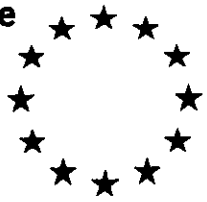


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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

**ON RECENT AMENDMENTS
TO THE ALBANIAN LAW
ON THE MAJOR CONSTITUTIONAL PROVISIONS**

(HIGH COUNCIL OF JUSTICE)

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The High Council of Justice under the Albanian Constitution

Article 15 of Chapter V of the Albanian Law No. 7491 on the Major Constitutional Provisions provides for the setting-up of a High Council of Justice with the declared aim of guaranteeing judges and Prosecutors against executive interference. An opinion has been sought as to the validity of this amendment. Article 15 reads:-

"The High Council of Justice is headed by the President of the Republic and is composed of the Chief Justice of the Court of Cassation, the Minister of Justice, the General Prosecutor, and nine lawyers distinguished for their abilities. They are elected once in five years as provided by Law, enjoying no right for immediate re-election, as follows:

- * Three members are from the ranks of the Judiciary.
- * Two members are from the ranks of the prosecutors;
- * Four members are elected by the Parliament out of whom two are from the ranks of lawyers, one from the professors of the Law Faculty and one from the ranks of the Judiciary.

The High Council of Justice is the only authority which decides upon the nominating, transferring and disciplinary responsibilities regarding the judges of the first level, those of Appeal and prosecutors, as well.

The High Council of Justice's way of operation and exercising its activity is defined in the internal rules it approves".

Preliminary comments

Most democratic European Countries have incorporated a politically neutral Judicial Service Commission or an equivalent body into their legal systems, either as an integral part of their Constitution or otherwise, as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the protection of judicial pluralism; the role of the judiciary in the safeguard of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. An autonomy and independence that should be material and real as a concrete affirmation and manifestation of the separation of powers of the State. It is immediately obvious that such a Commission could, if abused, be an instrument of undue interference by the executive and a means for undermining the independence of the judiciary. A situation that would be further aggravated by the fact that such action would be taken by a body having only the apparent legitimacy of a constitutional organ that should, in theory ensure the independence of the judiciary, but, in practice, would be used to subjugate the judiciary for the executive.

The effectiveness and the role of such a Commission would ultimately depend on

- (1) its composition;
 - (2) the manner of appointment of its members;
 - (3) its functions and powers;
 - (4) the will to assert its autonomy and authority in the exercise of these powers freely and objectively;
 - (5) the promotion of a culture that matters relating to judicial affairs are freed from the grip and influence of other organs of the state.
- Certainly, completely with regard to the substantial administration of justice and, as far as possible, with the regard to the administrative organisational conduct of judicial affairs.

The aims of the Judicial Service Commission should, therefore, broadly be:-

- a) to secure the independence of the judiciary by ensuring that all matters relating to its organisational requirements are excluded from the direct influence of the executive and entrusted to this autonomous Constitutional Commission.
- b) to provide the judiciary with a management system that would while reflecting the needs of society, ensure a measure of accountability with proper safeguards for judicial independence.

Analysis

(A) Composition

There is no uniform standard that regulates the composition of such bodies and different European countries have adopted various approaches which aim at strengthening the judiciary's independence by protecting judges both from undue influence of the executive and from unnecessary internal interference from within the judicial system itself. Each system has, therefore, to be examined on its own merits to establish whether the composition of the commission would adequately allow it that freedom of action that would guarantee autonomous decisions as the governing body of an independent judiciary. There are, therefore, no a priori rules to be followed. A basic rule seems to be that a large proportion of its membership should be made up of members of the judiciary and also that a fair balance should be struck between members of the judiciary and other ex officio or elected members.

The composition of the Albanian High Council of Justice seems to follow this pattern and the numerical balance struck appears to be substantially acceptable. The following additional remarks seem to be in order:

1) The High Council is headed by the President of the Republic. This is the practice in many countries where the Head of State is constitutionally considered as representing the whole unity of the people (art.24) and has only limited competencies generally to ensure the democratic process .

The President of the Republic under the Albanian Constitution as amended is looked upon as the guarantor of the Rule of Law and fundamental freedoms. His Chairmanship of the High Council not only lends prestige and authority to the institution but also should provide a check and balance on other powers represented on the Council.

The Chief Justice of the Court of Cassation, the Minister of Justice and the General Prosecutor are ex-officio members of the Council. I have only one reservation in this respect regarding the presence of the Minister of Justice in matters relating to the transfer and disciplinary measures taken in respect of Judges of the first level, those of Appeal and prosecutors. The nomination of judges in the above-mentioned courts and that of prosecutors, has been exclusively entrusted to the High Council of Justice. This is a very positive step in so far as it not only reduces the risk of nominations motivated primarily by political considerations but also provides a wider base of different opinions for

the choice of Judges, Magistrates and Prosecutors. It is however highly advisable that the Minister of Justice should not be involved in decisions relating to the transferring and disciplinary responsibilities entrusted in the High Council of Justice, since this could lead to undue influence and interference by the executive in these matters (Vide Infra Functions and Powers).

The composition of the Council also provides that three members are to be elected from the ranks of the Judiciary. There is no provision that these members should represent the various judicial categories and I feel that this should be specified. The recent amendment is a marked improvement on the previous one in so far as it specifies that the Judiciary is to be represented on the High Council of Justice. The previous law spoke merely of "jurists". The Article could perhaps be further improved by specifying that two members from the ranks of Judiciary were to be elected by Judges of the Court of Appeal, while the other member was to be elected from Judges of the first instance.

(2) It is proper that two members are to be elected from the ranks of the Prosecutors who were organised and function within the Judicial branch as a unique and centralised organ. (Article 13 Chapter 5)

(3) The Council also includes four members who are elected by Parliament, out of whom two are nominated from the ranks of lawyers. One from the Professors of the Faculty of Law and one from the ranks of the Judiciary. It is proper that these four members are elected by Parliament since this ensures a proper balance between the administration of justice, which should be the domain of the Judiciary, and the needs of society to ensure an adequate system of justice within a reasonable time, which is the domain of the people's representative. The Law recognises the importance of the qualified contributions that academics can give on such a Council by requiring one of these four members to be elected by Parliament from the Professors of the Law Faculty. There is no fundamental objection for one of these members to be chosen by Parliament from the ranks of the Judiciary. I note that this intervention of Parliament is considered by the Albanian Opposition as improper. I would not qualify it as such, though it is clear that this does not help to avoid undue politicisation of the composition of the Council, which should as far as possible be avoided since that could be a harmful influence. It might therefore be advisable that this member is included with and added to the three members elected from the ranks of the Judiciary. Consideration should also be given to the possibility of having one of the two lawyers elected by Parliament representing Government opinion while the other member would represent the Opposition.

In conclusion, I have no reservation of substance on the composition of the Council. A balance exists between the interest of the Judiciary and the interest of the Executive and Parliament. The composition of the Council ensures an acknowledged presence of Judges within the organ responsible for government of the judicial power without however leaving it entirely to the discretion of that power. It follows a pattern already adopted in various European countries including major Western European Democracies. My comments with regard to the composition should therefore be taken in the spirit of ameliorating the composition of the Council, and only in the light of Albanian particular circumstances and the prevailing stage of its development.

(B) The manner of appointment of the members of the High Council of Justice.

Even in this respect, Article 5 follows standard models. It is naturally positive that members are elected and that they do not enjoy the right for immediate re-election on the expiry of their five term period. There should, however, be no obstacle to their standing again for re-election. The law does not seem to lay down the method of election both when this is conducted by the various groups (Judiciary/Prosecutors) or when this is done by Parliament. This matter should be clearly regulated.

Furthermore, it is my view that Article 15 should stipulate that this election be made by secret universal suffrage while other matters regarding the regulation and conduct of these elections can be regulated by an ad hoc ordinary law.

(C). Functions and powers

The Albanian Constitution has opted to give the High Council of Justice an executive function, and not a consultative one. It is in fact the only authority which decides upon the nominating, transferring and disciplinary responsibilities regarding Judges, both of the first level and those of the Court of Appeal as well as prosecutors. This means that the Executive and indeed Parliament, are renouncing to these powers, and are entrusting them to this Council. It is noted that while Judges of the first level, of the Court of Appeal and prosecutors are subject to the authority of the Council in matters of discipline, the President and members of the Court of Cassation may be removed from office only on the basis of a reasoned decision of the People's Assembly where it is certified that they have committed a serious criminal act, specifically provided for in law or where they are mentally incapacitated (Article 6 of Chapter 5).

It is a moot point whether the protection against removal accorded to the Judges of the Court of Cassation, which could potentially have a marked political content, is preferable to the protection granted to other judges and to procurators under Article 15 since this purports to have matters relating to their duties and discipline decided by a body which was essentially made up of their own peers. As stated above the only reservation I make in this respect is the involvement of the Minister of Justice in disciplinary issues that could involve the transfer and even the dismissal of judges or prosecutors. It is understood that such a dismissal would also fall within the competence of the Council which would be considered to be a competent body for the purposes of Article 10 of this section which provides that the immunity of Judges may be withdrawn and they can be removed from office "only by a competent body" in cases consistent with the procedures provided for by law.

In this respect it is noted that the grounds for dismissal or other disciplinary measures are not specified in respect of Judges of the first level, those of the Court of Appeal and prosecutors and it is clear that such situations should be adequately regulated by ad hoc legislation. It seems that the functions of the High Council of Justice are limited exclusively to the nominating, transferring and the disciplinary responsibilities regarding judges and prosecutors. These functions do not extend to the organisation of the judiciary system in the country. It

does not have any function in this respect, not even a consultative one. It is suggested that other functions might appropriately be assigned to the High Council of Justice amongst which could be:-

- (1) To propose to the Executive such legislative measures aimed at improving the operation of judicial institutions;
- (2) To give opinions on matters concerning the administration of justice;
- (3) To ensure that adequate funding is forthcoming from the Executive to trial courts;
- (4) Proposing and implementing measures which aim at improving the operation of the judicial institutions, for example, reducing delay in the settlement of disputes;
- (5) The setting up of training programmes for Judges and Prosecutors;
- (6) The authority to make rules in certain aspects of the organisation of justice;
- (7) The adoption of systems of selection, training and improving persons concerned with and collaborating in the administration of justice.

In conclusion involvement of such a Commission is also recommended in career matters since judges' progress through the career system must be uninfluenced by any pressure, in particular from a political power.

A necessary corollary to the fact that the Constitution has given the High Council of Justice an exclusive determining function in the nomination, transfer and discipline of Judges and prosecutors, is the need to ensure immunity to the members of the Council on matters arising from the exercise of their powers and functions. Such immunity would ensure that members of the High Council of Justice would exercise their duties without any interference in the execution of their duties from the executive power. Thus, for example members should not be called upon to account for an expressed opinion or vote cast in the Council. Such an immunity should be entrenched in Article 15.

Procedural Matters

Article 15 finally provides that the High Council of Justices' way of operation and exercising its activity is defined in the internal rules it approves. It is acceptable that such a Council should be allowed to regulate its own procedures. On the other hand internal rules approved by it should be well-defined and accessible for verification and control. This especially with regard to matters that concern and regulate proceedings regarding the transferring and disciplinary responsibilities. It has to be stressed that in matters of discipline these internal rules should provide adequate guarantees for the Judges or prosecutors

involved to have a fair and impartial hearing with proper and sufficient safeguards for their fundamental rights.

CONCLUSION

It is a fact that the primary Judicial function is the determination of disputes whether between private persons or between a private person and a public authority. Judges are to apply the law and they are bound to follow decisions of the legislature as expressed in legislation. Clearly it must be possible for a judge to decide law-suits without fear of reprisals, whether from the executive or a wealthy corporation. Without an independent judiciary the construction of a State based on the rule of law is impossible. The setting up of bodies similar to the High Council of Justice is nowadays considered to be a means of achieving and strengthening the autonomy of the judicial power. The introduction of such measures augurs well in that it guarantees the establishment of an independent judiciary.

Article 15 if correctly applied should provide an effective tool for an independent judiciary in line with those existing in democratic countries. It is however in the practical implementation of the provision that the real pit-falls lie. However perfect the legislation is in theory, it will not by itself avoid the dangers of corruption and undue interference by other

organs to promote and foster a culture of judicial independence. Judges and prosecutors should assert their autonomy in the face of arbitrariness and arrogance. They should therefore exercise their newly found authority within the framework of the High Council for Justice to attain credibility. Through the proper functioning of this supervisory and disciplinary organ of the judiciary, the independence of the judiciary is enhanced.