

Strengthening the judicial culture as a tool for the effective implementation of the justice reform and the role of the HIJ





Kingdom of the Netherlands

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Abbreviations

CC	Constitutional Court
CEPEJ	European Commission for the Efficiency of Justice
CoE	Council of Europe
EC	European Commission
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
CJEU	Court of Justice of the European Union
HCJ	High Council of Justice
HIJ	High Inspector of Justice
HJC	High Judicial Council
ILDKPKI	High Inspectorate of Asset Declaration and Control and Conflict of Interest
IOM	International Monitoring Operation
IOM	International Monitoring Operation
KED	Judicial Appointments Commission
KLP	High Prosecutorial Council
MD	Ministry of Justice
NGO	Non-Governmental Organization
PP	General Prosecutor
UDHR	Universal Declaration of Human Rights



“Some standards can be prescribed by law, but the spirit of, and the quality of the service rendered by a profession depends far more on its observance of ethical standards.

These are far more rigorous than legal standards.... They are learnt not by precept but by the example and influence of respected peers. Judicial standards are acquired, so to speak, by professional osmosis. They are enforced immediately by conscience.”

- Justice J.B. Thomas of Australia¹

¹Judicial Ethics in Australia, 2d ed. Sydney: LBC Information Services, 1997, cited in CoE, "Magistrates ethics and deontology". <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Ethics/Paper2_en.asp>



1. Introduction

Judicial culture refers to the set of values, beliefs, norms, and behaviours that characterize the judiciary within a given legal system or country. It includes common attitudes and practices among judges, court personnel and legal professionals regarding the administration of justice, decision-making processes, and the general functioning of the judicial system, as well as judicial practice and the legal education of members of the judiciary.²

According to Bell, the judicial culture of a country determines how the principle of judicial independence, among other things, is presented and understood in its institutional form.³ According to him,

[A]s we try to put flesh on the bare bones of the principle of judicial independence, we must consider the kinds of institutions and operational principles which we expect. But at the moment at which we try to become more specific, we tend to diverge in the implementation of the principle. This is not to deny the principle, but to demonstrate that, judging what the principle means in a given country during a specific period requires attention to the historical and political context in which it operates. Current institutions are often justified by reference to the historical problems which they resolve. In addition, a comparison with the past provides evidence of the extent to which a country has progressed in achieving judicial independence.⁴

Saying this, Bell is suggesting that the concept of judicial independence is not a one-size-fits-all model; it is shaped by a country's judicial culture, historical context, and political environment. When implementing the principle of judicial independence, each nation might have different institutions and operational approaches tailored to its unique circumstances.

He draws attention to the fact that although the principle itself may be widely accepted, its implementation and interpretation may vary across different countries and time periods. This divergence is an acknowledgment—rather than a rejection of the principle—that the historical and political environment of a given nation must be considered when defining judicial independence within that nation. Bell also suggests that the way in which current institutions operate is frequently shaped by the problems or difficulties of the past. Analysing past circumstances sheds light on

² D Preshova, *Judicial Culture and the role of judges in developing the law in North Macedonia* (2021); CEELI Institute, *Manual on independence, impartiality and integrity of justice, a thematic compilation of international standards, policies and best practices* (2022).

³ J Bell, *Judicial Cultures and Judicial Independence*, Cambridge University Press, p 13. <
<https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/judicial-cultures-and-judicial-independence/9120C4FB9357780489524062C07C610E>>

⁴ *ibid*, p. 60.



how far a nation has come in attaining judicial independence and helps to understand how its legal system has developed.

For these reasons, a thorough examination of Albania's need for justice reforms over time is crucial to understanding the evolution of its judicial system and the pursuit of judicial independence. The complexities of Albania's legal system can be understood by exploring the historical background and the difficulties encountered when putting justice into practise. About building a strong and independent court that is suited to its unique historical and political environment, this analysis aids in outlining the steps taken thus far as well as the obstacles still to be addressed.

Numerous models have been tested in Albania over the past 30 years to determine the recipe that will ensure the country's judicial independence, both *de facto* and *de jure*. Over time, the judicial system has experienced a shift in personnel, institutions, and areas of competence to accomplish this goal. The legal landscape has also changed accordingly. Nevertheless, it becomes evident that three prominent factors persistently emerge: diminished trust in judicial institutions, instances of corruption, and undue influence from the executive branch⁵. Consequently, reforms have generally been necessary to address these issues.⁶

Creating an independent and functional judiciary has proven to be a complex challenge for Albania.⁷ This challenge took on greater proportions when it could

⁵A Hoxha et al, *Monitoring the Implementation of the Reform in Justice* (2019). See also the Ad Hoc Parliamentary Commission on Justice System Reform, *Analysis of the Judicial System in Albania* (2015), p 98. The Justice System Analysis conducted in 2015 by the Special Parliamentary Commission on Justice Reform emphasized that the system the judiciary in Albania, with the form of the existing institutional organization, was encountering numerous problems and "was not properly performing its mission to consolidate the rule of law". Problems such as the public's perception of the justice system as corrupt and influenceable in the delivery of justice, the weak position of the judicial power compared to the other two powers, as well as the failure of the system to hold corrupt prosecutors and judges accountable, were evidenced, among other things, in the analysis.

⁶I Topalli, *Controlling the Constitutionality of the Law in Albania: A Comparative Approach*, PhD (2015).

⁷In the European Commission's *Albania Progress Report 2015*, Albania's judicial system was considered at an early stage of preparation, noting that the administration of justice is slow and court decisions are not always implemented. Also, "The professional training of judges is insufficient and their independence is not fully ensured. There is insufficient accountability of judges and prosecutors and corruption within the justice system is widespread. Inter-institutional cooperation is weak and resources are insufficient." On this basis, the EC recommended the adoption of a strategy for a new judicial reform. *Albania Progress Report 2023*, p 19. In 2023, Albania has reached a moderate level of preparation in the functioning of the judiciary. Evidenced gaps, and recommendations for improvement, have been identified by the EC in terms of improving the efficiency of courts and prosecution services, as well as reducing unprocessed files, filling vacancies, as well as strengthening the capacity and independence of the judiciary and institutions governing, among others.



potentially affect the opening of negotiations for Albania's EU membership.⁸ Under these circumstances, the 2016 justice reform became necessary.⁹

Under the model presented by the Law Reform, High Judicial Council (HLC), the High Prosecutorial Council (HPC) and the High Inspector of Justice (HIJ) were established.¹⁰ Their purpose was prevent any interventions of the executive or the legislative in the judicial system. As such, the judicial councils became the responsible structures for the procedures of appointment, dismissal, and discipline, among others, of judges, prosecutors and members of the judicial system.¹¹ HIJ was established with the mandate to "verify complaints, investigate violations and initiate disciplinary proceedings" against several key parts of the judicial system¹², as an independent institution focused on issues of disciplining judges and prosecutors of all levels, members of the High Judicial Council, members of the High Prosecution Council and the General Prosecutor, is considered essential for guaranteeing the independence of the judiciary.¹³ *Prima facie*, the fulfilment of these standards has been achieved in the current model of the judiciary.¹⁴

The subject of discussion in this study is to what extent the judicial system's restructuring and the addition of new justice institutions have addressed or are addressing issues found in the previous legal system—corruption, malfunction, lack of integrity, professionalism, independence, efficiency, reliability, transparency, accountability, and responsibility of the system".¹⁵

⁸ Progress Report Albania 2016, p 89. <https://neighbourhood-enlargement.ec.europa.eu/system/files/2018-12/20161109_report_albania.pdf>

⁹ Special Parliamentary Committee on Justice System Reform, High Level Expert Group, p 2. <<https://rm.coe.int/strategjia-ne-refomen-e-sistemit-te-drejtise/16809eb53a>> "The overall goal of the reform process is to create a reliable, fair, independent, professional and service-oriented, open, accountable and efficient justice system that enjoys public confidence, supports development stable socio-economic of the country and enable its integration into the European family."

¹⁰The package of justice reform laws. <<https://klgj.al/ep-content/uploads/2019/09/Paketa-e-Ligjeve-t%C3%AB-Reform%C3%ABs-n%C3%AB-Drejt%C3%ABsi-2018.pdf>>

¹¹ In the Magna Carta of Judges, CCJE (Fundamental Principles 2010), the existence of the judicial councils is seen as necessary to ensure the independence of judges. It is foreseen that "the councils should be independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions." <<https://rm.coe.int/168063e431>>

¹²< <https://ild.al/sq/zyra-e-inspektorit-te-larte-te-drejtise/>>

¹³According to the ECtHR, Resolution on Judicial Ethics (2008), the independence of the judiciary must be guaranteed in relation to judicial activities and in particular in relation to recruitment, appointment up to retirement age, promotions, retention, training, judicial immunity, discipline, remuneration and financing of the judiciary. This is considered the international standard of independence, provided for in the Bangalore Principles of Judicial Conduct <<https://www.google.com/search?q=bangalore+rules&oq=bangalore+rules>>.

¹⁴ Please refer to table x.

¹⁵<<https://www.reformanedrejtisi.al/pse-nje-reforme-ne-drejtisi>>



This discussion paper aims to highlight the significance of the element of judicial independence culture based on an analysis of the fulfilment of judicial independence standards in three periods: 1991-1998, 1998-2016, and 2016 onwards. The purpose of this analysis is to contribute to the debate that judicial autonomy does not always translate into judicial independence.¹⁶ By evaluating earlier judicial models, the study's findings will focus on both the merits and demerits, placing particular emphasis on the role of the High Inspector of Justice.

The purpose of this endeavour is to pinpoint improvements that will strengthen the judicial independence culture. Additionally, it will be examined and suggested how the High Inspector of Justice can support the improvement of this culture by making specific suggestions and taking steps that will help ensure that Albania's legal system is more reliable and independent.

1.1 Introducing the research dilemma

In Plato's work, "The Republic", the interlocutors arrive at the final definition of justice, as a concept that applies both to the individual and to the state.¹⁷ Plato argues that individual justice is achieved when a person's reason guides his or her actions, and that the person's desires are consistent with what is morally right. In his ideal city-state conceptualization of justice, justice is achieved when each class of citizens performs its assigned role and function without interfering with each other's roles.¹⁸

With the justice reform of 2016, through constitutional amendments, special laws and new institutions, the judicial system gained a significant level of autonomy and independence. The judicial system has full competences to regulate internal procedures, internal affairs, and the conduct of its members - what is called "judicial self-governance".¹⁹ In principle, a self-governing judicial system operates free from external influences, whether from the executive, the legislative, or other sources

¹⁶See more F Caka, E Merkuri, Judicial Culture and the role of judges in developing the law in Albania IDSCS (2023); T Marinkovic, Personal Guarantees of judicial independence and judicial culture in Serbia IDSCS (2022); D Preshova, Judicial Culture and Individual Independence of Judges in North Macedonia: independent judiciary with dependent judges IDCS (2022). Based on the findings of the studies, the prevailing judicial culture shows that judicial autonomy in Albania, Serbia and North Macedonia does not translate into judicial independence. Despite the existence of judicial councils in these three states, based on the interviews conducted, the authors have found that there is a widespread fear and mistrust among judges within the institutions.

¹⁷ Plato, *The Republic*. Translated by Joëtt, B., Oxford University Press, 1888.

¹⁸ Ibid.

¹⁹Resolution of the ENCJ on Self Governance for the Judiciary: Balancing Independence and Accountability (2008). See also D Kosar, *Perils of Judicial self-government in transitional societies*, Cambridge University Press (2016). <<https://www.cambridge.org/core/books/abs/perils-of-judicial-selfgovernment-in-transitional-societies/judicial-accountability-and-judicial-councils/CF8944B8888D1B9FA21886B96C5E2B72>>



of influence, and has autonomy in decision-making, internal regulation, disciplinary procedures, and the creation of councils, among other elements.²⁰

At first sight, such a system which guarantees the separation of powers, their independence, and the functioning of the exercise of balance and control, is an optimal system for any democratic society. But the reality may be far from the legal predictions. Based on this premise, the research presents the subsequent three hypotheses, which will be examined subsequently:

Hypothesis 1: The degree of the judiciary's real independence is influenced not only by legal and structural modifications to the system, but also by the officials' comprehension and operationalization of the judiciary;;

Hypothesis 2: Improving the awareness of the value of culture among IHJ, HPC, and HJC will enhance the independence that the justice reform aims to achieve.

Hypothesis 3: The strict legalistic approach to the pursuit and fulfilment of the objectives of the justice reform, without the strengthening of the culture of independence, cannot be favourable for the progress towards membership in the European Union.²¹

The transformation of a negative judicial culture, influenced by political dynamics and anti-judicial value, cannot be carried out only through legal provisions. Transformation requires addressing anti-judicial values, behaviours, and the commitment of judges and members who are part of the judicial system to uphold the principles provided for in the legislation.

1.2 Research question(s)

An effective and independent judicial system is necessary to maintain the rule of law and the separation of powers, as well as to guarantee respect for the essential principles for the administration of justice, especially in cases of disputes between persons, or persons and the state.

²⁰European Charter on the Status of Judges, Basic Principles of the United Nations Organization for Independence of the Judiciary, Bangalore Principles of Judicial Conduct, Magna Carta of Judges, 2010 and Consultative Council of European Judges, Opinion 1 (2001).

²¹Integration in the European Union is closely related to the independence of the judiciary as a guarantee for the functioning of democracy, the rule of law and the protection of human rights in Albania. Based on the new EU enlargement methodology, Chapter 23, which focuses on Judiciary and Fundamental Rights, is part of the first group of negotiating chapters (Cluster 1), which will be the first to be opened and closed the last.



Based on the following discussion, the research questions that are analysed in this paper are:

- (i) What are the standards of judicial independence?
- (ii) How the notion of independence has evolved during three key periods of turmoil in the judicial system (1991-1998, 1999-2016, and 2016-onward) with a focus on the structures that guarantee independence.
- (iii) To what extent do structural changes in the judicial system contribute to or hinder the achievement of judicial independence, especially in the post-2016 reform period?
- (iv) What is the importance of cultivating a judicial culture within the judiciary and how does this affect the work of the ILD and its role in strengthening the rule of law?
- (v) How have various elements, including structural changes in the judicial self-governance system, the change in the disciplinary procedure and the cultivation of judicial culture contributed to the creation of an effective and independent judicial system in Albania?

In this analysis with a periodization approach, special attention is paid to the understanding of the multifaceted role played by disciplinary mechanisms in shaping and maintaining the independence of the judiciary.

A critical aspect of this analysis includes an exploration of the ILD in the period after 2016, to signal gaps, and eventually, making recommendations to the High Inspector of Justice.

1.3 Methodology

This work employs a variety of scientific research approaches to analyse heterogeneous data while considering the challenges associated with interpreting and operationalizing culture.

Desk research

Initially, a complete review of the literature, legal documents and doctrine was carried out, to create a world view on key notions, such as the separation of powers, independence of the judiciary, individual independence, the importance of self-governing institutions and the importance of a positive judicial culture. Additionally, the analysis that follows provides a summary of the constitutional role and performance of the HIJ and is based on reading the Constitution, the key laws of the legal reform package, and numerous publications that concentrate on the HIJ and the new justice institutions.



Interviews

Conducting interviews with a well-defined target group, namely general and special jurisdiction judges, and prosecutors, as well as members of the HPC and HJC, is a component of the study. We shall provide an account of the respondents' qualities while honouring and protecting their right to privacy.

- The first feature of the selection of interviewees is related to their status as public servants who work in judicial and justice structures, such as: the Court of First Instance of General Jurisdiction Tirana, the Prosecutor's Office of the Judicial District of Tirana, the Special Court of Instance First for Corruption and Organized Crime, the Special Prosecutor's Office, the High Judicial Council, and the High Prosecution Council;
- The second feature lies in the selection of interviewees with varied work experience. 2 of the interviewees have 20-25 years of professional experience, 3 of them have 10-18 years of experience, 1 of them has more than 25 years of experience.

Six interviews were done in all. To achieve a more comprehensive approach, a diverse selection of interviewees based on the previously mentioned criteria allows us to paint a clearer and more objective picture of how the laws currently in effect are applied, as far as the magistrates are aware, as well as whether the framework is legal, whether they truly feel independent within the justice system, and how effective the system is.

We reached out to 18 individuals fitting our target demographic, and then employed snowballing by having them inquire with additional people. Out of the 18 we contacted, six agreed to take part. Furthermore, we reached out to the HCJ, HCP, the Court of First Instance of General Jurisdiction Tirana, and the Prosecutor's Office of the Judicial District of Tirana, asking them to share the survey with their members. Despite our outreach, we did not receive any responses.

The coding of the interviewees for the purpose of the following reference of their answers is:

- Judge
- Former Judge
- Prosecutor
- Former Prosecutor
- KLP member
- Former Member of the KLJ



The interview questions are structured in such a way as to help in the best possible identification of the problems within the justice system and the identification of deficiencies in the organization and functioning of this system.

The interview questions are grouped into (i) Questions on the adequacy of the constitutional and legal framework to guarantee and support true judicial independence and self-governance; (ii) Questions on the real performance of the judicial governance system to ensure and maintain independence in practice; (iii) Questions on the importance of general culture for ensuring the independence of the judiciary; (iv) Questions on how to improve the situation; and (v) Questions on the legal framework and practice of ILD.

The challenges encountered during the development and analysis of the interviews are related to:

- Lack of a high number of interviews;
- Lack of answers to specific questions from the interviewees, ignoring the purpose of the question;
- The answer given was not relevant to the question.

The reason for the incorrect breakdown of the question may be the incorrect perception of the question by the interviewee, or the avoidance of a negative answer due to the task that the interviewee performs. In this context, to have a more complete and accurate evaluation as follows, we consider taking into consideration the limitations above.

As will be deepened in the continuation of this paper, judicial culture is an informal element. Interviews with members of the judicial system can provide us with a window into their perception of the prevailing judicial culture. Focusing on the individual approaches of the interviewees, we can understand the individual evaluations of the notion of judicial independence. By cross-checking the answers of the interviewees, we aim to understand if the new standard of judicial independence introduced after the judicial reform is becoming part of the judicial culture, as well as the perception of the interviewees on the role of the ILD in strengthening independence and importance.

Focus group with the Office of the High Inspector of Justice

Six officials of the Office of the High Inspector of Justice participated in the focus group: 1 magistrate inspector, 1 non-magistrate inspector, 2 legal advisors and 2 clerks, part of the administration of the Office of the HIJ.



The main purpose of this focus group was to discuss the importance of culture in strengthening the principle of judicial independence.

The purpose of the focus group was to gather the opinions of HIJ officials at three different levels of analysis: macro-level analysis, which looked at how the legal framework and external social, cultural, and systemic factors can influence the judicial culture in HIJ; individual-level analysis, which examined Inspectors' perceptions of judicial culture; and institutional-level analysis, which examined HIJ internal policies, procedures, and structures for ensuring and fostering judicial culture.

The three-level analysis and focus group results offer insightful information about the subtleties of the current judicial culture and how it affects the idea of judicial independence.

1.4 The purpose of the study

The purpose of the study is to examine and analyse the impact and development of judicial culture in the justice system of Albania, especially after the recent justice reforms. This study aims to understand how values, beliefs, norms, and behaviours within the judicial system can affect the independence, integrity, and efficiency of the judiciary in consolidating the rule of law in the country. On another level, by analysing the role, work, and responsibilities of the ILD, we want to understand how much influence the institution of the ILD can have on the development of judicial culture in Albania.

To fill the gap in scientific research and uncover new information about Albania's judicial culture, this study aims to develop a productive debate on ways to improve the country's judicial culture. This is because there is a dearth of literature on the components of Albania's judicial culture, as well as a lack of sharing of practical experience by members of the judiciary. In addition, as we read and talk about the study's results, we hope to spark interest in this area among academics and professionals and offer ideas for further research.

1.5 Structure of the study

Three components make up the study: the introduction, the four main sections, and the findings and conclusions. The introduction begins by setting the reader's perspective on the three time periods that will serve as the foundation for the discussion of Albania's judicial system's independence. The research's primary



concerns are outlined in the introduction and are connected to the question of whether changing the structure of the legal system without taking judicial culture into account will make it less independent or effective. Judicial culture is a very nebulous term that is difficult to quantify using indicators. That's why the process is explained in the introduction, along with how the leading points will be set for the topic of analysing judicial culture in Albania.

In the second section, the Albanian judicial system is analysed in three distinctive periods: 1991-1998; 1998-2016; and 2016 and onward. The indicators included in the standards card will be the focus of the analysis. Furthermore, these three concerns inside the section shall rule the section:

- 1.** The judicial system's independence from the legislative and executive branches;
- 2.** Independence of bodies within the judicial system;
- 3.** The identity of the HIJ's predecessors, as well as an evaluation of their independence during carrying out this function, before the HIJ was established.

In the fourth section, the study will examine the innovation in the justice reform, namely the establishment of the High Inspector of Justice institution, closely related to one element: the guarantee of independence and justice. Based on reports, legal norms and subsequent analysis of the paper, the authors dwell on the role and performance of the HIJ in the Albanian judicial self-governance.

Ultimately, the study's conclusions provide the following summary of the debates and analyses: First, by posing the question of whether prior systems failed for this reason, they address the conundrum of the significance of the judicial culture element in the independence of the judiciary. Based on the results of the focus group and interview, they also provide recommendations for bolstering the judicial culture element in all judicial system structures.

In the end, the findings of this study summarize the discussions and analyses in this way: First, they give an answer to the dilemma of the importance of the element of judicial culture in the independence of the judiciary as a result of raising the hypothesis if previous systems failed for this reason; as well as based on the interviews and the focus group, recommendations are given in terms of strengthening the element of judicial culture in all structures of the judicial system.



2. Standards of independence and culture of judicial independence

Judicial independence is created by combining two words: "independence" and "judicial". The term originates from the Latin word *judicial*, as a quality associated with a court or judge.²² The idea of the separation of powers, which holds that the legislative, executive, and judicial branches of government constitute three distinct branches and function as a check and balance system to prevent abuse and violations of social freedom, is closely linked to the concept of an independent judiciary.²³

The judiciary's independence refers to the ability of the judiciary as a whole and its individual members to carry out their duties free from interference from the government, the legislature, or any other source of power. The Venice Commission asserts that only an autonomous judiciary can administer justice impartially and in accordance with the law, defending each person's fundamental liberties and human rights.²⁴

Also, the separation of powers and the balancing of powers constitute the essence of the rule of law.²⁵ On the one hand, the legislative, executive and judicial powers must be independent of each other, since the combination of legislative-executive, legislative-judicial or judicial-executive brings (i) a person/structure would pass tyrannical laws, to later enforced tyrannically; (ii) the judge's decisions would have the force of law and be applied arbitrarily, and (iii) the executive judge would be a tyrant.²⁶ On the other hand, the three powers interfere, balance and mutually control each other, always based on constitutional and legal norms, in what is called the principle of balancing power ('check and balance').²⁷ The central idea is that the principle of separation and balancing of powers is not only applied in the case of the independence of the three powers, but also in other constitutional institutions, which are charged with different tasks and functions in a state of law.²⁸

A plethora of literature exists regarding the criteria of judicial independence, drawing from many sources such as international treaties, regional and international

²² English Oxford Living Dictionary, "Definition of Judicial in English" (2018)

<<https://en.oxforddictionaries.com/definition/judicial>>

²³< <https://www.ohchr.org/sites/default/files/Documents/Publications/training9chapter4en.pdf>>

²⁴See CoE, European Commission for Democracy through Venice (Venice Commission), *Compilation of Venice Commission Opinions and Reports concerning Judges* (2023).

<[https://www.venice.coe.int/èebforms/documents/?pdf=CDL-PI\(2023\)019-e](https://www.venice.coe.int/èebforms/documents/?pdf=CDL-PI(2023)019-e)>

²⁵Zaganjori et al, *Democracy and the State of Law*, Adelprint, p 28.

²⁶Charles de Montesquieu, "De l'esprit des lois", *Libre II, Chap.II*, quoted in Zaganjori X., *Democracy and the State of Law*, p 99.

²⁷Zaganjori et al, *Democracy and the State of Law*, Adelprint, p 29.

²⁸Zaganjori et al, *Democracy and the State of Law*, Adelprint,, p 30.



principles, guidelines, declaratory opinions, national practises, recommendations, and others.²⁹ At the European level, Article 6 of the European Convention on Human Rights³⁰ and Article 47 of the EU Charter on Fundamental Rights³¹ serve as the cornerstone to protect judicial independence. Besides this, the European Charter on the statute for judges³², the Magna Carta of Judges³³, the Judges' Charter in Europe³⁴, the Council of Europe Recommendation on Judges: Independence, efficiency and responsibilities³⁵, the Venice Commission's Recommendations³⁶, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia³⁷, the Opinions of CCJE³⁸ and the Reports of ENCJ³⁹ are the key legal instruments that could guide any judicial structure on their endeavour to judicial independence.

In an interpretation of Article 14 of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee has focused on the elements that make up the requirements of judicial independence, stating that:

The requirement of independence refers to the procedure and qualifications for the appointment of judges and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of

²⁹See CoE, European Commission for Democracy through Venice (Venice Commission), *Compilation of Venice Commission Opinions and Reports concerning Judges* (2023).

³⁰ European Convention on Human Rights - Article 6: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The European Court of Human Rights' case law when it is called to assess whether a judicial body can be labelled as an "independent" one referred, mainly, to four distinct criteria: (1) The manner of appointment of the judicial members; (2) The duration of the term of the judicial office; (3) The existence of certain guarantees against outside pressures; (4) Whether the body presents an appearance of independence. *Findlay v. the United Kingdom; Campbell and Fell v. United Kingdom; Maktouf and Damjanovic v. Bosnia and Herzegovina; Brudnicka and Others v. Poland*. Read further at M Mastracci, *Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland*, *Athens Journal of Law - Volume 5, Issue 3* –323-350 (2019). <<https://www.athensjournals.gr/law/2019-5-3-6-Mastracci.pdf>>

³¹ EU Charter of Fundamental Rights - Article 47: Right to an effective remedy and to a fair trial . Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

³² European Charter on the statute for judges (1998). <<https://rm.coe.int/090000168092934f>>

³³ Magna Carta of Judges (2010). <<https://rm.coe.int/16807482c6>>

³⁴ Judges' Charter in Europe (European Association of Judges) (1997). <<https://www.icj.org/wp-content/uploads/2014/10/Judges-charter-in-europe.pdf>>

³⁵ Recommendation No. R (94) 12. <<https://advokat-prnjavorac.com/zakoni/Recommendation.pdf>>

³⁶ *Compilation of Venice Commission Opinions, reports and studies concerning judges* (2023). <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2023\)019-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2023)019-e)>

³⁷ *Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus, and Central Asia* (2010). <<https://www.osce.org/files/f/documents/a/3/73487.pdf>>

³⁸ CCJE OPINIONS. <<https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta>>

³⁹ ENCJ project on Independence and Accountability. <<https://www.encj.eu/articles/71>>



their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.⁴⁰

Naturally, the independence of judges is only as important as the independence of all other judicial systems, such as prosecutors, HIJ members, and HPC and HJC members. To guarantee that their rulings are unbiased and grounded in the law and facts, judges must maintain their independence. To guarantee justice, they must remain unaffected by outside pressure, whether it be financial, political, or otherwise.⁴¹ To guarantee a fair trial and an impartial inquiry, prosecutors' independence is essential. They should possess the capacity to freely represent the interests of the public and pursue criminal prosecutions free from outside interference.⁴² The independence of the HIJ is important to conduct possible investigations of discipline violations or responsibility of judges and prosecutors. Being a body that evaluates the activity of justice actors, the independence of the HIJ is essential for the credibility of the evaluation process.⁴³ Independence in these cases is viewed at two levels: the independence of each individual involved in the judicial system, to work independently and impartially, based on the law and facts; and the institutional independence of these structures to be independent from external political, economic, or other influences, and to have the freedom to carry out their responsibilities independently and impartially.⁴⁴

⁴⁰ UN Human Rights Committee General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (ICCPR): Right to Equality Before Courts and Tribunals and to Fair Trial, para. 18, 2007. <<https://digitallibrary.un.org/record/606075?ln=en>>

⁴¹In the General Comment No. 32 (2007), the Human Rights Committee, established under the International Covenant on Civil and Political Rights ("ICCPR"), identified that the requirement of independence in Article 14(1) of the ICCPR law refers, in particular, (i) the procedure and qualifications for the appointment of judges; (ii) guarantees regarding their security of residence until the mandatory retirement age or the expiration of their mandate, when it exists; (iii) the conditions governing the promotion, transfer, suspension and termination of their functions; and (iv) the actual independence of the judiciary from political interference by the executive and legislative branches.

⁴²See CoE, European Commission for Democracy through Venice (Venice Commission), *Compilation of Venice Commission Opinions and Reports concerning Judges* (2023).

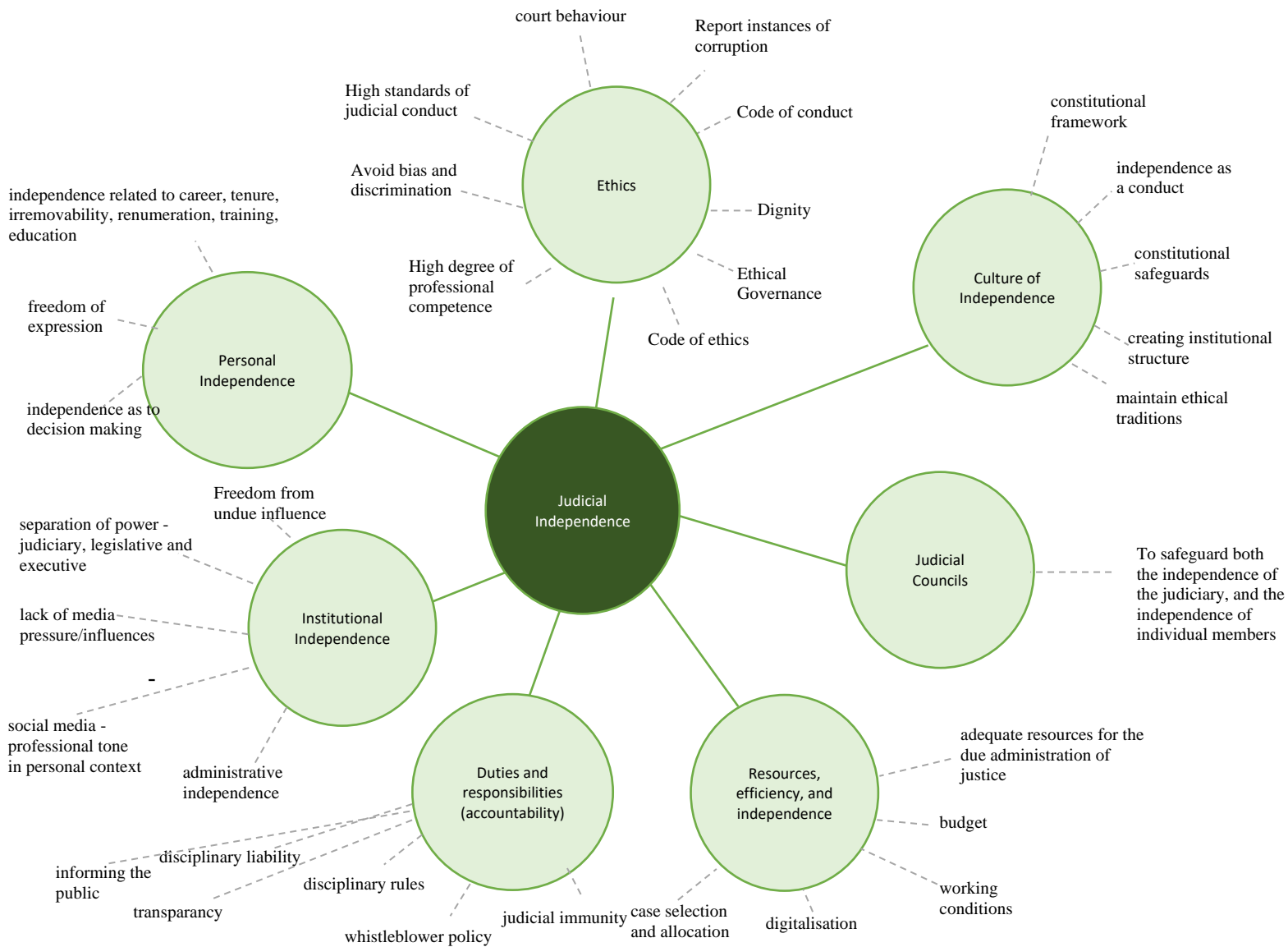
⁴³CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §33. The Venice Commission notes that the Inspector [...] will have the status of a Supreme Court judge (Article 147/d p. 3), but at the same time he/she is to a certain extent under the control of the Minister of Justice. It is desirable to leave the executive at a certain distance from the decision on the disciplinary responsibility of judges. Alternatively, the Constitution could simply provide for a procedure for placing before the responsibility of the Inspector for violations of discipline, in the disciplinary court having the final word on the matter."

⁴⁴<<https://rm.coe.int/16807481a1>>



Upon reviewing the contents of these crucial legal documents and leveraging the manual provided by the CEELI Institute⁴⁵, the following figure summarises all the key components of judicial independence.

Figure 1: Key components of judicial independence.



⁴⁵ CEELI Institute, Manual on Independence, Impartiality, and Integrity of Justice: A thematic compilation of international standards, policies, and best practices (2022).



Source: Own compilation based on CEELI Institute, Manual on independence, impartiality and integrity of justice, a thematic compilation of international standards, policies, and best practices (2022).

The figure above depicts a complex landscape rather than a simplistic binary view on the principle of judicial independence. Although constitutional provisions are undoubtedly a crucial foundation for maintaining judicial independence, it's also necessary to acknowledge the many moving parts that work together to safeguard this independence.

The cultivation and sustenance of a robust judicial culture are deeply entwined with the enforcement of judicial discipline. When members of the judiciary adhere strictly to ethical standards and exhibit exemplary conduct, they establish a foundation for a judiciary that values integrity and fairness. In addition, consistent adherence to disciplinary codes fosters an environment of accountability, respect for the rule of law, and integrity within the judiciary. This commitment to discipline forms the bedrock of a judicial culture centred on fairness, reliability, and public trust. It emphasises how crucial it is to uphold the highest ethical standards, which will impact the attitudes and actions of legal professionals and strengthen the legitimacy and efficiency of the judicial system.

Given the study's focus on IHJ, the next section will provide a brief overview of standards and best practises related to the work of disciplinary bodies. The objective of this exercise is to offer IHJ officials insights that they can use as a source of inspiration in their activities. Implementing effective disciplinary standards may help maintain the integrity of the judiciary, which would strengthen the culture of independence, transparency, and accountability within the judiciary.

2.1 Standards on disciplining members of judiciary

Discipline is one of the elements that could interfere with the principle of judicial independence.⁴⁶ Recommendation No. R (94) 12, Principle VI(2) and (3) provides that

States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt

⁴⁶ Resolution on Judicial Ethics, European Court of Human Rights, Adopted by the Plenary Court on 23 June 2008. < http://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf> Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.



with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself.⁴⁷

The Executive may only take part in the disciplinary processes against members of the judiciary or in the referral of complaints against them; it may not decide these cases.⁴⁸ Although in some legal cultures there could be examples of independent judicial decision-making under the executive administration, in general, and particularly for former communist states where the executive has predominantly dominated the judiciary, this type of model is not recommended.⁴⁹ On this reasoning, the power to discipline or remove a judge is recommended to be in an institution which is independent of the Executive.⁵⁰

Standards relating to the disciplinary proceedings:

- S 1** Procedural rules for disciplinary proceedings should guarantee a due process.⁵¹
- S 2** The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.⁵²
- S 3** Disciplinary proceedings shall take place before an independent body.⁵³
- S 4** There is a possibility of recourse before a court.⁵⁴
- S 5** The same lessons that apply to appointment of judges also apply to promotion and discipline:
 - Transparency: decisions should be published⁵⁵;
 - Decisions should be based on the most objective criteria possible⁵⁶;
 - If the executive and/or legislative branches are involved in the process, they should not have excessive influence⁵⁷;

⁴⁷ Recommendation No. R (94) 12, Principle VI(2) and (3). < <https://advokat-prnjavorac.com/zakoni/Recommendation.pdf>>

⁴⁸ Minimum standards of judicial independence, 8 Int'l Legal Prac. 65 (1983). < <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ilp8&div=27&id=&page=>>

⁴⁹ USAID, Guidance for promoting judicial independence and impartiality, PN-ACM-007. < https://pdf.usaid.gov/pdf_docs/PNACM007.pdf>

⁵⁰ International Association of Judicial Independence, Mount Scopus International Standards Of Judicial Independence (2008), p 4. < <https://www.icj.org/wp-content/uploads/2016/02/Mt-Scopus-Standards.pdf>>

⁵¹ CDL(1995)074rev Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), adopted at the 25th Plenary Meeting of the Commission, December 1995, chapter B.2.i.c), al. 5-8.

⁵² Minimum Standards Of Judicial Independence, International Bar Association (IBA) (1982). < <http://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29>>

⁵³ Magna Carta of Judges, Ccje, Council of Europe, Strasbourg, (2010).

⁵⁴ *ibid.*

⁵⁵ USAID, Guidance for promoting judicial independence and impartiality, PN-ACM-007. < https://pdf.usaid.gov/pdf_docs/PNACM007.pdf>

⁵⁶ *ibid.*

⁵⁷ *ibid.*



- A two-step process can increase transparency and reliance on objective criteria. One authority evaluates performance, and a separate authority makes the final decisions regarding promotion or discipline⁵⁸;
- Individual evaluation of judges should be kept separate, both from inspections assessing the work of a court, and from disciplinary procedures⁵⁹;
- The dismissal from office should be done only in a case of serious breaches of disciplinary rules or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial functions to an objectively assessed minimum acceptable standard.⁶⁰
- Lack of legal knowledge hold not result in disciplinary sanctions or affect the evaluation of the judge's work, and should be seen as an element of the independence of the judiciary.⁶¹
- A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage.⁶²
- All disciplinary action shall be based upon established standards of judicial conduct.⁶³

It is generally recommended the High Judicial Council be the final authority that would assess matters related to the discipline and dismissal of judges. However, the executive should not be part of the council or the decision making on disciplinary matters.⁶⁴

The CCJE, when dealing with the questions of ethics and discipline in its Opinion No. 3 (2002), has pinpointed the need to clearly distinguish between these two matters: ethics (professional conduct) and discipline (actions taken for misconduct).⁶⁵ The CCJE notes that the responsible body for ethics should be the judges themselves, or the council, if this Council "does not have a disciplinary function or has a special

⁵⁸ *ibid.*

⁵⁹ Opinion No. 17 (2014), paras 29, 39.

⁶⁰ *ibid.*, paras 29, 44.

⁶¹ Consultative Council of European Judges (CCJE) - opinion n° 20 the role of courts with respect to the uniform application of the law (2017).

⁶² Montreal Declaration Universal Declaration on the Independence of Justice, international association of judicial independence and world peace (jiwp) (1983).

⁶³ *ibid.*

⁶⁴ CDL-AD(2007)028 Judicial Appointments (report), para. 4, 10, 18-20, 25, 37. CDL-INF(1998)009 Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 16, cited in CDL-AD(2007)028 Judicial Appointments (report), para.34.

⁶⁵ Opinion No.10, Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (2007).

<https://rm.coe.int/168074779b>



body for disciplinary matters with a separate composition within the Council for the Judiciary".⁶⁶ If the Council has a disciplinary nature, then it is recommended to create ethics committee whose only function would be the drafting and monitoring of rules of professional ethics.⁶⁷ This separation allows for a clear demarcation between the roles of ethical conduct adherence and disciplinary action, ensuring that the body responsible for ethics is distinct from the one handling disciplinary measures for misconduct within the judiciary.

In this instance, the disciplinary body is the mechanism to address and rectify misconduct or breaches of ethics among judicial members. In doing so, the disciplinary body may be able to shift the judicial culture.

In the Opinion No. 3, the Consultative Council of European Judges (CCJE) have noted that judicial inspectorates, "on the basis of their observations of judges' behaviour, could contribute to the development of ethical thinking; their views could be made known through their annual reports". It is further noted that the independent authority involved in disciplinary proceedings, through the publication of their decisions, could be a form of effectively raising awareness on the positive values of judicial culture.

However, it must be said that experiences from many countries lead to the axiom that "the best institutional rules do not work without the good will of the people who are responsible for their implementation and application".⁶⁸ This reflects the need for a culture of judicial independence, which represents a key building block for the functioning of a modern democratic society. Public confidence in the justice and integrity of the judiciary fosters an environment where the law is applied fairly and without disruption, helping to preserve the fundamental principles of justice and individual liberty.

The Poland case

Poland has been a member of the European Union since 1 May 2004.⁶⁹ In 2017, similar in timeframe as Albania, Poland's judiciary underwent a reform with the stated goal to "enhance the democratic accountability of the Polish judiciary".⁷⁰ Poland is chosen as a case study due to its persistent rule of law concerns relating to the independence of the judicial system in the last years⁷¹ and the very low perception of trust among the general public and companies on the Polish judicial

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ J. E. Meyer, B. Roëan, *American Journal of Sociology*, Vol. 83, No. 2 (1977).

⁶⁹ Poland overview. <https://european-union.europa.eu/principles-countries-history/country-profiles/poland_en>

⁷⁰ p. 3. <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e)>

⁷¹ *ibid.*, p. 3.



independence.⁷² The analysis will focus specifically on the disciplinary regime set under the justice reform in Poland.

To set the scene for the Polish judicial reform, which was implemented with the intention to "increase the efficiency of the court, reduce "judicial corporatism", and enhance the accountability and professionalism of judges and re-establish the public trust in the judiciary"⁷³, these are the amendments⁷⁴ introduced:

- (i) Before the judicial reform, 15 out of 25 members of the NCJ were elected by their peers. After the judicial reform, the legislature became involved in electing the judicial members of the NCJ, where 15 were chosen by the Parliament instead of the judges;
- (ii) Following the judicial reform, the President will nominate candidates to the position of the First President of the Supreme Court;
- (iii) The Minister of Justice merged with the Prosecutor General and acquired the power to appoint/dismiss court presidents of the lower courts at his discretion during the transitional period of six months;
- (iv) The Minister of Justice also obtained other "disciplinary" powers vis-à-vis court presidents, and presidents of higher courts.⁷⁵
- (v) Two new chambers within the Supreme Court were created: the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs (the Extraordinary Chamber).⁷⁶
- (vi) New retirement ages, appointments and disciplinary proceedings were introduced.

The Venice Commission noted in its Opinion No. 977/2020, that "[the Venice Commission] never advocated a self-governing judiciary as a general standard, and that it is very much conscious of the diversity of legal systems in Europe in this

⁷² European Commission, 2023 Country Report, Poland, Institutional paper 245 (2023), p 15. <https://economy-finance.ec.europa.eu/system/files/2023-06/ip245_en.pdf>

⁷³ GRECO, Addendum to the Fourth Round Evaluation Report Poland, (Rule 34), Adopted by GRECO at its 80th Plenary Meeting (Strasbourg, 18-22 June 2018), p 5. <<https://rm.coe.int/addendum-to-the-fourth-round-evaluation-report-on-poland-rule-34-adopt/16808b6128>>

⁷⁴ Venice Commission Opinion No. 977/2020, dated 16 January 2020 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e)> and GRECO Addendum to the Fourth Round Evaluation Report on Poland, Adopted by GRECO at its 80th Plenary Meeting (Strasbourg, 18-22 June 2018) <<https://rm.coe.int/addendum-to-the-fourth-round-evaluation-report-on-poland-rule-34-adopt/16808b6128>>

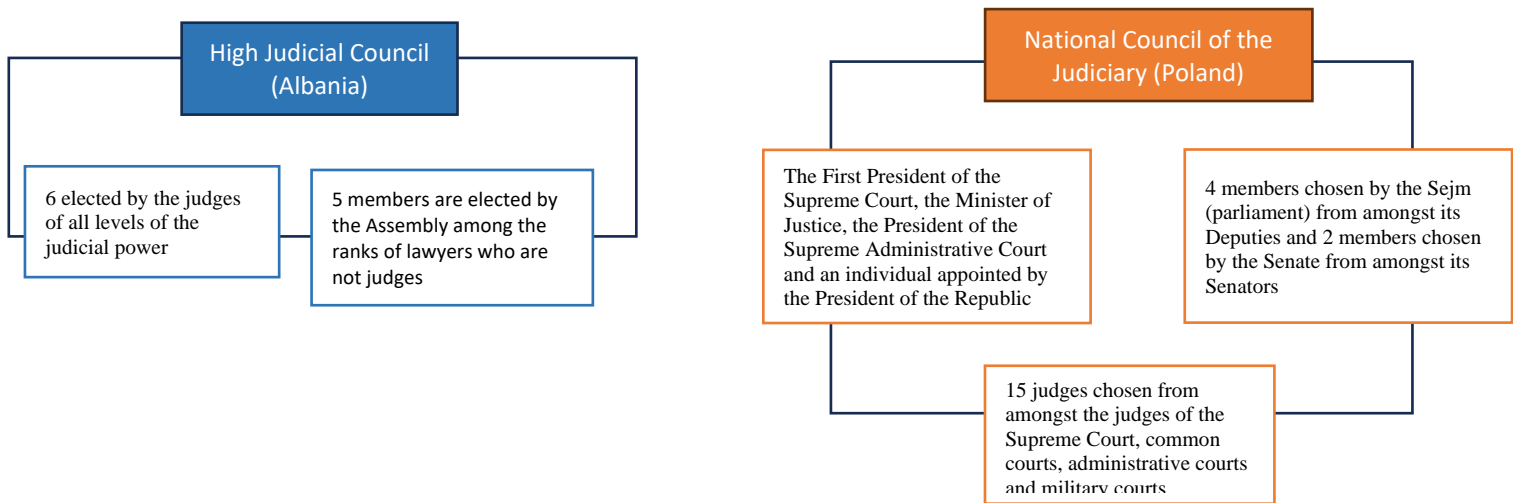
⁷⁵ This model created a hierarchical structure of subordination within the judiciary, in administrative matters, with the Minister of Justice/Prosecutor General at its top.

⁷⁶ These new chambers were staffed with newly appointed judges, selected by the new NCJ, and entrusted with special powers – including the power of the Extraordinary Chamber to quash final judgments taken by lower courts or by the Supreme Court itself by way of extraordinary review, or the power of the Disciplinary Chamber to discipline other judges. That put these new chambers above all others and created de facto a "Supreme Court within a Supreme Court". The disciplinary Chamber was responsible for reviewing decisions issued in disciplinary proceedings against judges.



respect."⁷⁷ Meaning that having judicial appointments made by the executive branch is not always a reflection of a hindrance to the principle of independence of the judiciary. However, it is acknowledge that establishing judicial councils is a positive step, particularly in newer democracies where the judiciary historically faced subordination to other branches of government.⁷⁸ In Poland, the National Council of the Judiciary (NCJ - the homologue of High Judiciary Council in Albania), was established to "safeguard the independence of courts and judges".⁷⁹ NCJ has a different composition in comparison the HJC in Albania, although their purpose is the same.⁸⁰

Table 1: Composition of the High Judicial Council (Albania) and the National Council of the Judiciary (Poland)



Following the justice reform, Poland experienced significant changes that raised concerns. These included a noticeable decline in the number of judges participating in the NCJ, a reorganisation of the NCJ, the Minister of Justice replacing court presidents on a large scale, and an increase in disciplinary actions against judges. Due to these modifications, several Polish courts filed appeals with the Court of Justice of the European Union (CJEU) "for preliminary rulings on whether parts of the Polish judiciary after the reform still could be considered as independent."⁸¹

Issues rose in Poland after the justice reform as there was a drastic reduction of the involvement of judges at the NCJ, reorganisation of the NCJ and mass replacements

⁷⁷ Venice Commission Opinion No. 977/2020, 16 January 2020, p 9.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e)

⁷⁸ *ibid.*

⁷⁹ Polish Constitution, Article 186. https://www.constituteproject.org/constitution/Poland_1997#s56

⁸⁰ Albanian Constitution, Article 147. "The High Judicial Council shall ensure the independence, accountability and appropriate functionality of the judicial power in the Republic of Albania".

https://www.gjk.gov.al/web/constitution_of_albania_1722.pdf

⁸¹ Venice Commission Opinion No. 977/2020, p 5.



of courts president by the Minister of Justice, intensification of the disciplinary procedures against ordinary judges, made that several Polish courts addressed to the Court of Justice of the European Union (the CJEU) requests for preliminary rulings on whether parts of the Polish judiciary after the reform still could be considered as independent.

The CJEU ruled on the judgment in this matter noting that a court is not an independent and impartial tribunal when "the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts [...] as to the direct or indirect influence of the legislature and the executive and its neutrality [...]".⁸² Regarding the appointment of court members within NCJ, the CJEU acknowledged that while individual factors might not individually raise concerns, when considered collectively along with the context of the decision-making process, they could potentially "throw doubt on the independence of a body involved in the appointment procedure".⁸³ The experiences and challenges faced by other countries, like the developments in Poland scrutinised by the CJEU, can offer valuable lessons for refining and strengthening existing disciplinary mechanisms in Albania. By examining these cases, Albania can evaluate how well its disciplinary system is working, possibly pinpointing areas that need reform or guaranteeing more independence and impartiality in the procedure.

The judicial reform resulted in the creation of two new chambers of the Supreme Court: The Disciplinary Chamber (Izba Dyscyplinarna) and the Chamber of Extraordinary Review and Public Affairs (Izba Kontroli Nadzwyczajnej i Spraw Publicznych), as well as the extraordinary appeal (skarga nadzwyczajna) in the Polish legal system.⁸⁴ The 2017 Act on the Supreme Court provides the Prosecutor

⁸² Venice Commission Opinion No. 977/2020, *ibid*, citing CJEU C-585/18 - A.K. (Independence of the Disciplinary Chamber of the Supreme Court) Judgment of the Court (Grand Chamber) of 19 November 2019, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* <<https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=ecli:ECLI:3AEU:3AC:3A2019:3A982>>

⁸³ Venice Commission Opinion No. 977/2020, citing C-585/18 - A.K. (Independence of the Disciplinary Chamber of the Supreme Court), p 5.

⁸⁴ *Walesa v Poland*, App no 50849/21 (12 October 2022). Introduction of extraordinary appeal under the 2017 Act on the Supreme Court was made under the Ustawa z dnia 8 grudnia 2017 o Sądzie Najwyższym; "the 2017 Act on the Supreme Court", dated on 8 December 2017. In the *Walesa v Poland*, ECHR finds that there has been a violation of the Article 6 § 1 of the Convention as regards the right to an independent and impartial tribunal established by law, where the court notes "As noted by the Court in *Grzęda*, the whole sequence of events – including in particular the laws on reorganisation of the judiciary in Poland – has vividly demonstrated that successive judicial reforms have been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, at remodelling the NCJ and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his or her role in matters of judicial discipline. As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened (see *Grzęda*, § 358)." The issues found by the court are (1) the defective procedure for judicial appointments involving the NCJ as established under the



General, among others, the competence to lodge an extraordinary appeal against a final decision (orzeczenie) of an ordinary court or a military court terminating proceedings in a case if (1) the decision violates the principles or freedoms and rights of a human being and a citizen laid down in the Constitution, and/or; (2) the decision grossly violates the law through its misinterpretation or misapplication, and/or (3) there is an obvious contradiction between significant findings of the court and the content of evidence collected in the case - and the decision may not be reversed or amended under other extraordinary appeals."⁸⁵

In a gist, the Poland government was highly scrutinized for the lack of an independent and impartial judiciary. The turning point came when the ECJ ruled that "the measures thus adopted by the Polish legislature are incompatible with the guarantees of access to an independent and impartial tribunal, previously established by law"⁸⁶, upholding the Commission's order that "the Republic of Poland pay the European Commission a periodic penalty payment of EUR 1 000 000 per day, from the date on which the present order is notified to the Republic of Poland and until such time as that Member State complies with the obligations arising from the order of the Vice-President of the Court of 14 July 2021"⁸⁷.⁸⁸ The EU went a step further and withheld the RRF, the EU's COVID-19 recovery fund, until Poland made legal amendments, which led to the dissolution of the Supreme Court's Disciplinary Chamber.⁸⁹ The Polish Supreme Court created "a test aimed at determination of the

2017 Amending Act which inherently and continually affects the independence of judges so appointed, (2) the judges appointed to two entire chambers of the Supreme Court do not meet the requirements of an "independent and tribunal established by law", (3) the exclusive competence of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court in matters involving a plea of lack of independence on the part of a judge or a court, (4) the defects of the extraordinary appeal procedure, and (5) the exclusive competence of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court to deal with extraordinary appeals.

⁸⁵ The 2017 Act on the Supreme Court, Section 89. Found in *Walesa v Poland*, App no 50849/21 (12 October 2022), para 33.

⁸⁶ Judgment of the Court in Case C-204/21, *Commission v Poland* (Independence and private life of judges), Press Release No 89/23. <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-06/cp230089en.pdf>> "ECJ, relying on its earlier case-law [*Judgment of 15 July 2021, Commission v Poland (Disciplinary regime for judges), C-791/19*] reiterates its assessment that the Disciplinary Chamber of the Supreme Court does not satisfy the requirement of independence and impartiality. It infers from this that the mere prospect, for judges called upon to apply EU law, of running the risk that such a body may rule on matters relating to their status and the performance of their duties, in particular by authorising criminal proceedings against them or their arrest or by adopting decisions relating to essential aspects of the employment, social security or retirement regimes applicable to them, is liable to affect their independence".

⁸⁷ Order of the Vice-President of the Court of 14 July 2021 in Case C-204/21 R (see also press release No 127/21).

⁸⁸ Order of the Vice-President of the Court of 27 October 2021 in Case C-204/21 R (see also press release No 192/21).

⁸⁹ J Jaracqewski, Europe's Sick Success Child: Poland is not all lost ... yet., VerfBlog, 2023/10/11, <<https://verfassungsblog.de/europes-sick-success-child/>>, DOI: 10.59704/03e824be4d469ec6. Under the RRP in 2023-2024, "Poland committed to reform the disciplinary regime for judges and to set up a review process before an independent court for judges affected by decisions of the Disciplinary Chamber of the Supreme



impact of irregularities in the appointment of judges on the legality of the composition of the court" in 2020 following the dissolution of the Disciplinary Chamber.⁹⁰ Another test was later introduced as part of an amendment Act on the Supreme Court.⁹¹

While Poland might not serve as an ideal model for emulation, it is still sensible to examine elements in Albania's judicial system that bear similarity to those in Poland. In the next section, an analysis of the High Council of Justice (HCJ)--as the constitutional authority and the national council of the judiciary of Albania, headed by the President of the Republic, with competences regarding appointments, professional and ethical evaluation, promotion, transfer, disciplinary action against judges-- will be conducted. The NCJ in Poland, similarly as in Albania, had a direct impact on the independence of judges, regarding the promotion, transfer, disciplinary proceedings, dismissal, and early retirement. In the case of NCJ, it has been scrutinized by the ECtHR and the CCJE, which have recommended that

[e]very decision relating to a judge's appointment, career and disciplinary action be regulated by law, based on objective criteria and be either taken by an independent authority or subject to guarantees, for example judicial review, to ensure that it is not taken other than based on such criteria. Political considerations should be inadmissible irrespective of whether they are made within Councils for the Judiciary, the executive, or the legislature"⁹²

The idea to have a test of independence and impartiality of the judges, including, inter alia, "the level of the judiciary to which the appointment was made; whether the appointment was for a first appointment or for a judicial promotion; the subject matter of the case; other violations of law in the course of the appointment procedure; the relationship with the [legislature/executive power]; whether a person recommended for the appointment had obviously inferior competence to their counter-candidate"⁹³ Szwed notes in his blog in *Verfassungsblog* on whether such test is really needed, provided that the ECtHR in the *Reczkowicz* case, held that the mere fact that a judge was appointed at the request of the reorganised NCJ was a sufficient factor to declare a violation of Article 6 § 1 of ECHR.⁹⁴ The

Court." Venice Commission Opinion No. 977/2020.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e)

⁹⁰ This relates to the irregular judicial appointments done by the NCJ after the 2018 reform in Poland. M Szwed, *Testing judicial independence: On the recent developments in the Polish rule of law crisis*, *VerfBlog*, 2022/8/18.

<https://verfassungsblog.de/testing-judicial-independence/>, DOI: 10.17176/20220818-182010-0

⁹¹ *ibid.*

⁹² 9 CCJE-BU(2020)3, Report on judicial independence and impartiality in the Council of Europe member States (2019 edition), 30 March 2020.

⁹³ See for more details M Szwed on the topic of the test introduced by the Supreme Court of Poland. The Supreme Court carefully considered the judge's selection process and his ties to the Ministry of Justice while evaluating the "independence and impartiality" of J.D., the improperly appointed judge of the court of appeal.

⁹⁴ *ibid.*



alternative test introduced in Poland in the amendment to the Act on the Supreme Court introduced provisions authorising courts to examine, at the request of party to proceedings, "a judge's compliance with the requirements of independence and impartiality, taking into account the circumstances surrounding his or her appointment and his or her conduct after appointment".⁹⁵ Despite some critics on the amendment⁹⁶, contemplating such measures in Albania might be valuable, especially in areas not covered by existing legislation, such as the evaluation of judges and prosecutors' behaviour and their impact on judicial independence (*which make elements of the judicial culture*⁹⁷). A test of this kind might make the standards for evaluating judges' conduct and qualifications clearer, which would improve the judiciary's transparency.

The next section intends to scrutinize the evolution of judicial independence during the transitional phases 1991-1998, 1998-2016 and 2016-now. The idea is to understand whether in the last 30 years that we've been shifting around institutions, have we arrived in the model that would guarantee no interference by the executive power, no corruption among judiciary members, and an increase of trust of members in the justice system.

⁹⁵ *ibid.*

⁹⁶ See for more details M Szwed on the topic.

⁹⁷ *Dolińska-Ficek and Ozimek v. Poland*, para 86. The relevant provisions of the 2011 Act on the NCJ, as amended by the 2017 Amending Act, Section 11a, which notes the procedure of electing the president of a district court, a regional court or a military court, or a court of appeal, district administrative court or military district court, the speaker of the parliament will prepare a file with "information on the candidate's judicial achievements, including socially significant or precedent-setting judgments, and relevant information on **the candidate's judicial culture**, primarily disclosed during inspections and lustrations."



3. Historical overview of the constitutional mandate and the status of independence of judicial structures during the transition

Three distinct periods can be distinguished in the development of the Albanian legal system: The first attempt to lay the groundwork for the independence of an independent judicial system took place between 1991 and 1998, when the 1998 Constitution went into effect. The second phase, which runs from 1998 to 2016, is a period of transition during which several types of judicial self-governance are tried and tested, and efforts are made to combat systemic corruption. The commencement of the third phase in 2016 marked by the justice reform signifies the conclusion of this one. The third phase, which runs from 2016 to the present, reflects the updated legal system following the significant amendments made to the Constitution in that year.

Without a focus on the significance of the changes made to the constitutional mandate and the autonomy of judicial organisations during the transitional period, it is impossible to analyse judicial culture in a vacuum. Based on the results of the historical comparison of judicial systems using the standards table, the primary facets of the treatment of the judiciary's independence will be covered in this part.

In response to the above-mentioned hypotheses, this section aims to provide an overview of the historical development of justice, with a focus on the bodies that have been authorised to oversee the inspection and disciplinary processes of justice institutions.

The transition period after the fall of the communist regime was characterized by the gradual removal of elements of the monist system and the establishment of new structures. This process of removing monist elements was accompanied by efforts to recreate and reform the judicial system. New institutions were founded⁹⁸, and the training and professionalisation of judges and prosecutors became part of the efforts to ensure a judicial system more independent from political influences.⁹⁹

⁹⁸Law No. 7574, dated 24.6.1992, on the organization of justice and some changes in the codes of criminal and civil procedures, gave the first contours of the justice system after the change of regime. In this period, the judicial system consisted of the Court of Cassation, the Court of Appeal, courts of first instance and military courts, as well as the presence of other institutions such as the Prosecutor's Office and the Supreme Council of Justice.

⁹⁹In the law No. 7491, dated 29.4.1991, Regarding the main constitutional provisions, the constitutional principle of the separation of legislative, executive, and judicial powers is sanctioned, as well as the principle of the independence of the courts in the exercise of judicial power. Article 3 "The fundamental principle of state organization is the separation of legislative, executive and judicial power", and Article 5 "Judicial power is exercised by courts that are independent and guided only by the law."



This makes the first attempt to a constitutional reform with the introduction in early 1991, the law "On the Principal Constitutional Provisions"¹⁰⁰ which superseded the previous communist regime's Constitution, governing the creation, structure, and operations of the judicial system. As Luarasi noted in "Along with the legal reform, efforts were made to carry out an institutional reform. All structures of the totalitarian state were demolished, and new institutional structures took their place [following western models]."¹⁰¹

With the exception of instances where they ran counter to the new constitutional framework, these components of the prior system did not undergo any notable modifications at this time.¹⁰² After a year, an amendment to the On the Principal Constitutional Provisions was approved, on the basis of which, the first Constitutional Court and the High Council of Justice (HCJ) were established.¹⁰³ The HCJ had authority over the appointment, advancement, transfer, and termination of judges, prosecutors, and investigators in addition to imposing disciplinary actions.¹⁰⁴ The quasi-executive character of the HCJ led to issues with how its duties were carried out. According to several decisions of the Constitutional Court, the HCJ conducted the judge's dismissal "for serious violation of discipline at work," "for violation of the judge's ethics," "for violation of the law and incapacity in office," without informing, calling, or giving the parties a chance to defend themselves--breaching the principle of rule of law.¹⁰⁵

In 1991-1998, overall, the parliament had an extensive role in the appointment and the selection of judges, as the Parliament appointed, with the recommendation of the President in some instances, (i) The president and deputy president of the Court of Cassation (Supreme Court)¹⁰⁶; (ii) The judges of the Supreme court¹⁰⁷, (iii) the

¹⁰⁰Law no. 7491, dated 29.4.1991.

¹⁰¹ A Luarasi, Legal and Institutional Reform in Albania after the democratic revolution (1991-1997) (1997), p 33. < <https://www.nato.int/acad/fellow/95-97/luarasi.pdf>>

¹⁰²See further OSCE, Analysis of the legal system in Albania (2004), p 1.

¹⁰³Law no. 7561, dated 29.4.1991 "On some amendments and additions to Law no. 7491, dated 29.4.1991 " On the Principal Constitutional Provisions". KLD was the body that could take measures for violations of discipline at work against judges, prosecutors, and the investigators.

¹⁰⁴The organization and administration of the courts in Albania: The role of the presidents of the courts, chancellors, and legal assistants in the perspective of the SEJ's recommendations and in the framework of the judicial reform in Albania

¹⁰⁵Constitutional Court, Decision No. 15, dated 3.6.1997. The court has valued this as a violation of the due process of law, and a violation of the independence of judges and prosecutors as subjects of independent judicial power. In this decision, the CJK considered that it was necessary to make an addition to Article 20 of Law No. 7574, dated 24.06.1992 "On the organization of justice and some changes in the Codes of Criminal and Civil Procedures", with the following content: "Against the decision of the High Council of Justice can be appealed to the Court of Cassation".

¹⁰⁶ Law No, Article 6. The president and members of the Court of Cassation are elected once every 7 years with the right to reelection.

¹⁰⁷ Law No, Article 6.



General Prosecutor¹⁰⁸; (iv) five out of 9 members of the Constitutional Court¹⁰⁹. The President of the Republic was the chair of the High Council of Justice, and the Ministry of Justice, was one of the members of the council.¹¹⁰ Some issues in this timeframe relate to the independence of judiciary. According to the ECtHR, "relevant in the assessment of independence (and impartiality) of a tribunal are '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'."¹¹¹ In this instance, the extensive politicisation of the process could have endangered the neutrality of the judiciary in Albania.

Furthermore, during this period, the HCJ had the prerogatives to control the appointment, transfer of judges, periodic evaluation of judges, investigation of complaints against judges, disciplinary measures and dismissal of judges.¹¹² As for the dismissal of judges, the HCJ could do so in cases where judges committed a crime, had mental or physical disabilities, acts or behaviours that discredit the position and image of the judge, or professional insufficiency.¹¹³ In cases where judges below the level of the Supreme Court were criminally prosecuted, when the latter were criminally prosecuted, if the HCJ did not give its consent within 24 hours from the notification of the charge, the criminal proceeding body had to release the judge. In the current system, the procedure concerning judges facing criminal charges has undergone alterations. The previous requirement for approval within 24 hours from the HCJ been eliminated.

The introduction of the notion of disciplinary responsibility suggested a change in the direction of a more responsible legal system.¹¹⁴ Nevertheless, obstacles continued because of ingrained behaviours and a delayed response to these changes.¹¹⁵ In its assessment to the institutional reform and the Albanian legal system from 1991-1997, Luarasi noted that

While the legal reform could be considered successful in general, the institutional reform did not accomplish the task of establishing the rule of law and creation of a steady democracy. The newly created institutions revealed deficiencies. The Authoritarianism of the old period of the communist regime loomed on the new institutions. An ideology instead of the legal state was

¹⁰⁸ Law No, Article 14.

¹⁰⁹ Law No, Article 18. 4 members of the Constitutional Court were appointed by the President.

¹¹⁰ Law No, Article 15.

¹¹¹ CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §34.

¹¹² Law no. 7561, dated 29.4.1991, Article 147.

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*



being installed, which very soon made people lose confidence. These institutions did not withstand the fire test. In a way they fomented the rebellion of 1997 and disintegrated in the face of the dramatic events generating chaos and anarchy. Establishment of steady and efficient institutions remains a sine-qua-non for the functioning of the legal state and pluralistic democracy in Albania. The 1997 crisis was in the first place an institutional crisis.¹¹⁶

This is the first instance that highlight the possibility that deeply ingrained cultural elements can impede structural changes within a society.

From the adoption of the Constitution in 1998, and until its substantial amendments in 2016¹¹⁷, the separation of powers and guaranteeing the independence of the judiciary was not achieved.¹¹⁸ The group of senior experts in the analytical report and strategy for justice reform explained that this was due to the tradition of adopting laws from other nations without taking into account the context of their implementation in the nation or the harmonisation of those laws with the legal framework as a whole.¹¹⁹

In this period, judicial culture was characterized by dynamics inherited from the previous period, including political influences on judicial processes and a certain level of resistance to rapid change.¹²⁰ These challenges resulted in a slower process of transformation of behaviours and norms in the judicial system, especially in the controlling role of the executive power over matters related to the appointments, status, career, and discipline of justice officials.¹²¹

Also, according to the experts, "The Constitution of 1998 has failed to insulate the independent institutions as much as it should from the influence of the political majorities. Similarly, the Constitution has failed to ensure a real and effective supervision of the Assembly over the government. However, it is clear to all actors

¹¹⁶ A Luarasi, *Legal and Institutional Reform in Albania after the democratic revolution (1991-1997)* (1997), p 33. <<https://www.nato.int/acad/fellow/95-97/luarasi.pdf>>

¹¹⁷The constitution approved in 1998 has undergone several changes in 2008, in terms of changing the mixed voting system to the proportional regional system, changing the mandate of the local government from three to four years, the way of electing the president, and establishing a limited five-year term for the Attorney General. These changes are outside the focus of the analysis of this study.

¹¹⁸Draft 24/09/2015, Explanatory material for constitutional changes, p 2.

<https://www.reformanedrejttesi.al/sites/default/files/material_shpjegues_per_ndryshimet_kushtetuese_24.09.2015.pdf>

¹¹⁹Reform Commission <<http://www.reformanedrejttesi.al/dokumenti-strategjik-dhe-plani-i-veprimit>>.

¹²⁰In October 2012, the Center for Transparency and the Right to Information conducted a survey with 58% of the total number of judges. 25% of them were of the opinion that the justice system is corrupt, while 58% believed that the system was perceived as corrupt. 50% of judges were of the opinion that the judicial system was not free from political influence.

¹²¹ibid.



and observers of political and institutional life in Albania that the most prominent failure of the 1998 Constitution has been its inability to create an independent, accountable, and efficient justice system."¹²²

In terms of irregularities in the disciplinary processes during this time frame, there is a plethora of Constitutional Court's decisions on the rule of law and human rights infringements issues that arose from the lack of independence of HJC and the other disciplinary mechanisms. To illustrate,

Under the Judiciary (Organisation) Act, the Judicial Service Commission (JSC), sitting to decide on a disciplinary measure against a judge, is required to summons the judge concerned and hear his or her side of the case. Two judges who sat on the JSC panel that disciplined a judge subsequently also sat in the joint chamber of the Court of Cassation, which rejected the judge's appeal. The Constitutional Court found that there had been a violation of the judge's right to be heard by the JSC, and of the principle of a fair trial inasmuch as two judges who were members of the JSC panel also sat in the joint chamber of the Court of Cassation.¹²³

Nevertheless, the Constitutional Court had held that the inclusion of the Ministry of Justice in the process is not a default indicator of the impartiality of the disciplinary proceedings. In the decision No 11, dated 27.05.2004, the Constitutional Court held that

The decisions of judges should conform only to the Constitution and laws. In order to ensure the best results, mechanisms have been introduced to ensure that pressure is not applied from inside or outside the judicial power. The Albanian Constitution has entrenched the independence of the different state powers, putting the emphasis on the independence of the judicial power. The establishment of the High Council of Justice is a component element of that principle. The fact that the Minister of Justice carries out verification of alleged violations by judges and presents proposals for disciplinary proceedings is not unconstitutional because the Minister has no right to vote and the High Council of Justice is free to decide on his or her proposals, thereby guaranteeing judges due process of law in disciplinary proceedings.¹²⁴

In general, the Constitutional Court in Albania held that "the Albanian Constitution guarantees the independence of the judicial power, granting judges the right of being untouchable and irremovable from office without reasonable grounds, as well

¹²²ibid.

¹²³ Albania, Constitutional Court, Date of issuance: 04-06-1999, Number of case: 43,ALB-1999-3-006, [English](#). CEELI Institute Manual, p 705.

¹²⁴ Constitutional Court, Decision No 11, 27.05.2004.



as the prohibition of criminal proceedings without the authorisation of the High Council of Justice. Only courts have the right to review judicial decisions."¹²⁵ Holding a position that the legal framework in place at that time did provide the necessary model to guarantee the independence of judiciary, both at institutional and individual level. Nevertheless, the reality at this time was evidently different. In the analysis of the justice system in Albania conducted by the group of high level experts, it is noted that

In the absence of an articulated pressure by the public and a broad political agreement, and the lack of a sufficient democratic tradition of the country, parliamentary majorities and governments of the time were satisfied with the cosmetic interference part in the justice system, mainly supported only by the votes of the majority. Worse, the very nature of these interventions has created the space for politics, which in any case to seek control over the governance of the institutions of justice to avoid risks that could come to politics from an independent justice. The policy has not escaped the temptation to save as much controlling role in matters relating to appointments, status, career and discipline of judicial officials, influencing in this way their behavior. Perhaps the most striking example of this constant trend is the insistence to preserve an exclusive role of the executive in the inspection of the activity of judges and their discipline.¹²⁶

At prosecution level, there existed an overarching concern about the extent of independence. For instance, the General Prosecutor proposed to the President recommendations for appointments, promotions, transfers, or dismissals. In addition, he had the authority to designate and remove heads and deputy heads in the prosecution departments, put prosecutors in temporary roles, start disciplinary actions and decide what sanctions to apply. The prosecution system's independence was impacted by this arrangement, which concentrated important decision-making in the hands of the general prosecutor.¹²⁷ In this context, based on recommendations from external experts and organisations, a necessity was raised to establish councils, where for instance, "a prosecution counsel must be able to provide independence from the government and separate the system of prosecution from the policy, and be limited to personal matters of the discipline, the appointment of prosecutors, training, evaluation and budget issues".¹²⁸

To provide a final overview on the issues relating to the independence of the judicial power at this time, particularly to the disciplinary procedure, these are the final takeaways that could be used as a reflection on how the system has changed from a period to the other:

¹²⁵ *ibid.*

¹²⁶ Ad Hoc Parliamentary Committee, Analysis of the Justice System in Albania (2015), p 8.

¹²⁷ *ibid.*, p 280.

¹²⁸ *ibid.*, p 15.



- The HCJ and the Ministry of Justice, which controlled the work of judges, during the performance of their duties, did not limit themselves to the task of training judges, but also examined judicial decisions, expressing their opinion on how judges implement substantive and procedural law.
- HCJ statistics - the vast majority of disciplinary proceedings and dismissal from office, are based on the argument that the judge has incorrectly applied the material or procedural law in the rendering of judicial decisions, which is a violation of the independence of the judicial power.
- The realization of the control of the judge from the point of view of professionalism and non-disdain with the obligation to interpret the laws, could be exercised by the HCJ through the criteria for the results achieved by the judge, keeping in mind the number of his decisions, those broken by higher levels of judges in relation to those who have been left in power.
- The activity of HCJ and that of the Ministry of Justice was debatable. The Ministry of Justice has had the right to carry out inspections of courts and judges, as well as the exclusive right to propose to the HCJ the taking of disciplinary measures, including the dismissal of judges. Although this is not a violation of the separation of powers and the independence of judges as a principle, in fragile democratisation of a post communist country like Albania, it left room for interferences from the executive and other influences.
- The Constitutional Court, in a request of the Colleges for the influence of the Ministry of Justice on the Judiciary, reasoned that the influence of the Ministry of Justice would be incalculable if the verification and the proposal of the disciplinary measure would be made by the HCJ under the supervision of the Inspectorate (Decision No. 3/2003).
- Violation of the principle of due process by the HCJ has been evidenced in several cases by the Constitutional Court. The Constitutional Court has also repealed one of the articles of the regulation "On the authority to exercise the activities of the Supreme Council of Justice", which allowed decisions on the method of reviewing disciplinary actions to be left to the authority that requested the action.
- Constitutional Court has held that: "The inspectorates of HCJ and MD, have the right to control not the delivery of justice, but its administration by the courts of first instance and those of appeal, both of which are the basis for starting and disciplinary proceedings, which ends with the decision of HCJ, respecting the requirements and principles of due process in the constitutional sense."



From a theoretical perspective, Gloppen states that "a well-functioning judiciary is essential to fight corruption"¹²⁹, but the problem is that "judicial institutions are themselves corruptible".¹³⁰ This is considered a challenge for the judiciary, especially when corruption may risk interfering with holding members of the judiciary accountable for violations of discipline at work - leading to the inviolability of the judiciary (a violation of the principle of judicial independence).¹³¹

¹²⁹S Gloppen, Court, corruption, and judicial independence (2014), p 1.

<https://www.cmi.no/publications/file/5091-courts-corruption-and-judicial-independence.pdf>.

¹³⁰Ibid.

¹³¹page 158.



4. High Inspector of Justice

In the Albanian judicial system before the justice reform, the main problems identified were related to (1) efficiency and (2) public trust in the judicial system.¹³² Both of these elements are related to corruption, external influence on decision-making and the administration of justice by judicial structures.

During the transition period, an evident problem was the element of impunity of the members of the judiciary - not being held accountable for the way they administered justice. The period before the judicial reform was characterised by a mystification of the figure of the judge, protection of the work of the prosecutors, and inviolability of the members of the HCJ.¹³³

One factor that can ensure the preservation of independence from outside influences is the regular assignment of responsibility for disciplinary violations, in accordance with the standards for ensuring the independence of the judiciary.¹³⁴ Except for cases related to the decision-making of a judge or prosecutor that are not foreseen as a violation of the law or as a result of illegal behaviour¹³⁵, disciplining members of the judiciary when they are in violation of the law is essential for maintaining integrity and trust in the judicial system.¹³⁶ In order to undo the work of the HCJ and the inspectorate of the Ministry of Justice¹³⁷ in violation of the principle of the separation of powers and the independence of the judiciary in Albania, in 2016, the creation of the High Inspector of Justice was proposed as a new

¹³² E Merkuri, Justice Reform: The Role of the High Inspector of Justice (ILD), ISP (2023), p 5.

<<https://ild.al/sq/2023/05/02/reforma-ne-drejtessi-rol-i-inspektoratit-te-larte-te-drejtessise/>>

¹³³ Albanian Committee of Helsinki, Report: Creation and operation of new justice institutions (2019), p 19.

<<https://ahc.org.al/ep-content/uploads/2019/08/RAPORT-%E2%80%93-CREATION-DHE-FUNCTIONIMI-I-ORGANEVE-T%C3%8B-REJA-T%C3%8B-GOVERNMENT-S%C3%8B-Towards%C3%8BSIS%C3%8B.pdf>>

¹³⁴ See Recommendation CM/Rec(2010)12, Chapter VII; the CCJE Opinion No. 3 (2002). Disciplinary proceedings may follow when judges do not perform their duties efficiently and properly. Such proceedings must be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions must be proportionate.

¹³⁵ See CCJE Opinion No. 3 (2002), paras 75, 76; Recommendation CM/Rec(2010)12, paras 66-71.

¹³⁶ CCJE (2010), Magna Carta of Judges (Fundamental Principles) (2010). <<https://rm.coe.int/168063e431>>

Independence and impartiality of the judiciary are essential prerequisites for the functioning of justice. The independence of the judiciary shall be guaranteed in relation to judicial activities and in relation to recruitment, appointment up to retirement age, promotions, tenure, training, judicial immunity, discipline, remuneration and financing of the judiciary. The disciplinary procedure takes place before an independent body with the possibility of recourse before the court.

¹³⁷ In the system before the 2016 reform, the Minister of Justice had the right to conduct inspections of courts and judges, as well as the right to propose to the High Council of Justice the taking of disciplinary measures, including the dismissal of judges; this violated the principle of separation of powers and the principle of independence of judges.



constitutional institution¹³⁸ with a clear goal: "to make the justice system more accountable and prevent the new system from reverting to the previous form".¹³⁹

As will be further discussed, the HIJ has the ability to impact Albania's judicial culture through its active supervision and evaluation of the behaviour and moral standards of those who work in the legal system. This supervisory function plays a vital role in moulding the ethical foundation and conduct of judges, in the following ways:

- (i) By conducting investigations, investigating complaints, and conducting investigations, the HIJ upholds the value of judges acting ethically, which is essential to developing a positive judicial culture
- (ii) HIJ may host seminars or training sessions for judges or other judiciary members on professional standards and the value of preserving the judiciary's independence. Providing direction and tools has a big impact on how judges, prosecutors, and Council members think and act inside the system. The HIJ is the primary organisation in analysing data, trends, and approaches that members of the judiciary have to the judicial culture, even though delivering trainings may not fall within its functional purview. This structure is the most suitable in this instance to identify the gaps concerning disciplinary infractions;
- (iii) HIJ may propose policies or guidelines aimed at increasing judicial culture, which may include codes of conduct, good practices, or recommendations to courts, prosecutors, and councils, for the promotion of a fair, transparent, and independent judiciary;
- (iv) Accountability within the judiciary can also be enhanced by offering transparent procedures for investigations into complaints submitted to the HIJ. The public's and the legal community's perceptions of the judicial system may benefit from this transparency;
- (v) HIJ may suggest partnerships with the Councils and the prosecution within the judiciary to promote policies and procedures that uphold a positive judicial culture by drawing attention to issues pertaining to recurrent infractions of discipline.
- (vi) To ensure the independence of judges, prosecutors, and Council members, HIJ may assume a protective role during investigations into disciplinary infractions brought about by outside pressures or influences.

¹³⁸ HIJ is one of the new bodies for the administration of the judicial system, together with HPC, HJC and Justice Appointments Council. Based on article 283, point 8, of the law "On governing bodies of the justice system", as amended, "The Office of the High Inspector of Justice will be considered established on the first day of the month following the appointment of the High Inspector of Justice from the Assembly". The High Inspector of Justice was elected by the Assembly with decision no. 2/2020.

¹³⁹ E Mërkuri, 'Justice Reform: The Role of the High Inspector of Justice (ILD)', p 5.



The above points are recommendations that come from reading a wide literature on the practices followed by HIJ counterparts in different countries and systems.¹⁴⁰ The key element that defines these recommendations is proactivity, or what is known in law, *motu proprio* (Latin for "on one's own initiative"), which describes an official action taken without a formal request from another party.

In addition to the disciplinary investigations and inspections provided for in the law¹⁴¹, undertaking the above recommendations can be considered as exceeding the scope of the HIJ (or as the saying goes "*That's above my pay grade.*"¹⁴²). Perhaps the recommendations made will add to the already heavy workload for the HIJ Office, which is already operating at reduced capacity. On the other hand, if judicial culture improvement initiatives are implemented now, they may eventually result in a decrease in the volume of complaints.

As an example, in November 2021, in the United Kingdom, the judicial discipline procedure in England and Wales was sent out for public consultation.¹⁴³ It was noted that the Judicial Conduct Inquiry Office (JCIO), the equivalent of the HIJ in England and Wales, has dealt with 10,000 complaints since the office was created in 2013.¹⁴⁴ In England and Wales, with a combined population of 60 million people¹⁴⁵, and 22,000 judicial officials¹⁴⁶, there were about 50 cases registered per year regarding the violation of discipline of persons holding a judicial mandate.¹⁴⁷ Over 5,669 complaints have been handled by the HIJ in its second year of operation, accounting for the backlog from the HIJ's predecessor institutions (roughly 56% of the total number of complaints that JCIOs has handled over a ten-year period). Logically, the comparison here is illustrative since the levels of judicial culture formation in the English and Albanian judicial systems are not the same.¹⁴⁸ However, it is important to note two things at this point:

¹⁴⁰ G Gee, 'The Persistent Politics of Judicial Selection: A Comparative Analysis', in A. Seibert-Fohr (ed.) 'Judicial Independence in Transition' (Heidelberg: Springer 2012), 132-133. S Shetreet, and C Forsyth, eds, 'The culture of judicial independence: conceptual foundations and practical challenges', Martinus Nijhoff Publishers, 2011. M Bobek, 'The Fortress of Judicial Independence and The Mental Transitions of The Central European Judiciaries' (2008) 14 European Public Law, 101.

¹⁴¹ Law No. 115/2016, Article 194.

¹⁴² "*Above my pay grade*" is an idiom that describes a situation that is outside one's area of responsibility, a decision that must be made by people of a higher rank. Something that is above someone's salary threshold requires more knowledge than that person has, or more authority than that person can possess.

¹⁴³ UK Ministry of Justice, Judicial Discipline, Consultation on proposals about the judicial disciplinary system in England and Wales, A consultation by the Lord Chancellor and Lord Chief Justice of England and Wales, (2021). <<https://consult.justice.gov.uk/>> This procedure had not been changed for 10 years, and the goal was to adapt the judicial disciplinary procedure to changes in the social and cultural context.

¹⁴⁴ *ibid*, p 6.

¹⁴⁵ Population UK <<https://www.ukpopulation.org/>>

¹⁴⁶ UK Ministry of Justice, Judicial Discipline Proposal, p 6.

¹⁴⁷ *ibid*.

¹⁴⁸ The English judicial system is considered one of the best and most independent in the world. See also Judicial Office UK, The judicial System in England and Wales: A visitor's guide <<https://www.judiciary.uk/ep-content/uploads/2016/05/international-visitors-guide-10a.pdf>>



- First, the high number of complaints addressed to the HIJ are not necessarily an indicator of the success of the judicial system; on the contrary, it is an indicator that reflects the problems of citizens with individuals who are part of the judicial system. If complaints are handled individually, without addressing the context that allows or encourages a specific behaviour of judicial individuals to be the subject of an appeal to the HIJ, this number can be increased. As will be discussed further below, HIJ thematic inspections on issues evidenced by complaints are a good attempt to change the country's judicial culture.
- Second, in the English judicial system, the problems of their disciplinary procedure system that they want to improve are: (1) in a number of their cases, investigations take a long time, and (2) there is a need to rather in relation to informing the public so that they better understand decision-making on the cause-and-effect relationship between a disciplinary offense and a disciplinary sanction.¹⁴⁹ These challenges resonate with the ongoing efforts in Albania to refine their disciplinary processes within the judiciary.

4.1 HIJ' constitutional status and mandate

Status of the High Inspector of Justice

Based on the constitutional provisions, the High Inspector of Justice is elected "by three-fifths of the members of the Assembly, for a period of 9 years, without the right to re-election, from the ranks of prominent lawyers with no less than 15 years of work experience in the profession, with high moral and professional integrity".¹⁵⁰ The High Inspector of Justice enjoys the status of a judge of the Supreme Court, and may be dismissed by the Constitution for (i) committing serious professional or ethical violations, as well as (ii) when convicted by a final court decision.¹⁵¹

The legislator has chosen this way of electing the head of the HIJ Office in order to remove it from the influence of the executive. This is in accordance with

¹⁴⁹UK Ministry of Justice, Judicial Discipline Proposal, p 6.

¹⁵⁰Constitution, Article 147/d. Constitution, article 147/d point 4; Law no. 115/2016, article 199, point 2 and article 201. KED selects and lists 5 candidacies according to its evaluation, which are sent to the Assembly to vote. The selection procedure must be public and transparent. The ILD must be elected with a 3/5 majority by the assembly within 30 days. If this is not achieved, then the first candidate ranked by KED is announced as appointed. The current High Inspector of Justice, Artur Metani, was elected by decision no. 2/2020, with 98 votes in favor.

¹⁵¹Ibid, Article 147/e. The protection given to the High Inspector of Justice with the involvement of the CJK in his dismissal for violation of discipline, is a great guarantee against the individual and institutional independence of the HIJ.



international standards, which state that "disciplinary mechanisms must be effective, objective, and protected from political influences".¹⁵²

During the interviews, the interviewees unanimously state that the legal framework in force to guarantee the independence and separation of the HIJ is adequate, good and exhaustive. They point out that the problem lies in its implementation in practice. The HIJ is estimated to be in need of human resources and specialized staff, as there is currently a shortage in the ranks of judge profile inspectors, and the appropriate forms and mechanisms must be found to recruit quality staff of various profiles. It is necessary to have the will of all actors for HIJ to adequately perform its role and duties.

For the performance/attitude of the HIJ to improve, the interviewees suggest that the actors who have the legal obligation to 'refer', such as the heads of prosecutions and courts, the General Prosecutor or the Minister of Justice, should be more proactive.

Mandate of the High Inspector of Justice

The creation of this institution, as well as the main governing institutions of justice, came as a necessity of an independent, responsible and effective judiciary in guaranteeing the rule of law, equal access to justice, as well as the fulfillment of the necessary reforms for membership in the EU.

The legal framework on the basis of which the HIJ was created are the constitutional amendments approved by the Assembly with Law no. 76/2016 "On some additions and changes to law no. 8417, dated 21.10.1998 "Constitution of the Republic of Albania", as amended, Law no. 96/2016 "On the status of judges and prosecutors in the Republic of Albania", amended, as well as Law no. 115/2016 "On the governing bodies of the justice system", amended.

HIJ, as a newly created institution, is an innovation for our judicial system, as this body is recognized with important powers, both judicial and administrative. It is the institution responsible for verifying complaints, initiating investigations into violations and initiating disciplinary proceedings against judges and prosecutors of all levels, members of the Supreme Judicial Council, members of the Supreme Prosecution Council, and the Prosecutor General.

The HIJ conducts regular evaluations of the performance of judges and prosecutors. This assessment includes assessing the quality of decisions and respecting ethical and legal standards, promoting a culture of impartial justice. But,

It is essential not to confuse ethical principles with disciplinary matters. On the contrary, it should be recognized that the ethical principles derive from the professional experience of all judges and are determined to advance justice in

¹⁵²CDCJ, Review of the implementation of the council of Europe plan of action on strengthening judicial independence and impartiality (2022) < <https://rm.coe.int/cdcj-2022-07e-sofia/1680a930ee>>.



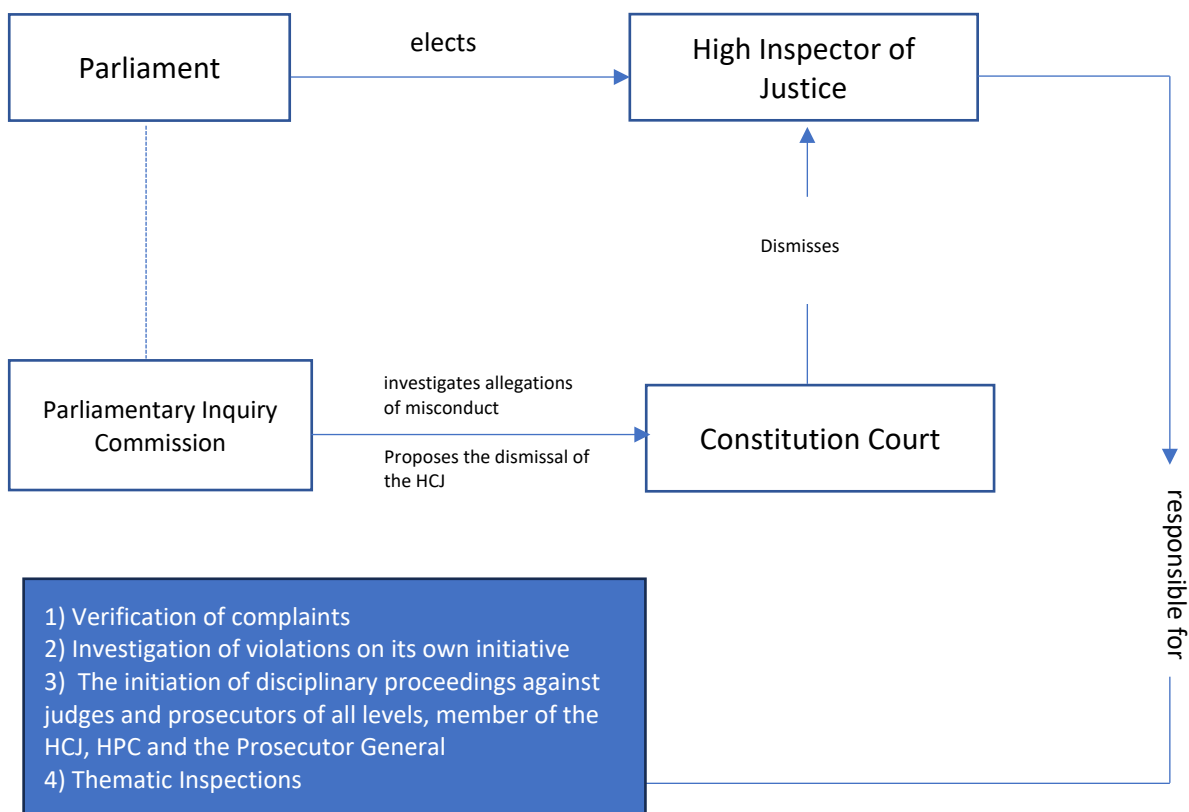
general and to contribute to the understanding of the work of judges. Ethical principles should also help develop a judicial culture which itself will contribute to social cohesion.¹⁵³

Following the evaluations, the HIJ provides recommendations to improve practices and behaviors within the judicial system. These recommendations often address identified challenges in using the law and maintaining the independence of judges and prosecutors.

HIJ has the task of monitoring the independence of judges and prosecutors from external influences. This includes identifying and reporting any type of pressure or interference that may influence their decision-making.

Through their recommendations and reports, HIJ contributes to improving the culture of judicial institutions, promoting independence, integrity and professionalism in the decision-making process.

Table 2: The process of disciplinary of the High Justice Inspector



Source: Constitution of Albania, Article 147/e.

¹⁵³International Association of Judges, Judicial Administration and status of Judiciary, <<http://www.iaj-uum.org/iuë/ëp-content/uploads/2013/02/I-SC-2004-conclusions-E.pdf>>



Law no. 115/2016 "On governing bodies in the justice system", as amended, in Part IV, Chapters I-IV, articles 193-216, regulates organizational issues. So, it regulates in detail the constitutional norms related to the object of activity of the High Inspector of Justice, the independence, budget and structure of the institution, the status of the High Inspector of Justice, incompatibilities, selection, mandate, powers, Deputy- the High Inspector of Justice, the investigation of disciplinary violations, the method of appointment, disciplinary violations, and the status of inspectors.

The HIJ conducts regular evaluations of the performance of judges and prosecutors. This assessment includes assessing the quality of decisions and respecting ethical and legal standards, promoting a culture of impartial justice. But,

It is essential not to confuse ethical principles with disciplinary matters. On the contrary, it should be recognized that the ethical principles derive from the professional experience of all judges and are determined to advance justice in general and to contribute to the understanding of the work of judges. Ethical principles should also help develop a judicial culture which itself will contribute to social cohesion.¹⁵⁴

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4.2 The role and performance of the HIJ

In the Declaration on Judicial Integrity, UNODC stated that in order to strengthen efforts to ensure that judges decide on cases based on the facts and in accordance with the law, without obstacles, undue influence, threats and interference, direct or indirect, it is important to support the creation and strengthening of disciplinary, control, evaluation mechanisms that hold members of the judiciary accountable, without compromising their independence.¹⁵⁵

¹⁵⁴International Association of Judges, Judicial Administration and status of Judiciary, <<http://www.iaj-ium.org/iuw/wp-content/uploads/2013/02/I-SC-2004-conclusions-E.pdf>>

¹⁵⁵UNODC, Declaration on Judicial Integrity, Global Judicial Integrity Network (2018).



This section will focus on the elements that have become part of the judicial system in Albania: the constitutional and legal provisions that regulate cases of violation of judicial duty, the authority that conducts the investigation of these violations, and the authority that is responsible for determining the measure of discipline in a specific matter. In assessing the interplay between the law, the HIJ and the HJC/HPC (and where applicable, judicial review), this section aims to highlight the role of the HIJ in guaranteeing the principle of judicial independence.

The High Inspector of Justice is the institution responsible for verifying complaints, investigating violations and initiating disciplinary proceedings against judges and prosecutors of all levels, members of the HJC and HPC, the Prosecutor General, according to the procedure established by law.¹⁵⁶ Also, the HIJ is responsible for the institutional inspection of the courts and the prosecution.¹⁵⁷ Merkuri's study on the role of the HIJ in the justice reform found that the constitutional powers of the HIJ give the prerogative to "a single man" [referring to the High Inspector of Justice] to process the entire system of justice, including judges, prosecutors, council members, and the General Prosecutor.¹⁵⁸ As the saying goes, "with great power comes great responsibility," the HIJ may have the opportunity to influence (1) the creation of a positive judicial culture, through the practices and standards it controls, and (2) increasing citizen confidence in the judicial system.

The first set of functions of the HIJ are closely related to the disciplinary investigation. According to Bist, judicial discipline means

the regulation of behavior in such a way that [the judge or judicial functionary in our case] gives justice without prejudice (...). Self-discipline can be distinguished as (a) personal discipline, (b) family discipline, (c) social discipline, (d) personal discipline, and (e) ethical discipline.¹⁵⁹ The disciplinary procedure is closely

¹⁵⁶Constitution, Article 147/a, point 3.

¹⁵⁷Constitution, Article 147/d, point 2. In 2023, the HIJ published the inspection report "On the procedure of announcing and justifying judicial decisions of the Court of First Instance of the general jurisdiction of Tirana (civil chamber) and the Administrative Court of First Instance. This inspection was initiated due to the high number of complaints submitted to the HIJ, where claims were raised for in clarifying court decisions beyond legal deadlines. The HIJ found that in cases where judges' non-compliance with procedural deadlines should not be considered a priori as a possible disciplinary violation, but this should be the subject of investigation on a case-by-case basis. This report will be important for the HIJ to start with the consolidation of practice and the number of complaints that will be presented to the HIJ, as well as the efficiency of their treatment. See further <<https://ild.al/ep-content/uploads/2023/10/Raporti-i-Inspektimit.pdf>>.

¹⁵⁸Merkuri, p 6. The Constitutional Court is the only entity that cannot be processed by the HIJ.

¹⁵⁹p 2. Bist gives these clarifications on each form of discipline. Personal discipline includes proper behavior, decent dress, good communication, and maintaining moral values as a personal preference. Family discipline is about maintaining morals, ethical behavior and peace in the family. Social discipline is about the fact that a judge should aim for an introverted life. Professional discipline is about creating an atmosphere where each party feels free to discuss the case freely and without fear in an open court. Ethical discipline is based on the premise that a judge must be disciplined in every aspect of life. Despite the fact that here we are talking about the discipline of the judge, the discussion on these values also applies to the new institutions of justice in Albania. These principles are generally provided in the principles and rules of conduct in the ethics codes of judges and prosecutors, in terms of regulating their behavior in the public and private sphere, as well as relations



related to the discussion of the independence of the judiciary. Judges, prosecutors and members of the judicial system must be responsible in terms of, with the sole purpose of guaranteeing "the honor and integrity of the judiciary."¹⁶⁰ According to Lubet, the independence of the judiciary does not require "absolute immunity", where immunity should be seen as closely related to decision-making free from external influences, restrictions and pressures.¹⁶¹ In an analysis of the cases where discipline can violate the independence of judges, Lubet foresees the cases when (i) judges are punished or limited in the they interpret the law, (ii) the judge is disciplined when he has mistakenly violated the rights of the parties provided for in the law, (iii) for matters of public sensitivity, judges are criticized by the media and politicians on their decision-making.¹⁶² So, in this process there are two premises: judges (as well as all members of judicial self-government without discrimination) must be subject to disciplinary responsibility for the cases provided for in the law¹⁶³, and this disciplinary process should not violate the independence of these persons in decision-making and exercising their duties in good faith.

Disciplinary procedures in the Albanian judicial model

Based on Article 147/d, the HIJ is responsible for "(1) verifying complaints, (2) investigating violations, and (3) initiating disciplinary proceedings", to the categories defined above, i.e. judge , prosecutor, member of the HCJ and member of the KLP.¹⁶⁴

Legitimate entities to request the investigation of the disciplinary violation to IHJ inspectors are:

- (i) The Head of the Court, in the case of judges;
- (ii) The General Prosecutor, in the case of prosecutors¹⁶⁵;

with other institutions. See further CoE, "Magistrates ethics and deontology".

<https://www.coe.int/t/dghl/cooperation/lisbonnetœork/themis/Ethics/Paper>

¹⁶⁰S Lubet, "Judicial discipline and judicial independence", *Laë and contemporary problems*, Vol 61: No 3 (1998), p 14. <https://scholarship.laë.duke.edu/cgi/viewcontent.cgi?article=1097&context=lcp>

¹⁶¹ibid, p. 16.

¹⁶²ibid, p 13. Lubet makes a distinction for good faith decision-making by judges. Regardless of the cases where the decision-making of judges may be in accordance with or in error of the reading of the law, the consequences that may come such as the threat of losing the job position, damage to the reputation, expenses on investigative procedures by the disciplinary body and others, may lead to the surrender of the principle of independence of the judiciary. This presentation of the US legal system analyzed by Lubet is consistent with international standards on judicial independence, and constitutes a recommendation of this study. The HIJ office must be careful about the cases it investigates, in order not to create a spirit of intimidation among the judges that could affect their decision-making.

¹⁶³In Albania, the institution that carries out the investigation process for these violations is the High Inspector of Justice. But different legal systems have different models.

¹⁶⁴ Constitution, Article 147/d.

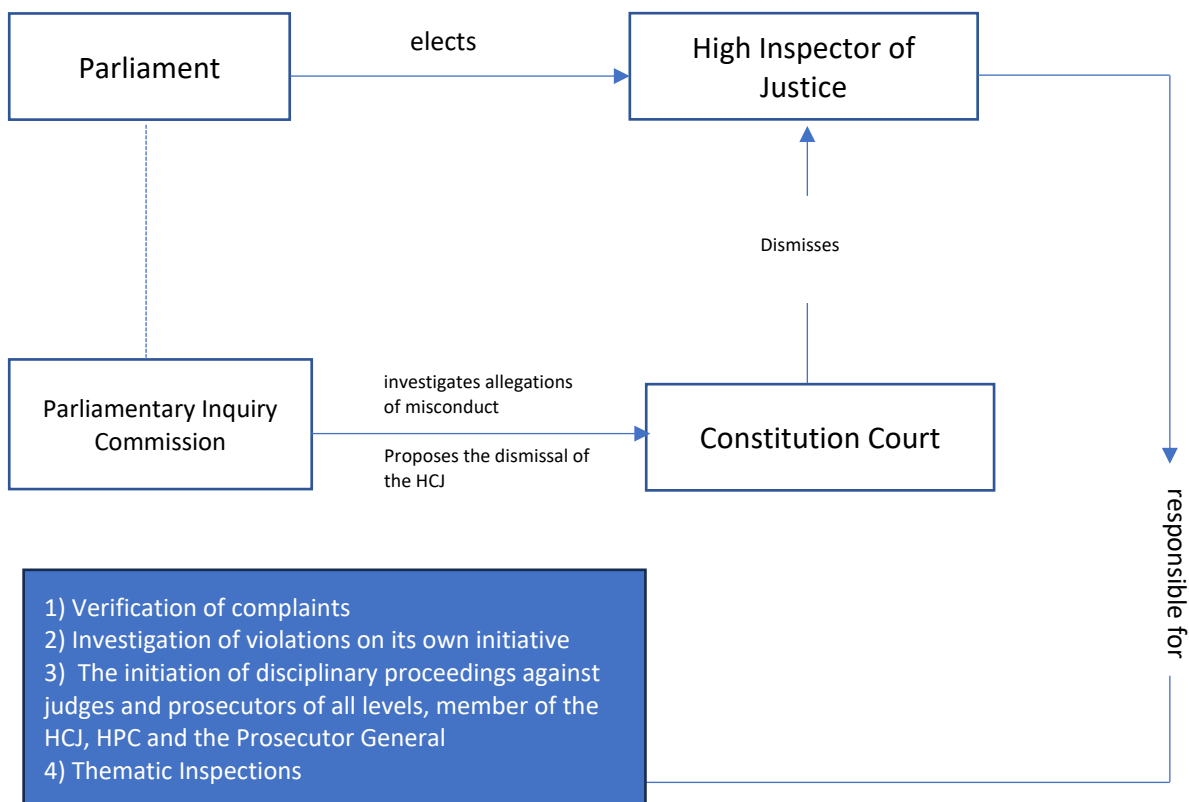
¹⁶⁵Also, the provision that the General Prosecutor can file HIJ requests for the investigation of disciplinary violations evidenced during the monthly reports by the heads of the prosecutor's offices, if implemented, is a



- (iii) Minister of Justice¹⁶⁶;
- (iv) A single member of the Council.¹⁶⁷

For the verification of complaints or the investigation of disciplinary violations against subjects, the Inspector can be set in motion based on the written complaint of any natural person, legal entity or public body concerned. The High Inspector investigates suspected violations mainly, based on public data or obtained in the framework of institutional and thematic inspections, on every aspect of the work of courts, judicial administration, prosecution offices and prosecution administration, based on the request of motivated in writing by the High Judicial Council, the High Prosecution Council, the Minister of Justice, the General Prosecutor and in the annual plan of inspections.

Table 3: The process of disciplinary of the High Justice Inspector



Source: Constitution of Albania, Article 147/e.

positive approach towards creating a culture of the rule of law. It cannot be realistic for the HIJ to take on the role of investigating *proprio motu* the disciplinary offense of the categories defined above. For this reason, the involvement of the PP, the Ministry of Justice (Article 107), the Head of the Special Prosecution (Article 106) and district prosecutors, regarding the obligation to inform the HIJ on disciplinary violations and problems encountered in the exercise of their activity, can create a culture of responsibility and eventually, a positive judicial culture in the judicial system.

¹⁶⁶Law no. 98/2016, Article 119, point 2(a).

¹⁶⁷Law no. 98/2016, Article 119, point 2(b).



Based on Law no. 96/2016 "On the status of judges and prosecutors", disciplinary violations are distinguished in three cases: disciplinary violations (Article 101), disciplinary violations related to the exercise of the function (Article 102), disciplinary violations outside the exercise of function (Article 103), and disciplinary violation due to the commission of a criminal offense (Article 104). In these provisions, for each case, a considerable number of behaviors and actions that may lead to the emergence of disciplinary responsibility are provided.

Table 4: Disciplinary violations and disciplinary measures

Disciplinary violation	Disciplinary measures
"Simple" disciplinary offense	Confidential notice
Disciplinary violations related to the exercise of the function	Public notice
Disciplinary violations outside the exercise of the function	Temporary salary reduction <ul style="list-style-type: none"> • up to 40 percent for a period not longer than one year • in the case of magistrates who have resigned, a fine equal to the temporary reduction in salary
Disciplinary violations due to the commission of a criminal offense	Demotion from a higher position to a lower one or from a position in the GJKKO or in the Special Prosecutor's Office in a court of general jurisdiction or in another prosecutor's office
	Suspension from duty for a period of three months to two years, with the right to benefit from the minimum wage dismissal from office

Disciplinary violations are investigated by the High Inspector of Justice. Depending on the subject that is investigated, the legal basis is determined.¹⁶⁸

¹⁶⁸Law no. 115/2016, Article 6: "Disciplinary violations of the member of the High Judicial Council are investigated by the High Inspector of Justice, based on the procedures and rules provided in the law "On the status of judges and prosecutors in the Republic of Albania" ." The disciplinary procedure against members of the High Judicial Council is carried out by the Constitutional Court, which decides on the basis of the law "On



Any natural or legal person can address the HIJ with a complaint for

[a]ctions or omissions, which constitute non-fulfilment of duty, or unprofessional or unethical behavior during the exercise of the function or outside of it, which discredit the position and figure of judges and prosecutors of all levels in the Republic of Albania, of the members of the Council of of the Supreme Court, of the members of the High Council of Prosecution, of the General Prosecutor, or harm the public's trust in the judicial system or the prosecution.¹⁶⁹

Entities that fall outside the focus of the appeal are: chancellors, legal assistants, chief secretary, court secretaries, convenors, other judicial administration officials, judicial police officers, state or private lawyers or bailiffs, or other entities that participate in a investigative or judicial process.¹⁷⁰

Upon receipt of the complaint, the HIJ must notify within 5 days the confirmation of the complaint, and confirm the authenticity of the claims.¹⁷¹ Due to the stock of files that came as a result of delays in creating the HIJ¹⁷², the review may be extended as the HIJ has organised its operations based on a new methodology for reviewing complaints based on a set of criterias.¹⁷³

the Constitutional Court in the Republic of Albania" and the law "On the status of judges and prosecutors in the Republic of Albania".

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² Delays in setting up the HIJ created deadlocks for the exercise of the legal powers that this institution has in terms of verifying disciplinary violations committed by judges and prosecutors, as well as for the initiation of disciplinary proceedings at the two High Courts of Justice and the High Court of Justice. Therefore, Albanian Committee of Helsinki estimates that the establishment of the HIJ should have preceded the establishment of the two Councils:

- The HIJ should have been established within 6 months from the entry into force of the constitutional amendments
- Deadline for KED - the institution that carried out the procedure of evaluating the fulfillment of the criteria and ranking the candidates for HIJ dt. February 1, 2017 (deadline not met). KED 2017 was never convened (dafuu) and KED 2018 was convened only 1 time and suspended its activity
- Delays in raising the HIJ - impasse in the exercise of the institution's legal powers in terms of verifying disciplinary offenses committed by judges and prosecutors, as well as for the initiation of disciplinary proceedings before the two HJC and HPC. The HIJ was established after two Councils
- KED 2017 and KED 2018 - extra legal situation as they did not work
- KED 2019 has submitted that the procedures of verification and evaluation of candidacies could not start and develop without approving the package of normative by-laws (ordered by Article 229 of Law No. 115/2016.
- KED started its activity on dt. January 15, 2018

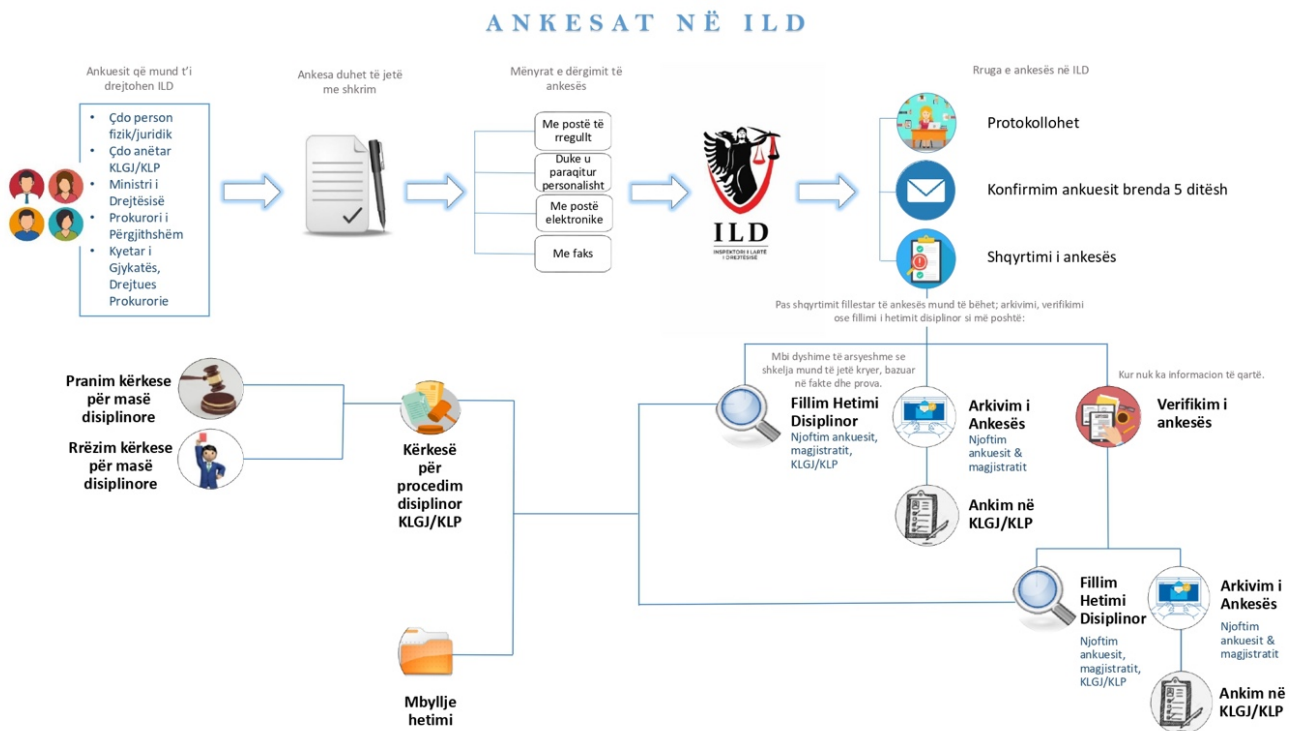
¹⁷³ Complaints will be reviewed according to criteria related to:

- Date of delivery
- the stage of handling inherited complaints;
- typology or urgency of treatment;



After the initial review, the HIJ decides: (1) archiving the complaint, since it does not meet one or more criteria to be admissible¹⁷⁴; (2) verifying the claims in the complaint when there are incomplete or unclear data, from different sources (other bodies; with the subject of the disciplinary investigation; the chairman or head of the body where the magistrate exercises his or her duties, etc.) or to request clarifications or documentation other than the complainant; and (3) initiate the investigation, when from the analysis of the data there are reasonable doubts that the violation may have been committed.¹⁷⁵

Figure 1: Complaints process at HIJ



Source: HIJ <https://ild.al/wp-content/uploads/2021/07/VERSION-OK_page-0001.jpg>

The HIJ initiates the investigation on its own initiative, based on substantial data on the facts resulting from reliable sources, on the basis of which there is a reasonable suspicion that the violation may have been committed.¹⁷⁶ In case the result of the

- the limitation periods of the complaint.

¹⁷⁴Law no. 96/2016 "On the status of judges and prosecutors in the Republic of Albania" amended, article 120, point 1, letter "d". In case the HIJ has archived the complaint or made a decision to close the investigation, the complaining entity can appeal the decision of the HIJ to (1) HCJ, in case the person has complained about a judge, (2) HCP, in case the person has appealed to the prosecutor, and (3) to the Appeal Chamber, in case the appeal is against a member of the KLJ or KLP.

¹⁷⁵<<https://ild.al/sq/pyetje-te-shpesta/>>

¹⁷⁶HIJ, Annual Work Report 2022. <<https://ild.al/ep-content/uploads/2023/05/RAPORTI-I-PUNES-VITI-2022.pdf>>



investigation confirms the existence of a reasonable doubt that the magistrate has committed a disciplinary violation¹⁷⁷, the HIJ initiates disciplinary proceedings at the Councils, presenting the investigation report together with the investigation file.¹⁷⁸

In cases where the HIJ requests the initiation of disciplinary proceedings before the councils, it may also propose disciplinary measures, such as (1) dismissal from office, (2) suspension from office, (3) public reprimand, and (4) temporary reduction of salary.¹⁷⁹

Councils review HIJ requests and may (1) accept the request in part¹⁸⁰, (2) suspend the disciplinary proceedings, or (3) not accept the proposed measure. The councils are discredited in terms of judging violations and evaluating the disciplinary measures proposed by the HIJ.¹⁸¹

The investigation, which may be conducted by the Appeals Chambers, HJC, or HCP, comes to an end with the disciplinary procedure.¹⁸² The reviewing and disciplinary subject, where applicable, makes the decision on the disciplinary procedure based on the HIJ's investigative file and the sanction that it recommends.¹⁸³ The question of what would happen in a situation where the HIJ proposed a severe disciplinary

¹⁷⁷Law no. 96/2016, articles 102-104. Disciplinary violations during the exercise of the function can be:

- unjustified or repeated non-performance of functions during trial or investigation;
- repeated delays or that bring serious consequences or unjustified delays of actions and/or procedural acts;
- the action, inaction or behavior of the magistrate, which brings unfair benefits or damages to the parties in a judicial process or investigative procedure, contrary to the law;
- serious or repeated violation of legal and sub-legal provisions that regulate the organization and functioning of courts or prosecutor's offices;
- non-implementation without justified reasons of the decisions given by the council or refusal to implement the disciplinary measure given to the magistrate;
- serious or repeated non-compliance with procedural and material legislation or the implementation of wrong procedural and material legislation, when ascertained by a higher court.

¹⁷⁸ Law no. 96/2016, Article 138.

¹⁷⁹ *ibid.*

¹⁸⁰According to the work report for 2022, the practice of the Councils in relation to the change of the decision has partly had to do with the evaluation of the given measure, but in no case "undermined the legality of the investigation, verification of violations or its very existence, but the change it has to do with the type of disciplinary measure requested by the High Inspector of Justice".

¹⁸¹ *ibid.*, p 21.

¹⁸² HIJ, Report on the work during the year 2022, p 21. <<https://ild.al/ep-content/uploads/2023/05/RAPORTI-I-PUNES-VITI-2022.pdf>>

¹⁸³According to HIJ, "From the practice followed so far with the Councils, in some cases the proposals for disciplinary measures have been partially changed. The changes have had to do with the assessment of the Councils, regarding the type of measure given. In no case the legality of the investigation, verification of violations or its very existence has not been violated, but the change has to do with the type of disciplinary measure requested by the High Inspector of Justice." According to Merhuri, the low number of HIJ decisions that are appealed, or the fact that the Councils have not returned the archiving decisions, is an indicator of the professional work of the HIJ.



measure and the HJC and HPC decided on a lighter measure arises, even though there is no practise regarding the HJC or HLP making decisions in complete opposition to the disciplinary measure proposed by the HIJ.

Furthermore, it is worth noting that Merkuri has noted in his report on "Justice reform: The Role of the High Inspector of Justice", that the HIJ does not have the right to appeal against the decisions of the councils that do not accept the disciplinary measures requested by him, as the Constitution does not appeals against the decision-making of the councils are provided for. According to this reasoning, appealing the decision on the disciplinary measure against the magistrates would give the court the right to express itself -- a right which is not provided for in the Constitution.¹⁸⁴

Even though the HCP and HJP do not face the same executive-related issues as the HCJ did, the principle of independence may still be violated on an individual and institutional level due to the absence of a unified judicial culture and the movement of professionals from the executive branch to judicial institutions.

In a hypothetical situation where the HIJ proposes disciplinary actions differing from those made by the HCJ/ HCP, the inspectors within the HCJ might perceive their role as merely formal, lacking substantial influence. However, insights from the HIJ focus group suggest no present issues with the decision-making of the HCP/HJP. The HIJ Office views the presence of avenues to appeal HCJ/HCP decisions positively, and the current practice of the HCJ/HCP aligning with HIJ standards is seen as compliant with institutional independence principles. Hence, fostering a positive judicial culture should encompass both institutional norms and individual conduct. Moreover, following the jurisprudence of other countries, *prima facie*, are not impartial. To illustrate

The applicant was a judge of the Court of Quebec against whom chief judge of the Court of Quebec laid a complaint with the Judicial Council, alleging that she breached the Code of Ethics. The applicant argued that the provisions of the Quebec Courts of Justice Act, allowing the chief judge of the Court of Quebec to lodge a complaint with the Judicial Council against a judge of that court, violated the principles of judicial impartiality and independence. The Supreme Court dismissed the appellant's appeal and stated that, it cannot be concluded from an examination of the powers conferred on the chief judge of the Court of Quebec by the Courts of Justice Act that they might compromise the impartiality of members of the Judicial Council or the committee of inquiry in dealing with a complaint lodged by the chief judge''. The Supreme Court held that where the chief judge makes use of the disciplinary process by taking the initiative of laying a complaint, there is no reason to think that the Council

¹⁸⁴ Constitutional Court, Decision No 45, dated 12.04.2022. B M raised a claim



and its committee do not, in the eyes of a reasonable and well-informed observer, have the impartiality required to carry out their duties.¹⁸⁵

Thematic Inspections

In addition to complaints, HIJ can also conduct thematic inspections.

According to Law no. 98/2016 "On the organization of the judicial power", the head of the court, who is considered the "manager" of the judicial administration, has the task of "supervising the work discipline of judges and requesting the initiation of an investigation when a disciplinary violation of judges is suspected in their courts".¹⁸⁶ Despite the fact that the institution to which the head of the court will refer is not explicitly mentioned, from the reading of article 147/d, we understand that it is inferring the HIJ. So, the HIJ, which will be set in motion by the head of the court, conducts the investigation.

When the HIJ Office receives complaints about judges in a court, the question of whether the HIJ should conduct an inspection regarding the possibility that the head of the court could be held accountable if he permits judges to breach disciplinary standards arises.¹⁸⁷ This would be an interesting avenue for the HIJ to explore.

A thorough assessment of the large volume of complaints submitted to the HIJ is warranted. The large number indicates trust in the HIJ institution to handle these complaints, but it also raises the possibility that there may be serious issues with how the complaints are handled if certain cases keep coming up in the legal system. Regarding the theme inspections, HIJ's approach is constructive.

In the Office of the HIJ focus group, the inspectors discussed how they carried out a thematic inspection with this facility in order to address the high volume of complaints that were filed with the Office of the HIJ, specifically regarding claims of delays in providing court decisions to the magistrate judges of the Administrative Court of Tirana and the Court of the First District of General Jurisdiction Tirana in a manner that went beyond legal terms.¹⁸⁸ These reports and inspections help to

¹⁸⁵ Canada, Supreme Court, Date of issuance: 14-12-2002, Number of case: CAN-1996-1-002, [English](#). CEELI Institute Manual.

¹⁸⁶ Law no. 98/2016 "On the organization of judicial power", Article 37, paragraph d.

¹⁸⁷ Similarly, in the case of prosecutors, the General Prosecutor "supervises the discipline in the work of prosecutors and makes a request to the HIJ to start an inspection for disciplinary violations of prosecutors". Law No. 97/2016 "On the organization and functioning of the prosecution in the Republic of Albania", article 38, point 2(i). It is interesting that in this case, the HIJ is expressly provided as the institution responsible for starting the inspection for disciplinary violations of prosecutors, while in the case of judges, the law needed interpretation.

¹⁸⁸ HIJ, Report of the thematic inspection with the object "On the procedure of announcing and justifying the judicial decisions of the judicial decisions of the Tirana Judicial District Court, the civil chamber and the Administrative Court of the First Instance Tirana" (2023). <<https://ild.al/sq/2023/10/04/raport-i-inspektimit->



validate the study's hypothesis by demonstrating that the effective understanding and operationalization of the judiciary's functioning significantly impact its true level of independence.¹⁸⁹

Based on the findings of the above-mentioned report, the recommendation made by the HIJ to keep "a register for the notification of the decision to the parties for which the date of the notification is recorded (...)"¹⁹⁰ and "the book showing the movement of files to keep the date of delivery of the file from the judge to the secretary of the session, the date of delivery from the secretary of the session to the court secretary, to be numbered on each sheet, to be signed by the chancellor/court secretary"¹⁹¹, significantly contributes to the creation of a positive judicial culture.¹⁹²

Another element that could violate the principle of judicial independence is transparency on the allocation of cases. In the case of the courts, the HJC is the body that approves the detailed rules on the program and procedures for allocating cases by lot.¹⁹³ But even in this case, IHJ has the duty and responsibility to carry out inspections of the division of cases and control of electronic reports at least once a year.¹⁹⁴ Recognizing the problem of interference in the distribution of cases by lottery as an opportunity to interfere in the decision-making of the judiciary, the legal obligation of the IHJ to keep this element under control every year, eventually, may contribute to the de facto disappearance of a practice of harmful to the independence of the judiciary.¹⁹⁵

Courts and prosecutors are not the only corrupt actors in the system. Administrators and chancellors are also likely to participate in corruption. There is a possibility that administrators and chancellors participate in corruption. This is mostly related to the assignment and allocation of cases by lot. Judges have

[mbi-proceduren-e-spalljes-dhe-arsyetimit-te-judicial-decisions-te-gjykates-se-skalles-se- before-the-jurisdiction-of-the-general-civil-chamber-of-tyranny-and-the-administrative-court/>](#)

¹⁸⁹ Hypothesis 1: The true level of independence of the judiciary is affected not only by the legal and structural changes of the system, but also by the level of understanding and operationalism of the judiciary by the officials working in this system.

¹⁹⁰ HIJ, Report of the thematic inspection, p 25.

¹⁹¹ *ibid.*

¹⁹² According to the prediction of the Justice System Reform Strategy (2015) where it is predicted that "the reform in justice will aim to create a coherent legal system that responds to our legal tradition, the needs and the level of development of the country as well as the need to enable the development our stable economic and social future. This means efforts to create a consolidated, systematized and harmonized legislation internally and with international standards and that is uniformly applied by the institutions of the justice system."

¹⁹³ Law no. 98/2016, "On the organization of judicial power in the Republic of Albania", Article 25, point 3.

¹⁹⁴ *ibid.*, Article 25, point 4.

¹⁹⁵ According to the 2022 Progress Report, due to the suspension of the operation of a Case Management System, and the presence of a small number of judges in the Courts, the allocation of cases by lot is not widely applied. Despite the fact that this situation may allow the influence of influence on a judge or prosecutor, such cases have not been reported by prosecutors and judges.



publicly complained in annual court reviews about the problem of "profitable" cases not being assigned to them, but given to preferred judges. There is evidence that court presidents instruct network administrators/court chancellors to assign specific cases to specific judges.¹⁹⁶

As stated above, the independence of the judiciary must be guaranteed both at the institutional level, i.e. the independence from other branches of power, but also at the individual level, the individual independence of members of the judicial system from the heads or leaders of justice institutions. In the case of heads of institutions who exert influence over the division of cases, this is a violation of the notion of judicial independence,¹⁹⁷ and therefore, an element that negatively affects the shaping of the culture of judicial independence, which can be changed with the intervention and control of the HIJ.

At the end of this section, we can conclude that the role of the HIJ in the judicial system in Albania after the justice reform can be emphasized in three directions:

- 1.** Improving the performance of judicial personnel, who, in order to avoid disciplinary measures for behavior committed intentionally or unintentionally,
- 2.** Promoting the integrity and independence of justice institutions, identifying and periodically reporting potential influences or pressures that may affect their regular functioning; AND
- 3.** Improving the judicial culture in the system.

4.3 HIJ as a key institution to promote and protect judicial culture and the independence of judicial institutions?

In the new architecture of justice, the HIJ has the potential to influence the improvement of judicial culture and the implementation of independence in the country through the exercise of its duties. Two legal obligations and practices of the HIJ that can significantly positively influence the shaping of the culture of the rule of law in Albania are (1) the obligation to perform, at least annually, thematic inspection on the practice and causes of the replacement of prosecutors; and (2) conducting periodic inspections of case assignments and case allocations by lottery.

¹⁹⁶ Group of Senior Experts, Analysis of the judicial system in Albania, p 253.

¹⁹⁷ Recommendation (94)12, which contains principles 1.2.d and f, provides that "the division of cases should not be influenced by any party to the case or person who may have an interest in the outcome of the case". Also, the Venice Commission has said that "the procedure for the allocation of judges must follow objective criteria" (CDL-AD(2002)026 at 70.7).



Judges and prosecutors will be impacted by the results of disciplinary investigations and how they are handled fairly and legally because of the nature of the institution, as they will be checked checked by an impartial body like the HIJ to ensure that they carry out their duties with integrity.

According to data acquired in the HIJ website, we have this panorama regarding the disciplinary violations of the subjects of the judiciary:

- 5653+ confirmed complaints¹⁹⁸
- 4788 complaints handled
- 865 complaints in the treatment process, of which 219 complaints are in the verification process after the initial review
- 105 magistrates investigated, of which 32 requests for disciplinary proceedings¹⁹⁹

Referring to the Resolution of the Assembly "On the evaluation of the activity of the Office of the High Inspector of Justice for the year 2022"²⁰⁰, it is noted that HIJ has been quite pro-active by engaging in many directions such as in the verification of complaints carried by previous bodies, the drafting and approval of annual and periodical reports, the preparation of the regulatory framework of institutional activity, the examination of complaints and the making of decisions on the initiation of disciplinary investigations, the completion of thematic inspections, cooperation with national partners and international, signing cooperation agreements, engagement with citizens, etc.

Regarding the impact that HIJ performance has on Albania's EU membership, the 2023 Progress Report on Albania by the European Commission has focused on the element of responsibility, as part of Chapter 23: Judiciary and fundamental rights, which related to the functioning of HIJ. As a whole, the judiciary according to the EC is somewhat prepared and moderately prepared in terms of the approximation of the judiciary's standards with the EU acquis, and moderately prepared in terms of

¹⁹⁸ The fact that it is a plus after the number 5653 leaves room for interpretation. 5653+ could be 5654 or 119029. The HIJ needs to be clearer, and for the sake of the existence of other mathematical symbols, a more adequate mathematical symbol might be \approx (which translates to 'approximately equal').

¹⁹⁹ <<https://ild.al/sq/kreu/>>

²⁰⁰ Assembly of Albania, Resolution "On the evaluation of the activity of the Office of the High Inspector of Justice for the year 2022", 12.07.2023. It is worth questioning the delay of the Assembly of Albania in issuing this resolution. Its approval in July 2023, with five months remaining from the end of the year, raises the question of the validity of the recommendations and the control of the Assembly over the HIJ. <<https://ild.al/ep-content/uploads/2023/09/RESOLUTE-E-KUVENDIT-PER-VLERESIMIN-E-PUNES-SE-INSPEKTORIT-TE-LARTE-TE-DREJTESISE-PER-VITIN-2022.pdf>>



the functioning of the judiciary.²⁰¹ Good progress has been made in terms of the implementation of the justice reform.²⁰²

The European Commission is concerned about the issue pertaining to the HIJ's operation with only half of the scheduled inspectors.²⁰³ It stands to reason that the HIJ's roles, responsibilities, and contributions to the operation of the legal system are crucial. In other systems, a lack of funding, a high workload, and the pressure to make decisions on cases by the deadline have all been linked to corruption.²⁰⁴ Additionally, the inspectors discussed their difficulties filling the positions of magistrate inspectors during the focus group with the HIJ. The legislator has set a very high bar, where the legal requirements to be taken into consideration for the role of an inspector near the HIJ are equated in terms of level with those of a high court judge. This is because the legislator wants to place the most qualified and experienced professionals close to the HIJ.²⁰⁵ The inspectors discussed in the focus group that individuals who satisfy the requirements to become magistrate inspectors would rather work as judges in the courts to further their professional aspirations. Based on these circumstances and conversations with HIJ inspectors, the legal prerequisites for consideration for the inspector post at the HIJ office ought to be loosened. Other issues raised in the Progress Report are related to the increase of cooperation between the institutions that are part of the judicial governance²⁰⁶, as well as increasing strategic communication in terms of key policies between justice institutions.²⁰⁷

Since one of the main goals of the justice reform was to increase trust in justice institutions and the judicial system, it is important to also evaluate the public's perception of security and justice institutions, based on the Albania Security Barometer reports. In 2019²⁰⁸, judicial institutions were perceived by the public as the institutions most influenced by politics²⁰⁹, where "the judiciary, the prosecution and the court are perceived as the most corrupt".²¹⁰ A similar situation is presented

²⁰¹Progress Report Albania 2023, p 19.

²⁰²ibid.

²⁰³Progress Report Albania 2023, p 21.

²⁰⁴The International Bar Association, Judicial Integrity Initiative: Judicial System Corruption.

²⁰⁵Findings from the HIJ focus group consultation.

²⁰⁶Progress Report Albania 2023, p 22.

²⁰⁷ ibid.

²⁰⁸ Time during which the HIJ was not functional due to delays in the implementation of the justice reform.

²⁰⁹ A Dyrmishi, Albanian Security Barometer, National Survey, CSDG(2019), p 20. <<https://csdgalbania.org/ep-content/uploads/2020/02/The-Albanian-Security-Barometer-2019-1.pdf>>. 53.54% of respondents said that the courts are not independent, and 49.51% said the same about the prosecution.

²¹⁰ibid, p 20. During the survey, citizens found that the judiciary is the most corrupt judicial institution, where 71.21% said that the Courts are corrupt "a lot", while 66.91% gave the same answer for the prosecution. The study also found that despite low trust in these institutions, the public has high confidence in SPAK's fight against corruption and organized crime, once GJKKO and SPAK become operational.



during the findings of the report on the Safety Barometer Albania 2020, where trust in the courts (51.93% answered that they have no trust at all), due to the perception of their level of corruption (71.21% said that the courts are very corrupt).²¹¹In 2021, SPAK (37.67%) and GJKKO (29.55%) were considered the most independent justice institutions from the influence of politics, while trust in the courts and the prosecutor continued to be low due to the perception of a high level of corruption.²¹²In 2022, the focus of the report was on corruption, where the public is divided on whether or not vetting contributed to the reduction of corruption in the judiciary.²¹³Also, in 2023, the findings of the Security Barometer, citizens' trust in justice institutions, remains low.²¹⁴

According to the European Union, judicial independence is a key element to increase citizens' confidence in the legal system.²¹⁵ For the EU, formal independence is not enough to achieve the objectives of justice, predictability and security over the legal system, but the system needs to be perceived as independent by citizens, in order to gain their trust.²¹⁶ According to Opinion No. 4(2003) of the Council of European Judges

The confidence that citizens have in the judicial system will be strengthened if judges have a depth and diversity of knowledge that extends beyond the technical domain of the law into areas of significant societal interest, as well as courtroom and personal skills and understanding that enable them to manage matters and deal with all persons involved in an appropriate and sensitive manner.²¹⁷

In the discussion with the focus group of the HIJ in terms of training on concepts and principles, they stated that magistrate inspectors follow the training of the School of Magistrates.²¹⁸ In the study of the treatment calendar published by the School of Magistracy for the year 2023-2024²¹⁹, it is reflected that out of 161 trainings provided

²¹¹ A Dyrnishi, Albanian Security Barometer, National Survey, CSDG, (2020). <https://csdgalbania.org/wp-content/uploads/2021/03/Security_barometer_2020_ENGLISH-ËEB.pdf>

²¹² A Dyrnishi, R Shehu, Albanian Security Barometer, National Survey, CSDG (2021), p 11. <<https://csdgalbania.org/ep-content/uploads/2022/01/Barometer-2021-Albania-1-ENG-1.pdf>>

²¹³ A Dyrnishi, Albanian Security Barometer, National Survey, CSDG (2022), p 60. <<https://csdgalbania.org/ep-content/uploads/2022/06/ASB-2022-ENG.pdf>>

²¹⁴ M Hallunaj, N Strati, Public Perception towards security and justice institutions and corruption issues in Albania, Albanian Security Barometer, National Survey, CSDG (2023), p 18. <https://csdgalbania.org/ep-content/uploads/2023/01/ËBSB-2022_Albania-Report-2_Jan-2023_ENG.pdf>

²¹⁵European Union, Best practice guide for managing supreme courts (2017).

²¹⁶ *ibid.*

²¹⁷ Opinion no. 4 (2003) of the consultative council of european judges (ccje) to the attention of the committee of ministers of the council of europe on appropriate initial and in-service training for judges at national and european levels, council of europe (2003).

²¹⁸ While non-magistrate inspectors do not. This is seen as a violation of the preparation and formation of judicial character and culture in the institution, which should be reevaluated.

²¹⁹< <https://www.magjistatura.edu.al/sq/kalendari-i-trajnime>>



with specific legal topics related to law issues, only three of them are related to the shaping of values in the Albanian judicial culture.²²⁰ In the case where Bell says that "common values, such as 'judicial independence', take on different meanings in different judicial cultures"²²¹, our view is that there is a lack of critical thinking about attaching values and standards arbitrarily to our judicial system. This contributes to a fiction of independence, where according to the members of the focus group and some of the interviewees, with the provision at the constitutional level of the separation of powers and the independence of the judiciary, the judiciary is independent. In support of Bell's thesis, the concept of an independent judiciary should be seen "closely related to a particular state, during a particular period, looking carefully at the historical and political context in which it will be applied".²²² And as a result, the true level of independence of the judiciary will be evidenced not only by the legal and structural changes of the system, but also by the level of understanding and operationalism of the judiciary by the officials working in this system.

As this paper draws closer to the conclusion, the following passages provide a final reflection on the subtle differences in judicial cultures across the globe, detailing instances in which judges and other judiciary members have been found guilty of disciplinary misconduct.

Georgian judge was found guilty of disciplinary misconduct for, in a trial, refusing to submit a motion and addressing the lawyers as follows: "I would like to explain to you, as lawyers, that your legal thinking is something very disturbing, to put it simply. I will not talk further about your incompetence." When a panel of judges granted the motion the judge in question stated to the panel: "I am concerned about the precedent we have just set. This is very bad precedent. Unfortunately my colleagues made the absolutely wrong decision to set this precedent." The Disciplinary Board also clarified that judge cannot publicly criticize or disrespectfully refer to another judge or his/her decision.

²²⁰ Training 1, Non-Verbal Communication for Judges. Training 149, Oratory skills; The language of meetings Focus on speaking, writing, reading and listening skills. Training 150, "Understanding, respect for ethical norms and integrity of the judge", as basic conditions for a reliable judiciary". F Caka and E Merkuri in "Judicial Culture and the Role of Judges in Developing the Law in Albania" have focused on the importance of soft skills training, and the importance of legal education on better interpretation of legal norms and debate on the development of law.

²²¹ J Bell, *Judicial Cultures and Judicial Independence*, Cambridge University Press.

<https://doi.org/10.5235/152888712802761798 P>

²²² *ibid*, p. 60.



In March of 2016 the case was appealed and a lighter disciplinary sanction given.²²³

A judge was disciplined for Social Media Posts. "According to Article 20 of the "Rules of Judicial Ethics of Georgia": "in his/her statement, a judge must show proper correctness, do not use offensive, derogatory words and expressions or discriminatory terminology. The Judge posted on Facebook a public post/announcement titled with the following words:

*"(addresses to someone) -- come to the streets - otherwise you will be dragged out"; "Rabbits, You are rubbish, kill people and scatter them." He then posted on Facebook: "You, - - and - -, finally cut the road for dialogue with the judiciary. You have no authority over us. " He also said openly in live: "we are not objective. And why should I listen to you? Or about what should I listen to? I will not listen to you anymore;" "You are funny, madam - if you think this provocation will work"; And the same type of communication continues by the judge in social media platform.*²²⁴

There is a necessity to differentiate between engaging in a misconduct and expressing one's opinion, and a member of judiciary, like every citizen, enjoys the right to freedom of expression, within the limits of his legal rights and obligations. In *Todorova v. Bulgaria*, ECHR rules in favour of Judge Todorova, who had voiced her strong opposition to the political system in place at the time. This case dealt with the right to free speech and the capacity to discuss legal issues without facing unwarranted disciplinary action.²²⁵

Finally, in order to give a broader panorama regarding the performance of the HIJ in increasing trust, we also received the perceptions of judges, prosecutors, members of the Supreme Court and members of the Supreme Court through interviews. The interviewees unanimously state that the legal framework in force to guarantee the independence and separation of the HIJ is adequate, good and exhaustive. They point out that the problem lies in its implementation in practice. HIJ is estimated to be in need of human resources and specialized staff, currently there are shortages in the ranks of inspectors and judges, and the appropriate forms and mechanisms must be found to recruit quality staff of various profiles. There needs to be the will of all actors for the HIJ to adequately perform its role and tasks.

²²³ Georgia - Disciplinary Board of Judges – Common Courts of Georgia – 21 January 2016 [Link to Case](#). CEELI Institute, Manual on Independence, Impartiality and Integrity of Justice, A thematic Compilation of International Standards, Policies and Best Practices, (2022).

²²⁴ Disciplinary case No21/19. CEELI Institute, Manual on Independence, Impartiality and Integrity of Justice, p 680.

²²⁵ Bulgaria, European Court of Human Rights (HUDOC) – Requete no. 40072/13 – 19 Oct. 2021 HUDOC - *Todorova v. Bulgaria* Judgement | Strasbourg Observer Article - *Todorova v. Bulgaria*). CEELI Institute, Manual on Independence, Impartiality and Integrity of Justice, p 679.



The interviewees identified a number of problems that affect the achievement of complete independence of the judiciary, problems that are related to the financial and functional side. Considered as such, the new configurations in the pyramid of the justice system, which have brought confusion, helped by the individuals who represent in the councils, has pronounced professional deficiencies and the desire to feel "omnipotent" . One of the issues brought to the attention of the interviewees is the gap in education between "new" and "old" magistrates. This means that court decisions on the same issues or circumstances are often different. The institution that should unify the practice is the Supreme Court, which meanwhile has thousands of pending cases.

Furthermore, the independence of the judiciary is not only ensured by the integrity of the judiciary but also by its financial independence, which in this particular case was very limited or dependent on the will of the executive power. The interviewees say that the judicial system and its institutions can be independent when the Assembly and the Ministry of Finance and Economy give you financial autonomy.

An interesting aspect is the finding that the interviewees do not see the judiciary isolated from political influences. At no time can the system of judicial self-government be isolated from politics, where almost half of the composition of the councils is made up of people chosen by politics. It is impossible to be independent from politics as long as in practice it happens that the Minister of the Interior makes political statements in the media, with complaints to the HIJ where a magistrate seeks to proceed after declaring an individual innocent. Independence refers to freedom from external pressures on judicial decision-making and implies the existence of guarantees against inappropriate influences on judges while performing their judicial role.

A very significant element is the evaluation of the High Court of Justice and the High Judicial Council if they effectively protect the interests of judges or political and/or business elites, as well as if their decisions are motivated by their individual interests, or by the motivation to support the independence of the judiciary. . In some cases, some interviewees preferred not to answer. Others evaluate HJC positively, as an institution that has acted and continues to act protecting the interests of judges. Indicative of this approach are even the press statements in defense of the magistrates, despite the fact that it has gone against the morals of the citizens, as the case of magistrate Suela Dashi can be mentioned. The complete opposite is observed for HPC. For this body, the assessment is not positive, describing it as a clientelistic body, with a dark past and future due to the 'bargains' that are made. According to the assessment of one interviewee, values are not promoted in HCP. An illustrative case is even brought to the attention to understand what the employees in this body represent, by referring to a video on YouTube, where the birthday of one of the members is celebrated. HCP is also labeled as a



body that exclusively protects its own interests, making self-promotions, as there have been cases where, contrary to the law, being members of the council, two of them have been promoted, and also a third one after finishing his term as a council member, in violation of the law, appointed himself leader with joint decision-making. Meanwhile, there have also been cases when people who were previously dismissed by presidential decree became prosecutors.

Overall, the interviewees raise the alarming problem that if the HCJ and HCP make decisions based on personal interests, then the system will one day fall and the constitutional changes will have no effect.

Regarding the question of whether the system for disciplining and sanctioning judges/prosecutors is appropriate, effective and independent from external influences, the interviewees stated that the problems do not come from the law but from people. The legal framework is more than sufficient, even ethical rules have been approved by the Councils, so the framework is complete. One of the interviewees states that the new justice is guided by an old mentality with a negative approach. Meanwhile, another interviewee states that the disciplinary processes are an integral part of the entire overview of the justice reform. Assessment, career development and discipline are the main pillars needed in this process. Regarding the assessment of effectiveness and impacts, it remains subjective and there is room for discussion on a case-by-case basis.

According to the above, in these few years of existence, the HIJ has shown that despite the challenges, it has played an inherent role in the Albanian judicial self-government system, producing factual data within the framework of consolidating the principle of legality and strengthening the independence and efficiency of justice system.

In the subsequent section, the focus will be on the final aspect addressed in this study, specifically examining the elements shaping judicial culture in Albania



5. Formalism and lack of critical thinking, as characteristics of judicial culture in Albania

According to Preshova's evaluation of North Macedonia's judicial culture, there are still barriers standing in the way of the judiciary's autonomy, even if the formal regulations and institutional frameworks comply with European norms. According to his theory, there are barriers that exist outside of the official institutional framework and that legal education and ongoing judicial training have a significant role in changing informal practises and judicial culture.²²⁶

The situation is similarly reflected by the responses of the interviewees in this study. Almost unanimously, the interviewees state that there is a culture of mistrust among the ranks of prosecutors and judges regarding the independence of the judiciary when asked if they believe the system is safeguarding political interests in the judiciary rather than the judiciary's independence. The vetting process has created a distrust of the judiciary and the part that has successfully passed it is viewed with suspicion and mistrust. The disbelief is growing and even proven with evidence time after time.

When asked if there is clientelism in the judicial system that leads to apathy and general passivity in the search for judicial independence, the vast majority of interviewees state that this phenomenon exists. Unfortunately, it is noticed that over time the magistrates are tired as long as their voice is not heard. Magistrates are not only SPAK and who produces news in the black chronicle. There is general passivity as a result of not solving the problems of the past. Only one of the interviewees states that there is no such clientelism.

There is a disconnect between the statutory regulations and the institutional structure as long as performance analyses for every element of the institutions that the justice reform has created are still lacking. In certain cases there is informality in decision-making.

Referring to the concept that values and principles are important for transforming the system into a truly independent system, a part of the interviewees think that the values shared by magistrates are important and the vast majority of them share the same view of an independent system. However, the way politics always tries to get involved, no matter what it says, demonstrates that politics and the judiciary have never been separated. Not only are values and principles necessary as ideas,

²²⁶D Preshova, Separate but not Independent: The (In)Combatibility of the Judicial Culture with Judicial Culture with Judicial Self-governance in North Macedonia (2022), p 38.



but they also need to be implemented well. When it comes to determining whether or not the system pays attention to the creation of suitable conditions for the promotion of the values and principles of judicial independence, the interviewees fall into two categories. Some believe that there is a strategy and drive to raise awareness of these ideals in society and to promote them.

Without a doubt, mindset and ingrained behaviours are crucial to accomplishing the goals established by legislation. To do this, a significant social movement is required to alter the prevailing mindset. Legal changes are not the source of all changes. Reaching goals brings about change. Increasing public trust is one of the goals set by justice, but it can be measured in ways other than through informational campaigns or television interviews. Decisions made by the magistrate are of higher quality if the requirements are satisfied for them to work at an ideal workload. As public trust grows, attitudes and behaviours that impede the accomplishment of justice's goals are progressively altered.

An interesting aspect that the interviewees were asked about is their assessment of the existing legal education system, whether it is providing the members of the judiciary (magistrates, members of the councils etc.) with adequate training on independence of the judiciary. Almost everyone stated that the form and approach of the educational system in the formation of new judges has created a not very good approach and needs restructuring and reformation. The fact is that arrogance and a lack of desire to learn can be observed in the younger generations of the judiciary. Excessive flows from the School of Magistrates have significantly reduced the cultural, professional and personal level of the younger generations of magistrates.

Interviewees state that there is an atmosphere of distrust in the ranks of prosecutors and judges regarding the independence of the judiciary. A significant aspect is the finding that magistrates feel tired as long as their voice is not heard. The approach of politics, which always seeks to intervene, shows that politics is not only not separated from the judiciary, but also negatively affects the violation of the values and principles of magistrates. Despite the new names, the new justice still reflects the old justice.

Focus group participants from the HIJ, who have long been part of the judiciary in other roles, provided replies that are consistent with the findings of researchers Caka and Merkuri.²²⁷ Caka and Merkuri, in their analysis of judicial culture and the role of judges in the development of law in Albania, found that judges limit their

²²⁷ F Caka, E Merkuri, *Judicial Culture and the role of judges in developing the law in Albania* (2021).



independence in the literal interpretation of the law, not exceeding moral values in their decisions.²²⁸In the following, the researchers find that

When judges perceive that the executive is controlling them, they tend to go towards formalism, glorify the law as the will of the majority, hesitate to strike down the government's act, and conform as much as possible to their domestic policies. Formalism has been seen as a bulwark against possible future threats from the government, since when something is prescribed by law, it is considered equal to being right.²²⁹

The data from the focus group with HIJ officials show that there is a reluctance to include culture as an analytical and operational criterion to guide the work for the implementation of the reform, which indicates a horizontality in the formalist approach to justice institutions.

²²⁸ *ibid*, p 29.

²²⁹ *ibid*, p. 30.



6. Conclusion

This study tries to address the justice system in a holistic manner by looking at the change in the status quo with the introduction of the High Inspector General of Justice. Analysing the role of the High Inspector of Justice and the element of the culture of independence of the judiciary, this paper aims to see the justice system through a different lens.

Prior to this study, several other researches have found that "constitutional amendments and judicial reform laws have established a number of mechanisms aimed at an independent and non-corruptible judiciary. However, their implementation in practice depends on several factors, among other things judicial culture".²³⁰

The judicial system in these 30 years of justice has undergone several reforms, which are based on the same foundations: corruption, political interference in the judiciary, violation of human rights, to name a few. The current judicial system is built in accordance with the highest standards of independence and proper operation of the judiciary, which may not even apply in some models of the countries of the European Union. However, the legal non-prediction of some standards does not always lead to a violation of the principle of judicial independence, just as their provision does not necessarily lead to the independence of the judiciary. In all cases, regardless of the judicial model, the common element of positive judicial cultures is the guarantee of human rights, trust in the judicial system and the promotion of independent justice.

As found, the HIJ's perspective and legislative structure are ideal for transforming Albania's judicial culture. This institution can affect the shift in the positivist attitude of judges to the fundamentals of law by the standards it sets during investigations and the start of disciplinary processes, as well as through the thematic inspections and reports.

²³⁰ A Anastasi, 'The Albanian justice reform in the framework of the European integration process', p 20.
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4316134>



7. Findings and recommendations

Albanian judicial culture reflects the historical, social, and legal influences that shape the behaviour and approaches of individuals within the judiciary, as well as the judiciary as a whole. It includes aspects such as the perception of the independence of the judiciary, following legal principles, ethical standards, as well as the approach to the interpretation and application of the law.

In recent years, efforts have been made to improve the judicial culture in Albania, aiming to promote transparency, accountability, and professionalism within the judiciary. This includes promoting values such as fairness, impartiality, and respect for the rule of law among judges and legal professionals.

However, what came out as a finding from the combination of different research methods during the writing of this research, is that the change of laws can affect the behaviour of the judiciary, but it can not always be directly translated into immediate or comprehensive changes in the conduct or culture of the judiciary. While legal reforms set the framework and guidelines for how justice should be administered, actual implementation and impact depend on various factors, such as the interpretation and application of the law, institutional culture, ongoing training, regular enforcement of laws, as well as perception and trust of the public on the judicial system. These elements have been analysed above, and the findings related to them can be highlighted as the novelty of this study.

However, the combination of various research methods used in drafting this research revealed that while changes in the law can have an impact on the judiciary's behaviour, these effects are not always immediately or completely translated into changes in the judiciary's conduct or culture. Legal reforms establish the framework and principles for the administration of justice, but their actual implementation and effects rely on several variables, including institutional culture, public opinion of the court system, regular enforcement of the law, interpretation and application of the law, and ongoing training.

First, the judicial reform brought about a change in the structure of the judiciary, through the establishment of new institutions, such as the High Judicial Council, the High Prosecutorial Council, and the High Inspectorate of Justice. These institutions were created with the main task of increasing the independence and professionalism of the judiciary. Despite this, historically entrenched practices, and cultures within the judiciary, such as corruption, nepotism, or undue influence, may resist immediate change. Even with a comprehensive legal framework, cultural elements such as hierarchy, customs, as well as informal networks, can be factors that can influence resistance to positive change.



Second, past perceptions and experiences related to corruption in the judicial system affect people's trust in the judicial system. Despite the reform, there are still concerns about the presence of corruption or illegal influence in the judicial system. For this reason, the institutions of the judicial system cannot conform to the premise that the change in the legal framework will result in an increase in public confidence in the judicial system. The judicial system, and specifically, each of its constituent parts, needs to have a higher level of transparency regarding their processes and decision-making. Also, efforts to improve judicial culture can be achieved by improving public confidence in the conduct and practices of the judiciary.

Thirdly, from the interpretation of some answers during the interviews with judges, prosecutors, and members of the HPC or HJC, such as: "I don't know that well enough and I can't express myself on this issue; No answer; It is a very individual question and I cannot answer for the generality; Unverified; "I am not able to answer these questions" may lead to the conclusion that a number of the interviewees do not feel sufficiently free and confident in expressing their opinion. In some cases, judicial functionaries may feel constrained to express their opinions about the judiciary, for several different factors, such as: (i) fear of facing consequences or 'retaliation' if they express criticism of the system affecting their careers; (ii) the lack or effectiveness of whistle-blowers within the judiciary that may prevent individuals from speaking out against issues or anti-cultural values they may witness within the system; (iii) hierarchical structures or prevailing cultural norms within the judiciary may discourage open discussion and constructive debate; (iv) external pressures, including political influences, may limit the freedom of members of the judiciary to express their true opinions as well as (v) the lack of independent platforms that allow members of the judiciary to express their dissent. them in a safe way. In some cases, if this process of expressing an opinion can bring about a harmful result for the person complaining, this person may feel inclined to remain silent in the face of harmful behaviour. Consequently, this also affects the independence of this person.

Also, despite legal changes and social development, there is still no break from the mentality of dependence on politics. And, even though the new model of judicial governance creates opportunities to guarantee an independent judicial system, it follows this need for legal changes because of existing legal vacuums. A case that can be mentioned to support this finding is the existence evidenced during the interviews of a trinity in continuous competition "General Prosecutor, the High Prosecutorial Council and the Head of SPAK" for which the law not only does not provide (within the decentralization idea) which body is independent from the other, but with the last legal changes of 2023, the role of the "General Prosecutor" is strengthened, which intervenes in the career of magistrates, thus overturning the concept of "decentralization".



Fourth, presenting the High Inspector of Justice as a key institution that can improve the state of judicial independence in the country is considered a herculean challenge if other elements of the equation are not taken into consideration. In principle, the legal framework for the system of disciplining and sanctioning magistrates is complete. Also, the legal framework in force to guarantee the independence and separation of HIJ is adequate, good, and exhaustive. However, HIJ currently has shortages in the ranks of judge profile inspectors, which is an issue that should be given priority. Also, HIJ needs human resources and specialized staff. The element of lack of financial independence has been identified as disturbing both during the interviews and the focus group.

Fifth, those with a legal duty to "refer," such the Minister of Justice, the General Prosecutor, and the heads of courts, ought to take the initiative more. The HIJ can evaluate the institutional and individual complaints that are submitted to the organisation. The HIJ can investigate the circumstances surrounding the discipline violation from the subject of the investigation if any of the following individuals exhibit behaviour that defies the law and cultural norms: the institution's superior or those in the hierarchy who are legally obligated to oversee the administration of justice in an orderly manner.

Sixth, this system may be doomed to fail in carrying out its purpose if the judiciary's institutional and individual independence is just technically tied to law rules and does not develop into a fundamental component of the judicial culture.

Regarding the subject matter of this research, the primary axis of understanding regarding the enhancement of judicial culture is connected to the shift in the belief that modifications to the law inevitably result in modifications to behaviour or judicial culture, which is shaped by customs, historical norms, and legal frameworks that have been developed over many years. Therefore, there isn't much evidence to support the claim that the 2016 constitutional amendments and other laws envision a system that is impenetrable by the government or outside pressures. For this reason, a fundamental cultural change within the judiciary is seen as necessary to practice true judicial independence. In this logical line, this discussion document proposes the following recommendations in terms of improving the judicial culture in Albania:

- To avoid interventions in the justice system and to increase efforts for its independence;
- The foundation for transforming Albania's judicial culture is education. To start a shift in court culture, educational programmes and initiatives targeted at judges would be a good place to start. Training should emphasise developing a comprehensive understanding of the values and significance of judicial independence in addition to legislative and institutional reforms.



Additionally, training on professional ethics and integrity, judicial independence, open communication, and respect for the rule of law may be part of these long-term training programmes, which have as their main goal strengthening the principles of the nation's judicial culture. More must be done to help the judiciary internalise these beliefs and recognise the significance of legal concepts;

- Promoting the importance of a strong judicial culture that focuses on advocacy on independence, integrity, and ethical behaviour. This can be achieved through awareness campaigns, forums, and collaborations with international organizations or experts who specialize in the development of judicial culture.
- Improving the dialogue and cooperation between the HIJ, the HJC and the HPC on the importance of improving and how to improve the judicial culture in their institutions, as a reflection of the judiciary.
- In order to address the existing problems with the independence of the judiciary, economic independence needs to be achieved, inter-institutional cooperation needs to be increased, awareness campaigns and legal education should be developed in the community, magistrates need to be represented in single and not fragmented associations, the principle of meritocracy should be strengthened in promotion and financial treatment, as well as to select candidates with a high level of education and quality;
- The educational system in the creation of new magistrates needs restructuring and reformation, as well as ongoing training by the School of Magistrates, especially in terms of the cultivation of judicial culture;
- In such a way that the decision-making is more qualitative, it is necessary for the magistrates to meet the conditions to work with an optimal workload, as well as the development of adequate conditions for the promotion of the values and principles of the independence of the judiciary.

To conclude, this study draws attention to gaps in the literature about the application and reflection of legal reforms, as well as the attention given to specific micro-issues within the larger difficulties and challenges facing the judicial system. This study acknowledges its limitations in that it cannot capture every factor that could impact the judicial culture or every avenue for improvement. That being stated, our goal was to thoroughly examine all perspectives on independence and the judicial culture of independence by employing a variety of research method, including focus groups, interviews, and comparative analysis. However, judicial culture is an informal element that cannot be measured with indicators, and even less so in a vacuum. For this reason, the main recommendation of this discussion document is the further deepening by researchers of the field on the improvement of judicial culture in Albania. Therefore, the main recommendation of this discussion



document is the further deepening by researchers of the field on the improvement of judicial culture in Albania.



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