Vacancy in the Constitutional Court after the Vetting Process and Problematics of its Members' Election

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Abstract

The vetting process and the political tension in Albania in recent months, changed not only the normal relations between constitutional institutions, but also their institutional view. The problems that the transitional reassessment process of judges and prosecutors brought to the Albanian justice system, reached considerable dimensions, until the collapse of the most important chain-parts of the judicial system. The Albanian state became the protagonist of an unprecedented situation that culminates in the non-functioning of the Constitutional Court, the only one that can possibly respond to and resolve the political-institutional standoff that has been increasing in recent months on the shoulders of a fragile democracy. Initial delays in the functioning of the vetting institutions, in the establishment of new justice institutions, the vacancy in the High Court which inevitably consequences in the vacancy in the Constitutional Court; all these aspects, significantly reflected on the normal functioning of existing institutions. Today, there is an urgent need for a return to the envisioned and promised identity of the justice system, and the thoroughfare seems to be still a long one.

1. Introduction

1.1 The Constitutional Court, a new but indispensable institution, an impartial arbitration, on behalf of the Constitution.

In the climate of profound changes in the Albanian constitutionalism after the 1990s, we perceive the formation of the Constitutional Court. Previously, the constitutional appraisal was entrusted to the authority which revised and approved the laws, so the Parliament itself. This was an unacceptable situation, as this authority cannot be the controller of itself. Upon the Constitutional Court's prediction, we can say that Albania benefited from the experience of other European countries that recognized this institution years ago 42. We see similar authorities in Europe after the World War II, under the theoretical elaborations of the prominent Austrian jurist Hans Kelsen43. Today, a mechanism regarding the control of the laws' constitutionality and other acts of constitutional authorities, does exist, in various forms, in 192 of the 196 States of the world. It turns out that, not only for Albania, but also for other European countries, constitutional courts are relatively new institutions, but the problems to which they have arisen and to which they try to provide solutions and answers, are often as old as the humanity itself. Nowadays, state institutions are subject to the law and judges, the latter independent in their function, missioning not only to enforce the law but also to restore its respect when it is violated. At the same time one of the main functions is to resolve the disputes between different powers, horizontal or vertical ones44. The foundation of a special court, acting independently of other powers, specifically independent from the political influence, was the best solution. To this institution it was entrusted the task of checking the constitutionality of laws and their revoking if they were not constitutionally compliant45. Thus, came out the so-called constitutional

"jurisdiction": a judicial-type activity, not a political one, but very close to and interfering with political institutions, but more so with the legislative and the executive power. In addition to the function serving as the "judge of the laws", another important function of this institution is to ensure a balance between powers and to resolve conflicts between the various competences of the State, in order to ensure and respect the constitutional norms. The Constitutional Court is a new institution, but a very important one for the activity of the highest state institutions; we can call it an impartial arbitration on behalf of the Constitution.

2. Composition and Election of the Constitutional Court

According to Article 125 of the Constitution, this court "consists of 9 members. Three members are appointed by the President of the Republic, three members are elected by the Parliament and three members are elected by the Supreme Court. The members are selected from among the candidates listed in the top three places if the list, by the Council of Nominations in Justice, according to the law. "The system of nomination, provided by the Constitution, is the result of a delicate balance in an attempt to harmonize the different needs between them. The constitution, through this system, seeks to ensure that judges might be as impartial and independent as possible, might have the appropriate level of technical-legal competence, but also to bring to the Constitutional Court different experiences and sensitivities. Although Article 125, paragraph 5, of the Constitution states that "A judge shouldn't had hold political functions in public administration or leadership positions in a political party for the last 10 years prior to candidacy", this does not mean that judges must be outlandish and detached from the problems that are present in political institutions. At the same time, the Article 125, paragraph 3, of the Constitution provides that: "Judges of the Constitutional Court shall stay on duty for nine years without the right to be reappointed". The term of duty of the members of the Constitutional Court is longer than that of any other mandate required by the Constitution, so it tends to ensure the independence of judges, even from the political authorities that designate them, for example the Parliament is elected for four years, the government lasts no more than one legislature, and the President of the Republic is elected for five years. Nowadays, because of the vetting process, this court no longer has its composition as provided by the fundamental law of the State. The vacancy of the only competent institution for the final interpretation of the Constitution, comes as a result of the reassessment process, the latter foreseen in the Article 179 / b (Added by the Law no. 76/2016, dated 22.7.2016), of the Constitution46. The constitutional reform in justice47 aims not only to guarantee the principle of the state of law and the independence of the justice system, but above all, to restore to the public the confidence in law enforcement institutions. On the other hand, the Constitution states that this reform will be carried out on the basis of the principles of a regular legal process and in respect for the fundamental rights of the subject to be evaluated48. Vetting is a process that will only take place once, as an extraordinary measure, but so much needed in Albania's conditions.

3. Election of Constitutional Judges by the Parliament

As mentioned above, the Article 125, paragraph 1, of the Constitution provides that three members of the Constitutional Court are elected by the Assembly, whereas the paragraph 2 of the same Article provides that "The Parliament elects a judge of the Constitutional Court with no less than three-fifths of all its members votes. If the Parliament does not elect a judge within 30 days of the submission of the list by the Justice Appointments Council, the first ranked candidate on the list shall be declared appointed." This article clearly expresses not only the required majority but also the quorum that the Constitution provides for the election of judges of the Constitutional Court, who have as their primary competence precisely its final interpretation. As a consequence of the opposition's sweltering of the mandates, the Parliament at the present moment cannot reach the quorum envisioned by the Constitution. We also emphasize that in Part three of the Constitution, Chapter 1, on the Election and Term of Members of the Assembly, it is clearly provided at the Article 64, paragraph 1, that "the Parliament shall consist of 140 Members elected by a proportional system with multi-member constituencies". The question that naturally arises is whether the current parliament is legitimate or not? Even if the Constitution would not provide for a qualified majority for the election of three members of the Constitutional Court, it seems that the absence of a number of representatives renders their election by the current Parliament illegitimate, moreover, the appointed judges are elected by parliament from magistrates but mainly by professors and lawyers, and in these elections the people themselves must be represented. The high number of votes needed to elect members of the Constitutional Court is a guarantee for the institution of this court, as it means that it is not the political majority that elects them. There's no doubt that political forces can conclude agreements between them so that they can be accepted and

voted on by both the parliamentary majority and the minority, this does not mean that the judges elected by the parliament are representatives of the political forces, on the contrary, the majority and the quorum requested, makes them representatives of the sovereign People, who must itself be represented by 140 MPs.50 The relationship between the Parliament and the Constitutional Court is very important, as the legislator's ability to "react to the Court's decisions and to adapt its legislative activity to the constitutional "judgment" can provide, only in itself, very clear indications of the type of said relationship. But legislative activity is not everything: the multiplicity of relations between the Parliament and the Court multiplies the "points of contact" between parliamentary activity and constitutional jurisprudence, so that only a general examination of them seems to be able to reveal the "political" significance that the Court assumes from the point of view of the Parliament.51 Undoubtedly, the implementation of the Constitutional Court's decisions is not only up to the judges, but it also requires the intervention of political organs, and therefore the manner in which the Constitutional Judges are elected in Parliament has an indisputable value.52 The election of the judges of the Constitutional Court is directly influenced by tensions that disturb the political framework, although they are never the cause53, but Albania's case seems to go beyond the fantasy of the Constitution's founders, for resolving such tensions.

4. Appointment of Constitutional Judges by the President of the Republic

The Article 125, paragraph 1 of the Constitution, stipulates that three members are elected by the President of the Republic and that the members are selected from among the candidates listed in the first three places on the list by the Justice Appointments Council. The nomination by the head of state is an important component; in fact there are these appointments that best guarantee the neutrality of the Constitutional Court. The Article 179, paragraph 2, of the Constitution (Amended by Law no. 76/2016, dated 22.7.2016), provides that "The first member to be replaced in the Constitutional Court shall be appointed by the President of the Republic, the second shall be elected by the Parliament and the third is appointed by the Supreme Court. This queue is to be followed for all the nominations that will be made after the entry into force of this law."54 As a matter of fact, foreign doctrines hold that the nominations by the President of the Republic must be made last, since in this form the Head of the State has the ability to repair some omissions, or some obvious disagreements in the formation of the college55. This is due to his constitutional role, which is clearly stated in the Article 86, paragraph 1, of the Constitution, namely that he, as the Head of the State, represents the unity of the people. At the same time, the Article 129 of the Constitution provides that, "A judge of the Constitutional Court shall take his duty after taking an oath before the President of the Republic". The President's relationship with the Constitutional Court is 'reciprocal', as it is this court that, according to the Article 131, point 'dh' of the Constitution, which decides on the "dismissal from duty of the President of the Republic and the confirmation of the impossibility of exercising his functions", as in point 'e' of the same article, it is provided that the Constitutional Court decides on "issues related to the election and incompatibility in the exercising of the functions of the President of the Republic, the MPs, the functionaries of the organs provided in the Constitution, and the verification of their election". It turns out a very important relationship, the one between the President and the Constitutional Court. On the other hand, the Article 134, paragraph 1, of the Constitution states that the Constitutional Court is set in motion at the request of the President of the Republic. Undoubtedly, the powers of the Head of the State to elect the members of the Constitutional Court essentially determines a strengthening of his position, but consequently also a strengthening of the neutrality and impartiality56 of this super partes organ, but which best expresses viva vox constitutionis. By guaranteeing, therefore, not only the State of Law, but also the consolidation of democracy.

4.1 The order and the chronology in the selection of members of the Constitutional Court by the President and the Parliament.

The Justice Appointments' Council, in October 2019, submitted to the Institution of the President of the Republic, the final lists of candidates for the vacancies in the Constitutional Court. Vacancies announced by the President of the Republic himself. The standoff begins with the fact that the President of the CED, on the same date, has carried out the administrative process of submitting lists to the Institution of the President of the Republic for filling two vacancies at the same time. According to the Institution of the President of the Republic this creates the conditions of a legal difficulty, as it is impossible that within a time frame of 30 days, this institution may evaluate the nominated candidates. Moreover, it is also considered the fact that it should be respected the order and the alternation of selection (at first the President and then the Parliament). This claim, based on Article 179 of the ARC (Amended by the Law no. 76/2016, dated 22.7.2016), which states in paragraph 2 that "The first member to be replaced in the Constitutional Court, is nominated by the

President of the Republic, the second is elected by the Parliament and the third is nominated by the High Court. This order is followed for all the nominations that will be made after the entry into force of this law. " As a result, the President of the Republic, was the first that elected the first member to the Constitutional Court, at the list of four candidate names, listed by the KED. Following this election, he asked the KED to suspend the deadlines, and to pass the order on to the Parliament to elect the next candidate. This request was not accepted by the KED. The latter states that the legal deadline of 30 days set by the organic law of the Constitutional Court, must be respected. Consequently, the second member of the Constitutional Court was automatically elected by the KED, Arta Vorpsi, the first listed at the system of points on the President's list. On the other hand, the Parliament, in the same line of interpretation as the KED, elected within 30 days the two other members of the Constitutional Court. The President pretends that his Institution has no maximum deadline within which to express itself and that, in fact, the 30-day deadline belongs only to the Parliament. This term is stated in the Article 125 of the KRSH, point 2, stating that, "The Parliament elects a judge of the Constitutional Court with no less than the three-fifths of all its members. If the Assembly does not elect a judge within 30 days of the submission of the list by the Justice Appointments Council, the first ranked candidate on the list shall be declared nominated". In reality, it is the Organic Law of the Constitutional Court that provides for the 30 day time-limit, more precisely the Article 7/b states that; "The President shall, within 30 days of receiving the list from the Judicial Appointments Council, nominate a judge of the Constitutional Court from among the three candidates listed in the first three places of the list. The nomination decree is announced accompanied by the reason for the election of the candidate. If the President does not elect the judge within 30 days of the submission of the list by the Council of Justice Appointments, the first ranked candidate on the list shall be considered appointed." Organic laws are sources of acts of constitutional law and directly used in its interpretation, but it should not be forgotten that the Constitution is the source upon all resources, and from there it begins the original interpretation, even in the case when the constitution expresses an order, at the Article 179, paragraph 2, where it is defined that the first Member to be replaced in the Constitutional Court is nominated by the President of the Republic, the second is elected by the Parliament, and the third is nominated by the Supreme Court. Noting that this order is to be followed for all the nominations.

5. Election of Constitutional Judges by the High Court and the "state of emergency"

The Article 125 of the Constitution provides that the third component legitimized by the Constitution for the election of its three members, is the High Court itself and that the members are selected from among the candidates listed in the first three places of the list by the Justice Appointments Council. For the same motive of the Constitutional Judges' vacancies, even the High Court is unable to perform its functions, so as a consequence of the judicial reform provided for in the Article 179/b, paragraph 3 (Added by Law no. 76/2016, dated 22.7.2016) of the Constitution, which states that the subjects to be subject to ex officio reassessment, are exactly even the judges of the High Court. According to the Article 136, paragraph 1, of the Constitution, the President of the Republic is entitled to appoint the Judges of the High Court, on the proposal of the High Judicial Council.57 The Paragraph 2 of the same article, states that, the Head of State, appoints a judge of the High Court within 10 days from the date of the decision making of the High Judicial Council. Unless the President determines that the candidate does not meet the eligibility criteria or eligibility requirements, by law. At the same time this article provides that, if a majority of the members of the Supreme Judicial Council, vote against the President's decree, not to nominate a candidate, the decree loses its power. In this case, as and when the President does not express himself, the candidate shall be proclaimed nominated and shall commence his duty within 15 days from the date of the decision of the High Judicial Council. While the Article 179, paragraph 12, of the Constitution states that, "With the establishment of the High Judicial Council, the President shall appoint the judges of the High Court in accordance to thr Article 136 of the Constitution. The President fills the first vacancy in the Constitutional Court under the paragraph 2 of this Article and Article 125 of the Constitution." Due to the vetting process, it's been a while that the High Court has functioned as a truncated judicial body. Currently it has only two members, so it is unable to perform its constitutional functions, one of which is the election of three members of the Constitutional Court. Therefore, the completion of this court is a conditio sine qu non, thus a necessary condition for filling vacancies in the Constitutional Court. The authority that can unblock the situation seems to be the Supreme Judicial Council (KLGJ), as it is up to the latter to propose to the President of the Republic the candidates to be nominated for the High Court. To date, no proposals have been submitted to the Office of the Head of State and the situation seems increasingly unclear on the length of the KLGJ verification and evaluation process. In recent months, in order to unblock the situation for the High Court nominations, the KLGJ has turned for legal aid, to the experts from the EU mission "Euralius V", in response to a request by "Euralius" expressing that in its opinion,58 one of the ways to solve the problem, can be through the usage of

a provisional scheme. So, it suggests that the appointment of temporary members, delegated by the lower level courts, may be a good method to get out of the High Court institutional crisis. This situation is thought to last until the number of members is formed according to the legal scheme. But the question that naturally arises in this case is whether there is a legal base to legitimize such an act? According to the Article 174, point 1, letter 'a' of the Law no. 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania", it is stipulated that, "The High Judicial Council and the High Prosecutorial Council are hereby authorized to adopt the detailed rules in accordance with the provisions and terms of this Law". It also states that, "Within three months of the creation of the Councils, the acts related to off-site activities, the creation of personal files, the temporary nomination of new appointees to the commanded posts, the magistrates in the delegation scheme, the promotion in task, to higher or specialized levels, the nomination of not judge members of the High Court, the nomination of the Attorney General and appointments to temporary positions. " It is clear from this article that the KLGJ has not respected the three-month deadline provided by law59, so it seems difficult, in the absence of the KLGJ, to identify a legal base for the opinion given by the EU mission. Undoubtedly, the drafting of secondary legislation would make it possible to initiate the procedure for filling in the vacancies in the High Court.

6. Conclusions

It is clear that one of the main problems, which has led to the deterioration of the current situation, is the exceeding of the KLGJ deadlines for drafting the necessary by-laws as they would clarify the procedure for filling in the vacancies in the High Court. Therefore, it would have been necessary to request the assistance of the 'EURALIUS V' mission, in drafting the by laws and not to seek a possible solution to the current situation. Undoubtedly, the opinion given by 'EURALIUS V' is based on provisional schemes, rather than ope legis, this version runs counter to the main purpose of the reevaluation process, which is precisely the return of civic confidence to institutions, thus it goes against the spirit of the reform in justice. The Constitution and the laws clearly set out the procedures and mechanisms for filling vacancies in the above-mentioned institutions, so resolving the situation in extra-legal contexts, seems totally unacceptable. The first step, seems to be the issuance of by-laws by the KLGJ, in order to fill the vacancies in the High Court and as a consequence the latter may elect the three members of the Constitutional Court. Meanwhile, it remains to be seen how the Assembly will interpret the quorum in relation to the voting of members of the Constitutional Court, when it writes that the Constitution clearly states that the quorum required for voting is "all the members of the Parliament", that is, 140 members of the Parliament, representatives of the sovereign people. Another solution, but requiring political will, is the legislator's intervention in improving the legal basis for the formation of judicial bodies. But even this option does not seem to be the best solution as it can take a lot of time and time is a high cost for the unstable Albanian democracy. As far as the selection by the President of the Republic of the members of the Constitutional Court is concerned, it seems clear that the chronological order provided by the KRSH itself (President-Parliament) must be respected, then the 30-day deadline provided by the organic law is added. The President cannot elect the second member, without the Parliament expressing his first choice of Constitutional Judge. We can say that the President has fulfilled without constitutional delay the election of the first member of the Constitutional Court. Consequently, the approval of two members at the same time by the Parliament is not in conformity to the KRSH.

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