive (the President of the Republic and the Minister of Justice). Therefore, from a professional viewpoint, judges and prosecutors are clearly in the majority (eight out of thirteen members). A knowledge and understanding of the problems of the government of judges and prosecutors are thus reasonably guaranteed.

b) As for the selection of its members, Article 15 provides for:

--Four ex officio members (the President of the Court of Cassation, the Minister of

Justice, the General Prosecutor and the President of the Republic).

--Four who are elected by Parliament

--Five who are elected as provided for by law from the ranks of the judiciary (three) and of the prosecutors (two).

This composition guarantees independence from the Executive power since, in fact, only two members (the President of the Republic and the Minister of Justice) belong to the Executive branch. In practice, Parliament elects six, since two ex officio members, the President of the Court of Cassation and the General Prosecutor, are elected by the People's Assembly, according to Articles 6 and 14 of Chapter 5 of the Law on the Major Constitutional Provisions. With respect to the five members elected from the ranks of judges and prosecutors, according to the report submitted by the Minister of State for Legislative Reform, they are elected in separate meetings of all judges and prosecutors.

As a result, the High Council presents a reasonable mix as to the qualifications of its members, as well as a diversity of political backgrounds, the Councillors being integrated in, or emanating from, different powers of the State. In this respect, the High Court's composition is in line with the common European pattern.

3) Some additional comments

a) The Law on Major Constitutional Provisions does not specify the parliamentary majority needed for the election of the four Councillors of Parliamentary origin. In principle, a simple majority would be enough for the election. In some countries such as Spain (Article 122 of the Spanish Constitution) a two-thirds majority is required for the election of Councillors. Therefore, parliamentary groups are forced to reach a consensus on candidates, thus, (in theory) reducing party influence.

b) The Law on Major Constitutional Provisions excludes the immediate reelection of the members of the Council. A similar clause can be found in the Italian Constitution, as well as in the Organic Law regulating the General Council of the Judiciary in Spain. The rationale behind this clause is, obviously, to guarantee to a maximum the Councillor's independence by avoiding the threat of not being re-elected However some objections in that regard can be raised, from a practical point of view:

b.1) The simultaneous turnover of all non-ex officio members means that the composition of the Council changes almost completely with each election. As a consequence, a period of severe "discontinuity" results in the workings of the institution, since the new members need time to familiarize themselves with the tasks of the Council, and many of the initiatives and proceedings commenced by the previous Councillors are simply abandoned or forgotten.

b.2) The non-reelection clause results in the loss of a great amount of experience, since Councillors well-acquainted with the techniques of the government of the judiciary must leave the Council once their mandate is finished.

b.3) It is doubtful that the non-reelection clause effectively protects the independence of the members in a significant way. It is revealing that such a clause is not contained in the Albanian Law on Major Constitutional Provisions with respect to the President and judges of the Court of Cassation (Article 6 of Chapter 5) nor to the General Prosecutor (Article 14). Since an electoral process is always necessary for the designation of the Councillors either by Parliament or by the groups of judges and prosecutors, it could be argued that the composition of the Council will always ultimately reflect the preferences of the electors, whether the Councillors have the possibility of reelection or not.

c) Finally, even if the non-reelection clause is maintained, it seems that a procedure of partial renewal of the Council (by thirds or halves) would avoid the problems resulting from the simultaneous change of all the elected members of the Council at the same time.