

RECENT DEVELOPMENTS IN ALBANIAN CONSTITUTIONAL JUSTICE

DOI:10.47743/rdc-2021-2-0006

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Abstract

The Constitutional Court of Albania was created in 1992. We can define three main periods for the operation of this court: the first period begins in 1992 and marks the establishment of the Albanian constitutional justice. The first years were characterized by short decisions, but related to important constitutional issues. The second period begins after the approval of the Constitution of the Republic of Albania in 1998. During these years, the case-law of the Court evolved and provided a constitutional doctrine in compliance with the European case-law. The third period begins in 2016 with the approval of the constitutional and legal reform. It was aimed to strengthen the independence of the Constitutional Court and the effectiveness of its decisions. The main areas the reform was focused on were the appointment process of the judges, including rules and criteria for the selection of candidates, the extent of the competencies of the Court regarding the individual as an entity that can initiate a case not only for due process of law, but also for all the fundamental rights and freedoms guaranteed by the Constitution etc.

Keywords: *Constitutional Court; Rotation procedure; Constitutional reform; Constitutional individual complaint; Vetting process*

This year marks the 30th anniversary of the Constitutional Court of Albania. We can define three important periods for the development of constitutional justice in Albania.

1. The first period

The first period begins with the establishment of the Constitutional Court by Law no. 7491, dated 29 April 1991, "On the main constitutional provisions", after the fall of communism, to be followed by Law no. 7561, dated 29 April 1992, "On several changes and additions to Law no. 7491, dated 29 April 1991".

The democratization of the country included, for the first time, a high court with the power to settle constitutional disputes and make the final interpretation of the

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Constitution. This institution would ensure the establishment of the rule of law and respect for human rights. It was created following the German and Italian model by a commission consisting of a group of constitutional experts.

The Court was composed of 9 members, 5 of which were elected by the Assembly and 4 appointed by the President of the Republic. The President of the Court was elected by a secret vote by the members of the Court. The latter were lawyers, Albanian citizens known for their professional skills, who had performed not less than 10 years in legal activity or were lecturers at the Faculty of Justice and had a high moral reputation. The term of the 3 members of the Constitutional Court, appointed in the first election, expired at the end of 3 years. Their names were determined by lot in each group of judges elected by the Assembly and the President of the Republic. After another 3 years, they were replaced in the same way, by lot, by 3 other judges. Substitute judges remained in office for 12 years, without the right to be re-elected.

This was the first composition of the Constitutional Court. The law also provided that the composition should be renewed every 3 years in one-third of it. In its jurisprudence, the Court considered that this rule provided for the gradual renewal of the Constitutional Court, always retaining a majority of 2/3 of the members with a length of service in the Court. This was an organizational principle, also accepted in the constitutional provisions of other countries, based on the specific features of the constitutional judicial process which, in addition to knowledge, also requires the necessary experience².

On 15 July 1998, the Assembly of Albania passed Law no. 8373, "On the organization and functioning of the Constitutional Court of the Republic of Albania", which provided the legal basis for issues concerning the Constitutional Court's performance. It included the organization of the Court, its operation, entities that could address the Court, rules for submitting a complaint, the review of the case, the type of decisions etc.

The first years of the functioning of the Constitutional Court were characterized by short decisions, but related to important constitutional issues, such as the incompatibility of laws with the main constitutional provisions, interpretation of various constitutional provisions etc. From 1992 to 1998, the Constitutional Court adjudicated 141 decisions³.

2. The second period

The second period begins after the approval of the Constitution of the Republic of Albania by the Assembly, in 1998.

In compliance with the new Constitution, the Assembly also approved Law no. 8577, dated 10 February 2000, "On the Organization and Functioning of the Constitutional

² Decision no. 4, date 2 June 1995 of the Constitutional Court of Albania.

³ https://www.gjk.gov.al/web/History_97_2.php (the number of decisions includes the year 1998).

Court of the Republic of Albania”, which provided for the constitutional and legal framework on issues of organization and functioning of the Constitutional Court.

The new law now stated that the Court would consist of 9 members, which were appointed by the President of the Republic with the consent of the Assembly. The judges were appointed for 9 years, without the right of reappointment, from the ranks of highly qualified lawyers with work experience of not less than 15 years in the profession. The President of the Constitutional Court was appointed from among its members by the President of the Republic, with the consent of the Assembly, for a period of 3 years, with the right of reappointment within the term of being a judge.

The problem of the renewal of the Court came to the surface again since the term of office of constitutional judges changed from 12 years to 9 years and he/she would continue in office until the appointment of his/her successor.

The Constitution of the Republic of Albania, in Article 127, had provided a cause for termination before the term of office of a judge of the Constitutional Court, reaching the age of 70 (point 1 letter “a”), a cause which was not provided in Article 23 of the Law no. 7561, dated 29 April 1992, “On some amendments and additions to the Law no. 7491, dated 29 April 1991, ‘On the main constitutional provisions’”. The President of the Republic addressed the Court for the interpretation of this article. In its decision, the Court provided that Law no. 7491, dated 29 April 1991, “On the main constitutional provisions”, with relevant amendments and supplements would be applied to members who have obtained the term of office with this law, but only in terms of the usual time limit for its exercise, which according to Article 18 of Law no. 7561, dated 29 April 1992, was 9 (nine) years for the members appointed in the first election and 12 (twelve) years for the alternate members.

For cases of premature termination of the mandate (including termination of the mandate upon reaching the age of 70), as well as for other essential elements of it, these members will also be subject to the provisions of the Constitution⁴.

A few years later, the Court was invested again by a group of deputies of the Assembly for the interpretation of Article 125/3 of the Constitution. The Court noted that, as a result of the implementation of the transitional provisions in 2010, the mandate of the last three judges who continued to serve for a 12-year term ended, as well as the mandate of the three judges who were elected for a 9-year term, based on the new constitutional provisions. Consequently, in the current situation, the mandate of the six judges of the Court, *i.e.* two-thirds of its composition, ended at the same time, not respecting the constitutional order to renew the Court every three years, with one-third of it, according to Article 125/3 of the Constitution.

The Court admitted that since the mandate of two-thirds of its judges had ended, a constitutional problem had arisen, but an interpretative decision could not give a final solution to the dispute. The establishment of a mechanism by the Court to maintain

⁴ Decision no. 8, date 3 March 2000 of the Constitutional Court of Albania.

the balance between the observance of the rule of periodic and partial renewal of this Court and the principle of guaranteeing the term of office of a constitutional judge could not fall into the constitutional jurisdiction. Thus, in these circumstances, the Court considered that it was the competence of the legislator to find and implement the appropriate mechanism to respect the constitutional principle of renewing the composition of the Constitutional Court every three years in one-third of it⁵.

After this decision, the Assembly decided not to review the decrees of the President of the Republic for the appointment of the new members of the Constitutional Court until April 2013, to ensure the rotation.

The President of the Republic addressed the Constitutional Court for the abrogation of this decision of the Assembly and the resolution of the conflict of competencies between these two institutions.

The Court stated that *"...according to Article 125/5 of the Constitution, the constitutional judge remains in office until the arrival of the new judge. This constitutional regulation gives the necessary and sufficient legitimacy not only to the constitutional judge but also to the decision-making process of the Court as a whole, to maintain constitutional justice, despite the possible situations that may arise during the process of appointing new members. Article 125/5 has a binding character and cannot be left to the evaluation of constitutional judges or other entities whether or not to stay in office after the end of the mandate until the appointment of a new judge. The legislator has deliberately provided for the obligation of the judge whose mandate has ended, to stay until the appointment of a new judge in order not to create blocking situations, which lead to a lack of security and predictability of constitutional control in a state governed by the rule of law. The situation in which the Court finds itself today, i.e. the tenure of its three members beyond the 9-year constitutional mandate, is not something new for this constitutional institution, which has consistently faced delayed renewals of its composition by two bodies entrusted by the Constitution to carry it out"*.

On the other hand, the Court considered that while the continuation of the tenure of constitutional judges, according to Article 125/5 of the Constitution, is an obligation for them, this does not mean that the President and the Assembly can extend beyond any reasonable time the procedures for their replacement. Before the end of the 9-year mandate of judges, they must take the necessary measures to determine the legal procedural modalities, as well as to replace them within reasonable procedural deadlines, to respect the obligation arising from Article 125/2 of the Constitution.

In its conclusions, the Court considered that the action of the Assembly to not review the Presidential decrees until April 2013, at which time the next renewal should take place, was not intended to obstruct the competence of the President to

⁵ Decision no. 24, date 9 June 2011 of the Constitutional Court of Albania.

appoint new members of this Court, which he has fulfilled. The Assembly, through its decision, aimed to regulate an unusual situation for the renewal of the Court, which has more importance in this case. In this context, the Court found that the President had not been deprived of the power to appoint constitutional judges nor had been hindered in the exercise of this power.

2.1. Entities that could address the Constitutional Court

Article 134 of the Constitution provided for the entities that could address the Constitutional Court, as follows:

- a) The President of the Republic;
- b) the Prime Minister;
- c) not less than one-fifth of the deputies;
- ç) The Head of the Supreme State Audit;
- d) any court according to article 145 point 2 of the Constitution. These entities had unlimited legitimacy and could address the Court for every issue provided in Article 124 of the Constitution.

The second category of entities were:

- dh) The People's Advocate;
- e) local government bodies;
- ë) bodies of religious communities;
- f) political parties and other organizations;
- g) individuals; who could address the Court only for issues related to their interests.

2.2. The competencies of the Court

After the Constitution was approved in 1998 and the organic law in 2000, the case-law of the Constitutional Court has evolved and provided a constitutional doctrine in compliance with the European case-law, especially the European Court of Human Rights and other European constitutional courts. The argumentative part of the decisions has also increased over the years.

Since the purpose of this paper is about the recent developments and the constitutional reform Albania had in 2016, we will only address some important decisions and competencies of the Constitutional Court⁶.

⁶ Article 131 of the Constitution provided that the Constitutional Court decides on:

"a) the compatibility of the law with the Constitution or with international agreements, as provided in Article 122;

b) the compatibility of international agreements with the Constitution before their ratification;

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

ç) disputes of competence between the governments, as well as between the central government and the local government;

d) the constitutionality of parties and other political organizations, as well as their activity, according to Article 9 of this Constitution;

As Articles 124 provides, the Constitutional Court settles constitutional disputes and makes the final interpretation of the Constitution.

2.2.1. *The interpretation of the Constitution*

The competence to interpret the Constitution was not included in Article 131, but as the Court has stated: *"...due to the extremely concise form of the constitutional provisions, through the decisions, i.e. the interpretation made by the Court, it becomes possible for the Constitution to be 'alive', which means that the Court adapts to the evolution of values in our country, guaranteeing that new values, which were probably not in the attention of the drafters of the Constitution, would receive dignity, recognition and, above all, constitutional protection. The mere fact that the constitutional norm becomes a reality during the interpretation, i.e. during the decision-making process of the Court, makes the latter without question a source of law, moreover, it makes it a primary source of it, given that Article 4 of the Constitution provides that the Constitution is the highest law in the Republic of Albania"*⁷.

To interpret the Constitution, the Court takes into account the existence of a close relationship between facts and the concrete norm requested for interpretation; the entities that address the Court have interpreted this norm and the constitutional problem has arisen as a result of uncertainties in the application of the constitutional norm.

The Constitutional Court has interpreted the Constitution on various occasions such as the procedure for the nomination and dismissal of ministers⁸, incompatibility with the mandate of the deputy⁹, the procedure to elect the members of the Constitutional Court¹⁰, the voting process in the Assembly¹¹, the review of decrees of the President of the Republic for the nomination of the members of Constitutional Court and High Court from the Assembly¹², the functioning and performing of investigative commissions of the Assembly¹³, approval of the political program and composition of the Council of Ministers¹⁴ etc.

dh) dismissal of the President of the Republic and certification of the impossibility of exercising his functions;

e) issues related to the eligibility and incompatibilities in the exercise of the functions of the President of the Republic and the deputies, as well as the verification of their election;

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

f) the final adjudication of individuals' complaints about the violation of their constitutional rights to a due process of law, after all legal remedies for the protection of these rights have been exhausted".

⁷ Decision no. 20, date 1 June 2011 of the Constitutional Court of Albania.

⁸ Decision no. 26, date 25 May 2021 of the Constitutional Court of Albania.

⁹ Decision no. 7, date 24 February 2016 of the Constitutional Court of Albania.

¹⁰ Decision no. 24, date 9 June 2011 of the Constitutional Court of Albania.

¹¹ Decision no. 29, date 21 October 2009 of the Constitutional Court of Albania.

¹² Decision no. 2, date 18 January 2005 of the Constitutional Court of Albania.

¹³ Decision no. 18, date 14 May 2003 of the Constitutional Court of Albania.

¹⁴ Decision no. 28, date 21 February 2002 of the Constitutional Court of Albania.

2.2.2. The compatibility of laws with the Constitution

Another important competence is the review of the compatibility of the law with the Constitution or with international agreements and also the compatibility of international agreements with the Constitution before their ratification.

The review of the compatibility of laws is made after the law has entered into force and this competence means that the Court can only declare the norm unconstitutional acting as a negative legislator, without interfering with the competencies of the legislator.

When reviewing a request for the incompatibility of a law with the Constitution, the Court has stated that it starts from the presumption of its compatibility with the Constitution (*conciliatory interpretation*). This interpretation is possible when a law or legal provision can be interpreted in more than one way, one of which is in accordance with the Constitution. This method seeks the constitutional effects of different outcomes and selects the outcome that is in line with constitutional values, taking into account here the fundamental rights of individuals¹⁵.

The Constitutional Court of Albania has reviewed laws and other normative acts through the years. One of the most important decisions was the abolition of the death penalty from the Criminal Code¹⁶, as an obligation to ratify Protocol 6 of the European Convention of Human Rights. Other important decisions of the Court have been the review of the law on legalization, urbanization, and integration of illegal constructions¹⁷; the law on the cleanliness of the figure of High Functionaries of the Public Administration and Elected Persons¹⁸; the agreement signed between the Republic of Albania and the Republic of Greece "On the delimitation of their respective areas, of the continental shelf and other maritime areas belonging to it under international law"¹⁹; the term "nationality" and "nationality in accordance with the nationality of the parents", defined in the law "On civil status"²⁰; Law no. 133/2015, dated 5 December 2015 on the treatment of property and the completion of the property compensation process²¹; Law no. 84/2016, dated 30 August 2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania"²²; Law no. 95/2016 "On the organization and functioning of institutions to fight corruption and organized crime"²³; Law no. 37/2018 "On determining the special procedure for evaluation, negotiation and conclusion of the contract with the object 'Design and implementation of the urban project and the new building of the National Theater'"²⁴ etc.

¹⁵ Decision no 29, date 31 May 2010 of the Constitutional Court of Albania.

¹⁶ Decision no. 65, date 10 December 1999 of the Constitutional Court of Albania.

¹⁷ Decision no. 3, date 2 February 2009 of the Constitutional Court of Albania.

¹⁸ Decision no. 9, date 23 March 2010 of the Constitutional Court of Albania.

¹⁹ Decision no. 15, date 15 April 2010 of the Constitutional Court of Albania.

²⁰ Decision no. 52, date 5 December 2012 of the Constitutional Court of Albania.

²¹ Decision no. 1, date 16 January 2017 of the Constitutional Court of Albania.

²² Decision no. 2, dated 18 January 2017 of the Constitutional Court of Albania.

²³ Decision no. 20, dated 20 April 2021 of the Constitutional Court of Albania.

²⁴ Decision no. 29, dated 2 July 2021 of the Constitutional Court of Albania.

2.2.3. Due process of law

The review of individuals' complaints about the violation of their constitutional rights to a due process of law was one of the main competencies of the Court that resulted in the majority of cases each year. The Court interpreted the due process of law as the procedural control of the judicial process, after all legal remedies for the protection of these rights had been exhausted.

The Constitutional Court is not a court of fourth instance. It does not re-evaluate the facts of the case but makes an assessment of a constitutional nature, different from that of the courts of ordinary jurisdiction. The Court analyzes the relevant facts and circumstances in that dimension that has an impact on the rights and freedoms provided by Article 42 and 131/f of the Constitution, which constitutes its constitutional jurisdiction. The task of the Court is not to resolve a legal dispute about matters of facts, but to identify facts of constitutional nature, which serve to exercise its competencies and constitute the essential element in determining the authority of a constitutional control²⁵.

As stated above, the case-law regarding due process of law has evolved during the years. The Court has changed its practice to be in line with the ECtHR's interpretation of Article 6 of the Convention. These were, for example, the cases regarding the trial *in absentia* and the non-execution of final decisions.

Regarding the trial *in absentia*, until 2010, ordinary courts and the Constitutional Court accepted that the counsel chosen by family members met the criteria of right to defense foreseen in the Criminal Procedure Code. In 2010, the Court changed its position stating that: "... the possibility of family members to provide a power of attorney to the defendant's counsel does not mean the transfer of the right to choose a counsel from the defendant to family members, but also implies the exercise of the will of this defendant, through family members. In other words, the defendant exercises this personal right through his family members, who have the objective opportunity to contact lawyers, in order for the latter to consider the possibility of obtaining the capacity of the defendant's legal counsel. In these circumstances, if there is a discrepancy between the will of the defendant and the will of his family members who have misinterpreted the will of the defendant or had a different will for the legal counsel, the will of the defendant must prevail, which, in any case, he may refuse or dismiss the counsel chosen by the family members"²⁶.

The non-execution of final decisions as part of the due process of law was accepted by the Constitutional Court only in 2006²⁷. The ECtHR, in the context of the execution of judgments, found that "...if the national law or in particular the interpretation *strictu sensu* of the 'fair trial' concept in the meaning of Article 6 § 1 of the

²⁵ Decision no. 14, dated 3 June 2009 of the Constitutional Court of Albania.

²⁶ Decision no. 30, date 17 June 2010 of the Constitutional Court of Albania.

²⁷ Decision no. 6, date 31 March 2006 of the Constitutional Court of Albania.

Convention by the national courts, does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, inter alia, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers of the Council of Europe, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach”²⁸.

Following this interpretation, the Constitutional Court had the opportunity to decide on claims for compensation as a result of unreasonable and unjustified delays in the execution of Court’s decisions referring to material and procedural provisions. However, the Court has hesitated to do so and although it has found the process irregular due to the non-execution of final court decisions within a reasonable time, guaranteed by Article 42 of the Constitution and Article 6/1 of the ECHR, the decision of the Court did not bring anything concrete to the individual. It only gave him the opportunity to exhaust national remedies before addressing the ECtHR to have its compensation²⁹.

The competence of the Court on the due process of law changed after the reform in 2016, as we will analyze hereinafter.

3. The third period

The third period of constitutional justice begins with the approval of the constitutional amendments on 22 July 2016, with the unanimity of 140 members of the Assembly.

Since the approval of the Constitution 18 years before, the justice system faced various developments and different challenges. Thus, the legislation of the main institutions of the justice system needed to change to increase its integrity, independence, efficiency, transparency, and responsibility.

The strategic document that preceded the reform had the following objectives for the Constitutional Court: guaranteeing the independence and effectiveness of the Constitutional Court from the constitutional point of view and increasing the efficiency and effectiveness of the Constitutional Court at the legal level³⁰.

²⁸ ECtHR, *Qufaj CO. SH.P.K. v. Albania*, 18 November 2004.

²⁹ A. Vorpsi, *Procesi i rregullt ligjor në praktikën e Gjykatës Kushtetuese të Shqipërisë*, Maluka, Tirana, 2011, p. 253.

³⁰ Strategy on the justice reform, <http://www.reformanedrejtesi.al/dokumenti-strategjik-dhe-plani-i-veprimit>.

3.1. The vetting process

The constitutional reform included a re-evaluation process, which was established to guarantee the proper functioning of the rule of law, the independence of the judicial system, as well as to re-establish the public trust and confidence in these institutions. The re-evaluation included an Asset Assessment, a Background Assessment and a Proficiency Assessment. This was called the *vetting* process and meant that 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 should, *ex officio*, be re-evaluated. All legal advisors of the Constitutional Court and High Court, legal assistants of the administrative courts, legal assistants of the General Prosecution Office should also, *ex officio*, be re-evaluated.

The vetting process was conducted by an Independent Qualification Commission, while the appeals filed by the assesses or the Public Commissioners could be considered by the Appeal Chamber attached to the Constitutional Court.

Failure to successfully pass the re-evaluation process constituted a ground for the immediate termination of the exercise of functions, in addition to the grounds provided for in the Constitution.

The process of re-evaluation began with delays, but after 5 years there are 132 subjects (judges and prosecutors) confirmed, 142 dismissed and 50 resigned from duty. This process also affected the Constitutional Court, as it was one of the first institutions where the re-evaluation started. Two members of the Court whose terms of office had terminated decided not to continue their mandate. One member resigned for personal reasons from the office of the judge. Four other judges, including the President of the Court, were dismissed from duty from the Independent Qualification Commission (the President was dismissed from the Appeal Chamber after passing the first instance). Only one judge was confirmed in duty. She was the only judge at the Constitutional Court and performed the duty of acting President for almost 3 years of non-functioning of the Constitutional Court and is still waiting to be replaced.

After the appointment of new judges by the President of the Republic and the Assembly, the Constitutional Court started its functionality on January 2021 with 7 judges. Currently, it is the turn of the High Court to appoint the last three members (the mandate of the acting President of the Court ended in 2017). This appointment has been postponed since the High Court did not have the necessary number of members to meet in the special meeting (due to the vetting process or end of their mandate) to appoint the members of the Constitutional Court (after the amendments of the law on Constitutional Court in 2021, this number is 10).

According to Article 179/b of the Constitution, the Assembly approved Law no. 84/2016, dated 30 August 2016, "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", which aimed to determine special rules for re-evaluation transition of all subjects of re-evaluation and the principles of organization

of the re-evaluation process for all judges and prosecutors, methodology, procedures, and standards of re-evaluation, organization, and functioning of re-evaluation institutions, as well as the role of the International Operation Monitoring (IOM), other state bodies and the public in the re-evaluation process. This law was challenged before the Constitutional Court, which declared it compatible with the Constitution³¹.

As stated above, four judges were dismissed from the Court. One of them addressed the ECtHR complaining that the vetting bodies lacked independence and impartiality, as required by Article 6 § 1 of the Convention, for the following reasons:

- (i) the vetting bodies were composed of non-judicial members who lacked the requisite professionalism and experience;
- (ii) the members of the vetting bodies were appointed by Assembly without any involvement of the judiciary;
- (iii) the vetting bodies carried out the preliminary administrative investigation, framed the “accusation” and decided on the merits of the “accusation”.

She also complained under Article 6 § 1 of the Convention of unfairness in the proceedings in her case, for the following reasons:

- (i) she had been denied the right to refute the main reason for her dismissal and defend herself;
- (ii) the IQC had shifted an unreasonable burden of proof onto her in relation to circumstances which had arisen decades ago;
- (iii) the Vetting Act had not prescribed any limitation periods;
- (iv) the decisions in her case had lacked reasoning in relation to her arguments;
- (v) the vetting bodies had applied double standards compared to other cases;
- (vi) the Appeal Chamber had dismissed her request to submit further exculpatory evidence;
- (vii) she had not had sufficient time and facilities to prepare her defense;
- (viii) the Appeal Chamber had failed to hold a public hearing, and
- (ix) the vetting bodies had breached the principle of legal certainty and legitimate expectation in so far as they had disregarded the positive audit of her assets carried out by HIDAACI.

The ECtHR declared that there have been no violations of Article 6 § 1 and Article 8 of the Convention³².

It stated that the composition of the IQC and Appeal Chamber had been established in accordance with the law. They had been empowered to deal with all questions of fact and law, and then take a final and binding decision on the merits of the case. The domestic legislation also provided that the bodies would exercise their functions independently. As the IQC and Appeal Chamber had been set up and composed in a legitimate way, satisfying the requirements of a “tribunal established by law”, the applicant had had access to a “court”. Article 6 § 1 therefore applied under its civil head.

³¹ Decision no. 2, date 18 January 2017 of the Constitutional Court of Albania.

³² ECtHR, *Xhoxhaj v. Albania*, 9 February 2021.

Regarding independence, once appointed, the vetting bodies had not been subject to any pressure by the executive during the examination of the applicant's case. That their members had not been drawn from the corps of serving professional judges had been consistent with the spirit and goal of the vetting process, specifically in an attempt to avoid any individual conflicts of interest and to ensure public confidence in the process. The fixed duration of their terms of office was understandable given the extraordinary nature of the vetting process. The domestic legislation had provided guarantees for their irremovability and for their proper functioning.

Regarding impartiality, there had been no confusion of roles for the IQC: the statutory obligation to open the investigation was not dependent on the IQC bringing any charges of misconduct against the applicant; its preliminary findings had been based on the available information without the benefit of the applicant's defence; and it had taken its final decision on the applicant's disciplinary liability on the basis of all the available submissions, including the evidence produced and the arguments made by the applicant at a public hearing. The mere fact that the IQC had made preliminary findings in the applicant's case was not sufficient to prompt objectively justified fears as to its impartiality. Regarding the Appeal Chamber, it had had full jurisdiction in examining the grounds of her appeal and had given a detailed decision in her case.

Regarding legal certainty, the Court declared that the adverse findings against the applicant had been based both on the disclosure made in her vetting declaration of assets and prior declarations filed by her and her partner. The applicant's difficulty in justifying the lawful nature of the financial sources owing to the passage of time and the potential absence of supporting documents was partly due to her failure to disclose the relevant asset at the time of its acquisition. Additionally, the Vetting Act provided attenuating circumstances if a person being vetted faced an objective impossibility to submit supporting documents. The applicant had not provided any supporting documents justifying the existence of an objective impossibility to demonstrate the lawful nature of her partner's income from 1992 to 2000. Further, the applicant's partner's savings, even if they had been accepted as claimed, would not have sufficed to buy the asset in question.

Also related to Article 8 of the Convention, the ECtHR found that there had been an interference with the applicant's right to respect for her private life, as a result of her dismissal from office on the basis of the Vetting Act: firstly, as regards the evaluation of assets, because she had been found to have made a false declaration and concealed a flat; and secondly, regarding the evaluation of professional competence, because she had undermined public trust by failing to recuse herself from the examination of a constitutional complaint. While the second ground was formulated in rather broad terms, it was not uncommon to have such a provision in disciplinary law and rules of judicial discipline, and the ground had been supplemented by statutory provisions in force at the relevant time. The interference had therefore been

“in accordance with the law”. It had also pursued legitimate aims, as the Vetting Act in general, and the interference in the applicant’s case in particular, had aimed to reduce the level of corruption and restore the public trust in the justice system, connecting to the interests of national security, public safety and the protection of the rights and freedoms of others.

3.2. Constitutional and legal amendments

The constitutional amendments were followed by the amendment of Law no. 8577, dated 10 February 2000, “On the Organization and Functioning of the Constitutional Court of the Republic of Albania”, with Law no. 99/2016. The main directions the law amended were as follows:

3.2.1. Appointment of members of the Court

Compared to the model under the previous version of Article 125, the manner of appointment of the members of the Court was changed. Before 2016, they were all appointed by the President of the Republic with the consent of the Assembly. Now, the number of members did not change, but they are elected as follows: three by the President of the Republic, three by the Assembly of Albania, and three by the High Court. The members of the Constitutional Court are appointed for 9 years, without the right to re-appointment. The rule on rotation remained the same, so the composition of the Constitutional Court shall be renewed every 3 years, by one-third of its composition. The new members had to be appointed on a rotation basis, respectively by the President of the Republic, the Assembly, and the High Court. This rule would be followed even in the event of early termination of the mandate of the Constitutional Court member. The Constitutional Court judge continues to stay in office until the appointment of the successor, except for the cases provided for in Article 127, paragraph 1, subparagraph c, ç), d), and dh)³³.

The members of the Constitutional Court shall have a law degree, at least 15 years of experience as judges, prosecutors, advocates, law professors or lecturers, senior employees in the public administration, with a renowned activity in the constitutional, human rights, or other areas of law. The judge cannot have held political posts in the public administration or leadership positions in a political party in the last 10 years before running as a candidate. Further criteria and the procedure for the appointment and election of judges of the Constitutional Court are regulated by law.

The procedure to select the members of the Court varies depending on the institution that has the right for this selection. It begins with the President of the Constitutional Court that notifies the President of the Republic on the vacancy, who

³³ “c) He/she resigns; ç) Dismissed in accordance with the provisions of article 128 of the Constitution; d) Establishing the conditions of in electability and incompatibility in assuming the function; dh) Establishing the fact of incapacity to exercise the duties”.

within 7 days of receiving the notification, announces on public information media and on the official website the opening of the application procedure. The applications are forwarded to the Justice Appointments Council. The Justice Appointments Council, following the evaluation of the appointment conditions and criteria, within 10 days of holding the meeting, drafts a final list by ranking the candidates. After that, the President, within 30 days of receiving the list from the Justice Appointments Council, appoints the member of the Constitutional Court from the candidates ranked on the three first positions of the list. The appointment decree is announced, accompanied by the reasons for the selection of the candidate. Where the President does not appoint a judge within 30 days of the list being submitted by the Justice Appointments Council, the candidate ranked first is considered as appointed.

The procedure is the same for the Assembly. The Constitutional Court judges are elected upon 3/5 of the votes of all members of the Assembly. Where the Assembly does not elect a judge within 30 days of submission of the list by the Justice Appointments Council, the candidate ranked first in the list is considered as appointed.

The last three members are elected by the High Court in the same procedure. The Chairperson of the High Court convenes a special meeting of the judges of the High Court. The meeting is valid if not less than 3/4 of all judges of the High Court are attending. The list of candidates is made known first to the participants in the meetings. For each vacancy, it is voted for each of the candidates ranked in the top three places of the list. The candidate obtaining 3/5 of the votes of the present judges is declared elected. If no necessary majority is attained, the candidate ranked first by the Justice Appointments Council is considered elected. The name of the elected judge is notified immediately to the Speaker of the Assembly, the President of the Republic, and the President of the Constitutional Court.

The appointment of new members of the Constitutional Court did not pass without political tension. After the opening of the procedure by the President and the Assembly, the Chair of the Justice Appointments Council 2019 transmitted simultaneously two lists to the President and two lists to the Assembly for their appointment.

The President appointed the first member from the first list and suspended the appointment of the second member of his quota (second round) pending the appointment by the Assembly of the first member on its quota (first round). The President called on the Assembly to elect only one member. After that, the Assembly elected its quota (first round). Since the President has suspended its quota, the candidate who ranked first on his list was considered as having been appointed by the President by default, by operation of the anti-deadlock mechanism (the President had failed to appoint the second judge from his quota – second round) within thirty days of transmission of the relevant list. The Assembly further elected its quota from the second list. Subsequently, the President appointed one of the candidates from his second list (not the one considered as appointed by default). The latter, considering

herself appointed by default, signed a statement in front of a notary intending to take up functions as a Constitutional Court judge. The two members elected by the Assembly and the member elected from the second list by the President were sworn in by the latter.

This situation meant that there were two appointed members for the same position at the Constitutional Court (one elected by default since the President failed to appoint a candidate within 30 days and one elected by the President from the second list after the Assembly elected his first candidate).

Consequently, the Speaker of the Albanian Assembly and the President of the Republic requested an opinion of the Venice Commission on “the appointments of Judges to the Constitutional Court of Albania”. The Venice Commission concluded that although the suspension made by the President was not explicitly envisaged by the Law on the Constitutional Court, it could be consistent with a default mechanism meant to deblock a situation in case of malicious or willful inaction on the part of one of the actors involved. If there is neither malicious nor willful inaction, but rather a legal vacuum to be filled, the *ratio legis* of a default mechanism would not apply. As a consequence, there must be the possibility to interrupt the – otherwise automatic – functioning of the default mechanism. Based on a teleological interpretation of the legal provisions, it could therefore be justified to accept the belated appointment of a second candidate by the President. It therefore seemed justified that the President refused to accept the oath of the judge allegedly appointed by default³⁴. Subsequently, the candidate elected by the President from the second list took office at the Constitutional Court.

According to the new law, the President of the Constitutional Court is now elected upon secret voting, by the majority vote of all judges of the Constitutional Court, for a period of three years, with the right to only one re-election, as opposed to the election from the Assembly before the reform.

The law also introduced disciplinary liability for the member of the Court. It also established the Legal Service Unit which operates attached to the Constitutional Court and it constitutes the scientific legal nucleus of the Constitutional Court. It carries out advisory and supporting activity in the decision-making process of the Constitutional Court, including the preparation of cases for trial, submitting legal opinions, and undertaking scientific research on legal cases being examined by the Constitutional Court, as well as any other tasks assigned by the President or the Meeting of Judges.

3.2.2. Competencies of the Court

Since the entry into force of the Constitution, until 2016, when the new constitutional amendments entered into force, individuals could appeal to this Court only for the allegation of violation of their right to a due process of law. Thus, for 18 years, the Court established its case-law based on these criteria. This was considered

³⁴ Opinion of the Venice Commission on the appointment of judges to the Constitutional Court, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)010-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)010-e).

a step back from the competencies this Court had before the entry into force of the Constitution, since the individual could address the Court for the protection of his constitutional rights and freedoms.

This limitation was corrected with the new amendment introduced in Article 131 of the Constitution – the extent of the right of the individual to address the Court. Thus, point “f” stated that the Court decides on the final examination of the complaints of individuals against the acts of the public power or judicial acts *impairing the fundamental rights and freedoms guaranteed by the Constitution*, after all effective legal remedies for the protection of those rights have been exhausted, unless provided otherwise by the Constitution.

This competence was detailed further within the Law no. 8577, dated 10 February 2000, “On the Organization and Functioning of the Constitutional Court of the Republic of Albania” amended, which provides in Article 70/1 that every individual, natural or legal person, being the subject of private and public law, when being a party in a legal process or the holder of fundamental rights and freedoms provided for in the Constitution, is entitled to lodge a complaint before the Constitutional Court against any act that violates his rights and freedoms provided for in the Constitution, under the criteria provided in Article 71/a of this Law. In specific cases, subject to the individual constitutional complaint can also be a law or a normative act, as provided by Article 49 paragraph 3 of this Law. The Constitutional Court shall conclusively examine the appeals against decisions of the High Judicial Council and High Prosecutorial Council, under Article 140 paragraph 4 and Article 148/d of the Constitution.

The criteria foreseen by law to examine the individual constitutional complaint are:

- a) the applicant has exhausted all effective legal remedies before addressing the Constitutional Court or when the domestic legal framework does not provide for effective legal remedies available;
- b) the application is submitted within the 4-month period of finding a violation;
- c) the negative consequences are direct and real to the applicant;
- ç) the examination of the case by the Constitutional Court could restore the infringed rights of the individual. In addition to the criteria envisaged in paragraph 1 of this Article, arrangements provided for in the law on preliminary examination can apply.

It should be noted that the individual constitutional complaint is not an *actio popularis* and, consequently, the exhaustion of other remedies is an important condition before individuals turn to the Constitutional Court.

Since the entry into force of this amendment, the Court has examined a few individual constitutional complaints. In most of the decisions, the Chamber of the Court has reasoned that the individual is not legitimized because he has not exhausted the effective remedies of appeal, referred to in Article 131/1/f of the Constitution. These include non-appeal in ordinary courts, non-filing of claims in all

levels of the judiciary, as well as non-appeal of normative acts in the Administrative Court of Appeal. Also, there are several complaints, which according to the Chamber have not raised their claims at the constitutional level, and therefore their review is not part of the constitutional jurisdiction.

The first time the Court decided on the individual constitutional complaint was in 2021³⁵. The applicant was an independent political candidate that addressed the Court with the request to repeal point 1 of article 162 of Law no. 10019, dated 29 December 2008, “The Electoral Code of the Republic of Albania”.

The Court stated that to meet the criteria of exhaustion of remedies, the applicant must have used all available legal remedies to protect the constitutional right violated by the impugned law, not only formally, but also in a substantial sense. As a rule, the law is implemented through acts of public bodies or court decisions, therefore the individual must, firstly, challenge them before the competent courts, exhausting all legal remedies provided by our legal system. It is also important to prove that the applicant was personally, directly and realistically affected. However, the law has also provided for cases when the fulfillment of this criterion is impossible (the legislation does not provide legal remedies or they are ineffective). Since the legal remedy may be different, depending on the type of appeal, its effectiveness is assessed not only by the fact that it is provided by law, but also by its applicability³⁶.

The Court considered that in the present case the impugned legal provision did not provide for the issuance of normative acts necessary for its implementation, but is directly applicable to the applicant from the moment he is registered by a decision of the State Election Commissioner to participate in election as a candidate nominated by voters. In these circumstances, the applicant had no other remedies available to exhaust other than filing a request for review of the compliance of the legal norm with the Constitution, *i.e.* filing an individual constitutional complaint to restore the alleged violation of a constitutional right. The Court decided to accept the complaint partially and declare the norm unconstitutional.

The amendments to the organic law also affected the time limits: from the 2-year deadline for individual requests, it was changed to 4 months from the finding of the violation, and from 3 years which was the deadline for opposing normative acts it was changed to 2 years from the entry into force of the act.

The moment of the finding of the violation means the date when the individual becomes aware of the reasoned act, which he will object. The burden of proof to prove the moment the applicant became aware of the act is on the applicant. If he fails to prove the exact date of becoming aware of the final decision, then the date of issuance of the decision by the state body that constitutes the last means of appeal will be calculated as the starting date of the deadline.

³⁵ Decision no. 31, date 4 October 2021 of the Constitutional Court of Albania.

³⁶ *Idem*.

In the last case mentioned above, the Court found that in the case of an individual constitutional appeal, the finding of a violation, as a rule, does not coincide with the moment of entry into force of the law or normative act. In these cases, the legal deadline is calculated from the moment when the act begins to produce effects for the applicant or, in other words, when the law or normative act is applied to him.

The other criteria of the negative consequences are direct and real to the applicant, as has also been explained by the case-law of the Court. The individual as a subject that should have an interest before addressing the Court should prove how he has been affected in his constitutional rights as a consequence of an undue process of law. His interest should be secure, direct, and personal and consist of the violated right and the actual harm caused.

In the above decision, the Court stated that the violation of fundamental rights must be direct and real, the applicant must prove that he is a victim of a violation and that he is directly affected by the restriction imposed by the impugned act. The Court considered that although at the time of filing the application there was no individual act against the applicant to prove the consequences of the application of the impugned provision, the fact of his registration as a candidate proposed by the voters to participate in the elections is sufficient to justify the interest in setting in motion the constitutional judgment. This means that the implementation of point 1 of article 162 of the Electoral Code would certainly take place, in the form of the final act of the process where the applicant was registered as an electoral subject. Given the substance of the allegations of violation of the right to be elected, in view of the principle of equality in law, the applicant could not be required to file a constitutional complaint only after the announcement of the unfavorable final result of the election, as the constitutional appeal would lose its purpose, which is the restoration of the violated constitutional right.

Regarding the restoration of the infringed rights of the individual, the Court decides on the abrogation of decisions incompatible with the Constitution; the return of the case for reconsideration to the relevant court and the finding of a violation of the constitutional right.

The latter has been an object of debate, since the finding of the violation of the constitutional right, especially regarding the non-execution of final court decisions, has not been considered an effective remedy by the ECtHR, as stated above³⁷.

This problem was also identified by the ECtHR in the case *Gjonboçari and others v. Albania*³⁸, where, among others (*inter alia*), was found a violation of Article 6 of the ECHR due to the delay of the civil process on the issue of property. The Court concluded that the Albanian legal system did not provide effective domestic remedies for overdue reparations, including compensation.

³⁷ ECtHR, *Qufaj v. Albania*, cited above.

³⁸ ECtHR, *Gjonboçari and others v. Albania*, 23 October 2007.

Following these findings, the reform included legal amendments to the Civil Procedure Code where now every person has been provided with new legal remedies to effectively protect themselves from the violation of the right to execute a court decision within a reasonable time (see Chapter X, Title III, Part II, CPC). Specifically, the rules of this chapter of the CPC recognize the right of any person who has suffered pecuniary or non-pecuniary damage, due to the unreasonable duration of execution, to file a claim in the courts of ordinary jurisdiction for just satisfaction (Article 399/1 of the CPC); determine what are considered reasonable deadlines according to the nature of the case, the degree and stage of the proceedings (Article 399/2 of the CPC); define the concept of fair remuneration (Article 399/3 of the CPC); assign the competence to review the claim (Article 399/4 of the CPC); provide detailed rules for the judicial review of these disputes up to the execution and the value of court decisions on them (Articles 399/5-399/12 of the CPC). Due to the continuous nature of exceeding the deadlines, the legislator has also determined the transitional regime of deadlines for cases, the execution of which was in process at the time of entry into force of the amendments to the CPC (Article 109 of Law No. 38/2017).

In its first decision taken by the Plenary of the Court³⁹ regarding a request for finding a violation of a reasonable time and speeding up the procedures, the Court stated that legal remedies provided by Articles 399/1 *et seq.* of the CPC are effective in principle. Regarding their effectiveness in practice, the Court, from the point of view of the criterion of exhaustion of effective legal remedies, provided by Article 131, point 1, letter “f”, of the Constitution, considered that they should be reviewed in the light of the circumstances of each concrete case. In this regard, it also takes into account the fact that for the implementation of legal remedies provided by the CPC to find a violation of reasonable time and expedite the proceedings, there is still no consolidated practice by the courts of ordinary jurisdiction, as it is a newly introduced legal remedy.

While the Court appreciates the measures taken by the relevant authorities, who together with the relevant means of speeding up the trial process serve the purpose of increasing the effectiveness of the judicial activity, it emphasizes that this tool can be effective in normal circumstances of the organization and functioning of the judicial system. In the present case, where the High Court has only 9 judges out of 19 due to the vetting process, doubts are raised about the possibilities that the accelerator request has to respond to the appropriate degree the need for the right of individuals to trial within a reasonable time concerning the real possibilities of the judicial system, due to the high volume of cases, as well as its human and infrastructural resources as a whole (the backlog of the High Court is considered around 38,000 cases).

In conclusion, the Court stated that although it appears that to some extent there is a length of the proceedings and that the applicant’s conduct has not hindered its

³⁹ Decision no. 33, date 1 November 2021 of the Constitutional Court of Albania.

progress, as well as the fact that the measures taken by the authorities are insufficient, the Court, having considered the circumstances of the case, its complexity, the risk to an insignificant degree for the applicant's interest, as well as the high number of cases pending before the High Court, concludes that there is no violation of the right to a fair legal process as a result of not reviewing the case within a reasonable time.

3.2.3. *Other amendments*

Some other constitutional and legal amendments regard the new entities that can address the Court: e) any commissioner established by law for the protection of the fundamental rights and freedoms guaranteed by the Constitution and ë) High Judicial Council and High Prosecutorial Council. They can file a request only regarding the issues connected to their interests.

The new law also changed the time limit for reviewing a case. The law before the reform stated that the review of cases in the Constitutional Court must begin no later than 2 months from the submission of the request. The new law stated that the review of a case by the chambers or the Meeting of Judges shall end within 3 months from the submission of the petition, except for cases when this law stipulates other time limits. The final decision shall be announced reasoned no later than 30 days from the end of the hearing session, unless otherwise provided for in this law.

Another important amendment is regarding deliberations and voting. Law no. 8577/2000 stated that when, during the voting, the votes were divided equally or in such a way that no conclusion of the case is voted by the requested majority (5 judges), the Constitutional Court decides to reject the request. The refusal does not constitute an obstacle for the applicant to resubmit the request in case conditions are created for the formation of the requested majority. The amended law provides that where the majority of five judges is not achieved, the application shall be considered rejected.

4. Conclusions

The Constitutional Court of Albania has a very important role in the constitutional system of the country. It guarantees the implementation of basic constitutional principles by all constitutional institutions in order to protect the rights and freedoms of the individual. The need to strengthen the independence of the Constitutional Court and the effectiveness of its decisions resulted in the constitutional and legal reform in 2016. This reform reviewed the appointment process of the judges, including rules and criteria for the selection of candidates in respect of independence, impartiality and the principle of constitutional loyalty; their disciplinary liability; the extent of the competencies of the Court regarding the individual as an entity that can

initiate a case not only for due process of law, but also for all the fundamental rights and freedoms guaranteed by the Constitution, the time-limit to submit an application etc.

Although the reform was approved in 2016, the Constitutional Court has now been functional for only one year. But a fully functional Constitutional Court is a step that needs to be taken as soon as possible, although the Court does not have any backlog from its non-functionality.

The important competence of the Court to adjudicate on individual constitutional complaint was a step further in the protection of the rights and freedoms of the individual, but still need to be elaborated by the Court.