

Justice Reform during the transition and its progress

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Abstract

One of the primary tasks of the Albanian state during the post-communist transition, remains the justice reform in its two main pillars: new legislation and justice bodies with new qualifications and mentality. Its purpose is to increase the independence of the justice system and strengthen it in terms of professionalism, efficiency, impartiality and honesty of judges and prosecutors in fulfilling their duties. For study purposes, we have divided the reform in post-communist justice into three-time phases, depending on the profound constitutional changes: 1991-1998, 1999-2016 and 2016 onwards. The first two stages are treated mainly in their historical way. This topic deals with the reflection of the results of this reform, the effects so far in achieving the goal for which it is developed. How and to what extent have the bodies of the justice system been cleaned out corrupt judges and prosecutors. Is their independence, impartiality and professionalism been achieved? In this regard, the study captures the changes in legislation, the structure of the system, the efficiency of the new era, the obstacles and shortcomings of the reform, the views of political forces and experts on its development, the contribution of our international experts and partners who strongly support morally, legally and financially, as well as other problems that serve the normal course of the justice reform. Finally, in the paper, criticism, opinions and suggestions are given to avoid shortcomings and lead the reform to the required objective.

Key words: *justice reform, judicial map, post-communist transition, justice efficiency.*

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I. Introduction

Historically, from the formal point of view, in all the basic acts of the Albanian state, the courts have been conceived as independent bodies in the administration of justice, guided and commanded only by the Constitution and the law. Thus, the Basic Statute of the Kingdom of Albania states that judges, in giving decisions, are independent and guided only by the law and their conscience [Basic Statute of the Kingdom of Albania, year 1928, published by the Royal Press Office, Tirana, 1997, Chapter III, Art. 118]. Similar formulations, with the same content, are given in the constitutions of the one-party socialist state of 1946 and 1976, which stipulate that the courts are independent in adjudicating the case (or in the exercise of their function) and decide only on the basis of law. [Constitution of the People's Republic of Albania, year 1946, articles 80 and 81 and Constitution of the Socialist People's Republic of Albania, year 1976, article 103]

Both in the conditions of the feudal-bourgeois regime of the Kingdom of Albania, and in the conditions of the communist dictatorship in Albania, for the way they function, the independence of the courts has been formal or, at least, quite limited. The nature, character and duties of these bodies, as well as the legislation of the state itself, are determined by the model of social relations. Justice takes the form and content that responds to the interests of the socio-economic formation of the respective historical period and reflects the degree of civilization of this period, is the product and reflection of the philosophical, economic, ideological, political and social views of the time. Major changes, reforms, and even its revolutionization, become necessary and inevitable in the stages of profound social transformations, especially in the moments of transition from one system to another socio-economic system.

Dictated by this law, after the fall of the socialist system in 1991, in addition to the reforms in the political and economic sphere that were made to replace the centralized economy with the free-market economy and the transition of Albania to democracy, important measures were taken in field of justice. In this context, a comprehensive and comprehensive reform was launched in both its main pillars: new legislation and justice bodies with new qualifications and mentality. This reform, like any new initiative, has been accompanied from the beginning by political-legal debates, with several remarks, criticism, disagreement on its design and implementation, especially with regard to the current reform, which is still in ongoing. The opposition and a considerable number of lawyers and experts, of both categories, those close to the opposition and the independent ones, express their disagreement on the way this reform is taking place, claiming that it is distorted and is under the political influence of the ruling party.

As per the above considerations, this paper will analyze some dissenting views and approaches, of domestic and foreign experts, which have been presented as well in the media programs. In addition, it will examine the constitutional norms, substantial and procedural legislation relevant to the justice system bodies and other reports, legal acts and documents related to the implementation of the justice reform. Post-communist justice reform can be divided into three-time phases, depending on profound constitutional changes: 1991-1998, 1999-2016 and 2016 onwards.

II. Justice reform during the years 1991 - 2016

In the first two phases of the Justice Reform, which we are mentioning together, all the previous legislation was transformed and replaced with the new legislation, according to the standards of the European Union, as well as the reorganization of the courts and bodies of the other justice system.

In the first place, the constitutional changes had to be made, on which this legislation would be based and the transformation of socio-economic relations. Initially, the law on the main constitutional provisions was adopted, as an interim package of provisions, which lasted until November 1998, when, after the referendum, it was replaced by the Constitution of the Republic of Albania, which is currently in force with the relevant amendments [Law no. 7491, dated 29.04.1991, "On the main constitutional provisions" and the Constitution of the Republic of Albania, 1998]. In the meantime, these basic acts were followed by codes and a number of important laws for the judiciary. On the other hand, as a member of the Council of Europe, in 1996 the Republic of Albania accepted the jurisdiction of the European Court of Human Rights in Strasbourg, with ratification by Assembly of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has become part of the Constitution and one more guarantee in meeting the standards of the rule of law. The Constitution stipulates that the system of government in the Republic of Albania is based on the division and balance between the legislative, executive and judicial powers and that the judiciary is exercised by the courts (Articles 7 and 135 thereof). In this view, (strict, narrow view), with genuine bodies of justice are understood only the courts of all instances. Whereas, in a broader sense, the system of justice bodies also includes the Constitutional Court, the Prosecution and other constitutional bodies, which, in one way or another, are related to the administration of justice or the executive administration of courts and prosecutor's offices.

The sanctioning of the separation and balancing of powers, as a basic constitutional principle, aimed then (and still aims today) at stripping the courts

and prosecutors' offices of party ideology and politicization, and creating a truly independent, impartial, professional, and integral judiciary. But, as it turned out, the new rulers only wanted the image of such a judiciary in public, when in fact they tried to capture and dominate it according to the Marxist axiom: "Power is one and indivisible." In this regard, with the rationale for the implementation of justice reform, the Council of Ministers opened a course, initially 3 months and then turned it into 6 months, for the training of employees of courts, prosecutors and investigative police, which is known as "Course of the Poplars", a nickname he received from the place where it took place, in the area of "Poplars, Durres" [DCM No. 133, dated 26.03.1993, "On the opening of courses for the preparation of employees of the prosecution, investigative police and courts "And DCM no. 296, dated 21. 06.1993]. Although trumpeted and propagated by its inventors as a need and means to replace the politicized judges of the communist regime with new judges, this course actually served to control the justice system through militant party judges and prosecutors, generally incompetent and easy to corrupt. Many judges and prosecutors who had served in the previous system, most of them young and not involved, were dismissed and replaced by "graduates" in the 6-month "Poplar" course, who came from all kinds of professions or sectors, some even in noncompliance with the educational and moral criteria, creating a negative impact on the new Albanian justice.

In the framework of the cooperation of the Albanian state with the Council of Europe, the School of Magistrates was established in 1996 [Law no. 8136, dated 31.07.1996], which would prepare new magistrates, judges and prosecutors who were thought to sound justice, establish a justice system with independent and uncorrupted professionals. Due to the political and social context, it started its activity at the end of the following year .In the second phase, after the adoption of the Constitution in 1998, efforts were made, through a program of assistance from the European Union, to reorganize the justice system, to remove from the system judges deemed incompetent and inadequate. To this end, a failed skills test was organized, as the Constitutional Court considered the test unconstitutional. However, the courts gained wider independence. According to the constitutional provisions, the High Council of Justice, shortly after the HCJ, was established, which decided on the appointment, promotion, transfer and disciplinary responsibility of judges, as well as the National Judicial Conference, a very important body that elected the members of the HCJ from the judicial system. Further, in 2005, the Assembly expanded the role of the National Judicial Conference, giving it the attributes of a representative forum of judges to strengthen the independence of the judiciary. [Constitution of the Republic of Albania, year 1998, article 147; Law no. 8811, dated 17.05.2001, "On the Organization and Functioning of the High Council of Justice"; Law No. 9399, dated 12.05.2005, On the Organization and Functioning of the Judicial Conference"].

In July 2003, the courts and prosecutors' offices of serious crimes were established at two levels, first instance and appeal [Law No. 9110, dated 24.06.2003], and in February 2008 the Assembly undertook further reforms in the judicial system with the approval of the new law "On the Organization and Functioning of the Judiciary in the Republic of Albania" [Law No. 9877, dated 18.02.2008]. The law set criteria for appointment and promotion, and provided that new judges in the courts of first instance should be appointed among the graduates of the School of Magistrates, except for former judges who wished to return to their offices. Military courts were dissolved, and administrative courts were established as well, in order to increase the professional quality, especially to facilitate the adjudication of administrative cases. [Law no. 49/2012, "On administrative courts and adjudication of administrative disputes"]. However, with all these reforms and reorganizations of the judiciary according to the best contemporary European standards, the image of the courts and the prosecution to the public perception came to deteriorate, as bodies stifled by corruption and influenced by politics in decision-making, which dictated the need for a new comprehensive reform.

III. Current Justice Reform

The current Judicial Reform begins in 2014, with the establishment of the Special Parliamentary Commission for the Reform of the Justice System, which prepared a report on the current state of the courts and prosecution offices, shortcomings and problems that resulted in terms of organization, functioning and administration. It has started from the international factor and continues to be strongly supported by it, respectively by the EU and the US with the aim to increase the confidence of the Albanian people in the accountability and success of this reform. Finally justice, being cleansed of corruption and disability, will win in the fight against corruption, organized crime and the influence of politics on the administration of justice, as a source of social injustice, gangrene and disintegration of the state.

The purpose of the Judicial Reform is to increase the independence of the justice system and strengthen it in terms of professionalism, efficiency, impartiality and honesty of judges and prosecutors in fulfilling their duties, in short to increase the quality and speed of trial (maximum: delayed justice, denied justice). As such, it fully affects every element of the current justice system, so it started with the adoption of constitutional amendments on July 21, 2016, where 21 articles were changed, out of a total of 26 belonging to the justice system, and 26 articles were added or new points as well as the package with organic laws was approved. With these changes, three institutions defined in the Constitution were dissolved and the establishment of at least 12 new independent institutions was foreseen, as well

as substantial restructuring of the existing institutions. Subsequently, amendments were made to the Criminal Code and the Code of Criminal Procedure, as well as the adoption of the Juvenile Criminal Justice Code.

IV. Justice Institutions

We are grouping the new Justice Institutions according to the functions they perform:

I. Executive governing institutions

1. The High Judicial Council
2. The High Council of the Prosecution
3. Judicial Appointments Council
4. High Inspector of Justice

II. Trial and prosecution institutions

1. The Constitutional Court
2. The Supreme Court
3. The General Prosecutor
4. Court against Corruption and Organized Crime (Special Court)
5. Prosecution against Corruption and Organized Crime (Special Prosecution)
6. National Bureau of Investigation

III. Transitional Reassessment Institutions (Vetting)

1. Independent Qualification Commission
2. Special Appellate Panel
3. Public Commissioners
4. International Monitoring Operation

We are not mentioning here the auxiliary institutions dealing with external links and data request. Although with a lot of delay, exceeding the constitutional and legal deadlines, the executive governing bodies of the judiciary, vetting and partially or with no full capacity, the institutions of trial and criminal prosecution have been established and started working normally. The Constitutional Court and the Supreme Court are still not fully operational, and some appellate courts are on the verge of collapse. We are focusing on the vetting process, which is at the

heart of the Justice Reform, in terms of the public interest, because its opinion is fraught with a negative perception not only of the performance of judges and prosecutors in post-communism, as affected by politicization and corruption, but also for the entire justice system. It must be acknowledged here that the Albanian politics itself has contributed to the creation of this negative image, throwing mud on the judiciary to cover corruption and its shortcomings in the governance of the country. The illusion was created that the source of all evil that grips the state and society comes from the justice system.

The vetting process is carried out by the three special institutions mentioned above, the Independent Qualification Commission, the Public Commissioners, and the Appellate Panel. They are assisted by the International Monitoring Operation, composed of observers from EU and US member states. Vetting is based on three pillars of re-evaluation: (1) control of assets, (2) control of image and (3) control of professional skills of judges and prosecutors, as well as other employees provided in the Constitution and the relevant organic laws of the package. The re-evaluation started in October 2016, with the approval of the law on the transitional re-evaluation of judges and prosecutors in the Republic of Albania and had to be completed within a period of five years. [Law no. 84/2016]

Specialists and academia have warned of a very complex and difficult process of reform in general, but also of vetting in particular, as for the first time it is experimented in our country and goes beyond the principles and rules known and applied in judicial systems. Eric Vincken, the Head of the Dutch experts' team of in our country, said: "Legal reform in Albania is of a historic and unique scale. It has never been implemented before" <https://www.prnewswire.com/news-releases/albania-justice-reform-of-historic-and-unprecedented-magnitude-683473791.html>. This process is further complicated by the fact that it has passed through (and still does), obstacles, political clashes, disagreements, reservations and doubts about its objectivity and impartiality, from the unilateral approval of the legal package of this reform to the allegations for the selective, political and clientelist removal of many professional judges and prosecutors and their replacement by militants of the ruling or incompetent party, in order to seize judicial power from the executive, although formally the political parties are in favor of this reform. Justice system experts continue to have differing views on how this reform is being implemented, as well as on its results and success. One of the most active and critical lawyers towards the reform, Prof. Assoc. Dr. Jordan Daci states that "justice reform seems to be taken hostage by the current majority" and that "the political class is in a clear conflict of interest in relation to justice reform, the whole class", because "from both sides without exception there are enough candidates for prison" [Invited by Artur Zhej in "360 degrees", on May 28, 2020 and abcneës.al, on May 22, 2019]. While the lawyer Alesia Balliu, considering the politically distorted

reform, states: “The result so far has been a prolonged weave, which has left the hole population on hold” and further: “Similar to our transition, the state managed to turn the Justice Reform into an endless “Odyssey”. [Alesia Balliu, Gazeta “Mapo”, dated 30.09. 2020, “Odyssey of Justice Reform”].

However, vetting has ended for the former judges of the Constitutional Court and the Supreme Court, removing almost all these judges from the system, without being able to replace them in time with other judges (even today the required number is not yet reached according to the constitutional provisions), which has led to the non-functioning of these courts for three-four consecutive years. Overall, the Transitional Re-evaluation bodies have dismissed nearly 50 percent of judges and prosecutors who have been subject to vetting, mainly for not justifying their assets, while some of them have resigned by refusing to face or avoiding vetting procedures. As warned by many professionals in the field of justice, but not only, the vetting was not completed nor could it be completed within the five-year constitutional deadline, in the circumstances, modalities and extent in which it took place. The re-evaluation has continued at a slow pace and will take extra time to complete, as a significant number of judges, prosecutors, and other justice staff (almost over twenty-five percent of them) has not yet undergone the vetting process.

According to the Constitution, the mandate of the members of the Independent Qualification Commission and of the Public Commissioners is 5 years from the date of their commencement of functioning. Following the dissolution of the commission, unfinished re-evaluation cases for judges are reviewed by the High Judicial Council and unfinished cases for prosecutors by the High Prosecution Council. Whereas, after the dissolution of the Public Commissioners, their competencies are exercised by the Head of the Special Prosecution. Appeals against the decisions of the commission, which are still unfinished, will be reviewed by the Constitutional Court. [Constitution of the Republic of Albania, amended, article 176 / b / 8].

In such a situation, where the number of undervalued judges and prosecutors remains considerable, the question arose as to what would be done to complete the vetting. Would the mandate of these bodies be terminated or extended to end their vetting? Termination of their mandate would create serious difficulties for the normal continuation of vetting and would jeopardize the standards and practices followed by these bodies, although the standards used so far leave much to be desired. They have even been criticized by the initiators and zealous supporters of this reform.

Overcoming this impasse through the extension of the mandate of the Independent Qualification Commission and the public commissioners, which was persistently insisted on by the EU representative and the US Embassy, again required

the amendment of the Constitution. Finally, amid numerous controversies and debates for and against, on February 10, 2022, the Albanian Parliament extended the deadline for the end of the mandate of these bodies to continue vetting until the end of 2024. [Law no. 16/2022, On an amendment to Law no. 8417, dated 21.10.1998, “Constitution of the Republic of Albania”, amended]

In a careful logical, literal and linguistic interpretation of the phrase “unfinished cases” and “against the decisions of the commission still unfinished” in Article 176 / b / 8 of the Constitution, it is concluded that in the competence of the High Judicial Council, the Council The High Prosecution and the Constitutional Court pass those cases or decisions that are registered with the Independent Qualification Commission at the moment of the end of the mandate, for which the proceedings have started. Therefore, in our opinion, the extension of the mandate is the most appropriate solution, although it was completed without studies and analysis for the non-fulfillment of duties by the Independent Qualification Commission.

V. Some issues of the Justice Reform

Justice reform has been welcomed by the public, which continues to wait impatiently for its promised results. It was trumpeted as a process that would give immediate results, especially from the international community, and that they would be held criminally liable as corrupted politicians (“the big fish”). What is the result so far? A protracted process, with repeated and unfulfilled promises, with blocked files and accompanied by fears that the prospect of reviewing them, especially by the Supreme Court will be distant and with serious consequences for the stakeholders and the Albanian society as a whole.

Although five years have passed since the adoption of the Justice Reform on July 21, 2016, clashes and accusations between the political wings for bias and seizure of the justice system continue to be severe, hindering and damaging its progress. The shortcomings of the reform, the delays, the tedious length of the procedures and the turbulent political climate, have made people even more skeptical and do not even believe in the “reformed Albanian justice” promised with so much fervor, where the restoration of the people’s trust to this justice has been and remains one of the main objectives of this reform.

In the recent controversy over the performance of the Prosecution against Corruption and Organized Crime, otherwise SAPK, each side of Albanian politics accuses the other side, for not initiating criminal cases against the “big fish” of their political opponents. Apparently, Albanian politics finds it difficult to give up pressure on the judiciary to achieve its goals. On the other hand, the US Embassy, which has the SPAK at its heart, came out in its defense and considered these

attitudes as unacceptable interference and pressure in the activity of the SPAK. The representative of the European Union, Alex Hupin, at the National Conference on 24.06.2022, on the topic “Public interest in the administration of justice and the independence of magistrates”, was critical of the impact on court cases, stating: “We have made a way long, but inappropriate influences and interference in judicial affairs still continue to take place. They take different forms, they take the form of attacks on justice reform, but also the form of attacks against judges and prosecutors <https://politiko.al/english/e-tjera/zyrtari-i-be-vazhdojne-nderhyrjet-ne-gjyqesor-ohen-gjyqtare-dhe-prok-i462460>.”

The laws in Albania are generally drafted and built according to the best international standards. We generally say that from time-to-time unnecessary changes and additions are made, which make it difficult for the interpreter and their implementation, as has happened with the Criminal Code and the Code of Criminal Procedure. Eric Vincken, Head of the Dutch experts’ team in our country, speaking about the values of the current reform in Albania, states: “Almost every article and chapter of the Albanian legislation has changed.” <https://www.prnewswire.com/news-releases/albania-justice-reform-of-historic-and-unprecedented-magnitude-683473791.html>. In fact, some of these additions and changes have brought more confusion than benefit. For example, Chapter VII of the Criminal Code, the general part, which provides for types of criminal offenses with terrorist purposes, consists of 14 articles, 12 of which have undergone two, three or four changes or additions within a four-year period. To make matters worse, there are clashes between them, predicting the same thing in two or more articles or even long sheets, with the nature of a “novel”, an article consisting of three pages, which no Heaven can distinguish. But what has compromised the system is the lack of proper implementation, a disease from which even the reform legislation is not escaping. On the other hand, a serious obstacle to the Justice Reforms is the very complex new justice system itself, with a multitude of bodies. The structure of the whole system, especially of the institutions of the executive governance of justice, is aggravated, superimposed, duplicated or characterized by parallel actions, taking large energies and budgets, unjustified for our small and poor country and makes that inefficient. The Venice Commission warned our state early on that such structures would require qualified human resources, which Albania did not have (and still does not), large budget expenditures (for a poor country like Albania) and clashes between these bodies over competencies or jurisdiction, which we are suffering today.

The way some of the most important bodies of this reform were formed, such as the Constitutional Court and the Independent Appellate Panel, left room for their capture by politics. Prior to the constitutional amendments, members of the Constitutional Court were appointed by the President of the Republic with

the consent of the Assembly, and now their appointment is fragmented into three groups: three members are appointed by the President, three members are elected by the Assembly and three members are elected by the Court. Senior, being selected from among the candidates ranked in the top three on the list by the Judicial Appointments Council. Evidence of this conclusion is the prolonged “battle” between the President of the Republic and the Assembly to bring to the Constitutional Court the jurors preferred by one or the other party.

VI. Conclusions

The justice system that is being built in Albania is experimental, it has not been encountered in any country, in the democratic ones, no or not, and it is not finding support (and there is no way) from any other country that is reforming in justice. And as with any experiment, you can do it, but you can also fail. Furthermore, the professional evaluation of judges and prosecutors was entrusted to an inexperienced administrative body, with anonymous members for the justice sector, as is the case with the Independent Qualification Commission. I fear that, with the completion of the vetting in the process, there will be a need for another reform in the judiciary, at least to reduce the number of existing structures, not to mention that it has started the campaign for the restructuring of the courts of appeal, which aims to focus in a single one in Tirana, an “experiment” that has been done before and has failed, as well as in reducing the number of district and administrative courts of first instance.

The High Judicial College, with its decision No. 211, dated 10.06.2022, has approved the Evaluation Report and the proposal of the institutional group on the organization of judicial districts and territorial jurisdiction of the courts. These new changes in our judicial system are once again quickened, with an unexplained rush, apparently we do not seem to have learned lessons from our failures, undertaking reforms not properly studied, tested and, shared/discussed with groups of interest such as: judges, prosecutors, lawyers, psychologists, prison staff and experts in various fields that are in one way or another related to the justice system, contributing to its proper functioning. Without underestimating the public consultation, the ones will wander through lengthy trials from one city to another and will have to disburse out of their efforts in order to claim their rights. While acting speedily and in a rush, things can't be sustainable. Underlying this doesn't mean procrastination and waste of time but undertaking prudent and safe steps.