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# DRAFT LAW

# ON THE ORGANISATION AND THE FUNCTIONING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA

**Comments by:**

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THE ALBANIAN DRAFT LAW ON THE ORGANIZATION AND THE FUNCTIONING OF THE CONSTITUTIONAL COURT

By prof. Sergio Bartole, University of Trieste.

The main purpose of the draft is providing for the organization and the functioning of the Court: it avoids adopting special rules for the different judgements listed in art. 131 of the Constitution. Therefore the procedural rules of the law shall apply in all the judgements before the Court, with the exception of the cases covered by special rules explicitly provided for by the law. But in the draft there are few special rules. This solution shall leave a lot of discretion to the Court in dealing with the peculiarities of the different judgements when the provisions of the law are not covering all the details of the different procedures. On the other side, the draft law does not offer a definition of the situations of fact which allows the submission of the requests to the Court by the authorities and the persons listed in art. 134 of the Constitution in the cases provided for by art. 131 of the Constitution. Actually, the description of the cases in this article is very vague, not clear and distinct. For instance, the draft does not say at which stage of the legislative procedure the request on the compatibility of the international agreements with the Constitution shall be submitted by the Court. Or it is unclear which are the powers mentioned in art. 131.d of the Constitution. Moreover, who is allowed to submit to the Court the request about the s.c. " constitutionality of the parties and other political organizations "? And, which are the issues related with the elections of the Chief of the State and the deputies that the Court is entrusted with the function of deciding? Eventually, the meaning of art. 131.i of the Constitution is not easily understandable: does it regard either the complaints concerning the " violation of ..constitutional rights to due process " only, or all the complaints interesting the violation of all constitutional

rights? The draft law apparently adopts both the solutions: look at art. 27.1 and compare it with the following art. 27.2.

If we stick to artt. 131 and 134 of the Constitution, we can conclude that the original intent of the framers of the Constitution was not clear, they did not decide whether the vague provisions of the Constitution should be implemented by legislative general rules or by the decisions of the Court on a case by case basis. Apparently the draft law adopts this second alternative: it states in art. 3.1 that " the Constitutional Court obeys only to the Constitution ", but is this solution a convenient solution for a country which does not have a tradition of constitutional justice? And is this solution coherent with the provision of art. 1.2 which instructs the Court to base its activity on the s.c. " general procedural rules ", " when this law does not determine special provisions "? Art. 1.2 is a very vague provision: it could be interpreted as leaving a lot of discretion to the Court because the reference to the s.c. general procedural rules is not very precise. Does the law refer to the general rules either of the civil procedure or of the criminal procedure? We can give different answers, but - howerver - these doubts and uncertainties certainly endanger the implementation of the intention of the legislator which is apparently aimed at binding the hands of the Court and putting it under the control of previously adopted normative rules.

Therefore, art. 3.1 should be completed by a reference to the laws adopted in conformity with the Constitution, leaving to the legislator the possibility of adopting other laws in view of the implementation of the constitutional rules affecting the Court. It should state: " the Constitutional Court obeys only to the Constitution and to the laws adopted in conformity with the Constitution ". And the draft should be amended and completed in conformity of this line. But, if the Albanian legislator wants to give the

Court a large discretion in dealing with the cases which fall in its jurisdiction, the domestic regulation ( mentioned by art. 58 ) should be allowed to provide not only for the administration of the Court, but also for the functioning and the procedure of the Court itself. The importance of these matters could require the entrusting of the approval of the domestic regulation to all the body of the Court. Adopting a domestic regulation with such an enlarged content, the Court shall limit the discretion inherent in its powers of providing for its procedure and functioning by deciding on a case by case basis: it shall be a deliberation which affects all the judges and has to be taken by all the judges, it is not convenient to leave it to the Chairman only.

The fourth alinea of art. 3 looks too restrictive and it conflicts with the principle of an open and democratic society.

Which are the financial means coming from income " that is not forbidden by law "?

Art. 11 should be revised, entrusting the powers listed at points 3, 6, 7, and 8 to plenary meetings of all the judges, with the inclusion of the adoption of the domestic regulation and the appointment of the Secretary general ( modifying art. 12.3 ). The powers of the Chairman shall be limited, even he keeps the functions concerning both the representation of the Court and the distribution of the Court workload between the judges, the signing of the acts of the Court, and the calling and chairing of the meetings of the Court. I have just explained the reasons which support the limitation of the powers of the Chairman.

The topic of the immunity of the judges deserves a larger treatment than the traetment provided for in art. 14. It has to be stated that the judges may not be required to give account of any opinions expressed or votes cast in the exercise of thei functions. If such a principle was missing, the criminal prosecution of the judges would appear completely

free, on one side, and, on the other side, the Court would have a large discretion in denying the consent provided for by art. 126 of the Constitution. The judges would be in the hands of the judiciary or the Court would be allowed to decide without the control of previously stated rules and breaking the principle of equality, insuring personal privileges to its members even when the general interests of the constitutional justice are not cocerned.

Art. 22 has to be revised introducing the principle that judges have to abstain from the exercise of their judicial functions when their neutrality is doubtful because they have interest connection with the case at stake: this provision shall be coordinated with the following art. 33.

Are the interested parties ( that is, the subjects who submitted the request ) allowed to submit a complaint when the trial body decides that the case does not have " to pass to the plenary session "? May they ask a final decision of the plenary session? In any case, the law should provide for the notification of the negative decision of the trial body to the subjects who submitted the request.

The deadline for the notification " about the date and the time of process " ( which could be delivered by telegraph also ) is very short. Among the acts which have to be notified, should be included the decision of the trial body, if it was not notified previously.

Sub art. 36 a rule should provide for the question about the voluntary intervention ( in the constitutional process ) of persons or State bodies which were not notified according to art. 35.

Is the Court allowed to call witnessess and to request documents ex officio and - therefore - also without a request of the parties? A positive solution could be preferable

if we keep in mind that the constitutional process is aimed at the implementation of general interests ( and not only of the interests of the interested parties ). The provisions concerning the decisions of the trial body confirm that the Court is allowed to dispose of the constitutional process. If the Court is entrusted with the power of terminating the process, it should have also the power of controlling the developments of the process towards a positive and constructive conclusion. Also art. 45.2 has to be kept in mind.

I have some doubts in understanding art. 47.1: it has to be evident that the requirement of art. 29.2 about the attendance of the judges at the plenary sessions has to be complied with in any case. When this precondition is satisfied, the requirement about the taking of the decisions " by an absolute majority " has to be implemented. It could be advisable to provide that a decision cannot be taken in absence of a judge who participated in the plenary session devoted to the examination of the case.

The law does not provide for general rules about the effects of the decisions of the Court. Art. 49 deals with the " unchanging of decision " and art. 50 with the " not having juridical effects of judicial decision ", while art. 51 gives " retroactive power " to the interpretative decisions. These rules have to be read in cordination with art. 132 of the Constitution. According to the alinea 2 of this article the dies a quo of the effects of the decisions of the Court should be the day of their publication in the Official Gazette. But have the decisions of the Court retroactive effects? When the Court states that a law is unconstitutional, does the decision cover future cases only, or shall judges, private subjects and public administrations restrain from applying the law even with regard to previous cases which are still open?

A general rule about the notification of the decision of the Court is missing; art. 51 covers a special hypothesis only.

Sub art. 55 the distinction between expenditures and taxes for the procedures, on one side, and tariffs for services carried out " from the Constitutional Court " is not very clear.

University of Trieste, September 11 th, 1999.

( prof. Sergio Bartole )