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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 2 December 1999
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CDL (99) 77
Or. Eng.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Meeting between the Constitutional Court of Albania and Messrs Bartole and Lopez Guerra on the draft Law on the Organisation and Functioning of the Constitutional Court of the Republic of Albania

M E M O R A N D U M

Upon invitation by the Constitutional Court of Albania, Messrs Bartole (Italy) and Lopez Guerra (Spain) visited the Court on 8 November 1999 in the company of Mr Dürr (Secretariat) and held an exchange of views on the draft Law on the Organisation and the Functioning of the Constitutional Court of the Republic of Albania with the judges of the Court and the Albanian Member of the Commission Mr Omari. Ms Reyhan Akant, head of the Tirana office of the Council of Europe, and a representative of the Albanian Parliament participated in the meeting as well.

The basis of the discussion was a revised draft of the law (CDL (99) 69) which had been transmitted to the Secretariat on 3 November 1999. A previous draft (CDL (99) 56) had already been subject to written comments by Messrs Bartole, Lopez Guerra and Solyom (CDL (99) 57, 58, 55) which were followed by a discussion with the President of the Court, Mr Abdiu, during the 40th Plenary Meeting of the Commission on 15-16 October 1999 in Venice.

I. General Remarks

The rapporteurs underlined that the second version of the draft was much more complete and was considerably improved as compared to the first version. Many of the comments made by the rapporteurs had been taken into account.

They suggested to pay particular attention to the procedure of concrete norm control (question of constitutionality raised by an ordinary court). This part needed to be further developed. The issues concerning the effects of the decisions should be made more explicit as well. In order to cope with the probable important case-load which could be a result of the law, more emphasis should be given to the written procedure.

II. Remarks concerning specific articles of the draft

Article 1.2

The rapporteurs suggested that only one procedural code should apply subsidiarily in order to supplement the law on the Court and not several procedural codes as foreseen in the draft. This could create a situation when it was unclear which procedural norms would apply. The “nature” of a case before a constitutional court was not civil, criminal or administrative but always “constitutional”. This issue was however less problematic than in the previous draft because the revised draft was more complete and would require less recourse to subsidiary norms.

The Court insisted that the nature - or the origin - of the case (civil, criminal, administrative) should determine the subsidiary procedural code used.

Article 3.1

While Mr Omari suggested that the Court should be bound not only by the Constitution as in the draft but also by all other laws, the Court pointed out that this was not appropriate because Article 124 of the Constitution used the same wording.

Article 6.2

The rapporteurs pointed out that allowing the Court to have other sources of income than the budget could endanger its independence.

The Court replied that only income not prohibited by law was foreseen. These resources would be outside the budget but they would be controlled by the High State Control (auditing).

Article 7

The rapporteurs suggested that judges of the Court who had been nominated replacing another judge should be able to be re-appointed when their term of office had been very short (less than three years). The Court replied that this was a good suggestion but that the Constitution provided otherwise.

For the rapporteurs, it was not clear whether the President could be re-appointed. For the Court, there was no doubt that the draft allowed the President to be re-appointed.

Asked why the procedure of rotation which had caused problems in the past was not regulated in the draft, the Court replied that Parliament intended to pass a specific law on this issue. The rapporteurs insisted that it should be made clear at least in the transitional clauses of the law that the existing system of rotation is to continue.

The Court agreed to amend the draft concerning the reappointment of the President and a transitional clause on the rotation.

Article 11.5

The rapporteurs insisted that there should be an appeal against disciplinary measures to the Plenary of the Court.

Mr Omari pointed out that there was in any case an appeal to the ordinary courts available. Therefore, there was no need for such a provision in this law.

Article 12.6

Both the Court and the rapporteurs pointed out that the issue of the status of the staff of the Court had to be defined (like staff of ministries or Parliament). The issue of remuneration should be seen independently from this.

Article 13.2

Mr Omari held that it was impossible to have the President of the Court himself define the number of policemen under his authority.

The Court agreed that in practice there was a need for co-operation between the President of the Court and the Minister of the Interior.

Article 14

The rapporteurs pointed out that there should be a functional immunity for acts performed in exercising as a judge and not a full immunity. Therefore, Paragraphs 1 and 3 of Article 14 should be merged. Furthermore, there should be a clause on the suspension of a judge when he/she is accused. Which majority would be applied? Was the judge allowed to take part in the vote?

Mr Omari pointed out that the Court should be obliged to give reasons when it does not lift the immunity.

The Court agreed to amend Article 14.

Articles 18 and 20

The rapporteurs suggested that a hearing should take place only when the parties asked for it. Otherwise the Court would be overwhelmed by the amount of time spent in hearings. The written procedure should be favoured.

Members of the Court insisted that new documents could come up at the hearing and that the other parties should have the right to learn about them.

The rapporteurs highlighted that proceedings before the Constitutional Court were fundamentally different from civil and criminal proceedings. There should be a time limit before the hearing until which any documents have to be submitted. The Court should then notify these documents to the other parties before the hearing. The time limits for the other party to react to these document can be left relatively short in order to accelerate the proceedings.

Article 21

The rapporteurs suggested that due to complex legal-technical questions being dealt with before the Constitutional Court, legal representation of parties should always be required. Parties who could not afford representation should be given legal aid.

The Court pointed out that the draft intended to give the individual a fair choice to represent him or herself or to seek assistance from a lawyer. The Court agreed to mandatory legal representation.

Article 22

Mr Omari pointed out that the clause on the impartiality of the judge was self-evident and could be left out of the draft.

The rapporteurs were of the opinion that sometimes even merely declaratory clauses might be useful.

Article 23.1

The rapporteurs suggested that only general effects of the decisions should depend on the publication of the decision in the official gazette. Persons imprisoned should go free immediately after a decision which annulled the law which was the basis of their sentence.

The Court pointed out that while this was desirable, the clear language of the Constitution was opposed to this (Article 132.2).

Mr Omari proposed that Article 132.2 second sentence of the Constitution could be interpreted in a way as to give the Court to right to ask for the immediate release of prisoners.

Article 24 and 28

The rapporteurs pointed out that there should always be one reporting judge, member of the panel deciding on the admissibility of the case.

The Court replied that in current practice, after registration of a case, the President always assigned one reporting judge and two other judges who formed the panel. Panels would be set up at the beginning of the year. The reporting judge would continue to act as such in the proceedings before the Plenary. The Court agreed that Article 28 needed redrafting to become clearer.

The rapporteurs agreed and insisted that this existing practice should be laid down explicitly in the law.

Article 25.3

The rapporteurs highlighted that it was difficult for the applicant to know who would be all the other parties (interested persons). Especially as Article 28.2 stipulated the non-acceptance of the appeal in case of formal errors, this could result in a denial of justice. It should be an obligation of the Court to identify all other parties and to notify them.

The Court agreed to change this article. The applicant should indicate who he/she thought are the other parties but the Court would also notify any other parties involved.

Article 27

The rapporteurs pointed out that there was a conflict between Article 27 which excluded time limits and later articles which introduced them in special procedures

The Court replied that this was an oversight in the draft.

Article 39.1

The rapporteurs held that all documents should already be produced during the written procedure before the hearing.

Article 41

Upon request by the rapporteurs, the Court pointed out that Article 41 concerned only the reopening of the hearing before the decision.

Article 46

The rapporteurs pointed out that article 46 mixed abstract and concrete norm control. These fundamentally different proceedings should be separated. Requests from ordinary courts (article 66) should be dealt with separately because they concerned a concrete case whereas requests from the other public bodies were abstract.

Article 47

The rapporteurs insisted that the time limit for introducing requests for direct, abstract norm control should be very short (less than five years). Oh the other hand there should be no time limit for indirect, concrete norm control via ordinary courts (article 66).

Article 50.3

The rapporteurs suggested that ratification proceedings should be suspended already after the introduction of the appeal to the Constitutional Court, not only before the hearing. Otherwise it could happen that the treaty is already ratified before the Constitutional Court decides.

The Court agreed.

Article 52

The rapporteurs admitted that it was very difficult to determine what a conflict of powers was. Should only highest organs be allowed to appeal? This might have to be decided in the future case-law of the Court. The individual should have a right to appeal to the Constitutional Court in case of a negative conflict of powers because typically none of the powers concerned was interested in the case.

The Court agreed.

Mr Omari suggested that the expression "organ representing a power" should be replaced with "constitutional bodies".

Article 64.3

The rapporteurs pointed out that the possibility of a review of the mandate of a deputy at any time during his/her term of office in paragraph 3 of Article 64 was to be avoided. This possibility should be limited to the three month following his/her election. If this clause concerned only the incompatibility then it should be moved before paragraph 2 which concerns elections. Obviously an incompatibility could occur also during the term of a judge. A time limit should start only when such facts would become known.

Mr Omari suggested that separate time limits for the proceedings concerning the eligibility and the incompatibility concerning deputies be introduced.

Article 66

The rapporteurs proposed to amend article 66 to make it clear that requests from ordinary courts for concrete review could be made when the question of constitutionality was "decisive for the outcome of the case" before them and not only when there was a "direct link". Furthermore, it should be made clear that such requests for concrete review could be made at any time; there should be no time limits. The trial before the ordinary court should be suspended pending the outcome of the proceedings before the Constitutional Court.

Article 69

The rapporteurs inquired about the necessary quality of the conflict between powers. There should be a concrete problem between the powers who asked the Court for a decision.

Article 71

The rapporteurs suggested that the absence of one judge should not impede the Court to go on with the discussion and voting session when there is a quorum of judges present.

Article 72

The rapporteurs held that the second sentence of Article 72 could create a problem with the principle of *res iudicata*. This sentence would invite the parties to 'try it again'.

The Court replied that case of a tie vote no final decision had been taken. Therefore there was no problem of *res iudicata*.

Article 74

The rapporteurs favoured effects of the decisions of the Constitutional Court only *ex nunc*. Cases before ordinary courts which have already been decided and which are not open to review should remain settled. Open cases, however, should be decided on the basis of the decision of the Constitutional Court. Thus general, final decisions should remain *res iudicata*. In the penal field, on the other hand, the decision of the Constitutional Court (annulment of a criminal law) should apply even to final cases when the new situation was more favourable to the sentenced person. Furthermore, it should be considered to give satisfaction also to the individual who brought the case before the Court, otherwise there would be no point in appealing to the Court.

Article 77

The rapporteurs insisted that the word "retroactivity" should be avoided because this is a very complex concept.

Article 79.4

The rapporteurs suggested that the power to impose fines for the non-execution of the decisions of the Constitutional Court could remain with the ordinary courts.