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CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

Questionnaire for the preparation of CCJE Opinion No. 18 (2015):

“The independence of the judiciary and its relations with the other powers in a modern democratic state”

Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

Questions

- 1) How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side?**

The Constitution of the Republic of Albania recognizes and guarantees the independence of judicial power by way of a wide range of provisions, which guarantee organizational, administrative and financial independence. The Constitution of the Republic of Albania did not suffice itself solely on the formal affirmation of the independence of the judiciary, but expressly provided for the constitutional guarantees for the accomplishment and implementation of such independence.

The principle of separation and balancing of judicial power constitutes one of the fundamental constitutional tenets. Constitution provides that the governing system in the Republic of Albania is based on the separation and balancing of the legislative, executive and judicial power.

Judicial power, according to the Constitution, is exercised by the High Court as well as by the appeal courts and district courts. The courts have the exclusive right to the function of exerting justice. This function of the courts determined the place of the judiciary in the system of institutions of state power and the status of judges. According to this resolution, judicial power is exercised in a cycle of stages following the principle of the control of lower courts' rulings from higher courts. This norm guarantees the independence of the judiciary, according to which court rulings are controlled only by the higher court and no other body can evaluate the legitimacy and grounds for court rulings, as long as they are not amended or repealed by a higher court. According to the Constitution, judges are independent and subject only to the Constitution and the laws.

Likewise, Constitution stipulates that intrusion in the activity of the courts or judges instigates responsibility pursuant to the law. Through this stipulation, the Constitution prohibits interference with the courts and judges.

The Albania Constitution provide that the organization and functioning of the bodies foreseen by the Constitution are regulated by their relevant laws, which must be adopted by a qualified majority, by the votes of 3/5 of all the members of the Assembly. This provision is an authentic and indispensable prerogative which provides constitutional bodies and institutions, including the judicial power, with a higher level of security, sustainability and efficiency in exercising their duties.

Self-governance is another important component of the independence of the judiciary recognized and guaranteed by the Constitution of the Republic of Albania. The Constitution regulates the composition and competences of the High Council of Justice. The High Council of Justice has the duty to "govern" the judiciary and is the constitutional body positioned at the top of the organizational pyramid of the judicial power. The presence of 9 judges in the composition of the High Council of Justice accomplishes the connection with the judicial corps and makes the court independent from intrusion by any other power. According to the Constitution, the High Council of Justice is the only body that decides on the transfer of judges as well as on their disciplinary responsibility.

Judicial power in the Republic of Albania also enjoys financial independence. The Constitution provides that courts have a separate budget which they propose pursuant to the law and administer themselves.

In addition to the above, the independence of the judiciary is guaranteed by a number of constitutional and legal norms sanctioning the status of the judge. This status generally includes the permanence, incompatibility and immunity from criminal proceedings, as well as several other rights.

As far as High Court judges, Article 140 of the Constitution provides that they can be dismissed by the Assembly by a vote of two thirds of its members for violating the Constitution, for committing a crime, for mental or physical disability, as well as for acts that seriously/gravely discredit the position and persona of a judge. However, the Constitution provides guarantees for a High Court judge from any arbitrary decision of the Assembly, in stipulating that a decision by the Assembly is reviewed by the Constitutional Court which, upon evidence that one of the above causes exists, announces his removal from office.

In order to guarantee the independence of the judiciary in exercising its duties, the law has limited the civil liability of a judge, according to which judges do not respond in a civil suit related to the conduct of their professional duties, with the exception of cases provided for by the law.

- 2) Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

In last 10 years, there have been several important discussions in Albania to consolidate/improve the justice system. Furthermore, those discussions are pursuing by numerous amendment of the law on the justice system, such as the law on organisation of judicial power, the law on administrative courts, the law on organization and functioning of the High Council of Justice, the law on Magistrate School ect. In the process of drafting of the above-mentioned laws were involved all actors of the system of justice, and stakeholders like MP's, judges, lawyers, scholars, association of judges. However, judges were less involved in this process, because of their limitations of the duty and the workload.

- 3) Has there been any significant debate on the issue of "judicial restraint" or "judicial moderation" with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

An example of the intervention of the judiciary which spoke at all levels - government officials, the media and the public, were the decisions taken by the Constitutional Court of Albania:

First Case:

The Constitutional Court examined on 07/04/2009, in public judicial hearing, the case no 6 of act, pertaining to:

Petitioner: Union of Judges of Albania

Interested Entities: Assembly of Albania, Ministry of Justice, Ministry of Finance, Judicial Budget Administration Office;

Subject matter: "Repealing, as being at variance with the Constitution, the sentence "*Basic salary of the first instance court of serious crimes is equal to 50 per cent of the salary of the High Court judge*", and the sentence "*Added to this salary shall, under specific working conditions, be 10 per cent*", of Article 26/2, of the Law no 9877, dated 18.02.2008, "On organisation of the judicial power in the Republic of Albania".

Upon the completion of the judicial examination, Constitutional Court in its Judgment no 26, dated 24.07.2009, decided: "Rejecting the petition for repealing, as at variance with the Constitution, the sentence "*Basic salary of the first instance court of serious crimes is equal to 50 per cent of the salary of the High Court judge*", and the sentence "*Added to this salary shall, under specific working conditions, be 10 per cent*", of Article 26/2, of the Law no 9877, dated 18.02.2008, "On organisation of the judicial power in the Republic of Albania".

Second Case:

The Constitutional Court examined on 11.12.2008, in public judicial hearing the case no 31/16 of act, pertaining to:

Petitioner: Union of Judges of Albania

Interested Entities: Assembly of Republic of Albania, Council of Ministers, High Council of Justice.

Subject matter: Repealing, as being at variance with the Constitution, the Articles 37/2, 38/a,

b of the Law no 9877, dated 18.02.2008 “On organisation of the judicial power in the Republic of Albania”.

Upon the completion of the judicial examination, Constitutional Court in its Judgment no 20, dated 09.07.2009, of the Constitutional Court decided: “Repealing, as being at variance with the Constitution, the phrase in Article 38, letter “a”, of the law no 9877: “*a) The registrar shall appoint and discharge the personnel of judicial secretarial office and the administrative and technical personnel of the services to courts*”; - Rejection of the petition in connection with claiming non-constitutionality of the phrase in Article 38, letter “b” of the Law no 9877: “*b) oversees the process of organisation and documentation of the assignment of judicial cases through lots, as well as signs assignment of the judicial case file to the respective judge*”. – Rejection of the petition in connection with claiming non-constitutionality of the phrase in Article 37, point 2, no 9877: “*The registrar shall be appointed and dismissed by the Ministry o Justice*”.

- 4) a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?
- b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the “official” reason for the changes or proposed changes.
- c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

Actually, the most important measures taken by the Government toward the independence and impartiality of the judiciary, are the amendments of the Law on the High Council of Justice, which address inter alia the mandate of members of the Council, who will now be suspended upon being indicted in criminal proceedings and dismissed if found to have violated the law or the Constitution, and who are not allowed to be promoted or transferred during their term in office nor to exercise a range of activities considered incompatible on conflict of interest grounds; and the amendment of the law on High Court which provide the establishment of a body, which will preselect the potential candidates and will refer them to the President, for the appointment as a judge on High Court.

The above mentioned legal initiatives were approved by the Albanian Parliament, but rejected by the President, motivating that the legal initiatives have restricted the President’ power provided by the Albanian Constitution.

- 5) In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of “public opinion”.

The functioning of the judicial system continuously has been subject of politicisation, limited accountability, poor inter-institutional cooperation and corruption. Second my personal perception, the fact that Albanian politicians attack so frequently the judiciary is mostly related to disregard the public opinion by misgovernment of state, than to address properly the shortcomings of the judiciary that faces recently in Albania.

- 6) To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The judicial power, except the guarantees regarding its independence, as part of state power is under the influence of other state power such as executive and legislative mainly related to the (i) budget issues and (ii) appointment of the members of the High Court.

(i) As above, the funds made available to the Judiciary shall be approved with the Annual Law of State budget, in total for the entire Judicial Power. The Judicial Budget Administration Office (JBAO) assumes a key role in the process of drafting the draft budget for the Judiciary.

The Judicial Budget Administration Office (JBAO) is led by the Steering Board, being chaired by the Chairman of High Court and has in its composition one member of the High Court elected by the meeting of judges of this Court, two chairmen of Appeal Courts elected by joint meeting of the chairmen of the Appeal Courts, four chairmen of the Judicial District Courts elected by the joint meeting of the chairmen of the Judicial Districts Courts and one representative of the Ministry of Justice. The Steering Board of JBAO breaks down and allocates the budget funds to each court by decision. These funds shall be managed by the courts themselves. JBAO shall, through its specialists, offer unified technical assistance to all the courts at the three levels.

(ii) Regarding the other issue of the influence by Parliament, this influence is related mostly with the appointment and dismissal of the member of High Court. But, so far, there is no case of the dismissal of one of the member of High Court in Albania.

I would like to pay the attention that since January 2013, Parliament has rejected presidential decrees appointing three members of the High Court and the seats concerned have yet to be filled. The motivation of Parliament regarding the rejected presidential nominations is unclear and not related directly to the legal criteria of the candidate, but to the lack of a preliminary inter-institutional dialog among President and Parliament.

- 7) Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?**