


Jurisdiction of the High Court and Constitutional Reform			Law
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Abstract			
<p>The High Court of the Republic of Albania is part of the justice system in Albania and it is the third instance of adjudication. According to the Constitution of the Republic of Albania of 1998, the High Court enjoys initial and revision jurisdiction and it unifies or changes judicial practice. Initial jurisdiction – it makes first instance adjudication for criminal charges against several special entities such as the President of the Republic of Albania, the Prime Minister and government members, Parliament members, members of the Constitutional Court and members of the High Court. The revision jurisdiction consists in the examination of the means of appeal against final decisions, such as the recourse and the re-adjudication request. At the same time, this court unifies and changes (evolves) the judicial practice. Exercise of initial and revision jurisdiction by the High Court transformed this court into a first instance one and caused work overload for this court. In these circumstances, the need for constitutional changes arose in order to improve the performance of this court. In the context of the justice reform and the constitutional reform of July 2016, the constitutional provisions regulating the jurisdiction of the High Court were amended. These necessary constitutional amendments deprived this court of initial jurisdiction and also limited the right to file an appeal. However, these constitutional changes did not provide for the regulation of the transitional situation concerning the authority that would adjudicate the special entities at a time when this court was deprived of the initial jurisdiction. This and other issues are discussed in this humble and non-exhaustive article.</p>			

1. Jurisdiction of the High Court under the Constitution of 1998

The Constitution of the Republic of Albania³, as the fundamental act of a country, among other things, provides for the organization and conduct of the judicial power.

Thus, Article 135 of the chapter on judicial power in the Constitution,⁴ specifies that:

“Judicial power shall be assumed by the High Court, appeal courts and first instance courts, which shall be established by law”.

Thus, the above constitutional provisions specify that the High Court of the Republic of Albania is also part of the judicial power and it is established by law. But what is the jurisdiction of this court? The Articles⁵ in the Constitution that cover the High Court provide that: The High Court has initial and revision jurisdiction.

³Approved by Law no. 8417, dated. 21.10.1998 of the National Assembly

⁴ See Article 135 of the Constitution of the Republic of Albania.

⁵ See Article 141 of the Constitution of the Republic of Albania.

In other words, this Article specifies that the High Court has initial jurisdiction, i.e. it acts as a first instance court despite the fact that it is the highest court in the Albanian judicial system.

The initial jurisdiction of the High Court is exercised in the cases when this court adjudicates criminal charges against the President of the Republic, The Prime Minister and the members of the Council of Ministers, Members of Parliament, judges of the High Court and the Constitutional Court. Although the Constitution defines it as initial jurisdiction, in essence this jurisdiction is a genuine competence, because this Court is asked to adjudicate a certain matter, which, in this case, entails these special subjects.

However, in addition to the initial jurisdiction, the High Court also enjoys revision jurisdiction. This revision jurisdiction relates to the fact that this court also adjudicates the means of appeal against decisions taken by the Court of Appeal and final decisions, as set forth in the Code of Criminal Procedure.

Being the highest instance court in the Albanian judicial system, the High Court is also granted another power, to unify or change the judicial practice, thus creating a case-law, whose application is obligatory. The unification of the judicial practice is a power exercised ex-ufficio by the High Court itself⁶.

The current regulations in the Code of Criminal Procedure are in accordance with these provisions of the Constitution.

2. Jurisdiction of the High Court under the provisions of the Code of Criminal Procedure

As the Constitution is a general act setting the regulations or general framework, the detailed regulations of the jurisdiction of the High Court are made by the Code of Criminal Procedure. As stated above, the High Court enjoys initial and revision jurisdiction and it unifies or alters the judicial practice for the judicial system as a whole. Below we focus on the jurisdictions regulated by the Code of Criminal Procedure.

2.1 Initial jurisdiction of the High Court under the provisions of the Code of Criminal Procedure

The Code of Criminal Procedure has, in some of its Articles, specified that⁷ criminal justice is also provided by the High Court, thus considering this Court part of the judicial system.

Meanwhile, pursuant to Article 141 of the Constitution, Article 13 of the Code of Criminal Procedure⁸ provides that the High Court is a first instance court and adjudicates in accordance with

⁶ See Article 141.3 of the Constitution: “As regards the unification or change (evolution) of the judicial practice, the High Court is entitled to adjudicate specific judicial cases in the united colleges”.

⁷Code of Criminal Procedure, Article 12, Criminal Justice is provided by the High Court.

⁸Article 13, Criminal courts of the first instance and their composition. Criminal offenses are adjudicated in the first instance by judicial district courts, serious crimes courts and the High Court, in accordance with the regulations and responsibilities set forth in this Code.

the rules set forth in this Code. Article 13/2 specifies that: *“in first instance courts, one judge adjudicates:*

- a) requests made by parties during preliminary inquiry;*
- b) requests for the execution of decisions;*
- c) requests for jurisdictional relations with foreign authorities.*

Thus, according to this Article, the High Court as a first instance court, when adjudicating criminal charges against the President of the Republic, the Prime Minister and the members of the Council of Ministers, Members of Parliament, judges of the High Court and the Constitutional Court, shall adjudicate all the above mentioned requests by one judge.

However, this regulation is in contravention of Article 14/a⁹ of the Code of Criminal Procedure, which stipulates that this court adjudicates in colleges (panels) of an adjudicating body of 5 judges in the cases of initial and revision jurisdiction.

In its practical implementation of initial jurisdiction, the High Court has adjudicated all requests during preliminary inquiries, including the requests for jurisdictional relationships with foreign authorities and requests for the execution of criminal decisions, with 5 judges. Moreover, even the basic adjudication of the case under initial jurisdiction was adjudicated by 5 judges. In fact, this kind of adjudication even for requirements of Article 13/2 of the Code of Criminal Procedure, by an adjudicating body of 5 judges, was in utter contravention of this Article, 13/2. Adjudication by one judge should have been applied by the High Court for a practical solution as well, not blocking adjudication at this court. Fortunately, this has not happened until now but it can be a hypothetical situation.

At present, the High Court consists of 19 members¹⁰ who adjudicate in panels of 5 members, including civil, criminal and administrative ones (with 3). If an adjudicating body adjudicated one of the requests of Article 13/2, this adjudicating body would find itself incompatible with¹¹ the office of the judge, and, as a consequence, would not be able to adjudicate the foundation of the case. It could also be true that other judges were in a condition of unlawfulness as they could have participated at any instance of adjudication, could be subjects that had been prosecutors, plaintiffs, appellants, witnesses, experts, translators, etc., they could have a close relationship with the person¹² under adjudication, or there was a case of waiver.¹³ This would also result in exemption from adjudication of these subjects, i.e. the probable exclusion from adjudication of an adjudicating body. A single adjudicating body could remain for adjudication. However, this final

⁹The High Court and its composition. The High Court adjudicates in panels with an adjudicating body of 5 judges and in united panels.

¹⁰ See Article 1 of Law no. 8588, dated 15.3.2000 on the organization and conduct of the High Court of the Republic of Albania.

¹¹ See Article 15 of the Code of Criminal Procedure, incompatibility due to position. In this case, they would be in the conditions of Article 15/2.

¹² Incompatibility of function due to blood relations.

¹³ See Article 17 of the Code of Criminal Procedure, cases of waiver.

decision taken by this criminal panel could be subject to recourse and adjudicated by another panel, in the High Court, other than the one having made the decision. However, as explained above, the number of panels is 3 and the three of them could be exhausted. This would bring about difficulties in establishing the new criminal college adjudicating the recourse because the judges of the High Court are subject to an appointment procedure by the Albanian Parliament and no other judge could conduct the adjudication because this would be in violation of the principle of the court established by law.

Accordingly, Article 14 of the Code of Criminal Procedure should have been amended in order to provide for adjudication by one member of all requests of Article 13/2 of the Code of Criminal Procedure.

2.1.1 Initial jurisdiction or competence?

As stated above, the High Court has initial jurisdiction granted by the Constitution to adjudicate as first instance court criminal charges against the following special entities:

- President of the Republic,
- the Prime Minister and the members of the Council of Ministers,
- Members of Parliament,
- judges of the High Court
- judges of the Constitutional Court.

Nevertheless, the Constitution does not specify the criminal offences these subjects will be adjudicated for, those connected with the office, committed during the exercise of the office irrespective of connection with the office, those committed even before assuming the office or upon the termination of the office.

Meanwhile, Article 75/b of the Code of Criminal Procedure specifies that the High Court acts as a first instance court with an adjudicating body of 5 randomly selected judges who adjudicate the criminal offences committed by the President of the Republic, Members of Parliament, the Prime Minister and members of the Council of Ministers, judges of the Constitutional and High Court, *when they hold their posts at the time of adjudication.*

The code has specified that these subjects shall be adjudicated for any criminal offense on the condition that at the moment of the initiation, continuation or termination of the criminal proceedings, these special subjects are holding these office at the time of the adjudication.

It is this function that provides these subjects with the guarantee that they shall be adjudicated by the highest court at a lower instance. Nevertheless, despite the term initial jurisdiction, in essence this jurisdiction is genuine competence of this court.

The number of cases adjudicated by this court has not been great but, taking into consideration the fact that first instance adjudication rules are applied, this kind of adjudication went beyond the

nature of adjudication conducted by this court, which was a third instance court, and it accordingly exercised revision jurisdiction.

3. Revision jurisdiction of the High Court under the provisions of the Code of Criminal Procedure

The revision jurisdiction of the High Court consists in the right of this court to re-adjudicate cases as a third instance court. This jurisdiction has been granted to this court in order to guarantee the right to effective appeal and examination of lawfulness of decisions and it consists in the exercise of examination through 2 means of appeal against the decision, the recourse and the revision request.

The recourse as a means of appeal was exercised only when there was violation of the law during adjudication, not regarding issues of fact. This is the reason why the High Court is regarded as a court of law, which adjudicates only compliance with the material and procedural law of decisions taken by lower courts.

This recourse was direct and ordinary.

Direct recourse¹⁴ was applied only for cases that were expressly set forth in the code, such as dispute over competence, jurisdiction, appeal against unlawful arrest and detention of a person suspected of having committed a crime, etc. Nevertheless, in essence, all these cases are concerned with the implementation of the law.

The Code also provides for ordinary recourse to the High Court with regard to cases related to the law, as a means of appeal against the decision of the Court of Appeal¹⁵.

The revision jurisdiction of the High Court also encompasses the adjudication of another means of appeal, namely the revision request.

3.1. Revision request as part of the revision jurisdiction of the High Court

The request for revision is not an ordinary means of appeal as it endeavors to counter a final decision, even in cases when such a decision has been executed or terminated. The power to adjudicate this means of appeal has been granted to the High Court. The Code provides for 4 cases when the revision request is upheld:

- a) when the facts of the decision do not comply with those of another final decision*
- b) when the decision has been grounded on a civil court decision, which is later revoked;*

¹⁴Article 431 of the Code of Criminal Procedure. Court decisions pertaining to conflict of jurisdiction and power and special cases provided by law are subject to direct recourse to the High Court.

¹⁵Recourse to the High Court against decisions of the Court of Appeal can be applied for the following reasons a) non-compliance with or wrong application of the criminal law; b) infringements that make the court decision null and void, under Article 128 of the Code of Criminal Procedure.; c) procedural infringements that have affected the decision.

- c) *When, following the decision, new evidence has come into light or discovered, which alone, or along with those administered in the process, demonstrate that the decision was wrongly made;*
- d) *When it is certified that the decision has been based on false adjudication acts or a fact that constitutes a criminal offense.*

In reality, all the cases mentioned above are not genuine legal causes, but cases of evidence or fact, but the lawmaker has deemed it appropriate to grant this power to the High Court.

The cases provided above refer to facts, not law:

Same facts for different decisions, when a criminal decision has lost the basis on which it was grounded, such as the emergence of new evidence or falsified evidence.

Therefore, we believe that this revision jurisdiction of the High Court is in contradiction with the nature of adjudication in the High Court as it is a genuine court of law. Consequently, this jurisdiction should be taken away from this court.

However, in addition to the revision jurisdiction, the High Court is also entitled to the unification or alteration of judicial practice. This issue is discussed below.

4. Unification or alteration of the High Court's judicial practice

Pursuant to Article 141 of the Constitution, the Code of Criminal Procedure¹⁶ provides for the unification and alteration of judicial practice:

“In the case of necessity to unify or alter the judicial practice, the High Court is entitled to request for adjudication in the united panels (colleges) cases waiting for adjudication in the Criminal College.

Request for cases is made following the decision of the Chairperson of the High Court or the Criminal College.

The decision of the united panels (colleges) is obligatory for courts when adjudicating similar cases”.

In practice, this power granted to the High Court to unify or alter the judicial practice is frequently considered a judicial precedent or case-law, as these unifying decisions provide a unified solution to similar cases resolved in different ways by our courts, thus unifying the judicial practice. These decisions have to be applied by the courts when they adjudicate such cases.

¹⁶See Article 438 of the Code of Criminal Procedure.

This positive practice of the High Court has had a very good impact on the development of the jurisdiction, legal opinion and the practical solution of cases at court, thus unifying the Albanian legal opinion. In addition to the invaluable practical importance, uniformity of the application of the law is, in certain cases, a matter of fair adjudication. The jurisdiction of the High Court in the unification of the practice is broad, diverse and positively evolved. We therefore believe that this should be the main power of the High Court.

However, in practice, these jurisdictions granted to the High Court by the Constitution and the Code of Criminal Procedure brought about problems because the High Court was faced with work overload for the following reasons:

- it had to adjudicate the means of appeal, such as the recourse against decisions taken by the Court of Appeal, which, due to the lack of any appeal limitation, were great in number, and almost all cases were brought to the High Court. This was in utter contradiction with the nature of this adjudication, which was supposed to be considering lawfulness alone.
- examination of the request for revision by this court which, in essence, was a matter of fact, rather than law;
- initial jurisdiction of the High Court;
- unification of the judicial practice.

Although of a more limited number, the last 3 cases still created a work overload for this court.

As a result, the necessity to make constitutional amendments emerged so that this court would play the role it is supposed to have, that of an elite court of legal opinion that verifies the application of the principle of lawfulness, rather than adjudicate cases of fact. However, the constitutional reform of the High Court was delayed due to the political apathy and the complexity of constitutional reforms in general.

Below we discuss the constitutional reform of the jurisdiction of this court.

5. Jurisdiction of the High Court under the constitutional amendments of July 2016

The Constitution of the Republic of Albania was subject to amendments in the context of the justice system reform. One of the goals of the reform was the improvement and alteration of adjudication in the High Court as a result of problems faced in practice, as this court had been practically transformed into a first instance court, re-adjudicating almost all cases that had been previously adjudicated by first instance courts. This case overload led to the infringement of another element of Article 42 of the Constitution, the completion of adjudication within a reasonable time limit.

If you refer to Article 135¹⁷ of the amended Constitution, you notice that nothing has changed because it provides that:

“the judicial power shall be assumed by the High Court, the appeal courts, and first instance courts, which shall be established by law”.

In other words, it has been identically regulated by Article 135 of the Constitution prior to the amendment, considering the High Court part of the judicial system.

Meanwhile, the same Article¹⁸ provides for the establishment of *a specialized court, competent to adjudicate corruption, organized crime, and criminal charges against the President of the Republic, the Prime Minister, members of the Council of Ministers, judges of the Constitutional and High Court, the Prosecutor General, the High Inspector of Justice, mayors, Members of Parliament, deputy ministers, members of the High Judicial Council and the High Prosecutorial Council, heads of central government and independent institutions provided in the Constitution or law, as well as charges against the above mentioned former officials.*

Thus, this Article provides for the establishment of a special court competent to adjudicate the 5 special subjects that were previously adjudicated by the High Court in initial jurisdiction. In other words, the amendment to Article 135 has deprived the High Court of its initial jurisdiction.

Article 141 was also subject to the following changes:

“The High Court shall decide cases concerning the meaning and application of the law and ensures the unification or evolution in the judicial practice, in accordance with the law.”

2. The High Court and the High Administrative Court may resolve jurisdictional disputes in a joint meeting of both courts, as regulated by law.”

This constitutional Article shows that the revision jurisdiction has been taken away from the High Court, although this is not clearly presented because Article 135 of the Constitution provides that the High Court is part of the judicial system, implying that it is a third instance court and enjoys revision jurisdiction.

Below we discuss the draft law for the amendment of the Code of Criminal Procedure with regard to the jurisdictions of the High Court.

¹⁷ Law no. 76/2016, dated 22.07.2016 “On some additions and amendments to Law no. 8417, dated 21.10.1998 “Constitution of the Republic of Albania”, as amended.

¹⁸ See Article 135/2 of the Constitution, as amended.

6. Jurisdiction of the High Court under the draft law on the amendment to the Code of Criminal Procedure

Constitutional amendments should also be followed by amendments to the Code of Criminal Procedure. The draft law on amendments to the Code of Criminal Procedure has provided for the legal regulation of constitutional amendments regarding the jurisdiction of the High Court.

Article 13 of the Code of Criminal Procedure has been amended and it now considers the judicial district courts and the Court against Corruption and Organized Crime as first instance courts. It is completely evident that the High Court has been deprived of initial jurisdiction and it shall not continue to adjudicate as a first instance.

To enhance the efficiency of the adjudication, the composition of the adjudicating body has also changed. The High Court will now adjudicate by an adjudicating body composed of three judges the recourses in a counseling chamber¹⁹, which is different from before, when it adjudicated in panels of 5 judges.

The composition of the adjudicating body for the unification of the judicial practice also changes. The unification and evolution of the judicial practice shall be made in panels with an adjudicating body of 5 judges, whereas the change of the judicial practice will be made in joint panels.

In addition, Article 75/a of the Code of Criminal Procedure has specified the case power to the Court against Corruption and Organized Crime²⁰.

Meanwhile, amendments to Article 75/b of the Code of Criminal Procedure have provided that: the High Court examines recourses for the unlawfulness and exercises other powers under the provisions of this Code²¹.

¹⁹ See the draft law to amend the Code of Criminal Procedure, amendments to Article 14 of the Code.

²⁰ See the draft law to amend the Code of Criminal Procedure, amendments to Article 75/a of the Code. The Court against Corruption and Organized Crime adjudicates:

a) crimes set forth in Articles 244, 244/a, 245, 245/1, 257, 258, 259, 259/a, 260, 319, 319/a, 319/b, 319/c, 319/ç, 319/d, 319/dh, 319/e;

b) any criminal offense committed by a structural criminal group, criminal organizations, terrorist organizations and armed gangs, under the provisions of the Criminal Code;

c) criminal charges against the President of Republic, Speaker of Parliament, the Prime Minister, members of the Council of Ministers, judges of the Constitutional Court and the High Court, the Prosecutor General, the High Inspector of Justice, Mayors, Members of Parliament, vice ministers, members of the High Judicial Council and the High Prosecutorial Council, and heads of central government and independent institutions provided in the Constitution or the law.

c) criminal charges against the above mentioned former officials, when the offense has been committed during the exercise of the office.”

²¹ See Article 51 of the draft law to amend the Code of Criminal Procedure, Article 75/b.

Thus, the High Court has retained the revision jurisdiction because of the law, as a third instance court, resulting in an addition and amendment to Article 432 of the Code of Criminal Procedure concerning recourse to the High Court²².

Meanwhile, in accordance with the constitutional amendments, the High Court has been deprived of the right to adjudicate requests for the revision of final decisions. These requests shall be adjudicated by the first instance court that has made the decision²³.

Conclusions and Recommendations

The High Court, under the regulations of the unchanged Constitution of 1998 had:

- a) initial jurisdiction, adjudicating 4 special entities at first instance. This type of adjudication went beyond the nature of the High Court, which was a court of law and was established as such;
- b) revision jurisdiction, adjudicating the means of appeal, including recourse and the revision request;
- c) unification and change (evolution) of the judicial practice;

These powers granted to the High Court transformed it into a district court, overloaded with cases, resulting in the infringement of one of the elements of the right to a fair and lawful process, the completion of the adjudication within a reasonable time limit. In such a situation, the constitutional reform of the adjudication in the High Court was a necessity. The constitutional reform brought a number of changes to the nature of adjudication in the High Court: Firstly, the High Court was deprived of initial jurisdiction. This court shall not continue to adjudicate any special subjects as a first instance court. To adjudicate these subjects, a special court known as the Court against Corruption and Organized Crime, which shall adjudicate a number of criminal offenses such as organized crime and corruption, and it also adjudicates a number of special subjects for all criminal offenses. However, despite the fact that the constitutional amendments were approved in July of 2016, at present, i.e. 2017, this court has not been established yet. In this situation, this legal vacuum has caused practical problems regarding the adjudication of the 5 special subjects in case they are suspected of committing a criminal offense in this period. A transitional constitutional provision was necessary to provide for the continuation of adjudication of these subjects by the High Court until the establishment of the special court, which would adjudicate these subjects. Secondly, this court was subject to a limitation of the revision jurisdiction, not directly by the Constitution, but by the spirit of the constitutional provisions. In these circumstances, the Code of Criminal Procedure was also subject to change, thus providing for the examination of the revision request by the first instance court that has made the decision.

²² Article 432 is subject to the following amendments and additions:

1. In letter “b” of point 1 the words “absolute” and expression “under Article 128 of this Code” are removed.
2. Letter “c” of point 1 is amended as follows:

“c) for not applying or wrong implementation of the procedural law leading to invalidity of acts, un-employability of evidence, rejection of requests made by parties or loss of a lawful right.”

²³ See the draft law on amendments to the Code of Criminal Procedure, Article, Article 452, as amended.

However, the High Court retains the revision jurisdiction as it adjudicates the recourse, which is a means of appeal. Moreover, there also developments in terms of changing the composition of the adjudicating body of this court, which will adjudicate recourses in panels of 3 judges, unify the judicial practice with 5 judges and alter the judicial practice with joint panels. All these measures taken in the context of the constitutional and justice reform were necessary. Now it is time to approve, as soon as possible, amendments to the Code of Criminal Procedure and efficiently apply these amendments.

References

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8. Law no. 95/2016, “On the organization and conduct of institutions in combating corruption and organized crime”.
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