

EDA ÇELA*

The re-evaluation of constitutional court judges in Albania

*"We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our property and our liberty and our property under the Constitution."
Charles Evans Hughes, the 11th Chief Justice of the United States.*

Constitutions, as supreme act of a state, come at an important historical or economic moment. Such was the situation in Albania after 25 years of dictatorship. After the 90s, the first pluralistic elections were held and *ipso iure* was established a democratic order. The fundamental principles that led to these democratic changes were first proclaimed by law no.7491 dt.29.04.1991 "On the main constitutional provisions", then by law no.7561 dated 29.04.1992 "On some amendments and additions to law no.7491 dt.29.04.1991 On the Main Constitutional Provisions".

Within these changes, the Constitutional Court was also established, as one of the most important institutions for guaranteeing the new constitutional order being installed in Albania. Since the beginning, this institution was considered by the lawmaker as the highest authority that guarantees respect to the Constitution and makes its final interpretation.

In 1998, was adopted the today Constitution by a referendum, which laid the foundations of the state and the justice system more stable. The

* PhD Candidate, University of Bari Aldo Moro, Ph.D. Program in Legal Principles and Institutions between Global Markets and Fundamental Rights.

Constitution created the premise for the powers to function independently and in a balanced way. This Constitution today, on the 20th anniversary of its adoption, carries 5 amendments.

The Constitutional Court of the Republic of Albania, from the moment it was established, has been re-renewed every 3 years with 1/3 of it. Vacancies are completed according to the legal provision and in any case, the Constitutional Court Judge continues in office until the appointment of his successor¹.

For the first time, this court is in its total malfunction, as a result of the established vacancy. The malfunction of the court has come for several reasons such as, the end of the mandate and the resignation of the official as well as his immediate dismissal.

This paper analyses the malfunction of the Constitutional Court of the Republic of Albania, as a result of the dismissal of its members. This came as a result of the adoption of a new package of constitutional changes with the aim to reform the judicial system in the country.

The last amendment of the Constitution of August 2016 marked the finalization of the Reform in Justice as a precondition for the integration of the country into the European Union.

According to Article 179/b of the Constitution of the Republic of Albania², the Judges of the Constitutional Court are hereby signed on the

¹ Article 125/5 of the Constitution of the Republic of Albania.

²Article 179/b/ 3, of Constitution of the Republic of Albania : *All judges, including judges of the Constitutional Court and High Court, all prosecutors, including the Prosecutor General, the Chief Inspector and the other inspectors of the High Council of Justice shall ex officio be re-evaluated.*

procedure of re-evaluation *ex officio*, with priority. The re-evaluation process, or otherwise called the vetting process, is a constitutional process that is carried from August 2016 in Albania and also it is regulated by a special law³. The purpose of the law is to determine the special rules for the re-evaluation of all re-evaluation entities to ensure the functioning of the rule of law, the independence of the justice system, and the restoration of public confidence in the institutions of this system. Failure to successfully pass the re-evaluation process constitutes a ground for the immediate termination of the exercise of functions.

The re-evaluation process is carried out on the basis of three criteria: (a) Asset assessment, (b) Background assessment, and (c) Proficiency assessment. The law has defined the re-evaluation Institutions as follows:

- The Independent Qualification Commission (the Commission);
- The Appeal Chamber;
- The Public Commissioners.

The re-evaluation shall be conducted by an Independent Qualification Commission, while the appeals filed by the assesseees or the Public Commissioners shall be considered by the Appeal Chamber attached to

³Law No.84/2016 “On the transitional re-evaluation of judges and prosecutors in the Republic of Albania”, <https://www.eurallius.eu/index.php/en/library/albanian-legislation/send/98-vetting/1-law-on-transitional-re-evaluation-of-judges-and-prosecutors-en>

the Constitutional Court. During the transition period of 9 years, the Constitutional Court shall consist of two chambers⁴.

The Commission is organized in 4 adjudication panels, composed of 3 members each⁵. The mandate of the members is 5 years. It is the first instance of evaluation, according to the 3rd criteria set by law.

The Appeal Chamber consists of 7 judges with a mandate of 9 years and is organized in trial panels composed of 5 judges. The Appeal Chamber shall uphold, modify or overrule the decision of the Commission giving a reasoned written decision. In cases of appeals by the Public Commissioners, the Chamber may not impose a more severe disciplinary measure, without providing the assessee with sufficient time to prepare and be heard in a hearing. Assesseees may exercise the right of appeal to the European Court of Human Rights. The Venice Commission in its opinion also supported the Appeal Chamber, in accordance to the right of a fair trial. The Venice Commission asserted that the Appeal Chamber can be considered as a specialized jurisdiction and does provide extensive rights and safeguards to people possibly affected by the re-evaluation procedure⁶.

⁴Article 179/b /5 of the Constitution of the Republic of Albania.

⁵Article 14, Law No.84/2016 “On the transitional re-evaluation of judges and prosecutors in the Republic of Albania.

⁶ Council of Europe (2016), “Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors (the vetting law)”, Adopted by the Venice Commission.

The college is the only adjudicating body of the decisions of the Independent Qualification Commission, and behind it the other level of appeal is the European Court of Human Rights.

A special and very important role has two Public Commissioners. They protect the public interest by appealing to the decisions of the Independent Qualification Commission and have a mandate of 5 years. Now days, the Constitution of the Republic of Albania has foreseen the International Monitoring Operation (IMO) as a special constitutional organ that will support the reevaluation process through monitoring and overseeing the whole process. IMO identifies the international observers, who exercise the tasks related to: Assembly recommendations regarding the qualification and selection of candidates for the position of a member of the Commission, the Judge of the Appeal Chamber and the Public Commissioners; submits findings and opinions on matters reviewed by the Commission and the Appeal Chamber, and contributes to the control of the figures, requesting that the Commission or the Appeal Chamber review evidence or present evidence obtained by state bodies, foreign entities or private persons, according to the law; gives public commissioners written recommendations to file a complaint. In case the Public Commissioner fails to implement the recommendations, he prepares a written report giving the reasons for the refusal as well as the right to receive all the information immediately, data on the persons and the necessary documents, in order to monitor the reevaluation process all levels and phases.

To carry out the assessment, the revaluation institutions cooperate by collecting official data from:

- High Inspectorate of Declaration and Audit of Assets and Conflict of Interest (“HIDAACI”) that is the institution in charge for the asset assessment. The asset assessment is the declaration and audit of assets, the legitimacy of the source of their creation, of meeting the financial obligations, including private interests, for the assessee and persons related to him or her, based on the asset declaration and other verifications done by HIDAACI. HIDAACI based on declarations of assets shall conduct a full audit procedure in compliance with this law, the Law “On the declaration and audit of assets, financial obligations of elected persons and certain public officials, the Law “On prevention of conflict of interest in exercising public functions” and the “Code of Administrative Procedures”. Also it is provided a full access to international observers, upon their request, to seek information, consult, copy or investigate declaration of assets submitted by the assessee or his or her related persons and their accompanying documents.
- Classified Information Security Directory (“CISD”), in charge for the background assessment. The object of background assessment shall be the verification of assessee’s declarations and other data with the purpose of identifying the assessees with inappropriate contacts with persons involved in the organized crime. The verification will be in absence of the declaration on

the background assessment. CISD is entitled to appoint additional officials to administer the background check for the purposes of this law. Persons conducting the background assessment shall comply with all applicable standards for the protection of privacy and confidentiality in office.

- Inspectorate of the High Council of Justice (“IHCJ”)⁷, is responsible for the proficiency assessment. The proficiency assessment evaluates assesses according to their ethical and professional activities in compliance with this law and the legislation that regulates the status of judges or prosecutors. . The proficiency assessment period is, for the purposes of this law, for the past three calendar years of exercising the duties from the entry into force of the vetting law. In case the assessee has less than three years in office, the re-evaluation period shall consist of all years of exercising this duty.

Also other institutions, that assist the re-evaluation process are: People’s Advocate (Ombudsman), the General Prosecutor’s Office, other institutions or authorities stipulated by the law. The final assessment is taken based on one or several criteria or based on an overall evaluation of all three criteria, or the overall assessment of the proceedings⁸.

⁷ Inspectorate of the High Council of Justice functioning according to Law no. 8811, dated 17/05/2001 “On organization and function of High Council of Justice”, amended.

⁸Article 4/ 2, Law No.84/2016 “On the transitional re-evaluation of judges and prosecutors in the Republic of Albania.

But how were judges of the Constitutional Court evaluated and what were considered non-fulfillment of the criteria, which then passed the immediate dismissal from their duty? The following is an analysis based on the decision of the Independent Qualification Commission, the Appeal Chamber and the Public Commissioners.

The Constitutional Court, at the time of its establishment, had a composition of 9 members. Judges of the Constitutional Court remain in office for 9 years without the right to re-appointment.

In 2015, the Constitutional Court had 9 members. In April 2016, one of the judges ended the mandate and had to remain in office until his replacement. The extension of his term ended when, in July 2017, the judge presented its resignation. This resignation effectively left an empty position that for over a year had not been fulfilled.

In the same situation, another member of this Court, whose mandate had ended in 2016, but after remaining in office pending his replacement, he resigned. The Constitutional Court, although with 7 members, could perform its full function, as the quorum needed for decision-making was completed.

In January 2018 resigned "for personal and health reasons" one of the members of the Constitutional Court, who had taken over his duties in 2013. Also, shortly after the implementation of the Constitutional amendments, there was another resignation in the Constitutional Court. None of the resigned judges did not undergo the re-evaluation process.

The six left members of the Constitutional Court passed through the re-evaluation process. Of these, 4 of them did not passed successfully the

re-evaluation process from the Commission and were immediately dismissed, 2 of them successfully passed the re-evaluation process from the Commission but after the Appeal Chamber's decision, only one of the re-evaluated members is currently in duty under the terms when the mandate has ended.

In the five cases of judges of the Constitutional Court, the decision was taken based on the assessment of the property. The object of asset valuation is the disclosure and control of the assets, the legality of the source of their creation, the fulfillment of financial obligations, including private interests for the re-evaluation entity and its affiliated entities. Four of them appealed to the The Appeal Chamber, which has affirmed their dismissal. In one case, the appeal was made by the Public Commissioner and the Appeal Chamber, changed the decision of the Commission by considering not successful the re-evaluation process and immediately dismissed the judge, that in this case was the chair man of the Constitutional Court.

In order to carry out re-evaluation, the Commission has taken into account the reports and the truthfulness of the statements of sources of income, statements, concealment or not of the property. The re-evaluation entity and related persons, together with the property declaration, present all documents that justify the authenticity of the declarations of the legality of the source of the creation of the assets. If the subject of the re-evaluation is objectively unable to dispose of the document justifying the legality of the creation of the asset, it must certify to the reassessment institution that the document has

disappeared, lost, can not be rebuilt or otherwise taken. Revaluation institutions decide whether the failure to submit justifying documents is for justified reasons. This rule applies even when the body responsible for issuing the justifying documents does not respond within the legal deadline.

What has been identified in each of the Commission's decisions relates mainly to the lack of legitimate financial resources to justify the property. The unit of measure to presume the legality or illegality of the proceeds, has been foreseen by law in its Article 6 of the vetting law: *The dismissal of the reinsurance subject is given as a disciplinary measure in the following cases: 1. When it turns out to have declared more than twice the legitimate property during the valuation of the property, including related persons.*

In any case, when the judges' asset assessment process is concluded, the availability of the asset at double the value that is to be available is presumed to have been caused by illegal financial resources.

Another case, part of the asset assessment object, relates to false or inaccurate statements in the declaration of assets⁹.

Regarding the background assessment, the law has foreseen that its object relates to the verification of the statements of the re-evaluation

⁹ Article 33/5 Law No.84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania". *Upon completion of the audit, the General Inspector of HIDAACI shall prepare a reasoned detailed report and, as appropriate, shall find out that: (a) Accurate declaration / disclosure in compliance with the law, with legitimate financial sources and not found in situation of conflicts of interest; (b) Lack of legitimate financial sources to justify their assets; (c) Hiding wealth/ assets; (d) False declaration; (e) Assessee found in situation of conflicts of interests.*

subject and other data in order to identify those entities that have inadequate contacts with the persons involved in organized crime.

The background assessment is developed based on accurate proofs, confidential information, and other available information¹⁰.

In the case of the judges of the Constitutional Court, it is evidenced through CISD inappropriate contacts of the subjects of re-evaluation with persons involved in organized crime.

A rather delicate issue relates to the assessment of the professional skills of the assessment subjects. This function before the constitutional changes of 2016 has been exercised by the High Council of Justice. The law has foreseen that the object of assessing professional skills is to assess the ethical and professional activity of the re-evaluation entities in accordance with this law and with the legislation regulating the status of judges or prosecutors. Members of the Constitutional Court are evaluated based on the resources provided for in the legislation regulating their status. Only in one case, the assessment of professional skills was minimal, considering as such, the lack of minority opinion in

¹⁰ Article 38/4, Law No.84/2016 “On the transitional re-evaluation of judges and prosecutors in the Republic of Albania”. *Conditions that support a finding of inappropriate contact with a person involved with the organized crime are in particular: a) The assessee has been photographed or a witness describes a meeting with a person involved with the organized crime. b) The assessee or a member of his or her related persons has held a non-casual communication with a person involved with the organized crime. c) The assessee or a member of his or her related persons has exchanged money, favours, gifts or property with a person involved with the organized crime. d) The assessee is closely related to a person involved with the organized crime. e) The assessee participates in or attends meetings with one or more persons involved with the organized crime. The person’s alleged membership in organized crime is well known, has been publicized, or is a matter documented in the respective registers.*

the case of voting against, finding violations of the law no. 8577, dated 10.02.2000 "On the Organization and Functioning of the Constitutional Court of the Republic of Albania", Article 72 determines the manner of making a decision and its promulgation, in paragraph 8 of which states that: "A retired minority judge has right to justify his opinion, to join the decision and publish it together. " Also the delayed reasoning of the decisions, which, among other things, violates the standard for a due legal process, referred to Article 42 of the Constitution and Article 6 of the ECHR.

During the re-evaluation process, the Commission has undertake a full inquiry, the judges have mainly failed in the assess assesment. In the other cases, only a few of them also have been judged as inadequate for the background assessment and proficiency assessment. It is contradictory as a very proficient judge has not managed to justify their assets.

Almost 20 years after its approvement, the Constitutional Court of the Republic of Albania is composed of 1 member and in complete malfunction.

Instead of conclusions.

At the time of its drafting, justice reform was predetermined as one of the most important and indispensable reforms in the country. This reform did not only aim to reorganize and re-establish the organs of justice, but as its attribute would also have the restoration of trust in

justice by stabilizing the democratic order and human rights in the country. Even the Venice Opinion stance supported the need for emergency intervention in the field of justice in the country, stating that: the necessity of the vetting process is explained by an assumption that the level of corruption in the Albanian judiciary is extremely high and the situation requires urgent and radical measures¹¹.

Although the justice reform was accompanied by a tight political climate, it managed to approve the legal package needed for its full functioning. This led to the failure in respecting the deadlines provided by the Constitution, the creation of 13 new institutions.

The first results of the reform were not related to the establishment of new institutions nor to their content. The utmost international and national attention was taken to the transitional re-evaluation of judges and prosecutors. In the case of the Constitutional Court, the vetting law created serious problems. The result of the reform and the law was the total nonfunctioning of this court as the only court that can judge the constitutionality or the unconstitutionality. As a guardian of the constitutional order and constitutional justice, this court as is not functioning, has turned Albania into a special case, where the judicial reform, left the country in a total *de facto* unconstitutionality.

The number of resigned judges and prosecutors, while not subject to the re-evaluation process, was lower compared to the dismissal decisions

¹¹ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

given by the re-evaluation institutions. Before the judicial reform, in personal judgment, corruption in the justice system was mostly a perception rather than a phenomenon that had long since occupied the system. In fact, the case-by-case re-evaluation of each member of the Constitutional Court showed quite the opposite. In all the cases, the competent authorities have based the dismissal of the judge, linked only to the economic aspect of the re-evaluation. Each of the judges possessed assets for which they failed to justify the legitimate source of the income. There was only one element of re-evaluation, leaving in the shadows other elements, to conclude that the judges were corrupted, and therefore should be out of the justice system.

The case of dismissal of a judge, according to law 84/2016, jeopardizes the public trust in the judicial system and he is under the circumstances of impossibility for remedying the deficiencies by a training. To jeopardize the public trust in the judicial system it is going to have a full effect in the future and not in the past. What are these affects? In any case, the cases judged by the judges and the decisions taken by them will not be reconsidered. The cases are considered "*res judicata*".

Somehow, by presuming the judges corrupted and leaving them out of the justice system, it is presumed that the reform has given its effects and "punished" them. But in fact, a citizen which was one of the parties in the trial judged by the judge is a victim of the injustice and he has no right to reopen the case, as the decision is final. What constitutional space is given to the citizen to ask for his right to a fair trial? There is nothing more than to go again in front of the court, only for the cases

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provided for by law to adjudicate a case, but with the full confidence that his case is currently being judged by an unchallenged judge. The purpose of this paper is to find out who judges the judges and the remedies against them, and has no intention of judging the judges. In his work, the judge is based on the law, in evidence and his internal conviction, which is irretrievably linked with the judge himself.

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