

RE-EVALUATION PROCESS, DUE LEGAL PROCESS AND INTEGRITY OF THE JUSTICE SYSTEM (ALBANIAN CASE)

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ABSTRACT: *Albania has entered into the process of the justice system reform, for the dismissal of judges and prosecutors, unsuitable for the function they are exercising. According to the Constitution, re-evaluation for all judges and prosecutors will be carried out on the basis of the principles of due process and respecting the fundamental rights of the re-evaluation subjects. This process will be carried out by two transitional re-evaluation bodies, established by the Constitution, which will give decisions and will examine the appeal against the disciplinary measures that can be appealed as well to the ECtHR by the assesseees. This article aims to provide an analysis of the situation of the justice system in Albania and to present the constitutional and legal framework for the re-evaluation process of judges and prosecutors. Subsequently, the paper attempts to summarize the standards required by the ECtHR for cases of dismissal against the assesseees. Finally, the paper concludes that, in order for the Albanian state not to be punished in the future, the newly established institutions for the re-evaluation of the justice system subjects should be familiar with the standards of the ECtHR for a due legal process. Furthermore, they should approach their duty in such a way as to avoid possible convention violations during this disciplinary process.*

KEYWORDS: Judge, Prosecutor, Appeal, Dismissal, Reform, Vetting.

INTRODUCTION

Some introductory considerations on the transitional re-evaluation process

Constitutional amendments have foreseen an extraordinary mechanism related to the integrity problem in the judicial system, which is the process of re-evaluation of judges, prosecutors and the category of legal advisers. This process consists in controlling subjects to be assessed in three aspects: *i)* an asset assessment (control of wealth, properties, funds on bank accounts, life trend, etc); *ii)* an background assessment, to identify those who have regular and inadequate contacts with members of organized crime; and *iii)* an assessment of professional skills. This has been called “the vetting process” of judges and prosecutors.

What is this vetting process? This process refers to the integrity assessment of individuals, to determine their suitability for the public function they exercise. Countries that have passed from dictatorships into democracy and which are in transition phase usually use this process to exclude incompetent and abusive public servants in their public offices. Countries that pass from one regime to another, of course, have a transitional period to completely move on to the new regime. This process has found room for more application in the field of so-called “justice in transition”. In this context – and the field of justice is no exception – it can be stated that this process is a suitable mechanism for transitional justice, even though an extreme measure of itself. Transitional justice is needed in political transition cases where transition from a state of lack of stability to a safer, more peaceful and trusting future is

required and where the general desire of society requires reconstruction of trust, repair of a mutilated justice and the building of a democratic government.

It is considered a normative expectation and constitutes a practical and political recommendation for states to take measures of transitional justice in order to repair the state and society as a result of a conflict or a period of authoritarian transition. Transitional justice includes a wide range of measures by which society faces past mistakes with the aim of achieving justice, rule of law and peace for the future. The very process of transitional justice, filled with conflicts and compromises, helps to develop a new sense of justice on which the state and society are rebuilt and repaired. Law scholars and practitioners claim that transitional justice may hinder future human rights abuses, reduce corruption, promote confidence, facilitate development, bring respect for the rule of law, correct society, and in particular, support democracy. Lustration is the dominant form of post-communist transitional justice and a specialized form of employee vetting. The meaning of lustration as it is practiced in post-communist countries is essentially wider, including a clear component of moral cleansing. It is described as a means of "ritual purification" to restore social order, with an important role in transforming the "moral culture" of Eastern European citizens.

Everyone can think why is it necessary for the Albanian context, especially after 27 years of transition from the monist system to the democratic system? (...) Why was transitional justice selected for application and why now? Is it the most appropriate mechanism and is it the right one? Political interests in democratic societies are fundamentally based on the demands and pressures of society. In this sense, any kind of reform is the answer to people's questions and the response to their desire for appropriate and different solutions from the current, with the goal of producing positive and improving results. Referring to the Justice System Analysis (March 2015), the situation is such that the system is not a public service, is not trustworthy, and most of all it is corrupt. Political, economic, financial corruption, nepotism, and clientelism and lack of professionalism have turned the justice system into a system of "injustice". Dependent justice does not provide for the protection of human rights. As a consequence, the lack of judicial protection of human rights, does not justify its existence under these circumstances.

In this context, all political actors, but also the judges and prosecutors themselves, basically share the same stance on the level of corruption and the necessity of implementing this process, though an extraordinary and extreme process. In fact, this process has not been invented for the Albanian situation and solving some of the problems that the Albanian justice system has exposed. Just from a simple search, it turns out that the re-evaluation process has been carried out in different countries in different contexts, but also in the same context, i.e., as a mechanism to fight corruption and inefficiency in the justice system, for instance we can mention, Serbia, Bosnia-Herzegovina, Kosovo.

Beyond the short-term sanctioning purpose of this process, which is the removal of inadequate individuals from the justice system, it has long-term goals and benefits as well; the gains of the redundancy of the public towards the justice system, the restoration of the legitimacy of institutions operating in the justice sector, the deactivation of structures through which judges or prosecutors find space for abuse and non-punishment, as well as removing structural, organizational obstacles, that do not allow the system to be functional.

On the other hand, this process will be interlinked, motivating and stimulating for those judges/prosecutors who are public officials with integrity, adequate to maintain their

positions, and which the system really needs. In this regard, the Venice Commission and the Council of Europe, Human Rights Directorate, in an opinion on the amendments to the Law on the High Council of Justice of Ukraine have stressed that the evaluation process should be treated in accordance with the safeguards, to protect those judges who are fit to do their job. Again, referring to the Albanian constitutional amendments, it turns out that the criteria for running into a number of new constitutional structures to be created (the High Judicial Council, the High Prosecutorial Council, the High Court members ...) are as such, stimulating for the judges and prosecutors working within the justice system and who have successfully passed the re- evaluation system, thus building a clear career system within the new system.

Considered as necessary in the context of judicial reform in order to change the critical situation in the field of justice and fight the high level of corruption in Albania, the process of vetting judges and prosecutors has also received the support of International institutions, including the Venice Commission, launched at the request of the Albanian Parliament to give an *amicus curia* opinion on the proposed constitutional changes. According to the Venice Commission, such a radical solution is not advisable under normal conditions, as it creates a great tension within the judiciary, destabilizes its work, increases public distrust of the judiciary, removes the attention of judges from ordinary duties and a very extraordinary measure raises the risk of seizing the judiciary from the political force that controls the process. But the Venice Commission has expressed its support for the efforts of the Albanian authorities and has estimated that this reform is urgent and that the critical situation in this area justifies a radical solution.

This process is currently in the implementation phase, starting with the selection of members of the transition re -evaluation institutions and the establishment of these institutions after it took nearly 2 years (2014-2016) for the adoption of constitutional and legal changes that were indispensable to implement this reform.

The constitutional court's judgement on the law on transitional re-evaluation

The Assembly of the Republic of Albania (the Assembly) has adopted the Constitutional Law no. 76/2016 "On Amendments to Law no.8417, dated 21.10.1998 "Constitution of the Republic of Albania". Part of these constitutional changes, besides the structuring and establishment of new justice system institutions, is also the completion of a comprehensive transitional re -assessment process for all judges and prosecutors in Albania, which includes controlling assets, controlling the background and controlling of proficiency (considered as re-evaluating subjects under the law). The re-evaluation will be conducted by the Independent Qualification Commission (IQC), while the appeals of the re-evaluation subjects or the Public Commissioner are reviewed by the Appeal Chamber (ACH) at the Constitutional Court, which are independent and impartial bodies.

Pursuant to article 179/b of the Constitution, the Assembly has approved the Law no. 84 / 2016, dated 30.08.2016 "On the Provisional Reassessment of Judges and Prosecutors in the Republic of Albania" (hereinafter "*Law on the transitional re- evaluation*" or "the Law"), which aims to determine the special rules for the transitional reassessment of all re-evaluation subjects and the principles of organizing the re-evaluation process for all judges and prosecutors, the methodology, procedures and standards for re-evaluation, the organization and functioning of re-evaluation institutions, as well as the role of the International Monitoring Operation (IMO), and other state and public bodies in the re-evaluation process.

The Law on the transitional re - evaluation was appealed to the Constitutional Court (“CC”), from the Association of Judges and 1/5 of the Deputies, as the initiating subjects of constitutional control.

Claims of the applicants

According to the claimants, the Law on the transitional re- evaluation violates the principle of separation and balance between powers as one of the basic principles of the Rule of Law. The Constitution has set up three new constitutional bodies that will re-evaluate judges and prosecutors, while articles 4, 30-44, 60 and 69 of Law on the transitional re- evaluation have eliminated the essence and spirit of constitutional provisions, because the control and investigation in the reevaluation process have been displaced by these newly created bodies and conceived as independent bodies (Public Commissioners, IQC and ACH) to existing, unconstitutional and government-controlled bodies such as the High Inspectorate of Declaration and Audit of Assets and Conflicts of Interest, the Classified Information Security Directorate, the School of Magistrates, the General Directorate for the Prevention of Money Laundering and the Ministry of Public Order.

In addition, the plaintiffs claim that according to the Constitution, the re-evaluation will be carried out on the basis of the principles of due process and respecting the fundamental rights of the re-evaluation subject, while Law on the transitional re- evaluation has not detailed any procedural rules to guarantee the basic elements of the due process and respect for these rights, hence it violates the principle of equality before the law.

Plaintiffs argue as well that Law on the transitional re- evaluation violates the right to a due process of law, as it does not respect the constitutional principles for obtaining, administering and assessing the evidence. Articles 53 and 54 of the law allow access to information from the public, but do not meet the standard provided for in the Constitution Annex. Law projections transform the reevaluation process from an objective and evidence-based process into a subjective process that is based on unlawfully collected data and without any legal criteria. This also violates the principle enshrined in article 32/2 of the Constitution that no one can be convicted on the basis of illegally collected data.

An additional argument which the plaintiffs claim is that the Law on the transitional re-evaluation violates the right of appeal of re-evaluation subjects, which constitutes a disproportionate restriction of constitutional rights and contradicts article 17 of the Constitution. The constitution has defined the constitutional competence of the ACH, conceiving it as a judicial body for appealing the decision of the IQC and acting according to the rules applied by the Administrative Court of Appeal. ACH does not have and can not have jurisdiction for matters covered by article 131/f of the Constitution because they belong to the constitutional jurisdiction of the Constitutional Court.

Plaintiffs argue as well that the law violates the principle of legal certainty, because the norms are unclear, confusing and in certain cases contradictory. It creates the possibility that in practice there will be institutional blockages, process delays, and conflicts of competences, pursuit of non-formal practices and other obstacles that undermine the essence of the reevaluation process.

Last, claimants argue that Article A of the Annex to the Constitution also provides for the restriction of the private life of the assessee sanctioned in articles 36 and 37 of the Constitution. Even in this case, the law did not foresee any circumstance or criterion for

restricting rights so that it would be partial and proportional to the need to carry out the process.

The CC asked the opinion of the Venice Commission, which expressed the *amicus curiae*, CDL-AD (2016) 036.

Summary of the Decision of the Constitutional Court:

For the alleged violation of the principle of separation and balance between powers

The Constitutional Court held that:

“The entire process of re-evaluation of judges and prosecutors, as part of the justice reform package, although it is an extraordinary measure of temporary character, has been raised by the constitution in the constitutional rank, foreseeing the institutions that will carry out this process, their competencies as well as the choice of members and the guarantees they enjoy. The purpose of defining the competences of these bodies directly in the Constitution means that no institution can take these powers or overlook them. In this context, the Court, in respect of the principle of separation of powers, has emphasized that it can not previously control the will of the lawmaker to act or not at a particular time and, following this line of reasoning, can’t control the constitutional issues that may have influenced the legislator for the special treatment of a particular case, as this is within the legislator's assessment space, while the task of the Court is to check whether the rule-setting of this case has been made in accordance with the Constitution and its fundamental principles (*see decision no.43, dated 26.06.2015 of the Constitutional Court*). The Court considers that, in the present case, by analyzing the provisions of the law subject to review in the spirit of the principle of separation and balancing between the powers sanctioned in article 7 of the Constitution, the standard of conciliatory interpretation with the Constitution must be applied in a particular way with article 179/b and its Annex.

According to article 179/b, item 5 of the Constitution, re-evaluation is performed by the IQC, and according to article 4/2 of the Law: "The Commission and the Appeal Chamber are the institutions that decide on the final evaluation of the re-evaluation entities". Notwithstanding the wording of this provision, it cannot be read detached, but in accordance with other legal provisions that define in detail the competences of the bodies involved in the process, as well as the competences that the IQC itself performs during this process. Article 5/1 of the Law provides that, "the re-evaluation process of the re-evaluation subjects shall be conducted by the Commission, the Appeal Chamber, the Public Commissioners, in cooperation with international observers". Also, as mentioned above, based on the provisions of chapter VII of Law on the transitional re-evaluation, it results that in carrying out their constitutional function, the reevaluation bodies carry out a proper process of control and evaluation and are neither based nor obliged by the conclusions presented to them by other auxiliary bodies.

Although the constitution maker has conceived and built a new reevaluation system, clearly defining the powers and scope of the evaluation of new constitutional bodies, this cannot mean that it intended to undermine the existing system of control and evaluation of public officials and the competencies of institutions established for this purpose. On the contrary, the aim was to carry out the reevaluation process by the new constitutional bodies, but in cooperation and with the assistance of the existing bodies, clearly stipulating the role of each body involved in the process and their relations in the framework of the realization of this process.

The Court considers that the existing law enforcement bodies have only an auxiliary role in the reevaluation process, while their activity is exercised under the supervision and control of the constitutional re-evaluation bodies. Establishment and constitution of IQC and ACH prior to commencement of the audit activity by the bodies established by law guarantees that an independent and transparent process of the entire reevaluation process is initiated in accordance with its purpose set out in article 179/B, item 1 of the Constitution, which provides: "Ensuring the functioning of the Rule of Law, the independence of the justice system, and restoring public confidence in the institutions of this system". Consequently, the Court concludes that this is the only way of interpreting the law under control, so that it does not contradict the principle of separation and balance between the powers".

For the alleged violation of the principle of legal certainty

"Regarding the allegation of violation of legal certainty, the applicants claim that in relation to members of the Constitutional Court, the High Court, counselors, legal assistants, and the General Prosecutor, it is not clearly provided which is the body, the rules and the modality of conducting the assessment.

The Court notes that, from the legal provisions challenged, it results that the professional evaluation for the judges of the Constitutional Court, the High Court and the General Prosecutor will be done by the same institution and in the same manner as ordinary judges and prosecutors (article 42 of the law). Also, this provision has defined the scope of assessment for the General Prosecutor and the legal basis for the assessment of other subjects, which will be the legislation regulating the status of judges and prosecutors, to the extent practicable. Although the Constitutional Court, under the permanent and normal accountability system, is not a part of the judicial system, is not subject to the same appraisal system as ordinary judges, the constitutional norm has also foreseen that the same rules applicable to other subjects will apply to them. Also, the Constitution has foreseen the body that will carry out the control of the professional ability of counselors and legal assistants.

Regarding the allegation of the ambiguity of the terminology used by the law, based on the provisions that determine the competences of other bodies involved in the process, and the working group or the professional assessment bodies, also mentioned above in this decision, the Court considers that they lack ambiguities, which may lead to their misinterpretation or misappraisal. Moreover, the Court notes that at the end of the re-evaluation process, the IQC issues a reasoned decision on the evidence and the reasons for its reliance and the conclusions drawn from it".

On the allegation of limiting the individual's fundamental rights

"The Court notes that the interference in this case is justified by the public interest, namely the reduction of the level of corruption and the restoration of public confidence in the justice system, thus it relates to national security interests, public security and the protection of the rights and freedoms of others. Consequently, in the present case, the interference was made for a lawful purpose, in the light of the second paragraph of article 8 of the ECHR, and in respect of article A of the Annex to the Constitution, which limits these rights. The Court reiterates that it is the duty of the new constitutional reevaluation bodies that during the control of the activity of the law enforcement authorities to seek respect for European standards and the jurisprudence of this Court as above.

Regarding the allegation of violation of the right to appeal, in assessing the constitutional provisions it results that they have determined the constitutional competence of the Appeal Chamber, conceiving it as a judicial body for appealing the decision of the IQC. Article 43 of the Constitution provides that: "Everyone has the right to appeal against a court decision to a higher court, unless otherwise provided in the law for minor offenses, for civil or administrative matters of minor importance or value, in accordance with the conditions laid down in article 17 of the Constitution". The Court has emphasized that the fundamental right to appeal, enshrined in article 43 of the Constitution, is a procedural right which serves to protect a substantive right. This right is based on the principle that: "... there cannot be a right without the right to appeal", or "... there is no right to appeal without a right". It should be understood as an opportunity for each individual to have certain procedural means to challenge the decision given by a lower court to a higher court, guaranteeing to the individual the right to face justice at all its levels. The Constitution guarantees to the individual the right to appeal at least once to a court decision rendered to him.

The Court considers that, by the way in which the Appeal Chamber in the Constitution and in the Law on the transitional re-assessment of judges and prosecutors provide, these legal texts provide sufficient elements to conclude that it can be regarded as a special jurisdiction which gives judicial guarantees to persons affected by the re-evaluation procedure and that the rights and guarantees contained in the legislative and constitutional scheme appear to be quite extensive.

Judging from the way the whole system of re-evaluation is conceived in the Constitution, that is, the bodies that perform it, the way of choosing their members and the guarantees they enjoy, the competencies that these organs will exercise and the legal basis for this activity, it is estimated that these bodies provide all the guarantees that require the right to a fair trial within the meaning of Article 42 of the Constitution and Article 6 of the ECtHR.

The Court has emphasized that in order to determine whether an organ is "independent" among others, the manner of appointing its members and the length of their function should be considered. The guarantee of the duration and the inviolability of the mandate protect the judge from the influences of political forces that may come to power. Only an independent court guaranteeing the inviolability of the mandate of its members can be considered as a court that administers constitutional justice in accordance with constitutional principles (*see decision no. 24, date 09.06.2011 of the Constitutional Court*). Under article F, paragraph 3, of the Annex to the Constitution, the Chamber decides definitively on the matter and can't return it to the Commission for reconsideration. It may seek the collection of facts or evidence and rectify any procedural error committed by the Commission".

On the alleged violation of the right to a due legal process/ the right to access to Constitutional Court

"Regarding the right to individual constitutional complaint, in the Venice Commission's assessment the Constitution has been silent as to whether a subject may file an individual appeal before the Constitutional Court and that in the absence of a detention there is no reason to exclude an opportunity, (*Paragraph 44 of the opinion CDL-AD (2016) 036*).

In the assessment of the Court, the Constitution has not silenced in this respect, as well as for some other constitutional rights. The Court notes that article A of the Annex to the Constitution for the purpose of carrying out this process also limits subparagraph (f) of article

131 of the Constitution, which implies that this restriction is specifically related to the right of the subjects subject to this process of being to the Constitutional Court, while under article F, point 8, and Annexes, the re-evaluated subjects may file an appeal to the ECtHR. The assessment of whether this restriction is proportionate or not cannot be the subject of this judgment as long as it is not only established in the constitutional order but also because the Court has no jurisdiction for the fundamental assessment of these provisions incorporated in the Constitution through a constitutional amendment. However, given the competences of ACH as the body controlling IQC's decision-making, it is estimated that this process is also controlled from the standpoint of its compliance with the Constitution”.

The normative analyse of the re -evaluation process according to the law on the transitional re- evaluation

According to article 179/b of the Constitution, the re-evaluation system is provided in order to guarantee the functioning of the Rule of Law, the independence of the justice system, and to restore public confidence in the institutions of justice. All judges, including judges of the Constitutional Court and Supreme Court, all prosecutors, including the General Prosecutor, the Chief Inspector and other inspectors at the High Council of Justice, are subject to *ex officio* re-evaluation. All legal advisers at the Constitutional Court and the High Court, legal assistants at the administrative courts, legal assistants at the General Prosecutor's Office will be re-evaluated *ex officio*.

According to the law, where appropriate, the re-evaluation institutions may also apply the procedures provided for in the Code of Administrative Procedures or the Law "On the organization and functioning of Administrative Courts and the Settlement of Administrative Disputes"(hereinafter “the Law on Administrative Disputes”), if these procedures are not provided for by the provisions of the Constitution or this law. The legal map of this process at the procedural legal level has 3 essential laws for implementation. *First*, the special law created for this process, the law on re- evaluation; *secondly*, the Code of Administrative Procedures (CAP); and *thirdly*, the Law on Administrative Disputes. According to the Law on transitional re-evaluation, although in a substantial part it has determined the procedures for reviewing cases by the IQC, some procedural legal provisions regarding the reevaluation process, more of a declarative nature, but which can be considered reference provisions, reflect the Code of Administrative Procedure or the Law on Administrative Disputes.

The Independent Qualification Commission and the Appeal Chamber exercise their functions as independent and impartial institutions on the basis of the principles of equality before the law, constitutionality, legality, proportionality and other principles guaranteeing the right of re-evaluation subjects.

From a structural point of view, the Law provides the procedure for re-evaluation and investigation of the case (from articles 48 to 57), defines the types of decision-making (from articles 58 to 61), as well as the structural typology of the decision from a formal perspective, while article 62 to 67 provides for the procedure of appeal.

On the other hand, the Law states that the re-evaluation subject's rights during the re-evaluation process are regulated in accordance with the provisions of articles 35-40 and articles 45 -47 of the Code of Administrative Procedures. These articles, respectively, have determined the right of the re-evaluation subject to represent itself or to designate or have legal representatives, as well as the right of the parties to obtain knowledge of their file and to

provide opinions and explanations in any stage of the procedure, for facts, circumstances or legal issues, as well as to file evidence or to submit proposals for solving the case.

According to article 27/2 of the Law, if a member of the re-evaluation institutions can not review an issue assigned to the reasons referred to in article 30 of the Code of Administrative Procedures or the Law "On the Prevention of Conflict of Interest in Exercising Public Functions ", he shall immediately notify the trial panel in writing. The exclusion of the commissioner, judge or the public commissioner from the examination of the case is decided by another panel adjudicated by lot.

According to article 28/2 of the Law, the member of the reevaluation institution and their staff handle the information on the re - evaluation procedure, respecting the principle of confidentiality and protection of personal data. Re-evaluation institutions are exempted from this obligation only in cases where the information is given to the assesees or bodies that by law have the right to request this information due to official duty.

The Independent Qualification Commission invites the subject of re-evaluation at a hearing in accordance with the rules provided for in the Code of Administrative Procedures. Articles 87-89 of the Law provide for the hearing of the interested party, the exercise of the right to be heard and the exemptions from this right. The law in this case did not specify if there were any cases that the right to be heard would be limited, but I think that in the context of this administrative proceeding, the right to be heard orally shall be absolute, without being limited to a hearing based only on the documentation. Furthermore, the hearing of the Chamber is public and is conducted in accordance with Article 20 of the Law "On the organization and functioning of administrative courts and the adjudication of administrative disputes".

According to article 20, the hearing of the case by the court in a court session is open to the public. The court may not allow the participation of the media and the public in a court session or part of it, with the justification of the protection of public morality, public order, national security, and commercial secrecy, the right to privacy or personal rights.

The philosophy of maximum openness and transparency should remain at the core of process development by these institutions, while fully respecting the right to be heard of the re-evaluation subjects without limiting it. The oral hearing is desirable, especially in the IQC session, as the only *de jure* judicial instance, as long as the processes in these institutions will be developed both on matters of fact and law, even though the law has specified the obligation for public hearing only when Public Commissioner submit an appeal against the decision of the Chamber.

Just as the ECtHR has decided on the matter Selmani vs. Macedonia, where had stressed that:

“...there had been a breach of Article 6 § 1, noting among other matters that the Constitutional Court had acted as a court of first and only instance in the applicants’ case and had been required to address issues of both fact and law. Moreover, it had failed to provide reasons for deciding that an oral hearing was not necessary.

According to the Law on the transitional re-evaluation process, upon the termination of IQC's decision as an administrative body, the rules on administrative appeal are not further applied by the Appeal Chamber. This provision comes as logic of the competences and functions of the ACH, which functions as a judicial body, and as such, will follow the rules of court

proceedings. The law itself uses the term "litigation" when referring to the ACH operational procedures, as supported by the Law on the Administrative Disputes.

As evidenced by the legal provisions, the IQC is more of a *de jure* administrative nature, which will function with procedural administrative rules, typical for disciplinary administrative proceedings, even though I am of the opinion that the IQC also meets the criteria of a independent judicial body, required by article 6 of ECtHR. In the case of *Dauti v. Albania*, the ECtHR has emphasized that:

“In order to establish whether a tribunal can be considered as “independent”, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see, amongst others, *Morris v. the United Kingdom*, no. 38784/97, § 58, ECHR 2002-I). 52. The Court notes that the Appeals Commission is wholly composed of medical practitioners, appointed by the ISS and ultimately approved by the Ministry of Health, under whose authority and supervision the doctors work. No legally qualified or judicial members sit on the Appeals Commission (see, by contrast, *Le Compte, Van Leuven and De Meyere*, cited above, § 58.) The law and the domestic regulations contain no rules governing the members’ term of office, their removal, resignation or any guarantee for their irremovability. The statutory rules do not provide for the possibility of an oath to be taken by its members. It appears that they can be removed from office at any time, at the whim of the ISS and the Ministry of Health, which exercise unfettered discretion. The position of the Appeals Commission members is therefore open to external pressures. Such a situation undermines its appearance of independence. In the light of the foregoing, the Court considers that the Appeals Commission cannot be regarded as an “independent and impartial tribunal” as required by Article 6 § 1 of the Convention”.

The Appeal Chamber *de jure* and *de facto* will function as a judicial body with typical procedural rules of a judicial nature, and is projected to be the first and the only instance of judicial appeal against the administrative decision of IQC to dismiss, suspend or confirm on duty the judge, prosecutor or legal advisor.

The due legal process as a right of re-evaluation subjects in the ecthr jurisprudence perspective

According to Article F/8 of the Annex to the Constitution, re-evaluation subjects may file an appeal to the ECtHR.

As part of the re- evaluation process, as discussed above, it is concluded that dismissal of a judge, as in other cases provided for by the Constitution, is conducted after a process of assessing the reasons and evidence administered by the disciplinary or the re-evaluation institutions according to and after a trial-based process and the principle of due process of law.

There must be some essential prerequisites so that the assessment can be successful, such as: *first*, the process as a general measure, applied equally to all judges/prosecutors and not to be applied selectively, always accompanied by certain procedural safeguards and not related to any specific issue that a judge has in its hands; *second*, the process shall follow the standards provided for in article 6 of the ECtHR, recognizing the right to appeal of the dismissal

decision to an independent and impartial tribunal, third, the composition of the Independent Qualification Commission or the Appeal Chamber, and the status of their members, shall have full guarantees of independence and impartiality.

The ECtHR is the referring court, or the competent court to deal with complains about the due process of law violations, and as the Constitutional Court in its decision no.2/2017 stated:

“Judging from the way the whole system of re-evaluation is conceived in the Constitution, that is, the bodies that perform it, the way of choosing their members and the guarantees they enjoy, the competencies that these organs will exercise and the legal basis for this activity, it is estimated that these bodies provide all the guarantees that require the right to a fair trial within the meaning of Article 42 of the Constitution and Article 6 of the ECtHR”.

So, from a normative and structural point of view, it seems that the Law on transitional re-evaluation process passed the constitutional test and *in principle* provides the necessary guarantees for the implementation of article 6 of the ECtHR, but for each individual case it will be important the manner of implementation of constitutional and legal norms by the vetting bodies.

So far, the ECtHR has had only one complaint against Albania, by a former judge outside the context of the reform, but an appeal in relation to article 6 of the ECtHR, which should therefore have an authentic value for those who will review the re-evaluation issues. This case is titled *Mishogjoni v. Albania*, in which the ECtHR ruled that there has been a violation of article 6/1 and article 13 of the ECHR over the unreasonable duration of the proceedings and the lack of an effective remedy for the violated right. The Court considered that an overall delay of almost four years taken by the HCJ to re-examine the applicant's case did not satisfy the “reasonable-time” requirement under the Convention. Accordingly, there had been a violation of Article 6 § 1 of the Convention as regards the overall length of the dismissal proceedings.

Based on the above mentioned analysis, the decision of the Appeal Chamber will be appealed to the ECtHR in the case of allegations of a violation of article 6 of the ECHR alone or in relation to other articles of the Convention. It is this judicial body that must meet the standards of the court established by law, and then all the other elements required by article 6 of the ECHR during the trial. From the point of view of structural deficiencies, the Law has passed the test at the Constitutional Court, but it is not excluded the possibility that the law will be analyzed by the ECtHR to confirm or not the standards of a due process of law or of other fundamental human rights according to the requirements of the ECHR.

The appeal of the assessee as a procedural element of access to ECtHR has been overcome in the terms of the Convention and the ECtHR jurisprudence, but also in the terms of their constitutional right, expressly sanctioned in the Constitution Annex.

In the forthcoming explanations, shortly, I am referring to some of the issues examined by the ECtHR on the basis of the appeal of dismissed judges, not necessarily in the context of the reform in the justice system of the respective countries, but nevertheless the standards should be taken into account by national institutions responsible for re-evaluation process, in such disciplinary processes.

Poposki and Duma v. the Former Yugoslav Republic of Macedonia

In this case two Macedonian judges were dismissed from the judiciary. They complained to the Court about their dismissal. The applicants alleged that the judicial disciplinary authorities which decided the case were not impartial since they were judged by a system in which members of the SJC who had carried out the preliminary inquiries and sought the impugned proceedings subsequently took part in the decisions to remove the applicants from office.

The Court reiterated that:

“As a rule, impartiality denotes the absence of prejudice or bias. According to the Court’s settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to: (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. However, there is no watertight division between subjective and objective impartiality, as the conduct of a judge may not only prompt objectively held misgivings as to his or her impartiality from the point of view of the external observer (the objective test) but may also raise the issue of his or her personal conviction (the subjective test). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge’s subjective impartiality, the requirement of objective impartiality provides a further important guarantee. In this respect, even appearances may be of certain importance; in other words, “justice must not only be done, it must also be seen to be done”. What is at stake is the confidence which the courts in a democratic society must inspire in the public”.

The Court noted that the impugned proceedings before the SJC were regulated by the 2006 Act, as amended in 2010, which regulated in detail the procedural rules initially specified in the Rules. It considers it important to note that a finding by the SJC of professional misconduct by a judge could lead only to the removal of that judge from office, because dismissal was the only measure available in cases of professional misconduct, in contrast to disciplinary proceedings, for which other measures were available.

Under the applicable legislation, any SJC member could ask the SJC to establish whether there had been professional misconduct on the part of a judge. Indeed, such proceedings were requested by N.H.A., a member of the SJC, in respect of the first applicant, and by the Minister of Justice in respect of the second applicant. The Minister was subsequently succeeded by the President of the SJC. The impugned proceedings were conducted by the Commission, as an internal body of the SJC. The Commission was composed of five members of the SJC, none of whom were the complainants. As the Government argued, the Commission cannot be considered to have carried out a “preliminary inquiry”, but it held hearings at which it considered relevant evidence and heard arguments by the applicants and the complainants. Both the applicants and the complainants made concluding remarks and signed the records of the hearings.

Having regard to the procedural rules described above, the Court considered that the complainants had the same rights as parties to the impugned proceedings. Their requests set in motion the impugned proceedings, to which they submitted evidence and arguments in

support of the allegations of professional misconduct on the part of the applicants. Accordingly, they acted as “prosecutor” in respect of the applicants, the “defendants” in the impugned proceedings, whose dismissal was sought as the only possible measure in cases of professional misconduct. After the proceedings had ended, the complainants were also parties to the decisions of the plenary of the SJC in respect of the applicants’ dismissals.

In such circumstances, the Court considered that a system in which members of the SJC who had carried out the preliminary inquiries and sought the impugned proceedings subsequently took part in the decisions to remove the applicants from office, casts objective doubt on the impartiality of those members when deciding on the merits of the applicants’ cases.

The Court therefore concluded that the confusion of the complainants’ roles in the impugned proceedings resulting in the applicants’ dismissal prompted objectively justified doubts as to the impartiality of the SJC. Accordingly, there has been a violation of Article 6 § 1 of the Convention on this account.

Oleksander Volkov Vs. Ukraine

In this case, the applicant was a Ukrainian national. Mr.Volkov was elected to the post of member of the High Council of Justice (“the HCJ”), but did not assume the office as he was not allowed to take the oath of office in Parliament. Two members of the HCJ, conducted preliminary inquiries into possible misconduct by Mr.Volkov. They concluded that he had reviewed decisions delivered by Judge B., his wife’s brother; on several occasions – some of them dating back to 2003 - and that he had made gross procedural violations when dealing with cases involving a limited liability company, some of his actions dating back to 2006. Following these inquiries, the President of the HCJ, submitted two applications to Parliament for dismissal of Mr. Volkov from the post of judge.

The Parliament, having considered these applications by the HCJ, as well as the recommendation of the parliamentary committee on the judiciary, voted for Mr Volkov’s dismissal for “breach of oath”.

Mr. Volkov complained that the proceedings before the HCJ had lacked impartiality and independence given the way in which it was composed. He also claimed that some members of the HCJ had been involved in the proceedings before the parliamentary committee. He further complained about the electronic vote in Parliament, alleging that the Members of Parliament who had attended had used their absent peers’ voting cards. This misuse of voting cards was confirmed by statements made by Members of Parliament and a video. Mr.Volkov challenged his dismissal before the Higher Administrative Court (“the HAC”), which found that the HCJ’s application to dismiss him following first inquiry had been lawful and substantiated. The HAC further found that the application following second inquiry had been unlawful, because Mr Volkov and his wife’s brother had not been considered relatives under the legislation in force at the time. However, the HAC refused to quash the HCJ’s acts taken in that case; noting that under the applicable provisions it was not empowered to do so. The HAC further noted that there had been no procedural violations either before the parliamentary committee or at the Parliament.

Relying on Article 6, Mr. Volkov complained in particular that: his case had not been considered by “an independent and impartial tribunal”; the proceedings on his dismissal had been unfair as there had been no limitation period; Parliament had adopted the decision on his dismissal without proper examination of the case and by abusing the electronic voting

system; his case had been heard by a special chamber of the HAC which was not a “tribunal established by law”; and, the HAC was not competent to quash acts adopted by the HCJ. Relying on Article 8, Mr. Volkov further complained that his dismissal from the post of judge had been an interference with his private and professional life. He also complained of a violation of Article 13 (right to an effective remedy).

The Court held in particular: that the proceedings leading up to Mr Volkov’s dismissal had not fulfilled the requirements of an “independent and impartial tribunal”; that the proceedings before the High Council of Justice, which initiated the inquiries leading up to his dismissal, had been unfair as there were no time-limits for such proceedings; that the vote in Parliament on his dismissal had been unlawful; and, that the chamber of the Higher Administrative Court, which reviewed the case, had not complied with the principle of a “tribunal established by law”.

Baka vs. Hungary

The applicant was a judge at the European Court of Human Rights for seventeen years. On 22 June 2009 he was elected by the Hungarian Parliament as President of the Supreme Court for a six-year term, until 22 June 2015. As President, the applicant had both a managerial and a judicial role, mostly through presiding over deliberations to preserve the consistency in the case law. He was also *qualitate qua* President of the National Council of Justice, and therefore under the explicit legal obligation to express his opinion on parliamentary bills that affect the judiciary. Mr. Baka publicly criticized several aspects of the comprehensive constitutional and legislative reforms, initiated by the second Orbán-Government that directly affected the judiciary, most notably the lowering of the mandatory retirement age for judges from 70 to 62.

In April 2011 Parliament adopted the new Fundamental Law of Hungary, which replaced the Constitution of 1949 and entered into force on 1 January 2012. Article 25 of the Fundamental Law proclaims the Kúria as the country’s supreme judicial organ. In December 2011 Parliament approved several Transitional Provisions to the Fundamental Law, providing that the Kúria would be the legal successor to the Supreme Court and that the mandate of the President of the Supreme Court would terminate upon the entry into force of the Fundamental Law. Moreover, the new Organization and Administration of the Courts Act introduced a new criterion for the election of the new President of the Kúria, i.e. at least five years of experience as a judge in Hungary. The combination of these provisions led to the termination of Mr. Baka’s mandate and his ineligibility for a new term, as well as loss of the corresponding remuneration and benefits. Interestingly, the legislative procedure regarding the Transitional Provisions was only initiated at the end of November 2011, three weeks after a parliamentary speech made by the applicant in which he criticized the planned judicial reforms. Since there were no possibilities for judicial review at the national level, Mr. Baka lodged an application against Hungary with the ECtHR.

In May 2014 the Court held that Hungary had violated articles 6, §1 and 10 of the Convention. Hungary, however, requested that the case be referred to the Grand Chamber, which the Court accepted.

With regard to the applicability of article 6, §1 ECHR, the Court noted that Mr. Baka was elected President of the Supreme Court on the basis of the 1949 Constitution and the Organization and Administration of the Courts Act for a fixed term of six years, with only an

exhaustive list of reasons for terminating the mandate, such as mutual agreement, resignation or dismissal after demonstrated incompetence with regard to the managerial tasks. In the latter case, the President would have been entitled to judicial review of the dismissal before the Service Tribunal. The Court therefore held that – under the existing legal framework at the time of his election – Mr. Baka enjoyed a right to serve a term of office until such time as it expired, or until his judicial mandate came to an end. Moreover, his entitlement to a full term was supported by constitutional principles regarding the independence and irremovability of judges. Lastly, the Court considered that the fact that the applicant's mandate was terminated *ex lege* by operation of new (constitutional) legislation could not retrospectively remove the arguability of Baka's right under the applicable rules in force at the time of his election. Indeed, it was precisely this new legislation that constituted the object of the dispute between Baka and the State of Hungary, to which the guarantees of article 6, §1 (had to) apply. The question whether Mr. Baka had a right under Hungarian law to a full term mandate could therefore not be answered on the basis of the new legislation.

On the basis of the Court's case law, the question whether a right of a civil servant is 'civil' in the meaning of article 6, §1 is settled in the light of two criteria: (1) whether the national law expressly excluded access to a court of the post or category of staff in question and (2) whether the exclusion is justified on objective grounds in the State's interest. Article 6, §1 does not apply when these two conditions are met. According to the Court, the President of the Supreme Court was not expressly excluded from the right of access to a court. Indeed, Hungarian law explicitly provided for a right of judicial review in case of dismissal, in line with several (soft law) international and Council of Europe standards with regard to the independence of the judiciary. Moreover, in order for national legislation excluding access to a court to have any effect under article 6, §1, it should be compatible with the rule of law, which is inherent to the Convention. Since the new legislation is directed against a specific person and therefore not an instrument of general application, the Court considered it contrary to the rule of law. In this light, it cannot be concluded that national law expressly excluded access to a court. Given that the two conditions for excluding the application of article 6, §1 must be fulfilled, the Court did not find it necessary to examine the second condition. The Court noted that the premature termination of Mr. Baka's mandate as President of the Supreme Court was not reviewed, nor was it open to review by an ordinary tribunal or other body exercising judicial powers, because of legislation whose compatibility with the requirements of the rule of law is doubtful.

The ECtHR therefore held that Hungary impaired the very essence of the applicant's right of access to a court, as guaranteed by article 6, §1 of the Convention. In the Court's view, considering the sequence of events – mentioned above – in their entirety, there is moreover *prima facie* evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate, especially since the Hungarian government had previously assured the Venice Commission that the Transitional Provisions to the Fundamental Law would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime and members of the parliamentary majority had indicated that Mr. Baka's mandate would not be terminated upon entry into force of the new Fundamental Law. Moreover, neither Mr. Baka's qualifications nor his professional conduct were ever questioned by the authorities.

Lastly, the Court considered that the changes made to the tasks of the President of the supreme judicial body were not of such a fundamental nature that they should or could have

prompted the termination of Mr. Baka's mandate. The termination of the mandate was therefore an interference with the exercise of his right to freedom of expression, guaranteed by article 10 ECHR. Hungary argued that the termination of the mandate was legitimately aimed at maintaining the authority and impartiality of the judiciary.

However, the Court considered that a State cannot legitimately invoke the independence of the judiciary to justify a measure such as a dismissal for reasons that had not been established by law and which did not relate to professional incompetence or misconduct. Indeed, rather than serving the aim of maintaining the independence of the judiciary, the premature termination of Mr. Baka's mandate appeared to be incompatible with that aim. The inference therefore did not pursue a legitimate aim. The Court reiterated that Mr. Baka not only had a right, but also a duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary. He expressed his views on issues related to the functioning and reform of the judicial system, the independence of judges, and their retirement ages, which are all questions of public interest, calling for a high degree of protection of the freedom of expression. Mr. Baka was removed 3,5 years before the end of his term, which is hard to reconcile with the irremovability of judges. The premature termination therefore defeated, rather than served the independence of the judiciary. Lastly, the Court found the measure to have an undeniable chilling effect in that it discourages judges from participating in the public debate on issues concerning the judiciary. In sum, the measure was not necessary in a democratic society. Accordingly, the Court found a violation of article 10 ECHR.

Kudeshkina vs. Russia

The applicant held judicial office at the Moscow City Court. In December 2003, during general elections for the State Duma of the Russian Federation, Ms. Kudeshkina gave some interviews to the radio and newspapers. She made the following statements: *"Years of working in the Moscow City Court have led me to doubt the existence of independent courts in Moscow. Instances of a court being put under pressure to take a certain decision are not that rare, not only in cases of great public interest but also in cases encroaching on the interests of certain individuals of consequence or of particular groups" (...)* In the course of the examination one of her biggest case *"was withdrawn from me by the Moscow City Court President, Yegorova, without any explanation" (...)* *"Yegorova called me several times, whenever the prosecutor thought that the proceedings were not going the right way; on the last occasion I was called out of the deliberations room, which is unheard of. Never in my life had I been shouted at like that" (...)* *"The public prosecutor exerted pressure on me. You put a question to the victim, and he immediately challenges you" (...)* *"This is not the only case where the courts of law are used as an instrument of commercial, political or personal manipulation" (...)* *"if all judges keep quiet this country may soon end up in a [state of] judicial lawlessness".*

The High Judiciary Qualification Panel reported to the President of the Supreme Court their findings concerning the complaint against Ms. Yegorova, and decided that there were no grounds for charging Ms Yegorova with a disciplinary offence.

In the meantime, the President of the Moscow Judicial Council sought termination of the Ms. Kudeshkina's office as a judge. He applied to the Judiciary Qualification Board of Moscow, alleging that during Kudeshkina's election campaign she had behaved in a manner inconsistent with the authority and standing of a judge. He claimed that in her interviews she

had intentionally insulted the court system and individual judges and had made false statements that could mislead the public and undermine the authority of the judiciary. The Judiciary Qualification Board of Moscow examined the Moscow Judicial Council's request. Ms. Kudeshkina was absent from the proceedings, apparently without any valid excuse. The Judiciary Qualification Board of Moscow decided that Ms. Kudeshkina had committed a disciplinary offence and that her office as a judge was to be terminated in accordance with the Law "On the Status of Judges in the Russian Federation".

The ECtHR reiterated that issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10 of the European Convention on Human Rights.

However, the Court had in many occasions emphasised the special role in society of the Judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.

The Court noted that the disciplinary proceedings entailed the loss of the judicial office she held in the Moscow City Court and of any possibility of exercising the profession of judge. This was undoubtedly a severe penalty and it must have been extremely distressing for Ms. Kudeshkina to have lost access to the profession she had exercised for 18 years. This was the strictest available penalty that could be imposed in the disciplinary proceedings and, in the light of the Court's findings above, did not correspond to the gravity of the offence. Moreover, it could undoubtedly discourage other judges in the future from making statements critical of public institutions or policies, for fear of the loss of judicial office.

ECHR decided that there has been a violation of Article 10 of the Convention: the domestic authorities failed to strike the right balance between the need to protect the authority of the Judiciary and the protection of the reputation or rights of others, on the one hand, and the need to protect Ms. Kudeshkina's right to freedom of expression on the other. It was the Court's assessment that the penalty at issue was disproportionately severe and was, moreover, capable of having a "chilling effect" on judges wishing to participate in the public debate on the effectiveness of the judicial institutions.

For the purposes of this research the *Matyjek* and *Zyblek* decisions of the Court are also of relevance, because of the same standards of article 6 of ECHR required in both processes: the vetting on judiciary and lustration. In the Council of Europe's Parliamentary Assembly Guidelines, is foreseen that:

"To ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, in no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal."

Any lustration measures or any vetting measures taken should be compatible with the principle of the rule of law and focused on respect to fundamental human rights and the democratization process.

Matyjek vs. Poland

T. Matyjek was deemed a lustration liar based on the act of 1997. He submitted a lustration declaration in connection with his election to the Polish Sejm. As a result of the conducted lustration proceedings, he was stripped of his parliamentary mandate and was deprived of the opportunity to perform a series of public functions (specified by the lustration act) for a period of 10 years. T. Matyjek lodged a complaint against the violation of Article 6 of the Convention (the right to a fair and public hearing). In particular, he complained about the fact that he was unable to effectively defend himself, as he was not allowed to take notes during the proceedings before the lustration court due to limited access to case records (he was only given the opportunity to view the records, without the opportunity to take notes outside the security office). On 30 May 2006, the European Court of Human Rights issued an admissibility decision stating that the guarantees resulting from Article 6 of the Convention in the extent, in which they regulate the situation of the accused individual during a criminal trial, apply to lustration proceedings based on the act of 1997.

On 2 November 2006, the Helsinki Foundation for Human Rights presented an “amicus curiae opinion” in this case. In this opinion, the Foundation emphasized that the aim of the lustration act was to disclose the truth about the cooperation of a certain category of public persons with security services. Considering the social significance of lustration proceedings and the serious consequences for the individual who filed an untrue declaration, the principles of the state of law and procedural guarantees for the person subject to lustration must be meticulously observed. The Foundation emphasized the key significance of the right to access records in lustration proceedings. If a Party whom the documents concern was not given access to them, its ability to negate the version of events presented by the security services is seriously limited.

In the judgment, the Court stated that if the State decides to introduce lustration proceedings, than it must ensure that the individuals they concern will be guaranteed all procedural safeguards resulting from the Convention.

In the Court’s opinion, due to the secrecy of the documents and restrictions in access to case records by the lustrated individual, as well as due to the privileged position of the Commissioner for Public Interest in lustration proceedings, the opportunity for the Complainant to prove that he did not consciously and secretly cooperate with security services in the understanding of the lustration act of 1997 has been seriously limited. The rules of lustration proceedings failed to respect the principle of equality of arms in criminal proceedings and were constructed in such a way that it was practically impossible for the complainant to cope with the burden of proof.

Zablocki v. Poland

Upon the entry into force of the 1997, Lustration Act, the applicant in the Zablocki case, at the time a member of the supervisory board of a public radio station, was obliged to make a lustration statement. Six years after he made the statement, Mr. Zablocki was informed by the Public Interest Commissioner that there was reasonable suspicion that his statement was false.

The Commissioner filed a successful motion with the Appellate Court in Warsaw to launch lustration proceedings against Mr. Zabłocki. The hearings of these lustration proceedings were closed to the public. The Appellate Court in Warsaw, deciding the case in the first instance, ruled that the applicant was a secret and intentional collaborator of the Communist security forces and as such submitted a false lustration statement. All the archive documents constituting evidence in the case were classified, meaning that the Applicant could access them only at the Confidential Office of the court.

The second-instance court affirmed the Appellate Court's decision. The applicant filed a cassation complaint before the Supreme Court which was dismissed as manifestly groundless. The decision resulted in the imposition of a ten-year ban on the applicant from exercising any public function.

According to the ECtHR, the accused's effective participation in his criminal trial must include the right to compile notes in order to facilitate his defence, regardless of whether or not he is represented by counsel.

The ECtHR held that the applicant's ability to prove that the contacts he had had with the communist-era secret services did not amount to intentional and secret collaboration had been severely curtailed. The Court decided that, in practice, an unrealistic burden had been placed on the applicant, resulting in violation of the principle of equality of arms.

In conclusion, it should be noted that the above mentioned cases of ECtHR are very important milestones in the process of the effective process of re-evaluation by IQC and ACH, in accordance with the standards of ECtHR. Standards such as, burden of proof, equality of arms, impartial and independent tribunal are of extreme importance in such a delicate and difficult process in order to reach the aim and objectives of the Law, such as the proper function of *Rule of Law*, and true independence of the judicial system as well as the restoration of public trust in the institution of the justice system.

CONCLUSION

The re - evaluation process is a mechanism that, together with some other structural and organizational changes to the justice system in Albania, is expected to bring the desired effects to citizens. However, the greatest expectation that exists of the reform as a whole is to change philosophy towards impartial and independent justice system. This reform will attempt to create a new spirit, demotivating behavior and attitudes that may manifest a lack of integrity, and serve as an incentive and impetus for new attitudes and values in improving the justice system and citizens' confidence in this system.

On the other hand, the respect of the rights of the re-evaluation subjects is a requirement for the national disciplinary authorities, especially for the Appeal Chamber as the only and final instance at the national level, as well as a correction of the administrative decision-making of the IQC, precisely because no other injustice should be produced in the name of justice.

Finally, ECtHR has referred to the growing importance that international and Council of Europe legal instruments, international case law and practice of international bodies attach to procedural fairness in cases involving the removal or dismissal of judges. ECHR and ECtHR interpretative case laws should be in the focus of the vetting institutions in order to avoid violations and the harmful financial consequences to the Albanian state, but not only, in the event of non-compliance with constitutional and convention fundamental rights of re-

evaluation subjects. If the vetting process will not be organised and implemented in full compliance with the methodology, procedures, principles and standards required, there will be no confidence boost in the justice system and naturally there will not be a rebuilt of public trust. This cascade effect should be taken into consideration as one of the first priority of the appointed members of the re-evaluation institutions.

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