

Spring 1993

The Tribunal in Albania

John Paul Jones

University of Richmond, jjones@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [Courts Commons](#)

Recommended Citation

John Paul Jones, *The Tribunal in Tirana*, *E. Eur. Const. Rev.*, Spring 1993, at 51

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

THE TRIBUNAL IN TIRANA

By John Paul Jones

As amended periodically, The Law on Major Constitutional Provisions of April 29, 1991 (No. 7491) serves the Republic of Albania as a temporary constitution. The final constitution, which is currently being prepared by the Special Constitutional Commission, must be ratified by the People's Assembly to take effect. When the Law on Major Constitutional Provisions was enacted more than two years ago, it was intended by the People's Assembly to remain in force for less than a year. It is still in service, however, the Special Constitutional Commission having proven incapable thus far of drafting a suitable replacement.

In its original form, the Law on Major Constitutional Provisions said little about an Albanian judiciary and nothing about its role in constitutional enforcement. Article 2 declared that the state was based on the rule of law and had the duty of respecting, *inter alia*, the constitutional order as well as human dignity, rights, freedoms, and equality under law. Article 3 identified the separation of legislative, executive, and judicial powers as the fundamental principle of state organization. Article 5 noted that judicial power would be exercised by courts that are independent and guided solely by law. While the organs and operations of legislative and executive powers were described in substantial detail, those of the judicial power were not described at all. Almost as an afterthought, Article 42 left the establishment of courts to existing law.

After the bloodless revolution of March 1992, a new People's Assembly moved to correct this oversight, passing some amendments and additions to the April 1991 law, precisely one year later. Together, these April 1992 amendments added a new chapter to Albania's provisional constitution entitled "The Organization of Justice

and the Constitutional Court." Part I of the amendment established a judicial system comprised of a Court of Cassation, an appellate court, courts of first instance, and military courts. Part II of the amendment established a Constitutional Court. Both the text and the structure of the amendment reveal the legislature's antipathy towards a unified judicial system of constitutional review. Explicitly described as the "highest judicial authority," the Court of Cassation enjoys appellate power to review for errors of law—except when the asserted error is lack of conformity of a normative act with the provisional constitution. Errors of that sort lie within the exclusive purview of the Constitutional Court. According to Article 24, the Constitutional Court has these competencies:

1. It makes interpretations of the constitution and constitutional laws.
2. It judges whether laws and acts that have the force of law are compatible with the constitution and with the law.
3. It judges whether acts and regulatory provisions are compatible with the constitution and with the law.
4. It decides on the compatibility with the constitution of international agreements concluded in the name of the Republic of Albania before their ratification, as well as on the compliance of the laws with generally accepted norms of international law and with agreements to which the Republic of Albania is a party.
5. It resolves disagreements of competency between the executive, legislative, and judicial powers as well as those between local authorities and the central power.

6. It decides questions connected with the constitutionality of parties and other political and social organizations and can prohibit their activity.
7. It resolves questions on the legality of the election of the President of the Republic, deputies, and also popular referenda, promulgating the conclusive results.
8. It investigates penal accusations raised against the President of the Republic.
9. It resolves conclusively complaints of persons presented by way of constitutional control for violation of their basic rights by illegal acts.
10. It decides on the suspension of the implementation of a law when it observes that it is not compatible with the constitution, and on the suspension or repeal of acts and other provisions when it observes that they are not compatible with the constitution or with law, as well as taking measures that it deems appropriate for the question it is adjudicating.

According to Article 25, the court may itself initiate constitutional review. The President of the Republic, a parliamentary group, one fifth of the Deputies, the Council of Ministers, judges and local government organs may also trigger review by the court, as may any person claiming violation of his or her constitutional rights or freedoms.

According to Article 26, decisions of the Constitutional Court must be reasoned. They must be reached by majority vote. Judges of the court acknowledge that there have been disagreements about the resolution of one or more of the first eight cases, but no dissenting opinions have yet been made public. Despite the fact that Article 26 specifically authorizes a dissenting judge to attach to the court's decision a dissenting opinion, the Chief Judge has so far declined to release dissents for publication in the Official Notebook, which has been the exclusive source for decisions. As an example of the court's product, Decision Number 8, the most recently reported, is described below.

Albanian Constitutional Court Decision #8

In Decision No. 8, the Tirana District Court and the Prosecutor General both challenged The Law on Weapons of May 25, 1992 (No. 7566). The law permitted police to enter residences and search for unlicensed fire-

arms without prior authorization from the district prosecutor, and directed that persons apprehended on suspicion of possessing unlicensed firearms be held in custody for the duration of the investigation and trial.

The Constitutional Court found that the Prosecutor General lacked standing to bring such a challenge, but found itself empowered to consider *sua sponte* the proposition that the Law on Weapons conflicted with Article 2 of the Law on Major Constitutional Provisions as amended by Article 1 of the Law of April 29, 1992. In other words, the Constitutional Court found itself competent to consider on its own motion the proposition that a statute empowering police to search persons and places without the approval of the prosecutor violated the fundamental tenet of judicial independence and the fundamental right of persons to be free from arbitrary search and seizure.

According to the Constitutional Court, searches without prior prosecutorial authorization could be proper only in exceptional, that is urgent and flagrant, cases and only then if specifically provided for in the relevant penal statute. These limitations, along with the requirement that *post hoc* approval be obtained from the district prosecutor within twelve hours of the search, were deemed by the Court to be essential aspects of the freedom from unreasonable search and seizure guaranteed by Article 2 of the provisional constitution.

When the Court turned to the constitutionality of custodial detention of a suspect during the entire investigation and trial, however, it applied the principle of judicial autonomy articulated in Article 1 of the 1992 amendment, rather than an individual right discernible in Article 2 of the Law on Major Constitutional Provisions. The court found that the decision to detain a suspect in custody was dependent on the particular circumstances of the case, including the type of offense, the weight of evidence, the health of the accused, as well as the likelihood of flight, interference with the investigation, or continued wrongdoing. The analysis of such factors was a peculiarly judicial function, concluded the court, and its assignment to the police in cases governed by the Law on Weapons therefore constituted a breach of the constitutional imperative of separation of powers.

In light of the Albanian perception of the district prosecutor as a judicial officer, it is not clear why the Constitutional Court correlated the two issues and the

two principles in this fashion. Both issues may be seen as conflicts between executive power, as exercised by police, and judicial power, as exercised by judicial officers such as the district prosecutor and the trial judge. When police search without a prosecutor's approval, they usurp judicial prerogative just as much as when they detain a suspect in custody without a judge's approval. By the same token, if, in Albania, a person's constitutional rights include freedom from most warrantless searches, it is hard to imagine that they do not include as well freedom from confinement without the approval of a neutral and detached magistrate. In Article 4 of its provisional constitution, the Republic of Albania guarantees individual human rights accepted by international conventions. Just such a right can be found in Article 9, Section 3 of the International Covenant on Civil and Political Rights and in Article 5, Section 3 of the European Convention of Human Rights. The Republic of Albania has pledged its conformity to both of these conventions.

Having found two provisions of the Law on Weapons incompatible with the Law on Major Constitutional Provisions, the Constitutional Court then proceeded to amend the former by judicial fiat. The court rewrote the first sentence of Article 14.4 of the Law on Weapons so that searches without prior prosecutorial approval would only be permitted in the limited conditions which the court had previously found constitutionally acceptable. The court merely declared the second sentence (permitting detention until judgment) invalid.

The Constitutional Court's twin holdings that Albania's provisional constitution prohibits both most warrantless searches and all pre-trial detention without a magistrate's approval ought to seem unexceptional to most Anglo-American observers. These holdings mesh with both our own constitutional traditions and an emerging Western consensus. On the other hand, the court's next step, rewriting a statute by court order, might raise an eyebrow or two, especially when it occurs so proximately to the court's reaffirmation of the sacrosanct nature of separation of powers. If, as this decision makes clear, the executive has no business making judicial decisions, what business has the court rewriting legislative acts?

The offense is more formal than substantial, however. American courts accomplish much the same result; they just do it with less forthrightness. Tools for avoiding

at least the appearance of conflict at the boundary between judicial and legislative power abound in systems based upon separation of powers. Perhaps the most illustrative example is the United States Supreme Court's revision of the draft law for conscientious objectors in *United States v. Seegar*. The Selective Service and Training Act of 1940 had excused from compulsory military service those who by "religious training and belief" opposed all wars. When a new draft law was enacted in 1948, Congress narrowed the religious training and belief prerequisite to conscientious objection to "belief in relation to a Supreme Being" and not "essentially political, sociological or philosophical views or a merely personal moral code." In *Seegar*, the Court nevertheless held that the quoted language also provided for exemption of one who did not entertain any such belief in a Supreme Being. Unlike the Constitutional Court of Albania, the United States Supreme Court did not dictate an amendment to the statute before it, but its transparently manipulative interpretation amounted to the same thing.

Borrowing from *Seegar*, the Albanian Constitutional Court could have accomplished the same ends in Decision No. 8 without so openly usurping legislative power. To the first offending sentence, for example, the Court might have applied the useful presumption that a legislature intends to legislate only that which would comply with the constitution. Assuming that the presumption could not have been rebutted in this instance (by, for example, ill-considered if candid declarations during floor debate of an intent by the People's Assembly to defy the basic law), it could have led the court to conclude that the legislature intended to confer on police as extensive a power to search for weapons as the constitution would suffer. Then the Constitutional Court could have found that the Law on Weapons really authorized police searches only under the conditions the Court derived from Article 2 of the Law on Major Constitutional Provisions. The result would have been a judicial decision upholding a legislative act, or at least presenting the appearance of doing so.

John Paul Jones is a Professor at the University of Richmond Law School. The author is indebted to Kathleen Imholz, Esq., of Mishkin, Kohler & Imholz in New York for very careful translations.