
**THE EFFECTS OF CONSTITUTIONAL CHANGES ON THE
JUDICIARY SYSTEM IN ALBANIA: THE PROCESS OF VETTING**

**OS EFEITOS DAS MUDANÇAS CONSTITUCIONAIS NO SISTEMA
JUDICIÁRIO NA ALBÂNIA: O PROCESSO DE VETTING**

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ABSTRACT

Objective: in order to increase confidence in the institutions of justice, Albanian politics have undertaken a series of constitutional changes that aimed at a radical reform of the judicial system in Albania, unique in its kind, as the guarantor of the independence of the constitutional institutions, strengthening the healthy part and fulfilling one of the obligations for the European accession of Albania. The main focus of the last few years has been focused on control / Vetting, that is, the exclusion from the judicial system of individuals who do not meet one of the three constitutional criteria (wealth, moral integrity and professionalism), omitting other important aspects of the reform, new entrants to the system, the career system, the improvement of quality in judicial decisions, transparency and independence and professionalism. Vetting, control per se, is not a reform of justice, but only one of its constitutive phases. How is the Vetting process affecting judicial standards, how are the new Albanian justice institutions reacting, what is the public opinion on this progress or the benefits of society from this process?

Methodology: the deductive method is used, with a bibliographical and documental approach, by reviewing books, journals and the legislation.

Results: The transition period from vetting – so, from the creation of new organs to their full functioning - is used by the justice system to continue to take advantage of situations where denial of justice is still possible or to carry out acts which could integrate the extremes of the crime of corruption. These subjects should resign with the approaches of the control procedures. The lack of a clear link between the decision to dismiss the KPK / KPA and the consequence of bringing those who have



broken the law to the justice has given space and immunity to people who, although they have no more the minimum requirements to do it (beginning from moral integrity), still holding the power, compromising in this way the public support for justice reform

Contributions: the research gives as contribution a study of the Albania Democratization, as well as its Constitution enacted in 1998.

Keywords: Albania; Constitution; Vetting; Transition period.

RESUMO

Objetivo: a fim de aumentar a confiança nas instituições de justiça, a política albanesa empreendeu uma série de mudanças constitucionais que visavam uma reforma radical do sistema judicial na Albânia, único em seu tipo, como o garante da independência das instituições constitucionais, fortalecendo a parte saudável e cumprindo uma das obrigações para a adesão europeia da Albânia. O foco principal dos últimos anos tem sido o controle / Vetting, ou seja, a exclusão do sistema judicial de pessoas que não atendam a um dos três critérios constitucionais (riqueza, integridade moral e profissionalismo), omitindo outros importantes aspectos da reforma, novos ingressos no sistema, o sistema de carreiras, a melhoria da qualidade nas decisões judiciais, transparência e independência e profissionalismo. A fiscalização, o controle per se, não é uma reforma da justiça, mas apenas uma de suas fases constitutivas. Como está o processo de Vetting afetando os padrões judiciais, como as novas instituições de justiça albanesas estão reagindo, qual é a opinião pública sobre este progresso ou os benefícios da sociedade neste processo?

Metodologia: é utilizado o método dedutivo, com abordagem bibliográfica e documental, através da revisão de livros, periódicos e da legislação.

Resultados: O período de transição do vetting - ou seja, da criação dos novos órgãos ao seu pleno funcionamento - é utilizado pelo sistema de justiça para continuar a tirar proveito das situações em que a negação da justiça ainda é possível ou para a prática de atos que integrem o extremo do crime de corrupção. Esses sujeitos devem conformar-se com as abordagens dos procedimentos de controle. A falta de uma ligação clara entre a decisão de demitir o KPK / KPA e a consequência de levar aqueles que infringiram a lei à justiça deu espaço e imunidade às pessoas que, embora não tenham mais os requisitos mínimos para fazê-lo (partindo da integridade moral), ainda detendo o poder, comprometendo desta forma o apoio público à reforma da justiça

Contribuições: a pesquisa traz como contribuição um estudo da democratização da Albânia, bem como de sua Constituição promulgada em 1998.

Palavras-chave: Albânia; Constituição. Vetting. Período de transição.



1 INTRODUCTION

After the democratic changes of the 90s, Albania is going through a long transition such as socio-economic and political too, accompanied by many difficulties and problems in all fields. The factors that influenced this long transition can be found in the historical context of the Albanian state: from the backwardness of the Ottoman occupation to non-existent institutional structures, to conflicting state-citizen relations, to a backward feudal economy in which prevails the peasant population. The establishment of an autocratic monarchy, although it attempted to guide under the Italian and French policy and legislation, made impossible radical changes. The years of communism led to the disappearance of political pluralism and democratic institutions, was developed a planned, centralized, and collectivist economy, which created a socialist society based on social and economic equality¹.

The pluralistic transformations, democratic values and principles, freedom, and respect for human rights, which have accompanied democratic development in Albania, have been "enclosed" in Geoffrey Pridham's definition of democratization, understood as «the process of changing the regime from totalitarian rule to the establishment of liberal democracy, as a multidimensional process, which includes: the overthrow of the totalitarian regime, liberalization of the pre-transition, democratic transition, democratic consolidation and finally the liberal democracy. Democracy within it will contain a variety of aspects of the past that can complicate the process of changing the regime»².

The democratization of Albanian society began with the improvement of the constitutional framework, starting from the Laws on the Principal Constitutional Dispositions³. This set of constitutional laws laid the foundations of the democratic State and Rule of Law system in a parliamentary republic, in which national sovereignty was entrusted to the people, and which recognized and respected

¹ I. TOPIALLI, 2018.

² G. PRIDHAM, 2005.

³ L. n. 7491/1991.



human dignity, guaranteed rights, and freedoms, the constitutional order, equality before the law, social justice and pluralism.

The principle of separation of powers constituted the center of the organization of the state, among whose bodies were the People's Assembly and the President of the Republic (Chapter II), while the Council of Ministers represented the main organ of state administration (Chapter III).

The people exercised their power through its representative bodies, as well as through the referendum.

The representative bodies were elected by universal and direct suffrage, ensuring the freedom and secrecy of the vote⁴.

In a society politically divided and fragmented by conflicts between different political parties, Albania took a long time to implement a "consensual" Constitution. In 1998, the Constitution paved the way for the introduction of democratic principles and the construction of the rule of law, democratic and social system, guaranteeing fundamental rights and freedoms and other national values. This fundamental Charter has passed the test of time, thanks to the provision of specific guarantees, such as the control of constitutional legitimacy of the laws, the recognition of the prevalence of international sources over internal ones, the clauses of international integration, the direct invocation of the European Convention of human rights, the possibility of constitutional review only with a qualified majority, the guarantees of human rights not only by national but also international judges, direct execution, etc⁵.

2 THE CONSTITUTIONAL REFORMS

The Albanian Constitution was placed at the top of the pyramid of regulatory acts, according to the principles of the rule of law and "legitimizing" the constitutional bodies envisaged therein. The fathers of the Constitution, through this, have tried to

⁴ Art. 1-3, l. n. 7491/1991.

⁵ A. ANASTASI, 2013, 63 ss.



create a lasting public consensus and to ensure that it contained the solutions to overcome any type of public confrontation⁶.

The absence of a Constitution shared by the majority of the associates could easily transform a democratic attempt into a "tyranny". In this spirit, the Constitution was intended to provide the greatest possible incentives for the development of the society - an unsuccessful attempt during the post-communist period, since it was born from a weak, incomplete constitutional basis - providing not only the supremacy of the Constitution but also the necessary system of "self-defense" and its conservation.

The Constitutional Court was conceived as the authority with the power to defend, guarantee and ultimately, interpret the Constitution, guarantor of the rule of law institution according to the example of the positive experiences of the European Constitutional Courts and beyond. Constitutional justice provides guarantees regarding the hierarchy of sources of law, arbitrates the jurisdiction between public authorities, and applies constitutional rules regardless of whether the parties are public authorities or not (TRAJA, p. 13-14). The main purpose of constitutional control or constitutional justice in Albania has been and remains the identification, evaluation and continuous, uninterrupted and systematic correction of the alterations of the constitutional balance. This control is a tool to guarantee the sustainability of a pluralistic society, which achieves functional and dynamic uniformity and implements its continuous development (IVI, p. 200).

The lack of political stability, constitutional jurisprudence, for over 20 years, has consistently offered an alternative in clarifying the meaning of constitutional provisions and in alleviating the negative consequences caused by institutional deadlocks. The Constitutional Court - under the influence of internal factors, such as the need to clarify the constitutional text and the harmonization of principles and values embodied in it, or external factors, such as the need for Europeanization / internationalization of constitutional justice - has made it possible through various

⁶ V. BALA, 2015, 143 ss.



interpretations, the transformation of the fundamental law from a mere formal / existing Constitution into a “living” Constitution (BERBERI, p. 115ss).

There is no shortage of cases in which political bodies, in the exercise of their functions and competencies, have distorted the content of constitutional rules to the point of violating the principle of separation of powers; or where the legislator has passed laws that violate the independence of some institutions or the principle of rule of law and human rights, through disproportionate interference; or again in cases where the control function of the Assembly was exercised in violation of the constitutional rules; when the executive exercised legislative functions even in the absence of constitutional delegation; when fundamental rights and freedoms have not been respected by the courts; when ordinary jurisdiction has questioned the value of the final decisions of the Constitutional Court, etc.

Regardless of the contribution and role played by the Constitutional Court in mitigating institutional clashes, the Albanian transition has gone through periods of extremely serious political crisis.

This situation influenced the first amendments to the Constitution in 2007 as regards the extension of the mandate of the representatives of the local government from 3 to 4 years (art. 109, paragraph 1), as well as the procedures for the member’s assignment of the Central Electoral Commission. Other changes, in 2008⁷, included the remodeling of the electoral system, from a mixed system to a regional proportional system (art. 64), the interference in the general election rules (art. 65), the remodeling of the competence of the President of the Republic on the establishment of the Parliamentary Assembly (art. 67), the modalities for the presentation of the lists of candidates to the Parliament members (art. 68), the procedure for the President’s election, the start and end of the presidential term (articles 87 and 88), the confidence and no-confidence motion (articles 104 and 105), the verification for the first time of the attorney general mandate (art. 149, cc. 1 and 4), as well as the repeal of the XII Part, which envisaged the Central Electoral Commission as a constitutional body (BALA (PAJO)).

⁷ L. n. 9904/2008.



These changes were considered positively by the experts of the Venice Commission of the Council of Europe. The exception was done for the amendments of art. 104 on the motion of confidence and art. 149 on the Attorney General, which were seen as a step backward, in violation of the independence of these institutions (CDL-AD (2008)033).

Another change that violated the constitutional order was that of art. 87, which issues the election of the President of the Republic. This constitutional organ was conceived as a neutral organ, guaranteeing the integrity of the constitutional order and representing the unity of the people (E. HASANI - I. CUKALOVIC, 2013, 386 ss). By changing the formula of the President's election from consensual to political, its function is delegitimized, transforming its activity into a constant source of institutional stalemate.

Another controversial issue concerned the election of the members of the Supreme Court and the Constitutional Court, as regards the subjective requirements and the necessary *quorum* for the election which would allow avoiding any accusation of "political affiliation", because of the required necessary heterogeneity of the vast majority components. Accusing as politically affiliated the supreme judges, and in particular those of the Constitutional Court seriously jeopardizes the proper functioning of the judicial system and, consequently, delegitimizes their function.

The changes of 2012, which affected the constitutional regime of parliamentary and judicial immunity, was a necessary change in the context of the fight against corruption and the reforms produced by European integration (A. ANASTASI, 2014).

In assessing the dynamics and the fundamental role of many of these legal and political events, we must be realistic and recognize that progress in the field of law still takes a long time.

The Albanian legal system continues to be in transition and influenced by various systems, mainly European ones. It was found that several branches of Albanian law have their origin in various foreign legal models, which has led, in some cases, to legislative inconsistencies, with unnecessary repetitions and/or with the



choice to regulate the same institution in an unreasonably different way legal, in more laws.

Albanian legislation leaves much to be desired from a technical point of view, with contradictory, ambiguous, non-harmonized, and sometimes inconsistent provisions in the envisaged principles and in used terminology, with the consequent non-uniform application of the legislation. Instead, as it is known, legislative solutions should be such that they can last for a long period of time.

In Albania, the adoption of laws is often achieved through the consent of politicians, who present it as the best solution for a given political or legal situation, but which, in practice, has not produced a good result in legislative quality terms. Furthermore, this consensus was not based on a preliminary study and on a clear analysis of the social and economic situation, necessary to be regulated, or on its evolution, or effected by other influencing factors, as well as legal, social and economic effects that the law itself will produce. The law is designed to solve problems and not to create new ones.

Precisely for this purpose, were used the rules on the selection and nomination of judges which represent a guarantee for every rule of law system. Conversely, rules that do not ensure the autonomy and independence of the magistrate, compromise the efficiency of the judicial system *tout court*, the trust of the civil society in justice and in political institutions.

The judicial system has provided evidence of independence and professionalism in certain historical moments, alternated however with negative and questionable attitudes. This, as already mentioned, feeds a constant loss of trust of civil society in justice. The loss of this trust has been attributed to the lack of objective analysis on the shortcomings of the judicial system itself, and also, in some cases, to the unjust attribution to the magistrate of the responsibilities inherent in matters to which it was actually extraneous and which couldn't be solved.

The fact is that public opinion perceives the judicial system as influenced by corruption, by external pressures from the justice administration, nontransparent, ineffective, and with inapplicable judicial decisions. In a survey in 2009 entitled



Corruption in Albania: perceptions and experiences, the Research Institute on Alternatives Development found that Albanians believed that courts were conditioned by monetary interests, commercial ties, personal relationships between judges and political interests (Corruption in Albania, 2009, p. 22-24).

In October 2012, the Center for Transparency and Freedom of Information conducted a survey among judges (which involved less than 60% of them). 25% of respondents said that the judicial system was corrupted, while 58% believed that the system was not, but was perceived as corrupted. Furthermore, 50% of the judges believed that the judicial system was not free from political constraints. These polls have shown that a large proportion of Albanians believe that the judiciary is one of the three institutions that provide a minor contribution to the fight against corruption.

According to an assessment made by GRECO⁸, the judicial system in Albania was characterized by (i) a lower level of public trust; (ii) a weak position competed to other powers; (iii) a lack of control over the selection of Supreme Court judges; (iv) the exclusive competence of the Minister of Justice to initiate disciplinary proceedings against the first instance and appeal Courts judges; (v) the inactivity of the National Judicial Conference, which has had a negative impact on the selection, career advancement, training, and disciplinary proceedings against the judges.

In order to increase the confidence in the judiciary, the Albanian political institutions have implemented a series of constitutional reviews aimed at a radical reform of the judicial system in Albania, unique in its kind, so that it could become the guarantor of the independence of the other constitutional bodies, strengthening its positive aspects and fulfilling one of the obligations for the European accession of Albania.

According to Mr. Fatmir Xhafaj, former president of the Parliamentary Commission for Judicial Reform, a profound reform of the judicial system would make it possible to clean up corrupt, incompetent or influenced judges and prosecutors by the criminal phenomenon; it would encourage the creation of new institutions

⁸ Valuation Rapport for Albania n. 4, 24-27 June 2014 GRECO (Group of States against the corruption)
http://www.coe.int/t/dghl/monitoring/greco/news/News%2820140627%29Eval4Albania_en.asp



guaranteeing system independence, balance and effective control in the fight against corporatism and corruption. In his view, the judicial system in Albania will have to be rebuilt from the ground up, but radical changes will be tied not only to laws and rules but also to people's hearts and minds.

The constitutional amendments - supported by the international community in Albania, by the political institutions and by public opinion - on qualitative changes in the judicial system, were approved by an absolute majority in Parliament, with 140 votes in favor, on 21-22 July 2016 and are entered into force on 11 August 2016. The Constitution reform envisaged the creation, through initial regulation, of the institutions that would complete the *vetting* process (control) of the justice organs. This process provided for the establishment of an independent commission for the nomination of the various magistrates, according to the requirements already established by law, more specifically of the Court of First Instance, of the judges and prosecutors of the Court of Appeal, of the Court for disciplinary appeals, for public commissioners and disciplinary agents, and of the International Monitoring Operation (hereinafter OMN), which is the international body for monitoring the *vetting* process.

The *vetting* law of 7 October 2016 established the establishment of the aforementioned bodies no later than 145 days from its entry into force.

The Constitutional Nomination Council (hereafter KED), from the Constitution, had to be established by August 26, 2016, and the first members would have received the mandate by December 31, 2016. These members would be the first subjects involved in the *vetting*/control process.

The amended Constitution also provided that the High Council of Justice (hereinafter KLGJ) would replace the High Council of Magistrate within 8 months of the entry into force of the constitutional amendments, provided that its members who are togged and not togated had passed successfully the *vetting*/control process (F. KALAJA: 2017).

For the first time, the High Council of the Public Prosecutor (hereinafter KLP) was established, within 8 months from the entry into force of the constitutional



amendments, provided that, the prosecutors and its other non-prosecutor's members had successfully completed the vetting/control process.

Another institution established within six months of the amendments coming into force (always for the first time) is the High Inspector of Justice (hereinafter ILD) who has a nine-year mandate. The Constitution specified that, until the parliamentary elections of 11 August 2016, the members of this body would be elected by 2/3 of the Assembly, and, after that date, by 3/5 of the Assembly. The inclusion of this provision in the Constitution was the result of a difficult agreement between political forces.

Another constitutional change concerns the merger between the Court of First Instance for serious crimes with the Court of Appeal for serious crimes and, in their place, the establishment of Special Courts against organized crime and corruption. These special courts will be established within two months by the establishment of the KLGJ, and the law that will regulate the transfer of the cases that will be processed by them.

The Prosecutor Office for serious crimes will cease to function when the Special Prosecutor Office will be established and its judicial powers will be established by law. Always the new constitutional provisions provided that, the Special Prosecutor Office would be established within two months after the establishment of the KLP.

At the same time, the Constitution provided that, the Attorney General - who has a seven-year term - would be elected with a 2/3 majority by the Assembly, in the parliamentary elections of 11 August 2016. After this period, the establishment of this authority will be elected by 3/5 of the Assembly.

3 THE BUDGET OF THE JUDICIARY SYSTEM REFORM

After about 3 years, it was possible to establish the KLGJ and the KLP, the essential structures in the transition from the re-evaluation process to the process of creating new justice *governance* institutions in Albania. In fact, the justice reform is



pursued more as a requirement imposed from the outside (with strong encouragement from the EU, the US, and Western institutions) more than inside (with the support of institutional and political actors).

The main *focus* of the last few years has concentrated on the control/vetting, or better, on the exclusion from the judicial system of the individuals who miss one of three constitutional criteria (wealth, moral integrity and professionalism), omitting other important aspects of the reform such as new entries to the system, the career system, the improvement of quality in judicial decisions, transparency and independence and professionalism. *Vetting*, control, in itself is not a reform of justice, but only one of its constitutive phases (NË DREJTËSI, 2018).

The balance of what has been done till now offers a judicial system without a Constitutional Court, with a Supreme Court operating with only three members with 31,000 cases ongoing process.

The Special Prosecution Office and the Anti-Corruption Court were not established, 150 magistrates have been removed from the judicial system, whose replacement is a separate problem, and with a provisional Attorney General, who has been in office for more than a year⁹.

All deadlines have been violated and the only new bodies that have been established so far are the High Council of the Prosecutor's Office, which is still without a building, the High Judicial Council, which takes incomplete decisions as it has not yet been fully regulated, the Inspectorate of High Justice, which decides in merits on disciplinary measures for judges and prosecutors when they violate the law (F. KALAJA).

The deadlines set in the Constitution have been violated several times, but the establishment and selection of new candidates for the Special Structure against Corruption and Organized Crime (SPAK), the Constitutional Court, the Supreme Court and even the Court of First Instance and the Anti-Corruption Court of Appeal will require high months and perhaps another year.

⁹ <https://oranews.tv/article/mosfunkcionimi-i-reformes-ne-drejttesi-bilanci-i-tre-viteve>.



Currently, the KED is still verifying the nominations for the Constitutional Court, and at the same point are also the verifications for the nominations for the KLP, for the SPAK and for the Attorney General¹⁰.

So far, the Albanian Constitution and laws have been respected only by international institutions, since the only constitutional body created in compliance with the deadlines is the OMN, the only organ not created by the Albanians, in fact, the Albanian law has entrusted its institution to international bodies. No new Albanian institutions were established within the deadlines, nor were the constitutional and legislative provisions for their institution respected by the Albanian institutions.

The same *vetting*/control process has shown: double standards in judging the same problems; political pressure; differences in the qualification and judgment between the same control structures, assessing only the component of wealth, and avoiding the assessment of skills or moral integrity. At KPK¹¹ / IKP¹² / KPA¹³ was emphasizes a clear strategy on the *vetting* process implementation (if, for example, we will start from those who have applied to access the new envisaged judicial authorities) or how will be evaluated the complaints of persons harmed by the activity of the judge, who is under control.

4 FINAL CONSIDERATIONS

Vetting was proved as a useful tool for assessing the situation in politics, *media*, academia, sports, etc., responding to civil society's request for an elite rotation, but at the same time, it is abused for political and populist needs which led to its progressive loss of importance.

The transition period from *vetting* – so, from the creation of new organs to their full functioning - is used by the justice system to continue to take advantage of

¹⁰ <https://oranews.tv/article/mosfunksionimi-i-reformes-ne-drejtesi-bilanci-i-tre-viteve>.

¹¹ Independent Commission for the Qualification (Komisioni i Pavarur i Kualifikimit – KPK).

¹² Institution of the Public Commissioners (Institucioni i Komisionereve Publike – IKP).

¹³ Speciale College of Appeal (Kolegji i Posaçëm i Apelimit – KPA).



situations where denial of justice is still possible or to carry out acts which could integrate the extremes of the crime of corruption. These subjects should resign with the approaches of the control procedures. The lack of a clear link between the decision to dismiss the KPK / KPA and the consequence of bringing those who have broken the law to the justice has given space and immunity to people who, although they have no more the minimum requirements to do it (beginning from moral integrity), still holding the power, compromising in this way the public support for justice reform¹⁴.

In this context, the question arises: why are independent institutions in Albania so vulnerable, are they conditioned by the failures of the Constitution of 1998 or by the Albanian citizen who does not accept their independence or he/she is not accustomed to it?

In this context, the answer may list several factors, starting from the subordination of the Constitution to political influence, which is a common modus operandi for our political operators. With this attitude, according to the Albanian constitutionalist Aurela Anastasi, "the representatives of the institutions put political interest first, rather than the Constitution one. This opportunism has also damaged the judiciary, which has often been subjected to the intrusive pressure of political power holders. On the other hand, the failures of a Constitution cannot be understood separately from the failures of the institutions that impose it. The Constitution establishes some principles and a model to follow, but the way in which the political forces or the legal operator apply it, or the fact that it does not apply it, is a determining factor. When we talk about the failures of individuals, we also consider the institutions. Therefore, the individual fails not only as such but also as the institution that he directs or works for" (A. ANASTASI, 2015).

¹⁴ Reform of Judiciary System, cit.



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