Strasbourg, 7 December 2004

CDL-AD(2004)034
Or. Engl./Fr.

Opinion no. 312/2004

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AMICUS CURIAE OPINION ON THE INTERPRETATION OF ARTICLES 125 AND 136 OF THE CONSTITUTION OF ALBANIA (APPOINTMENT OF HIGHEST JUDGES)

Adopted by the Commission at its 60th Plenary session (Venice, 8-9 October 2004)

on the basis of comments by

Mr Sergio BARTOLE (Substitute member, Italy)
Mr José Manuel CARDOSO DA COSTA (Member, Portugal)

This document will not be distributed at the meeting. Please bring this copy.
Ce document ne sera pas distribué en réunion. Prière de vous munir de cet exemplaire.

Table of contents

Introduction...3
The request...3
Conclusion 3
Appendix I – Request for an *amicus curiae* opinion by the President of the Constitutional Court of Albania…………………………………………………………………….......…...............5
Appendix II - Comments by Mr. Bartole 7
Appendix III – Comments by Mr. Cardoso da Costa ……………………………………….……... 10

Introduction

1. By letter of 1 September 2004, the President of the Constitutional Court of Albania, Mr. Sauli, asked the Venice Commission to give an amicus curiae opinion on the Interpretation of Articles 125 and 136 of the Constitution of Albania, which concern the Appointment of Highest Judges (Appendix I).

2. The Commission appointed Messrs Bartole and Cardoso da Costa as rapporteurs. Their comments figure in the appendices to this opinion (Appendix II and III respectively). The present amicus curiae opinion was adopted by the Venice Commission at its 60th Plenary Session in Venice on 8-9 October 2004.

The request

3. The request for an *amicus curiae* opinion by the Constitutional Court relates to a request by the President of the Republic for an interpretation of Articles 125 and 136 of the Constitution of Albania. The background to this request is the nomination of a person as a judge of the Constitutional Court to which the Assembly has not given its consent. In his request, the President argues that in deciding upon the consent, the Assembly would be limited to verify whether the nomination was constitutionally and legally valid.

4. The opinion thus concerns mainly the first sentence in each of Articles 125 and 136 of the Constitution according to which the judges of the Constitutional Court and the Supreme Court are “appointed by the President of the Republic with the consent of the Assembly”.

5. The issue at stake is the scope of the powers of the President and the Assembly respectively. Is the Assembly restricted to verify that the Presidential nomination conforms to constitutional and legal criteria or whether the Assembly can also examine the substance of the choice of the President, that is whether the Assembly’s right of control is merely formal or material allowing for a substantive right to veto presidential nominations.

Conclusion

6. When giving its “consent” to Presidential nominations of judges of the Constitutional Court and the Supreme Court, the Albanian Assembly has the power to decide upon the merits of the nominations and not only whether formal requirements were met. Consequently, the Assembly has a real ‘veto power’ over presidential nominations for highest judges. Several arguments lead to this conclusion:

1. a literal interpretation of the word “consent”,
2. the need to avoid leaving the powers to make these appointments with a single institution concentrating power in one person,
3. a comparative approach, which identifies a pluralistic composition of Constitutional Courts as a European standard and which points to similarities with the procedure for the appointment of Justices of the US Supreme Court,
4. the choice of the Albanian constituent for a “parliamentary republic”,
5. a historic interpretation comparing the current constitution with the previous constitutional provisions in force before 1998, and
6. the right of the Assembly to dismiss the judges.

The above arguments are presented in the comments by the rapporteurs annexed below.

7. An open debate of the presidential nominations by the Assembly prior to its vote would be important to give the President necessary information about the reasons for a refusal of consent, which will allow him to present nominations which are acceptable to the Assembly. A revision of the Standing Orders of the Assembly in this sense seems appropriate also in accordance with the principle of constitutional loyalty *(Verfassungstreue)*, which governs the relations between the President and the Assembly.

APPENDIX I

Request for an *amicus curiae* opinion by the President of the Constitutional Court of Albania

REPUBLIC OF ALBANIA

CONSTITUTIONAL COURT

The President

Prot. No. _____
Tirana, 01.09.2004

Re: Request for an *amicus curiae* opinion on the interpretation of two constitutional provisions.

Mr. Secretary,

On 21.07.2004 the President of the Republic submitted a request to the Constitutional Court, according to Article 134 of the Constitution, for interpretation of Articles 125 and 136 of the Constitution relating to nomination, pursuant to those provisions, of judges of the Constitutional Court and the Supreme Court respectively by Decree of the President of the Republic with the consent of the Assembly of the Republic. In accordance with Article 125, paragraph 2, a Constitutional Court judge is appointed for a non-renewable term of nine years, and is chosen from among highly qualified lawyers with at least 15 years' professional experience.

The circumstances prior to the filing of the abovementioned request were as follows: the President of the Republic nominated a Constitutional Court judge by Decree of 24.06.2004. This Decree was then submitted to the Assembly of the Republic, which did not give its consent. Following proceedings without debate and by a secret vote (in accordance with the Rules), the Assembly of the Republic decided not to give its consent to the President of the Republic's Decree.

In his request, the President argues that pursuant to Article 125 of the Constitution, it is his duty to check whether all the constitutional and legal criteria are met by the candidate and that he takes responsibility for choosing the best candidate, while the role of the Assembly in granting its consent should be limited to verifying whether the nomination is based on the requisite constitutional and legal criteria. Pursuing his argument, "the Assembly cannot base its consent on criteria other than those laid down by the Constitution and the law. The Constitution gives the President (not the Assembly) of the Republic the task of examining candidates' records and of choosing the best among them who meet all the requisite criteria". In so doing, in the view of the President of the Republic, the Assembly of the Republic would assume a power that is not among the powers conferred upon it by the Constitution.

On the basis of this argument the President of the Republic asked the Court to interpret Articles 125 and 136 of the Constitution, which are jointly linked to the procedures that the Assembly of the Republic must follow when it considers Decrees of the President of the Republic nominating a Constitutional Court judge and a Supreme Court judge. The President also wishes to know whether or not the Assembly has the right to withhold its consent when the candidate for the post of judge meets all the criteria required by the Constitution.

According to the President's assessment in his request, the extended interpretation of its powers by the Assembly of the Republic would amount to interference in the constitutional competence and powers of the President of the Republic. Such an interpretation would go beyond the spirit and meaning which the Constitution accords to political will in the appointment of judges to the Constitutional Court and the Supreme Court.

Having regard to the sensitive nature of its treatment of this request, the Court is anxious to have the opinion of experts (rapporteurs) appointed by the Venice Commission as *amici curiae*. I would be grateful if you would ensure that this request is dealt with and that a reply is received during the first half of October 2004. I venture to hope that, as in the past, the Commission will give its scientific opinion on this case, which will obviously be invaluable to the Court. I look forward to receiving your reply.

Yours faithfully,

Dr. Gjergji SAULI
President

Mr. Gianni Buquicchio
Secretary to the Venice Commission
COUNCIL OF EUROPE
F-67075 Strasbourg-Cedex

APPENDIX II

Comments by Mr. Bartole

The judges of the Constitutional Court of Albania requested from the Venice Commission an opinion about the powers of the Assembly of the Albanian Republic in dealing with the nominations of the constitutional judges submitted by the President of the Republic to the consent of the Assembly. As a matter of fact, a conflict recently arose in the Republic of Albania when the Assembly refused its consent to the appointment of a constitutional judge nominated by the President of the Republic. According to the opinion of the President the Assembly exercised a power which it does not have because it is the President who has to check the compliance of his nominations with the constitutional and legal rules established for the appointment of the constitutional judges.

Answering to the question submitted to Our Commission requires to have a clear idea of the content of the constitutional provisions dealing with the appointment of the members of the Constitutional Court. Art. 125.1 of the Albanian Constitution entrusts the power of appointing all the nine judges of the Constitutional Court to the President of the Republic. But the judges can be appointed by the President only on the basis of the previous consent of the Assembly. The parliamentary intervention is evidently required to counterbalance the apparently exclusive power of the President in the matter. In many democratic legal systems the power of appointing the constitutional judges is not entrusted to one constitutional body or authority only but it is divided between more than one constitutional organ: some judges have to be appointed by the Head of the State, other judges are to be elected by the Parliament and - sometimes - constitutional judges are partially elected by the superior judicial courts or by an assembly of the judges of the superior courts. This division of work (and of power) is provided for to avoid the appearance of the dependence of the Court on only one political or constitutional authority. The presence in the same body of judges who are appointed by different authorities is a guarantee of the independence and of the neutrality of the body itself.

The Albanian Constitution drew inspiration from the provision of the American Constitution dealing with the appointment of the judges of the Supreme Court, and entrusted the President of the Republic with the power of appointing all the judges of the Constitutional Court notwithstanding that such a choice looks unusual for a parliamentary system of government. But we can guess that the Framers of the Albanian Constitution thought that the American Constitution itself suggested a solution which could correct the apparent exclusiveness of the presidential power where it provides for the participation of the Parliament in the procedure. As a matter of fact, the mentioned art. 125 expressly requires the consent of the Assembly to the presidential nomination. Obviously the solution which the Albanian Framers adopted implies that the President of the Republic has to communicate his nominations to the Parliament and the Parliament has to examine and discuss the presidential choices.

This is the way of dealing with the matter which the American Senate adopted. It is well known that a Commission of the American Senate examines the presidential nominations hearing not only the candidates but also persons who are in the position of offering to the Commission useful informations and suggestions with regard the professional abilities and orientations of the candidates in view of the decision which has to be adopted by the Senate. The decision of this body is taken in a plenary meeting of the assembly under the chairmanship of the Vice-president of the United States.

In his very interesting book "God save this honorable Court" (New York 1985) Laurence H. Tribe, professor of constitutional law at Harvard Law School, criticized the myth or doctrine of the "spineless Senate", according to which "appointments are the President's to make; the Senate may grumble a bit, but in the end it merely rubber-stamps the President's nomination to the Court" (page. 77). According to his opinion the historical record does not support that doctrine because the Senate has always vigorously challenged the presidential nominations and sometimes rejected them, refusing its consent to the choices of the President. Can this American example be useful to the interpretation of the Albanian Constitution? It could be objected that the American Constitution requires not only the consent but also the advice of the Senate in the selection of the judges of the Supreme Court, while the Albanian Constitution requires the parliamentary consent only, and therefore it apparently denies to the Assembly a say about the substance of the presidential choice, that is the professional qualifications of the candidates. But Tribe reminds us again that "it has generally been accepted that the Senate's power of" advice and consent "is formally limited to a veto" (American constitutional law, II ed., New York 1988). The Senate is not authorized to submit suggestions or proposals to the President about the appointment of the judges of the Supreme Court, but it has the power of examining the merit of the presidential choices in view of his decision of giving or refusing its consent. It is well known that the hearings in the competent commission of the Senate deal with the professional and ideological qualifications of the lawyers nominated by the President. Tribe's book was written before the discussion in the Senate about the proposal of the President of appointing to the Supreme Court judge Bork whose nomination did not get the consent of the Senate in 1987. Tribe was not able to take into account these more recent developments but they confirm his opinion.

If we agree that the requirement of the parliamentary advice in United States of America does not allow the Senate to previously advise the President about the criteria and the guidelines to be adopted in the exercise of his power of appointing the judges of the Supreme Court, the lesson of the American experience can be useful to Albania. The requirement of the parliamentary consent does not imply a previous interference of the Assembly in the presidential choices, but the power of giving the consent necessarily implies also the power of denying the consent when the presidential choice cannot be accepted ex post by the Assembly.

The President of the Albanian Republic does not share this opinion. We can understand his position. According to the Standing Orders of the Assembly, this body has to decide about the presidential nominations after a procedure which does not allow a debate in a Commission or on the floor and requires a secret vote. Therefore the President can easily have the feeling to be confronted by an arbitrary parliamentary decision of which he cannot know the reasons and justifications. He sees his authority put in danger, he sees the credibility of the nominated persons put in danger, but the Assembly is not obliged to offer an explanation of its decision. On the other side, the Assembly could object to these worries that it is a common practice of the assemblies that decisions regarding persons have to be adopted by secret vote. Moreover the European constitutional doctrines suggest that a politicization of the choice of the judges has to be avoided because it can endanger the independence and the neutrality of the judges or - at least - the appearance of their independence and neutrality. A debate on the floor about the presidential choices could emphasize such a danger.

But it also true that the position of the constitutional judges is quite peculiar and cannot be easily compared with the position of the other judges. They are dealing with delicate questions which have a clear political relevance. They have to adopt as the yardstick of their judgements constitutional rules which leave a lot of discretion to the interpreters. They are frequently

allowed to elaborate the effects of their decisions as far as the relevant constitutional and legislative rules explicitly or implicitly give them some leeway in the matter. Moreover the Albanian constitutional judges can deliver dissenting opinion and are allowed to publicly state their position about the decisions adopted by the Court. Therefore, if the Constitution requires the parliamentary consent of their appointment, we should conclude that it allows a parliamentary discussion about the professional qualifications of the nominated lawyers with regard to the political relevance of their work, their preferred legal doctrines in the field of the interpretation of the constitutional law, and their statesmanship in dealing with the effects of their work. Such a debate is the means offered to the Assembly to counterbalance the apparent exclusiveness of the presidential power. In a democracy the use of the powers of the constitutional authorities implies a free scrutiny by the public opinion; therefore it has to be arranged in such a way to publicize the political guidelines inspiring the behaviour of the competent bodies. The citizens have to have the possibility of comparing the results of the political decisions with the reasons which support them. Moreover the President of the Republic has to be informed about the criteria of judgement which the Assembly adopted in dealing with his proposals.

My guess is that the Albanian constitutional provisions have to be read taking into account the peculiarity of the choice of their Framers. While the entrustment of the power of appointing some constitutional judges to the Head of the State is a frequent feature of the European democratic systems of government (Italy, France e.g.), we don't have parliamentary systems of government which entrust the appointment of all the constitutional judges to the Head of the State requiring at the same time the consent of the Parliament. The requirement of the parliamentary consent implies the establishment of a relation of cooperation between the President and the Assembly as far as the President has the power of submitting nominations to the Assembly and the Assembly has the power of vetoing them. If such an arrangement has to work, it is necessary that the President is in the position of knowing the guidelines which the Assembly follows in the matter. This result can be obtained only if the Assembly devotes a public debate - in a special commission or on the floor - to the examination of the presidential proposals. It could be said that the solution is conflicting with the European standards and is following the traditional guidelines of a different legal system, the American constitutional system. But we have to keep in mind that we are confronted by a constitutional arrangement which combines a parliamentary system of government with features which are typical of a presidential system of government, where the powers of the Head of the State concerning judicial appointments are counterbalanced by the scrutiny of the Parliament. Moreover the presidential nominations are not adopted on the basis of a proposal of the Cabinet and any ministerial signature is not required for the validity of the appointment.

Therefore the conclusion can de drawn that when the Albanian Assembly deals with the presidential nominations of the constitutional judges, it has to openly debate them before giving or refusing its consent to them. The Standing Orders of the Albanian Assembly presently in force should be amended. Obviously a different solution could be adopted if the constitutional provisions in the matter were modified by the introduction of a more balanced distribution of the power of appointing the constitutional judges among the superior authorities of the Albanian Republic.

University of Trieste, September 15th, 2004 (prof. Sergio Bartole)

APPENDIX III

Comments by Mr. Cardoso da Costa

I. Introduction

1. The Constitutional Court of Albania has asked the Venice Commission for an opinion by international legal advisers on the interpretation of Articles 125 and 136 of the Albanian Constitution.

These Articles relate to the nomination of the judges of the Constitutional Court itself and of the country's Supreme Court; on 21.07.2004, the President of the Republic, relying on Article 134 of the Constitution, asked the Court to interpret them.

The context of such application to the Court by the President of the Republic was the refusal by the Albanian Parliament (Assembly of the Republic) to approve the Presidential Decree of 26.06.2004 nominating a new judge, specifically a judge of the Constitutional Court.

2. In this case, therefore, the Commission is called upon to issue (or to have issued) an *amicus curiae* opinion to assist the applicant Court in its decision on a specific question of interpretation put to it.

II. Legal provisions

3. Articles 125 and 136 of the Constitution of the Republic of Albania read as follows (English text taken from website http/www.gkj.gov.al):

Article 125

1. *The Constitutional Court is composed of 9 members, who are appointed by the President of the Republic with the consent of the Assembly.*

2. *The judges are named for 9 years without the right to be reelected and among lawyers with high qualification and with not less than 15 years' experience in the profession.*

3. *One third of the members of the Constitutional Court are replaced every three years according to the procedure foreseen by law.*

4. *The President of the Republic with the consent of the Assembly appoints the President of the Constitutional Court among the ranks of its members for a three-year term.*

5. *The judge of the Constitutional court remains in office until the nomination of his successor.*

Article 136

1. *The members of the High Court are appointed by the President of the republic with the consent of the Assembly.*

2. One of the members is appointed Chairman following the procedure contemplated by paragraph 1 of this article.

3. The Chairman and members of the High Court hold the office for 9 years without the right of re-appointment.

4. The other judges are appointed by the President of the Republic upon the proposal of the High Council of Justice.

5. Judges may only be citizens with higher legal education. The conditions and procedures for selection are defined by law.

Moreover, Article 134 – only subparagraph a) and number 2 are of interest – provides as follows :

Article 134

1. The Constitutional Court is put into motion on the request of:
a) The President of the Republic;
…………………………………………………….
…………………………………………………….

2. The subjects provided for in subparagraphs f), g), h), i), and j) of the paragraph 1 of this article, could make a request only for issues related with their interests.

Article 128

The judge of the Constitutional Court may be dismissed by the Assembly through two thirds of its total number of members if he/she violates the Constitution, commits a crime, becomes mentally or physically incapable, commits other acts that incriminate the position and personality of the judge. The decision of the Assembly is reviewed by the Constitutional Court, which, upon verification of the above-mentioned reasons, declares the dismissal of the members of the Constitutional Court.

Article 140

A judge of the High Court may be discharged by the Assembly with two-thirds of all its members for violation of the Constitution, commission of the crime, mental or physical incapacity, or acts and behaviour that seriously discredit the position and image of the judge. The decision of the Assembly is reviewed by the Constitutional Court, which, upon verification of the existence of one of these grounds, declares his discharge from duty.

Article 131

The Constitutional Court decides on:

a) Compatibility of the law with the Constitution or with international agreements as provided in article 122;

b) Compatibility of international agreements with the Constitution, prior to their ratification;

c) Compatibility of normative acts of the central and local bodies with the Constitution and international agreements;

ç) Conflicts of competencies between powers, as well as between central government and local government;

d) Constitutionality of the parties and other political organisations, as well as their activity, according to article 9 of the Constitution;

dh) Dismissal from duty of the President of the Republic and verification of the impossibility to exercise his function;

e) Issues relating to the election and incompatibility in exercising the function of the President of the Republic and of the deputies, as well as of their election;

ë) Constitutionality of the referendum and verification of its results;

f) Final adjudication of the individuals' complaints for the violation of their constitutional rights to due process of law, after all legal means for their protection have been exhausted.

III. A preliminary issue

5. If the terms of the Albanian Court's statement are taken literally, the President of the Republic has only asked it "to interpret Articles 125 and 136 of the Constitution".

Had this been the case, it might be a continual source of confusion as to whether the request was an appropriate way of obtaining a reply from the Court, since, among the grounds on which application may be made to the Court set out in Article 131 of the Constitution, there is none that contemplates a simple interpretative "statement" of the Constitution. In the context of such grounds, and once they are set in motion, the Court may obviously interpret the fundamental law: but it is required, in so doing, to "decide" a dispute, a conflict, in short a "legal issue".

However, the request for an opinion does not raise and does not deal with this aspect of procedure or with the competence of the Court. We must therefore conclude that the Court found no difficulty with it – probably because it took the view that the President's request was seeking a decision on a "*conflict of competencies between powers"* (between the President and the Parliament in this case), an area in which Article 131(c) of the Constitution specifically gives it jurisdiction.

6. Be that as it may, since the issue was not raised by the Albanian Court, the Commission should be careful not to raise it. In any event it does not seem excessive to draw attention to it in these "comments".

IV. Interpretation of Articles 125 and 136 of the Albanian Constitution

7. It is only the first paragraph of the two Articles, whereby either the nine judges of the Constitutional Court or the judges of the Albanian Supreme Court are "appointed by the President of the Republic with the consent of the Assembly" that is really at issue.

The issue can be easily stated, namely the extent of the President's power of choice and, correspondingly (or conversely), the extent of the Parliament's power of rejection: is the President of the Republic exclusively responsible (as he maintained in his request to the Court) for choosing the candidates ("the best candidate"), the Assembly being required "to confine itself to verifying whether the nomination is based on the requisite constitutional and legal criteria" or alternatively, is the Assembly entitled to go further (as it appears to have done in this case) and to consider the President's choice(s) from the point of view of "merit" (in the broad sense), being able, therefore, to reject the nomination of a judge (or judges) whom it regards as unsuitable?

In other words, does the Albanian Constitution (in Articles 125/1 and 136/1) presuppose and require substantial agreement (in fact "political" agreement) between the President and the Assembly on the choice of judges for the Constitutional Court and the Supreme Court, giving the Assembly a real "power of veto" over their nomination, or does it merely give the Assembly a power of formal control (and therefore mere "legal" control) of the President's choices?

8. In our opinion there is little doubt that the former proposition is the correct one. Indeed, there are plenty of arguments in support of such an answer:

a) First of all, the wording of the Constitution itself: it does not refer to, for example, "verification", but to "consent": is it not the case that this means the need for an "agreement"? Moreover, the wording of the Constitution is adopted by the legislator in the Law on the Rules of the Constitutional Court (Law 8577 dated 10/02/2000, Section 7) and in the Law on the Supreme Court (Law 8588 dated 15/03/2000, Section 4): in both cases there is again a reference to "consent" (*upon the consent*). [Note that the English translation of the Albanian original took the same expression from Article II, section 2, of the American Constitution on the role of the Senate in the nomination of judges of the *Supreme Court: "... by and with the Advice and* **Consent** *of the Senate …*", which is of particular interest in the light what will be said below, in paragraph *c)*].

b) But over and above the wording, and of greater importance, is the fact that such an interpretation is the most reasonable (the only reasonable?) one from the institutional viewpoint, because the alternative interpretation would mean that the choice of judges – of all judges – for the two highest Courts would be at the sole discretion of the individual holder of a single political office. It seems obvious that the latter solution would not provide a proper guarantee (or would be likely to fail in this respect – and that is enough) of the authority and independence of the Courts. This is stated as a purely objective and institutional judgement which, it must be stressed, is independent of the "character" of any person holding the individual office in question (in this case the President of the Republic), of his political "honesty" and of his sense of what he owes the office and the State.

c) Confirmation (striking confirmation) that this is the case – and this is a third point – can be found in comparative constitutional law: it is considered that a search for a similar system of nominating judges to the highest Courts (and in particular Constitutional Courts), whereby the choice of all these judges is left to the absolute discretion of a single political institution concentrating power in one person (the Head of State), in the Constitutions and laws of democratic State governments will be in vain.

The *standard* of these governments in this area is quite different, and points to a formula or procedure for the appointment of judges (in particular Constitutional Court judges) that might be called "pluralistic", however that characteristic is expressed:

- by the sharing of responsibility for the choice of judges among several entities (possibly including the President of the Republic) or institutions of the State (as is the case, for example, in Italy, France, Spain or Romania);

- by a kind of institutional co-operation by two or more entities in the appointment of judges (the choice and nomination of judges by the Head of State from among those submitted to him as a double or triple list by the Parliament or one of its chambers or even by other institutions, as happens in Belgium, Turkey or Slovakia; or, the initiative in the choice of judges is assigned to the Head of State but his "proposal" must be approved by the Parliament or one of its chambers, as in Slovenia or Russia, or his "choice" must receive the consent of Parliament or one of its chambers, or such consent must not be refused, as is the case with the United States Supreme Court, a well-known model, to which may be added the Supreme Court of Brazil, or in Europe the Supreme Court of the Czech Republic;

- or lastly, by an exclusively (or almost exclusively) parliamentary procedure for the choice of judges, in which the competitive pluralism of the political parties involved and the need to seek a consensus or compromise among them plays a part (as is the case, for example, in Germany, Switzerland, Portugal, Hungary, Poland or Croatia).

It seems quite clear, therefore, that an interpretation of Articles 125/1 and 136/1 of the Constitution of Albania granting Parliament only the right to check that the President of the Republic's choice is "legally" proper (that the "requisite constitutional and legal criteria" have been met) will not be in conformity with the *standard* just described (particularly with regard to Constitutional Court judges).

d) Moreover it can be said – and this will be a fourth argument – that such an interpretation will probably not be the one most in line with the constitutional definition (Article 1) of the Albanian political system as a "parliamentary republic" and the comparative purity (including election of the President by the Assembly alone: Constitution, Article 86) of the parliamentary system in place.

It certainly cannot be said that the interpretation at issue would be absolutely irreconcilable with such a system. Nevertheless, would it really be the intention of the constitutional legislator in such a context to deprive the Parliament of any involvement in the choice of judges for the highest Courts in the country, beyond checking that the President of the Republic's nominations meet formal requirements?

But in addition (even over and above the parliamentary "purity" of the government), would involvement limited to such a level be in conformity with the (essentially political) nature of the parliamentary body?

e) A similar claim must also be made from a historical viewpoint – more specifically, from the point of view of the development of Albanian constitutional law with regard to the appointment of the judges of the highest Courts.

Initially, when democracy in Albania was revived and the Constitutional Court and the new Court of Cassation were set up, the judges of the former Court were nominated in part by the Assembly of the People (4) and in part by the President (5), while the appointment of the judges of the latter was a matter for the Assembly alone (Law 7491 dated 29/04/91, "*On the main constitutional provisions*", according to the site referred to above). These rules for the appointment of judges were replaced in the country's new Constitution on 28/11/98 – which also adopted the title "Supreme Court" instead of "Court of Cassation" – by the provisions of Articles 125/1 and 136/1, at issue here.

Is it likely that the aim of the change would be to reduce the Albanian Parliament's involvement in appointing the judges of both Courts in so drastic a fashion (which would be the case in the interpretation under analysis)? Is it not much more probable that the constitutional legislator had a different intention: to set up another "pluralistic" system in place of the original system for choosing judges for the Constitutional Court and the Supreme Court?

f) Lastly it might also be added – obviously as a secondary argument – that the mere "legal and formal" involvement (*hoc sensu*) of the Assembly in the appointment of the judges of both Courts would not sit well with the Assembly's power to remove them from office in the cases and in the terms prescribed in Articles 128 and 140 of the Constitution.

9. So we arrive at the conclusion that in Articles 125/1 and 136/1 the Albanian Constitution provides for true "consent" (with regard both to formal requirements and to the merits of the choice) by the Assembly of the Republic to the nomination of judges of the highest Courts in the country by the President of the Republic, which calls for the (implied) "agreement" of the two entities for such a nomination to take effect.

In arriving at such a conclusion, however, we do not forget either the difficulties of the system or the requirements that it imposes on those involved. These may be related to the concept (or to the virtue) of "constitutional loyalty" (*Verfassungstreue*), which in fact shows itself in mutual respect by each authority for the area of competence of others: in this case it should lead the President of the Republic to take particular care in the choice of each judge (having regard to the capability and the merits of the candidate, as well as the various circumstances attendant on each nomination) and should lead the Assembly to examine presidential nominations in the light of considerations of the same type; in so doing, the Assembly should be guided by the sole aim of ensuring that the Courts are composed of suitable and properly qualified judges and should take care not to convert its "power of veto" into an unjustified and arbitrary barrier, and even worse if persisted in, into the "right of initiative" which rests with the President in these matters.

Thus an appeal to the practice or exercise of this virtue by the President of the Republic and by the Assembly of the Albanian Republic in the choice of judges for the highest Courts in the country is implicit in the constitutional provisions, which make them jointly responsible for this choice. This should be emphasised, but it must also be recognised that the difficulties that may arise there are within the area of "politics" (not the "legal" area), and will have to be solved in that area.

IV. Conclusion

10. In the light of all the previous considerations, the conclusion is that Articles 125/1 and 136/1 of the Constitution of the Republic of Albania should be interpreted to mean that the requirement therein for the "consent" of the Assembly of the Republic to the nomination of the judges of the Constitutional Court and of the Supreme Court does not merely give the Assembly the right to check that the constitutional and legal criteria have been met in respect of each nomination, but also includes the power to consider the "merits" (in the broad sense) of the choice and the right to reject it on those grounds.

Coimbra, 23 September 2004.